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Weekly Criminal Law

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

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Executive Summary

Yun v R (NSWCCA) - criminal law - objective seriousness - standard non-parole period offence - moral culpability - mental illness - assessment of objective seriousness post *Muldrock* - appeal dismissed

Strachan v R (NSWCCA) - criminal law - directions - assessment of probative value - admissibly of material found during search - whether tendency evidence - no errors identified - appeal dismissed

Robinson v R (NSWCCA) - criminal law - assistance to authorities - home invasion - s112(3) *Crimes Act 1900* (NSW) offence - sentencing factors identified - in exceptional circumstances a combined discount of 40% allowed - no error identified - appeal dismissed

Dixon v R (NSWCCA) - criminal law - defence opening - failure of accused to give evidence - whether miscarriage of justice - whether defence counsel's incompetency caused miscarriage - whether judge adequately directed jury on defence case - test identified - no miscarriage of justice - appeal dismissed

Summaries With Link (Five Minute Read)

Yun v R [2017] NSWCCA 317
Court of Criminal Appeal of New South Wales

Latham, Bellew & Campbell JJ

Criminal law - objective seriousness - murder - appellant was tired for murder in 2003 and was found guilty - he was sentenced to 26 years 8 months, NPP 20 years - the appellant appealed the severity of his sentence, submitting that the sentencing judge erred in assessing the objective seriousness of his offending and in using, as a starting point, the relevant standard non-parole period of 20 years - the Court found that there was error (*Yun v R* [2008] NSWCCA 114, [31]-[33]) - the appellant was resentenced to 24 years, NPP 18 years (the 2008 sentence) - in 2014 the appellant applied (the first application), pursuant to Part 7 *Crimes (Appeal and Review) Act 2001* for an inquiry into his sentence - this application was dismissed - in 2017, following *Buttrose v Attorney General of NSW* ((2015) 324 ALR 562) the applicant made a further application for an inquiry into his sentence (the second application) - this application was granted *(Further Application by Gil Bum Yun pursuant to s78 Crimes (Appeal and Review) Act 2001* ([2017] NSWCCA 825), the court accepted that there as a doubt as to whether a Muldrock error (*Muldrock v R* (2011) 244 CLR 120) occurred when the CCA re-sentenced the appellant for murder in 2008 - held: (i) application of *R v Way* (2004) 60 NSWLR168) (*Way*) - the effect of the High Court's decision in Muldrock is that the correct approach to sentencing an offender for an offence to which a standard non-parole period applies is the appraoch outlined in *Markarian v R* ((2005) 228 CLR 357) at [51], namely an approach that reflects a process of instinctive synthesis [see [22] for additional details of that process] - here, on the resentencing of the appellant, the Court adopted the process of intuitive synthesis in that the court arrived at a sentence by taking into account the objective seriousness of the offending and the appellant's subjective circumstances - no error identified; (ii) objective seriousness - *Muldrock* limits the range of factors to an assessment of objective sourness (see *R v Koloamatangi* [2011] NSWCCA 288, [18]-[21]) - the intention of the offender has always been a significant factor in the assessment of objective seriousness (*R v Ainsworth* (1994) 76 A Crim R 127; *R v Holton* [2004] NSWCCA 214; *Apps v R* [2006] NSWCCA 290) - the inclusion of this factor necessarily enlarges the range within which a given offence sits - in *Muldrock* the High Court drew a distinction between "characteristics of the offender" and "the nature of the offending" - the latter expression includes mens rea, which is an integral part of the offender's conduct - duress or provocation are within "the nature of the offending" (*Williams v R* [2012] NSWCCA 172, [42]) - mental illness may properly be described as a characteristic of an offender, or a matter personal to the offender (*Subramaniam v R* [2013] NSWCCA 159, [57]) - additional authorities considered - this Court has invariably determined since *Muldrock* that an offender's mental condition at the time of the commission of the offence is a critical component of "moral culpability", which in turn affects the assessment of "objective seriousness" - the appellant's submission that an assessment of objective seriousness of a standard non-parole period offence, post *Muldrock*, precludes consideration of an offender's mental state, duress, provocation and mental illness (where causally related to the commission of the offence) was rejected; appeal dismissed. [Editor's note: Campbell J agreeing with Latham & Bellew JJ. For earlier proceedings see *Yun v R* [2008] NSWCCA 114; *Application by Gil Bum Yun pursuant to s78 Crimes (Appeal & Review) Act 2001* [2014] NSWSC 824; *Further Application by Gil Bum Yun pursuant to s78 Crimes (Appeal & Review) Act 2001* [2017] NSWCA 825.]

