AR CONOLLY & COMPANY
LAWYERS

Benchmark

Friday, 27 October 2017

Weekly Criminal Law Review

Editor - Richard Thomas of Counsel

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

Follow @Benchmark_Legal

Search Engine

Click here to access our search engine facility to search legal issues, case names, courts and judges. Simply type in a keyword or phrase and all relevant cases that we have reported in Benchmark since its inception in June 2007 will be available with links to each case.

Executive Summary

KN v R (NSWCCA) - criminal law - stay - principles considered - evidence to be given from overseas using Jabber program - whether permission was an interlocutory judgment or order - leave to appeal - principles identified - no error identified - application dismissed

Stanton v R (NSWCCA) - criminal law - sentence - good character - historical sexual assault offences - whether offender's "good character" a mitigating factor - whether sentence manifestly excessive - whether sentence crushing - appeal dismissed

Adams v R (NSWCCA) - criminal law - murder - tendency evidence - principles and authorities considered - business records - admissibility considered - judge alone trial - unreasonable verdict - principles - appeal dismissed

Summaries With Link (Five Minute Read)

KN v R [2017] NSWCCA 249
Court of Criminal Appeal of New South Wales
Beazley ACJ, Walton & N Adams J
Criminal law - stay pending appeal - interlocutory appeal - the applicant was indicted on 4 counts of sexual offences against the same complainant - on the morning of the trial, the Crown applied for the complainant and one witness to give evidence from overseas via peer-to-peer desktop AVL software using the Jabber program - the witnesses would give their evidence from their residential homes - the applicant opposed the application and sought an adjournment - the trial judge refused the adjournment and "ordered" that the witnesses could give their evidence via AVL from remote locations overseas - the applicant then sought to appeal (s5F *Criminal Appeal Act 1912* (NSW)) and sought an order staying the trial, pending determination of his appeal - the stay application was heard urgently and dismissed - held: (1) leave to appeal under s5F - *Slotboom v R* ([2013] NSWCCA 18, [6]-[7]) confirms the applicable principles that apply to a determination whether to grant leave (*Agius v R* (2011) 80 NSWLR 486, [10]; *R v Alexandroaia* (1995) 81 A Crim R 286, 290 approved); (2) temporary stay - the principles governing the grant of a temporary stay are summarised in *Macdonald v R; Maitlnad v R* ([2016] NSWCCA 306, [140]) - see also *R v Seller; R v McCarthy* (2015) 89 NSWLR 155, [128] & *Subramaniam v R* (2004) 211 ALR 1, [24]-[27]); (3) evidence by AVL - the complainant was entitled to give evidence pursuant to s 294B *Criminal Procedure Act 1986* (NSW) from a place other than the courtroom - nothing in s 294B limited the location, which could include an overseas location - see also s 5B *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) - there was merit in the Crown's submission that the trial judge's order under s 5B(1) was not an "interlocutory judgment or order" - these terms were not defined - in *R v Steffan* ((1993) 30 NSWLR 633, 636) the Court stated that a "judgment" is "the decision of a court which determines the proceedings (or an identifiable or separate part of them) and which is entered in the records of the court" - an "order" is a "command by a court that something be done (or not done)" - see *Cheikho v R* (2008) 75 NSWLR 323, [22]; *R v Bozatsis and Spanakakis* (1997) 97 A Crim R 296, 303; *AF v R* [2015] NSWCCA 35, [32] - rulings on the admissibility of evidence are not judgments or orders within s5F - the same may be said of the court permitting or authorising particular technology for taking evidence via AVL - see *Steffan* : an "order" is a command that something be done or not done which is enforceable by the court should there not be compliance with the order, including by contempt - a court's acceptance however that particular technology would be an appropriate and permissible means by which evidence may be given is a far cry from "a command that something be done or not done" - the permission, or direction, that Jabber technology be used, was not an interlocutory order or judgment within s5F(3) - that being so there was no bias for a temporary stay - there was no error in the trial judge 's acceptance that he taking of the evidence via AVL could be conducted using the jabber program; application dismissed.
KN

