NSW GOVERNMENT | Crown Solicitor's Office

In case you missed it – recent developments in criminal liability and the sentencing of offenders

26 April 2017

Hosted by the Criminal Law Practice Group

Crown Solicitor's Office

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Client seminar

26 April 2017

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Recent developments in appellate criminal cases

Client seminar
26 April 2017

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- Issues for discussion

i. the *doli incapax* presumption
ii. circumstantial evidence
iii. jury issues, including jury misconduct
iv. voice identification evidence
v. annulment of fines

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The *doli incapax* presumption

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Circumstantial evidence

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- “I[t] was not unreasonable for the jury to conclude, on the whole of the evidence, that it tested credulity too far to suggest that the evident desire to be rid of his wife was fortuitously fulfilled by her unintentional death.”

(*The Queen v Baden-Clay* [2016] HCA 35 at [69])

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Jury issues

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1. *NH and Ors v The Director of Public Prosecutions* [2016] HCA 33

Jury issues

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2a. *R v Qaumi and Ors (No. 41)* [2016] NSWSC 857

2b. *R v Qaumi and Ors (No. 56)* [2016] NSWSC 1130

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Voice Identification Evidence

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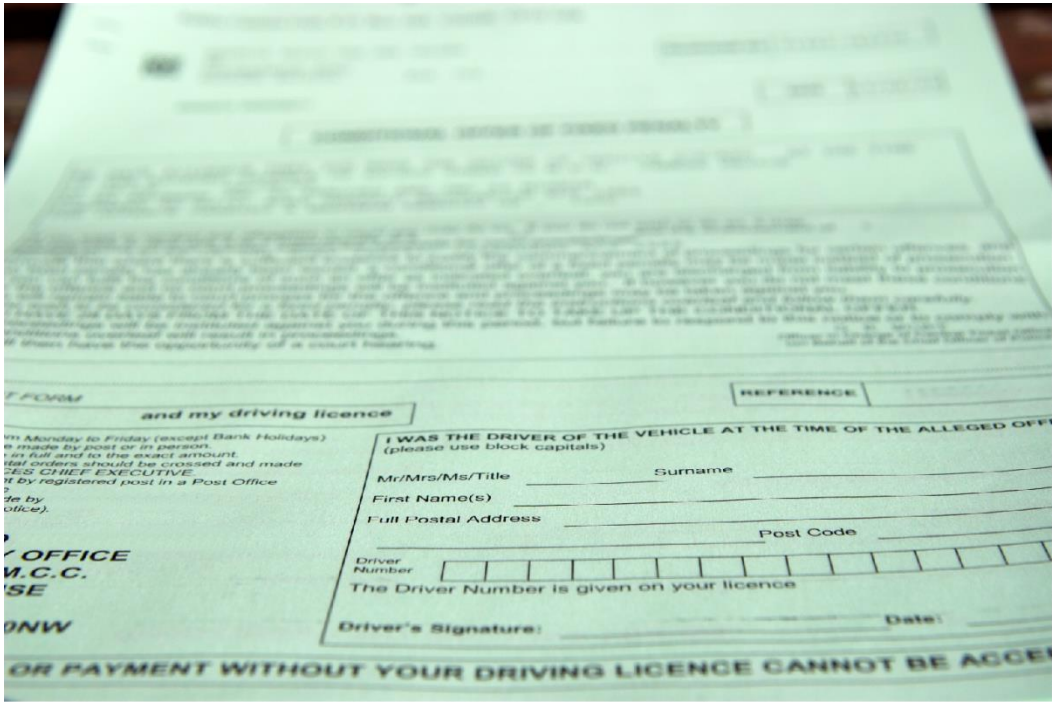
Annulment of fines



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"A failure by a person to lift a finger to make any enquiry does not constitute being hindered by any external events, such as accident, illness, misadventure or other cause."

(*Boensh v Commissioner of Fines Administration* [2017] NSWCA 15 at [19])

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Brett Thomson
CSO Special Counsel

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High risk offenders – Public protection and personal rehabilitation

Crimes (High Risk Offenders) Act 2006

"The way in which the criminal justice system should respond to the case of the prisoner who represents a serious danger to the community upon release is an almost intractable problem."

Fardon v Attorney-General (Qld) **[2004] HCA 46; (2004) 223 CLR 575** per Gleeson CJ at [12].

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Habitual Criminals Act 1957

4

If the judge to whom such application is made is satisfied that it is expedient with a view to such ***person's reformation or the prevention of crime that such person should be detained in prison for a substantial time, the judge may pronounce the person to be an habitual criminal*** and shall thereupon pass sentence upon the person in accordance with the provisions of section 6.