Yun

Strachan v R [2017] NSWCCA 322
Court of Criminal Appeal of New South Wales
Basten JA, Bellew & Hamill JJ
Criminal law - directions - firearms offences - a search warrant was executed on the applicants house and a “Dynaweld” box was discovered containing firearms and ammunition - the appellant operated a business named “Dynawled” and his fingerprints were located on tape on the outside of the box and on a plastic bag containing the firearms - the applicant denied knowledge of the firearms and ammunition - the applicant and 2 co-accuseds were then charged with firearms offences - the applicant and one Murdoch were charged with a single joint count of possessing more than 3 unregistered firearms - they pleaded not guilty and were convicted - the applicant was sentenced to an aggregate of 4 years 6 months, NPP 3 years 3 months - telephone calls from Murdoch in prison were guarded and when he was arrested a search of his premises had located a printed manual containing instructions for building a 9mm machine gun - the applicant’s fingerprints were on several pages of the manual - held:(i) admissibility of the machine gun manual - referring to s55(1) *Evidence Act 1995* (NSW)) - the relevance of the manual derived from the fact that the applicant’s fingerprints were found on several of its pages - from that it could be inferred, contrary to the applicant’s denials, that he was aware of the contents of the manual and had an interest in its contents - the second step in the analysis of probative value was to determine whether an established interest in a machine gun could rationally affect the jury’s assessment of whether the applicant knew of the guns which were in fact in his garage - s97 *Evidence Act 1995* and tendency evidence referred to - s97 was not engaged - the term tendency evidence is not to be construed in the broadest sense available from the literal meaning of the words in the section - the reference to proof of a particular state of mind does not mean that all evidence of character or conduct on a different occasion which goes to demonstrate a state of mind, including knowledge, of an accused, is tendency evidence - rather the term “tendency” suggests a pattern of behaviour - having a particular sate of mind or knowledge does not necessarily demonstrate a tendency to commit criminal acts (see *R v Cooper* (1849) 3 Cox CC 547, 549-550) - here, once it was established that the firearms were located in a box in the applicant’s garage with his fingerprints, the evidence that he had an interest in firearms generally tendered to establish that his denial of knowledge of the contents of the box was implausible - the trial judge was correct in ruling that the manual was relevant and admissible - ground rejected: (ii) directing the jury on lies - no error demonstrated, the direction given was in accordance with *Zoneff v The Queen* ((2000) 200 CLR 234) and no exception was taken at trial by the applicant’s counsel; appeal dismissed. [Editor’s note: Bellew & Hamill JJ agreeing with Basten JA.]
Strachan

Robinson v R [2017] NSWCCA 315
Court of Criminal Appeal of New South Wales
Bathurst CJ, R A Hulme & Wilson JJ

Criminal law - sentence discount - assistance to authorities - applicant pleaded guilty to an offence of specially enter a dwelling house with intent to commit a serious indictable offence, namely robbery in company - the circumstances of special aggravation were that the offence was committed whilst armed with a dangerous weapon (s111(3) *Crimes Act 1900* (NSW)) - additionally the applicant pleaded guilty to an offence of specially aggravated break, enter and commit a serious indictable offence, namely robbery in company (s112(3) *Crimes Act 1900*) - again, the circumstance of special aggravation was the commission of the offence while armed with a dangerous weapon - a fixed term of 2 years was imposed for the first offence and 4 years 6 months, NPP 2 years 6 months, was imposed for the second, s112(3), offence - the overall sentence imposed was 5 years 3 months, NPP 3 years 3 months - the individual sentences were reduced by 25% for early pleas, with an additional discount of 20% for assistance to authorities, giving an overall discount of 45% - the appellant appealed the sentences, submitting that the judge erred in failing to allow a proper discount for assistance and that the sentences were unjust - held: (i) s23 *Crimes (Sentencing Procedure)* Act *1999* (NSW) & discount for assistance - it is uncontroversial that a discount to be given for assistance to authorities, is an aspect of the sentencing discretion (*Hutchinson v R* [2014] NSWCCA 317, [32]) - the Court has observed that the combined discount for both a plea of guilty and assistance to authorities should not normally exceed 50% (*Z v R* [2014] NSWCCA 323, [27]) - combined discounts of 40% should be granted very exceptionally, if at all, in a case where there is no evidence that the offender will spend time in custody in circumstances that are more onerous than for the general prison population (*R v Sukkar* (2006) 172 A Crim R 151, [5]; *R v Ehrlich* (2012) 219 A Crim R 415, [67]; *LB v R* [2013] NSWCCA 70, [62]; *Haouchar v R* [2014] NSWCCA 227, [37]) - here there was no suggestion that the sentencing judge overlooked any aspect of the applicant's assistance and s23(3) imposes a limit on the degree to which a discount can be allowed in order that the ultimate sentence is not unreasonably disproportionate to the nature and circumstances of the offences; (ii) s112(3) offences - the offence was a particularly serious example of its type - it was planned, committed with 3 other offenders who were disguised and armed - victims were threatened with a firearm which was in fact discharged - home invasion offences are regarded as being of considerable seriousness (*Palijan v R* [2010] NSWCCA 142, [22]; R v Elmir; R v Salami [2003] NSWCCA 192, [19]) - the sentence was not unreasonably or plainly unjust; appeal dismissed. [Editor's note: Bathurst CJ & Wilson J agreeing with R A Hulme J.]
Robinson

