

# **Criminal Law in the 21st Century**

## **The High Court and Criminal Law**

### **15th International Criminal Law Congress**

Chief Justice Robert French AC

15 October 2016, Adelaide

Your Honours, ladies and gentlemen: my thanks to the organisers for offering me this opportunity to address the 15th International Criminal Law Congress. I attended the first Congress in October 1985 in this city and was struck then by the energy and commitment of its organisers among whom Kevin Borick was a leading figure.

It was not long before my appointment, the following year, to the Federal Court that I made my last appearance before the High Court of Australia on an application for special leave to appeal, argued as on an appeal, against a conviction for wilful murder under the *Criminal Code 1913* (WA). The *Judiciary Act 1903* (Cth) had been amended in 1984; the amendments to s 35 of that Act, and corresponding amendments to the *Federal Court of Australia Act 1976* (Cth), meant that a grant of special leave was required in almost all cases before the appellate jurisdiction of the High Court could be engaged.<sup>1</sup> It was, however, not unusual at the time to be permitted to put the full appeal argument on an application for special leave in criminal matters without time limits later introduced.

The accused had repeatedly stabbed and mutilated his flatmate without any provocation.<sup>2</sup> The psychiatric evidence was that his behaviour was consistent with an antisocial personality disorder. However, the trial judge directed the jury that the disorder did not amount to a mental disease or natural mental infirmity within the meaning of s 27 of the *Code*, which provided for the so-called defence of insanity. While acknowledging that an important question was involved, the High Court held in a short ex tempore judgment that the direction was justified in light of the evidence.

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<sup>1</sup> *Judiciary Amendment Act (No 2) 1984* (Cth); *Federal Court of Australia Amendment Act 1984* (Cth).

<sup>2</sup> See *Hodges v The Queen* (1985) 19 A Crim R 129, the decision of the Court of Criminal Appeal which was the subject of the special leave application.

An academic article about the case and the general issue of antisocial personality disorder in the context of the insanity defence appeared in the *Criminal Law Journal* the following year.<sup>3</sup> The article set out the transcript of some of the exchanges between the then Chief Justice, Sir Harry Gibbs, and myself. Re-reading it, it seems to me that he gave me generous leeway to develop a difficult argument even though it was an extended special leave application. But then as I remarked earlier this year in delivering an oration in his honour to the Samuel Griffith Society, he answered the description he himself had accorded to Griffith as 'always dignified and courteous'.

The transcript disclosed that the Chief Justice suggested that it was necessary in the case to have evidence that the accused was suffering from a mental disease. I submitted that the psychiatrists having given evidence of a condition defined by reference to a cluster of behaviours amounting to an anti-social personality disorder, it was for the Court to decide as a matter of law whether the term 'mental disease' in the *Code* properly construed, covered the disorder. Our dialogue came to its effective conclusion with the following exchange:

Gibbs CJ: But ... we have a man who is lacking to some extent in capacity to control, lacking to some extent in moral sense and this, it is said, is due to the very unhappy and deprived life he has led. Now, *can the Court say with no medical evidence to support it that that man is suffering from a mental disease?*

Mr French: Yes, it can, with respect, your Honour.

Gibbs CJ: That is all there is to it, is there not, in this case?<sup>4</sup>

Reference to Sir Harry Gibbs is apposite because he addressed the first International Criminal Law Congress here in October 1985.<sup>5</sup> He reflected upon the increase in the amount of time spent by courts on criminal law and suggested a number of reasons. He attributed that increase in part to the growth in the crime rate and the incidence of violent crimes.

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<sup>3</sup> P A Fairall and P W Johnston, 'Antisocial Personality Disorder (APD) and the Insanity Defence' (1987) 11 *Criminal Law Journal* 78.

<sup>4</sup> Ibid 89–90.

<sup>5</sup> Sir Harry Gibbs, 'Who Decides? A Review of the Appellate Structure with Particular Reference to Appeals against Sentence: The Role of the High Court', (Speech delivered at the International Criminal Law Congress, Adelaide, 7 October 1985).

