RECENT DECISIONS FROM APPELLATE COURTS

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BAIL

R v Hird [2017] NSWSC 1400

A second bail application was made on the grounds that a 'circumstances relevant to the grant of bail have changed since the previous application was made' as per s 74(3)(c) *Bail Act 2013* (NSW). Applicant submitted that they met this criterion as a co accused had been arrested and plea negotiations were taking place.

Court found that this did not establish a change 'relevant to the grant of bail', but that the circumstances would be different if the negotiations resulted in altering the charges laid or in the applicant entering a plea.

CRIMINAL RESPONSIBILITY

IL v The Queen [2017] 345 ALR 375

Appellant was charged with 2 counts. Count 1: manufacture of large commercial quantity of prohibited drug, Count 2: murder, with alternatives Count 2a: unlawfully causing death, 2b: unlawful possession of firearms. Crown alleged accused was guilty of Count 2 even though they could not exclude the possibility that the deceased was killed accidently as a result of his own act, the appellant was guilty by reason that the act which caused the deceased's death was committed in the course of the joint criminal enterprise to manufacture the prohibited drug, and was therefore an act of the appellant as a participant in the enterprise [42]. Trial judge directed jury to acquit the accused on count 2. Crown appealed successfully and new trial ordered.

The High Court confirmed that the original trial direction was correct and allowed the appeal (thereby stopping the re-trial).

Kiefel CJ, Keane and Edelman JJ: "The short point is that the murder "taken to have been committed" and :every other punishable homicide" taken to be manslaughter to which s 18 refers require the killing by one person of another. Section 18 is not concerned with the circumstance of a person who kills himself or herself intentionally. Nor is it concerned with a person who kills himself or herself accidentally. It follows that the offence of murder is not committed where a person kills himself or herself in an attempt to commit, or during or immediately after the commission of, a relevant crime. Nor is the offence of manslaughter committed when a person kills himself or herself in some other way. Section 18 did not create such new offences. Nor could the section be engaged, and such offences created, by attributing to another person an act which caused a self-killing" [25].

Bell J, Nettle J: “Assuming it were the deceased’s act of lighting the gas ring burner which caused the deceased’s death, that act was not the actus reus of a crime of murder or manslaughter, or, to put it another way, the deceased and the appellant did not do between them all the things necessary to constitute a crime of murder or manslaughter. It follows that the appellant could not properly be considered liable for the deceased’s death pursuant to the doctrine of joint criminal enterprise liability. It would have been a very different case, however, if a third party had been killed” [80].

Gordon J (dissenting): “Distinguishing between an act and the actus reus of a crime is not useful when considering the application of s 18(1)(a). Introducing a distinction of that kind departs from the statutory words used in the provision. It is a departure because introducing a distinction of that kind necessarily attributes a *different* meaning to the phrase “the act of the accused… causing the death charged” for the purpose of constructive murder from the meaning of the phrase for the purpose of the first category of murder. On that approach, it is not doubted that for the first category, the acts of the parties to a joint criminal enterprise that, between them, comprise the actus reus of an offence within the scope of the agreement can be relied on to establish murder. But the same approach leads to the result that, for the second category, the acts of the parties to a joint criminal enterprise that, between them, comprise the actus reus of an offence within the scope of the agreement and which is a foundational offence cannot be relied on to establish constructive murder. There is no basis for that distinction and one has not been identified” [152].

EVIDENCE

Identification Evidence

The Queen v Dickman [2017] 344 ALR 474; HCA 24

Respondent convicted of intentionally causing serious injury and making a threat to kill. Appealed to CA of Victoria and had convictions set aside on the grounds that ID evidence made 2 years after the incident (after a 1st incorrect ID in 2009) by the victim was inadmissible per s 137 *Evidence Act* and had occasioned a substantial miscarriage of justice. Prosecution appealed to High Court. Appeal allowed. The evidence was correctly admitted into the original trial and, in any event, the conviction of the respondent was inevitable even without it (at [58]).

“The appellant is right to contend that the jury was not required to grapple with “abstract notions as to the dangers of identification evidence” as the limitations of the August 2011 identification were apparent. The trial judge’s conclusion that the danger of unfair prejudice was minimal and could be adequately addressed by direction was justified. It follows that the admission of the August 2011 identification did not involve error” [57].

Fadel v R [2017] NSWCCA 134

Appellant convicted of intimidating a person intending to cause physical or mental harm and intentionally causing grievous bodily harm. Victims father identified the accused in court. Trial judge immediately directed the jury not to have regard to the identification. Trial judge also directed jury that failure to procure DNA evidence was a ‘neutral factor’. Appealed on

grounds the jury was to be discharged after the ID and that the DNA evidence should not have been directed as 'neutral'.

"One thing that emerges from the decision in *Festa* is that "at-court identification" evidence, while to be treated with circumspection and caution, is not necessarily inadmissible. Admission of such evidence therefore does not mandate discharge of the jury, although it does call for careful, firm and clear directions" [84].

"That, in my opinion, is sufficient to conclude the issue in relation to Ground 1. This was a case far removed from *Festa*. This was not a case in which the evidence of identification was given by a witness previously unacquainted or unfamiliar with the person identified. This was evidence given by a person who had frequented the premises next door to those of the appellant, who knew and recognised (although not by name) members of the appellant's family (including the appellant), and who had observed at close quarters the commission of the offence and its immediate aftermath, including the arrest of the appellant. If it is in-court identification, it is of an unusual and special kind, not subject to all of the same weaknesses as, for example, the evidence in *Festa,* which, notwithstanding its weaknesses, was held not to have been inadmissible" [85].

