THE UNIVERSITY OF SYDNEY

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CrimNet

Sydney Institute of Criminology

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COVID-19 Criminology Continues

NEW PUBLIC HEALTH ORDER
Prohibition of intentional spitting and coughing

The NSW Health Minister issued the Public Health (COVID-19 Spitting and Coughing) Order 2020 on 9 April 2020, amended on 20 April 2020. Clause 5 provides that a person 'must not intentionally spit at or cough on' a public official, or 'another worker' while the worker is at the worker's place of work, or travelling to or from that place of work, 'in a way that would reasonably be likely to cause fear about the spread of COVID-19.' Public official is defined in cl. 3 as a health worker, a police officer, another person exercising functions under a law of NSW, an Immigration and Border Protection worker and a person employed or otherwise engaged by the Commonwealth Department of Health. A 'worker' is not exhaustively defined, but includes retail, airport and transport workers: cl.5(3). An amendment to the Public Health Regulation 2012 under the Public Health Amendment (COVID-19 Spitting and Coughing) Regulation 2020 provides for a fine of $5,000 for a spitting or coughing offence under the Order.

For prospective spitting / coughing victims not covered by the Public Health Order, the offence of common assault under s.61 of the *Crimes Act 1900* may apply. Spitting has been held to fall within the scope of a common assault: *DPP v JWH (NSWSC, Hulme J, 17 October 1997*, while COVID-19-related coughing directed at members of the public is being charged as common assault in England and Wales according to the Crown Prosecution Service. A recent case dealt with at Leeds Magistrates' Court involved a man who became aggressive and abusive to staff who were supervising a queue of shoppers at a store, allowing only a restricted number into the shop at any one time to ensure social distancing. When prevented from jumping the queue by staff, the offender 'coughed theatrically into the air', then 'gargled and spat in the direction of a female staff member, and laughed'. He was sentenced to six months in prison.

MANIFESTLY INADEQUATE SENTENCE SURVIVES CROWN APPEAL
COVID-19 considered in exercise of Court's discretion

The respondent (to the Crown appeal) in *RC v R; R v RC* [2020] NSWCCA 76 was convicted after trial of one count of sexual intercourse with a child under the age of 10 years, contrary to s.66A(1) of the *Crimes Act 1900*. The victim was his almost six-year-old grand-son. The offence involved digital penetration of the victim's anus while the respondent was bathing him. The respondent was sentenced to a community corrections order ('CCO') for 18 months. The respondent appealed to the Court of Criminal Appeal ('CCA') against his conviction. The conviction appeal was dismissed. This summary addresses the Crown's appeal to the CCA against sentence under s.5D of the *Criminal Appeal Act 1912*.

The sentencing judge had imposed the CCO and expressed an intention to include a community service component prior to receiving an assessment report, as required under Part 2, Division 4B (particularly s.17D(4)) of the *Crimes (Sentencing Procedure) Act 1999*. The assessment report subsequently prepared by Community Corrections stated that no community service work was available as no agency could offer work to a convicted child sex offender. The sentencing judge then imposed the CCO without any work component. Had the sentencing judge awaited the preparation of the assessment report, he may have formed a different view as to the appropriate sentence to be imposed. This procedural irregularity resulted in a sentence that was lower than the sentence that his Honour had intended to impose.

The CCA also found that sentence was manifestly inadequate: [235]. The offence carries a maximum penalty of life imprisonment and has a standard non-parole period of 15 years. Wilson J said at [230], 'These legislative guideposts without more demonstrate the very grave view taken by the Parliament and the community of offences contrary to s 66A of the *Crimes Act*. Stern sentences are required in offending involving the sexual abuse of children to protect these most vulnerable members of our community. Children, and particularly young children, have little or no capacity to protect themselves against sexual assaults. The criminal justice system must supply that protection.' Furthermore, 'it could only be in the most extraordinary and unusual circumstances that a sentence of full-time imprisonment would not be imposed on an offender': [233], and there were no extraordinary or unusual circumstances in this case. It was not open to the sentencing judge to find that the offence fell at the very lowest level of objective gravity given the victim's age, the fact that the offence caused some pain, was committed in the victim's home and involved a gross breach of trust: [238]-[239].

