DISTRICT COURT APPEALS

By Ken Averre

ALS Conference 2 August 2012

Wollongong

Appeals From The Local Court

District Court

Crimes (Appeal and Review) Act 2001

Section 11	appeal as of right to the District Court against conviction or sentence (or both) But NOTE: Time limits – 28 days (s 11 (2)) but provision for late applications (s 13)
Section 11A	appeal against refusal of application for annulment of conviction
Section 12	appeal against conviction in absence only with leave of the District Court
Section 17	Appeal against sentence by way of rehearing of evidence, although fresh evidence may be given – no leave required
Section 20(2)	Sentence can be increased but principles in *Parker v DPP* (1992) 28 NSWLR 282; 65 A Crim R 209 operate where the judge is contemplating an increased sentence.
Section 18	Appeal against conviction by way of rehearing on the evidence. Fresh evidence may be given but only with leave. Free copy of the transcript.
Section 19	Evidence may be given in person

Supreme Court

Crimes (Appeal and Review) Act 2001

Section 53 (1) of the *Crimes (Appeal and Review) Act 2001* provides for an appeal against conviction or sentence to the Supreme Court on a question of law or on a question of mixed law and fact with leave of the Supreme Court.

S 53(3) provides for and appeal against an order in committal proceedings and against an interlocutory made by the Local Court in relation to a person in summary proceedings but only on a ground that involves a question of law alone and only by leave of the Supreme Court.

However, the time for appeal (s 53(4)) is prescribed by Part 51B of the *Supreme Court Rules 1970* – an appeal must be made within 28 days after the date the decision is pronounced or given (the material date) but this may be extended by the Supreme Court.

For enlightment on what is a question of law alone or what is a question of mixed law and fact see: *R v PL* (2009) NSWCCA 256 per Spigelman CJ at [11] – [27].

See: *CL v DPP* (NSW) [2011] 943.

Section 69 Supreme Court Act 1970

It possible to bring proceedings in the Supreme Court to challenge a determination of the local court. However, there are limited grounds upon which such an appeal can be brought and they can be summarised as jurisdictional error; wrongly applying or directing as to the law; denial of procedural fairness; or denial of natural justice. It is akin to an administrative review of the decision of the Local Court.

However, this is the avenue of appeal in relation to a refusal by the Magistrate to order costs pursuant to s 212 *Criminal Procedure Act 1986*. See: *De Varda v Constable Sterngord (NSW Police)* [2011] NSWSC 868.

See also: *Lawson v Dunlevy* [2012] NSWSC 48; *RP v Ellis & Anr* [2011] NSWSC 442.

Appeals to the District Court

The Court in *Charara v the Queen* [2006] NSWCCA 244 affirmed some key principles in relation to appeals under s 18 of the Act, including the following:

(a) An appeal under section 18 of the Act is a rehearing on the certified transcripts of evidence, supplemented by reference to exhibits tendered in the Local Court, and not an appeal *de novo.*

(b) The principles governing appeals from judges sitting without a jury apply; the appellate judge is to form his or her own judgment of the facts while recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called in the lower court and observing the natural limitations stemming from proceeding wholly or substantially on the transcript record.

(c) Whilst the magistrate's reasons are not part of the certified transcripts of evidence referred to in s 18(1), recourse may be had to them since the appellate function could not properly take place without reference to them.

Essentially, the test the Court applies is whether the District Court is, on the transcript and any other evidence admitted in the proceedings, satisfied beyond reasonable doubt of the guilt of the appellant: *Charara v the Queen* [2006] NSWCCA 244; *Gianoutsos v Glykis* [2006] NSWCCA 137; *Wood v Director of Public Prosecutions* [2006] NSWCA 240. The following instructive passage appears in *Gianoutsos v Glykis* (at paras [37] – [38]):

