

Friday, 21 December 2018

## Weekly Criminal Law

A Weekly Bulletin listing Decisions  
of Superior Courts of Australia covering criminal

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### Executive Summary

**Small v R** (NSWCCA) - criminal law - sentence appeal - sentencing judge had regard to, and took into account, quasi-custody in formulation of sentence - no error in sentencing judge's approach - appeal dismissed

**Ngo v R** (NSWCCA) - criminal law - drug offences - sentence appeal - 'knowingly take part' in cultivation of 'large commercial quantity' of cannabis - "Form 1 offence" - offence on a '166 certificate' - no error in sentence - appeal dismissed

**Moresco v The Queen** (VSCA) - criminal law - 'recklessly causing serious injury' - sentencing appeal - parity principle - leave to appeal refused

**Question of Law Reserved (No 1 of 2018)** (SASCFC) - criminal law - sexual offences - determination of 'question of law' relevant to defendant's sentencing - whether s9(2) *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017* (SA) was valid - Court answered question in the negative

**The Director of Public Prosecutions v DL** (ACTCA) - criminal law - 'reference appeal' - sexual offences - tendency evidence - determination of question arising 'at or in relation to' proceeding against respondent

### Summaries With Link (Five Minute Read)

## **Small v R [2018] NSWCCA 290**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CL; Johnson & Campbell JJ

Criminal law - drug offences - sentencing appeal - applicant pleaded guilty to supplying prohibited drug - applicant sentenced to 4 years in prison with 2 year non-parole period - applicant contended sentencing judge erroneously failed to 'give credit and backdate the applicant's sentence' in reflection of applicant's time in "quasi-custody"- s25(1) *Drug Misuse and Trafficking Act 1900* (NSW) - 'evidentiary foundation' for taking quasi-custody into account - held: sentencing judge had regard to, and took into account, quasi-custody in formulation of sentence - no error in sentencing judge's approach - appeal dismissed.

[View Decision](#)

## **Ngo v R [2018] NSWCCA 296**

Court of Criminal Appeal of New South Wales

Hoeben CJ at CJ; Rothman & Price JJ

Criminal law - drug offences - sentencing appeal - applicant pleaded guilty to 'knowingly take part' in cultivation of 'large commercial quantity' of cannabis - s23(2)(a) *Drug Misuse and Trafficking Act 1985* (NSW) - applicant sought that judge take into account "Form 1 offence" - there was also 'related offence' on a '166 certificate' - judge imposed aggregate sentence of 4 years 6 months in prison with 2 years 9 months non-parole period - applicant contended judge erred in failure properly to have regard to applicant's age, prospects of rehabilitation, difficulty of prison due to deprivation of 'family and friends who all reside in Vietnam', and lack of evidence of benefit from cannabis plants' cultivation - applicant also contended primary judge gave 'disproportionate weight' to 'general deterrence and retribution', and that sentence was manifestly excessive - held: appeal dismissed.

[View Decision](#)

## **Moresco v The Queen [2018] VSCA 336**

Court of Appeal of Victoria

Kaye, Hargrave & Weinberg JJA

Criminal law - applicant together with another pleaded guilty to charge of 'recklessly causing serious injury' - applicant sentenced to 3 years detention in Youth Justice Centre - co-accused sentenced to 3 years in prison with 21 months non-parole period - applicant contended that sentence offended the 'principle of parity' - 'levels of culpability' - 'personal circumstances' - whether 'justifiable sense of grievance' - *R v Mercieca* [2004] VSCA 170 - held: leave to appeal refused.

[Moresco](#)

## **Question of Law Reserved (No 1 of 2018) [2018] SASCF 128**

Full Court of the Supreme Court of South Australia

Vanstone J; Lovell & Hinton JJ

Criminal law - sexual offences - District Court judge reserved 'question of law' relevant to

defendant's sentencing for Court's consideration under s153 *Criminal Procedure Act 1921 (SA)* - question concerned validity of s9(2) *Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017 (SA)* ('Amending Act') - Amending Act, 'on its face', governed defendant's sentencing - question was: 'Is s9(2) of the Statutes Amendment (Attorney-General's Portfolio) (No 2) Act 2017 (SA) valid?' - whether s9(2) offended 'Kable principle' - whether s9(2) required a 'repeat of the task undertaken at trial', the outcome of which could 'differ to the true content of the verdict' - whether s9(2) required Court to retry question which it had already resolved - whether s9(2) threatened District Court's 'institutional integrity' - whether s9(2) incompatible with 'constitutionally mandated position' of Court - held: Court answered question of law in the negative.

[Question of Law Reserved](#)

## **The Director of Public Prosecutions v DL [2018] ACTCA 61**

Court of Appeal of the Australian Capital Territory

Mossop, Loukas-Karlsson JJ & Robinson AJ

Criminal law - 'reference appeal' - sexual offences - tendency evidence - applicant sought that Court of Appeal 'hear and decide a question of law' arising 'at or in relation to' proceeding in which it was alleged respondent sexually abused his granddaughters - trial was complete - respondent was convicted of offences and received prison sentence ('ACT trial') - applicant submitted that question of law 'worthy of the Court's attention' had arisen before ACT trial began in ruling pursuant to s192A *Evidence Act 2011 (ACT)* given in *R v DL [2018] ACTSC 28* - question was: 'When determining in a criminal proceeding whether the probative value of tendency evidence "substantially outweighs any prejudicial effect it may have on the defendant" under s101(2) of the Evidence Act 2011 (ACT), is it permissible to consider the effect that the use of the tendency evidence against the defendant in that proceeding may have on the defendant in other proceedings?' - held: Court answered question in the negative.

[The Director of Public Prosecutions](#)

# Benchmark

## **To Mrs K\_\_\_\_, On Her Sending Me an English Christmas Plum-Cake at Paris**

**By:** Helen Maria Williams

What crowding thoughts around me wake,  
What marvels in a Christmas-cake!  
Ah say, what strange enchantment dwells  
Enclosed within its odorous cells?  
Is there no small magician bound  
Encrusted in its snowy round?  
For magic surely lurks in this,  
A cake that tells of vanished bliss;  
A cake that conjures up to view  
The early scenes, when life was new;  
When memory knew no sorrows past,  
And hope believed in joys that last! —  
Mysterious cake, whose folds contain  
Life's calendar of bliss and pain;  
That speaks of friends for ever fled,  
And wakes the tears I love to shed.  
Oft shall I breathe her cherished name  
From whose fair hand the offering came:  
For she recalls the artless smile  
Of nymphs that deck my native isle;  
Of beauty that we love to trace,  
Allied with tender, modest grace;  
Of those who, while abroad they roam,  
Retain each charm that gladdens home,  
And whose dear friendships can impart  
A Christmas banquet for the heart!

[https://en.wikipedia.org/wiki/Helen\\_Maria\\_Williams](https://en.wikipedia.org/wiki/Helen_Maria_Williams)

Helen Maria Williams (17 June 1759 – 15 December 1827) was a British novelist, poet, and translator of French-language works. A religious dissenter, she was a supporter of abolitionism and of the ideals of the French Revolution; she was imprisoned in Paris during the Reign of Terror, but nonetheless spent much of the rest of her life in France.. A controversial figure in her own time, the ..

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