B

BAIL

[2.100] Definition

The term bail comes from the French *bailler*: to take charge of, guard, control; and thence to hand over, deliver.

An accused is granted bail on release from the custody of officers of the law and into the custody of persons known as sureties. The sureties undertake to produce the accused at a specified time and place to answer the charge against him or her. If they fail they are liable to forfeit the sum specified when bail is granted.

The accused and sureties enter a recognisance (an obligation or bond) that the accused will appear.

The amount of money lodged as security bail must not be the money of the accused. Such an act is a corruption of the bail process, *Re B* [1981] 2 NSWLR 372, and may amount to an offence: *R v Freeman* (1985) 3 NSWLR 303; 17 A Crim R 272 (CCA).

[2.105] No common law right to bail

In *Chau v DPP* (1995) 37 NSWLR 639; 132 ALR 430; 82 A Crim R 339 (CA) Gleeson CJ said (at 646; 436; 345):

> There is no common law right in a person who has been arrested and charged with a serious crime to be at liberty or on bail pending the resolution of the charge. (The principles applied by courts in

making discretionary decisions as to bail are reviewed, for example, in *R v Watson* (1947) 64 WN (NSW) 100 and *R v Light* [1954] VLR 152.) In any event if there were such a right, it could be modified by statute.

[2.110] Legislation

Qld: *Bail Act 1980*;

WA: *Bail Act 1982*;

Tas: *Bail Act 1994*;

NT: *Bail Act*;

NSW: *Bail Act 2013*;

Vic: *Bail Act 1977*;

SA: *Bail Act 1985*;

ACT: *Bail Act 1992*;

NZ: *Crimes Act 1961* ss 318–320C.

[2.115] Absconding on bail

When an accused absconds and fails to answer his bail there are three main consequences:

1. the surety is forfeited: *Re King and Scott* (1930) 50 NZLR 162 (CA); *R v Baker* [1971] VR 717 (Gowans J);
2. on apprehension the accused is unlikely to be bailed again: *Lambley v The Queen* (1989) 40 A Crim R 430;
3. the absconding or flight can be used in evidence at the trial of the accused. See **Flight** at [6.1300].

[2.120] An approach of a court

In *DPP v Serratore* (1995) 38 NSWLR 137; 81 A Crim R 363; 132 ALR 461 (CA), Kirby P said (at 142–143; 466; 369):

> Bail is a particular feature of the systems of law which derive their origins from the common law of England. It was not a feature usual to other legal systems, such as those of civil law countries, although in recent times the influence of the privilege to seek bail has come to be felt in the municipal systems of non-common law States and in the international statements of basic civil rights. The *International Covenant on Civil and Political Rights* (ICCPR), Art 9, for example, provides:
>
> > 9.1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.
> >
> > ...
> >
> > (3) Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. *It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial*, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment. (Emphasis added).

> Australia is a party to the International Covenant. In the event of uncertainty of the common law or ambiguity of legislation, an Australian court may have regard to the provisions of the International Covenant to help resolve the uncertainty or ambiguity: see *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1 at 42 (CLR); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 288–289, 315.

[2.125] Successive applications

In *Scrivener v DPP* (2001) 125 A Crim R 279 (Qld CA) McPherson JA, with whom the others agreed, said (at 282 [11]):

> An appeal to this court is not the only avenue open to someone whose application for bail has been refused. An alternative is to renew the application to another judge of the court. The right of the applicant to go from one judge to another was recognised by the Full Court in *R v Malone* [1903] St R Qd 140, 141, and again in *R v Hughes* [1983] 1 Qd R 92, 93, as well as by other authorities in this State. See also *Eshugbayi Eleko v Officer Administering the Government of Nigeria* [1928] AC 459. At least that is so before the accused is given in charge to the jury.

[2.130] Bail considerations

Considerations for granting bail include:

- a presumption in favour of bail save in specified cases;
- need to prepare a defence: *R v Gay* [1969] SASR 467;
- seriousness of offence: *R v Young* (1966) 83 WN (Pt 1) (NSW) 391;
- likely severity of punishment: *R v Lythgoe* [1950] St R Qd 5 (Mansfield SPJ);
- likelihood of answering bail;
- likelihood of re-offending;
- potential for interference with witnesses.

[2.135] Bail pending appeal after conviction by magistrate

Cases on bail pending appeal after conviction by a magistrate include:

R v Taylor (1995) 80 A Crim R 371 (NSW Sully J);

Petreskei v Cargill (1987) 18 FCR 68; 79 ALR 235; 31 A Crim R 277 (FCA);

Re Barnett [1987] VR 387; (1986) 24 A Crim R 177 (Hampel J);

Re Lycouressis [1983] 2 VR 219 (Murphy J);

R v Blackler [1981] VR 672 (Starke ACJ).

[2.140] Bail after committal

YSA v DPP (2002) 133 A Crim R 368 (Vic CA).

[2.145] Bail after conviction and before sentence

DPP (Cth) v Germakian (2006) 166 A Crim R 201 (NSW CA).

[2.150] Bail pending appeal after conviction at trial

General

Exceptional circumstances are to be shown for bail to be granted after conviction pending an appeal. Some legislation says that.

Legislation

WA: *Bail Act 1982* Sch 1, Pt C, cll 4 and 5;

NT: *Bail Act* s 23A;

NSW: *Bail Act 2013* s 62;

ACT: *Bail Act 1992* s 9E.

Cases

Tilley v The Queen (2008) 83 ALJR 233; 251 ALR 367 (Hayne J) (refused);

Tieleman v The Queen (2004) 149 A Crim R 303 (WA, FC) (refused);

Walser v The Queen (1994) 73 A Crim R 154 (WA, White J) (granted);

R v Wilson (1994) 34 NSWLR 1; 73 A Crim R 532 (CA) (refused);

Bernt v The Queen (1994) 70 A Crim R 1 (WA, Scott J) (granted);

R v Eaves (1987) 35 A Crim R 364 (NSW, Finlay J) (refused);

R v Hilton (1986) 7 NSWLR 745; 27 A Crim R 59 (CCA) (granted);

Re Clarkson [1986] VR 583 (FC) (refused);

Ex parte Maher [1986] 1 Qd R 303; (1985) 19 A Crim R 177 (FC) (refused);

R v Giordano (1982) 31 SASR 241; 6 A Crim R 397 (FC) (refused);

Chamberlain v The Queen (1982) 69 FLR 445; 6 A Crim R 385 (FCA) (granted);

R v Manning [1936] VLR 84 (Gavan Duffy J) (refused);

KWLD v The State of Western Australia [No 2] [2013] WASCA 129 (refused).

HD v The Queen [2015] ACTCA 49 (bail refused).

Those exceptional circumstances include:

- A ground of appeal which has an extraordinarily high prospect of success: *R v Wilson* (1994) 34 NSWLR 1; 73 A Crim R 532 (CA) (refused). In *Marotta v The Queen* (1999) 73 ALJR 265; 160 ALR 525 Callinan J granted bail.
- That the custodial sentence will have been substantially served: *Bernt v The Queen* (1994) 70 A Crim R 1 (WA, Scott J); *R v Greenham* (1998) 103 A Crim R 185 (NSW, Sperling J); *Re Zoudi* (2006) 14 VR 580; 168 A Crim R 444 (CA, 5 member court).

Habeas corpus does not apply: *Eaves v James* (1988) 33 A Crim R 369 (NSW CA).

Writing

J Willis, "Bail pending appeal after conviction and sentence on indictment" (2005) 29 Crim LJ 296–314.

[2.155] Bail after conviction at trial and unsuccessful appeal, pending special leave application to the High Court

Exceptional circumstances are to be shown:

Hayes v The Queen (1974) 48 ALJR 455;

Chamberlain v The Queen [No 1] (1983) 153 CLR 514; 46 ALR 608 (Brennan J);

Frugtniet v The Queen (1996) 71 ALJR 311 (Gaudron J).

The fact that a custodial sentence would have been all but served by the hearing of the application is an exceptional circumstance. Bail was granted in *Peters v The Queen* (1996) 71 ALJR 309 (Dawson J) and in *Marotta v The Queen* (1999) 73 ALJR 265; 160 ALR 525 (Callinan J).

[2.160] Contempt

Where an order of imprisonment has been made against a contemnor, bail is inappropriate: *Young v Registrar, Court of Appeal [No 2]* (1993) 71 A Crim R 121 (NSW CA).

[2.165] Delay

Exceptional delay of the trial date argues towards granting bail:

Tregurtha v The Queen (2002) 136 A Crim R 443 (WA, Barker J);

Mokbel v DPP (No 3) (2002) 133 A Crim R 141 (Vic, Kellam J).

The normal delay between arrest and committal, and committal and trial were said not to be exceptional circumstances in *R v Thinh Tang* (1995) 83 A Crim R 593 (Vic, Beach J).

[2.175] Terrorism

Haddara v DPP (2006) 159 A Crim R 489 (Vic, Osborn J): bail refused.

Thanayagamoorthy v DPP (2007) 212 FLR 326 (Vic, Bongiorno J): bail granted.

Raad v DPP (2007) 175 A Crim R 240 (Vic, Bongiorno J): bail refused.

[2.180] Murder

In cases of murder exceptional circumstances must be shown before granting bail:

Dodd v The Queen (2002) 135 A Crim R 545 (WA, McKechnie J);

R v Schmidt (2002) 133 A Crim R 194 (SA, Gray J);

R v Halas (2001) 81 SASR 1; 122 A Crim R 503 (Gray J).

Bail granted:

Farquar v Fleet (1989) 50 SASR 490; 41 A Crim R 40 (Legoe J);

R v Jemielita (1995) 12 WAR 362; 78 A Crim R 91 (FC);

DPP v Eaves (1987) 35 A Crim R 364 (NSW, Finlay J);

DPP v Pakis (1981) 3 A Crim R 132 (NSW, O'Brien CJ of Cr D).

[2.185] On arraignment bail is in the discretion of the judge

Lord Steyn when delivering the leading judgment in *R v Central Criminal Court; Ex parte Guney* [1996] AC 616; 2 All ER 705; 2 Cr App R 352 (HL) said:

> When a defendant who has not previously surrendered to custody is so arraigned he thereby surrenders to the custody of the court. From that moment the defendant's further detention lies solely within the discretion and power of the judge. Unless the judge grants bail the defendant will remain in custody pending and during his trial. This is a readily comprehensible system which causes no problems for the administration of justice.

[2.190] Justices appeal: bail in the discretion of the judge

In *R v Peehi* (1997) 41 NSWLR 476; 92 A Crim R 539 (CA) the appellant had appealed to the District Court from the sentence given by the local court. During the judge's reasons

Mr Peehi absconded. For that he was convicted by a jury of escape. Appeal dismissed. Once the appeal began the appellant was in the custody of the District Court.

[2.195] Surety

The court can have no regard to the character or antecedents of the proposed surety. In *R v Barrett* (1985) 16 A Crim R 123 O'Loughlin J said (at 125):

> In *Badger* (1843) 4 QB 468, 114 ER 975, Lord Denman CJ made it quite clear that the Court was not entitled to enter into:
>
> > An investigation as to the character or opinions of such bail, provided (the Court) is satisfied of their sufficiency to answer for the appearance of the party in the amount reasonably required for that purpose.
>
> Although *Badger's case* can not now be considered the law in the United Kingdom (by virtue of the introduction of the *Bail Act* in 1976), it must nevertheless, in my opinion, be regarded as the law in South Australia.

[2.200] Court review of bail

Legislation

Qld: *Bail Act 1980* s 8;

WA: *Bail Act 1982* ss 54 and 55;

Tas: *Bail Act 1994* s 24;

NT: *Bail Act* ss 34–36;

NSW: *Bail Act 1978* ss 63–67;

Vic: *Bail Act 1977* s 18A;

SA: *Bail Act 1985* s 15A;

ACT: *Bail Act 1992* ss 41–46;

NZ: *Crimes Act 1961* ss 379B and 397.

Cases

YSA v DPP(Vic) (2002) 133 A Crim R 368 (Vic CA);

Fernandez v DPP (Vic) (2002) 5 VR 374; 132 A Crim R 270 (CA, Full Bench);

R v Melbourne (2002) 132 A Crim R 318 (SA, Bleby J);

Scrivener v DPP (2001) 125 A Crim R 279 (Qld CA);

Farquar v Fleet (1989) 50 SASR 490; 41 A Crim R 40 (Legoe J);

See also

Beljajev v DPP (unreported, Vic FC, 8 August 1991);

R v Tang (1995) 83 A Crim R 593 (Vic SC, Beach J);

R v Bey (1996) 86 A Crim R 304 (Vic SC, Beach J);

R v Radev (1999) 108 A Crim R 121 (Vic SC, Beach J);

Re Asmar [2005] VSC 487;

R v Naidu [2011] VSC 170.

N Gobbo, "Drugs, Bail and Exceptional Circumstances" December 1998 Law Inst J (Vic) 61.

[2.205] Offence committed while on bail

An offence committed while on bail (or parole) calls for significant punishment.

Bail

R v Richards [1981] 2 NSWLR 264 (CCA);

Pop v The Queen (2000) 116 A Crim R 398 (WA CCA);

R v Wilde; Ex parte Attorney-General (Qld) (2002) 135 A Crim R 538 at 540 [15] (Qld CA).

Parole

R v Readman (1990) 47 A Crim R 181 (NSW CCA);

R v Moffitt (1990) 20 NSWLR 114; 49 A Crim R 20 (CCA);

R v Schofield (2003) 138 A Crim R 19 (NSW CCA).

[2.210] Surety

A bail surety is a person who guarantees that the accused will attend court. A promise of money is usually part of the guarantee.

In *Mokbel v DPP* (2006) 14 VR 405; 170 A Crim R 179 (Gillard J) Antonios Mokbel had absconded during a drug trial. His sister-in-law, Renate Mokbel, had been his surety and guaranteed $1m. She failed in her application to have the bail conditions altered.

BASHA INQUIRY

[2.400] Meaning

The expression is directed to the power of a judge to allow the defence a dry run cross-examination in the absence of the jury when a witness was not called at committal.

In *R v Basha* (1989) 39 A Crim R 337 Hunt J said (at 339):

> I have myself in the past permitted an accused to cross-examine a new witness on a voir dire before he was called in the trial. We have been told that other judges have also done so, prior to any evidence being called in the trial. Just how the prejudice is to be removed is for the Crown, not the courts, to determine. On the other hand, of course, the issue of whether the prejudice has in fact been removed will in the end be for the trial court, not the Crown, to decide.

