

FOLEY'S FEBRUARY CRIMINAL LAW CPD SERIES

– THURSDAY 29 FEBRUARY, 2024

LEARNINGS FROM SOME RECENT DECISIONS OF THE COURT OF APPEAL

1. **Hearsay evidence – Admissibility is restricted to “first-hand hearsay” – s. 62 of the Evidence Act, 2008**

- Glowacki v R [2023] VSCA 176, at [15], [17] & [18];
 - In an interview with the police, Hammel said that Glowacki had said to Hammel that because Glowacki had jumped over fences, he had cuts all over his legs;
 - Prosecution sought to prove that Glowacki had jumped over fences and cut his legs and therefore that Glowacki was at the scene of the aggravated burglary;
 - Hammel was not “available”.

- Haris v R [2023] VSCA 205, at [35] – [36].
 - KH, in a conversation with both Haris and ZA, confessed to committing the rape upon V with which Haris was now charged;
 - KH then died;
 - ZA made a written statement to the police in accordance with the conversation described above, that is, recounting KH making the confession;
 - ZA has now left Australia, and cannot be contacted.

2. **Stay applications – on the basis that the inadmissibility of evidence will lead to an unfair trial**

2.1 The test, and its application

- Haris v R [2023] VSCA 205, at [49] – [53], [59] – [60] & [65] – [66].

2.2 Challenging a refusal to grant a permanent stay on an interlocutory appeal

- Haris v R [2023] VSCA 205, at [37], [39], [54] & [56].

3. **A (limited) way around the injunction in IMM v R (2016) 257 CLR 300 in the context of s. 137 of the Evidence Act, 2008 (Vic.)**

3.1 The injunction

- IMM v R (2016) 257 CLR 300, at [38] – [39], [44], [49], [52] & [57] – [58];

- Also see: DPP v Hague [2018] VSCA 39, at [17] & ff.

3.2 Taking into account (the inherent infirmities of the evidence which affects) the quality of the evidence (of eye witness identification).

- Moreno v R [2023] VSCA 98, at [50] – [55], [56], [80] – [86], [93] – [94] & [95] – [106].

4. **The admissibility of tendency evidence – “significant probative value” within the meaning of s. 97(1)(b) of the Evidence Act, 2008 (Vic.)**

- Morey v R [2023] VSCA 153, at [45] – [50].

- Tendency: D engaged in threats of violence toward V in the belief that they would compel V's compliance with D's demands;
- Facts in issue: Both whether the acts occurred and the intention of D.
- Cf. Harlen v R [2023] VSCA 269
 - Tendency: D had a willingness to engage, or actually engaged, in "verbal violence" and "physical violence" toward Ms. A and Ms. H (intimate partner and former intimate partner respectively) as a "means of control over them".

5. Tendency evidence – the standard of proof for every charged act relied upon

- DPP v Rodder [2023] VSCA 262, at [28] – [34]
 - Sexual offences – 2 complainants – 27 charges on the indictment
 - The evidence upon which the prosecution relied to establish the alleged tendencies: every sexual act alleged in every charge on the indictment ("the charged acts") and 6 other pieces of sexual misconduct which are not the subject of a charge on the indictment ("the uncharged acts").

6. Coincidence evidence

- Feng v R; DPP v Feng [2023] VSCA 196
 - Sexual offences – 6 complainants;
 - The nature of coincidence reasoning: [44] – [48];
 - The steps for determining the admissibility of coincidence evidence: [49];

- The directions to the jury and ss. 26, 27 & 30 of the Jury Directions Act, 2015 (Vic.): [50] – [55], [61] & [63] – [67];
- For 3 (of the) complainants, the coincidence evidence was introduced to prove the identity of the offender, namely, Feng;
- For the other 3 (of the) complainants, the coincidence evidence was introduced to prove that different complainants would not make similar allegations against Feng unless the allegations were true (that is, 2 or more complainants could not invent their versions of events independently and by chance), thereby proving the unlikelihood of fabrication or invention by them: [50], [53], [58], [61] & [63].

7. **Evidence of admissions by an accused**

- Headland (a pseudonym) v The King [2023] VSCA 174
 - Grounds for exclusion of admissions made by accused during record of interview; consideration of ‘the circumstances in which the admission was made’; Evidence Act, 2008, ss. 85; 90.

8. **Identification evidence**

- Fowkes v The King [2023] VSCA 160
 - Evidence that two victims of alleged offending identified the accused as one of the offenders from a photograph on Facebook; neither victim had initially recognised any of the offenders at the time of the offending; before making the Facebook identification, one of the victims was told by another, who had seen the offenders, that someone had told her that the applicant was one of the offenders;

- Test for exclusion of ‘visual identification evidence’, particularly in the social media context; ‘Facebook identifications’; Evidence Act, 2008 s 114.

9. **The relevance of childhood deprivation in sentencing: the correct approach to applying *Bugmy v The Queen* (2013) 249 CLR 571.**

- Newton (a pseudonym) v The King [2023] VSCA 22, [36]–[46].

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