Crime had become more visible and more a matter of community concern. Interestingly, however, he added, in a somewhat backhanded compliment to the profession:

Further, the sceptical and non-conformist intellectual climate of the times has made lawyers more ready to question doctrines formerly thought to be established and the ready availability of legal aid has given those briefed in criminal proceedings a greater opportunity to attempt to persuade the courts to re-examine old principles or formulate new ones.<sup>6</sup>

He described it as a welcome development that the Congress was held in an attempt to assist in shaping criminal law and practice in the best interests of society.<sup>7</sup> The durability of the Congress, in this its 31st year, suggests that it has continuing appeal and utility to practitioners in the field of criminal law.

Sir Harry Gibbs spoke in 1985 of sentencing appeals and, in particular, Crown appeals against sentence. His remarks and their sequelae in relation to sentencing demonstrate a larger phenomenon. That is that the criminal law engages the legal system generally. It involves the common law, the common law as modified by statute and stand-alone statute law of some difficulty, not least in the Commonwealth *Criminal Code*,<sup>8</sup> the Uniform Evidence Acts<sup>9</sup> and various sentencing Acts. It involves public law and, from time to time, constitutional law. It is a phenomenon which means that criminal lawyers cannot live in silos. Justice Michael Kirby remarked in an article in 2002 concerning the High Court's increased involvement in criminal appeals:

with the creation of permanent appellate courts and particularly where they hear criminal and civil appeals without any distinction, the old notion that criminal appeals are somehow divorced from the mainstream of appellate work, has gradually faded away.<sup>10</sup>

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<sup>6</sup> Ibid 2.

<sup>7</sup> Ibid.

<sup>8</sup> *Criminal Code Act 1995* (Cth) Sch 1.

<sup>9</sup> *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2011* (ACT); *Evidence (National Uniform Legislation) Act* (NT).

<sup>10</sup> Justice Michael Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?' (2002) 23 *Australian Bar Review* 4, 12.

He characterised criminal appeals as having become a regular part of the work of Australian courts which could not be ignored by the final court.

The particular questions raised by Crown appeals against sentence formed an important part of Sir Harry Gibbs' presentation to this Congress in 1985. He discussed the nature of the discretion conferred on the Court of Criminal Appeal in Queensland by the words of s 669A of the *Criminal Code* (Qld) allowing the Court to vary a sentence on a Crown appeal 'in its unfettered discretion'. The word 'unfettered' had been inserted before the word 'discretion' by an amendment in 1975.<sup>11</sup> Sir Harry remarked that it had been thought in some cases that in such an appeal against sentence, it was not necessary to show that an error had been made by the trial judge in exercising the sentencing discretion. He added:

It was of course most unlikely that it was intended to place the Crown in so favoured a position and the misconception ... was removed by the more recent decision of the High Court in *Griffiths v The Queen*. It is now clear that the court is not entitled to interfere with the sentence on an Attorney-General's appeal unless there has been some error of the kind described in *House v The King*.<sup>12</sup>

Ten years later in 1995, in *R v Melano; Ex parte Attorney-General (Qld)*,<sup>13</sup> the Queensland Court of Criminal Appeal, reflecting Sir Harry's view, held that unless the sentencing judge had erred in principle the sentence he or she had imposed would be 'proper'. Variation by the Court would not be justified in such a case unless in exceptional circumstances to establish or alter a principle or approach or set out the appropriate sentencing range.<sup>14</sup> In 2005, however, the correctness of that decision was called into question by dicta of McHugh, Callinan and Heydon JJ in *York v The Queen*.<sup>15</sup> Then, in 2009, in *R v Lacey; Ex parte Attorney-General (Qld)*,<sup>16</sup> the Court of Appeal of the Supreme Court of Queensland, sitting a bench of five, decided to reconsider *Melano*. The Court concluded, by majority, that *Melano* was "opposed to the undoubted intention of the Parliament as

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<sup>11</sup> *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 584–8 [22]–[35].

<sup>12</sup> Gibbs, above n 5, 5 (footnotes omitted).

<sup>13</sup> [1995] 2 Qd R 186.

<sup>14</sup> *Ibid* 189.

<sup>15</sup> (2005) 225 CLR 466, 474–5 [26] (McHugh J), 484–5 [61] (Callinan and Heydon JJ).

<sup>16</sup> (2009) 197 A Crim R 399.

enacted" in s 669A'.<sup>17</sup> The Court of Appeal in exercising its discretion on a Crown appeal was required to have regard to the sentence imposed below but come to its own view as to the proper sentence to be imposed.