Notwithstanding the conclusion that a sentence of full-time imprisonment should have been imposed, the CCA exercised its discretion not to intervene. Evidence was presented on appeal that the respondent's advanced age (76 years) and respiratory illness put him at greater risk than other prisoners of contracting COVID-19. It was submitted on his behalf that if infected, the respondent faced a very poor outcome, including the possibility of death. The respondent's enhanced COVID-19 risk would have justified a finding of special circumstances to vary the 'statutory ratio' between the total term and the non-parole period under s.44(2) of the *Crimes (Sentencing Procedure) Act 1999*: [251]. It could readily be accepted that the respondent would experience a heightened less of stress and anxiety in relation to the pandemic were he to be sentenced to a term of imprisonment: [254]. R A Hulme and Hamill JJ agreed with Wilson J. **Read the CCA judgment here.**

RELEVANCE OF COVID-19 TO SENTENCE APPEALS

Limits to CCA's powers in absence of appellable error

The applicants in *Borg v R; Gray v R* [2020] NSWCCA 67 sought leave to appeal against the sentences imposed for commercial drug supply. The appeals were ultimately dismissed by the Court of Criminal Appeal ('CCA'). At the hearing of the appeal, counsel who appeared for one of the applicants sought to rely on further submissions relating to COVID-19, not just in the event her client was to be re-sentenced, but in the Court's consideration of the question of whether the sentence was manifestly excessive. No fresh evidence was sought to be adduced.

Adamson J noted there were limits to the circumstances in which the CCA could receive new evidence and refused to consider the additional submissions since the Court was not entitled to re-sentence the applicant in the absence of error by the sentencing judge. McCallum JA and Johnson J agreed, McCallum JA adding that any review of a sentence in the light of subsequent events falls within the province of the Executive Government. McCallum JA also noted the recent legislation enabling the Corrective Services Commissioner to release certain categories of prisoner and concluded, 'This Court has no authority to arrogate any such emergency power to itself.' **Read the CCA decision here**.

VIRTUAL COURTROOMS
Dropping out, dialling back in

Ian Macdonald, Edward Obeid and Moses Obeid are being jointly tried for wilful misconduct in public office by judge alone before Justice Fullerton in the Supreme Court of NSW. New arrangements had been announced regarding physical appearances at trials in the Supreme Court during an adjournment in the proceedings after the trial had been in progress for almost five weeks. In the course of a 'test run' of the facilities for convening a 'virtual courtroom' via a web link it became clear that the system did not easily cope with the appearance of all six counsel and each of the instructing solicitors. Justice Fullerton expressed concerns as to how it was envisaged that witnesses would give evidence via audio-visual link ('AVL') and be cross-examined where the Court Book exceeded thousands of pages and almost 80 documents marked for identification. The Crown applied for orders under newly enacted ss.22C(3) and (4) of the *Evidence (Audio and Audio Visual Links) Act 1998* (NSW) for the appearance of the legal representatives of each party, the accused and all Crown witnesses to take place by AVL from a variety of remote locations. On repeated occasions during a subsequent convening of the Court, one or more of the parties 'dropped out', necessitating a communication between them and the trial judge's tipstaff advising of the steps they should take to 'dial back in'. The Chief Justice refused an application for the parties to appear in person. An application was ultimately made on behalf of Macdonald for the trial to be adjourned part heard, based on the practical difficulties in representing Macdonald remotely.