Followed:

R v Sandford (1994) 33 NSWLR 172; 72 A Crim R 160 at 180–181, 190–191 (Hunt CJ at CL);

DPP v Bayly (1994) 63 SASR 97; 75 A Crim R 549; 126 ALR 290 at 119–122, 571–573 (Olsson J);

DPP v Bayly (No 2) (1994) 75 A Crim R 575 at 578 (SA, Olsson J);

DPP v Denysenko [1998] 1 VR 312; (1997) 91 A Crim R 313 at 316–317, 317–318 (CA).

Strictly speaking, such cross-examination is not a voir dire: see *R v Sandford* (1994) 37 NSWLR 172; 72 A Crim R 160 (CCA).

[2.405] Not appropriate where trial would be unfair

A Basha inquiry is not appropriate where the accused "would suffer unacceptable disadvantage or prejudice if now tried on the indictment, in the sense that there is a serious risk that her right not to be tried unfairly would be infringed; see *Barron v Attorney-General*": *R v Hiroti* (1997) 95 A Crim R 72; 140 FLR 366 at 84, 377 (NT, Kearney J).

The indictment was stayed until further committal.

[2.410] Where witness has not given evidence on a certain topic

In *R v Kennedy* (1997) 94 A Crim R 341 (NSW, Hunt CJ at CL) the accused was charged with sexual offences against a girl, then 13 years old. She had not spoken about dates or places. His Honour ruled (at 351):

> There is available a procedure, now known as a *Basha* inquiry, by which the applicant would be able to cross-examine the complainant in order to investigate, in advance of her evidence at the trial, whether she can say more than the police have so far been able to extract from her as to when and where these offences are alleged to have occurred. Provided that the investigation is strictly limited to those two issues, the procedure would be both permissible and useful.

[2.415] Effect of legislation curtailing committal witnesses

The result of legislation curtailing committal witnesses may result in a stay of the trial or a Basha inquiry.

In *DPP v Tanswell* (1998) 103 A Crim R 205 (NSW CA) Sheller JA giving the leading judgment said (at 211):

> There was nothing in the legislation to suggest that the legislature intended to allow the defendant to override the informant's discretion by forcing the informant to tender more witnesses than the informant in the proper exercise of that discretion, decided would be tendered. The right of the informant to decide what witnesses would be tendered in the informant's case was well entrenched. A stay of the proceedings might result if the discretion was not properly exercised and the prosecutor's failure to call a witness in the committal proceedings created a prejudice which was not otherwise cured by the Crown: *R v Basha* (1989) 39 A Crim R 337 at 341.

BATTERED WOMAN SYNDROME

[2.600] Definition

Battered woman syndrome is not a fomal defence. In *R v Runjanjic* (1991) 56 SASR 114; 53 A Crim R 362 (CCA) the accused were under the dominion of a man named Hill. He required them to detain a third woman, Patricia Hunter. After he had beaten Hunter, Hill later died. The accused were convicted of false imprisonment and causing grievous bodily harm. The trial judge had disallowed expert evidence of the syndrome.

King CJ said (at 118; 366):

> I gather from the literature that the idea of the battered woman syndrome was pioneered by Dr Lenore Walker in a publication entitled *The Battered Woman* (1979). She is the author of *The Battered Woman Syndrome* (1984). It now appears to be a recognised facet of clinical psychology in the United States and Canada. It emerges from the literature that methodical studies by trained psychologists of situations of domestic violence have revealed typical patterns of behaviour on the part of the male batterer and the female victim, and typical responses on the part of the female victim. It has been revealed, so it appears, that women who have suffered habitual domestic violence are typically affected psychologically to the extent that their reactions and responses differ from those which might be expected by persons who lack the advantage of an acquaintance with the result of those studies.
>
> Repeated acts of violence, alternating very often with phases of kindness and loving behaviour, commonly leave the battered woman in a psychological condition described as "learned helplessness". She cannot predict or control the occurrence of acute outbreaks of violence and often clings to the hope that the kind and loving phases will become the norm. This is often reinforced by financial dependence, children and feelings of guilt. The battered woman rarely seeks outside help because of fear of further violence. It is not uncommon for such women to experience feelings for their mate which they describe as love. There is often an all pervasive feeling that it is impossible to escape the dominance and violence of the mate. There is a sense of constant fear with a perceived inability to escape the situation.

In *R v Chhay* (1994) 72 A Crim R 1 (NSW CCA) Gleeson CJ said (at 11):

> To quote a recent article commenting on the decision in *Ahluwalia* [1992] 4 All ER 889; 96 Cr App R 133 (D Nicholson and R Sanghvi, "Battered Women and Provocation" (1993) Crim LR 728 at 730):
>
> > According to research and many cases themselves, battered women tend not to react with instant violence to taunts or violence as men tend to do. For one thing, they learn that this is likely to lead to a bigger beating. Instead, they typically respond by suffering a "slow-burn" of fear, despair and anger which eventually erupts into the killing of their batterer, usually when he is asleep, drunk or otherwise indisposed.

[2.605] Avoiding stereotypes

In *Osland v The Queen* (1998) 197 CLR 316; 159 ALR 170 Kirby J said (at [158]):

> Avoiding stereotypes: Care needs to be taken in the use of language and in conceptualising the problem presented by evidence tendered to exculpate an accused of a serious crime on the ground of a pre-existing battering or abusive relationship. As evidence of the neutrality of the law it should avoid, as far as possible, categories expressed in sex specific or otherwise discriminatory terms. Such categories tend to reinforce stereotypes. They divert application from the fundamental problem which evokes a legal response to what is assumed to be the typical case.

And later (at [161]):

> As a construct, BWS may misrepresent many women's experiences of violence. It is based largely on the experiences of Caucasian women of a particular social background. Their "passive" responses may be different from those of women with different economic or ethnic backgrounds. This was recognised by the Supreme Court of Canada in *R v Malott* (1998) 155 DLR (4th) 513 at 528.
>
> It is possible that those women who are unable to fit themselves within the stereotype of a victimised, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalised for failing to accord with the stereotypical image of the archetypal battered woman.

[2.610] Expert evidence is to be admitted

In *Lavalee v The Queen* [1990] 1 SCR 852; 55 CCC (3d) 97 the Supreme Court of Canada said (at 871–872; 112):

> Expert evidence on the psychological effect of battering on wives and common law partners must it seems to me be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalisation? We would expect the woman to pack her bags and go. Where is her self respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

In *Osland v The Queen* (1998) 197 CLR 316; 159 ALR 170 Gaudron and Gummow JJ said:

> [56] [E]xpert evidence of heightened arousal or awareness of danger may be directly relevant to self-defence, particularly to the question whether the battered woman believed that she was at risk of death or serious bodily harm and that her actions were necessary to avoid that risk. And, of course, the history of the particular relationship may bear on the reasonableness of that belief.
>
> [57] Given that the ordinary person is likely to approach the evidence of a battered woman without knowledge of her heightened perception of danger, the impact of fear on her thinking, her fear of telling others of her predicament and her belief that she can't escape from the relationship, it must now be accepted that the battered wife syndrome is a proper matter for expert evidence. Such evidence has been received in South Australia, New South Wales, England and the United States of America. And in *R v Lavallee* [1990] 1 SCR 852; 55 CCC (3d) 97 the Supreme Court of Canada accepted that the battered wife syndrome was a proper matter for expert evidence.
>
> [58] As with expert evidence generally, a trial judge should direct the jury that it should decide whether it accepts evidence given with respect to the battered wife syndrome. As was pointed out in *R v Lavellee* [1990] 1 SCR 852; 55 CCC (3d) 97, however, the issue is not simply whether the accused is a battered woman. Rather, the issue is usually whether she acted in self-defence and, if not, whether she acted under provocation. They are issues which arise in the factual context of the particular case. If it is not otherwise obvious as to how the evidence of battered wife syndrome may be used, it should be related to those issues in the factual context in which they occur.

Kirby J said (at [167]):

> [E]xpert testimony about the general dynamics of abusive relationships is admissible if relevant to the issues in the trial and proved by a qualified expert. The greatest relevance of such evidence will usually concern the process of "traumatic bonding" which may occur in abusive relationships. This phenomenon has been observed in the circumstances to which evidence of BWS may relate. But it has also been described as between battered children and their parents, hostages and their captors and prisoners in a concentration camp and their guards.

Other cases

R v J (1994) 75 A Crim R 522 (Vic CCA);

R v Singleton (1994) 72 A Crim R 117 (NSW, Irvine J);

R v Malott [1998] 1 SCR 123; 155 DLR (4th) 513; 21 CCC (3d) 456 (SCC).

Issues are self defence, provocation and duress

In *R v Runjanjic* (1991) 56 SASR 114; 53 A Crim R 362 (CCA) King CJ said (at 122; 370):

> I can see no distinction in principle between the admission of expert evidence of the battered woman syndrome on the issues of self defence and provocation and on the issue of duress.

See also

Osland v The Queen (1998) 197 CLR 316; 159 ALR 170 (HC) per Gaudron and Gummow JJ (at [58]).

[2.615] Self defence

Self defence was an issue in:

- *R v Lavalee* [1990] 1 SCR 852; 55 CCC (3d) 97 (SCC) where the accused shot dead her retreating male partner who had assaulted and threatened her;
- *R v Chhay* (1994) 72 A Crim R 1 (NSW CCA) in which the trial judge had directed the jury on self defence and provocation. The accused was convicted of murder. The appeal was allowed because the direction on provocation had been wrong. Note however that the Court of Appeal did not say that self defence should not have been left to the jury;
- *Secretary v The Queen* (1996) 5 NTLR 96; 107 NTR 1; 131 FLR 124; 86 A Crim R 119 (CCA) in which the accused shot dead her sleeping husband. The Court of Criminal Appeal found the trial judge was wrong not to have left self defence to the jury; (On retrial she was acquitted of all charges.)
- *R v Graveline* [2006] 1 SCR 609; 266 DLR (4th) 42; 207 CCC (3rd) 481 (SCC). The judge directed the jury on self defence though such a proposition was weak. Automatism was the proper defence. The accused was properly acquitted.

[2.620] Provocation

Provocation was used as a defence in:

R v Ahluwalia [1992] 4 All ER 889; 96 Cr App R 133 (CA).

R v Chhay (1994) 72 A Crim R 1 (NSW CCA).

R v Thornton (No 2) [1996] 2 All ER 1023; [1996] 2 All ER 1023; [1996] 2 Cr App R 108 (CA).

See also

Provocation at [16.7800].

[2.625] Duress

Duress (and compulsion under the Criminal Code s 20) was held to be a defence in *Rice v McDonald* (2000) 113 A Crim R 75 (Tas, Slicer J).

See also

Duress at [4.5900].

[2.630] Property offences

In *R v Lorenz* (1998) 146 FLR 369 (ACT) Crispin J held that the battered woman syndrome was no defence to thefts from a supermarket.

In *Rice v McDonald* (2000) 113 A Crim R 75 (Tas) Slicer J held that the syndrome was a defence to stealing and making a false report to police.

[2.635] Sentence

R v Casotti (1994) 74 A Crim R 294 (Vic CCA);

R v MacKenzie [2002] 1 Qd R 410; (2000) 113 A Crim R 534 (CA);

[4.335] Date of death

See also

Causation (Year and a day rule) at [3.770].

DECLARATION

[4.500] Definition

A declaration is the judgment of a superior court on law or rights.

[4.505] Extent of remedy

In *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564; 106 ALR 11; 59 A Crim R 255 Mason CJ, Dawson, Toohey and Gaudron JJ said (at 581–582 (CLR), 22 (ALR)):

> It is now accepted that superior courts have inherent power to grant declaratory relief. It is a discretionary power which "[i]t is neither possible nor desirable to fetter … by laying down rules as to the manner of its exercise". (*Forster v Jododex Austr Pty Ltd* (1972) 127 CLR 421, at 437, per Gibbs J). However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions (see *In re Judiciary and Navigation Acts* (1921) 29 CLR 257). The person seeking relief must have "a real interest" (*Forster* (1972) 127 CLR, at p 437, per Gibbs J; *Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd* [1921] 2 AC 438, at p 448, per Lord Dunedin) and relief will not be granted if the question "is purely hypothetical", if relief is "claimed in relation to circumstances that [have] not occurred and might never happen" (*University of NSW v Moorhouse* (1975) 133 CLR 1 at p 10, per Gibbs J) or if "the Court's declaration will produce no foreseeable consequences for the parties" (*Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at p 188, per Mason J; see also p 189, per Aickin J; 18 ALR 55, at pp 69, 71 respectively).

An account of *Sankey v Whitlam* (1978) 142 CLR 1; 21 ALR 505 is in *Rozenes v Beljajev* (1995) 1 VR 533; 126 ALR 481 (FC) in which the court said (at 569–570; 518):

> In *Sankey* (1978) 142 CLR 1 the High Court had to consider whether it was appropriate for declaratory relief to go in the course of committal proceedings on private informations in relation to a claim that certain Crown documents were privileged from production pursuant to the informant's subpoena. The court confirmed the wide power to grant declaratory relief (see per Gibbs ACJ at 25-6, Stephen J at 79-80, Mason J at 81-83 and Aickin J at 103 agreeing with Stephen J) including relief in respect of committal proceedings. The difficult question was whether in the circumstances declaratory relief might go in relation to a matter of evidence. Gibbs ACJ put the question thus at 25:
>
> > The question whether the power to grant declaratory relief extends to enable the court to declare that particular evidence is admissible or inadmissible, or that the evidence led by an informant is sufficient to make out a prima facie case, is a much more difficult one, because it is not so clear, in such cases, that the plaintiff has any "right", even within the widest sense of that word, in respect of which he can seek relief. Grave doubts on this point were expressed by Hutley JA (with whom Moffitt P agreed) in *Acs v Anderson* [1975] 1 NSWLR 212 at pp 215-217, but I need not consider whether there would be power to grant declaratory relief in all such cases.
>
> The question in *Acs* [1975] 1 NSWLR 212 arose in the course of a committal and concerned the power of a liquidator to waive legal professional privilege concerning conversations of a former solicitor of the company. The magistrate having ruled against waiver, a declaration was sought that

> the liquidator had power to waive the privilege. The case was decided on the basis that, even if there be power to grant a declaration on such a point in the course of a committal proceeding, the declaration should be refused, as the importance or significance of the evidence was unclear: (see per Hutley JA at 216 and Mahoney JA at 219).

