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Weekly Criminal Law Review

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

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Executive Summary

Glover v R (NSWCCA) - criminal law - duplicity - child prostitution - elements of the offences considered - whether counts charged more than one offence - no duplicity - appeal dismissed

Bahrami v R (NSWCCA) - criminal law - jury - juror absent - bullying - correct procedure to be adopted considered - jury to self - assess its ability to continue - trial continued - authorities referred to - no error - appeal dismissed

Potts v R (NSWCCA) - criminal law - severity appeal - sentenced on incorrect basis - error - applicant institutionalised - bleak future - resentenced

Curtis v R (NSWCCA) - criminal law - conspiracy to commit insider trading - agreement to supply information - not all information would be material to the market - appellant convicted - whether verdict unreasonable - appeal dismissed

DPP v Johnson & Yahoo!7 (No 2) (VSC) - criminal law - contempt - penalty proceedings - need for specific and general deterrence - serious contempt - good behaviour bond and $300,000 fine imposed on respondents

R v Farrer (SASCFC) - criminal law - conviction appeal - circumstantial case - dangerous driving causing death and leaving the scene - findings of fact open - appeal dismissed

R v Peake (SASC) - criminal law - manslaughter - mother sustaining a fall and unable to walk - whether only child who lived with her assumed a duty towards her - whether manslaughter by

omission - test objective - no duty shown - verdict of acquittal entered

R v Arthur (ACTSC) - criminal law - sentence - whether discount of utilitarian value for early plea available - Federal and Territory offences - discount only for Territory offences - sentence imposed

R v BL (ACTSC) - criminal law - pre-trial evidence - complainant permitted to have her support dog present when giving evidence remotely - whether a direction to the jury required - dog not to be seen by jury - no direction required

Summaries With Link (Five Minute Read)

Glover v R [2016] NSWCCA 316
Court of Criminal Appeal of New South Wales
Gleeson JA, Fagan & N Adams JJ
Criminal law - conviction & severity appeals - child prostitution - appellant charged with 10 offences involving juvenile female complainants (ss66C, 91D(1)(a), 91F *Crimes Act 1900* (NSW)) - the prostitution occurred in the appellant's home and in hotel premises - offences: s91D(1)(a) 'caused a child to participate in an act of child prostitution' and s91F 'exercising lawful control over premises in which a child participated in an act of child prostitution' - appellant argued that counts bad for duplicity and placed him in double jeopardy - held: s91D(1)(a) - essence of offence lies in the offender causing the child's participation in child prostitution - making premises available at which sexual services may be provided by the child can be a particular of the offender's causative acts, but the provision of premises is not essential to the charge - s91F: the gravamen of the offence lies in the failure to exercise, with due diligence, lawful control over premises to prevent them from being used for child prostitution - there is no warrant to read in the section a restriction that the offence can only be committed if the offender, being capable of exercising control over the premises, does not by any act cause the child to participate in prostitution - duplicity arises where one count on an indictment charges two or more separate offences - that duplicity may be patent or latent and only become apparent when the Crown opens its case or tenders evidence - here, there was no duplicity in the pleadings - the contention that the counts involved double jeopardy raised the issue of two or more statutory prohibitions applying to the same set or overlapping sets of primary facts (see also *Pearce v The Queen* (1998) 194 CLR 610; *The Queen v Carroll* (2002) 213 CLR 635) - *R v Dodd* (1991) 56 A Crim R 451 illustrates the applicable principles - applying the test Gleeson CJ adopted in that decision, the evidence necessary to secure a conviction on the s91D(1)(a) charge would not have been sufficient to secure a conviction on the s91F charge - see *Environment Protection Authority v Australian Iron & Steel Pty Ltd* (1992) 28 NSWLR 502, 507G-508A - confirmed in *Pearce* - the counts were not amenable to being stayed as an abuse of process under the principle applied in *Nahlous v The Queen* (2010) 77 NSWLR 463 - the fact that the appellant was convicted of two offences in which a common circumstances was the use

of his home for child prostitution was relevant on sentence, to be taken into account by regard to the principle of totality - on the issue of severity, the s91DF & s91F offences were 'about mid range' in seriousness - the sentence was not manifestly excessive - appeal dismissed.
Glover

