NSW GOVERNMENT | Crown Solicitor's Office

2020 CPD CONFERENCE

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Session 4B:
Litigation in a criminal context

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Preventative order regimes

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The role of the prosecutor

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Litigation in a criminal context

Understand the court's function in high risk offender litigation

Overview of CHRO and THRO regimes

Crimes (High Risk Offenders) Act 2006 **("CHRO Act"):**

- Post-sentence detention and supervision of offenders who pose an unacceptable risk of committing "serious sex offences" and "serious violence offences"

Terrorism (High Risk Offenders) Act 2017 **("THRO Act"):**

- Post-sentence detention and supervision of offenders who pose an unacceptable risk of committing "serious terrorism offences"

Types of orders

Continuing Detention Order

- Authorises the full-time detention of an offender in a correctional centre after their current custody expires.

Extended Supervision Order

- Authorises the supervision of the offender in the community after their current custody expires, and requires the offender to comply with any conditions imposed by the Court.

Nature of proceedings

- **Civil proceedings**: s. 21 of the *CHRO Act* and s. 50(1) of the *THRO Act*.
- **Protective** in nature, not punitive.
- **Primary object**: safety and protection of the community: s. 3(1) of the *CHRO Act*; s. 3(1) of the *THRO Act*.
- **Another object**: encourage offenders to undertake **rehabilitation:** s. 3(2) of the *CHRO Act*; s. 3(2) of the *THRO Act*.

Who is caught by the legislation?

- **CHRO Act**: is serving (or has served) a sentence of imprisonment for a serious sex or serious violence offence.
- **THRO Act**: Serving a sentence of imprisonment for *any* NSW indictable offence within one of the following categories:
  1. A "convicted NSW terrorist offender" s. 8;
  2. A "convicted NSW underlying terrorism offender" s. 9; or
  3. A "convicted NSW terrorism activity offender" s. 10.

Unacceptable risk

- The Court must be satisfied to a "**high degree of probability**" that the relevant offender poses an "**unacceptable risk**" of committing an offence if not kept in detention or supervision.
- **CHRO Act**: unacceptable risk of committing another "serious sex offence" or "serious violence offence".
- **THRO Act**: unacceptable risk of committing a "serious terrorism offence".

Predicting future risk

- Risk assessment report: assesses the likelihood of the eligible offender committing the relevant serious offence.
- Reliance on expert's clinical judgment: "The fact that the prediction of risk is largely clinically-based does not deprive it of validity." Adams J in *State of NSW v White (Final)* [2018] NSWSC 1943.

Constitutional issues arising under the CHRO and THRO Acts

- *Kable v DPP (NSW)* (1996) 189 CLR 51
  - Function substantially impairs a court's institutional integrity
  - Function therefore incompatible with court's role as repository of federal jurisdiction

Institutional integrity

- *Wainohu v NSW* (2011) 243 CLR 181, [44]-[46] (French CJ and Kiefel J)
    - Independence and impartiality
    - Procedural fairness
    - Open court
    - Reasons for decisions
    - Review for jurisdictional error

Challenge to CHRO Act

- *Kamm v NSW* (2017) 95 NSWLR 179
  - Substantial discretion
  - Review and appeal
  - Onus of proof on Attorney General
  - Requirement to give reasons
  - Detention for protective, not punitive, purposes

Challenge to THRO Act

- THRO Act: *NSW v Lawrence* [2019] NSWSC 1441
  - Do court's procedures accord procedural fairness and avoid practical injustice?

Predictive risk

- *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575
- *Thomas v Mowbray* (2007) 233 CLR 307
  - Commonwealth legislation – vesting of non-judicial power in a federal court
- *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236
  - *Crimes (Serious Crime Prevention Orders) Act 2016* (NSW)

The role of the Prosecutor

The scope of the Prosecutor’s duty to call witnesses

Brett Thomson, Special Counsel

Sophie Williams, Solicitor Advocate

Mattress-gate: the facts

The defendant, **Theo Fender**, is accused of having dumped a mouldy mattress in a reserve in a busy inner-city street.