Stanton v R [2017] NSWCCA 250
Court of Criminal Appeal of New South Wales
Johnson, Adamson & Campbell JJ
Criminal law - Sentence - historical sexual assault offences - the applicant, a religious brother and teacher at a school in Western Sydney, pleaded guilty to 12 offences against 3 boys in 1980 & 1981 - 7 further offences were taken into account on a Form 1 and he was sentenced to an aggregate sentence of imprisonment of 23 years, NPP 13 years 9 months - the applicant sought to appeal the severity of his sentence, submitting the judge erred (inter alia) in failing to give any mitigating effect to evidence of good character - the applicant was 25 or 26 years at the time of the offending and almost 61 at sentence - he acknowledged that he is a paedophile with an exclusive sexual interest in young boys, but apart from the offences had no other criminal record - held: (1) discount for pleas of guilty - the pleas were entered about 1 year after the applicant was committed for trial - the discount for the utilitarian value of a plea will be largely determined by the timing of the plea, so that the earlier the plea the greater the discount (*R v Borkowski* (2009) 195 A Crim R 1, [32]) - generally the reason for the delay in entering a plea is irrelevant - the court will not usually find error in a court choosing a discount of 15% rather than 20% (*Sullivan v R* [2008] NSWCCA 196, [14]) - here, the discount of 15% was more than reasonable; (2) prospects of reoffending - the onus lay upon the applicant, on the balance of probabilities, to establish that the risk of re-offending was low - here, it was open to the judge on the evidence to find that this onus had not been discharged; (3) good character - the applicant's otherwise good character was only a small factor to be weighed in the sentencing exercise (*Ryan v The Queen* (2001) 206 CLR 267, [33]-[34]; *BJS v R* (2013) 231 A Crim R 537, [240]) - s21A(5A) *Crimes Sentencing Procedure) Act 1999* (NSW) considered - the section provides that an offenders otherwise good character, or lack of convictions, is not to be taken into account on sentence if the court finds that that was of assistance in the commission of the offence - however there was doubt as to whether that section applied as the offences committed are not specified in the relevant exhaustive definition of "child sexual offence" (s21A(6)) - if s21A(5A) does not apply, that would appear to be a matter of legislative oversight - error not otherwise identified; (4) manifestly excessive - the applicant committed a large number of very serious offences against 3 young victims in his care over a period of about 18 months - the sentences were required to reflect the various purposes of sentencing, including the impact of the crimes upon the victims and the community (s3A(g) *Crimes Sentencing Procedure) Act 1999 ; R v Gavel* (2014) 239 A Crim R 469, [112]) - the applicant's subjective case was limited - no error identified (see *ZA v R* [2017] NSWCCA 132, [68]-[93]) - the Court was not persuaded that the sentence was a crushing one (see *ZA v R*, supra); appeal dismissed. [Editor's note: Adamson & Campbell JJ agreeing with Johnson J.]
Stanton

Adams v R [2017] NSWCCA 215
Court of Criminal Appeal of New South Wales
Hoeben CJ at CL, R A Hulme & Wilson J
Criminal law - murder - conviction appeal - the appellant was convicted of murder after a trial by