Dixon v R [2017] NSWCCA 299
Court of Criminal Appeal of New South Wales
Basten JA, McCallum & Wilson JJ
Criminal law - defence opening - accused's failure to give evidence - applicant was charged with 2 counts of sexual intercourse with a child under 10 (s66A(1) *Crimes Act 1900* (NSW)) - at trial, the applicant's counsel opened to the jury, telling them that the accused would give evidence - the applicant did not, however, give evidence and the jury returned verdicts of guilty on both counts - the applicant sought to appeal his convictions, submitting, inter alia, that a miscarriage of justice had occurred because his counsel, due to incompetency, had failed to

seek a discharge of the jury once he failed to give evidence - held: (i) leave - to the extent that ground 2 raised an issue as to the omission to direct the jury on the applicant's failure to give evidence, leave was required (r4 *Criminal Appeal Rules* (NSW)) - while ground 3 did not require leave under r 4, leave under s5(1)(b) *Criminal Appeal Act 1912 (*NSW) was required as that ground raised a mixed question of law and fact - leave granted; (ii) failure to seek a direction on the applicant's failure to give evidence - the burden of the applicant's submission was that his counsel's opening remarks created an expectation in the jury that it would hear from him and that they "needed to be told in some way" to disregard that expectation; that while things change in a trial the applicant still had the benefit of the right to silence - the direction as to an accused's entitlement to elect to remain silent was given by the trial judge in empathic terms and was the last thing the jury heard before they retired to consider their verdict - the directions were adequate to dispel the expectation that the applicant would give evidence - the jury were properly directed and there was no miscarriage of justice; (iii) duty to put defence case to jury - this was, as the trial judge concluded, an obvious case in which it was not necessary to summarise the evidence - however, the trial judge was still required to put the defence case fairly before the jury (*RPS v R* (2000) 199 CLR 620) - the critical task was to determine the content of that requirement in this instance - the test is ultimately one of fairness, which is necessarily context-based - the obligation of a trial judge is to conduct a trial that is fair to both the accused and the Crown - the notion that a judge has a "higher" duty where the defence case is weak, is apt to distort the true task and cannot be regarded as a principle of law - the accused's entitlement to a fair trial does not require the judge to advocate for the accused, or to promote a weak case beyond its actual strength - no objection was taken by the applicant's counsel and while the position adopted by counsel is not determinative, it is appropriately regarded as "a reasonably reliable indicator of the fairness or sufficiency of what has been said" (*AP v R* [2013] NSWCCA 189, [29]; *Aravena v R* (2015) 91 NSWLR 258, [119]-[121] - authorities referred to - here, the jury could not have been left under any doubt as to the nature of the applicant's case - the sole focus of the defence was upon the complainant's credibility and the judge's summing advanced that case to the jury - in the circumstances, little was to be achieved by a reiteration of the evidence, or of points made by counsel an hour or so earlier - the lack of a request for a redirection provided a cogent basis for concluding that, in the circumstances, the trial judge's summing up was perceived as adequate; appeal dismissed. [Editor's note: Basten JA & Wilson J agreeing with McCallum J.]
Dixon

Empty Manger

By: David Conolly

Once a church,
the little building
gathers dust.

Has he finally
abandoned us?

Is this the end
of
the lovely dream?

Look
at the hot, silent land -
and remember:

it was to planet earth
he came,
not to bricks
and crumbling mortar.

And to earth's inhabitants.

Wherever his Way
still lives -
and in whom -

he is present.

Always will be.

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