In *Sankey* (1978) 142 CLR 1 Gibbs ACJ continued as follows at 25:

> In my opinion it would be within power to grant a declaration of the kind sought by Mr Sankey in the present case. It seems to me that when an informant has properly required the production on subpoena of an admissible document, and the Commonwealth has objected to the production of the document on the ground that the public interest requires that it should not be disclosed, it is possible to regard the Commonwealth as asserting, against the informant as well as against the court, a "right" to withhold production of the document, and that in those circumstances the court has power to grant declaratory relief if the objection is held to be untenable.

[4.510] Exceptional cases

The court will limit its intervention to exceptional cases. In *Anderson v Attorney-General (NSW)* (1987) 10 NSWLR 198; 27 A Crim R 103 (CA), Kirby P said (at 200):

> The jurisdiction of the Court to make a declaration of the law applicable to the indictment against the claimant was not disputed by the Attorney-General. However, the courts' disinclination to do so in criminal cases, particularly in circumstances where proceedings are in charge of a judge who at this very moment is beginning the trial, has been frequently stated. Courts such as this will limit their intervention to special cases. They will intervene only in the "most exceptional" circumstances: see Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 at 25, or for "some special reason" (ibid, Mason J at 82); see also *Bacon v Rose* [1972] 2 NSWLR 793 at 797; *Bourke v Hamilton* [1977] 1 NSWLR 470 at 479; *Barton v The Queen* (1980) 147 CLR 75 at 104 and *Lamb v Moss* (1983) 49 ALR 533 at 545.

Samuels JA (at 204) and McHugh JA (at 206) joined those sentiments.

In *R (Rusbridger) v Attorney-General* [2004] 1 AC 357; [2003] 3 WLR 232; [2003] 3 All ER 784 (HL) the Guardian newspaper sought a declaration that it would not commit treason by advocating a republic to replace the monarchy. Declaration refused. Case not exceptional enough.

See also

Biggs v DPP (1997) 17 WAR 534; 95 A Crim R 349 (FC);

Coleman v DPP (2002) 5 VR 393; 132 A Crim R 255 (CA);

Tez v Longley (2004) 142 A Crim R 122 (NSW, Shaw J).

[4.515] Form of application

A form of application for declaration can be seen in *Ebatarinja v Deland* (1997) 92 A Crim R 370 (NT, Mildren J) (at 373):

3. A Declaration that no criminal proceedings for offences alleged to have occurred on the 21st day of February 1995 be taken against the plaintiff without the provision of an adequate interpreter.
4. A Declaration that no criminal proceedings for offences alleged to have occurred on the 2lst day of February 1995 be taken against the Plaintiff until he can be communicated with adequately.
5. Such other Declaration as this Honourable Court may deem fit.

DEFENCE

[4.700] How a defence is raised

In *R v Taylor* [1967] 2 NSWLR 278; 85 WN (Pt 1) NSW 392 (CCA) Moffitt J said (at 294; 399):

> [T]he "defence" must be raised by the accused in the sense that he must be able to point to evidence in either the Crown case or his own case from which it is open to the jury, by inference and not speculation, at least to infer that in fact he honestly believed the woman consented, but that once there is material to so raise the matter, the ultimate onus rests on the Crown, so that the principles applicable as to when a direction should be given and the directions which should be given as to onus of proof are the same principles as are applicable in respect of other so-called "defences", such as self-defence, the defence of automatism and provocation under the common law.

Approved:

Verdon v The Queen (1987) 30 A Crim R 388 (WA CCA) where Burt CJ said (at 391):

> [T]he statement of the law formulated by Moffitt J in *R v Taylor* [1967] 2 NSWLR 278; 85 WN (Pt 1) NSW 392 … is the law of the Code.

[4.705] Proof on balance of probabilities

Generally

In *Sodeman v The King* (1936) 55 CLR 192 Dixon J said (at 216):

> Where by statute or otherwise the burden of disproving facts or of proving a particular issue is thrown upon a party charged with a criminal offence, he is not required to satisfy the tribunal beyond reasonable doubt. It is sufficient if he satisfies them in the same manner and to the same extent as is required in the proof of a civil issue.

Application

R v Wilson (No 2) (2007) 169 A Crim R 553 at 567 [69] (SA CCA);

R v Tween [1965] VR 687 (FC) per Pape J at 701.

[4.710] Defence fairly supported by evidence but not fanciful

In *R v Tikos (No 1)* [1963] VR 285 (CCA) Sholl J said (at 289):

> [T]he trial judge is not bound to leave merely fanciful theories, which nothing in the evidence fairly supports, just in case counsel may later argue on an appeal that they ought to have been put. But anything which may conceivably be thought by a reasonable jury to be a serious possibility should be dealt with by the jury.

Followed:

R v Bozikis [1981] VR 587; (1980) 5 A Crim R 58 at 596, 76 (CCA).

In *R v Payne* [1970] Qd R 260 (CCA) the court said in a joint judgment (at 264):

> It is of course true that a judge is bound to direct the jury as to a defence which is supported by the evidence but is not advanced by the accused; … But this does not mean that a judge must search his mind for fanciful interpretations of the evidence in order to put them to the jury as possible defences, particularly if he is not asked to do so by counsel for the accused.

Approved:

R v Skerritt (2001) 119 A Crim R 510 at 516 [25] (CA).

In *R v Lovett* [1972] VR 413 (CCA) Little J, giving the judgment of the court, said that a trial judge is (at 419):

> [O]bliged to see that an issue of fact which is capable of providing a defence to the charge is put before the jury for their determination: vide *Mancini v DPP* [1942] AC 1 at pp 7-8; [1941] 3 All ER 272 ; *R v Lovesey* [1970] 1 QB 352 at 356; [1969] 2 All ER 1077.

In *Viro v The Queen* (1978) 141 CLR 88; 18 ALR 275 Gibbs J said (at 118):

> A judge, if any doubt as to whether there is sufficient material to raise such an issue should leave the issue to the jury.

See also

R v Howe (1958) 100 CLR 448 at 459;

Viro v The Queen (1978) 141 CLR 88; 18 ALR 275 at 117 (CLR);

R v Lane [1983] 2 VR 449 at 456 (CCA);

Zecevic v DPP (1987) 162 CLR 645; 25 A Crim R 163; 71 ALR 641 at 662–663, 665 (CLR);

R v Gillman (1994) 62 SASR 460 (CCA);

R v Hawes (1994) 35 NSWLR 294 (CCA).

[4.715] Duty of defence counsel

In *R v Youssef* (1990) 50 A Crim R 1 (NSW CCA) Hunt J, with whom the others agreed, said (at 3):

> In every case, the accused bears an *evidentiary* onus to point to or to produce evidence … from which it could be inferred that – as I would prefer to put it – there is at least a reasonable possibility that, for example, the act of the accused was accidental, or that it was provoked or done in self-defence: cf *Purkess v Crittenden* (1965) 114 CLR 164 at 168, 171.

Followed:

DPP v Olcer (2003) 143 A Crim R 337 at 341 [22] (Vic, Nathan J).

Both of the above were automatism cases.

[4.720] Defence to be negated

The prosecution must negative a so-called defence if such defence is raised in the evidence.

In *R v Abusafiah* (1991) 24 NSWLR 531; 56 A Crim R 424 (CCA), Hunt J delivering the leading judgment said (at 541; 435):

> [I]n all cases in which a so-called "defence" is raised by an accused (such as duress, self-defence or provocation), the issue is whether the Crown has eliminated any reasonable possibility that the accused acted under duress or in self-defence or under provocation, as the case may be.

Approved in the following duress cases:

R v Lanciana (1996) 84 A Crim R 268 at 271 (Vic CA);

R v Zaharias (2001) 122 A Crim R 586 at 598 [69] (Vic CA).

[4.725] Prosecution not to rebut fancy defences

The warning that the prosecution cannot rebut the remote defence comes from *Thompson v The King* [1918] AC 221; [1918–1919] All ER Rep 521; (1917) 13 Cr App R 61 (HL). Lord Sumner said (at 232; 526; 78):

> The prosecution cannot credit the defence with fancy defences in order to rebut them at the outset with some damning piece of prejudice.

Approved:

Killick v The Queen (1981) 147 CLR 565; 37 ALR 407 per Gibbs CJ, Murphy and Aickin JJ at 571;

Perry v The Queen (1982) 150 CLR 580 per Gibbs CJ at 588.

But the prosecution can lead evidence to rebut an anticipated defence.

R v J (1996) 88 A Crim R 399 (Vic CA) per Southwell AJA at 406.

That rebuttal evidence might show a criminal propensity. In *Makin v AG (NSW)* [1894] AC 57 (PC) Lord Hershell said (at 68):

> [T]he mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused.

[4.730] Onus of proof

Most defences must be disproved by the prosecution once they are raised by the evidence. Two exceptions are insanity and diminished responsibility. The defence must prove these exceptions on the balance of probabilities.

Uniform Evidence Acts s 141(2) gives legislative effect to this standard of proof.

> **141 Criminal proceedings: standard of proof**
>
> (2) In a criminal proceeding, the court is to find the case of a defendant proved if it is satisfied that the case has been proved on the balance of probabilities.

The term "criminal proceeding" is defined in Dictionary Part 1.

> ***criminal proceeding*** means a prosecution for an offence and includes:
>
> (a) a proceeding for the committal of a person for trial or sentence for an offence; and
>
> (b) a proceeding relating to bail;
>
> but does not include a prosecution for an offence that is a prescribed taxation offence within the meaning of Part III of the *Taxation Administration Act 1953*.

[4.735] Defence duty to disclose

Some legislation requires the defence to disclose some of its evidence to the prosecution. That duty is in addition to giving notice of alibi.

See also

Alibi at [1.3800]; and **Disclosure** at [4.2800].

DEFRAUDING

[4.900] Offences

Various statutes make defrauding an offence.

[4.905] Legislation

Cth: *Criminal Code Act 1995* ss 133.1 – 135.5; *Bankruptcy Act 1966* s 6, 263; *Corporations Law* s 596;

Qld: *Criminal Code* s 643;

WA: *Criminal Code* s 409;

Tas: *Criminal Code* ss 250–252, 255–257; *Evidence Act 1910* s 106;

NT: *Criminal Code* ss 227 (deception), 284 (conspiracy to defraud);

Vic: *Property Law Act 1958* ss 172–173;

SA: *Criminal Law Consolidation Act 1935* s 195;

ACT: *Criminal Code 2002* ss 325–336; *Crimes Act 1900* s 114D.

[4.910] Definitions

In *Welham v DPP* [1961] AC 103; [1960] 1 All ER 805; 44 Cr App R 124 (HL) Lord Radcliffe said (at 123; 808; 141):

> It requires a person as its object: that is, defrauding involves doing something to someone. Although in the nature of things it is almost invariably associated with the obtaining of an advantage for the person who commits the fraud, it is the effect upon the person who is the object of the fraud that ultimately determines its meaning.

Followed:

Scott v Metropolitan Police Commissioner [1975] AC 819; [1974] 3 All ER 1032; 60 Cr App R 124 (HL).

In *Spies v The Queen* (2000) 201 CLR 603; 173 ALR 529; 113 A Crim R 448, Gaudron, McHugh, Gummow and Hayne JJ said (at 630; 550; 470 [78]):

> The decision in *Scott* [1975] AC 819; [1974] 3 All ER 1032; 60 Cr App R 124 must mean that a person may also be defrauded without being deceived. It necessarily follows that, in an offence alleging "defrauding", deceit is not a necessary element of that offence.

The statute will determine whether dishonesty is an element of the offence: *Macleod v The Queen* (2003) 214 CLR 230; 197 ALR 333; 140 A Crim R 343.

[4.915] Examples

In *R v Iannelli* (2003) 175 FLR 96; 56 NSWLR 247; 139 A Crim R 1 (CCA) the appellant was convicted of defrauding the Commonwealth by failing to pay tax instalment deductions on companies she controlled. Held: (analyzing authorities) the evidence did not show offences. Appeal allowed. Acquittal entered.

[4.920] Other references

See also

Dishonesty at [4.3400]; **Property offences** at [16.6500]; and **White collar crime** at [23.300].

DELAY

[4.1100] Justice delayed is justice denied

In *R v Lawrence* [1982] AC 510; [1981] 1 All ER 974; 73 Cr App R 1 (HL) Lord Hailsham said (at 517; 975; 3):

> My Lords, it is a truism to say that justice delayed is justice denied. But it is not merely the anxiety and uncertainty in the life of the accused, whether on bail or remand, which are affected. Where there is delay the whole quality of justice deteriorates. Our system depends on the recollection of witnesses, conveyed to a jury by oral testimony. As the months pass, this recollection necessarily dims, and juries who are correctly directed not to convict unless they are assured of the reliability of the evidence for the prosecution, necessarily tend to acquit as this becomes less precise, and sometimes less reliable. This may also affect defence witnesses on the opposite side.

The delay in this motor accident case was 11 months.

In *R v Dupas* (2006) 14 VR 228; 170 A Crim R 172 (Coldrey J) the alleged murder was nine years before trial. His Honour, the trial judge, allowed a direct presentment without committal. A Basha inquiry would suffice. His Honour said (at 233; 177 [32]):

> The catchcry "justice delayed is justice denied" is not limited to a defence perspective.

In *R v Johannsen and Chambers* (1996) 87 A Crim R 126 (Qld CCA) the accused were charged in 1994 with a murder 20 years before. Much of the police brief was lost including early exculpatory statements of a now-important prosecution witness, the records of interview, police running sheets and notebooks and numerous related records of interview. The trial judge refused a permanent stay. The appeal was allowed and a permanent stay was granted.

[4.1105] Legislation

Some legislation provides that a person charged with a criminal offence is entitled to be tried without unreasonable delay.

Vic: *Charter of Human Rights and Responsibilities Act 2006* s 25(2)(c);

ACT: *Human Rights Act 2004* s 22(2)(c);

NZ: *New Zealand Bill of Rights Act 1990* s 23(2).

See also

Abuse of process at [1.1000]; and **Stay** at [19.5900].

