Appeals from the Local Court to the Supreme Court

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Introduction

1. This paper deals with the somewhat "niche' area of Criminal Appeals from the Local Court to the Supreme Court. Such appeals form a small but important part of the complex system of criminal appeals in NSW. I have included references herein to the relevant legislation, court rules and case law you should be aware of. In addition, I have attempted to address common practical questions that might arise in determining whether to appeal a conviction in the Local Court to the Supreme Court and/or seek judicial review of a magistrate's finding.

2. The first matter to be aware of is that there are a number of avenues of appeal for a person aggrieved by a result in a criminal matter in the Local Court. I have adapted a diagram that appears in the New South Wales Law Reform Commission ("LRC") Report 140: **Criminal Appeals** published in March 2014, to represent this (see Figure 1 annexed to this paper).

3. Putting to one side the avenue of seeking annulment in the Local Court itself under s. 4(1) of the ***Crimes (Appeal and Review) Act*** 2001 (the ***CAR Act***"), you will note that there are three avenues of redress from the Local Court to a higher court: one is to the District Court under Part 3 of the ***CAR Act*** and the other two are to the Supreme Court; one under Part 5 of the ***CAR Act*** and the other by way of judicial review under s. 69 of the ***Supreme Court Act* 1970** ("the ***SC Act***"). I will be discussing the latter two of these three avenues in this paper.

4. After the first avenue of appeal or review is exhausted the next "port of call" varies depending on where you initiated your first appeal or review. As Figure 1 shows, if a party is unhappy with a result in the District Court he or she can state a case to the Court of Criminal Appeal ("CCA") under s. 5B of the ***Criminal Appeal Act* 1912** ("the ***CA Act***") or seek judicial review of the decision in the Court of Appeal under s. 69 of the ***SC Act*** (but only on a ground of jurisdictional error: s. 176 of the ***District Court Act* 1973**). If unhappy with either your statutory appeal to the Supreme Court under Part 5 of the ***CAR Act*** or judicial review of your matter under the ***SC Act*** both further avenues of appeal from the Common Law Division of the Supreme Court are to the Court of Appeal under s. 101(2)(h) of the ***SC Act*** but only by way of leave. The result of all of this is that three out of the four ultimate avenues of appeal or review for Local Court criminal matters in NSW are to the Court of Appeal rather than the CCA.

5. To further complicate the situation I have not included on that diagram (Figure 1) a further avenue of appeal from the Local Court to the CCA in committal proceedings. Section 5F of the ***CA Act*** provides that appeals may be brought to the CCA against an interlocutory judgment or order given or made in, inter alia *committal proceedings*. Although the DPP or Attorney General can appeal as of right (s. 5F(2)), any other party requires either the leave of the CCA (s. 5F(3)(a)) or certification from the judge or magistrate that the judgment or order is a proper one for determination on appeal (s. 5F(3)(b)). So that is a further avenue of appeal from an interlocutory order made in committal proceedings in the Local Court.

6. The somewhat unsatisfactory nature of this complex system can be practically demonstrated by the related decisions of the CCA in ***Robinson v Woolworths*** (2005) 158 A Crim R 546 and the Court of Appeal in

Robinson v Zhang (2005) 158 A Crim R 575. Both of these decisions deal with precisely the same issue under s. 138 of the ***Evidence Act* 1995**. Robinson was an informant in separate prosecutions against both Woolworths and a Ms Zhang for selling cigarettes to minors. In ***Robinson v Woolworths*** the prosecution was successful in the Local Court and Woolworths appealed to the District Court. Berman DCJ upheld the appeal by excluding the evidence of the sale to the minor under s. 138 of the ***Evidence Act*** on the basis that it had been "improperly" obtained (young persons were sent into the shop to purchase the cigarettes at the request of the informant and this was considered to be "improper" within the meaning of s. 138). The prosecutor then stated a case from that decision to the CCA under s. 5B of the ***CA Act.***

7. In the prosecution of Ms Zhang the magistrate excluded the evidence of the sale to the minor under s. 138 of the ***Evidence Act*** on the basis that it had been "improperly" obtained. The prosecutor appealed this decision on a question of law alone to the Supreme Court under s. 56 of the ***CAR Act*** and was unsuccessful. He then appealed to the Court of Appeal under s. 101(2)(h) of the ***SC Act*** where he was ultimately successful. Both appeals turned on whether the conduct of the officers in obtaining the evidence of the minor purchasing the cigarettes was 'improper' for the purposes of s. 138 of the ***Evidence Act,*** impropriety not being defined in that Act.