On appeal, the High Court in a joint judgment of six Justices, with Heydon J dissenting, held, contrary to the view of the Court of Appeal, that s 669A conferred power on the Court of Appeal to vary a sentence on a Crown appeal only when it had been determined that there was an error on the part of the sentencing judge.<sup>18</sup> The term 'unfettered discretion' conferred upon the Court of Appeal the power to substitute the sentence it thought appropriate once error had been demonstrated<sup>19</sup> — which is more or less what Sir Harry Gibbs had said when he addressed this Congress in 1985.

The High Court's judgment, delivered in 2011, engaged with some important questions of principle. The joint judgment made reference to the traditional view that Crown appeals against sentence are exceptional. Deane and McHugh JJ in *Malvaso v The Queen*<sup>20</sup> had acknowledged that Crown appeals had become commonplace, but maintained that they represented a departure from traditional standards of what was proper in the administration of criminal justice and in a practical sense were 'contrary to the deep-rooted notions of fairness and decency which underlie the common law principle against double jeopardy.'<sup>21</sup> Their observations were quoted by the majority in *Lacey*.<sup>22</sup>

Rejecting the construction of s 669A that would allow a Court of Appeal to increase a sentence without demonstrable error on the part of the primary judge, the majority in *Lacey* said:

Such a construction ... has the vice that it deprives the sentencing judge's order of substantive finality. It effectively confers a discretion on the Attorney-General to seek a different sentence from the Court of Appeal without the constraint of any threshold criterion for that Court's intervention. Such a construction tips the scales of criminal justice in a way that offends 'deep-rooted notions of fairness and

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<sup>17</sup> Ibid 416 [146].

<sup>18</sup> *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573.

<sup>19</sup> Ibid 598 [62].

<sup>20</sup> (1989) 168 CLR 227.

<sup>21</sup> Ibid 234 cited in *Bond v The Queen* (2000) 201 CLR 213, 223 [27].

<sup>22</sup> (2011) 242 CLR 573, 583 [19].

decency'. It is not therefore a construction lightly to be taken as reflecting the intention of the legislature.<sup>23</sup>

The judgment in *Lacey* was of significance extending beyond its particular interpretation of s 669A of the *Criminal Code* (Qld). It invoked the principle of legality, which favours constructions of statutory provisions, where such constructions are open, which will avoid or minimise encroachment upon common law principles, rights and freedoms. The joint judgment also enunciated the Court's approach to legislative intention, describing the concept of an 'objective collective mental state' of the legislature as 'a fiction which serves no useful purpose'. The joint judgment stated:

Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts.<sup>24</sup>

Those rules of construction are concerned not to discover some imagined intention as an anterior fact but to have regard to the text, context and purpose of the relevant provision. The identification of the purpose of a statute or statutory provision does not require identification of an imagined collective state of mind held by the legislature. Purpose can be ascertained and defined by reference to the text of the statute itself, the functions it serves, any express statements of purpose in the statute, and appropriate extrinsic materials.<sup>25</sup>

The Crown sentencing appeals saga, which I have described, amply demonstrates the general proposition that sentencing is an important element in criminal appellate work. It is always with us as a matter for debate and discussion and intersects with sometimes large questions of principle. This is reflected in the increased involvement of the High Court in

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<sup>23</sup> Ibid 583–4 [20] (footnote omitted).

<sup>24</sup> Ibid 592 [43] (footnote omitted).

<sup>25</sup> *Acts Interpretation Act 1901* (Cth) s 15AB; *Interpretation Act 1987* (NSW) s 34; *Interpretation of Legislation Act 1984* (Vic) s 35(b); *Acts Interpretation Act 1954* (Qld) s 14B; *Interpretation Act 1984* (WA) s 19; *Acts Interpretation Act 1931* (Tas) s 8B; *Legislation Act 2001* (ACT) ss 141–143; *Interpretation Act* (NT) s 62B.

sentencing in recent times. It was not always thus. Traditionally, the Court eschewed involvement in sentencing issues.