DNA:

"The direction given was in accordance with the evidence in the trial. It would have been open to trial counsel to cross-examine Detective Brandon about the likelihood that, after kicking a person, blood or other biological material might have been expected to have been found on the assailant's boots. And it would have been open to trial counsel to have called expert evidence on that subject. Although a plastic and reconstructive surgeon gave evidence, no questions were asked of him to establish that his injuries were such that it might have been expected some DNA residue would have been left on the footwear of the attacker. That was not done. Rather, counsel appears to have intended to rely only on a negative inference. There was an evidentiary vacuum. Given the state of the evidence, the direction was adequate" [103].

Onus and Standard of Proof

The Queen v Dookheea (2017) 347 ALR 529; HCA 36

Judge directed jury that they must be satisfied of the accused's guilt 'not of any doubt but beyond reasonable doubt'. Appeal allowed: HC accepted Crown's submissions that "it does not follow that it is an error for a trial judge to contrast reasonable doubt with any doubt. While it may be unnecessary and unwise for a trial judge to do so, it will not always result in a substantial miscarriage of justice and in this case it did not do so" [28].

"Although, as authority stands, it is generally speaking unwise for a trial judge to attempt any explication of the concept of reasonable doubt beyond observing that the expression means what it says and that it is for the jury to decide whether they are left with a reasonable doubt (and in certain circumstances explaining that a reasonable doubt does not include fanciful possibilities), the practice ordinarily followed in Victoria, as it was in this case, and often

followed in New South Wales, includes contrasting the standard of proof beyond reasonable doubt with the lower civil standard of proof on the balance of probabilities. That practice is to be encouraged. It is an effective means of conveying to a jury that being satisfied of guilt beyond reasonable doubt does not simply mean concluding that the accused may have committed the offence charged or even that it is more likely than not that the accused committed the offence charged. What is required is a much higher standard of satisfaction, the highest known to the law: proof beyond reasonable doubt" [41].

Tendency & Coincidence

Hughes v The Queen (2017)244 ALR 187; HCA 20

Appellant charged with 11 counts of sexual offences against several children under the age of 16. Prosecution sought to adduce evidence of each complainant in support of its case on each count. Issue whether tendency evidence that 'a man of mature years has a sexual interest in female children aged under 16 years and a tendency to act on that interest by engaging in sexual activity with underage girls opportunistically, notwithstanding the risk of detection" is capable of having significant probative value. Issue on appeal is whether the extent to which, if at all, evidence of conduct adduced to prove a tendency is required to display features of similarity with the facts in issue because it can be assessed as having "significant probative value" [1]. "In a case in which the complainant's evidence of the conduct the subject of the charge is in issue, proof of that tendency may have that capacity" [2].

"The assessment of whether evidence has significant probative value in relation to each count involves consideration of two interrelated but separate matters. The first matter is the extent to which the evidence supports the tendency. The second matter is the extent to which the tendency makes more likely the facts making up the charged offence. Where the question is not one of the identity of a known offender but is instead a question concerning whether the offence was committed, it is important to consider both matters. By seeing that there are two matters involved it is easier to appreciate the dangers in focusing on single labels such as "underlying unity", "pattern of conduct" or "modus operandi". In summary, there is likely to be a high degree of probative value where (i) the evidence, by itself or together with other evidence, strongly supports proof of a tendency, and (ii) the tendency strongly supports the proof of a fact that makes up the offence charged" [41].

Davis v R [2017] NSWCCA 257

Appellant was convicted of supply prohibited drug found in the bedroom of a house she occupied. Case was that she was not a drug supplier, and that they belonged to the person whom she had a relationship with who was staying with her. Alternatively they were the person who occupied the room before her. Appealed on grounds that a miscarriage of justice occurred by the admission that the accused was a drug user and funded her habit by committing credit card fraud, and that there was a failure to treat the evidence that the other two potential suspects had supplied the drugs as tendency evidence (who had previously been convicted of drug offences where the applicant did not). Appeal allowed – conviction

quashed, no new trial ordered due to third trial for applicant, time lapsed and proportionality to importance of the offence.

Ground 1:

"I do not agree with the applicant's submission that the introduction of the evidence could not be explained on the basis of a forensic advantage. The choice made by the applicant's counsel had the advantage of explaining to the jury that the applicant's drug addiction was funded by her dishonest use of other people's credit cards and not by the sale of prohibited drugs" [61].

"The Crown cross-examined the applicant at length concerning her drug use and credit card fraud. This evidence was relevant to the critical issue in the trial and was not relevant only to the applicant's credibility… did not require leave under s 104 EA" [66].

Ground 2:

"In my view the probative value of the evidence is not as tendency evidence but as evidence directly relevant to the critical issue in the trial which was whether the Crown had established beyond reasonable doubt that the applicant was in possession of the drugs [97]". This (anti-tendency) direction was confusing and that the potential to divert the jury's attention away from the relevant of the evidence. The members of the jury may have understood that they could not take into account the prior convictions of Mr Hogan and Ms Ironside (other two suspects) when assessing their evidence. The direction diminished the significance of the prior convictions to the applicant's case and did not provide appropriate guidance to the jury as to the use to be made of the evidence. In my respectful opinion, the jury should have been told by the judge that the evidence of the prior convictions, of further drug supply and of the occupation of bedroom three by Mr Hogan and Ms Ironside was relevant to their task of assessing whether it was a reasonable possibility that someone other than the applicant had the possession of the drugs" [103]-[104].