> "37 In *Allesch v Maunz [2000] HCA 40;* (2000) 203 CLR 172 the HighCourt considered the appeal provisions under the *Family Court Act.* In the course of the joint judgment of Gaudron, McHugh, Cummow and Hayne JJ their Honour's said at 180:
>
> > "For present purposes, the critical difference between an appeal by way of rehearing and a hearing *de novo* is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error (see CDJ v VAJ [19998] HCA 76; (1998) 197 CLR 172 at 201-2002), whereas, in the latter case, those powers may be exercised

> regardless of error. ***At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised regardless of error.***" (emphasis added)
>
> 38 In the present case, the legislation does indicate that the District Court's appellate powers may be exercised regardless of error. Section 20 of the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW) provides that on an appeal from a magistrate the District Court may either set aside a conviction (or in this case an APVO), or it may dismiss the appeal. The District Court is not limited to ordering fresh proceedings in the court below. Indeed, unlike the Supreme Court (see s 55(1)(b) of the *Crimes (Local Courts Appeal and Review) Act 2001* (NSW)), the District Court is given no express power to remit the matter back to the Local Court for redetermination in accordance with its directions. In *R v Kurtic* (1996) 85 A Crim R 57, Hunt CJ at CL noted that the power to determine an appeal otherwise than by ordering fresh proceedings would indicate that a court with such a power is not a court of error (at 59-60)."

Preparing

Having seen the legal aid and ALS list in the District Courts at Sydney and Parramatta I am sure spending hours analysing transcripts of evidence and reasons for decisions is unrealistic. The thing is this though – if it matters to you do a note on the file as to what you think was wrong.

Written submissions. I am sure that this is not necessarily a realistic proposition for most practitioners but let me say this. If you have a technical appeal on the law and or where there are real issues about the evidence handing up written submissions improve your chances!

They also help you make sure that you are familiar with the materials the judge will have and will help you identify the issues in the case.

You can either fax them to the court the night before (as long as you also send a copy to the DPP) or alternatively hand them up in court.

Whether you are preparing written submissions in advance or preparing for an appeal on the hop what you need to ask is what the appeal is about? Well inevitably it will be about the facts and law.

Whatever the appeal is about there is a way to go about preparing the appeal:

ASSESS the type of case you are dealing with:

POSITIVE	clear weaknesses and dangers can be plainly demonstrated to lurk within the prosecution case
NEGATIVE	the more the facts are analysed the stronger they appear

Positive Cases

Analyse the facts in detail. A substantial point in your argument is likely to rely upon grounds of appeal to the effect that the verdict is not adequately supported by the evidence.

Start your argument with a short summary of the facts in an uncontroversial manner and do not overstate the facts.

You could start as follows:

The appellant was convicted after hearing in the Parramatta Children's Court of a single count of indecent assault. The offence, said to have been committed on xxxxxx, was brought under s 61L of the *Crimes Act* 1900 and the appellant was sentenced to a 12 month good behaviour bond pursuant to s 33(1)(b) of the Children (Criminal Proceedings) Act 1997. The appellant appeals that conviction and sentence.

The appellant is a young man of years of age both at the date of the incident and the date of the hearing (born xxxxxx) who, prior to the alleged incident, had never been charged with any criminal offence. He was convicted on the uncorroborated evidence of the complainant, who was xxx years of age at the time of the incident but some months older than the appellant (in that she was xx at the time of giving evidence). The narrative of the complainant as to complaint to two witnesses was inconsistent with the evidence of those two witnesses and her behaviour was, it is submitted, inconsistent with the offence having occurred. Initial complaint was said by the complainant to have been made to a friend on the day of the actual incident with the police having been contacted some three months later.

The appellant asserted his innocence to the police at the earliest opportunity and gave evidence on oath which was consistent throughout. It will be contended that a finding of guilt is not safely supported by the evidence and particularly so in the light of certain aspects of the onus and burden of proof in the context of the two differing versions of events from the complainant and the appellant and the risks inherent in that.

The weakness lurking the prosecution case can ultimately be seen in the unreliability of the evidence of the complainant herself and in particular in the inconsistency with the evidence of others.