In *White v The Queen*<sup>26</sup> in 1962, the Court refused an application for special leave to appeal against a declaration that a prisoner was an habitual criminal. Dixon CJ made some rather discouraging remarks about applications for special leave to appeal against sentence. He did not think that in such cases the Court should intervene unless there appeared to have been 'a gross violation of the principles which ought to guide discretion in imposing sentences'.<sup>27</sup> No such case had appeared in the history of the Court. The Court, he said, had refused time and time again to grant special leave to appeal against sentences. In fact, the High Court did not grant leave to appeal against a sentence until 1979 in the case of *Veen*.<sup>28</sup> The Australian position reflected the English position. In 1984, Lord Diplock observed that sentencing 'seldom involves a certifiable question of law of general importance'.<sup>29</sup> He could only identify one example of leave being granted solely to appeal against sentence, which had preceded his appointment as a Law Lord in 1968.<sup>30</sup>

Sir Harry Gibbs maintained a generally discouraging approach in his speech in 1985. He said that the threshold for the grant of special leave was not met 'simply because a sentence appears to be excessive'. He invoked the 'gross violation' threshold propounded by Dixon CJ. Of course, to say that mere apparent excess or inadequacy does not warrant the grant of special leave is to say nothing controversial having regard to the criteria for such grants under s 35A of the *Judiciary Act*. Indeed in *Muldock v The Queen* in 2011, the High Court said that it is not its function to determine challenges to sentences that are said to be excessive.<sup>31</sup> On the other hand, 'gross violation' is not a necessary condition of the Court's engagement pursuant to s 35A.

The *Veen* case, decided in 1979, was the first matter in which the High Court granted leave to appeal against sentence. It concerned an Indigenous man charged with murder, but convicted of manslaughter on the ground of diminished responsibility. He was sentenced to life imprisonment by the primary judge. The High Court granted special leave to appeal and

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<sup>26</sup> (1962) 107 CLR 174.

<sup>27</sup> Ibid 176.

<sup>28</sup> *Veen v The Queen* (1979) 143 CLR 458.

<sup>29</sup> *R v Courtie* [1984] AC 463, 466.

<sup>30</sup> *Verrier v Director of Public Prosecutions* [1967] 2 AC 195.

<sup>31</sup> (2011) 244 CLR 120, 140 [59].

allowed the appeal, substituting a sentence of 12 years' imprisonment. The question of principle centred on the extent to which a sentencing court could rely on the protection of the community from the perceived likelihood the offender would commit other crimes in the future. The New South Wales Court of Criminal Appeal was held to have erred in relying upon principles of 'preventive detention' developed in England in cases where a person with a mental illness was found guilty of a serious crime.

In the event, nine months after his release on licence in 1983, Veen stabbed another man to death. He pleaded guilty to manslaughter on the ground of diminished responsibility and was sentenced to life imprisonment. He again applied for special leave to the High Court. The majority observed that although it was earlier uncertain, it was now known that he had a propensity to kill when under the influence of alcohol and under stress. The majority held that a sentence of life imprisonment was not disproportionate to the gravity of the offence.<sup>32</sup> The Court's experience in the *Veen* case was not calculated to encourage it to get into the business of sentencing appeals. In the event, as we all know, it did get involved in that business.

The proposition that mere excess is not enough to warrant the grant of special leave still holds good. Of course, a manifest excess or, for that matter, inadequacy may be demonstrative of error. However, appeals against sentence are no longer numerically anomalous. Since I was appointed to the Court, sentencing appeals by the prosecution or by the defence have been heard at a rate of more than two per year. If one had to identify factors contributing to the increase in sentencing appeals, they would include:

1. The general increase in applications for special leave and appeals heard in criminal matters.
2. The need for consistent statements of common law principles guiding the exercise of sentencing discretion, and the recognition of the High Court's role in providing such guidance.
3. The enactment by State and Territory legislatures of sentencing statutes that may affect procedure in innovative or idiosyncratic ways. *Muldrock* was an example,

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<sup>32</sup> (1979) 143 CLR 458, 478.

involving the construction of a statute specifying standard non-parole periods for hypothetical mid-range offences.

An overview of the key issues in sentencing decisions since I joined the Court in 2008 indicates the variety of questions to which those decisions have given rise.