8. There were hence separate appeals pending in both the Court of Appeal and the CCA on precisely the same issue from separate Local Court proceedings. The Court of Appeal and CCA ultimately convened a joint hearing of the two appeals. They delivered the CCA decision in ***Robinson v Woolworths*** first allowing the prosecutor's appeal and then followed that decision with the Court of Appeal judgment in ***Robinson v Zhang***. In ***Robinson v Woolworths*** the CCA (Basten JA with whom Barr and Hall JJ agreed) held that in the absence of any unlawfulness on the part of the law enforcement officer, mere doubts about the desirability or appropriateness of particular conduct will not be sufficient to demonstrate impropriety. There was no evidence in either of the appeals that the law enforcement authority had applied any form of pressure, persuasion or manipulation hence the conduct was not capable of constituting impropriety for the purposes of s. 138 of the ***Evidence Act***. These decisions (apart from providing helpful assistance as to the proper construction of s. 138(1) of the ***Evidence Act***) highlight the different paths an appellant can take on the journey from a conviction or acquittal in the Local Court through the appellate process in NSW.

9. The LRC has recently made a number of recommendations as to how to reform criminal appeals in NSW. These include, in the context of Local Court appeals, combining the ***CAR Act*** and the ***CA Act*** into one Act and having all such criminal appeals ultimately considered by the CCA rather than the Court of Appeal as currently occurs. I briefly refer to some of the LRC recommendations at the conclusion of this paper.

10. Another preliminary matter to be aware of is one that will come as no surprise to you as criminal law practitioners: appeals to the Supreme Court from the Local Court are much rarer than those from the Local Court to the District Court. Figures taken from the LRC Report indicate that in 2013 there were 19 such appeals, in 2012 there were 24 and in 2011 there were 12 leading to a total of 51 in the three years from 2011-2013.

11. These small numbers become even starker when compared with the number of appeals from the Local Court to the District Court during the same period. Figures taken from the **DPP Annual Report 2013/2014** show that in 2013/2014 that office completed 6879 conviction and severity appeals, in 2012/2013 the figure was 6375 and in 2011/2012 the figure was 7064. Those appeals to do not include the Commonwealth DPP appeals.

12. As you can see not only are appeals from the Local Court to the Supreme Court part of a somewhat complicated appeals system, they are also relatively rare when compared with appeals to the District Court.

13. I propose to address three topics in this paper:

    a) What sorts of matters are appealed to the Supreme Court under Part 5 of the ***CAR Act***?

    b) What sort of matters are the subject of Judicial Review proceedings from the Local Court to the Supreme Court?; and

    c) What were the recommendations of the Law Reform Commission Report: ***Criminal Appeals*** as to simplifying this area?

STATUTORY APPEALS TO THE SUPREME COURT – WHEN AND WHY?

Relevant Legislation

14. Part 5 of the ***CAR Act*** is the relevant statutory regime which deals with appeals from the Local Court to the Supreme Court. It replaced the former provisions in the ***Justices Act* 1902** where such appeals used to be in the nature of a stated case.

15. Part 5 of the ***CAR Act*** is divided into two divisions. Division 1 addresses appeals by defendants whereas Division 2 deals with prosecution appeals. Both divisions provide for appeals as of right and appeals that require the Court's leave.

Defendant appeals

16. Section 52 of the ***CAR Act*** provides that a defendant has an appeal as of right to the Supreme Court against a conviction or sentence by the Local Court if the ground of appeal involves a question of law alone.

17. Section 53 of the ***CAR Act*** provides that a defendant can, with leave of the Court, appeal against

    - conviction or sentence on the ground of a question of fact or a question of mixed law and fact: s. 53(1);
    - an order made by a Magistrate in relation to any committal proceedings if it involves a question of law alone: s. 53(3)(a); and
    - an interlocutory order made by the Local Court in relation to summary proceedings, if it involves a question of law alone: s. 53(3)(b).

Prosecutor appeals.