Negative Cases

> The less said about the facts the better. You cannot ignore them.

> > In those circumstances, there is a real danger that the evidence of the prosecution, superior mathematically might be assumed to constitute a body of evidence that the appellant in some way to discredit for him to be acquitted. It will be contended that it was critical to analyse the evidence against the background of very careful directions as to the onus of proof, mistaken identity and the relevance of intoxication.

As outlined above, the District Court does not need to find error but you will encounter judges who really believe they cannot go behind the findings of credit made by a magistrate who had the advantage of hearing and seeing the witness. In a case such as that then it is important to demonstrate some inversion of the onus. Often it will be like hitting your head on a brick wall. However, persevere.

Fresh Evidence

Leave of the court is required to adduce "fresh evidence". Lave is to be granted if the court is of the opinion that it is "in the interests of justice" that the evidence be given.

"Fresh evidence" is defined in s 3 as follows:

> "in relation to appeal proceedings, means evidence in addition to or in substitution for the evidence given in the proceedings from which the appeal proceedings have arisen."

So it is not as convoluted as it is for appeals in other jurisdictions but it is suggested that the part seeking to adduce the "fresh evidence" should offer some explanation as to why the evidence was not called in the local court.

Butterworth's Criminal Practice & Procedure NSW[1] identifies that the interests of justice would appear to include the following factors:

- The interest in securing relevant testimony
- The interest in assuring that a person who is accused of a crime is convicted if guilty and acquitted if innocent after he has had a fair trial
- The public interest in the due administration of justice
- The interest in keeping parties to the cases which they ran at the first instance

[1] [4-s18.5] 91,211

There is wide discretion to permit the fresh evidence.

From a practical point of view you need a notice of motion and affidavit!

Evidence to be given in person

Section 19 of the Act adopts the concepts of "special reasons" and "substantial reasons" from ss 91 and 92 of the *Criminal Procedure Act 1986*. Butterworth's authors give a lengthy analysis of the practical operation of ss 18 and 19[2] which is worth a read.

> "The following propositions may be stated concerning the operation of ss 18 and 19:
>
> (a) the legislation is intended to encourage both prosecution and defence to call all witnesses and tender all evidence before the local court and for those witnesses to be examined and cross-examined fully at that hearing;
> (b) neither the prosecution nor defence has an automatic entitlement to tender further evidence or to call further witnesses on appeal or to further examine or cross-examine witnesses who were called at the Local Court hearing;
> (c) "fresh evidence", oral or documentary, may only be given on appeal against conviction with the leave of the court, if the court is of the opinion that it is in the interest of justice that the evidence be given: s18(2). Ordinarily, the party seeking to adduce "fresh evidence" should offer some explanation as to why the evidence was not called in the Local Court and satisfy the Court that it is in the interests of justice that the evidence be given on appeal. ....."

Facts, Credibility & Demeanour – A Troublesome Trio

A difficulty for most practitioners is that a determination may have been made as to the credibility of witnesses in the local court hearing. The Magistrate will have had the benefit of seeing and hearing the evidence. The key cases are said to be as follows:

- *Devries v ANR Comm.* (1993) 177 CLR 472
- *Abalos v Aust. Postal Comm* (1990) 171 CLR 167
- *Jones v Hyde* (1989) 63 ALJR 349
- *Fox v Percy* [2003] HCA 22

[2] [4-s 19.10]

According to Justice David Peek QC of the South Australian Supreme Court the following passage from judgement of Brennan, Gaudron and McHugh JJ in *Devries v Aust. Nat. Railways Comm.* (1993) 177 CLR 472 is possibly the most misunderstood in the whole of the Commonwealth Law Reports. Justice Peek has referred this misunderstanding (and not the judgment itself) as the "mirage". The passage is as follows:

> "More than once in recent years, this Court has pointed out that a finding of fact by a trial judge, based on the credibility of a witness, is not to be set aside because an appellate court thinks that the probabilities of the case are against – even strongly against – that finding of fact ((12) See Brunskill (1995) 59 ALJR 842; 62 ALR 53; Jones v. Hyde (1989) 63 ALJR 349; 85 ALR 23; Abalos v. Australian Postal Commission (1990) 171 CLR 167.). If the trial judge's finding depends to any substantial degree on the credibility of the witness, the finding must stand unless it can be shown that the trial judge "has failed to use or has palpably misused his (or her) advantage" ((13)) S.S. Hontestroom v. S.S. Sagaporack (1927) AC 37, at p 47.) or has acted on evidence which was "inconsistent with facts incontrovertibly established by the evidence" or which was "glaringly improbable" ((14) Brunskill (1985) 59 ALJR, at p 844; 62 ALR, at p 57.)."

Conflict

The plurality of the High Court had, in *Warren v Coombes* (1979) 142 CLR 531, observed[3]:

> "....there is a conflict between two principles, each of which has to be given effect. The first is that the appeal is a rehearing, and, as Lord Sumner said, it is not "a mere matter of discretion to remember and take account of this fact; it is a matter of justice and of judicial obligation". The second principle, again to quote Lord Sumner, is that 'not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case'.

The High Court again looked at the conflict in *State Rail Authority of New South Wales v Earthline Constructions Pty Limited (In Liq)* [1999] HCA 3; 160 ALR 588

Gaudron Gummow and Hayne JJ at 63

> "It is true that the trial judge, in determining whether to accept the evidence of Mrs Page was heavily swayed by his impression of her whilst giving oral evidence. However, this circumstance does not preclude a

[3] At p 537

> court of appeal from concluding that, in the light of other evidence, a primary judge had too fragile a base for supporting a finding that a witness was unreliable."

Kirby J, at [68] – [93] considered the authorities and set out, and at [93], a non-exhaustive list as to when credibility findings were not a bar to the appeal. For the purposes of this paper it is possible to identify a number of the matters relevant to criminal appeals:

> By reference to incontrovertible facts or uncontested testimony it may be possible to show that the conclusions reached are plainly wrong.
>
> Where evidence had been wrongly admitted and the trial judge reached conclusions on the basis of that evidence.
>
> The reasons given by the trial judge for rejecting the evidence of a particular witness may go beyond a simple statement about the witnesses' appearance or demeanour. The additional reasons may demonstrate that the judge took into account irrelevant considerations or has not properly weighed all of the relevant considerations.
>
> The conclusion reached does not depend upon credibility considerations or impressions about the demeanour of a witness but upon the judge's assessment of objective facts or inferences to be drawn from the facts as found. The appellate court will then be in as good a position to make the assessment and draw the inferences.

Decisions since Earthline

Boland v Yates Property Corporation Pty Ltd (1999) 74 ALJR 209

Walsh v Law Society Of New South Wales [1999] 3 HCA 33; 198 CLR 73; 165 ALR 405

What has to be borne in mind in relation to most of the decisions dealing with these issues is that *Devries* was a civil case. The prosecution must prove its case beyond a reasonable doubt and the question is not as to which of two conflicting witnesses is to be preferred but rather whether the case is proven beyond reasonable doubt and the question remains the same at the appellate level.

Flowing from that is a reminder that criminal law involves a number of rules of practice and law not applicable in the civil area. Required warnings as to suspect classes of evidence are good examples and the non-observation of such rules of practice and law may lead to a verdict being set aside in a way quite foreign to appellate review of civil law.

In *Singh v R* [2011] NSWCCA 100 Rothman J observed at [127] – [130]:

“Mr Singh, raises *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (In Liq)* [1999] HCA 3; (1999) 160 ALR 588; (1999) 73 ALJR 306, in which the High Court of Australia dealt with the role of appellate courts in relation to findings of fact based on credibility of witnesses. Of course, *Earthline* , supra, did not concern a jury verdict, in relation to which there is still some slightly greater deference and *Earthline* was a civil proceeding. In *Earthline* , supra, Justice Kirby said:

> "There is a growing understanding, both by trial judges and appellate courts, of the fallibility of judicial evaluation of credibility from the appearance and demeanour of witnesses in the somewhat artificial and sometimes stressful circumstances of the courtroom. Scepticism about the supposed judicial capacity in deciding credibility from the appearance and demeanour of a witness is not new. In *Societe D'Avances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The 'Palitana')* , Atkin LJ remarked that 'an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.' To some extent, the faith in the judicial power to discern credibility from appearances was probably, at first, a consideration which the judiciary assumed that it inherited from juries. It was natural enough that trial judges, accustomed to presiding over jury trials, would claim, and appellate judges would accord, the same 'infallible' capacity to tell truth from falsehood as had historically been attributed to the jury. Nowadays, most judges are aware of the scientific studies which cast doubt on the correctness of this assumption. Lord Devlin in *The Judge* quoted with approval a remark of MacKenna J: 'I question whether the respect given to our findings of fact based on the demeanour of the witnesses is always deserved. I doubt my own ability ... to discern from a witness's demeanour, or the tone of his voice, whether he is telling the truth.' It was a becoming but entirely accurate modesty.
>
> Apart from all else, demeanour is, in part, driven by culture. Studies suggest that evaluation of the evidence of women may sometimes be affected by stereotypes held by the decision-maker. This is doubtless also true in the case of evidence given by members of minority groups, whether racial, sexual or otherwise. Distaste or prejudice can cloud evaluation. Further, in a society such as Australia's, the capacity of the judiciary to respond to every cultural variety of communication is limited. Fifty years ago, the Supreme Court of Canada wisely declined to offer guidelines about the kinds of demeanour that would afford reliable indicators of the trustworthiness of witnesses. The studies of experimental psychologists since that time have confirmed the danger of placing undue reliance upon appearances in evaluating credibility. Such studies were not available to the appellate courts when the rules of deference to the assessments of trial judges on questions of credibility were first written. They are available to us today.

> Although they have not yet resulted in a re-expression of the appellate approach (and by no means expel impressions about witnesses from the process of decision-making) the studies have two consequences. Trial judges should strive, so far as they can, to decide cases without undue reliance on such fallible considerations as their assessment of witness credibility. And appellate courts should refrain from needlessly expanding the categories of trial conclusions about the facts which are effectively unreviewable because of presumed or inferred credibility considerations."

His Honour Justice Kirby was a little more strident in his approach to issues of credibility than was the plurality judgment (Gaudron, Gummow and Hayne JJ) which, in part, says:

> "[63] It is true that the trial judge, in determining whether to accept the evidence of Mrs Page, was heavily swayed by his impression of her whilst giving oral evidence. However, this circumstance does not preclude a court of appeal from concluding that, in light of other evidence, a primary judge had too fragile a base to support a finding that a witness was unreliable. The documentary evidence in this case, comprising unchallenged affidavit material of Mrs Meek and Ms Packham, the wage records and related documents of Earthline and Nuline, the list of plant (at least in relation to machine No 59) and the analysis of Coopers & Lybrand (in respect of the duplicity claims), provides significant support to the allegations made by Mrs Page.
>
> As Kirby J and Callinan J point out in their reasons for judgment, these were matters to which weight was not given either by the trial judge or the Court of Appeal. The substance of the matter is that there has not yet been a determination of the SRA's case upon a consideration of the real strength of the body of evidence it presented. There must be a new trial at which this consideration will be undertaken."

Earthline , supra, concerned findings of credibility that did not take account of independent, uncontroversial and uncontroverted material inconsistent with those findings. This is a wholly different situation. The physical evidence relating to Mr Singh's alibi was itself the subject of significant controversy.

While each alibi witness testified to the date of the birthday party, no witness could attest to the accuracy of the date imprinted by the camera on the photographs. The photographs evidence different times displayed by the clock on the wall that featured in some of the photographs compared, with the time on the uncle's wristwatch. All of the photographs were taken during the party, which lasted from approximately 7.30pm to 11.00pm. There was some controversy as to whether the negatives of the photographs were ever supplied to the police."