Consistency between intermediate appeal courts in sentencing for federal offences was considered in *Hili v The Queen*<sup>33</sup> and *R v Pham*.<sup>34</sup> The significance of a yardstick derived by reference to comparable cases was an issue in *Munda v Western Australia*.<sup>35</sup> The parity principle was applied in *Green v The Queen*<sup>36</sup> to a case in which the Crown had appealed against some but not all co-offenders. The fact that a person sentenced for one offence could have been charged with and convicted of an alternative offence carrying a lesser maximum penalty was held in *Elias v The Queen*<sup>37</sup> not to be a matter to be taken into account by the sentencing judge. Fact-finding in the sentencing process was considered in *Filippou v The Queen*<sup>38</sup> and *Nguyen v The Queen*.<sup>39</sup> The relevance of aboriginality of offenders and the high incarceration rates of Aboriginal people throughout Australia were in issue in *Munda*<sup>40</sup> and *Bugmy v The Queen*.<sup>41</sup> In substance the Court held in *Munda* that Aboriginal offending is not to be viewed systemically as less serious than offending by persons of other ethnicities.<sup>42</sup> In *Bugmy* it held that a sentencing court cannot take judicial notice of the systemic background of deprivation of Aboriginal offenders. In any case in which it is sought to rely on an offender's background of deprivation in mitigation of sentence, it is necessary to point to material tending to establish that background.<sup>43</sup>

The powers and discretions of sentencing courts and appellate courts were considered in a number of cases including *Muldrock*,<sup>44</sup> already mentioned, which concerned the proper application of standard non-parole periods. *Muldrock* had a sequel in *Achurch v The*

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<sup>33</sup> (2010) 242 CLR 520.

<sup>34</sup> (2015) 90 ALJR 13.

<sup>35</sup> (2013) 249 CLR 600.

<sup>36</sup> (2011) 244 CLR 462.

<sup>37</sup> (2013) 248 CLR 483.

<sup>38</sup> (2015) 256 CLR 47.

<sup>39</sup> (2016) 90 ALJR 595.

<sup>40</sup> (2013) 249 CLR 600.

<sup>41</sup> (2013) 249 CLR 571.

<sup>42</sup> (2013) 249 CLR 600, 619 [53].

<sup>43</sup> (2013) 249 CLR 571, 592 [36], 594 [41] (footnotes omitted).

<sup>44</sup> (2011) 244 CLR 120.

*Queen*.<sup>45</sup> The Court there held that a power to correct penalties under s 43 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) did not authorise the re-opening of proceedings in which a sentence open at law was reached by a process of reasoning involving an error of law — in that case the error identified in *Muldrock*. The power conferred by s 43 was not lightly to be construed as undermining the distinction between appellate and original jurisdiction.<sup>46</sup>

The role of the appeal court when imposing sentence after allowing an appeal was considered in *Kentwell v The Queen*<sup>47</sup> and the exclusion of 'double jeopardy' as a mitigating factor in relation to resentencing for federal offences was the subject of the decision in *Bui v Director of Public Prosecutions (Cth)*.<sup>48</sup> The nature of the appeal court's discretion on Crown appeals was, as noted earlier, discussed in *Lacey* in the context of Queensland legislation. In *CMB v Attorney-General (NSW)*<sup>49</sup> the Court held that if error were established on a Crown appeal the Crown nevertheless had the onus of demonstrating why the Court of Criminal Appeal should not exercise its residual discretion not to interfere.<sup>50</sup> In *Barbaro v The Queen*<sup>51</sup> the Court held that the prosecution, on a sentencing hearing, is neither required nor permitted to make a submission about the available range of sentences for an offence.<sup>52</sup>

In the last decade there have been a number of cases about the constitutional validity of particular provisions relating to sentencing and/or parole. These have included *Magaming v The Queen*<sup>53</sup> in which the Court upheld the validity of provisions allowing for prosecutorial choice between two people smuggling offences, only one of which contained a mandatory minimum sentence. The discretion was not inconsistent with the separation of judicial from executive power under Ch III of the Constitution. In *Pollentine v Bleijie*<sup>54</sup> the Court rejected a challenge to a provision allowing a sentencing judge, acting upon a report from medical practitioners, to declare that a child sex offender was incapable of exercising proper control over his sexual instincts and to direct that he be detained at Her Majesty's pleasure.

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<sup>45</sup> (2014) 253 CLR 141.

<sup>46</sup> Ibid 153 [16] (French CJ, Crennan, Kiefel and Bell JJ) (footnotes omitted).

<sup>47</sup> (2014) 252 CLR 601.

<sup>48</sup> (2012) 244 CLR 638, 651 [19].

<sup>49</sup> (2015) 89 ALJR 407.

<sup>50</sup> Ibid 411 [6], 415 [34], 421 [66].

<sup>51</sup> (2014) 253 CLR 58.

