



Friday, 26 April 2024

Weekly Criminal Law

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

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Executive Summary

Bugmy v Director of Public Prosecutions (NSWCA) - conviction for resisting an officer in the execution of duty during an arrest for breach of bail conditions quashed, as arresting officer did not consider the matters required to be considered by s77(3) of the *Bail Act 1978*

Edquist-Wheeler v R (NSWCCA) - s47 of the *Crimes (Sentencing Procedure) Act 1999 (NSW)*, which provides that the Court cannot set a sentence commencement date after the date of sentencing for an offender in full time imprisonment if the non-parole period of the current sentence has expired, should also apply in the case of a revoked Intensive Correction Order

HABEAS CANEM

Country smile



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Summaries With Link (Five Minute Read)

Bugmy v Director of Public Prosecutions (NSW) [2024] NSWCA 70

Court of Appeal of New South Wales

Leeming & Mitchelmore JJA, & Basten AJA

Bail - Bugmy as arrested and charged with using a carriage service to menace or harass, contrary to s474.17(1) of the *Criminal Code Act 1995* (Cth) - she was granted conditional bail by a Senior Constable, who identified as bail concerns that she might endanger the safety of persons and interfere with witnesses or evidence - a condition was that she not contact Broken Hill Police Station - she then made an abusive phone call to that Station - police then arrested her for this breach, and Bugmy resisted that arrest - she was convicted of resisting an officer in the execution of duty, contrary to s58 of the *Crimes Act 1900* (NSW) - the Supreme Court dismissed an appeal against this conviction - Bugmy sought leave to appeal to the Court of Appeal - held: acting "in the execution of his or her duty" for the purposes of s58 of the *Crimes Act* requires the prosecution to establish that the resistance occurred during the lawful execution of an officer's duty - s77(3) of the *Bail Act 1978* (NSW) provides that a police officer, when deciding whether to take action, and what action to take, to enforce bail requirements must consider: (a) the relative seriousness or triviality of the failure or threatened failure; (b) whether the person has a reasonable excuse for the failure or threatened failure; (c) the personal attributes and circumstances of the person, to the extent known to the police officer; and (d) whether an alternative course of action to arrest is appropriate in the circumstances - it was common ground that the arresting officer did not consider the matters in s77(3) - the arrest appeared to have been effected because other officers had formed the view that Bugmy should be arrested, and the arresting officer was tasked with that "job" - a lawful exercise of the power of arrest conferred by s77 is one in which the arresting officer complies with s77(3) - leave to appeal granted, appeal allowed, conviction quashed.

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Edquist-Wheeler v R [2024] NSWCCA 49

Court of Criminal Appeal of New South Wales

Adamson JA, Lonergan, & Sweeney JJ

Sentencing - the applicant pled guilty to one count of cultivating a commercial quantity of prohibited plants by enhanced indoor means and exposing a child to the cultivation, contrary to s23A(2) of the *Drug Misuse And Trafficking Act 1985* (NSW) - when he committed the offence, he was subject to an Intensive Correction Order for a similar offence - the ICO was revoked from the day he was arrested for the fresh offence - he was sentenced for the fresh offence to 4 years and 6 months imprisonment, with a non-parole period of 3 years and 4 months - the sentencing judge set the commencement date of sentence as a date about six months in the future, so that it ran partly consecutively with the sentence for the revoked ICO - the applicant sought leave to appeal against sentence - held: s47 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) has the effect that the Court cannot set a sentence commencement date after the date of sentencing if the offender is in full time imprisonment and the non-parole period of the

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current sentence has expired - fairness and justice required that the sentencing judge take a similar approach to the revoked ICO, given that reinstatement of the revoked ICO was available pursuant to s165 of the *Crimes (Administration of Sentences) Act*, to avoid the perception of the applicant being doubly punished by his ICO having been revoked because of the fresh offence and his sentence for the subsequent offence being accumulated to the extent that it was on the revoked ICO, having regard to the criminality of both offences - this was an error in the exercise of the sentencing discretion - further, the sentencing judge's indication during the sentence proceedings that he would backdate the sentence to a date before the date the sentence was imposed deprived the applicant of the opportunity to make submissions about why the sentence should not commence after the date of sentence - there had therefore been a denial of procedural fairness - further, the sentencing judge mistook the facts about the applicant's protective custody, of which there was some evidence - the sentencing judge had also overlooked the effect of the accumulation of sentences on the total non-parole period - leave to appeal granted, and applicant resentenced to imprisonment for 3 years, 6 months with a non-parole period of 2 years, 6 months commencing on the date of sentencing by the sentencing judge.