judge alone - he was sentenced to 20 years, NPP 15 years - at tria, the Crown was permitted to adduce tendency evidence - the Crown also relied upon a document identifying the appellant's car registration details as a business record - held: (1) tendency - appellant submitted that a tendency to act "in a particular way" must be expressed in a way which enables the defence to appreciate the case which it is required to meet - no error identified - it was clear that both counsel at trial were well aware of the contents of the tendency notice and the trial judge's (shorthand) description of it - on appeal it was conceded that the tendency evidence was of significant probative value, so that the possibility of unfair prejudice was the only issue to be considered - that issue was to be considered against the background that the trial judge had decided that the trial should proceed by judge alone because of the possibility that the reasoning of a jury might be excessively influenced by the evidence of the appellant's conduct towards young women in the past and the tendencies it established - further, the appellant's argument misconstrued the nature of tendency evidence - such evidence does not have to prove a tendency to commit a particular crime (*Hughes v R* [2015] NSWCCA 330, [183]-[185], *Hughes v The Queen* [2017] HCA 20, [40]-[41]) - ground not made out; (2) failure to direct (s133 *Criminal Procedure Act 1986* (NSW) - *Fleming v The Queen* ((1998) 197 CLR 250, [27]) referred to - no objection in terms of this ground was made at trial - an appellant should always have an obligation to raise objection at trial - see *Greenhalgh v R* [2017] NSWCCA 94. [21] & r4 Appeal Rules - there is a distinction between "warning" and "direction" (*Filippou v The Queen* (2015) 256 CLR 47, [52]; *JWM v R* [2014] NSWCCA 248, [147]) - ground not made out; (3) business records - the representation contained in the document was relevant - the evidence was that the witness had memorised the number plate of the vehicle driven by the man who raped her as either DMB 065or DMB 055 - s59 *Evidence Act 1995* (NSW) generally prohibits the receipt of out of court representations to prove the truth of their content - s183 permitted the trial judge to draw inferences from document in determining their admissibility - the moving party was required to prove matters of fact on the balance of probabilities (s142(1)) - the exception to the hearsay rule the Crown relied upon was the "business records" exception contained in s69 - the trial Judge found that the document was created for the purpose of a business and that it was created by the NSW Police Service for its own purposes - the judge was satisfied on the balance of probabilities that the representation was made on the basis of information indirectly supplied by a person who night reasonably have had personal knowledge of the asserted fact - no error was disclosed and the court was satisfied that the document emanated from the Police Service - this ground was not made out; (4) unreasonable verdict - the appellant relied upon 3 categories in support of his submission - each category considered at length - the relevant principles in relation to an unreasonable verdict in a judge alone trial are restated in *Thornton v R* ([2017] NSWCA 86, [204]-[207]) - here, the trial judge dealt with each of the suggested rational hypotheses consistent with innocence and rejected them; appeal dismissed. [Editor's note: R A Hulme & Wilson JJ agreeing with Hoeben CJ at CL. For earlier decisions see: *R v Adams (No 1)* [2015] NSWSC 1960; *R v Adams (No 5)* [2016] NSWSC 1563; *R v Adams (No. 6)* [2016] NSWSC 1565*; R v Adams (No 7)* [2017] NSWSC 179.]
Adams

The Snail
By: Richard Lovelace
Wise emblem of our politic world,
Sage snail, within thine own self curl'd;
Instruct me softly to make haste,
Whilst these my feet go slowly fast.

Compendious snail! thou seem'st to me,
Large Euclid's strict epitome;
And in each diagram dost fling
Thee from the point unto the ring;
A figure now triangular,
An oval now, and now a square;
And then a serpentine dost crawl,
Now a straight line, now crook'd, now all.

Preventing rival of the day,
Th'art up and openest thy ray,
And ere the morn cradles the moon
Th'art broke into a beauteous noon.
Then when the sun sups in the deep,
Thy silver horns ere Cynthia's peep;
And thou from thine own liquid bed
New Phoebus heav'st thy pleasant head.

Who shall a name for thee create,
Deep riddle of mysterious state?
Bold Nature that gives common birth
To all products of seas and earth,
Of thee, as earthquakes, is afraid,
Nor will thy dire deliv'ry aid.

Thou thine own daughter then, and sire,
That son and mother art entire,
That big still with thy self dost go,
And liv'st an aged embryo;
That like the cubs of India,
Thou from thyself a while dost play;
But frighted with a dog or gun,
In thine own belly thou dost run,
And as thy house was thine own womb,
So thine own womb concludes thy tomb.

But now I must (analyz'd king)
Thy economic virtues sing;
Thou great stay'd husband still within,
Thou, thee, that's thine dost discipline;
And when thou art to progress bent,
Thou mov'st thy self and tenement,
As warlike Scythians travell'd, you
Remove your men and city too;
Then after a sad dearth and rain,
Thou scatterest thy silver train;
And when the trees grow nak'd and old,
Thou clothest them with cloth of gold,
Which from thy bowels thou dost spin,
And draw from the rich mines within.

Now hast thou chang'd thee saint; and made
Thy self a fane that's cupola'd;
And in thy wreathed cloister thou
Walkest thine own grey friar too;
Strict, and lock'd up, th'art hood all o'er,
And ne'er eliminat'st thy door.
On salads thou dost feed severe,
And 'stead of beads thou dropp'st a tear;
And when to rest, each calls the bell,
Thou sleep'st within thy marble cell,
Where in dark contemplation plac'd,
The sweets of nature thou dost taste;
Who now with time thy days resolve,
And in a jelly thee dissolve,
Like a shot star, which doth repair
Upward, and rarify the air.

https://en.wikipedia.org/wiki/Richard_Lovelace

Click Here to access our Benchmark Search Engine