Unfair Prejudice (s.137)

R v SG [2017] NSWCCA 202

Crown appeal against exclusion of evidence by a child in relation to various sexual offences towards her mother by her father. The child made statements to the effect that she had seen an incident occur between her parents. Crown appealed on grounds the judge erred in finding the evidence was not relevant and erred in finding the probative value of the evidence was outweighed by the danger of unfair prejudice to the accused. Appeal allowed

It is clear from his Honour's reference to the victim telling her daughter about events occurring at uncertain times, and "that in determining the relevance of the evidence, his Honour had regard to its reliability. That reflects an approach contrary to that prescribed in IMM. It was not part of his Honour's function, in determining relevance, to consider whether

or not there may be a basis or bases for the rejection of the evidence by the jury. His Hour was required to take the evidence at its highest and assume that it would be accepted" [33].

"Bearing in mind the width of s 55, the evidence (of SG) is plainly capable of rationally affecting, directly or indirectly, the assessment of the probability of one or more facts in issue. It follows that the evidence is relevant under s 55 of the Act, and admissible under s 56" [36].

"The unfair prejudice identified by the trial judge was that the matters to which he had referred made it "difficult if not impossible" for the respondent to adequately test the contents of any assertions. I am not able to accept that to be the case. It will be open to counsel for the respondent, as it would be at any trial, to cross-examine the assertions. The obvious purpose of cross-examination is to test the assertions which are made in evidence in chief. There is, in my view, no danger of unfair prejudice to the respondent, be it on the basis identified by his Honour or otherwise" [47].

FORENSIC PROCEDURES

Lewis v Sgt Riley [2017] NSWCA 272

Applicant was subject to a local court order under s 75L *Crimes (Forensic Procedure) Act* 2000 to submit to forensic procedure. Sought to appeal the order to the district court. District court found only avenue of review was to the supreme court as per s 115A of the same act. Appeal to CA allowed on the grounds that the legislative history "leads to the conclusion that the avenue of appeal to the Supreme Court provided for in s 115A is not exclusive but co-exists with the alternative of an appeal to the District Court provided for by s 70(1)(b) of the *Local Court Act 2007* [61] (Fagan J)".

LOCAL COURT PROCEDURE

Livbuild v Willoughby Council [2017] NSWCCA 255

Appellant entered guilty pleas and was convicted of two offences of carrying out development without consent per s 76A(1) of the *Environmental Planning and Assessment Act 1979* in the Land and Environment Court. Appellant appealed on the grounds that the proceedings commenced outside the statutory time limit of 2 years. Appealed under s 5AB of *Criminal Appeal Act 1912.* CCA set aside orders and entered verdicts of acquittal.

Despite the guilty plea, a conviction resulting from a prosecution brought in breach of a statutory time period will be liable to be set aside [12].

OFFENCES

Break & Enter

Ghamrawi v R v R [2017] NSWCCA 195

Applicants convicted of break and enter per s 112 *Crimes Act*. Dispute as to whether applicants opened the unlocked door without knocking or whether someone inside said 'come in'. After entering the applicants assaulted someone inside. Trial judge gave a direction re s 112 and said "If the person intends to commit an unlawful act at the time that they are given permission to enter the house, then there is a breaking, because the permission of invitation to enter is only if it is for a lawful purpose. If the person is invited to enter a house, does enter the house, and it is only after the lawful entry into the house that they decide to commit an unlawful act, then there is no breaking". CA allowed appeal, remitted for retrial.

"I have concluded that the better view is that there is no breaking if the person has express or implied permission to enter through a closed (but unlocked) door, even if the person had felonious intent at the time he or she affected entry" [79].

Child Sexual Assault

Tikomaimaleya v R [2017] NSWCCA 214

Appellant was convicted of one count of sexual intercourse with a child under 10. The complainant was 4-5 years old at the time of the incident and 6 years old at the time of the trial. She gave evidence at trial and was sworn under oath. Defendant raised issues of competence under s 13 *Evidence Act.* Her interview with police was also played to the jury as her evidence in chief pursuant to s 306V of *Criminal Procedure Act*. Appealed on grounds that the judge erred in finding the complainant was competent to give sworn evidence, admitting the interview with police was a failure of procedure resulting in a miscarriage, and the verdict was unreasonable. Appeal dismissed.

"The assessment of the complainants competency to give sworn evidence was one the trial judge was entitled, and, indeed, required to make. By s 13(8), for this purpose, the court may inform itself as it thinks fit. The trial judge did this by questioning the complainant and drawing conclusions about her capacity to understand her obligation to tell the truth. No error has been identified" [46].

"The result is that, even if the complainant were not competent to give sworn evidence, the directions to the jury would have been no different from those that were in fact given" [49].