[4.1110] Delay caused by court processes

In *Guerra v Baptiste* [1996] 1 AC 397; [1996] 1 Cr App R 533; [1995] 4 All ER 533 (PC) the appellant had been sentenced to death in Trinidad and Tobago. Appeal processes had taken considerable time. Lord Goff said (at 413; 542; 592):

> It follows that the mere fact that the appellant takes advantage of the appellate procedures open to him will not of itself debar him from claiming that the delay involved has contributed to the breach of his constitutional rights. But if the delay has occurred as a result of exploiting the available procedures in a manner which can be described as frivolous or an abuse of the court's process, the delay incurred cannot be attributed to the appellate process and is to be disregarded.

See also

Flowers v The Queen [2000] 1 WLR 2396 (PC).

[4.1115] Stay: general principles

In *Jago v District Court (NSW)* (1989) 168 CLR 23; 41 A Crim R 307; 87 ALR 577; [1989] HCA 46 Mason CJ said (at 33–34; 583–584):

> The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused …
>
> In any event, a permanent stay should be ordered only in an extreme case and the making of such an order on the basis of delay alone will accordingly be very rare.

There are numerous reasons that delay in bringing a prosecution can prejudice an accused. Most importantly it diminishes the opportunity for the accused to mount what is normally the strongest defence in our system of law: alibi. Accused faced with the prospect of being required to trace their whereabouts years, and often decades earlier, are often confronted with insurmountable problems in establishing and proving their location at a particular point in time.

More generally, the frailty of the human memory and the reduced ability to obtain relevant documentary and other exculpatory evidence means that the likelihood of a court being able to accurately determine the circumstances surrounding an alleged event diminishes with the passage of time. A particular problem is the inability to cross-examine in detail prosecution witnesses: *Carver v Attorney General (NSW)* (1987) 29 A Crim R 24. Delay necessarily increases the chance of an inaccurate result.

McHugh JA in *Aboud v Attorney General (NSW)* (1987) 10 NSWLR 671; 31 A Crim R 127 stressed that a speedy trial is also desirable in order to miminise the length of pre-trial incarceration; reduce the anxiety of the accused and minimise the damage to accused's reputation and economic interests. Thus, there are sound reasons for the existence of the right to be tried without unreasonable delay - substantive justice requires trials to occur as quickly as possible after the event.

Yet, this right too is given lip service by the courts, so much so that it is the aspect of the right to a fair trial which is most regularly disregarded by the legal system. In *Jago v District Court (NSW)* (1989) 168 CLR 23; 41 A Crim R 307; 87 ALR 577; [1989] HCA 46, Brennan J, at 49, noted that there are sound justifications for granting a stay on the basis of unreasonable delay:

> When serious delay is attributable to the prosecution and an accused has been prejudiced thereby, the courts are tempted to offer the remedy of a permanent stay.

Despite this, His Honour, at 49, significantly limited the circumstances where a stay could be granted. A stay is only appropriate where the accused can show that:

> The lapse of time is such that any trial is necessarily unfair so that any conviction would bring the administration of justice into disrepute.

The right to be tried without unreasonable delay has only be exercised in little more than a handful of cases, casting into doubt the substabtive commitment to the principle. A Productivity Commission report in early 2010 revealed that only one Australian jurisdiction (Western Australia) met the generous national benchmark of finalising cases within two years: Productivity Commission, "Report on Government Services 2010" (2010): http://www.pc.gov.au/__data/assets/pdf_file/0004/93928/24-chapter7.pdf. In Victoria and New South Wales the delay between charging an accused and the trial is more than two years in approximately 10 per cent of cases.

[4.1120] Application of stay principles

The cases where a stay was ordered are:

R v Littler (2001) 120 A Crim R 512 (NSW CCA);

Salmat Document Management Solutions Pty Ltd v The Queen (2006) 199 FLR 46; [2006] WASC 65;

R v Smith (2000) 117 A Crim R 1; [2000] QCA 443;

R v Davis (1995) 57 FCR 512; 81 A Crim R 156 (FCA);

R v Johanssen (1996) 87 A Crim R 126 (Qld CA);

Ross v Tran (1996) 87 A Crim R 144 (Vic, Nathan J);

R v Aitchison (1996) 90 A Crim R 448 (ACT, Higgins J);

Commonwealth Service Delivery Agency v Bourke (1999) 75 SASR 299; [1999] SASC 154;

R v Reeves (1994) 122 ACTR 1; 121 FLR 393.

Examples of cases where there was held to be not to be overwhelming prejudice include:

Longman v The Queen (1989) 168 CLR 79; 43 A Crim R 463; 64 ALJR 73; 89 ALR 161; [1989] HCA 60;

Breedon v The Queen (1995) 124 FLR 328 (NT, Angel J);

Austin v The Queen (1995) 14 WAR 484; 84 A Crim R 374 (Owen J);

Aitchison v DPP (1996) 135 FLR 217; 90 A Crim R 448 (ACT, Higgins J);

R v Gray (1997) 70 SASR 62 (Bollen AJ).

R v F J L [2014] VSCA 57

Delay due to absconding:

R v Shore (1992) 66 A Crim R 37 (NSW CCA).

[4.1125] Where a stay is refused a jury warning may be necessary

In *DPP v Tokai* [1996] AC 856; [1996] 3 WLR 149 (PC) the Board advised (at 867; 157):

> If the trial judge does not grant a stay, it will be his duty in directing the jury to bring to their attention all matters arising out of the delay which tell in favour of the accused. If he fails to do

> that satisfactorily the appeal process is available to put right any injustice which may have resulted from the failure, as in *R v Dutton* [1994] Crim LR 910.

In *Charles v The State* [2000] 1 WLR 384 (PC) the Board advised (at 390–391):

> If the trial is allowed to proceed after a long delay it is important that the defendant should be given such assistance as is reasonably within the power of the court and the prosecution to deal with difficulties caused by the delay and that the jury should be given sufficiently firm and clear direction as to such difficulties caused by the delay.

The High Court has said that a judge must give any warning "necessary to avoid a perceptible risk of miscarriage arising from the circumstances of the case": *Longman v The Queen* (1989) 168 CLR 79; 43 A Crim R 463; 64 ALJR 73; 89 ALR 161; [1989] HCA 60 at 86, 167 per Brennan, Dawson and Toohey JJ. They were dealing with delay. The judge must give a warning and not just a comment: *Crampton v The Queen* (2000) 206 CLR 161; 75 ALJR 133; 117 A Crim R 222; 176 ALR 369.

R v Liddy (2002) 81 SASR 22 (CCA) was a sexual offence case. The accused was a magistrate who had visited sexual indignities on a number of boys. There was substantial delay in complaint. Mullighan J, with whom the others agreed on this point, examined the details of the trial judges warning to the jury. His Honour held that the directions were proper (at 76–83 [198] – [211]).

[4.1130] Difficulty in testing prosecution witnesses on credibility

In *R v PY* (1999) 105 A Crim R 505 (NT CCA) the court said in a joint judgment (at 509):

> In many cases where the prosecution case is principally that of the word of one witness against the word of the accused, the accused will often be able to do little more than deny the charges, and test the credibility of the Crown's principal witness on what may appear to be peripheral issues. In cases involving long delay, the ability of the accused to test the Crown's principal witness on credibility issues is likely to be affected by the inability of the accused to recall events or conversations, or to gather evidence, including documentary evidence which may be of assistance to his defence. The full significance of such delay is not likely to be appreciated by jurors without instruction by the trial judge.

[4.1135] Possible alibi lost by delay

In *Jones v The Queen* (1997) 191 CLR 439; 71 ALJR 538;; 98 A Crim R 107 143 ALR 52 Gaudron, McHugh and Gummow JJ said (at 455; 610; 120):

> The possibility of finding a witness or witnesses with a clear recollection of the relevant days inevitably became more remote as the delay in making the complaint became greater …
>
> As a result, the appellant may have been deprived of a cast iron alibi that would have brought about his acquittal.

In *R v PY* (1999) 105 A Crim R 505 (NT CCA) the court said in a joint judgment (at 509):

> Due to the delay, the complainant may be unable to specify with accuracy the date and time of the alleged crime, and this may prevent the accused from establishing an alibi.

[4.1140] Judge's warning to the jury: propositions

In *R v Johnston* (1998) 45 NSWLR 362 (CCA), Spigelman CJ, delivering the leading judgment set out the following seven propositions (at 375):

> A review of those authorities suggest the following propositions relevant to the determination of this case:
>
> (i) Whenever it appears to a trial judge that delay whether occasioned by delay in reporting a crime or otherwise, may have affected the fairness of a trial, he or she should make such comments and give such warnings as will ensure that the trial is fair.

Parliament. The common law has abundant riches; there may we find what Byles J called "the justice of the common law" (*Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180 at p 194).

Applied:

Tran v MIMIA (2003) 126 FCR 199 at 202 [9] (Finkelstein J).

In *Furnell v Whangarei High Schools Board* [1973] AC 660; [1973] 1 All ER 400 (PC) Lord Morris of Borth-y-Gest repeated some of his earlier metaphor. His Lordship said (at 673; 412):

Natural justice is but fairness writ large and juridically. It has been described as "fair play in action".

[14.310] Act in good faith

In *Sydney Municipal Council v Campbell* [1925] AC 388 (PC), Duff J said (at 343):

A body such as the Municipal Council of Sydney, authorised to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes, and if it attempts to do so, the courts will interfere.

Approved:

Werribee Council v Kerr (1928) 42 CLR 1 per Knox CJ;

R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 per Aicken J.

[14.315] No-one should be judge in his own case

Latin: nemo debet esse judex in propria sua causa.

In *Dickason v Edwards* (1910) 10 CLR 243, Griffiths CJ said (at 250):

It is, of course, a general rule of natural fair play that a man cannot be judge in his own case. In the case of statutory tribunals that rule is absolute, unless the statute provides, as it does in some cases, that the person who is only formally a party may nevertheless sit on the tribunal.

Thus the judge must not have a financial interest, for example, holding shares in a party: *Dimes v Grand Junction Canal* (1852) 3 HL Cas 759.

[14.320] An accuser must not be a judge

Where a tribunal which judges the case has also laid the charge, its decision is apt to be set aside. Examples are:

R v Optical Board of Registration; Ex parte Qurban [1933] SASR 1 at 8, 12-13 (FC);

R v Medical Board of SA; Ex parte S (1976) 14 SASR 360 (FC).

Refusal to set aside:

Re Medical Board (WA); Ex parte P (2001) 24 WAR 127 (Murray J).

[14.325] Natural justice before tribunals

In *Russell v Duke of Norfolk* [1949] 1 All ER 109 (CA) the plaintiff had been warned off racecourses and his trainer's licence revoked. His civil jury action against the Jockey Club failed. He appealed and lost that too. Tucker LJ said at 118:

There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.

Approved:

R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group (1969) 112 CLR 546 at 562;

NCSC v News Corp (1984) 156 CLR 296 at 311–312;

O'Rourke v Miller (1985) 156 CLR 342 at 535;

Kioa v West (1985) 159 CLR 550; 60 ALJR 113; 62 ALR 321 at 613 (CLR) per Brennan J;

R v Chairman of Parole Board of NT (1986) 43 NTR 13 (FC).

[14.330] The expression "procedural fairness" is more apt

In *Kioa v West* (1985) 159 CLR 550; 60 ALJR 113; 62 ALR 321 Mason J said (at 584–585; 346–347):

What is appropriate in terms of natural justice depends on the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting …

In this respect the expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.

See also

Penelope Pether, "We say the law is too important just to get one kid" (1999) 21 *Sydney Law Review* 114-123.

[14.335] Prohibition may be a remedy for denial

In *Magistrates' Court (Vic) v Murphy* [1997] 2 VR 186; 89 A Crim R 403 (CA) Charles JA said (at 213; 432–433):

It is clearly the law that prohibition is available to restrain the continuation of legal proceedings conducted in such a way as to deny natural justice: *R v Kent Police Authority; Ex parte Godden* [1971] 2 QB 662; *Stollery v Greyhound Racing Control Board* (1972) 128 CLR 509; *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374; *Craig v South Australia* (1995) 184 CLR 163 at 175-6. As Sheller JA said in *Chow v Director of Public Prosecutions* (1992) 28 NSWLR 593 at 618, "A classic case for intervention by way of prohibition is that where a person proposes to sit in a judicial capacity in breach, by reason of partiality, of the rules of natural justice", in reliance upon *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248 at 258-63.

See also

Audi alterem partem at [1.7000]; **Bias** at [2.1800]; **Coroner** at [3.7500]; **Dietrich** at [4.2100]; **Prerogative writ** at [16.3500]; **Procedural fairness** at [16.5700]; and **Prohibition** at [16.6100].

NECESSITY

[14.500] Necessity is a defence

According to Young CJ and King J in *R v Loughnan* [1981] VR 443 (CCA) the defence of necessity at common law involves the following elements (at 448):

> [T]he criminal act must have been done only in order to avoid certain consequences which would have inflicted irreparable evil upon the accused or upon others whom he was bound to protect …
>
> … the accused must honestly believe on reasonable grounds that he was placed in a situation of imminent peril…
>
> … the acts done to avoid the imminent peril must not be out of proportion to the peril to be avoided.

The facts constituting the defence must be evident to the actor at the time of the commission of the offence: *Limbo v Little* (1989) 65 NTR 19; 98 FLR 421; 45 A Crim R 61 at 46–48, 448–449, 87–88 (CA).

In *R v Rogers* (1996) 86 A Crim R 542 (NSW CCA) Gleeson CJ said (at 546):

> The corollary of the notion that the defence of necessity exists to meet cases where the circumstances overwhelmingly impel disobedience to the law is that the law cannot leave people free to choose for themselves which laws they will obey, or to construct and apply their own set of values inconsistent with those implicit in the law. Nor can the law encourage juries to exercise a power to dispense with compliance with the law where they consider disobedience to be reasonable, on the ground that the conduct of an accused person serves some value higher than that implicit in the law which is disobeyed.

Approved:

Mark v Henshaw (1998) 85 FCR 555; 101 A Crim R 122; 155 ALR 118 (FCA) in a joint judgment (at 559; 121; 126).

See also, *Re A (Children)* (2000) 9 BHRC 261; 57 BMLR 1; [2001] Fam 147 where necessity was successfully used as a defence to justify the medical killing of one conjoined twin to save the other.

