Reasonable Cause Criminal CPD Conference

Recent Decisions on Crime and Evidence
25 March 2017
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1) Mental Elements

***Zaburoni v The Queen* (2016) 256 CLR 482**

- The appellant was found guilty of transmitting a serious disease with intent to his girlfriend contrary to s317 of the *Criminal Code* (Qld). The issue at trial was whether the appellant intended to transmit the disease.
- He appealed against his conviction on the basis that it was unreasonable and could not be supported having regard to the evidence. The Queensland Court of Appeal dismissed his appeal on the basis that frequent engagement in conduct where a person is (highly) reckless as to the consequences of that conduct is sufficient to establish intent.
- The High Court upheld the appeal. Kiefel, Bell and Keane JJ held that "knowledge or foresight of result, whether possible, probable or certain, is not a substitute in law for proof of a specific intent under the Code" (at [14]).
- Kiefel, Bell and Keane JJ also held that "Where the accused is aware that, save for some supervening event, his or her conduct will certainly produce a particular result, the inference that the accused intended, by engaging in that conduct, to produce that particular result is compelling. Nonetheless, foresight that conduct will produce a particular result as a "virtual certainty" is of evidential significance" (at [15]).
- Gageler J noted that there was no dispute between the parties that the prosecution had to prove beyond reasonable doubt that the appellant had an intention to transmit the disease. His Honour said "The intention to be proved was an actual subjective intention to achieve that result as distinct from awareness of the probable consequences of his actions." (at [55]).
- Nettle J said "where it is proved that an accused foresaw that his or her actions would have an inevitable or certain consequence, it logically follows that the accused intended to bring about that consequence; and that is so whether or not the accused desired to bring it about." (at [66]).

***Smith v The Queen; The Queen v Afford* (judgment reserved)**

- These cases consider the element of import a substance under s307(1) of the *Criminal Code* (Cth) and whether awareness of likelihood can be used to establish intention under the *Criminal Code*. The Smith matter is an appeal from

the NSW Court of Criminal Appeal. The Afford matter is an appeal from the Victorian Court of Appeal.

- These cases raise similar issues to the one considered by the High Court in *Zaburoni* but in a different context.
- In the Smith matter, the NSW Court of Criminal Appeal held that the fault element for the physical element of importing a substance is intention. The Court held that the directions to the jury were not erroneous even though in part of the directions the jury were told that if they were satisfied the accused was aware of a significant or real chance that his luggage contained those concealed packages they should go on to consider whether that was sufficient to satisfy them beyond reasonable doubt he intended to import the packages.
- Conversely, in the Afford matter, a majority of the Victorian Court of Appeal (Priest and Beach JJA) held that similar directions were erroneous because they may have left the jury with the impression that establishment of an awareness of a likelihood that the substance was being imported was the equivalent of intention under the Code. The Court also considered that the trial judge did not make it clear that any such awareness could only be part of the circumstances from which a relevant intention might be capable of being drawn.

***Aubrey (MA) v The Queen* (judgment reserved)**

- The High Court is considering another case involving a person transmitting HIV to another. In this case the appellant was found guilty of maliciously inflicting grievous bodily harm contrary to s35(1)(b) of the *Crimes Act* (as it stood in 2004).
- The question involved is whether, in order to establish malice in the sense of recklessness, the prosecution must establish beyond reasonable doubt that the accused foresaw a probability of harm eventuating or whether some degree of foresight of a mere possibility of some degree of harm of the kind foreseen is sufficient.

***Castle v R* [2016] NSWCCA 148**

- This case involved a strange set of circumstances. The complainant was driving and noticed two hitchhikers on the side of the road. One of them walked in front of the car which caused the complainant to stop. The men told the complainant they wanted to be taken to Nimbin. The complainant replied that he could not. One of the men, Mr Boyd, appeared to offer the complainant drugs and Mr Castle was seen to be holding a bag of cannabis and a steak knife. It was alleged that these actions instilled fear in the complainant who complied with their request.