Domestic Violence

DPP v Darcy-Shillingsworth [2017] NSWCCA 224

The respondent was convicted of reckless wounding, AOABH and recklessly causing GBH. Sentenced to 150 hours community service and an aggregate sentence under s 53A *Crimes (Sentencing Procedure) Act 1999* of 21 months imprisonment suspended pursuant to s 12 upon the respondent entering into an 18 month good behaviour bond. Later amended to 18 months and 6 months. Crown appealed – manifestly inadequate. Appeal allowed and resentenced.

"Given the leniency of the sentences imposed, there must be a concern that in a relatively small remote Aboriginal community, alcohol-fuelled violence was to be treated more leniently than would be the case in other communities and that Aboriginal victims of domestic violence were not to be accorded the same protection by way of enforcement of apprehended violence orders and by means of penalties reflecting the need for both specific and general deterrence, as would be true in other communities. Such reasoning would be impermissible. However, simply outlining facts without saying how they were taken into account leaves open the possibility that the undoubted leniency of the sentence was explained by such impermissible assumptions. Whether that occurred, one cannot be sure" [68].

Cherry v R [2017] NSWCCA 150

Applicant charged with multiple domestic violence offences and aggravated break and enter and commit robbery and multiple counts on a form 1. Sentenced to aggregate term of imprisonment 4 years npp and balance of term 2 years. Appealed on grounds sentence was manifestly excessive, judge erred in considering rehabilitative prospects and erred in assessing mid range objective seriousness. Appeal dismissed.

"The applicant committed the offences in breach of an ADVO which as been put in place to protect her from the Applicant. These were not offences committed in breach of conditional liberty simpliciter. They were in breach of a form of conditional liberty designed to protect the same victim from further attacks by the Applicant. The repeated commission of domestic violence offences in breach of an ADVO attracted a need for specific deterrence, general deterrence and denunciation in this case: *Browning v R* [2015] NSWCCA 147 at [4]-[9]" [80].

"The aggregate sentence constituted a measured and balanced sentencing response to the Applicant's serious offences, with regard being had to his subjective circumstances and other relevant sentencing factors" [83].

Romero v DPP [2017] NSWSC 1190

Applicant convicted of common assault in Local Court. LCM at the same time made a final AVO. S 298H provides for the use of evidence in proceedings relating to a domestic violence

offence may also be used in the making of a final AVO. On appeal it was found that s 298H was construed incorrectly and the matter was remitted to be determined according to law.

"Even if the Local Court could, in a proper case, embark upon hearing the two different kinds of proceedings (civil and criminal) concurrently in that manner, it is something as to which the Court would have to hear from the parties and afford an opportunity to an accused person to make appropriate submissions" [14].

Firearms Offences

NSW Commissioner of Police v Eykamp [2017] NSWSC 1723

The defendant was convicted of various firearm offences, particularly failure to store correctly. S 80 of the *Firearms Act 1996* provides that the local court may on application by a police officer or person claiming to own a surrendered or seized firearm, order that the firearm be forfeited to the Crown, returned to the person claiming ownership, or otherwise disposed of in a manner the Court thinks fit. The magistrate ordered that the firearms be sold by a third party and proceeds given to the first defendants son. The courts discretion is subject to s 80(2) which provides that if a person is found guilty of firearms offences the court is taken to have ordered the firearms to be forfeited to the Crown. Appeal allowed, magistrates orders quashed.

NSW Commissioner of Police v Howard Silvers & Sons Pty Ltd [2017] NSWSC 981

Police searched a shop premises and seized items with the appearance of firearms as per s4D of the *Firearms Act* 1996. The defendant company filed an application in the Local Court for the return of the items. The magistrate found they were 'children's toys' and within the exception outlined in s 4D(4). Police appealed on the grounds that packaging alone was not sufficient proof that the items were children's toys. Appeal allowed and remitted back to LC to be heard in accordance with law.

"It was incumbent on his Honour to give full effect to the primary object of the *Firearms Act* of ensuring community safety. His conclusion that "parliament must have intended that toy guns are not to be regarded as imitations despite varying degree's of realism" failed to give proper attention to the purpose of the legislation to protect the community from the illegal possession and use of firearms or imitation firearms. To conclude that an item which substantially duplicated the appearance of a firearm was a children's toy because of its packaging was to reach a conclusion contrary to the purpose of the legislation" [52].

Importation of Border Controlled Drug

Smith v The Queen, The Queen v Alford (2017) 259 CLR 291; HCA 19

In both cases, Smith and Alford were convicted of importing prohibited drugs through associations of theirs and carrying items or luggage for those associations into Australia through all expenses paid trips. Both claimed to lack the intention to import prohibited drugs as they did not have the knowledge of the presence of those substances.

Both cases applied reasoning in *Kural* which provided that it was open to infer intent to import a narcotic drug contrary to s 233B(1)(b) of the *Customs Act* where it was established that the accused knew or believed or was aware of the likelihood, in the sense of there being a significant or real chance, that what was being imported was a narcotic drug. Issue whether this applies to s 307.1 of the Criminal Code.