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6 Sentence to be imposed on persons pronounced to be habitual criminals

(1) The judge who, pursuant to the provisions of section 4, has pronounced a person to be an habitual criminal, shall pass a sentence of imprisonment upon such person for a term of not less than five years nor more than fourteen years.

(2) Any sentence of imprisonment being served by any such person at the time the person is pronounced to be an habitual criminal shall be served concurrently with the sentence imposed pursuant to the provisions of subsection (1).

One particular concern that is dealt with by this scheme relates to a handful of high-risk, hard-core offenders who have not made any attempt to rehabilitate whilst in prison. These offenders make up a very small percentage of the prison population, yet their behaviour poses a very real threat to the public. These concerns are compounded where the offender never qualifies for parole and is released at the end of their sentence totally unsupervised. The bill addresses this problem by allowing this small group of high-risk offenders to be placed on extended supervision, or, in only the very worst cases, kept in custody. The Department of Corrective Services has advised that only a small number of offenders would fall into this very high-risk category.

Mr CARL SCULLY (Smithfield—Minister for Police)

Extract from NSW Legislative Assembly Hansard and Papers Wednesday 29 March 2006

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3 Objects of Act

(1) The primary object of this Act is to provide for the extended supervision and continuing detention of high risk sex offenders and high risk violent offenders so as to ensure the safety and protection of the community.

(2) Another object of this Act is to encourage high risk sex offenders and high risk violent offenders to undertake rehabilitation.

"This is about sending a message to the worst prisoners: 'If you don't do the rehabilitation, you know what? You won't get out.'

Sydney Morning Herald 11 April 2010

The Government is pleased to introduce the Crimes (Serious Sex Offenders) Amendment Bill 2013. The purpose of the bill is to extend the existing scheme for the continued detention and extended supervision of serious sex offenders to high-risk violent offenders. The bill also extends the scheme to offenders who committed serious offences as a child. Such offences are currently excluded from the serious sex offender regime. This extension will apply to high-risk violent offenders and serious sex offenders. The bill recognises that there are serious violent offenders in our prisons who are nearing the end of their sentence who have made no attempt to rehabilitate themselves, or who have made it very clear to authorities that they intend to re-offend when they are released. The bill responds to this very clear danger and ensures the protection of the community from a clear risk.

The Hon. DAVID CLARKE (Parliamentary Secretary) [3.34 p.m.], on behalf of the Hon. Michael Gallacher.

Extract from NSW Legislative Council Hansard and Papers Tuesday 12 March 2013

5E High risk violent offender

(1) An offender can be made the subject of a high risk violent offender extended supervision order or a high risk violent offender continuing detention order as provided for by this Act if and only if the offender is a high risk violent offender.

(2) An offender is a ***high risk violent offender*** if the offender is a violent offender and the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious violence offence if he or she is not kept under supervision.

(3) The Supreme Court is not required to determine that the risk of a person committing a serious violence offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious violence offence.

5B High risk sex offender

(1) An offender can be made the subject of a high risk sex offender extended supervision order or a high risk sex offender continuing detention order as provided for by this Act if and only if the offender is a high risk sex offender.

(2) An offender is a ***high risk sex offender*** if the offender is a sex offender and the Supreme Court is satisfied to a high degree of probability that the offender poses an unacceptable risk of committing a serious sex offence if he or she is not kept under supervision.

(3) The Supreme Court is not required to determine that the risk of a person committing a serious sex offence is more likely than not in order to determine that the person poses an unacceptable risk of committing a serious sex offence.

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***The State of New South Wales v Manna* [2017] NSWSC 463**

Per Walton J at [23] and following:

24. As to the Courts making a determination under s 5E:

1. The nature of the risk posed by an offender is to be assessed by reference to past conduct, the seriousness of the possible future conduct and the period over which the risk may come to fruition. The assessment must be based on an absence of protective measures. The "criterion of unacceptability depends upon these matters, together with a comparison, to the extent that the evidence permits, of what may be described as the background level of risk to the community from violent offenders": *Lynn* at [126] (per Basten JA).

2. "The concept of 'risk' clearly involves a risk to the community; although the qualifier 'unacceptable' could be read in an extended sense as meaning deemed unacceptable by the Court. It is still the composite phrase which must be understood as referring to a risk to the community": *Lynn* at [127] (per Basten JA).

3. The precise parameter or standard or norm against which the determination under s 5E(2) must be made are not immediately evident from the text of the provision. A determination as to whether something is unacceptable is an evaluative task and evaluative determinations require a context in which they are to be made: *Lynn* at [51] (per Beazley J). The required state of satisfaction in s 5E(2) requires the exercise of a discretionary judgment: *Lynn* at [82] (per Basten JA).