18. Section 56 of the ***CAR Act*** provides that a prosecutor may appeal to the Supreme Court as of right on a ground that involves a question of law alone against:

    - an order of the Local Court that stays summary proceedings for the prosecution of an offence (s. 56(1)(b));
    - an order made by a Local Court dismissing a matter the subject of summary proceedings (s. 56(1)(c));
    - an order for costs made by a Magistrate against the prosecutor in any committal proceedings (s. 56(1)(d));
    - an order for costs made by a Magistrate in summary proceedings (s. 56(1)(e)); and

- a sentence imposed by the Local Court in any summary proceedings (s. 56(1)(a)).

19. Section 57 of the ***CAR Act*** provides that leave is required for a prosecutor to appeal on a ground that involves a question of law alone against:

    - an order that has been made by a Magistrate in relation to any committal proceedings (s. 57(1)(b));
    - an interlocutory order that has been made by the Local Court in relation to a person in summary proceedings (s. 57(1)(c)); and
    - against a sentence imposed by the Local Court in relation to an environmental offence (s. 57(1)(a)).

What is "A question of law alone"?

20. Whether an alleged error involves "*a question of law alone*" is not always straightforward. Justice Johnson summarised some of the statements of principle on this issue in ***Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Limited*** [2006] NSWSC 343; (2006) 67 NSWLR 402 at [58]-[59] as follows:

    - There is no universally applicable test for distinguishing questions of law from questions of fact: **Collector of Customs v Agfa-Gevaert Ltd** [1996] HCA 36; (1995) 186 CLR 389 at 394; **Sood v R** [2006] NSWCCA 114 at paragraph 30.
    - The formulation "question of law" employs general words capable of application at different levels of generality: **Attorney General for NSW v X** [2000] NSWCA 199; (2000) 49 NSWLR 653 at 660 (paragraph 25).
    - The expression "question of law" is wider than "error of law": Attorney General for NSW v X at 677 (paragraph 124).

21. As to the issue of appeals by a prosecutor against an acquittal generally Johnson J went on to note in ***Director of Public Prosecutions (NSW) v Illawarra Cashmart Pty Limited*** at [61]-[62]:

> *"61 That an appeal to this Court by a prosecutor from an acquittal in summary criminal proceedings is confined to a question of law alone is not surprising. Such an appeal constitutes a statutory exception to the rule against double jeopardy: Davern v Messel [1984] HCA 34; (1983-1984) 155 CLR 21 at 30.*
>
> *62 However, a decision of a court of summary jurisdiction acquitting a defendant has never been regarded with the same sanctity as the verdict of a jury and the consistent trend of legislation, both in England and Australia, has been towards allowing the prosecution to appeal against an order of a Magistrate dismissing a charge and empowering the Supreme Court on appeal to quash the order: Davern v Messel at 37-38".*

22. For a summary of the relevant authorities on the question of what constitutes a "*question of law alone*" and some examples, you should have regard to the commentaries under s .52 of the ***CAR Act*** in both the LexisNexis Service: **Criminal Practice and Procedure NSW** by Johnson and Howie at 4-252.5 ff (page 91,601 of Volume 1) and the Thomson Reuters Service: **Criminal Law (NSW*)*** by Blackmore and Hosking [4.19805] (1 – 70602 of Volume 1). For practical purposes a ground of appeal alleging error based on a "*question of law alone*" would include matters of statutory construction, the elements of an offence, rulings on the admissibility of evidence, denials of procedural fairness and the inadequacy of reasons provided by the magistrate.

What is "A question of mixed law and fact"?

23. Some appeals which purport to be based on errors of law are in fact based on questions of mixed fact and law and hence require leave. For example, an argument that insufficient weight was attached to a matter assumes that it was one to which a Magistrate was required to have regard and raises whether or not he or she correctly applied the statutory requirement to the facts of this case. That constitutes a question of mixed fact and law, which would require leave pursuant to s. 53(1) of the ***CAR Act***: ***R v PL*** (2009) 199 A Crim R 199 at 205 [25]–[26] per Spigelman CJ (McClellan CJ at CL and RA Hulme J agreeing).