<sup>52</sup> Ibid 66 [7] (French CJ, Hayne, Kiefel and Bell JJ).

<sup>53</sup> (2013) 252 CLR 381.

<sup>54</sup> (2014) 253 CLR 629.

*Kuczborski v Queensland*<sup>55</sup> involved a challenge to Queensland legislation where members and office bearers of certain declared associations could suffer more severe sentences for declared offences than other persons charged with the same offences. In that case the Court unanimously concluded that the plaintiff did not have standing to challenge the provisions creating the enhanced penalties because, not being the subject of any charge, his freedom was not affected.<sup>56</sup>

*Momcilovic v The Queen*<sup>57</sup> concerned alleged inconsistencies between Victorian and Commonwealth provisions in relation to the penalties for drug trafficking offences. There were a number of other important issues in *Momcilovic* in relation to the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Finally, in relation to sentencing, in *Crump v New South Wales*<sup>58</sup> a New South Wales law had altered criteria for release on parole for certain classes of already sentenced prisoner for which non-parole periods had been fixed. The Court held that the changes did not impermissibly impeach, set aside, alter or vary the judicial disposition reflected in the sentence, albeit it fixed a non-parole period.<sup>59</sup>

There have been a significant number of criminal appeals dealing with important questions of liability and criminal evidence and with the impact of coercive investigative processes upon pending trials. The Court has also been concerned with constitutional questions relating to functions conferred on State courts which it was said were incompatible with their institutional integrity as courts.

In relation to liability, the Court has had to come to grips with provisions of the *Criminal Code* (Cth). In *R v LK*<sup>60</sup> and *Ansari v The Queen*<sup>61</sup> the law relating to conspiracy required the Court's attention. Both cases concerned money laundering offences under s 400.3 and the way in which the fault elements of that offence provision interacted with the fault element for conspiracy in the *Criminal Code*.

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<sup>55</sup> (2014) 254 CLR 51.

<sup>56</sup> Ibid 70 [30], 87–8 [99], 106–8 [177]–[181], 131–32 [280].

<sup>57</sup> (2011) 245 CLR 1.

<sup>58</sup> (2012) 247 CLR 1.

<sup>59</sup> Ibid 27 [60].

<sup>60</sup> (2010) 241 CLR 177.

<sup>61</sup> (2010) 241 CLR 299.

Recently the Court returned to the doctrine of extended joint criminal enterprise, holding in *Miller v The Queen*<sup>62</sup> that the principle stated in *McAuliffe v The Queen*<sup>63</sup> — that a party to a joint criminal enterprise would be liable for an incidental offence where they foresee the commission of the offence in the course of carrying out the agreement and continue to participate in the enterprise — should stand. In 2006, the Court had by majority declined an invitation to reopen and overrule *McAuliffe*.<sup>64</sup> The United Kingdom Supreme Court earlier this year held in *R v Jogee*<sup>65</sup> that the development of the doctrine of 'parasitic accessorial liability' enunciated by the Privy Council in *Chan Wing-Siu v The Queen*<sup>66</sup> had represented a 'wrong turn'. While the Court in *Miller* held that it was appropriate, in light of *Jogee*, to reconsider the place of extended joint criminal enterprise in Australian law, it ultimately declined to follow the course adopted by the Supreme Court, holding that this principle, as stated in *McAuliffe*, should remain part of the common law of Australia.

A further case which bears mentioning is the 2012 decision in *PGA v The Queen*.<sup>67</sup> The Court there had to grapple with the historical proposition that a husband could not be guilty of the rape of his wife on the basis that a wife was presumed to have consented to sexual intercourse in marriage. That proposition is of course contrary to modern understandings, but it was contended that this accurately represented the law in 1963, when the alleged offending took place. A majority held that if the proposition was ever part of the common law in Australia, it had long before ceased to be so.

Decisions on evidentiary questions have dealt with the tendency and coincidence rules under the uniform *Evidence Acts*. This is an area of some continuing difficulty and no doubt will come before the Court again. Most recently in *IMM v The Queen*<sup>68</sup> a majority of the Court, responding to a difference between intermediate appellate courts in Victoria and New South Wales, held that when assessing probative value for the purposes of determining the admissibility of tendency evidence, a trial judge must proceed on the assumption that the jury will accept the evidence (and thus assume it to be credible and reliable).<sup>69</sup>

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<sup>62</sup> (2016) 90 ALJR 918.