4. The impact of an order on the offender is not a factor in assessing unacceptable risk which focuses rather on the assessment of factors relevant to the content of the risk itself: *Lynn* at [137] (per Basten JA), *Attorney-General of NSW v McGuire* [2016] NSWSC 158 at [43] (per Rothman J).

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Section 5G: Adequate Supervision

25. As earlier mentioned, the test for the making of a continuing detention order contains an additional requirement compared to those governing the making an extended supervision order, namely, the Court must be satisfied that adequate supervision will not be provided by the extended supervision order.

26. The following principles derived from *Donovan* apply to that test:

1. The onus lies on the State to prove that adequate supervision will not be provided by an extended supervision order: *Donovan* at [23].

2. The test is not whether there is a risk that adequate supervision will not be provided by an extended supervision order, but rather that adequate supervision will not be provided by an extended supervision order: *Donovan* at [22].

3. Unlike the considerations arising under s 5E where an unacceptable risk must be assessed as if there was no supervision at all, the resolution of the question as to whether there is adequate supervision for the purposes of s 5G, requires an assessment of the particular extended supervision order, which is proposed in the proceedings: *Donovan* at [24] and [73]. The state of satisfaction under s 5G(1) is, therefore, lower than the state of satisfaction required under s 5E: *Donovan* at [24].

4. The structure of the Act suggests a hierarchy of final orders that acknowledges the fundamental nature of the right to personal liberty. Extended supervision orders are addressed first, in Pt 2 of the Act, and must logically be considered first. Continuing detention orders are addressed in Pt 3 of the Act and may be made only if the court is satisfied that adequate supervision will not be provided by an extended supervision order. In so providing, the Act expressly acknowledges that a continuing detention order made after a final hearing is, in effect, an order of last resort. It is to be made only after a careful assessment of the adequacy of the supervision that will be provided by an extended supervision order: *Manna No 3* at [19] (per McCallum J).

5. Whilst the concepts “unacceptable risk” under s 5E(1) and “adequate supervision” under s 5G(1), both entail evaluative judgments, they serve different purposes and operate in different ways: *Donovan* at [69].

6. The determination of whether an extended supervision order will provide “adequate supervision” is an evaluative judgment undertaken by the court according to the circumstances of the individual case and having regard to objects of the Act (giving primacy to the objects stated in s 3(1)):*Donovan* at [77], *State of New South Wales v Donovan* [2015] NSWSC 1254 at [56] (per McCallum J), *State of New South Wales v Armstrong*[2015] NSWSC 1510 at [11].

7. The inquiry as to adequate supervision also requires consideration of the secondary purposes of the Act, that is, to encourage rehabilitation and the wide range of conditions which could be imposed by an interim supervision order: *Anderson v State of New South Wales* [2016] NSWCA 86 at [17].

8. The assessment as to whether an extended supervision order will not provide adequate supervision must be informed by consideration of risk factors, including psychiatric or psychological evidence, and the risk of reoffending (which also encompasses the circumstances or factors which may contribute to that risk): *Donovan* at [63]-[65]; [75]-[77]; [87], [89] and [90].

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9. Even if the Court determines that adequate supervision will not be afforded by an extended supervision order, the Court still has discretion to decline to make a continuing detention order: *Donovan* at [15].

Two examples:

State of New South Wales v Butterfield [2016] NSWSC 925

- Risk factors including a very long history of criminal offending and aggression, numerous institutional infractions, severe and pervasive Personality Disorder and her history of substance misuse.
- Dr Samuels: a person who “does represent an extreme type of offender”.

- “What is clear is that she [Ms Butterfield] has an enormous capacity for violence, she is impulsive, unpredictable and if she is in a setting where she is not contained, has access to substances, weapons, encounters people who are likely to upset or aggravate her, and she is suffering low mood, anxiety and paranoid thinking, this is a volatile mix which could lead to a serious act of violence.”
- Dr Samuels opines, with which opinion I agree, that the conditions do not exist which would allow Ms Butterfield to be the subject of an Extended Supervision Order at [35].
- CDO for maximum period of five years.

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State of New South Wales v Pacey [2015] NSWSC 1983

- Mr Pacey has only ever been convicted of committing one serious violence offence.
- In my opinion, taken at its highest, that material indicates without question that Mr Pacey is by definition a serious violent offender, but I am not satisfied to a high degree of probability, or indeed anything like it, that he poses an unacceptable risk of committing another serious violence offence. [48]

- Mr Pacey is at some risk of reoffending. That does not set him apart from a very large number of those with whom he has been incarcerated. The material that I have considered does not, however, satisfy me that there is an identifiable risk of sufficient probability to indicate that he is a high risk violent offender. [54].

- Summons dismissed with costs.