Bahrami v R [2017] NSWCCA 8
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, R A Hulme & Schmidt JJ
Criminal law - conviction appeal - appellant found guilty of people smuggling offences - sentence 11 years 3 months, NPP 7 years 3 months - at the close of cross examination of the appellant a juror sent a note to the trial judge indicating that she was 'being mistreated by another juror (bullying)' - the judge discussed the matter with both counsel, but otherwise did not investigate the juror's complaint - when the jury returned into court the juror was absent and despite attempts to contact her she did not come back into court - the judge then discharged the juror - the judge then provided a document to each remaining juror asking them whether they, personally, considered that they could continue 'to function as a juror in accordance with your oath or affirmation' and, secondly, whether they personally considered that the jury could continue to 'freely discharge its function' - the jury responded in the affirmative, some jurors simply responding 'yes' and others with additional comments - the trial then continued without objection by defence counsel - on appeal, it was argued that the judge erred in not investigating the complaint and that a miscarriage of justice arose from the failure to investigate and from the failure to discharge the jury - held: the fact that the juror had not returned to court was a critically important fact - how long she was absent for was only important for deciding how long the proceedings would be interrupted for - an investigation by the sheriff into her absence was not required, there being no basis to suspect that the jury's verdict would be affected by improper conduct (s73A *Jury Act 1977* (NSW)) - there was an alternative and more expeditions course available, which the judge took - *Elomar v R; Hasan v R; Cheikho v R; Cheikho v R; Jamal v R* (2014) NSWCCA 303 implicitly endorsed the approach taken by the judge of seeking self-assessment by jurors of their ability to discharge their duty (see: *R v Spilios* [2016] SASCFC 6) - defence counsel also agreed with this course and after the jury's response was received did not object to the trial continuing - *Webb v The Queen; Hay v The Queen* (1983) 181 CLR 41; *Smith v The State of Western Australia* (2014) 250 CLR 473 referred to - appeal dismissed [Editor's note: Hoeben CJ at CL & Schmidt JJ agreeing with R A Hulme J].
Bahrami

Potts v R [2017] NSWCCA 10
Court of Criminal Appeal of New South Wales
Basten JA, Johnson & Button JJ
Criminal law - sentence appeal - applicant sentenced for one count of attempting to commit an aggravated break, enter & steal, the aggravation being in company of his adult son - the sentencing judge imposed a sentence on the basis that the applicable penalty included a standard non-parole period (SNPP) - this constituted error as the SNPP does not apply to

attempts to commit the substantive offence (*D A C v R* [2006] NSWCCA 265, [9]-[10]) - held: on resentencing - here, the offence consisted of an attempt by two persons to break into residential premises that was wholly unsuccessful; readily detected; lacking in any preparation or professionalism; except for wearing gloves - a discount of 5% was appropriate - the applicant's conduct in custody on prior occasions was disruptive, manipulative, intimidating and the evidence showed him to be 'thoroughly institutionalised', with a bleak future - a degree of general and personal deterrence was required to reflect the seriousness of the offence - resentenced to 3 years 4 months, NPP 2 years 6 months [Editor's note: Basten JA agreeing with Button J; Johnson dissenting on the issue of resentencing].
Potts