<sup>63</sup> (1995) 183 CLR 108.

<sup>64</sup> *Clayton v The Queen* (2006) 81 ALJR 439.

<sup>65</sup> [2016] 2 WLR 681.

<sup>66</sup> [1985] AC 168.

<sup>67</sup> (2012) 245 CLR 355.

<sup>68</sup> (2016) 90 ALJR 529.

<sup>69</sup> *Ibid* 537 [39], 539 [52] (French CJ, Kiefel, Bell and Keane JJ).

The Court dealt with the role of evidence of good character in *Braysich v The Queen*,<sup>70</sup> which concerned a stockbroker who had been found guilty of share trading offences. He sought to raise a statutory defence that his conduct did not have the purpose of creating a false or misleading appearance of active trading. The trial judge refused to allow the defence to be put to the jury, on the basis that the appellant had not led evidence, as to his purpose. The High Court held on appeal that this was erroneous, observing that the defence raised an issue of honesty, to which evidence adduced of the appellant's good character was relevant.

The threshold for the reception of alleged expert evidence was considered in *Honeysett v The Queen*<sup>71</sup> in 2014. The relevant evidence was given by an anatomist. He had viewed CCTV images of a robbery and gave evidence of anatomical similarities between one of the robbers and the appellant. The Court concluded that his evidence gave 'the unwarranted appearance of science to the prosecution case'.<sup>72</sup> Forensic evidence of a different nature was in issue in *Fitzgerald v The Queen*,<sup>73</sup> handed down on the same day. To prove the appellant was present at a murder scene, the prosecution relied on his DNA being found there on a didgeridoo. The appellant argued that he had earlier shaken hands with his co-accused, which led to a secondary transfer of his DNA when the co-accused went to the scene. The Court quashed his conviction, holding that the secondary transfer hypothesis was not unreasonable.

The increasing intersection of criminal processes with statutory investigative processes, and the impact of the latter on the privilege against self-incrimination, occupied the attention of the Court in four recent decisions: *X7 v Australian Crime Commission*,<sup>74</sup> *Lee v New South Wales Crime Commission*,<sup>75</sup> *Lee v The Queen*<sup>76</sup> and *R v Independent Broad-based Anti-corruption Commissioner*.<sup>77</sup> These turned on the construction of the particular statutory schemes and the extent to which their language displaced the relevant privilege and compromised the accusatorial character of the criminal trial process, in which the accused

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<sup>70</sup> (2011) 243 CLR 434.

<sup>71</sup> (2014) 253 CLR 122.

<sup>72</sup> Ibid 138 [45].

<sup>73</sup> (2014) 88 ALJR 779.

<sup>74</sup> (2013) 248 CLR 92.

<sup>75</sup> (2013) 251 CLR 196.

<sup>76</sup> (2014) 253 CLR 455.

<sup>77</sup> (2016) 256 CLR 459.

may choose to offer no account of events to simply test the sufficiency of the prosecution evidence.

Chapter III of the Constitution has played a role in relation to statutory provisions dealing with assets said to be the proceeds of crime and statutory schemes for the issue of control orders against members of declared organisations. That line of cases has flowed from, and developed principles first enunciated in *Kable v Director of Public Prosecutions (NSW)*.<sup>78</sup> They include *International Finance Trust Co Ltd v New South Wales Crime Commission*,<sup>79</sup> relating to an obligation imposed on the Supreme Court of New South Wales in certain circumstances to make ex parte restraining orders preventing dealings with specified property interests. In *South Australia v Totani*,<sup>80</sup> the Court held invalid a provision of the *Serious and Organised Crime (Control) Act 2008* (SA) which required the Magistrates Court of South Australia to make a control order against a person if satisfied that the person was a member of an organisation in respect of which the Attorney-General had made a declaration. In *Wainohu v New South Wales*,<sup>81</sup> a section of the *Crimes (Criminal Organisations Control) Act 2009* (NSW) which provided that a judge designated by the Attorney-General as an eligible judge could make an administrative declaration in relation to an organisation without an obligation to give reasons was held invalid. On the other side of the ledger, statutes providing for enhanced penalties for members of declared criminal organisations and for the use of criminal intelligence in closed courts were not struck down in *K-Generation Pty Ltd v Liquor Licensing Court*<sup>82</sup> and *Assistant Commissioner Condon v Pompano Pty Ltd*.<sup>83</sup>

There have been important decisions on the relationship between the criminal law and the implied freedom of political communication. Anti-consorting laws in New South Wales were upheld by a 6 to 1 majority in *Tajjour v New South Wales*<sup>84</sup> against a challenge based on the implied freedom of political communication. And in *Monis v The Queen*<sup>85</sup> the Court divided equally on the question whether the offensive communications provisions in s 471.12 of the *Criminal Code* (Cth) infringed the implied freedom.