24. Justice Button considered this question recently in ***Brough v DPP*** [2014] NSWSC 1396 when his Honour observed the following at [49]:

> *"Turning next to the question of whether the appellant has established that a question of law alone has been demonstrated, I accept that there is no bright line between a question of law and a question of mixed fact and law.* ***However I consider that a question concerning the application of correct legal principle to the facts of a particular case is a question of mixed fact and law: R v PL [2009] at [26].*** *The application of incorrect legal principle to the facts of a particular case on the other hand could give rise to a question of law alone: R v PL [2012] at [39]".*
>
> *[emphasis added]*

The requirement of leave

25. I have been unable to find any judicial pronouncements as to what are the relevant factors militating for or against a grant of leave in those ***CAR Act*** appeals which rely upon a question of mixed law and fact or fact alone. By way of contrast, the relevant matters to take into account when considering whether the Court of Appeal should grant leave to appeal under s. 101(2)(h) of the ***SC Act*** are set out in cases such as ***Director of Public Prosecutions v Priestley*** [2014] NSWCA 25; 201 LGERA 1 and ***Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das*** [2012] NSWCA 164.

26. Howie J commented on the absence of any authorities on this issue in ***Kapral v Bunting*** [2009] NSWSC 749 at [48]. That matter was an appeal from a decision of a Magistrate to order a forensic procedure on the plaintiff. Howie J observed that he had "difficulty" in conceiving a case where leave might be granted on a question of fact although in the cases of a conviction or sentence *"It is perhaps possible to imagine that there may in such an appeal be an error of fact of such significance that it might, if not reviewed, result in a positive injustice*". His Honour went on to state: *"The Supreme Court should in my opinion be cautious before interfering with a factual decision made by a magistrate who correctly understood and applied the law in an otherwise unimpeachable hearing in the Local Court and where minds might reasonably differ about the finding of fact involved".*

27. In my experience if a ground of appeal which involves a question of mixed law and fact is one ground of appeal in a summons which also relies upon grounds of appeal which clearly concern questions of law alone that might be one situation where leave is more likely to be either granted or not opposed by the other party. Another situation would be if the matter involved a matter of public interest in that area of the law.

Procedural requirements

28. The procedural requirements for bringing ***CAR Act*** appeals to the Supreme Court are covered in Part 51B of the ***Supreme Court Rules*** ("***SCR***"). The important matters to note are as follows:

    - An application for leave to appeal and appeal under Pt. 5 of the ***CAR Act*** is commenced by way of summons (Pt. 51B ***SCR***, r. 7) in the Common Law division of the Supreme Court (Pt. 51B ***SCR***, r. 2).

- The summons must be accompanied by a brief but specific statement of the grounds relied upon in support of the appeal, including the grounds upon which it is contended there is any error of law and whether the appeal is from the whole or part of the decision below: Pt. 51B ***SCR*****,** r. 8.
- Any informant and any person directly affected by the relief sought in the appeal should be named as defendants: Pt. 51B ***SCR***, r. 10. The Magistrate or Local Court is **not** to be joined as a defendant (r. 10(3)).
- A copy of the summons must also be given to the Court below: Pt. 51B ***SCR***, r. 13.
- The appeal must be filed within 28 days of the decision of the Local Court (ss. 52(2), 53(4), Pt. 51B ***SCR*****,** r. 6) although the Court can extend this time limit. A cross appeal must be filed by way of summons with 28 days of service of the summons instituting the appeal or leave to appeal: Pt. 51B ***SCR***, r. 5.
- The summons can be amended without leave within 7 days of the hearing by filing a supplementary notice: Pt. 51B ***SCR***, r. 16.
- The plaintiff must file an affidavit exhibiting a copy of the transcript of the proceedings before the Local Court and the Court's reasons no later than three days prior to the hearing of the summons: Pt. 51B ***SCR***, r. 9. An affidavit annexing the Transcript and the reasons for any decision must be filed along with any exhibits.

Orders that can be made

29. Section 55 of the ***CAR Act*** provides that an appeal against conviction can be determined:
    - by setting aside the conviction: s. 55(1)(a);
    - by setting aside the conviction and remitting the matter to the Local Court for redetermination in accordance with the Supreme Court's directions: s. 55(1)(b), or
    - by dismissing the appeal: s. 55(1)(c).

30. Section 65 of the ***CAR Act*** provides that a conviction order or sentence is not to be set aside on appeal because of (a) "*an omission or mistake in the form of the conviction or order*", or (b)*"an error in law in the order or sentence*", if it appears to the appeal court that there were sufficient grounds before the Local Court to have authorised a conviction, order or sentence free from the omission, mistake or error. There is a helpful summary of some of the relevant authorities regarding the application of s. 65 of the ***CAR Act*** at [27]-[28] of ***RH v DPP (NSW)*** [2014] NSWCA 305.