Smith v The Queen – appealed to HC against decision of NSWCCA which upheld his conviction - appeal dismissed

The Queen v Alford – Crown appealed to HC against VCA decision to quash the conviction - appeal allowed

"In cases like those the subject of these appeals, a mental state short of intent is highly unlikely because, if someone is aware of a real or significant chance that there is an extraneous substance in his or her luggage, and the person's state of mind is truly that he or she would not be prepared to take the substance into Australia if it were within the luggage, it is to be expected that the person would inspect the luggage to ensure that there is no substance in it, or at the very lease declare his or her concerns to Customs upon arrival. Where, therefore, as in these appeals, a person is aware of a real or significant chance of the presence of an extraneous substance in an object which the person brings into Australia, and does nothing by way of inspection or declaration to avoid the risk of its presence, the circumstances of the case strongly suggest that the person's state of mind is, in truth, that he or she is prepared to proceed with bringing the object into Australia even if the substance is in the object; and thus that the person means and intends to import the substance" [59].

Intentionally Damaging Property

Grajewski v DPP [2017] NSWCCA 251

Applicant was convicted of intentionally or recklessly damaging property contrary to s 195(1)(a) of *Crimes Act 1900* by locking himself to a coal loading machine while protesting and suspending from the ground. Appeal to DC dismissed, questions sent to CCA.

CCA determined meaning of "destroys or damages" in s 195(1):

'"Temporary functional derangement" constitutes damage'; *R v Heyne* (unrep, CCA, 18/9/98) and *Hammond v The Queen* (2013) NSWLR 313.

'Damage' in the criminal context requires some level of physical interference with the property [62]. "I think consistently with the legislative text and purpose and authority that there must be some physical interference with the property. That is to say, I think there is a material difference between a protester who ties herself to the wheel or the blade of a bulldozer, and the protester who lays down in front of the bulldozer. In both cases the operator may be prevented from using the bulldozer, but only in the former cases is there the combination of physical interference and temporary inoperability which satisfies the "destroys or damages" element of the offence" [62].

Intimidation

DPP v Nikolovski [2017] NSWSC 1038

Nikolovski was charged with intimidation contrary to s 13(1) of the *Crimes (Domestic and Personal Violence) Act* 2007. The LCM dismissed the charges on the basis that the charges should have been laid under s 60 *Crimes Act 1900* as the victim was a police officer executing their duty at the time of the offence. DPP appealed, appeal was allowed and sent back to LC to be re determined. SC found that the two provisions were from different statutes so there was no basis to find that one was intended to override the other [13].

"The differences between the elements of the two offences are significant for two reasons. First, they provide further evidence to displace any inference that Parliament intended that s 60(1) of the *Crimes Act* to displace s 13(1) of the CDPV Act… Secondly, they may serve to explain why the prosecutor charged the defendant with an offence under s 13(1) CDPV Act rather than under s 60(1) Crimes Act" [21].

Sexual Offences

Binns v R [2017] NSWCCA 289

Applicant convicted of sexual intercourse with person under 10 per s 66A *Crimes Act 1900.* Offence occurred in late 2008/early 2009 and complaint made in 2013, a delay of 4.5 years. Appealed on the grounds that the judge failed to direct the jury of the forensic disadvantage resulting in the delay from the complaint per s 165B *Evidence Act* 1995 because if it was sooner after the incident there may have been DNA evidence. "The applicant submitted that *any* lapse of time which resulted in the loss of a possible source of relevant evidence engaged the obligation to warn in s 165B". The submission was not accepted. [25] "Significant forensic disadvantage" requires examination of the consequences of the delay, not the extent of the delay. [23]-[24] *PT v The Queen* [2011] VSCA 43.

R v Lazarus [2017] NSWCCA 279

Respondent acquitted of sexual intercourse without consent. Crown appealed on the basis the judge erred in her comments on self-induced intoxication and failing to direct herself regarding the steps taken by the respondent to ascertain whether the complainant was consenting as per s 61HA(3)(d). After the appeal was filed the defence requested a recording of proceedings to determine whether there was a transcript error in relation to the direction on self-induced intoxication. This occurred without the crown's knowledge.

"Although the defence representative did not communicate directly with the chambers of the trial judge he must have been aware that his assertion that there was an error in the reasons would come to the attention of the trial judge in support of his application for access to the recording. Viewed that way, defence representative engaged in a form of indirect communication with the chambers of the trial judge, about an obviously important issue, without informing the Director that he was doing so" [88]. "The practice of a party's legal representative engaging in correspondence of this kind, without informing the representative of the other party to the proceedings, is one which must be firmly discouraged. In not notifying the Director of his correspondence, the defence representative contravened the principle in *RE JRL"* [92].

Supply Prohibited Drug

Parente v R [2017] NSWCCA 284

Applicant was sentenced after pleading guilty to 2 counts of supply prohibited drug and one count of supply commercial quantity (and three others on a Form 1). Sentenced to aggregate sentence of 4 years imprisonment, npp 2 years. Sentencing judge found that applicants drug supply activities 'were at the lower scale' of seriousness and presented with the issue of whether 'an offender's rehabilitation can constitute exceptional circumstances required to avoid the application of the general rule that persons substantially involved in supply of drugs must be sentenced to imprisonment' as per the principle in *Clark* which states that 'in cases of drug dealing to a substantial degree, a sentence of full time custody must be imposed unless there are exceptional circumstances'. Leave to appeal against sentence allowed, appeal dismissed – no resentencing required regardless.

[103]-[107] Looked to *Hilli v The Queen* and *Robertson v R* and found that the principle in *Clark* should no longer be applied in sentencing for drug supply cases. Sentencing in those cases should be approached in a manner consistent with the general sentencing principles.