The brief contains the statement of an eye witness, **David Pendable**, who saw the defendant and a companion in the street at the time, and later reported the alleged offence to our client. Mr Pendable provided a physical description matching Theo Fender, and a link to local community Facebook page where he later saw a photo of Mr Fender. The photo on Facebook was posted on the evening the alleged offence is alleged to have been committed. In the Facebook photo, the defendant is pictured with two companions. One of them matches the description of the woman seen with the offender in the street, and is tagged as **Wanda Gottaway**.

Mattress-gate: the facts cont…

At the time of the alleged offence, Mr Pendable was in a vehicle travelling with three friends which had just pulled up in the street. The brief contains a statement from each of the friends: **Miss Wright, Mr Shore** and **Mr Flighty.** Some of the details that the friends supply in their statements are different from the details the eyewitness has given.

The investigation has also identified a number of residents who live in the street where the alleged offence occurred. Whilst we have a list of residents' names, no statements from any of those people appear in the brief.

Based on Mr Pendable's statement, our client is convinced we have a "slam dunk" case, and wants the matter prosecuted quickly. The investigators have not approached the defendant with the allegation.

Richardson v R (1974) 131 CLR 116

"In making (the prosecutor's) decision as to the witnesses who will be called he may be required in a particular case to take into account many factors, for example, whether the evidence of a particular witness is essential to the unfolding of the Crown case, whether the evidence is credible and truthful, whether in the interests of justice it should be subject to cross-examination by the Crown, to mention but a few."

R v Apostilides (1984) 154 CLR 563

- The Crown prosecutor alone bears the responsibility of deciding whether a person will be called as a witness for the Crown.
- When charging the jury, the trial judge may make such comment as he then thinks to be appropriate with respect to the effect which the failure of the prosecutor to call a particular person as a witness would appear to have had on the course of the trial. No doubt that comment, if any, will be affected by such information as to the prosecutor's reasons for his decision as the prosecutor thinks it proper to divulge.
- A decision of the prosecutor not to call a particular person as a witness will only constitute a ground for setting aside a conviction if, when viewed against the conduct of the trial taken as a whole, it is seen to give rise to a miscarriage of justice.

Ms Wright

AN INTERESTED WITNESS.

"In general, the Crown is expected to call eye witnesses of any events which go to prove the elements of the crime charged even though they give accounts inconsistent with the Crown case. **The prosecutor's suspicion of the reliability of a witness** does not, of itself, constitute an adequate basis for a refusal to call an eye witness."

Mr Shore

"A refusal to call the witness will be justified only by reference to the overriding interests of justice. **Such occasions are likely to be rare.** The unreliability of the evidence will only suffice where there are **identifiable circumstances which clearly establish it**; it will not be enough that the prosecutor merely has a suspicion about the unreliability of the evidence."

Mr Flighty

"…eyewitnesses do not belong to a camp, but are within the class of persons from whom juries expect and are entitled to hear. The characterisation of witnesses being in "camps" is unfortunate. It necessarily implies that the prosecutor might choose to call only those witnesses favourable to his camp. This is in absolute derogation of a prosecutor's responsibilities".