Curtis v R [2016] NSWCCA 299
Court of Criminal Appeal of New South Wales
Payne JA, Price & Davies JJ
Criminal law - conviction appeal - appellant convicted of one count of conspiracy to commit insider trading (s11.5 *Criminal Code Act 1995* (Cth)) - appellant was alleged to have entered into an agreement (the conspiracy) with a friend, Hartman, for Hartman to send him details of shares Hartman would be trading in so that the appellant could buy and sell shares before Hartman's trading was completed - on appeal, appellant argued that the verdict was unreasonable because it was not open for the jury to be satisfied that the trading information supplied by Hartman was 'material' in the sense that a reasonable person would have expected that information to have a material effect upon the price of the shares - the appellant argued that the terms of the agreement with Hartman required the prosecution to prove that 'all' information supplied about trading intentions would be 'material' in the sense that it would influence persons who commonly traded in shares - the appellant further relied on *R v LK; R v RK* (2010) 241 CLR 177 to argue that the prosecution had to prove that the information supplied 'would' have, rather than 'may' have had that necessary quality - held: the principles relevant to an unreasonable verdict have been reiterated by the High Court in *The Queen v Baden-Clay* [2016] HCA 35 - see also *MFA v The Queen* (2002) 213 CLR 606 - at the time of making the agreement, Hartman and the appellant knew that not all of the information would be material, but they did know that some of it would be - the agreement alleged in the indictment was to engage in trading using only information which was material - that is, information which he knew or believed a reasonable person would consider likely, if publicly available, to affect the share price - *R v LK; R v RK* & *Ansari v R* (2010) 241 CLR 299 considered - here, the single physical element of the offence was that the appellant and Hartman entered into the alleged agreement (*R v LK: R v RK* [131]; *Ansari* [40]) - the fault element required to prove the charge was intention - it was also necessary to prove one or more overt acts - it was common ground that this occurred - the direction (not complained of) did not suggest that the Crown had to prove that all information supplied was 'material' - upon the whole of the evidence and the directions provided, the jury were entitled to be satisfied beyond reasonable doubt that the appellant was guilty - see also *R v Mansfield* (2011) 251 FLR 286; (2012) 247 CLR 86 - appeal dismissed [Editor's note: Price & Davies JJ agreeing with Payne J. See also: *R v Curtis* [2016] NSWSC

660*; R v Curtis (No 2)* [2016] NSWCCA 795; *R v Curtis (No 3)* [2016] NSWSC 866].
Curtis

DPP v Johnson & Yahoo!7 (No 2) [2017] VSC 45
Supreme Court of Victoria
John Dixon J
Criminal law - contempt - penalty hearing - first respondent a journalist who authored an article published by the second respondent - article titled "Man paused to take 'smoke break' while bashing girlfriend to death" - murder trial aborted as a result of publication - declaration that both respondents guilty of contempt of court - at penalty hearing, DPP argued the contempt was aggravated by a number of factors, including the necessity to hold a second trial and the arguably disingenuous explanations for the contempt - the respondents argued that the contempt was accidental, inadvertent and expressed remorse and sincere contrition - held: the fundamental aim of punishment for contempt is to uphold and preserve the undisturbed and orderly administration of justice in the courts according to law (*R v Derryn Hinch* [2013] VSC 554, [12]) - here, the right of all accused persons is to be tried before an impartial jury (*DPP v Wran* (1987) 7 NSWLR 616, 639) - where the respondent is an individual, the court may punish by a fine, committal to prison, or both - where the respondent is a corporation, the court may punish by a fine, sequestration, or both - the court may decline to record a conviction - there is no maximum fine - the principles for recording a conviction set out in s8(1) *Sentencing Act 1991* (Vic) apply - in *R v Herald & Weekly Times Pty Ltd* ([2008] VSC 251, [16]) Kyrou J set out the relevant considerations when sentencing for contempt - a significantly serious contempt is where the publication interferes with the course of and has a tendency to prejudice, a murder trial, especially where the trial is aborted (*R v Herald & Weekly Times Pty Ltd*; *R v Nationwide News Pty Ltd* [2006] VSC 420, [5]-[6]) - in exercising the discretion of whether to record a conviction, a significant factor is whether the contempt was contumacious - a mere inadvertent failure to check an article prior to publication is less serious than a publication occurring with knowledge that the article has not been properly checked - here, the contempt was very serious - the first respondent has learned, in a harsh and unforgiving way, a lesson she will not forget and this mitigated the need for specific deterrence - however, both respondents contested their liability for contempt - the later expressions of remorse following the finding of guilt cannot carry the same impact as a genuine and unconditional expression of remorse made at the first available opportunity - Court satisfied that the first respondent has felt and expressed genuine remorse - 2 year good behaviour bond imposed - if of good behaviour for the 2 years, proceedings will be dismissed - Yahoo!7 bore primary responsibility for the contempt - it failed to ensure its systems for supervision and control of the dissemination of information about court proceedings were sufficient to prevent prejudicial material being aired - $300,000 fine imposed [Editor's note: for contempt proceedings see *DPP v Johnson & Yahoo!7* [2016] VSC 699].
Johnson & Yahoo!7