- The complainant pulled over at his uncle's property and spoke to his uncle. His uncle observed that the complainant looked as though he had been crying. His uncle told Mr Boyd and Mr Castle that the complainant would only drop them at the look out. As they approached the lookout Mr Boyd grabbed the steering wheel and told the complainant to take them to Nimbin which the complainant did.
- The appellant's case was that the appellant had done nothing to cause the complainant's fear nor did he have any knowledge of it.
- The jury were directed that it was the Crown case that the appellant knew that the complainant was not consenting due to the circumstances and his initial refusal. The jury were also told that the offence could be established if the appellant was reckless as to consent. The issue on appeal was whether it was erroneous to direct the jury that recklessness could be satisfied where the appellant failed to consider whether or not the complainant was consenting to his detention in circumstances where lack of consent would have been obvious to a person with the accused's mental capacity if he or she had considered it.
- The NSW Court of Criminal Appeal concluded that the element of knowledge of lack of consent for an offence contrary to s86 of the *Crimes Act* can be satisfied by recklessness and that this could be established by the following states of mind:
    - knowing disregard of an appreciated risk that the person was not consenting ([55], [63], [130]); or
    - an intention to commit the act not caring whether the victim consents or not ([48]-[50], [60], [130]).
- However, recklessness is not satisfied where the accused simply fails to consider whether or not the complainant was consenting where lack of consent would have been obvious to a person with the accused's mental capacity if he or she had considered it ([47], [97]).

***McIlwraith v R* [2017] NSWCCA 13**

- This appeal considered whether the offence of intimidation contrary to s13 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) is an offence of specific intent and whether the provisions under Part 11A of the *Crimes Act* regarding intoxication apply to it.
- The offence of intimidation was relied upon as the serious indictable offence in respect of a break and enter with intent to commit a serious indictable offence charge under s112 of the *Crimes Act*.
- The appellant appeared from an alcove under the complainant's house wearing a blue ski suit that belonged to the complainant's father in law which was usually stored at the premises. The applicant was also wearing a beanie and a

dark shirt. The appellant had a tomahawk in his hand. He approached the complainant who ran down the side passage into the house next door. The appellant followed him. The complainant went into the laundry and a hear glass smash and someone enter the laundry. The appellant tried to gain access to the premises. The appellant was then seen to leave the premises and return to the complainants' home. The police arrived and discovered the appellant lying partly under a bed and a doona in the main bedroom.

- Basten JA found that the offence of intimidation is one of specific intent (at [42]). His Honour did so on the basis of the decisions considering Part 11A of the *Crimes Act* and murder, such as *R v Grant* (2002) 55 NSWLR 80 and *Harkins v R* [2015] NSWCCA 263.

***RP v The Queen* (2016) 91 ALJR 248**

- This is the first High Court decision on the question of doli incapax in Australia.
- The child was convicted of two counts of sexual intercourse with a child aged under 10 years old and one count of aggravated indecent assault. He was 11-12 years old at the time of the offences. The minimum age of criminal capacity in NSW is 10 years. From the age of 10 to 14 years, the common law presumption of doli incapax applies but it can be rebutted.
- Kiefel, Bell, Keane and Gordon JJ held that the presumption of doli incapax may be rebutted by evidence that the child knew that it was morally wrong to engage in conduct constituting the actus reus of an offence. The plurality also said that knowledge of moral wrongness is different from the child's awareness that the conduct is merely naughty or mischievous. It must be established that the child knew that the conduct was seriously or gravely wrong (at [9]).
- The plurality said that the presumption cannot be rebutted merely as an inference from the doing of the act(s). There must be evidence from which an inference can be drawn beyond reasonable doubt that the child's development is such that he or she knew that it was morally wrong to engage in that conduct (at [9], [12]).

***Miller v The Queen* (2016) 90 ALJR 918**

- In this case the High Court declined to revisit the decision of *McAuliffe v The Queen* (1995) 183 CLR 108 and the principles of extended joint criminal enterprise in light of the United Kingdom's Supreme Court decision in *Jogee* [2016] 2 WLR 681 which abandoned this as a basis for criminal liability.
- The High Court also declined to narrow the test for foresight in extended joint criminal enterprise to a foresight of probability as opposed to possibility.