In granting the application over the Crown's objection, her Honour stated, 'The accused are entitled to a fair trial which includes, necessarily, fair process and procedures. I am of the view that a trial of the accused in a virtual courtroom is impractical. I have further resolved to the view that the accused's right to a fair trial would be at risk were I to order that it continue at this time, subject as it is to the current health and safety regime imposed under the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (NSW) under s 7 of the *Public Health Act 2010* (NSW), and the Chief Justice's direction that there be

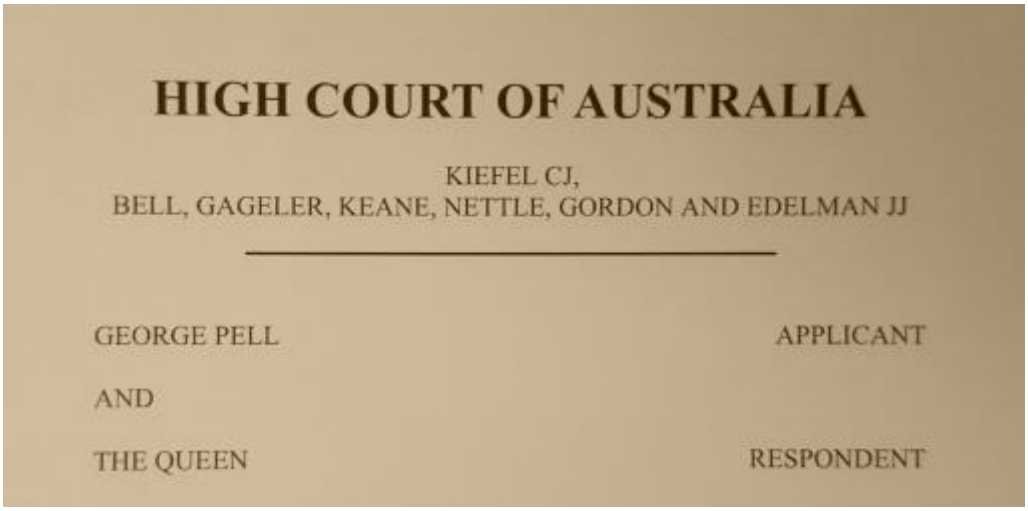
no physical appearances in trial proceedings.' The trial was adjourned to August 2020. **Read the Supreme Court decision here**.

LOCAL COURT LISTING ARRANGEMENTS UPDATE
Memorandum Number 9

The Chief Magistrate, Judge Graeme Henson has issued Memorandum No. 9 to update and consolidate listing arrangement in light of COVID-19. In the introductory comments, the Chief Magistrate notes, 'It should not be assumed the current provisions of the *Bail Act 2013* are secondary to the existence of the pandemic. Applications for review of bail will be dealt with in accordance with settled principle and the statutory requirements of the Act.'

Among the key provisions in the criminal jurisdiction are that contested hearings will not be heard. Pleas and sentencing submissions may be communicated in writing and a physical appearance by the defendant (not in custody) and their legal representative will not be required unless the Court determines it is necessary. Sentencing proceedings involving defendants in custody may proceed and dealt with to finalty through the use of AVL technology. **Read the Chief Magistrate's Memorandum (No. 9) here**.

COVID-19 CRIMINAL LAW RESOURCES
Criminal law-related COVID-19 resources have been compiled by several organisations, including the NSW Public Defenders, Legal Aid NSW and the Judicial College of Victoria.



High Court overturns jury verdict

Pell v The Queen [2020] HCA 12

The applicant was convicted of five sexual offences committed against two choirboys when the applicant was the Catholic Archbishop of Melbourne. His appeal against his convictions was dismissed by the Victorian Court of Appeal by a majority of two to one. His application for special leave from the decision of the Victorian Court of Appeal was referred to the Full Court of the High Court.

The grounds of appeal were that the majority in the Court of Appeal erred (i) by

finding that their belief in the complainant required the applicant to establish that the offending was impossible in order to raise and leave a doubt, and (ii) in concluding that the verdicts were not unreasonable as there remained a reasonable doubt as to the existence of any opportunity for the offending to have occurred.