R v Farrer [2017] SASCFC 3
Full Court of the Supreme Court of South Australia

Vanstone, Kelly & Nicholson JJ
Criminal law - conviction appeal - appellant's vehicle struck the rear of a bicycle, killing the rider - the driver kept driving and later stated to police that she had hit a pole - methylamphetamine was subsequently found in her blood - she had been at a party and one issue at trial was whether she had slept in the hours before the collision - another issue was whether she had ingested the methylamphetamine after the collision - the prosecution case was circumstantial - the appellant did not give evidence and the defence was that she had simply fallen asleep at the wheel - the appellant was convicted of one count of aggravated death by dangerous driving (s19A *Criminal Law Consolidation Act 1935* (SA) ('*CLC Act*')) and one count of leaving the scene of an accident after causing death (s19AB(1) *CLC Act*) - on appeal, it was argued that the trial judge erred by not giving reasons, in making findings that were not reasonably open and that the verdict was unreasonable - held: the findings that the appellant had not slept in the hours before the collision and that she had ingested methylamphetamine before the collision were open to the judge - appeal dismissed [Editor's note: Vanstone & Nicholson JJ agreeing with Kelly J].
Farrer

R v Peake [2017] SASC 10
Supreme Court of South Australia
Vanstone J
Criminal law - manslaughter - judge alone trial - accused, diagnosed with Autism Spectrum Disorder, was the only child of the deceased, who was aged 82 - accused, who lived with her mother, had returned home to find her mother had fallen outside the house - she helped her mother to crawl into the kitchen - the mother rejected the accused's offer to telephone for an ambulance - the accused feared her mother would choke if she gave her food or water and did not seek help for her - her mother died 7 days later - the accused was charged with unlawfully killing her mother (manslaughter by omission) - the accused did not appreciate the risk of leaving her mother on the floor and had responded inappropriately to the situation - her behaviour was assessed as maladaptive risk assessment and response - a finding was made that she was mentally incompetent to commit the offence charged - on the trial of the objective facts: held - manslaughter can be committed by omitting to act - in such cases, the prosecution must prove that the accused owed a duty to the deceased to act in a certain way but omitted to do so, that the omission caused the death and that the omission could be characterised as (usually) criminally negligent or (rarely) as an unlawful and dangerous act - the duty may arise from a relationship or may be imposed by statute, by a contract, or through voluntary assumption of the care of another (*Burns v The Queen* (2012) 246 CLR 334, [97]) - relationships that are generally recognised as giving rise to such a duty include a parent's relationship with his or her child and a doctor's relationship to his or her patient - *Reg v Stone; Reg v Dobinson* [1977] QB 354 considered - the circumstances in which a duty will be implied or will be found to have been undertaken are very limited - once the duty is established, the degree of negligence required to establish a breach will be the same as for the more usual case of manslaughter by criminal negligence - in *Wilson v The Queen* (1992) 174 CLR 313, 333, the

High Court accepted that *Nydam v R* [1977] VR 430, 445 correctly sets out the test for criminal negligence - the Court, while doubting the correctness, accepted that in this instance the determination of whether the accused had assumed a duty towards her mother was to be tested objectively - *R v Taktak* (1988) 14 NSWLR 226 referred to - here, the accused was accustomed to take instructions from the mother and had helped her into the house - that did not constitute an assumption of a duty - the fact that the mother was in the house did not show that a duty had been assumed - the nature of the long-standing relationship between the accused and her mother and, in part, the accused's disorder, meant that the accused did not assert herself - at no stage did she assume a legally recognised duty to her mother as a ground for lability for manslaughter - verdict of acquittal entered.
Peake