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INTERNATIONAL LAW

Executive Summary and (One Minute Read)

Kirkorov v Lithuania (Eur Ct HR) - Decision of Lithuania to deny entry to Russian entertainer on national security grounds did not amount to a violation of Article 10 (freedom of expression) of the *European Convention on Human Rights*

Summaries With Link (Five Minute Read)

Kirkorov v Lithuania, ECHR 096 (2024)

European Court of Human Rights

Bårdsen P, Ilievski, Kuris, Yüksel, Schembri Orland, Krenc, & Derencinovic JJ

Kirkorov was a popular singer from Russia who had been found by the Lithuanian Migration Department to have publicly supported Vladimir Putin and supported Russia's actions in Crimea. The government of Lithuania placed Kirkorov on a list of aliens barred from entering the country. Kirkorov unsuccessfully challenged this decision in the Lithuanian courts. Kirkorov then brought proceedings before the European Court of Human Rights alleging that the actions of Lithuania violated his right to freedom of expression guaranteed by Article 10 of the *European Convention of Human Rights*. Article 10 provides that everyone has the right to freedom of expression without interference by public authority and regardless of frontiers. However, these rights may be subject to such restrictions as are prescribed by law "and are necessary in a democratic society, in the interests of national security' or public safety. The European Court found that, while the right of a foreigner to remain in a country is not a Convention right, 'immigration controls must be exercised consistently with Convention obligations'. The Court ruled that the ban on entry was materially related to the right of expression because, under Article 10, no distinction can be drawn between nationals and foreigners. As entry to Lithuania was denied on the basis of Kirkorov's past statements, the Court found that there had been an interference with his Article 10 rights. The issue came down to whether Lithuania's actions were permissible as being prescribed by law and necessary in the interests of national security. The Court found that Lithuania's actions were prescribed by law that purported to be based on national security. Nevertheless, it was for the courts to determine whether the invocation of national security had a reasonable basis or was contrary to common sense. The Court concluded that there had not been a violation of Article 10 in light of the careful scrutiny by the Lithuanian courts to the claim that Kirkorov represented a threat to national security. Further, the European Court held that the measures taken by Lithuania were not disproportionate and that the national courts had properly weighed the interests of national security against the measures taken against Kirkorov.

[Kirkorov](#)



Poem for Friday

The Song of a Comet

By: Clark Ashton Smith (1893-1961)

A plummet of the changing universe,
Far-cast, I flare
Through gulfs the sun's uncharted orbits bind,
And spaces bare
That intermediate darks immerse
By road of sun nor world confined.
Upon my star-undominated gyre
I mark the systems vanish one by one;
Among the swarming worlds I lunge,
And sudden plunge
Close to the zones of solar fire;
Or 'mid the mighty wrack of stars undone,
Flash, and with momentary rays
Compel the dark to yield
Their aimless forms, whose once far-potent blaze
In ashes chill is now inurned.



A space revealed,
I see their planets turned,
Where holders of the heritage of breath
Exultant rose, and sank to barren death
Beneath the stars' unheeding eyes.
Adown contiguous skies
I pass the thickening brume
Of systems yet unshaped, that hang immense[67]
Along mysterious shores of gloom;
Or see—unimplicated in their doom—
The final and disastrous gyre
Of blinded suns that meet,
And from their mingled heat,
And battle-clouds intense,
O'erspread the deep with fire.

Through stellar labyrinths I thrid
Mine orbit placed amid
The multiple and irised stars, or hid,
Unsolved and intricate,
In many a planet-swinging sun's estate.

Of times I steal in solitary flight
Along the rim of the exterior night
That grips the universe;
And then return,
Past outer footholds of sidereal light,
To where the systems gather and disperse;
And dip again into the web of things,
To watch it shift and burn,
Hearted with stars. On peaceless wings
I pierce, where deep-outstripping all surmise,
The nether heavens drop unsunned,
By stars and planets shunned.
And then I rise
Through vaulting gloom, to watch the dark
Snatch at the flame of failing suns;
Or mark
The heavy-dusked and silent skies,[68]
Strewn thick with wrecked and broken stars,
Where many a fated orbit runs.
An arrow sped from some eternal bow,
Through change of firmaments and systems sent,

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And finding bourn nor bars,

I flee, nor know

For what eternal mark my flight is meant.

Clark Ashton Smith was born on 13 January, 1893, in Long Valley, Placer County, California. Largely self-taught, he began writing at a very young age, acquiring an exceptionally large vocabulary by reading the dictionary from cover to cover. A protégé of the San Francisco poet George Sterling, Smith achieved recognition at the age of 19 for his collection of poems *The Star Treader* (1912), influenced by Baudelaire, Poe and Sterling. Smith always considered himself a poet first and foremost, however, following the Great Depression, he later turned to writing short stories for pulp magazines such as *Weird Tales* as this was a more lucrative source of income to support himself and his aging parents. He wrote more than 100 short stories between 1929 and 1934, and it is this, along with his friendship with fellow *Weird Tales* contributor H. P. Lovecraft, for which he is remembered today. Smith lived most of his life in Auburn, California, and passed away in his sleep on 14 August 1961, at the age of 68. In addition to his literary activities, he created a large number of drawings, paintings and sculptures which reflected the otherworldly atmosphere of his tales.

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