The High Court unanimously granted special leave on both grounds, upheld the appeal and entered verdicts of acquittal all counts on the basis that there was a significant possibility that an innocent person had been convicted because the evidence failed to establish proof beyond a reasonable doubt. The High Court held that the Court of Appeal correctly identified the relevant test set out in *M v The Queen* (1994) 181 CLR 487, being 'whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty': [43]. The Crown case proceeded on the basis that each incident took place following Mass, the first four offences on one of two dates in December 1996 and the fifth on a date in February 1997. Consistently with its obligations, the Crown called a number of witnesses whose largely unchallenged evidence was to the effect that there was no realistic possibility the offences occurred having regard to the strictness with which certain church rules were observed (such as the applicant never returning to the sacristy alone and always being accompanied while robed) and the applicant's practice of greeting parishioners on the Cathedral steps after Mass. The Court of Appeal's error was in finding that, despite the contradictory evidence, it remained possible that the key Crown witness's account was correct, rather than asking whether it was reasonably possible that his account was incorrect, giving rise to a reasonable doubt about the applicant's guilt: [46].

Sydney Institute of Criminology Deputy Director Andrew Dyer says: 'This case has aroused great controversy, but my present view is that the result that the High Court has unanimously reached is sound. It is true that that Court has often pointed out that jury verdicts should not lightly be disturbed (eg *The Queen v Baden-Clay* (2016) 258 CLR 308, 329 [65]). But this is not the first time that that Court has set aside such a verdict (see eg, recently, *Fennell v The Queen* (2019) 93 ALJR 1219; *Coughlan v The Queen* [2020] HCA Trans 8); and there seems to be force in the Court's conclusion that this was a case where the jury was required to have a doubt. It is important that sexual offence complainants be believed. Accordingly, the Court's confirmation that juries may convict on such complainants' evidence alone (at [53]), is to be welcomed. But it is also important not to convict people unless their guilt has been proved beyond reasonable doubt, and in the unusual circumstances of this case - many witnesses gave evidence that Pell had or would have had no opportunity to offend - it seems at least arguable that the jury was unreasonable to convict. This is not to accept claims from some quarters that this complainant's evidence was clearly false. As the High Court indicated, the jury found him to be credible and reliable: [39]. It is merely to acknowledge that the jury's belief of a complainant and the existence of a reasonable doubt can co-exist (*Liberato v The Queen* (1985) 159 CLR 507, 515, 519-520; *de Silva v The Queen* (2019) 94 ALJR 100, 104-5 [12]).'

Sydney University Law School Professor David Hamer observes that the broader question raised by this case 'is the vulnerability, on appeal, of jury convictions resting solely upon the complainant's word'. While the High Court recognised that complainant credibility is a jury question (at [37], [38]), 'this is subject to an important qualification… the appeal court still "examines the record" to determine whether the prosecution has proved its case beyond reasonable doubt: [39]. The other evidence in the case may be sufficient to throw doubt on the complainant's

credibility. That is what occurred here. The High Court largely accepted the defence characterisation of the evidence of limited opportunity, perhaps to the point that there was no "possibility" of the offence occurring as the complainant described: [110], [114].' Professor Hamer points out the High Court's view that the prosecutor at trial failed to properly challenge evidence of the defendant's lack of opportunity: eg [76], [88], [91], [101], [119], [127]: 'To a degree, the prosecution was then barred from submitting that the evidence could not be accepted at face value.' The prosecution had sought to undermine the reliability of the evidence favourable to the defence on the basis that the witnesses' evidence may have been weakened by the delay in instituting proceedings. Professor Hamer observes that the High Court questioned whether it was appropriate to 'discount' the defence case in this way: [91].