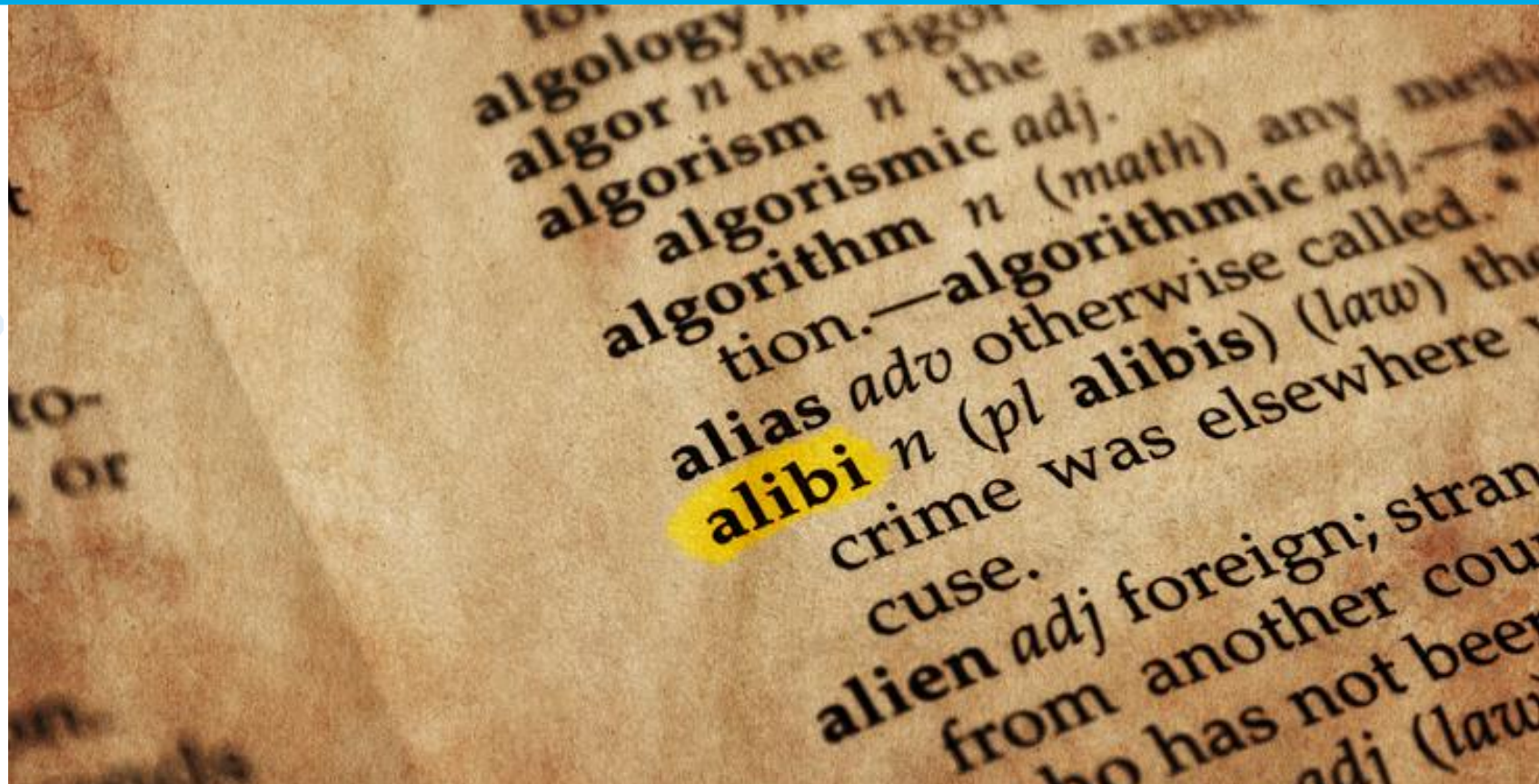
Livermore v R [2006] NSWCCA 334

- The criticism of a Crown witness who was not sought to be declared unfavourable, by a prosecutor, was a "serious irregularity".
- The expression by a prosecutor of his own view of the quality of the evidence, along with other inappropriate comments, gave rise to the prospect the jury was "actuated" by prejudice.
- The description by the prosecutor of an accused's evidence as "pathetic" and comments about his own reaction to the evidence, did not exhibit fairness and detachment.

Allchin v R; Skepevski v R

- There was no suggestion that either witness would be called in the case, the accused knew beforehand they would not be called;
- The material events in this case were recorded by Police surveillance. The outline of events, none of which was challenged, did not require the witnesses to be called;
- No statements had been taken from the witnesses. However, the prosecution was entitled to assume that as persons who appeared to be involved in the criminal enterprise their evidence would involve either self-incrimination, or would be unreliable. There was no authority which required them to be called.
- There had been no explanation of how the failure to call the witnesses led to a miscarriage of justice.

Trudy Goodhope



Takeaways

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- Statements from all relevant witnesses (even if inconsistent)
- Prosecutor’s duty of fairness extends to investigative agencies
- Information gathered and available to both parties
- Don’t “tailor” investigation to match case “theory”
- All credible and relevant evidence

Further reading

"The prosecutor's duty with respect to witnesses"
Martin Hinton
(2003) 27 Crim LJ 260