

FOLEY'S FEBRUARY CRIMINAL LAW CPD SERIES
– THURSDAY 27 FEBRUARY, 2025

LEARNINGS FROM SOME RECENT DECISIONS OF THE COURT OF APPEAL

1. Latent ambiguity/Uncertainty/Latent duplicity

- Bernard v R [2024] VSCA 293, at [82] – [89];
 - Did V recount a specific instance, or did V “generalise”?

- Butcher v R [2024] VSCA 322, at [77] & ff.
 - Did V actually identify (or sufficiently differentiate) in her evidence a particular instance, here, the “first instance”, or was the “first instance” merely notional: [107] – [127];
 - A “course of conduct charge” (for which provision is made by clause 4A of Schedule 1 of the Criminal Procedure Act, 2009 (Vic.)) was not permissible: [155] – [169];
 - The prosecution could, in any event, have relied upon the “single transaction exception” to the rule against latent duplicity (see R v Morrow & Flynn [1991] 2 Qd R 309, at p. 312): [97] – [104] & [129] – [137];
 - There was no prejudice or unfairness to the defence: [138] – [154].

2. Non-compliance with the requirements of the Jury Directions Act, 2015 (Vic.)

- (i) Through oversight, the trial judge failed to give the direction pursuant to s. 41 (where D failed to give evidence)

- Allen v R [2024] VSCA 128.

- (ii) Failure by the trial judge to give the directions required by s. 27 (not to engage in “impermissible propensity reasoning”) where the Crown had relied on tendency evidence
 - Lee v R [2024] VSCA 10, at [24] – [53];

 - Briggs v R [2024] VSCA 80, at [40] – [65].

- (iii) Multiple “forensic disadvantages” within the meaning of s. 38 may, when considered cumulatively, constitute a “significant forensic disadvantage” requiring a direction pursuant to s. 39
 - Haynes v R [2024] VSCA 207.

- (iv) Undermining the “significant forensic disadvantage” direction pursuant to s. 39 by making impermissible comments and by including disadvantages sustained by the prosecution.
 - Briggs v R [2024] VSCA 80.

- (v) Misconstruction of the definition of “evidence of a kind that may be unreliable” within the meaning of s. 31
 - Kovachev v R [2024] VSCA 325.

- (vi) Failure by the trial judge to be satisfied for the purposes of s. 43(2) (prosecution failure to call witnesses...)
 - Milky v R [2024] VSCA 136.

- (vii) The trial judge erroneously left to the jury “other misconduct evidence” (namely, uncharged acts which were admitted merely as “context

evidence” and which were not cross-admissible because they were confined to each individual V) as “tendency evidence”, which could be used in support of “tendency reasoning”, but which was not included in the Tendency Notice

- Milky v R [2024] VSCA 136.

(viii) Incriminating conduct

- Non-compliance with the notice requirements (under s. 19)
 - Healy v R [2024] VSCA 81;
 - Hussain v R [2024] VSCA 288.
- Failure by the trial judge to make a determination under s. 20(1)(b)
 - Hussain v R [2024] VSCA 288.
- Erroneous determination made by the trial judge under s. 20(1)(b)
 - Cookson v R [2024] VSCA 289.
- Failure by the trial judge to give the directions required by s. 21
 - Healy v R [2024] VSCA 81;
 - Sturt v R [2024] VSCA 102;
 - Hussain v R [2024] VSCA 288.

3. Good character evidence

- (i) Consequences of failure to lead evidence of good character

- Baker (a pseudonym) v R [2024] VSCA 87;
 - Browne v R [2024] VSCA 194.
- (ii) Where trial judge errs in refusing to allow evidence of good character in a particular respect to be adduced
- Schmidt v R [2024] VSCA 256.

4. **Juries**

- (i) Inattentive or sleeping jurors
- Doyle v R [2024] VSCA 120.
- (ii) Continuing a trial with fewer than 12 jurors: Juries Act 2000 s. 44
- Kawana v R [2024] VSCA 219.
- (iii) The practice of reminding jurors of their separation oath
- Frendo v R [2024] VSCA 319, at [130]–[144].

5. **Compelling production of ‘confidential communications’ in a criminal trial: Evidence (Miscellaneous Provisions) Act 1958 s. 32C**

- Duncan (a pseudonym) v R [2024] VSCA 27

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