Although it did not give rise to a separate ground of appeal, the High Court disapproved of the Court of Appeal's practice of viewing the recording of the complainant's evidence, stating, 'the appeal court should not seek to duplicate the function of the jury in its assessment of the credibility of the witnesses where that assessment is dependent upon the evaluation of the witnesses in the witness-box': [37]. (The NSW Court of Criminal Appeal referred to this approach in resisting a request to view the recording of a complainant's evidence in *RC v R; R v RC* [2020] NSWCCA 76 at [145]-[149].)

Read the High Court's judgment here.

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New publications

Book review "Queer histories and the politics of policing" by Emma K. Russell

Review by Justin R. Ellis (2020) *Current Issues in Criminal Justice*

Justin Ellis identifies a 'legitimacy problem' in policing organisations that deny past wrongs towards Lesbian, Gay, Bisexual and Transgender (LGBT) communities. Despite public apologies and an increased policy focus on diversity and inclusion, policing organisations may be said to engage in symbolic acts of recognition without meeting public expectations of police accountability. In this review, Ellis refers to Russell's documentation of the Victoria Police raid on the Tasty nightclub in Melbourne in 1994, when 463 patrons and staff were detained and strip-searched. In doing so, Ellis draws upon his own analysis of the excessive use of police force at the 2013 Sydney Gay and Lesbian Mardi Gras parade. The book also explores how police organisations appropriate LGBT rights imagery, contributing to the erasure of past police wrongs. Ellis reflects on the backlash to the enactment of same-sex marriage in the form of the Religious Freedom Bill as a 'stark reminder that the LGBT human rights struggle is non-linear and unpredictable' and that 'LGBT communities need to remain vigilant'.

Read the review here.

Bulletin Use of mobile phones to buy and sell illicit drugs

Australian Institute of Criminology

Communications technology is an important tool in drug markets throughout Australia and elsewhere. This AIC Statistical Bulletin uses data obtained through the Drug Use Monitoring in Australia (DUMA) program to examine the use of mobile phones within the illicit drug market. 487 police detainees were interviewed during July and August 2018 in relation to mobile phone ownership, use of messaging apps and how these technologies were used for drug-related communication.

Of those who had a mobile phone, 278 (59%) had used it to buy (98%), sell (48%) or deliver (41%) drugs. The most common telecommunication methods used were phone calls (85%), text messages (77%) and messaging apps (53%). The most common reason for using messaging apps was ease or convenience, although concealment and security reasons were also reported. Messaging apps were more commonly used by younger detainees. Among those who had used a mobile phone to buy or supply drugs, 45% had used code words or code names and 17% had used an encrypted device to evade law enforcement. Another tactic used to evade the authorities was the short-term use of 'burner' phones. A better understanding of the motives and methods used in the illicit drug market may assist in the development of countermeasures for drug-related crime enabled by these technologies. Read the AIC Statistical Bulletin here.

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Jobs and opportunities

Nominations 2020 ANZSOC Awards

The Australian and New Zealand Society of Criminology ('ANZSOC') confers a number of Awards each year. The following are now open for nominations:

- New Scholar Prize
- Adam Sutton Crime Prevention Award
- Allan van Zyl Memorial Award
- David Biles Correctional Research Award
- Indigenous Justice Award
- Award for Excellence in Teaching
- Undergraduate Student Paper Award
- Best Honours or Masters Thesis in Criminology Award
- PhD Student Paper Award.

Nominations for awards should be made in writing, accompanied by documentation supporting all aspects of eligibility for the award, and be submitted by email to secretary@anzsoc.org by **30 April 2020.** Applicants for Awards may nominate themselves, but may only submit one application in any given year. A number of ANZSOC Awards are for members only. **For more information visit the website here.**

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Events, seminars and conferences

Event promotion Cancellation and postponement of events

CrimNet will suspend promotion of all events in accordance with orders by the Minister for Health to address the spread of COVID-19, and otherwise to promote the protection and safety of staff, students and the general community both within and outside the State of NSW.

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