POLICE POWERS

DPP v Owen [2017] NSWSC 1550

Magistrate dismissed charges of resist police and assault police on the grounds that the evidence produced by the prosecution was improperly obtained and inadmissible because he accused was not cautioned. SC found LCM erred in finding the evidence was obtained illegally or by impropriety. For the evidence to be inadmissible pursuant to s 138 there must be "a link between the obtaining of evidence and either some contravention of an Australian law ('illegality') or impropriety. The evidence must have been *obtained* either illegally or impropriety, or in consequence of an illegality or impropriety" [62]. In this case, it was 'difficult to see how that evidence of Owen's resistance to arrest and striking was obtained in consequence of Mr Owen not being cautioned that that anything he said or did could be used in evidence [72].

S 139 is directed to cautioning before questioning a person who is under arrest for an offence, where in this case the accused was being arrested for an outstanding warrant, and no questioning was intended [75]-[76]. This was determined in accordance with the NSW Police Force "Code of Practice for CRIME" re Cautioning.

Appeal allowed – matter remitted to be dealt with according to law.

Prior v Mole (2017) 343 ALR 1; HCA 10

Prior was apprehended under s 128(1) of the *Police Administration Act* (NT) with the belief that he was intoxicated in a public place and because of his intoxication, that he might intimidate, alarm or cause substantial annoyance to people and that it was likely that he would commit an offence, namely drinking in a regulated place or disorderly behaviour. Supreme Court and Court of Appeal both found reasonable grounds for that belief. Special leave to HC granted. Appeal dismissed.

Appeal considers whether it was open to the court of appeal to find that the facts and circumstances known to the arresting constable provided reasonable grounds for his belief that because of Mr Prior's state of intoxication it was likely he would continue to drink and commit a further offence (Liquor Act offence – drinking in restricted area) [10].

Prior contended that reliance on the arresting officer's experience as a police officer did not provide reason for his arrest or assumption as to future conduct [16]. "The Court of Appeal drew the inference from (the arresting constable) that the experience of which he spoke was of dealing with intoxicated people who were, for that reason, behaving in the aggressive, abusive way in which Mr Prior was behaving. This was a fair inference to draw. The Court of Appeal accepted that Mr Prior's judgment was impaired by his intoxication. The Court of Appeal considered that it was reasonable, based on his experience in dealing with people whose judgment is impaired by intoxication, to believe that informing Mr Prior that he was

not allowed to drink alcohol in that location was unlikely to achieve the desired result. The Court of Appeal considered that it was reasonable, based on his experience in dealing with people whose judgment is impaired by intoxication, to believe that Mr Prior's likely reaction in his intoxicated condition to having his alcohol confiscated would be to procure more alcohol and to continue drinking where he was. The Court of Appeal's capacity to assess the reasonableness of these conclusions did not depend upon, and was unlikely to be advanced by, an account of the officer's history of dealing with intoxicated persons. The assessment is one about which reasonable minds may differ, but in our view the Court of Appeals' finding was open to it" [19].

"Mr Prior relies on an alternative ground which accepts that the preconditions for the exercise of the s 128 power were met but contends that the decision to apprehend him nonetheless exceeded the limits of the power. To apprehend Mr Prior and take him into custody based on a belief that he was likely to commit an offence which is punishable by no more than forfeiture of the alcohol and the issue of a contravention notice is challenged as having been out of all proportion to the protective purposes for which the power is conferred. No basis apart from the nature of the offence that it was believed Mr Prior was likely to commit is identified in support of the contention that the decision to apprehend him was taken for a 'disproportionate and illegitimate purpose", a contention which was not put below. The purposes of the power include protection of the intoxicated persons. Section 128(1) in its current form was inserted with the object among other objects of preventing the commission of alcohol related offences. This object is not confined to the prevention of offences punishable by imprisonment. It was within the scope of the power to take Mr Prior into custody in circumstances in which the arresting constable had reasonable grounds for believing that because of Mr Prior's intoxication he was likely to continue drinking alcohol at a regulated place" [20].

State of New South Wales v Bouffler [2017] NSWCA 185

Respondent was arrested by officers at his home after a two hour standoff with him acting violently inside with his children present. He was subject to an ADVO against his former partner and was in breach of it earlier the same day by harassing and intimidating her at her workplace. 17 officers attended the house, 9 went inside. Initially sued the state for unlawful arrest, wrongful imprisonment and trespass to his property and person. Awarded damages. State of New South Wales appealed and Bouffler cross-appealed. Appeal granted for the State.

In construing ss 9, 10 and 99 of LEPRA, the following was established:

"The words and syntax of ss 9(1), 99(2) and 99(3) make it plain that each individual officer who exercises the function (enter, detain, arrest) must have the requisite state of mind" [47].

"When a statutory provision requires that a state of mind be based or held upon reasonable grounds, the question whether there are reasonable grounds is determined objectively at the time when the relevant power or function is exercised"[87].

Arrest to prevent reoffending:

"In these circumstances, given his belief that the ADVO had been breached, that the situation involved a high degree of risk and that the respondent would be likely to breach the ADVO again if not arrested, it is clear that Inspector Atkins had the requisite suspicion held on reasonable grounds under s 99(3)(b), that being a suspicion that it was necessary to arrest the respondent to prevent a further breach of the ADVO" [132].