[14.505] Cases where the defence has been found not to appear on the facts

In the following cases, necessity was argued but held not to apply:

Police v Bayley (2007) 96 SASR 555; 48 MVR 20 (David J): The respondent drove dangerously to escape a car driven by people with whom he had argued earlier. The appeal was dismissed: *Bayley v Police* (2007) 99 SASR 413; 178 A Crim R 202; 49 MVR 376 (CA) in which the court said that the defence is a rare one;

Clarkson v The Queen (2007) 209 FLR 387; 171 A Crim R 1 (NSW CCA): passports and drivers licences in false names to mask his identity from gangland threats;

R v Quayle [2005] 1 WLR 3642; [2005] 2 Cr App R 527; [2006] 1 All ER 988 (CA): ill people produce cannabis to allay pain;

R v Japaljarri (2002) 134 A Crim R 261 (Vic CA): murder;

R v Latimer [2001] 1 SCR 3; (2001) 193 DLR (4th) 577; 150 CCC (3d) 129 (SCC): father's second degree murder of daughter with cerebral palsy but not terminally ill;

R v Lorenz (1998) 146 FLR 369 ACT, Crispin J: theft from supermarket, battered woman syndrome no defence;

R v Rogers (1996) 86 A Crim R 542 (NSW CCA): escape;

Limbo v Little (1989) 65 NTR 19; 98 FLR 421; 45 A Crim R 61 (CA): trespass;

R v Dixon-Jenkins (1985) 14 A Crim R 372 at 378 (Vic CCA): threatening to cause damage;

R v Loughnan [1981] VR 443 (CCA): escape.

[14.510] Cases where the defence has been held to apply

R v Pommell [1995] 2 Cr App R 607 (CA);

Woodward v Morgan (1990) 10 MVR 474 (Vic, O'Bryan J): doctor speeding to help a sick patient;

White v Christian (1987) 9 NSWLR 427; 31 A Crim R 194 (NSW District Ct., Shadbolt DCJ): exceeding the speed limit when taking a sick son to hospital;

In *Perka v The Queen* [1984] 2 SCR 232 (SCC) a distressed vessel carrying drugs sought refuge in Canadian waters.

[14.520] Statutory application of the necessity defence

All of the code jurisdictions in Australia have a statutory verision of the necessity defence, which is in similar terms to the common law. For example, s 41 of the *Criminal Code 2002* (ACT) provides that:

> (1) A person is not criminally responsible for an offence if the person carries out the conduct required for the offence in response to circumstances of sudden or extraordinary emergency.
>
> (2) This section applies only if the person reasonably believes that –
>
> (a) circumstances of sudden or extraordinary emergency exist; and
>
> (b) committing the offence is the only reasonable way to deal with the emergency; and
>
> (c) the conduct is a reasonable response to the emergency.

Section 10.3 of the Criminal Code (Cth), s 322R(2) of the *Crimes Act 1958* (Vic) (which only applies to murder, manslaughter, and defensive homicide), and s 25 of the *Criminal Code* (WA) and s 25 of the Criminal Code (Qld) is in similar terms. See also, Pt IIAA of the Criminal Code (NT).

See also

Defence at [4.700] and **Duress** at [4.5900].

NEGLIGENCE

[14.700] Introduction

Negligence gives rise to a number of different criminal offences.

[14.705] Medical negligence

Some legislation refers to acts of medical treatment.

Legislation

Qld: Criminal Code s 288;

WA: *Criminal Code* s 265.

Each section is the same. They provide:

> It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

Cases

The cases that courts apply to these sections derive from the common law.

In *R v Bateman* (1925) 19 Cr App R 8; [1925] All ER Rep 45 (CCA) a doctor delivered a baby which after a difficult labour was born dead. Many eminent doctors said that the actions were proper. He was convicted of manslaughter. The court allowed the appeal. The appeal turned on the proper directions to the jury. Hewart LCJ gave the judgment of the court. His Lordship said (at 11–12; 48):

> In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to crime, judges have used many epithets such as "culpable," "criminal," "gross," "wicked," "clear", "complete." But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety or others as to amount to a crime against the State and conduct deserving punishment.

And later (at 16; 51):

> It is desirable that, as far as possible, the explanation of criminal negligence to a jury should not be a mere question of epithets. It is, in a sense, a question of degree, and it is for the jury to draw the line, but there is a difference in kind between the negligence which gives right to compensation and the negligence which is a crime.

Approved:

R v Adomako [1995] 1 AC 71; [1994] 3 All ER 79; (1994) 99 Cr App R 362 (HL);

Akerele v The King [1943] AC 255; [1943] 1 All ER 367 (PC);

In *R v Miller* [1962] Qd R 594 (CCA) Sable J (at 599) referred with approval to an earlier unreported decision in which Mansfield CJ had said:

> [I]t may possibly be better that a direction in the terms given in *Bateman*'s case be followed in matters of this sort but I do not think it is essential.

In *Airedale Hospital Trustees v Bland* [1993] AC 789; [1993] 1 All ER 821 (HL) it was held that turning off a life support system was not a crime.

[14.710] Duty of persons in charge of dangerous things

Some legislation sets out the duty of a person in charge of a dangerous thing.

Legislation

Qld: Criminal Code s 289;

WA: *Criminal Code* s 266.

Each section is the same. They provide:

> It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety, or health of any person may be endangered, to use reasonable care and take reasonable precautions to avoid such danger; and he is held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty.

Cases

The common law applies to these sections as it did to the ones above.

Griffiths v The Queen (1994) 69 ALJR 77; 76 A Crim R 164; 125 ALR 545 was about one boy shooting his best friend by accident when they were out hunting. The High Court set the conviction aside. Brennan, Dawson and Gaudron JJ said (at 78–79; 547; 166):

> In order to establish criminal responsibility for causing a death under s 289, the Crown must prove that an accused was guilty of that degree of negligence which is punishable as manslaughter under the common law: *Callaghan v The Queen* (1952) 87 CLR 115 at 124; *R v Scarth* [1945] St R Qd 38.

Omodei v Western Australia (2006) 166 A Crim R 40 (WA, Johnson J) was an appeal from a magistrate's conviction. A father and son were hunting. The father's shot hit the son on the hand. The appeal was dismissed. His Honour said (at 54 [134]):

> [T]he question of foreseeability of serious harm or "accident" is relevant to whether or not criminal negligence is established.

In *R v Scarth* [1945] St R Qd 38 (CCA) Macrossan SPJ said (at 45–46):

> [T]he phrases "reasonable care" and "reasonable precautions" should be given the well-established meaning given to them by judges expounding the common law.

Dangerous thing:

In *R v Clark* (2007) 171 A Crim R 532 (Qld CA) the appellant had not properly fixed a harness to a woman who was riding a flying fox between trees. He was an employee of the company running that scheme. The victim fell 20 metres and was badly injured. The trial judge had directed on recklessness. Held: appeal against conviction dismissed. The failure to exercise reasonable care in this dangerous operation.

Pacino v The Queen (1998) 105 A Crim R 309 (WA CCA): dangerous dogs.

R v Stott and van Embden (2001) 123 A Crim R 359 (Qld CA): heroin injected into a victim.

R v Hodgetts and Jackson [1990] 1 Qd R 456; (1989) 44 A Crim R 320 (CCA): meat preservative put in coca cola can be expected to be drunk by a vagrant. He did and died.

Non-dangerous thing:

In *R v DDB* [2007] 1 Qd R 478; (2006) 166 A Crim R 543 (CA) a grandmother allowed her seven and nine-year-old grandsons to drive a tiny forklift. Grandfather had earlier given them careful instructions about it. The boys were familiar with vehicles. Held: the trial judge did not instruct the jury properly on recklessness. The forklift was not dangerous. Appeal against conviction allowed. Acquittal entered.

[14.715] Negligence causing injury or harm

Legislation recites the offence of negligence causing injury or harm. Their application is often in motor vehicle cases.

Legislation

Qld: Criminal Code s 328;

WA: *Criminal Code* s 304;

NT: *Criminal Code* ss 43AL and 174E;

NSW: *Crimes Act 1900* ss 54 and 212;

Vic: *Crimes Act 1958* s 24;

ACT: *Criminal Code 2002* (ACT) ss 21 and 52 (negligence of a corporation).

Cases

In *R v BBD* [2007] 1 Qd R 478; (2006) 166 A Crim R 543 (CA) Philip McMurdo J said (at [50]):

> In Queensland, where recklessness is not an express element of an offence under s 328, it is unnecessary, and in my respectful view, conducive to unnecessary complication to direct a jury that they must find recklessness. What is essential is that a jury understands that the prosecution must prove that the defendant's default was so serious that it should be regarded as a crime and deserving of punishment. Accordingly the standard direction according to the benchbook makes the distinction between negligence which supports a civil claim for compensation and that more serious act or omission which warrants criminal punishment. In making that distinction, it is apt to tell juries that the defendant's conduct must be deserving of moral condemnation. Hence the benchbook direction as to the element of "grave moral guilt deserving of punishment". But it is unnecessary and undesirable to add recklessness, as if it were a separate element of the offence.

In *R v Shields* [1981] VR 717; (1980) 2 A Crim R 237 (CCA) the applicant had been convicted of negligent driving causing grievous bodily injury. The court examined authority then in a joint judgment said (at 723; 244):

> Accordingly the jury may be directed that the Act or omission must have taken place in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised, and which involved such a high risk that grievous bodily injury would follow, that the act or omission merits punishment under the criminal law.

In *R v Leskinen* (1978) 23 ACTR 1; 36 FLR 414 Blackburn CJ ruled that the test of driving causing grievous bodily harm (under legislation then in force in ACT) required the degree of negligence appropriate to manslaughter.

In *Patel v The Queen* [2012] HCA 29 the appellant submitted that offence contained in s 288 of the *Criminal Code* (Qld) did not apply to the decision whether to proceed with proceed and only applied to the surgery itself. This was rejected by the Court, which stated that it imposed a duty with respect to the decision to proceed with jury. The plurality (French CJ, Haye, Crennan and Kiefel JJ) stated, at [24]:

> It may be accepted that the word "act" in the phrase "doing such act" refers back to "surgical or medical treatment ... or ... any other lawful act". The act to which it refers is not, however, restricted to the act of surgery. It refers to surgical treatment, which may readily be understood to encompass all that is provided in the course of such treatment, from the giving of an opinion relating to surgery to the aftermath of surgery. It would be a strange result if the section was taken as intending to impose a duty with respect to the conduct of surgery and its aftermath, but not to require the exercise of skill and care in the judgment which led to it.

[14.720] Defence proof of no negligence

It may be that in a public welfare offence the person charged can avoid conviction by proving no negligence. The standard of proof would be on the balance of probabilities.

In *R v Sault Ste Marie* [1978] 2 SCR 1299 (SCC) Dickson J, delivering the judgment of the court, said (at 1312–1313):

> Public welfare offences involve a shift of emphasis from the protection of individual interests to the protection of public and social interests. See Sayre, *Public Welfare Offences* (1933) 33 Colum L Rev 55; Hall, *Principles of Criminal Law*, (1947), ch 13; Perkins, *The Civil Offence* (1952), 100 U of Pa L Rev 832; Jobson, *Far from Clear*, 18 Crim L Q 294. The unfortunate tendency in many past cases has been to see the choice as between two stark alternatives; (i) full *mens rea*; or (ii) absolute liability. In respect of public welfare offences (within which category pollution offences fall) where full *mens rea* is not required, absolute liability has often been imposed. English jurisprudence has consistently maintained this dichotomy: see Hals. (4th ed.) Vol. II, *Criminal Law, Evidence and Procedure*, para 18. There has, however, been an attempt in Australia, in many Canadian courts, and indeed in England, to seek a middle position, fulfilling the goals of public welfare offences while still not punishing the entirely blameless. There is an increasing and impressive stream of authority which holds that where an offence does not require full *mens rea*, it is nevertheless a good defence for the defendant to prove that he was not negligent.

[14.725] Other reference

See also

Dangerous Act at [4.100];

Driving causing death or injury at [4.5000];

Manslaughter at [13.1300].

NEMO DEBET BIS VEXARI

[14.900] Definition

The Latin phrase "Nemo debet bis vexari pro una et eadem causa" translates to "No-one ought to be twice harassed for one and the same cause".

Another version is: nemo debet bis punari pro uno delicto.

In *Rogers v The Queen* (1994) 181 CLR 251; 74 A Crim R 462; 123 ALR 417 Deane and Gauldron JJ said (at 277; 436; 481):

> [T]he conclusive aspect of autrefois acquit or that aspect of it which maintains the incontrovertible character of judicial decisions derives from the principle embodied in the maxim res judicata pro veritate accipitur. Its preclusive aspect, or that aspect which prevents the relitigation of matters already determined in favour of the accused, derives from the same principles as issue estoppel, as is the principle embodied in the maxim nemo debet bis vexari pro eadem causa which, in its application to criminal proceedings, has become known as the rule against double jeopardy.

In *Meiklejohn v Central Norseman Gold Corporation Ltd* (1998) 19 WAR 298; 100 A Crim R 521 (FC) Anderson J said (at 314; 537):

> The common law rule against double punishment is very strong: *Johnson v Needham* [1909] 1 DB 626; *Johnson v Miller* (1937) 59 CLR 467; *Byrne v Baker* [1964] VR 443 at 454-458; *Broken Hill Associated Smelters Pty Ltd v Stevenson* at 145-146; *O'Loughlin; Ex parte Ralphs* (1971) 1 SASR 219. I think it would require clear legislative language to displace it.

In *Pearce v The Queen* (1998) 194 CLR 610; 103 A Crim R 372; 156 ALR 684 Gummow J said (at 625; 695; 384 [54]):

> The maxim, nemo debet bis vexari pro una et eadem causa (it is the rule of law that a man shall not be twice vexed for one and the same cause), appears in *Sparry's case*: (1589) 5 Co Rep 61a; 77 ER 148. The maxim applies not only to res judicata doctrines but also to vexatious litigation and abuse of process: Kersley, *Broom's Legal Maxims*, (10th ed, 1969), p 220. In its application to criminal proceedings, it "has become known as the rule against double jeopardy": *Rogers v The Queen* (1994) 181 CLR 251 at 277.

See also

Island Maritime Ltd v Filipowski (2006) 226 CLR 328; 162 A Crim R 409; 228 ALR 1 at 343; 12; 421–422 [41] per Gummow and Hayne JJ.