In *Fox v Percy* [2003] HCA 22 (cited approvingly in *Charara*) Gleeson CJ, Gummow and Kirby JJ stated at 25:

> **"..**Within the constraints marked out by the nature of the appellate process, the appellate court is obliged to conduct a real review of the trial and, in cases where the trial was conducted before a judge sitting alone, of that judge's reasons. Appellate courts are not excused from the task of "weighing conflicting evidence and drawing [their] own inferences and conclusions, though [they] should always bear in mind that [they have] neither seen nor heard the witnesses, and should make due allowance in this respect". In Warren v Coombes, the majority of this Court reiterated the rule that:
>
> > "[I]n general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge but, once having reached its own conclusion, will not shrink from giving effect to it."
>
> As this Court there said, that approach was "not only sound in law, but beneficial in ... operation".

And their Honours stated further at 30:

> "..It is true, as McHugh J has pointed out, that for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses. Thus, in 1924 Atkin LJ observed in Société d'Avances Commerciales (Société Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana"):
>
> "... I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanor."
>
> Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or

> anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical"

Fox v Percy has been characterised as representing a liberalisation in the approach to be taken by appellate courts to findings of fact at first instance[4]:

> "..The rule in New Zealand is that an appellate court will only interfere with the trial judge's findings of fact in exceptional circumstances. The traditional view is entrenched, namely, an appellate court should not reverse the decision of a trial judge on a question of fact unless that decision is shown to be wrong. The fact that the trial judge hears and sees the witnesses is regarded as being of paramount importance [32].
>
> In Australia, the approach has been the same but there are signs of a more liberal approach. In Fox v Percy[33] Gleeson CJ, Gummow and Kirby JJ emphasised the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses [34]. They referred to remarks made by Atkin LJ [35]: "I think that an ounce of intrinsic merit or demerit in the evidence, that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour." [36]
>
> In CSR Limited v Della Maddalena [37] Kirby J, with the concurrence of Gleeson CJ, said [38] that Fox v Percy had brought about "an important change in the statement by this Court of the jurisdiction and powers of intermediate appellate courts". His Honour said that the change "involved a shift to some degree from the more extreme judicial statements commanding deference to the findings of primary judges said to be based on credibility assessments". The degree to which the shift in emphasis has occurred is not yet clear. Nevertheless, their Honours' judgment indicates that reliance upon the subtle influence of demeanour requires careful consideration in each case before it is permitted to trump appellate intervention [39]".

There have been a couple of recent decisions of the Court of Appeal which may, or may not, be of some assistance. They are:

---

[4] Justice David Ipp. Problems with Fact-finding . Available online at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwPrint1/SCO_ipp020906

McKellar v Director Of Public Prosecutions (NSW) [2011] NSWCA 91
Director of Public Prosecutions (NSW) v Earl Burns & Anor [2010] NSWCA 265

Weaknesses in the Prosecution Case

If it can be demonstrated that the Magistrate may not have adequately taken into account the defects or discrepancies in the prosecution case then an appeal will be allowed.

Were there weaknesses lurking within the prosecution case?

Some examples include:

- Inconsistent statements
- Contamination of memory or delay
- Intoxication
- Identification
- Failure to call relevant witnesses
- Rebutting defences
- Doli Incapax (see *RP v Ellis* [2011] NSWSC 442)

Flawed Reasoning & Inversions Of The Onus Of Proof

If it it be demonstrated that the Magistrate has engaged in illogical or inappropriate reasoning then an appeal will be allowed. This is directed to the onus and standard of proof. Can an inversion of the onus be shown, no matter how subtle?

Some examples:

- Magistrate influenced by the appellant's exercise of the right to silence
- Magistrate weighing up which side to accept – e.g. improbabilities about aspects of both the prosecution and defence case

A problem frequently encountered is the approach that a decision that the complainant's evidence is more reliable than that of the defendant. This approach tends to obscure the real question of whether there is sufficient reliable evidence to come to a conclusion beyond reasonable doubt.