31. In ***RH v DPP (NSW)*** [2014] Basten JA (with whom Beazley P and McColl JJA agreed, McColl JA dissenting as to the final orders to be made) allowed an appeal under s. 101(2)(h) of the ***SC Act*** against a decision of Hoeben CJ at CL who had dismissed an appeal under s. 52 of the ***CAR Act*** from the Children's Court on a question of law concerning the presumption of *doli incapax*. Although Hoeben CJ at CL had found that the magistrate had erred, his Honour went on to dismiss the appeal by, in effect, making the same ultimate factual finding as the Magistrate. The Court of Appeal held that s. 55 of the ***CAR Act*** only provides for the three ways of dealing with an appeal set out therein and his Honour had not expressly relied upon s. 65 of the ***CAR Act*** (nor had it been raised before his Honour in argument). In allowing the appeal Basten JA observed at [43]:

> *"On an appeal limited to a question of law, the findings as to error dictated the outcome, unless it could be said that, applying the correct test, there was only one conclusion open to the magistrate. The Chief Judge did not reach that conclusion, nor could he have done so on the material before him. Accordingly, the only course open was to set aside the conviction. The fact that it was open on the evidence for the magistrate to conclude beyond reasonable doubt that the applicant had criminal capacity merely meant that the matter could be remitted for a further hearing, rather than the charge being dismissed. It would have been open to the Chief Judge to set aside the decision and remit it pursuant to s 55(1)(b); that course was not taken.*

32. Section 66 of the ***CAR Act*** provides that if a matter is remitted to the Local Court the Chief Magistrate can nominate a magistrate other than he or she who presided over the initial hearing if the original magistrate has ceased to hold office as a Magistrate, or "*is for any other reason unable to continue to hear and determine the matter*". This has been held to include when the Magistrate is disqualified as a result of findings made in the original determination. In ***Director of Public Prosecutions (NSW) v Wililo and Anor*** [2012] NSWSC 713 Johnson ordered that the matter be re-heard by a magistrate other than that who had presided over the Local Court hearing noting such an order has been made in the past in ***Director of Public Prosecutions (Cth) v Neamati*** [2007] NSWSC 746; ***Director of Public Prosecutions v Yeo*** and ***Commonwealth Director of Public Prosecutions v Acevedo*** [2009] NSWSC 653 at [62].

SO WHAT APPEALS GO TO THE SUPREME COURT RATHER THAN THE DISTRICT COURT?

33. As I set out above the overwhelming majority of appeals from the Local Court are to the District Court under Part 3 of the ***CAR Act.*** So when should an appeal be made to the Supreme Court under Part 5 of the ***CAR Act*** rather than to the District Court? The majority of them are matters in which there is no right of appeal to the District Court in the first place. These matters include:

    - Appeals by the Prosecutor against an acquittal/discharge;
    - Appeals by a defendant on an interlocutory matter;
    - Appeals against orders made (or not made) under the ***Crimes (Forensic Procedures) Act*** **2000 ("*CFP Act*")**; Part 5 of the ***CAR Act*** applies to these decisions in the Local Court by virtue of s. 115A of the ***CFP Act***; and
    - Appeals by the Roads and Maritime Services ("RMS") or any other regulatory prosecutor who have not been able to persuade the DPP to take over their prosecutions under ss. 9 of the ***DPP Act*** **1986** (only the DPP has a right to appeal to the District Court under s. 23(1) of the ***CAR Act***).

34. The recent decision in ***Brough v DPP*** [2014] NSWSC 1396 is an example of when going to the Supreme Court is the only option. As you would be aware appeals to the District under Part 3 of the ***CAR Act*** have a three month time limit which cannot be extended: s. 13 of the ***CAR Act***. Mr Brough's appeal against the severity of a sentence imposed in the Local Court to the District Court was statute barred hence he appealed to the Supreme Court instead where there is a discretion to extend time to appeal.

35. Putting to one side appeals where the appellant's only avenue of appeal is to the Supreme Court, what factors would dictate whether an accused person convicted in the Local Court should appeal his or her conviction and/or sentence to the Supreme Court rather than the District Court under Part 3 of the ***CAR Act***? Needless to say if your appeal turns on findings of fact or credibility issues you will only be able to appeal to the Supreme Court with leave, so there is little point in pursuing that avenue for a facts-based appeal when you have a rehearing as of right in the District Court. In addition, although there is express provision for fresh evidence to be permitted in appeals to the District Court, albeit with leave (s. 18(2) of the

CAR Act) there is no express provision for fresh evidence in an appeal to the Supreme Court so if you wish to adduce fresh evidence on your appeal the District Court is the appropriate appeal avenue.