R v Arthur [2017] ACTSC 23
Supreme Court of the Australian Capital Territory
Robinson AJ
Criminal law - sentencing - offender pleaded guilty to 3 counts relating to child pornography material (s474.19(1) *Criminal Code 1995* (Cth); s65 *Crimes Act 1900* (ACT)) - two different sentencing regimes engaged (Part 1B *Crimes Act 1914* (Cth) & *Crimes (Sentencing) Act 2005* (ACT)) - held: *R v De Leeuw* [2015] NSWCCA 183, [72] sets out relevant propositions to be applied in sentencing offenders for child pornography offences - unless exceptional circumstances exist, a sentence involving an immediate term of imprisonment is ordinarily warranted (see: *R v Jongsma* (2004) 150 A Crim R 386, [14]) - the objective seriousness is ordinarily determined by reference to a number of factors, including the nature and content of the material, the number of images and whether the material is for sale or further distribution (see [17]) - general deterrence is the primary sentencing consideration (see: *Assheton v R* (2002) 132 A Crim R 237, 246-7) - less or limited weight is given to an offender's prior good character (see: *R v Gent* (2005) 162 AZ Crim R 29, 44) - here, there was only a small number of images - the offender suffered from depression - being bound by *Cameron v The Queen* (2002) 209 CLR 339, [11]-[15] & *R v Harrington* (2016) 11 ACTLR 215, [38], [132] a discount for the utilitarian value of the early plea can only be given for the Territory offence - 10% allowed - sentence of full time imprisonment imposed.
Arthur

R v BL [2017] ACTSC 16
Supreme Court of the Australian Capital Territory
Penfold J
Criminal law - pre-trial evidence - accused charged with 2 counts of indecency and one of assault upon his daughter - daughter suffering from Asperger's Syndrome - daughter's evidence to be taken in pre-trial hearing - daughter granted permission to have her dog present during her evidence - dog would not be visible in the video recording of the daughter's evidence - Crown sought a ruling that the judge direct the jury about the dog's presence - defence objected, arguing that mention of the dog would invoke sympathy in the minds of the jury and

might distract them from their task - held: accepting that the presence of the dog would have a positive effect upon the daughter's capacity to give her evidence - telling the jury about the support dog carried the same risk as would arise when the jury discovers that a witness has a support person in the remote witness room - that risk must be addressed by a specific direction to the jury - the presence of a support person might engender the suspicion that the witness cannot cope and thereby create prejudice against the accused - the presence of a support dog might similarly engender an emotional response, invoking a feeling of warmth towards the complainant that is not based on her need for the dog's support, but on the affection she would be presumed to have for the dog - however, because the dog would not be seen or heard, no direction was required in this instance [Editor's note: see *R v BL* [2016] ACTSC 209 for prior interlocutory rulings].
BL

Youth and Age
By Samuel Taylor Coleridge

Verse, a breeze mid blossoms straying,
Where Hope clung feeding, like a bee—
Both were mine! Life went a-maying
With Nature, Hope, and Poesy,
When I was young!

When I was young?—Ah, woful When!
Ah! for the change 'twixt Now and Then!
This breathing house not built with hands,
This body that does me grievous wrong,
O'er aery cliffs and glittering sands,
How lightly then it flashed along:—
Like those trim skiffs, unknown of yore,
On winding lakes and rivers wide,
That ask no aid of sail or oar,
That fear no spite of wind or tide!
Nought cared this body for wind or weather
When Youth and I lived in't together.

Flowers are lovely; Love is flower-like;
Friendship is a sheltering tree;
O! the joys, that came down shower-like,
Of Friendship, Love, and Liberty,
Ere I was old!
Ere I was old? Ah woful Ere,
Which tells me, Youth's no longer here!
O Youth! for years so many and sweet,
'Tis known, that Thou and I were one,
I'll think it but a fond conceit—
It cannot be that Thou art gone!

Thy vesper-bell hath not yet toll'd:—
And thou wert aye a masker bold!
What strange disguise hast now put on,
To make believe, that thou are gone?
I see these locks in silvery slips,
This drooping gait, this altered size:
But Spring-tide blossoms on thy lips,
And tears take sunshine from thine eyes!
Life is but thought: so think I will

That Youth and I are house-mates still.

Dew-drops are the gems of morning,
But the tears of mournful eve!
Where no hope is, life's a warning
That only serves to make us grieve,
When we are old:
That only serves to make us grieve
With oft and tedious taking-leave,
Like some poor nigh-related guest,
That may not rudely be dismist;
Yet hath outstay'd his welcome while,
And tells the jest without the smile.

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