An example of a written submission on this:

Not A Matter Of Who To Believe or Preferring the Complainant to the Appellant

> Clearly, there is a conflict in the evidence as between the complainant and the appellant as to what occurred in the course of the journey in the vehicle on XXXXXXX. The key issue was credibility but posing the question as "who to believe" is apt to be misleading because the inquiry of the tribunal of fact is not as to which of the parties giving the competing stories is to be preferred. The preference of the complainant's evidence to that of the defendant leaves unanswered the essential question whether the tribunal is satisfied that every element of the charge is proved beyond reasonable doubt. The rejection of the appellant's evidence does not prove positive proof of guilt nor does the preference of the complainant's evidence lead inevitably to a conclusion that his or her evidence should be accepted as proof beyond reasonable doubt.
>
> It is possible that a Court may find the witness credible and to reject the evidence of an accused and yet still entertain a reasonable doubt. However, it is submitted that this Court would have some concerns as regards the credibility of the complainant in the light of the issues raised above.
>
> In *R v Murray* (1987) 1 NSWLR 12 Lee J said (at 19(E)) that it was customary for judges to stress that where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in; but a direction of that kind does not of itself imply that the witness' evidence is unreliable."
>
> For the reasons set out above the court would not be satisfied beyond reasonable doubt as to the guilt of the appellant.
>
> The appellant seeks that the appeal be allowed and the conviction be quashed.

A mere recital of the correct standard by the Magistrate will not cure the defect!

Failure To Give Adequate Reasons

This is an error of law and can be of some assistance. It is not often argued and in many ways ties into what has been discussed already in the context of flawed reasoning or the inversion of the standard. Indeed it can be where the Magistrate has not applied the facts to the law.

One example I want to give arises in the context of work that I do for protestors. The Appellant was charged with and pleaded not guilty to an offence of using intimidation to unlawfully influence a person which had been charged under s 545B(1)(a)(i) of the *Crimes Act 1900*. He was convicted after hearing.

It was a very technical appeal and so the decision was taken to approach the appeal on the basis of error in the local court. The aim was to simply satisfy the

District Court that the offence could not be made out on the evidence presented in the local court.

Written submissions were prepared (and faxed the night before) and those submissions addressed the following contention:

> *There was no evidence to establish the elements of the offence charged beyond reasonable doubt and in particular;*
>
> *(1) there was no evidence of intimidation as defined in s545B;*
>
> *(2) there was no proof beyond doubt as to any mental element of the offence; and*
>
> *(3) there were no findings in the Court below as to the essential elements of the offence; and*
>
> *(4) there was no finding in the court below as to "wrongfully and without lawful authority".*

As to (3) this could be viewed as a failure to give reasons – or more properly put make the appropriate findings. These were the written submission on that:

> "It is submitted that, in the present case, the Magistrate was required to satisfy himself of the following:
>
> (a) that the appellant intimidated Mr Aish within the definition of s 545B(2);
> (b) intending Mr Aish to apprehend injury to his occupation, employment or other source of income;
> (c) that the appellant did so in order to compel Mr Aish to abstain from doing an act which he had a legal right to do; and
> (d) that the appellant's actions were wrongful and without lawful authority.
>
> However the Magistrate failed to make definitive findings as to the essential elements of the offence charged. As to (a), the conduct element/actus reus, the most that can be said is that the Magistrate found that the appellant had "deliberately placed himself in the path of a vehicle which he knew was being driven by a logger". As to (b), the mental element/mens rea, namely whether the appellant intended to cause apprehension of injury in order to compel Mr Aish from doing an act which he had a legal right to do, the Magistrate found that the "appellant's intention was to make it as difficult as possible for the logger to get to work". However, this was contrary to the consistent evidence provided by the appellant.
>
> The significance of the lack of findings on the part of the Magistrate and his failure to identify the essential elements of the offence of intimidation

is that the findings that were made do not sustain or support proof of the offence charged."