[14.905] Legislation

Some legislation prevents double jeopardy:

Cth: *Crimes Act 1914* s 50FC; *Criminal Code Act 1995* s 71.18; *Commonwealth Places (Application of Laws) Act 1970* s 8;

Qld: *Evidence Act 1977* s 39P; Criminal Code s 17;

Tas: Criminal Code s 11;

NT: *Criminal Code* ss 17–21;

NSW: *Crimes (Sentencing Procedure) Act 1999* s 20; *Crimes Act 1900* s 52AA(6);

Vic: *Charter of Human Rights and Responsibilities Act 2006* s 26; *Interpretation of Legislation Act 1984* s 51; *Juries Act 2000* s 86;

SA: *Acts Interpretation Act 1915* s 50;

ACT: *Human Rights Act 2004* s 24;

NZ: *New Zealand Bill of Rights Act 1990* s 26(2);

Can: *Canadian Charter of Rights and Freedoms* s 11(h).

[14.910] Conspiracy and substantive offence

In *R v Hoar* (1981) 148 CLR 32; 37 ALR 357 Messrs Hoar and Noble were convicted of conspiracy to fish for barramundi during a prohibited period. The majority said (at 37–38, 361):

> We are told that, notwithstanding the conviction for conspiracy, there are pending against Hoar charges for summary and substantive offences under the *Fisheries Act* based on the same transactions as those involved in the offence of conspiracy. The Solicitor-General for the Northern Territory informed this Court that the Crown had not decided whether to proceed with these charges. Twelve of the offences are alleged to be constituted by acts which were overt acts of the conspiracy, and were taken into account by the Federal Court in determining sentence to be imposed for that offence. Further prosecutions would therefore seek further punishment for the same acts.
>
> That suggests that the Crown's advisers have overlooked practice, if not a rule of law, that a person should not be twice punished for what is substantially the same act (see *Connolly v Meagher* (1906) 3 CLR 682). It has long been established that prosecutions for conspiracy and for a substantive offence ought not to result in a duplication of penalty.

[14.915] Other cases

In *R v Audino* (2007) 180 A Crim R 371 (Vic CA) the lady driver was sentenced for culpable driving by having excess alcohol and for the summary offence of driving with excess alcohol. Appeal against sentence allowed;

Davern v Messel (1984) 155 CLR 21; 53 ALR 1 per Gibbs CJ (at 29–30; 5–6);

Falkner v Barba [1971] VR 332 (Gillard J): Assault of a building inspector and interference in the course of his duties;

R v Donnelly (1920) 14 QJPR 62 (Shand J): Resisting arrest bars a prosecution for assault police in the execution of his duty. Perry J came to the same conclusion in *Ingomar v Police* (1998) 72 SASR 232;

Gould v Sin On Lee (1912) 6 QJPR 15 (Jameson J): Unlawful possession of opium and unlawfully having in opium in his possession.

[14.920] Second offence not sufficiently related to first

Connolly v Meagher (1906) 3 CLR 682 and in the Full Court [1906] St R Qd 125; [1906] QWN 23: Supply of liquor to a boy under 14 years and keeping premises open for sale of liquor during prohibited hours.

Howard v Pacholi [1973] VR 833 (Anderson J): Aiding and abetting after discharge on conspiracy. This decision should not be followed because of *R v Hoar* (1981) 148 CLR 32; 37 ALR 357.

[14.925] The principle applies to the Magistrates' Court

In *Flatman v Light* [1946] KB 414; [1946] 2 All ER 368 (KBD) Lord Goddard said (at 419; 370):

> When a case is being dealt with by a court of summary jurisdiction I think it is true to say what the court must do is to give effect to the maxim nemo debet bis vexari pro una et eadem causa.

See also

Double jeopardy at [4.4600].

NO CASE SUBMISSION

[14.1100] The test-magistrate or judge without a jury

In deciding whether to dismiss information at the close of the prosecution case upon a submission of no case to answer, the test to be applied is whether there is evidence which, if accepted would provide evidence of each element of the charge. Even if there is such evidence, it may be so lacking in weight or reliability that it is open to the court, as a matter of discretion, to dismiss the information.

The proper approach to take is discussed in *R v Galbraith* [1981] 1 WLR 1039; [1981] 2 All ER 1060; (1981) 73 Cr App R 124 (CA) (at 1042; 1062; 127):

> (1) If there is no evidence that the crime alleged has been committed by the defendant there is no difficulty–the judge will stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example, because of inherent weakness or vagueness or because it is inconsistent with other evidence:
>
> (a) where the judge concluded that the prosecution evidence, taken at its highest is such that a jury properly directed could not properly convict on it, it is his duty on a submission being to stop the case.
>
> (b) where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability or other matters which are generally speaking within the jury's province and where on one

R v Martin (No 4) (1999) 105 A Crim R 390 (SA, Debelle J).

R v Plunkett (1997) 69 SASR 452 (CCA).

See also

Stay at [19.5900].

[16.8535] No publicity of sexual charges

Legislation forbids publication of such details as may identify a complainant in a sexual case.

Yet if there is publicity, that may explain the similarities of the evidence of different complainants. In that event the jury must be warned.

In *R v Glennon (No 2)* (2001) 7 VR 631 (CA) Callaway J said (at 689 [159]):

> [t]he judge might say something to the following effect:
>
> > You have heard that there was media publicity about allegations levelled at the accused. This is not evidence that those allegations were true. The media publicity is completely irrelevant except for the possibility, as the defence contends, that it influenced the complainants and explains what the Crown says are the similarities between their accounts. You must be satisfied beyond reasonable doubt that media publicity was not the explanation for those similarities and that the complainants' allegations are truly independent of each other before you use the kind of reasoning that I have just described.

Winneke P and Ormiston JA approved the direction (at 663 [73]).

See also

Victim impact statement (Sexual offences) at [22.935] and **Similar facts** (Collusion) at [19.4490].

[16.8540] Publication of name of witness

See **Witness** at [23.700].

[16.8545] Possible direction on adverse publicity

The whole of the potential jurors might need to be addressed about adverse publicity before empanelment.[9] A judge will need to give a direction to avoid a perceptible risk of miscarriage.[10] A judge might say (after arraignment):

1. As you have heard, the accused is charged with (state the offence and any relevant particulars).
2. I know that there has been a good deal of publicity about this case. (That was quite some time ago). I expect that there has also been some talk in the community, and perhaps rumours about what happened.
3. Before any of you can take your place as a juror you must first take an oath or an affirmation. The effect of that solemn promise is that you will listen to the evidence and give a true verdict.

9 *R v Von Einem* (1991) 55 SASR 199; 52 A Crim R 373 at 218; 392 (Duggan J); *R v Martin (No 4)* (1999) 105 A Crim R 390 at 395 [18] (SA, Debelle J).

10 *Longman v The Queen* (1989) 168 CLR 79; 43 A Crim R 463; 64 ALJR 73; 89 ALR 161; [1989] HCA 60 at 86.

4. The word "evidence" means what the witnesses say and do in this court.[11]
5. If you are a juror you must confine yourself to the evidence in this court, and disregard everything else.
6. You will have to put from your mind anything you hear about the case outside court, in the media or anywhere. You will not discuss the case with anyone outside court.
7. You will also have to put from your mind everything you might have heard already about the case.
8. This case is trial by jury, not trial by media[12] or by gossip or rumour.[13]
9. There may be some of you who feel that you are not able to disregard what you believe you already know about this case. That is, you cannot free your mind from prejudice and prejudgment.[14]
10. If any of you feels so affected by what you have already seen, read or heard about this case that you might not be able to return a true verdict, I will excuse you from sitting as a juror.[15] [19] (SA, Debelle J).

[16.8550] Suppression order

A court can make an order suppressing publicity about a person facing trial.

In *Channel Seven Adelaide Pty Ltd v Draper* (2004) 90 SASR 160; 151 A Crim R 309 (CA) Mr A had been charged with murder. His notoriety was increased when a female federal politician took him overseas as her "boyfriend" at taxpayers expense. The court ordered that a suppression order remain to stop publicity of Mr A's charges.

In *General Television Corporation Pty Ltd v DPP* (2008) 19 VR 68; 182 A Crim R 496 (CA) the court approved a judge's order suppressing the TV programme "Underbelly" until the trials connected with the programme were finished.

But in *DPP v Williams* (2004) 10 VR 348 Cummins J was asked by the prosecution for suppression orders. His Honour made a review of authority and refused to suppress publication.

Other cases

John Fairfax Publications Pty Ltd v District Court (NSW) (2004) 61 NSWLR 344; 148 A Crim R 522 (CA);

Herald and Weekly Times Ltd v DPP (2003) 86 SASR 70 (FC).

In Re Prosecutions under the Controlled Substances Act (1987) 26 A Crim R 183 (No 1) (SA, Prior J).

Hamzy v The Queen [2013] NSWCCA 156

11 *R v Georgiou* (2002) 131 A Crim R 150 at 153 [18]; *R v Dudko* (2002) 132 A Crim R 371 at 375 [22].

12 *R v Glennon* (1992) 173 CLR 592; 60 A Crim R 18; 106 ALR 177; [1992] HCA 16 per Brennan J at 614 (CLR).

13 *R v Yuill* (1993) 69 A Crim R 450 at 454; *R v Richards and Bijerk* (1999) 107 A Crim R 318 at 327 [52].

14 *R v Glennon* (1992) 173 CLR 592; 60 A Crim R 18; 106 ALR 177; [1992] HCA 16 at 624 (CLR); *R v Long* (2002) 128 A Crim R 11 at 16 [24] (Qld, Dutney J).

15 *R v Martin (No 4)* (1999) 105 A Crim R 390 at 395.

See also

"Prejudicial Pre-Trial Media Publicity" [2000] Alt LJ 1.

Venue at [22.300].

PUBLIC PLACE

[16.8700] Definition (at common law)

"The word 'place' is not a word of art and its meaning may be different in different statutes": *Scott v Cawsey* (1907) 5 CLR 132 (at 141 per Griffith CJ).

In *Ward v Marsh* [1959] VR 26 (FC) the issue was whether the ground floor of the Myer Emporium was a public place. Lowe J said (at 28):

> "Public Place" covers every place to which the public qua public may at the relevant time go. It is immaterial that none at such time is present. It is also immaterial how the right of the public to go to such places arises … All that is necessary is that at the time in question members of the public may, because they are members of the public, go to the place if they choose.

Sholl J enunciated two propositions (at 36–37):

> (a) a "public place" includes a place to which the public generally is in the habit of going in substantial numbers (with or without some limitation of hours) whether by right or not, and whether substantial numbers are actually present at the relevant time or not, provided that is within the limitation of hours (if any) … (b) it includes also a place to which the public is in the habit of resorting as such by reason of its public purpose or character (with or without some limitation of hours), even though not in substantial numbers, whether any of the public are present at the relevant time or not, provided it is within the limitation of hours (if any).

Other cases

R v Clark [2005] 1 SCR 6; (2005) 249 DLR (4th) 257; (2005) 193 CCC (3d) 289;

Bogdal v The Queen [2008] EWCA Crim 1 (16 January 2008).

[16.8705] Payment to enter

The fact that the public has to pay to enter does not prevent its being a public place: *Howard v Murphy; Sainsbury v Palmer* (1907) 28 ALT (Supp)10; 13 ALR (CN) 3; *Airton v Scott* (1909) 22 Cox CC 16.

[16.8710] Examples

Public place

Road: *Semple v Howes* (1985) 38 SASR 34 (FC); *DPP v Jones* [1999] AC 240; [1999] 2 All ER 257; [1999] 2 Cr App R 348 (HL);

Tram: *Milne v Mutch* [1927] VLR 190 at 193 (McArthur J);

Train: *Langrish v Archer* (1882) 10 QBD 44; [1881-1885] All ER 913;

Shop: *Ward v Marsh* [1959] VR 26 (FC);

Telephone box: *R v Chill* [1935] NZLR 186 (CA);

Landing of block of flats: *Knox v Anderton* (1983) 76 Cr App R 156 (DC);

Service station: *Dowling v Nominal Defendant* (1975) 6 ACTR 17 (Connor J);

Car park: *R v Abrahams* [1984] 1 NSWLR 491; (1984) 13 A Crim R 113 (CCA);

Car park behind a hotel: *Attorney-General's Reference No 3 of 1983* [1985] 2 WLR 253; 1 All ER 502; *R v Annakin* (1988) 17 NSWLR 202; 37 A Crim R 131 (CCA);

Police station foyer may be: *Bethune v Heffernan* [1986] VR 417 (Nathan J);

Football ground: *Cawley v Frost* [1976] 1 WLR 1207; 3 All ER 743 (CA);

Caravan park: *DPP v Vivier* [1991] 4 All ER 18 (DC).

Not a public place

Police station: *E (a Child) v Staats* (1994) 13 WAR 1; 76 A Crim R 343 (White J).

Inside a car on a road: *Hardman v Minehan* (2003) 57 NSWLR 390 sub nom *Hardman v DPP* (2003) 138 A Crim R 560 (CA).

Front yard of a house: *R v Roberts* [2004] 1 WLR 181; [2004] 1 Cr App R 178 (CA).

[16.8715] Proof of public place

Archbold, *Criminal Pleading Evidence and Practice* (Sweet & Maxwell,London 1998) says (at para 24–113 p 1848):

> Before land can be said to be public, the onus is on the prosecution to prove that the public had access to it,and the best way of doing so is to prove they actually use it: *Pugh v Knipe* [1972] RTR 286, DC. Where a place is a "public place", before it can become a private place there must be evidence which shows that after a certain hour or a particular point in time there is some physical obstruction to be overcome, so that anyone entering does so in defiance of the prohibition, express or implied: *R v Waters*, 47 Cr App R 149, CCA. In *Sandy v Martin* [1974] Crim LR 258, DC the defendant parked his car in a car park bearing a notice that it was for the use of patrons of the inn only. The defendant remained in the inn until closing time and an hour later was found by the police leaning against his van in the car park, drunk. The court, upholding the justices' decision to dismiss the information as they were not satisfied that an otherwise private place is public if and so long as the public have access at the invitation of the landowner. Here, there was no evidence that the licensee's invitation continued an hour after closing time.

[16.8720] Sex within view of a public space

In *R v Clark* [2005] 1 SCR 6; (2005) 249 DLR (4th) 257; (2005) 193 CCC (3d) 289 (SCC) the accused was alleged to be masturbating inside his home. The light was on and there were no curtains. From the street the accused could only be seen from the neck and shoulders up. Held: not a public place.

In *Pregelj v Manison* (1987) 51 NTR 1; 88 FLR 346; 31 A Crim R 383 (CCA) the appellants were having sexual intercourse within their bedroom. The light was on and there were no curtains. An off duty policeman saw them from the street. Both accused said they thought their sex was private and that they couldn't be seen. Held: appeal allowed and the conviction quashed. Mens rea is an element of the offence.