36. Assuming that the appeal turns on a question of law it seems to me there are at least two reasons why you would appeal to the Supreme Court in favour of the District Court.

37. First, if the issue that the appeal turns on is so clearly a question of law alone the view might be formed that the appeal would be more appropriately dealt with in the Supreme Court rather than by way of re-hearing on the facts in the District Court. This is particularly the case when the question of law is complex, novel or difficult. An appeal to the Supreme Court would usually be listed for half or even a full day's hearing. Furthermore, the Supreme Court judge hearing the appeal will often have read the materials before the hearing begins.

38. Second, the legal issue involved might be an uncertain one in relation to wish you might seek to establish a precedent. Clearly, a Supreme Court judgment on a question of law would be binding on Magistrates and District Court judges whereas the decisions of District Court judges on appeal would not be. You might be aware of some non-binding decisions in your favour and seek to test the point in the Supreme Court to establish precedent in that regard.

39. There are three potential disadvantages to going to the Supreme Court rather than the District Court.

40. First, if you lose there will now be precedent against you.

41. Second, it will take longer in the Supreme Court and you will have to follow a timetable, which will include provision for the filing of evidence and written submissions. In the Supreme Court you will be required to state the precise grounds of appeal, and, unless the Court grants leave, you will be limited to arguing those grounds. By way of contrast, a statement of "*I am not guilty*" is generally a sufficient ground of appeal in the District Court. An appeal to the District Court by way of a re-hearing on the papers will be finalised significantly quicker in the District Court than in the Supreme Court.

42. Third, there is the potential risk of a costs order being made in the Supreme Court. The Director of Public Prosecutions ("DPP") does not seek costs in District Court appeals despite the fact that the District Court has the power to award costs: 28(3) of the ***CAR Act***. The DPP takes a different approach in ***CAR Act*** appeals to the Supreme Court. In cases where the DPP appeals to the Supreme Court under the ***CAR Act*** and is successful, he will usually seek costs but also submit that the unsuccessful respondent is eligible for a ***Suitors' Fund*** certificate. Section 6(1)(a) of the ***Suitors' Fund Act* 1951** provides that if an appeal against the decision of a court to the Supreme Court on a question of law or fact succeeds, the Supreme Court may, on application, grant a certificate under that Act to the respondent to the appeal. This certificate covers the costs order to the successful party and 50% of the costs of the unsuccessful party. The maximum amount payable under this certificate is $10,000.

43. In appeals where the DPP is the respondent to the appeal it is my experience that the question of costs differs on a case by case basis: if the appeal turns on an important or unresolved legal issue and it is in both parties' interests that it be resolved the DPP may agree early in the proceedings that both parties pay their own costs.

44. Not all ***CAR Act*** appeals involve the DPP. In appeals under the ***CFP Act*** and appeals in matters where the DPP has not taken over the matter from police your opponent will be the informant police officer. In my experience the NSW Police Force approaches the question of costs on a case by case basis. The RMS

and other regulatory prosecutors seem to adopt a similar approach. Given the possibility of the question of costs arising in a ***CAR Act*** appeal, I draw your attention to some recent decisions regarding the power of the Supreme Court to order costs in ***CAR Act*** appeals as the issue is currently somewhat contentious.

Costs in CAR Act Appeals

45. Section 76 of the ***SC Act*** (which conferred power, inter alia, to award costs in summary criminal proceedings) and most of the ***SCR*** were repealed in 2005 as part of the enactment of the ***Uniform Civil Procedure Rules*** ("***UCPR***") and the ***Civil Procedure Act* 2005.** Most of the repealed ***SCR*** are now to be found in the ***UCPR.*** Whereas s. 76 of the ***SC Act*** was not limited to civil proceedings, it's re-enactment as s. 98 of the ***Civil Procedure Act*** is (s. 4(1) and Part 7 of the ***Civil Procedure Act***). The practical effect of this is that since 2005 there has been no statutory power to award costs in ***CAR Act*** appeals.