2) Onus and Standard of proof

***H v R* [2016] NSWCCA 63**

- The NSW Court of Criminal Appeal upheld an appeal against conviction and ordered a retrial for murder.
- The issues at trial were Mr H's intention at the time, self-defence and provocation. The jury were given oral directions and also provided with written directions containing a question trail.
- The Court of Criminal Appeal found that the written directions impermissibly equated beyond reasonable doubt with the existence of a reasonable possibility and failed to link that possibility to a requirement that the Crown remove or eliminate it. This constituted a fundamental departure from the conventional formulation of the standard of proof (at [87], [107]).

***Moore v R* [2016] NSWCCA 185**

- The NSW Court of Criminal Appeal dismissed an appeal against a murder conviction. There were two issues at trial – whether the defences of self-defence and provocation applied.
- The jury were given oral and written directions regarding the elements of murder, the principles of self-defence, manslaughter based on excessive self-defence and provocation and manslaughter based on unlawful and dangerous act. A question trail was also given to the jury.
- Basten JA held that there was no error in the directions on self-defence where reference was made to whether there was a reasonable possibility the accused believed his conduct was necessary to defend himself (at [36]). This is so notwithstanding the onus of proof lay on the prosecution on the standard of beyond reasonable doubt. His Honour said that the reference to a "reasonable possibility" "is a reference to that which would be required to hold a reasonable doubt" (at [36]).
- RA Hulme J in separate reasons said that *H v R* was not authority for the proposition that posing a question in terms of whether there is a reasonable possibility is itself wrong or involves a distortion of the onus and standard of proof (at [114]). Further, there was some support in the authorities to the effect that existence of a reasonable possibility of some exculpatory matter is the corollary of the Crown not having proved the accused's guilt beyond reasonable doubt (at [115]). Adamson J dissented.

***The Queen v Dookheea* (Special leave granted)**

- The High Court has granted special leave to the Crown to appeal from a decision of the Victorian Court of Appeal. The Victorian Court of Appeal upheld an

appeal against conviction on the basis that the trial judge explained the phrase "beyond reasonable doubt" to the jury.

- The issue before the Court is whether it was erroneous for the trial judge to direct the jury that the Crown must satisfy the jury "not beyond any doubt, but beyond reasonable doubt".

R v Baden Clay **(2016) 90 ALJR 1013**

- The High Court reinstated Mr Baden-Clay's conviction for murder after the Crown appealed against the Queensland Court of Appeal's decision to uphold his conviction appeal, acquit him of murder and convict him of manslaughter.
- The decision concerns how a circumstantial case is to be evaluated and whether there are rational hypotheses consistent with innocence in circumstances where the accused gives evidence that discounts the existence of any such rational hypotheses.
- The High Court held that it was open to the jury to convict Mr Baden Clay of murder and that the hypothesis consistent with innocence for murder (that is, that Mr Baden-Clay killed his wife but without the requisite intent) was not supported by Mr Baden' Clay's evidence. A hypothesis consistent with innocence was not available on the evidence ([4], [7] and [79]).

3) Expert evidence and the duty of disclosure

***Wood v R* (2012) 84 NSWLR 581**

- McClellan CJ at CL at [719] summarised the principles regarding expert witnesses set out by Cresswell J in *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyd's Rep 68, 81-82.
    1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
    2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness … should never assume the role of an advocate.
    3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider the material facts which could detract from his concluded opinion.
    4. An expert witness should make it clear when a particular question or issue falls outside his expertise.
    5. If an expert's opinion is not properly researched because he considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In case where an expert who has prepared a report could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should ne stated in the report.
    6. If, after exchange of reports, an expert witness changes his view on a material matter having read the other side's expert reports or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.
    7. Where expert evidence referred to photographs, plans, calculations, analyses, measurements, survey reports or other similar documents, these must be provided to the opposite party at the same time as the exchange of reports.

***R v Drummond [No 2]* [2015] SASCFC 82**

- Drummond was convicted of attempted kidnapping. The critical issue at trial was the identity of the assailant. DNA evidence was presented at trial and the forensic scientist gave evidence that swabs from the applicant's clothing indicated that two persons had contributed to the DNA result with the

complainant being positively excluded as one of those contributors. The swabs from the complainant's clothing indicated at least three persons had contributed to the DNA result with the applicant being positively excluded as one of those contributors.