In *Secretary v The Queen* (1996) 5 NTLR 96; 107 NTR 1; 131 FLR 124; 86 A Crim R 119 (CCA) Mildren J, giving the leading judgment, said (at 101; 6; 129; 125):

> We must therefore confine ourselves to the special facts. Lest it may be thought that this procedure may give rise to injustice, the practice is for the trial judge to settle the special facts and the question of law with counsel for the accused and for the Crown, which we were told was done in this case. However, where the trial judge has given reasons for his ruling, as was done in this case, there is no rule that precludes us from considering those reasons, just as we may consider any other legal materials helpful to the resolution of the question reserved.

[17.110] Treated as an appeal against conviction

This procedure is treated as if it were an appeal against conviction: *R v Demicoli* [1971] Qd R 358 (CCA); *Secretary v The Queen* (1996) 5 NTLR 96; 107 NTR 1; 131 FLR 124; 86 A Crim R 119 (at 108; 12; 136; 131) (CCA).

[17.115] Northern Territory: procedure available to the defence only

In the Northern Territory , the procedure is available only to the defence: *R v Hofschuster [No 3]* (1994) 94 NTR 45; 121 FLR 76 (Thomas J).

[17.120] Order of submissions

The party at whose instance the question was received has the right to begin: *R v Roberts* (1886) 12 VLR 135 at 138 (FC); *R v Shuttleworth* (1909) VLR 431 at 433 (FC). The prosecution is entitled to be heard on argument even when there is no appearance for the prisoner: *R v Martin* (1849) 1 Den CC 398; 169 ER 297 (CCR: six member court); *R v Taylor* (1863) 2 W & W 153 at 156 (Vic FC).

See also

Attorney-General at [1.6800]; **Case stated** at [3.500]; and **Director of Public Prosecutions** at [4.2600].

QUIDDITY

[17.300] Meaning

Quiddity means the essence or essential quality of something. (It can also mean something trifling, a quibble).

[17.305] Use as essential quality

In *R v Robinson* [1989] VR 289; (1988) 38 A Crim R 1 (CCA) Nathan J said (at) of the jury system (at 304; 15):

> [T]he quiddity of the jury system is the random composition of juries, designed to reflect the community and its values.

In *Katsuno v The Queen* (1999) 199 CLR 40; 109 A Crim R 66; 166 ALR 159; Kirby J agreed. His Honour said (at 89; 100; 191 [114]):

> Randomness in the selection of the jurors ultimately chosen is, as Nathan J observed in *Robinson* [1989] VR 289; (1988) 38 A Crim R 1, the quiddity of the jury system as provided by the Act.

See also

Slattery v Bishop (1919) 27 CLR 105 per Gavan Duffy J at 112;

Phillips CJ, "Practical Advocacy" (1998) 72 ALJ 340-341.

QUO WARRANTO

[17.500] Meaning

Quo warranto is a Latin term meaning by what authority.

[17.505] Prerogative writ

In *Liston v Davies* (1937) 57 CLR 424 Dixon J said (at 433):

> There was at common law an original writ issuing out of Chancery for the Crown called a writ of quo warranto. It lay against anyone claiming or usurping any office, franchise or liberty, and its purpose was to inquire into the authority upon which the claim rested and to determine the right to the office, franchise or liberty. An information was devised to take its place and the writ of quo warranto fell into disuse. The information was "properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him, or seize it for the Crown but hath long been applied to the mere purposes of trying the civil right seizing the franchise, or ousting the wrongful possessor; the fine being nominal only".
>
> (*Blackstone, Commentaries*, 5th ed (1773), vol 3, c 17, sec 5, p 263).

For the remainder of the history of the writ and the information see the rest of Dixon J's judgment.

[17.510] An exceptional remedy

In *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; 93 ALR 1 Brennan J said (at 33–34, 23):

> It is not the function of a court to direct or to affect the selection of judicial officers. A remedy (*quo warranto*) can be granted only in the exceptional case where the appointment is not authorised by law. It is not to the point that some appointments to judicial office have been made for unworthy purposes or of unworthy people; the responsibility for appointments to judicial office, by constitutional convention if not by constitutional law, belongs to the Executive Government. The courts are not responsible for their own constitution. The calibre of appointments to the judiciary depends solely on the Executive Government and that is a heavy responsibility which the Executive Government alone must bear.

[17.515] Abolition of information

The information or writ of quo warranto has largely been abolished.

Qld: *Judicial Review Act 1991* s 42;

Tas: *Supreme Court Civil Procedure Act 1932* ss 83 and 84;

NSW: *Supreme Court Act 1970* s 12;

Vic: *Supreme Court (General Civil Procedure) Rules 2005* O 38.04;

SA: *Local Government Act 1934* s 706; *Supreme Court Rules 1987* r 98(2).

It may continue to exist, however, in the Commonwealth, Western Australia and the Australian Capital Territory.

Cth: *High Court Rules 1952* O 55 and 47;

WA: *Supreme Court Act 1935* s 36;

ACT: *Supreme Court Rules* O 55 r 34.

[17.520] Modern remedy

Where the information and writ has been abolished the same relief can be obtained by the issue of an originating motion for injuction or declaration:

Qld: *Supreme Court Act 1995* s 186;

NSW: *Supreme Court Act 1970* s 70;

Vic: *Supreme Court (General Civil Procedure) Rules 2005* O 56.01;

SA: *Supreme Court Rules 1987* r 98(1).

R

RAPE

[18.100] Definitions

At common law rape is the unlawful carnal knowledge of a woman without her consent by force, fear or fraud: 1 East PC 434 and see 1 Hale 627 ff.

In *Papadimitropoulos v The Queen* (1957) 98 CLR 249 the court said in a joint judgment (at 261):

> [R]ape is carnal knowledge of a woman without her consent: carnal knowledge is the physical fact of penetration; it is the consent to that which is in question; such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.

[18.105] Legislation

Qld: Criminal Code s 347 (rape);

WA: *Criminal Code* s 325 (sexual penetration without consent);

Tas: Criminal Code s 185 (rape);

NT: *Criminal Code* s 192 (sexual intercourse without consent);

NSW: *Crimes Act 1900* ss 61H (sexual intercourse): 61HA (without consent);

Vic: *Crimes Act 1958* s 38 (sexual penetration without consent);

SA: *Criminal Law Consolidation Act 1935* s 34M (rape);

NZ: *Crimes Act 1961* (sexual violation);

Eng: *Sexual Offences Act 2003* s 1 (rape).

[18.110] Indictment

The drafting of indictment where there was more than one act arose in *Kaitamaki v The Queen* [1985] AC 147; [1984] 2 All ER 435; 79 Cr App R 251 (PC) at 152; 438; 254:

> Their Lordships were, however, disturbed by the course taken by the Crown at the trial. The indictment charged one offence of rape. The prosecution case was that there were two rapes. In the event, as could have been anticipated, there developed two different defences. To the first allegation the defence was consent; to the second the defence was that she consented to penetration but not to the subsequent intercourse, which, however, was not sexual intercourse for the purposes of the 1961 Act (see s 127). The Crown well knew that its case was that there were two rapes. In fairness to the accused each should have been separately charged.

Representative counts

An indictment containing representative counts was held satisfactory in *R v Funderburk* [1990] 1 WLR 587; [1990] 2 All ER 482; (1990) 90 Cr App R 466 (CA).

[18.115] Joinder of rape counts

In *R v Walker* (1983) 7 A Crim R 443 (Qld, Connolly J) the joinder of two counts of rape was permitted. The alleged offences were a month apart and on separate women.

See also

Joinder at [10.300].

[18.120] Generally the report of proceedings is not to identify the complainant

Proceedings in camera

Crimes Act 1900 (NSW) s 77A.

Publication not to identify the complainant

See **Sexual Offence** at [19.3000].

[18.125] Penetration

In rape, there must be penetration. Before significant changes in the law penetration was of the vagina by the penis: see *Papadimitropoulos v The Queen* (1957) 98 CLR 249. It did not include penile penetration by the victim of the accused's mouth: *DPP's Reference (No 1 of 1992)* (1993) 9 WAR 281; 65 A Crim R 197 (CCA).

[18.130] Consent

An element of the offence is that the accused penetrated the complainant without consent. The complainant must be capable of consenting.

In *Question of Law Reserved on Acquittal Pursuant to Section 350(1A) Criminal Law Consolidation Act (No 1 of 1993)* (1993) 59 SASR 214; sub nom *Re Case Stated by DPP (No 1 of 1993)* 66 A Crim R 259 (CCA) King CJ said (at 220; 265):

> The law on the topic of consent is not in doubt. Consent must be a free and voluntary consent. It is not necessary for the victim to struggle or scream. Mere submission in consequence of force or threats is not consent. The relevant time for consent is the time when sexual intercourse occurs. Consent, previously given, may be withdrawn, thereby rendering the act non-consensual. A previous refusal may be reversed thereby rendering the act consensual. That may occur as a consequence of persuasion, but, if it does, the consequent consent must, of course, be free and voluntary and not mere submission to improper persuasion by means of force or threats.

Approved:

R v Aiken (2005) 157 A Crim R 515 at 519 (NSW CCA);

R v Mueller (2005) 62 NSWLR 476 at 479 [36]–[37] (CCA).

In *R v Shaw* [1996] 1 Qd R 641; (1995) 78 A Crim R 150 (CA), Fitzgerald P said (at 643; 152):

> Capacity to consent raised different issues. Towards the end of the 19th century, the accepted view with respect to women of unsound mind was that of Willes J in *Fletcher* (1859) Bell CC 63; 169 ER 1168 at 70 (Bell CC), 1170 (ER), that if a woman of unsound mind is in such a state of idiocy as to be incapable of expressing either consent or dissent, and the prisoner has connection with her, he is guilty of rape, but otherwise the consent of such a woman, induced by mere animal instinct, is sufficient to prevent the act from constituting a rape. See also *Fletcher* (1866) LR 1 CCR 39; *Barratt* (1873) LR 2 CCR 81; cf *Lambert* [1919] VLR 205 at 212. At 213 of the latter decision, there is a reference to *Lock* (1872) LR 2 CCR 10 in terms which seem to suggest that consent could also be given by "a child of tender years" although at 212, and again at the end of Cussen J's judgment at 214, he says that capacity to consent falls to be determined by all the facts of the particular case. The effect of intoxication on capacity was dealt with in *Camplin* (1845) 1 Cox CC 220, CCR (in which the female was a 13-year-old girl), and it was held that a sleeping woman could not consent in *Mayers* (1872) 12 Cox CC 311; *Young* (1878) 14 Cox CC 114, CCR.

[18.135] Legislation on consent in a sexual case

The following jurisdictions have legislation on consent in a sexual case:

Qld: Criminal Code s 348 provides:

> (1) In this chapter, "consent" means consent freely and voluntarily given by a person with the cognitive capacity to give the consent.
>
> (2) Without limiting subsection (1), a person's consent to an act is not freely and voluntarily given if it is obtained–
>
> (a) by force; or
>
> (b) by threat or intimidation; or
>
> (c) by fear of bodily harm; or
>
> (d) by exercise of authority; or
>
> (e) by false and fraudulent representation about the nature or purpose of the act; or
>
> (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

Vic: *Crimes Act 1958* s 36 provides:

> For the purposes of Subdivisions (8A) to (8D) "consent" means free agreement. Circumstances in which a person does not freely agree to an act include the following–
>
> (a) the person submits because of force or the fear of force to that person or someone else;
>
> (b) the person submits because of the fear of harm of any type to that person or someone else;
>
> (c) the person submits because she or he is unlawfully detained;
>
> (d) the person is asleep, unconscious, or so affected by alcohol or another drug as to be incapable of freely agreeing;
>
> (e) the person is incapable of understanding the sexual nature of the act;
>
> (f) the person is mistaken about the sexual nature of the act or the identity of the person;
>
> (g) the person mistakenly believes that the act is for medical or hygienic purposes.

See also, ss 37, 37AA, 37AAA of the *Crimes Act 1958*.

WA: *Criminal Code* s 319 provides:

> (2) For the purposes of this Chapter–
>
> (a) "consent" means a consent freely and voluntarily given and, without in any way affecting the meaning attributable to those words, a consent is not freely and voluntarily given if it is obtained by force, threat, intimidation, deceit, or any fraudulent means;
>
> (b) where an act would be an offence if done without the consent of a person, a failure by that person to offer physical resistance does not of itself constitute consent to the act;
>
> (c) a child under the age of 13 years is incapable of consenting to an act which constitutes an offence against the child.

In *Michael v Western Australia* (2008) 183 A Crim R 348 (WA CA) Miller JA, with whom Steytler P agreed, said (at 384 [161]):

> The extended meaning of "consent" contained within s 319(2)(a) of the *Criminal Code* means that the inducing causes of consent can now destroy the reality of consent: if a complainant consents to sexual intercourse in which she perceives what is about to take place, understands the identity of the man in question and the character of what he is doing, there can, nevertheless, be an absence of free and voluntary consent if that consent is obtained by threats, intimidation or deceit. They are the inducing causes.

NSW: *Crimes Act 1900*, s 61HA provides:

> (2) A person"consents" to sexual intercourse if the person freely and voluntarily agrees to the sexual intercourse.
>
> (3) A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:
>
> (a) the person knows that the other person does not consent to the sexual intercourse, or
>
> (b) the person is reckless as to whether the other person consents to the sexual intercourse, or
>
> (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.
>
> For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:
>
> (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
>
> (e) not including any self-induced intoxication of the person.
>
> (4) A person does not consent to sexual intercourse:
>
> (a) if the person does not have the capacity to consent to the sexual intercourse, including because of age or cognitive incapacity, or
>
> (b) if the person does not have the opportunity to consent to the sexual intercourse because the person is unconscious or asleep, or
>
> (c) if the person consents to the sexual intercourse because of threats of force or terror (whether the threats are against, or the terror is instilled in, that person or any other person), or
>
> (d) if the person consents to the sexual intercourse because the person is unlawfully detained.
>
> (5) A person who consents to sexual intercourse with another person:
>
> (a) under a mistaken belief as to the identity of the other person, or
>
> (b) under a mistaken belief that the other person is married to the person, or
>
> (c) under a mistaken belief that the sexual intercourse is for medical or hygienic purposes (or under any other mistaken belief about the nature of the act induced by fraudulent means),
>
> does not consent to the sexual intercourse. For the purposes of subsection (3), the other person knows that the person does not consent to sexual intercourse if the other person knows the person consents to sexual intercourse under such a mistaken belief.
>
> (6) The grounds on which it may be established that a person does not consent to sexual intercourse include:
>
> (a) if the person has sexual intercourse while substantially intoxicated by alcohol or any drug, or
>
> (b) if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force, or
>
> (c) if the person has sexual intercourse because of the abuse of a position of authority or trust.
>
> (7) A person who does not offer actual physical resistance to sexual intercourse is not, by reason only of that fact, to be regarded as consenting to the sexual intercourse.
>
> (8) This section does not limit the grounds on which it may be established that a person does not consent to sexual intercourse.