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<sup>78</sup> (1996) 189 CLR 51.

<sup>79</sup> (2009) 240 CLR 319.

<sup>80</sup> (2010) 242 CLR 1.

<sup>81</sup> (2011) 243 CLR 181.

<sup>82</sup> (2009) 237 CLR 501.

<sup>83</sup> (2013) 252 CLR 38.

<sup>84</sup> (2014) 254 CLR 508.

<sup>85</sup> (2013) 249 CLR 92.

In *Momcilovic*, mentioned earlier, the Court considered the application of the interpretive provision in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) to a reverse onus provision applicable to drug prosecutions under Victorian law. It also considered the constitutional validity of a section of the Charter providing for the Supreme Court of Victoria to make declarations of inconsistent interpretation. Importantly, that case held that prosecutions by a State authority of a resident of another State involved federal diversity jurisdiction defined in s 75(iv) of the Constitution and conferred on State courts by s 39(2) of the *Judiciary Act*.

The constitutional dimension in the Court's criminal law jurisdiction has also been seen in connection with the requirement for trial by jury in trials by indictment for Commonwealth offences. The Court has upheld the validity of appeals against directed verdicts of acquittal in federal offences as not offending against s 80.<sup>86</sup> The most recent decision involving s 80 was *Alqudsi v The Queen*.<sup>87</sup> The Court held by a 6 to 1 majority that s 80 of the Constitution precludes the application of a provision of a State law allowing for the court to order trial by judge alone on the application of the accused or the prosecution. Very recently, the Court granted special leave to appeal against a decision of the Court of Appeal of Western Australia in the case of *Rizeq*.<sup>88</sup> The appellant was charged with an offence against State law but, being a resident of another State, the prosecution, as in *Momcilovic*, involved the exercise of federal diversity jurisdiction. The appellant was convicted by majority verdict in Western Australia. He contended that because the case was in federal jurisdiction, s 79 of the *Judiciary Act* picked up the State law creating the offence and turned it into a Commonwealth offence, thereby attracting s 80 of the Constitution and requiring a unanimous verdict.<sup>89</sup> The case is likely to be heard by the High Court early next year.

There have been a number of cases in the High Court raising the question of the examinability by courts of events in the jury room<sup>90</sup> in criminal trials. The last of those was a case from South Australia involving the delivery of a mistaken verdict by the foreperson.<sup>91</sup>

<sup>86</sup> *R v LK* (2010) 241 CLR 177, 199–200 [40], 215–16 [86].

<sup>87</sup> (2016) 90 ALJR 711.

<sup>88</sup> Transcript of Proceedings, *Rizeq v Western Australia* [2016] HCATrans 233 (7 October 2016). See *Hughes v Western Australia* [2015] WASCA 164.

<sup>89</sup> *Cheatle v The Queen* (1993) 173 CLR 541.

<sup>90</sup> *Smith v The Queen* (2015) 255 CLR 161.

<sup>91</sup> *NH v Director of Public Prosecutions (SA)* (2016) 90 ALJR 978.

All of that takes me back to the first criminal appeal I heard as Chief Justice, which posed the question — does it matter in a jury trial if the judge is asleep?<sup>92</sup> The answer was in the affirmative.

## **Conclusion**

As appears from this brief and incomplete survey of the Court's decisions over the last decade, the Court has been engaged with the criminal law in a variety of ways. The exercise of the Court's jurisdiction in relation to the criminal law has involved the application of common law principles, statutory interpretation, the interaction between the common law and statutes and constitutional principles. For that reason, if no other, we can say of the work of the High Court in criminal law in the 21st century that it continues to live in interesting times and that practitioners in the field have a large canvas on which to develop their skills.

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<sup>92</sup> *Cesan v The Queen* (2008) 236 CLR 358.