Lawful arrest:

"Factors such as: (i) That the victim was visibly distraught, upset and intimidated from the statement he obtained; (ii) that the respondent had repeatedly breached ADVO's in the past; (iii) that the victim needed protection and that previous ADVO's hadn't prevented him from breaching the conditions and, (iv) to prevent a repetition of the offence, taken in conjunction with the matters that provided a reasonable basis for the suspicion that it was necessary to arrest the respondent without a warrant to prevent a repetition of the breach of the ADVO lead inevitably to the conclusion that his Honour was correct in finding that it was inappropriate to deal with the matter by way of a Court Attendance Notice" [134] and [137].

Breach of the peace:

"A breach of the peace includes 'a wide range of actions and threatened actions that interfere with the ordinary operation of civil society'. In particular, a threat or a realistic apprehension of self-harm could constitute a breach of the peace. Each case will be fact dependent" [164].

Arresting officers:

Not all of the officers who entered the house did so for the purpose of effecting an arrest, some were concerned with supporting the arresting officers, removing children etc.. LEPRA s 99 therefore had no application to those officers and the trial judge erred in finding that they effected unlawful arrests. [210].

Trespass to house:

"We do not agree that entry pursuant to LEPRA s 10 requires a lawful arrest under s 99. Section 10(1) permits a police officer to enter a dwelling to arrest a person. If a police officer enters premises for some other purpose which is not authorised, for example, pursuant to s 9, the entry onto the property constitutes a trespass. This is a different question from whether an arrest is lawful, which requires that s 99 must be satisfied. Because ss 10 and 99 have different spheres of application, it is possible that a person may enter a property to arrest a person and thus not commit a trespass, but the arrest not be lawful because the police officer may be found not to have the requisite state of mind for the purposes of ss 99(2) or 99(3)" [224].

Assault:

"Given that the respondent had refused to leave the house for over two hours, was behaving in a manner described as "irrational" and was wielding a block of wood, we consider that the force used by the constables was reasonably necessary" [255].

Trespass to perimeter of house:

Officers attended the premises due to a breach of an ADVO. Some were aware of previous breaches…respondent refusing to come out of the house for 2 hours, and having children with him. There was "sufficient evidence upon which to infer that the officers who entered the property but remained on the perimeter had the relevant state of mind under s 9(1). [279]-[280].

There was no basis for either aggravated or exemplary damages [295].

SENTENCING PRINCIPLES

Aggregate Sentences

Berryman v R [2017] NSWCCA 297

Applicant pleaded guilty to 5 offences and one on a Form 1. Sentenced to aggregate term of imprisonment of 11 years 3 months. Judge applied 25% early guilty plea discount on each indicative sentence. Applicant submitted the sentence was manifestly excessive as the judge should have applied the discount on the aggregate sentence.

"*The judges approach of applying the plea discount to the indicative sentences is consistent with a preponderance of authority*" [29] (*PG v R* [2017] NSWCCA 179). And that as in a number of other cases, *"…a discount must be applied to the starting point of each indicative sentence and that there should be no explicit discount applied to the aggregate sentence*" [30].

Conditional Liberty

Archer v R [2017] NSWCCA 151

The applicant pleaded guilty to three counts; murder, wounding with intent to cause GBH and contravene AVO, and sentenced to imprisonment for NPP 20 years 4 months and balance of term 6 years. The applicant appealed on 5 grounds, one of which was that HH erred by double counting in relation to the applicant's breach of conditional liberty of the AVO. HH dismissed this ground.

"*The two concepts are different. A breach of bail involves a breach of an undertaking given to the court to observe certain conditions… The AVO, although based upon the fact of the offending in June 2014, did not raise the same issues as were raised by those offences. It constituted an additional layer of protection for the deceased in that it involved specific orders being made for by a court as to the conduct of the applicant towards the deceased*" [85].

"*There was no error of principle in what her Honour said nor in how her Honour took it into account that the principle offences were committed while the applicant was on conditional liberty. Because it was different to the breach of the AVO offence, it was appropriate for her Honour to take it into account when sentencing for the principal offences without there being double counting*" [89].

Fullerton J (dissenting): "*In these circumstances, by her Honour treating the breach of the apprehended violence order as "a matter of serious aggravation" in the sentence to be imposed for the murder, and then to order that the sentence of 21 months for the beach of the apprehended violence order to be, effectively, wholly accumulated upon that sentence where the underlying conduct was, to a large extent, overlapping did, in my view, involve some impermissible double counting*" [140].

Guilty Plea Discount

Murray v R [2017] NSWCCA 262

The applicant pleaded guilty in the local court to 2x counts of supply large commercial quantity of prohibited drug. The sentencing judge made reference to allowing the 'full discount' for his guilty pleas, however, made no reference to the discount being applied in sentencing remarks. Applicant appealed on grounds that the judge either failed to take into account the discount or, in the alternative failed to explain how the guilty pleas had been taken into account. The court allowed the appeal and found in accordance with other decisions that "The importance of transparency when offenders are sentenced has been more recently emphasised in *Woodward v R* [2014] NSWCCA 205 and *Lee, Matthew v R* [2016] NSWCCA 146" [35].