In *O'Sullivan v R* [2012] NSWCCA 45, at [124], the court noted that the statutory meaning of consent maintains a subjective component. The element of honest belief in s 61HA(3), however, is to be tested by reference to whether there are reasonable grounds for the belief asserted by the accused. See also, *W O v Director of Public Prosecutions (NSW)* [2009] NSWCCA 275, [80].

[18.140] Consent must be real

In *R v Mobilio* [1991] 1 VR 339; (1990) 50 A Crim R 170 (CCA) the accused was a radiographer, convicted of rape. He introduced an ultrasound transducer into the vaginas of young women. The prosecution contended that the consents were not real because the victims consented to a medical procedure while the accused acted for his sexual gratification. His appeals succeeded. The court said in a joint judgment (at 349–350; 180–181):

DPP (NT) v WJI (2004) 219 CLR 43; 210 ALR 276;

DPP's Reference No 1 of 2002 (2002) 12 NTLR 176; 171 FLR 403; 137 A Crim R 158 (CCA – five member bench);

McMaster v The Queen (1994) 4 NTLR 92; 117 FLR 200 (CCA);

R v Marama (2001) 118 A Crim R 111 (NT, Riley J).

[18.165] Direction on consent and belief in consent

Where consent and belief in consent are trial issues, a judge must relate the law to the facts. In Victoria, *Crimes Act 1958* s 37 requires such a direction. In *R v Yusuf* (2005) 11 VR 492; 153 A Crim R 173 (Vic CA) Winneke P looked at the section, then said (at 502; 183 [18]):

> it seems to me to be tolerably clear that the requirement imposed on the judge is to relate his direction as to the accused's belief in consent to the relevant facts which have been placed in issue in the proceeding and not to the ultimate issues comprising the elements of the offence. After all, that is the natural meaning of the words contained in the section, and is – in any event – in conformity with the procedural obligation imposed by the common law upon the judge, as made clear by *Alford v McGee* (1952) 85 CLR 437 at 446.

In *R v Zilm* (2006) 14 VR 11; 161 A Crim R 149 (CA) the court allowed the appeal against conviction because the trial judge directed the jury wrongly. Callaway JA said (at 13; 151 [2]):

> The belief of an accused person that the complainant was consenting to a sexual act does not have to be reasonable as a matter of law. The Crown must prove that, in fact, the accused was aware that the complainant was not consenting or might not be consenting. The unreasonableness of his belief does not mean that he is guilty. The direction required by s 37(1)(c) of the *Crimes Act 1958*, where it is relevant to the facts in issue, makes it more important than ever that the jury understand the true significance of the question whether the belief of the accused person was reasonable.

In the rape case of *Banditt v The Queen* (2005) 224 CLR 262; 223 ALR 633; 157 A Crim R 420 Gummow, Hayne and Heydon JJ said (at 275; 642; 430 [34]):

> [A]s Gibbs J emphasised in *La Fontaine v The Queen* (1976) 136 CLR 62 at 77:
>
> > The purpose of a summing up is not to endeavour to apprise the jury of fine legal distinctions but to explain to them as simply as possible so much of the law as they need to know in order to decide the case before them.

In *R v Alexander* (2007) 174 A Crim R 297 (Vic CA) the court held 2-1 that the trial judge properly directed the jury on mistaken belief in consent. Appeal dismissed.

See also

Judge at [10.900].

[18.170] Continuing penetration after knowledge of lack of consent

Kaitamaki v The Queen [1985] AC 147; [1984] 2 All ER 435; 79 Cr App R 251 (PC) was an appeal from New Zealand. The construction of the relevant statute required conviction where penetration was by consent but intercourse continued after knowledge of lack of consent. Cases referred to by the appellant in the unsuccessful appeal were:

R v Salmon [1969] SASR 76 (CCA);

R v Mayberry [1973] Qd R 211 (CCA);

Richardson v The Queen [1978] Tas SR 178 (CCA);

R v Salmon [1969] SASR 76 was distinguished and *Kaitamaki* [1981] 1 NZLR 527 (CA) followed in *R v Murphy* (1988) 52 SASR 186; 37 A Crim R 405 (CCA).

[18.175] Effect of intoxication of accused

In *R v Curtis* (1991) 55 A Crim R 209 (SA CCA) Olsson J said (at 218):

> Quite apart from the fact that no specific explanation was given to the jury as to the possible effects of marijuana as an intoxicant in its own right either considered alone or when ingested in addition to alcohol – a state of understanding which could well be foreign to at least some jurors – it was, in the context of a case such as this, vitally important that the trial judge ensure that the jury was left in no doubt that, at all times, it remained incumbent upon the Crown to negative any reasonable possibility that intoxication played any relevant part in the perceptions or understanding of the appellant.

Duggan J said (at 223):

> The case called for a more extensive direction on how events such as those to which I have referred might have been perceived by a man affected by the consumption of alcohol and marijuana. The possibility of misconceiving the complainant's attitude should have been raised in this context: *Wilson* (1986) 42 SASR 203; 22 A Crim R 130.

Tactical considerations can play a part. In *R v Ball* (1991) 56 SASR 126; 53 A Crim R 461 (CCA), Matheson J said (at 178–179; 473–474):

> I have anxiously considered the submission that the issues raised on the appeal were not issues at the trial. I can understand why it did not suit the defence to do so. Although I have never thought that the adjectives "partial" and "total" are helpful in a discussion of intoxication, I think the following quotation from the judgment of White J in *R v Egan* (1985) 15 A Crim R 20 at 41-42 is pertinent:
>
> > Counsel did not address on partial intoxication. This may have been due to oversight, although this is to be doubted because counsel were experienced, and they raised the point immediately after the summing up was completed. It is more likely that counsel appreciated the fact that the arguments based on partial intoxication were two-edged, like a two-edged sword as it were. There is a favourable or helpful edge which assists accused persons in cases like this, at the first stage of the exercise where the jury is considering the question whether the accused realised she might not be consenting. They get the benefit at that stage of any dulling of his perceptions due to partial intoxication. Once the jury decides that he did realise, notwithstanding partial intoxication, that she might not be consenting, the very fact of partial intoxication may then be used by the jury as the explanation why the accused pressed on with intercourse recklessly indifferent as to her consent. That is the adverse or unhelpful edge of the direction as to partial intoxication. It may be that counsel realised this difficulty and for tactical reasons, did not make too much of the issue.
>
> (And see also *R v Summers* (1986) 22 A Crim R 47 at 48.) The law, however, is clear that a trial judge has to put to the jury any defence that fairly arises on the evidence: see *R v Murphy* (1988) 52 SASR 186 at 195-197; 37 A Crim R 405 at 414-417 where Cox J reviews the English and Australian authorities.

In *R v Morgan* (1993) 30 NSWLR 543; 67 A Crim R 526 (CCA) there had been evidence of the accused's intoxication. No direction on the belief on consent was asked for by the defence at trial, probably because the accused said there was no intercourse. The failure of the trial judge to direct the jury on intoxication was a ground which did not succeed, although the appeal was allowed on other grounds.

R v B, MA (2007) 99 SASR 384; 177 A Crim R 268 (CCA) the court analysed the changes to *Criminal Law Consolidation Act 1935* s 269. At trial, the defence had not asked for an intoxication direction and none was given. The court made a thorough examination of legislation and authority. Appeal dismissed.

[18.180] Intoxication of victim

Generally

In *R v Bree* [2007] 3 WLR 600; [2007] 2 All ER 676; [2007] 2 Cr App R 158 (CA) Sir Igor Judge P giving the judgment of the court said (at [32]):

Drunken consent is still consent.

In *C v T* (1995) 58 FCR 1; 136 ALR 703 (FCA) Burchett J said (at 17–18; 718–719):

> The law on this subject is not in doubt. The essential principle is the same, both under the Code of the Northern Territory (which may be applicable: *Svikart v Stewart* (1994) 69 ALJR 35), and under the modified common law obtaining in New South Wales (which may also be applicable by virtue of s 61 of the *Defence Force Discipline Act 1982* (Cth). In *McMaster v The Queen* (21 March 1994, CA/NT), Thomas and Priestley JJ and Gray AJ, unreported) a strong Court of Criminal Appeal held, in a judgment delivered by Gray AJ:
>
> > In States where the elements of the crime of rape are governed by the common law, it is clear that it is an element of the crime that the accused intended to have sexual intercourse without consent. This requires proof by the Crown that the appellant knew the woman was not consenting or knew she may not be consenting and proceeded regardless: see *R v Saragozza* [1984] VR 187; *R v McEwan* [1979] 2 NSWLR 926 and *R v Brown* (1975) 10 SASR 139.
> >
> > This means that a jury should be directed along these lines in all cases …The above authorities show that, under the common law doctrine, the belief on the accused's part that the woman is consenting need not be a reasonable belief. What the Crown must negative is a genuine belief, whether reasonable or not.
> >
> > In my opinion, the same result is reached in the Northern Territory by virtue of s 31(1) of the *Code* which provides:
> >
> > > A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
> >
> > In my opinion, s 31(1) produces the result that the prosecution must prove that it was the intention of the accused to assault the victim without his or her consent This involves the proposition that the accused knew that the victim was not consenting or knew that he or she may not be consenting and proceeded regardless.

In *R v Francis* [1993] 2 Qd R 300 (CA), the Court, decided a case where the evidence suggested consent had been induced by the excessive consumption of alcohol. In their joint judgment, Davies JA and Demack J said (at 305):

> It is not correct as a matter of law that it is rape to have carnal knowledge of a woman who is drunk who does not resist because her submission is due to the fact that she is drunk. The reason why it is not is that that at least includes the case where the carnal knowledge is consensual notwithstanding that the consent is induced by excessive consumption of alcohol. The critical question in this case was whether the complainant had, by reason of sleep or a drunken stupor, been rendered incapable of deciding whether to consent or not.

See also *R v Bonora* (1994) 35 NSWLR 74 at 80 (CCA).

In *R v Lambert* [1919] VLR 205 at 213, where Cussen J, speaking for the Full Court of the Supreme Court of Victoria, quoted a dictum of Parke B that rape was "committed by violating a woman when she is in a state of insensibility and has no power over her will … the accused knowing at the time that she is in that state".

This is in keeping with the principle affirmed by the High Court in *Papadimitropoulos v R* (1957) 98 CLR 249, where Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ referred (at 255) *toR v Lambert* [1919] VLR 205"as to the need of the man's being aware of the absence of consent", and said (at 261):

> To return to the central point, rape is carnal knowledge of a woman without her consent…such a consent demands a perception as to what is about to take place, as to the identity of the man and the character of what he is doing. But once the consent is comprehending and actual the inducing causes cannot destroy its reality and leave the man guilty of rape.

That decision of the High Court in *Papadimitropoulos* has recently been followed by the Court of Appeal in England in *R v Linekar* [1995] 2 WLR 237, where (at 244) it was described as a "highly persuasive authority".

Evidence

Where the prosecution case is that the complainant was so intoxicated that she could not consent, she is still able to give evidence-in-chief that she had no intention or wish to have sexual intercourse. Of course she could then be cross-examined: *R v Blayney* (2003) 87 SASR 354; 140 A Crim R 249 (CCA).

Other cases

R v Wilson, Tchorz and Young (1986) 42 SASR 203; 22 A Crim R 130 (CCA);

R v Esau [1997] 2 SCR 777; (1997) 148 DLR (4th) 662; 116 CCC (3d) 289 (SCC);

R v Green (2001) 78 SASR 463; 119 A Crim R 75 (CCA);

R v Pryor (2001) 124 A Crim R 22 (Qld CA);

R v Blayney (2003) 87 SASR 354; 140 A Crim R 249 (CCA);

R v TA (2003) 57 NSWLR 444; 139 A Crim R 30 (CCA);

R v Bree [2007] 3 WLR 600; [2007] 2 All ER 676; [2007] 2 Cr App R 158.

Reliability

In *R v Salih* (2005) 160 A Crim R 310 (Vic CA) the appellant had been convicted of rape. Was there consent? The complainant was heavily intoxicated by alcohol and marijuana. She gave a number of different versions of various events. The court held that the trial judge should have directed the jury on her reliability.

Harper AJA, with whom the others agreed, said (at 340 [112] – [113]):

> Neither side called any experts to speak on the subject, so the jury if they considered the matter at all must of necessity have done so by drawing on whatever experience they or individual jurors may have had. The judge, of course, could not by any direction of his fill the gap left by the absence of expert evidence. The best he could have done was to remind the jury of the evidence about her consumption, and of her own assessment of its effect on her, and warn them that, as that is all they have, it would be unsafe to convict the applicant on the complainant's evidence unless having very carefully considered that evidence they were satisfied that it was accurate.
>
> In my opinion, a direction of that kind should have been given.

[18.185] Reckless indifference to consent

Where the accused realised that the victim might not be consenting but nevertheless proceeded to have intercourse, the mental state is called recklessness or reckless indifference.

In *Banditt v The Queen* (2005) 224 CLR 262; 223 ALR 633; 157 A Crim R 420 the court examined this aspect of the law in a New South Wales appeal. One issue was the interpretation of the *Crimes Act 1900* s 61R(1):

> [A] person who has sexual intercourse with another person without the consent of the other person and who is reckless as to whether the other person consents to the sexual intercourse is to be taken to know that the other person does not consent to the sexual intercourse.

There was a joint judgment of Gummow, Hayne and Heydon JJ dismissing the appeal. Their Honours said (at 275; 642; 430 [33]):

> [I]t may be possible, as is the case elsewhere in the law, to construe the term "reckless" as involving measurement against an objective criterion.

and later (at 276; 642; 430–431 [37]):

> A direction that "reckless" has the meaning to be given by the jury in the particular circumstances of the case would be erroneous …