- After an unsuccessful appeal against conviction and failed application for special leave to appeal, Drummond made an application for permission to appeal a second time. On the application, Drummond relied upon evidence from Dr Harding suggesting that the forensic scientist's evidence before the jury was wrong and misleading.
- Peek J noted that the prosecution is obliged to disclose all relevant evidence to the accused and there is no obligation on an accused person to fossick for information to which they are entitled (at [172], see also *Grey v The Queen* (2001) 75 ALJR 1708, *Mallard v The Queen* (2005) 224 CLR 125, *Wood v R)*. Peek J also said that counsel is entitled to assume that the prosecution will not lead false or misleading evidence as part of its case (at [174]). His Honour concluded that the evidence regarding the forensic evidence given at trial was "fresh" and noted that Blue J came to the same conclusion by reference to authorities regarding the obligations of expert witnesses. Peek J agreed with the comments of Blue J on this subject (at [175]).
- Blue J held that "The duties of an expert witness include providing independent assistance to the court, stating the facts on which his or her opinion is based, stating if his or her opinion is not properly researched and making disclosure of all material matters that affect his or her opinion. The duties of the prosecution include timely disclosure of the evidence it proposes to lead, material that would assist the defence case and in the case of scientific material all material matters that affect positively or negatively the scientific case relied on by the prosecution." (at [305], see also [307] and [311]).
- In assessing whether the evidence could have been discovered with reasonable diligence of the accused, Blue J took into account a number of matters, including
    - "to the knowledge of defence Ms Mitchell was an independent expert owing a duty to the Court to provide objective unbiased evidence"
    - "if there was any doubt or potential controversy about whether the FSSA studies showed that only 10 per cent of samples submitted to FSSA provided any useful information or usable DNA, the prosecution owed a duty to disclose the FSSA studies to the defence before leading that evidence from Ms Mitchell"
    - "the point of the Forensic Science SA existing as an independent expert agency is to relieve the parties of having to undertake their own

independent analyses. Parties are encouraged not needlessly to challenge uncontroversial independent expert evidence."

- The expert's evidence "would not reasonably have put defence counsel on notice that she had no direct knowledge of the studies on which she claimed to rely, that she had misrepresented what the studies showed or there was any doubt or controversy about what they showed." (at [312]-[318]).

The Guildford Four and Birmingham Six cases

- *Ward* (1993) 96 Cr App R 1: a prosecutor's duty of disclosure "is a positive duty which in the context of scientific evidence obliges the prosecution to make full and proper inquiries from forensic scientists in order to ascertain whether there is discoverable material." (at 52).
- *Macguire* (1992) 94 Cr App R 133 at 147: "a forensic scientist who is an advisor to the prosecuting authority is under a duty to disclose material of which he knows and which may have "some bearing on the offence charged and the surrounding circumstances of the case"…. We hold that there is such a duty because we can see no cause to distinguish between members of the prosecuting authority and those acting in the capacity of a forensic scientist. Such a distinction could involve difficult and contested enquiries as to where knowledge stopped but, most importantly, would be entirely counter to the desirability of ameliorating the disparity of scientific resources as between the Crown and the subject. Accordingly we hold that there can be a material irregularity in the course of a trial when a forensic scientist advising the prosecution has not disclosed material of the type to which we have referred."

NSW Expert Code of Conduct

1 Application of code

This code of conduct applies to any expert witness engaged or appointed:

(a) to provide an expert's report for use as evidence in proceedings or proposed proceedings, or

(b) to give opinion evidence in proceedings or proposed proceedings.

2 General duties to the Court

An expert witness is not an advocate for a party and has a paramount duty, overriding any duty to the proceedings or other person retaining the expert witness, to assist the court impartially on matters relevant to the area of expertise of the witness.