"Although sentencing judges were encouraged to quantify the discount awarded for the plea, it is not mandatory for them to do so: *R v Thomson; R v Houlton* (2000) 49 NSWLR 383" [33]. Previous cases have satisfied the court that a discount was taken into account although cursory reference only was made in the judgment [38]. Judgment in the present case however was not delivered immediately and the degree of latitude afforded to sentencing judgments delivered *ex tempore* is not available [41].

Samuel v R [2017] NSWCCA 239

The applicant was charged with ongoing supply of prohibited drug, supply of prohibited drug, unauthorized possession of firearms in circs of aggravation and several offences on a Form 1 in relation to each count in 2007. He subsequently absconded and turned himself into police in 2015 entering pleas of guilty to each charge. At sentencing a discount of 17.5% was applied for the guilty pleas. The applicant appealed on the grounds that HH erred by reducing the sentence by 17.5% on the basis that the proceedings had been delayed and that there was no difference between entering pleas in 2007 and 2015.

Basten JA held: the principle in *R v Thomson; R v Houlton* had been misinterpreted and "To state that a discount should 'generally' be assessed within 'the range of 10-25 per cent' should not be understood as conferring a contingent entitlement, subject only to justified reductions from a maximum discount of 20%" [5].

Wilson J also held that "(Section 22 *Crimes (Sentencing Procedure) Act 1999)* requires a sentencing court to take into account the face of the plea, its timing, and the circumstances in which it was entered" [53]. "There is no rule of law that makes a reduction in sentence in such circumstances mandatory; must less is a discount of any particular percentage obligatory" [54]. "It was entirely open to the sentencing judge in assessing the utilitarian value

of the applicant's pleas to have regard to the whole history of the matter, and to the delay occasioned by the applicant's flight from the jurisdiction in 2007" [60].

Mental Health

Luque v R [2017] NSWCCA 226

Applicant plead guilty to one count of making a false accusation contrary to s 314 *Crimes Act 1900* and sentenced to 2 years 6 months imprisonment with npp 12 months. The applicant was found to have a history of interstate dishonesty offences. At sentencing, HH noted that nothing in the psychiatrists report suggested that 'the actions taken by the offender were something that she could not see control, over which she had no independent capability of exercising discretion, or had no understanding of what she was doing… The reports do not establish a basis to find that her actions were a direct result of any mental illness of incapacity. She certainly had some depression round that time, but this went far beyond something which could be excused on the basis she had no idea what she was doing' [63].

The applicant submitted that HH erred in the consideration of her mental state and expert evidence about the topic and that it did contribute to the offence in a material way [66]. The Crown submitted that 'any mental condition of the applicant did not automatically entitle her to a more lenient sentence *Aslan v R* [2014] NSWCCA 114 at [34], and that HH did not err in assessment of the applicants mental condition' [69]-[70].

The court allowed the appeal and found that "*the approach adopted by his Honour to the whole question of mental condition was somewhat too restrictive: by that I mean, too high a bar was set before the mental conditions of the applicant were judged to be able to be taken into account on sentence… I consider that some of the negative propositions called upon the applicant to demonstrate more than the law of sentencing required. By that I mean, she did not need to demonstrate that her actions were beyond her control; not that she had no independent capability of controlling them; nor that she had no understanding of what she was doing. Nor was it incumbent upon the applicant to show that her actions were 'excused' on the basis that she had 'no idea what she was doing'. Contrary to the foregoing, the question was whether the applicant had established on the balance o probabilities that her actions were mitigated, on the basis that a mental illness or condition played a role of some significant in her offending*" [80]-[82].

Parity

Miles v R [2017] NSWCCA 266

Applicant pleaded guilty and was sentenced to 5 counts of drug supply offences and 5 further counts on a Form 1 to 8 years with npp 4 years 6 months. Appealed on grounds that there was disparity between his sentence and that imposed on his co-offender (3x counts with no Form 1 offences). Aggregate sentence for co offender was 4 years and 6 months with npp of 2 years 6 months. Appeal allowed and applicant resentenced to 7 years imprisonment with npp 3 years 9 months.

Leeming JA: [9] It is not necessary for the disparity to be ‘gross, marked or glaring’ as in *Tan v R* [2014] NSWCCA 96. Adopted Hamill J’s approach in *Cameron v R* [2017] NSWCCA 229 at [79]-[90] “I am not convinced that the application of epithets such as ‘gross’ or ‘glaring’ to the asserted disparity is a necessary part of the process of reasoning when an intermediate appellant court is called upon to determine a ground of appeal where disparity (or, more usually, a lack of due proportion between sentences imposed on associated offenders) is asserted” and stated “*… the collocation of the three is apt to heighten the test and may distract from the underlying principle”* [9].

Suspended Sentences

DPP(NSW) v Dwyer [2017] NSWSC 1735

Defendant sentenced to 9 month suspended sentence for common assault in 2012. Later failed to appear in court for drug offence and failing to report to Probation and Parole. Defendant found in 2017. Magistrate sentenced to 12 month suspended sentence for drug offences and took no action in relation to breach of the first s12 bond due to ‘effluxion in time’. Court found that the magistrate had not satisfied himself that the failure to comply with the bond was trivial in nature or that there were good reasons for excusing the defendants failure to comply with the bond as in s 98(3) *Crimes (Sentencing Procedure) Act.* [18]. The “effluxion of time” was not capable of rationally affecting the first matter. It was necessary to set aside the sentence imposed for possession as it was predicated on no action being taken with respect to the s 12 bond [19].”