3 Content of report

Every report prepared by an expert witness for use in court must clearly state the opinion or opinions of the expert and must state, specify or provide:

(a) the name and address of the expert, and

(b) an acknowledgement that the expert has read this code and agrees to be bound by it, and
(c) the qualifications of the expert to prepare the report, and
(d) the assumptions and material facts on which each opinion expressed in the report is based (a letter of instructions may be annexed), and
(e) the reasons for and any literature or other materials utilised in support of each such opinion, and
(f) (if applicable) that a particular question, issue or matter falls outside the expert's field of expertise, and
(g) any examinations, tests or other investigations on which the expert has relied, identifying the person who carried them out and that person's qualifications, and
(h) the extent to which any opinion which the expert has expressed involves the acceptance of another person's opinion, the identification of that other person and the opinion expressed by that other person, and
(i) a declaration that the expert has made all the inquiries which the expert believes are desirable and appropriate (save for any matters identified explicitly in the report), and that no matters of significance which the expert regards as relevant have, to the knowledge of the expert, been withheld from the court, and
(j) any qualification of an opinion expressed in the report without which the report is or may be incomplete or inaccurate, and
(k) whether any opinion expressed in the report is not a concluded opinion because of insufficient research or insufficient data or for any other reason, and
(l) where the report is lengthy or complex, a brief summary of the report at the beginning of the report.

4 Supplementary report following change of opinion

(1) Where an expert witness has provided to a party (or that party's legal representative) a report for use in court, and the expert thereafter changes his or her opinion on a material matter, the expert must forthwith provide to the party (or that party's legal representative) a supplementary report which must state, specify or provide the information referred to in clause 3 (a), (d), (e), (g), (h), (i), (j), (k) and (l), and if applicable, clause 3 (f).
(2) In any subsequent report (whether prepared in accordance with subclause (1) or not), the expert may refer to material contained in the earlier report without repeating it.

5 Duty to comply with the court's directions

If directed to do so by the court, an expert witness must:
(a) confer with any other expert witness, and
(b) provide the court with a joint report specifying (as the case requires) matters agreed and matters not agreed and the reasons for the experts not agreeing, and
(c) abide in a timely way by any direction of the court.

6 Conferences of experts

Each expert witness must:

(a) exercise his or her independent judgment in relation to every conference in which the expert participates pursuant to a direction of the court and in relation to each report thereafter provided, and must not act on any instruction or request to withhold or avoid agreement, and

(b) endeavour to reach agreement with the other expert witness (or witnesses) on any issue in dispute between them, or failing agreement, endeavour to identify and clarify the basis of disagreement on the issues which are in dispute.

4) Other decisions of note concerning the *Evidence Act 1995* (NSW)

***Hughes v The Queen* (judgment reserved)**

- This case concerns the test for admitting tendency evidence under s97 of the *Evidence Act*, that the evidence is of significant probative value.
- The decision will address whether, and to what extent, tendency evidence must have (striking) similarities with the evidence concerning the charges before it can be admitted. In doing so, the High Court will resolve whether the Victorian approach under *Velkoski v R* [2014] VSCA 121 should be followed or not.
- The decision will, hopefully, provide guidance as to the mode of reasoning employed when considering tendency evidence and its admissibility.

***Sio v The Queen* (2016) 90 ALJR 963**

- The accused was charged with murder and armed robbery with wounding after a robbery at a brothel in Sydney. His accomplice entered the brothel alone, armed with a knife, and fatally stabbed an employee of the business before taking money from the deceased's pocket.
- The accomplice of the accused participated in an electronically recorded interview. He admitted to stabbing and robbing the victim and said the appellant supplied him the knife. At trial, the accomplice refused to give evidence and the prosecution sought to have his interviews and written statements admitted pursuant to s65 of the *Evidence Act*. The evidence was admitted.
- The High Court held that s65(2) requires regard to be had to each particular fact the party seeking to have the evidence admitted seeks to prove by the evidence. It is erroneous to apply s65(2) by forming an overall impression of the general reliability of the statements and that such a compendious approach does not conform with the requirements of the *Evidence Act* (at [57]-[59]).
- Assessment of the reliability of the accomplice's statements should have taken into account the fact that he was an accomplice and that he sought to minimise his culpability. The Court considered that it did not follow from satisfaction of s65(2)(d)(i) that the statement was made in circumstances in which it was likely to be reliable (at [62], [68]).
- Section 65(2)(d)(ii) requires consideration of the objective circumstances in which the representation was made and whether it is likely to be reliable evidence of the fact asserted (at [69], [70], [72]).