46. Despite the absence of a statutory power to award costs in ***CAR Act*** appeals, there have been a number of recent decisions in which the necessary power to award costs in such cases has been said to be found in s. 23 of the ***SC Act*** which states that the Supreme Court "*shall have all jurisdiction which may be necessary for the administration of justice.* This line of authority commenced in the context of contempt proceedings (***ASIC v Sigalla (No 4)*** [2011] NSWSC 62, ***ASIC v Sigalla (No 6)*** [2012] NSWSC 83) and ***Ronowska v Kus (No 2)*** [2012] NSWSC 817) but has more recently been applied in ***CAR Act*** proceedings including ***Cunningham v Cunningham (No 2)*** [2012] NSW 954 (an appeal from an apprehended domestic violence order), ***ACP v Munro*** [2012] NSWSC 1510, ***Saad v Jeffcoat*** [2013] NSWSC 1585 and ***Coffen v Goodhart*** [2013] (appeals against orders made under the ***CFP Act*****)** and ***Bimson, Roads and Maritime Services v Damorange Pty Ltd (No 2)*** [2014] NSWSC 827 (an appeal by the prosecutor against sentences imposed in a prosecution under the ***Road Transport (General) Regulation* 2005** and the ***Road Transport (Safety and Traffic Management) Act* 1999**).

47. The prospect of an adverse costs order should not act to dissuade a defendant in the Local Court from bringing an appeal to the Supreme Court. Clearly, if you have a good case costs will be ordered in your favour. I raise these matters only because adverse costs orders are not something criminal lawyers usually have to be concerned with.

Some recent CAR Act cases

48. Before moving from the topic of ***CAR Act*** appeals I should mention some recent appeals of this nature that might be of interest.

Forensic Procedure Appeals

49. The only avenue of appeal by a party aggrieved by an order of a magistrate to either require a person to undergo a forensic procedure under the ***CFP Act*** or by a prosecutor when such an order is not made is to the Supreme Court under Part 5 of the ***CAR Act***. Part 5 of the ***CAR Act*** applies to these decisions in the Local Court by virtue of s. 115A of the ***CFP Act.*** Invariably, such appeals turn on whether the magistrate has properly complied with the requirements of the statute insofar as the matters that must be established before such an order can be made.

47 Part 5 of the ***CFP Act*** concerns the carrying out of forensic procedures on "*suspects".* The applicable definition of "*suspect*", is a person whom a police officer "*suspects on reasonable grounds has committed an offence*": s. 3. By s. 22, a person is authorised to carry out a forensic procedure on a "*suspect*" by order of a

Magistrate under s. 24. A "*forensic procedure*" is defined as constituting an "*intimate forensic procedure*" or a "*non-intimate forensic procedure*": s. 3.

48 Section 26 of the ***CFP Act*** provides that an "*authorised applicant*" (defined in s. 3 to include "*an investigating police officer in relation to an offence")* may apply to a Magistrate for the making of a final order authorising the carrying out of a forensic procedure on a "*suspect*". That section sets out what must be included in an application, who can make it, and what form it should take. The application must be in writing and by virtue of s. 26(2)(b): "*be supported by evidence on oath, or by affidavit, in relation to the matters as to which the Magistrate must be satisfied, as referred to in section 24*.

50. Section 24 of the ***CFP Act*** provides that there are three matters that the Magistrate must clearly address in his or her reasons:

- that there are reasonable grounds to believe that the suspect has committed an offence: s. 24(1)(a); s. 24(2)(a); s. 24(3)(a);
- that there are reasonable grounds to believe that the procedure might produce evidence tending to confirm or disprove that the suspect has committed the offence: s. 24(1)(a); s. 24(2)(b); s. 24(3)(b); and
- that the carrying out of such a procedure is justified in all the circumstances: s. 24(1)(b); s. 24(4).

51. The ***CFP Act*** was introduced in 2001. There is now a body of authority which confirms that there must be strict adherence to the requirements of s. 24(1)(a), s. 24(1)(b) and s. 24(4) of the ***CFP Act*** with an express articulation of a finding regarding the statutory test. This is unsurprising given that the legislation compels a suspect to provide potential evidence to the prosecution (see Simpson J's comments in ***Orban v Bayliss*** [2004] NSWSC 428 at [30]-[32]). Most appeals turn on whether the Magistrate has properly addressed the statutory requirements that must be met before an order can be made.

52. There have been a number of recent decisions in this area of which you should be aware including ***Daley v Brown Pittman v Brown*** [2014] NSWSC 144, ***Coffen v Goodhart*** [2013] NSWSC 1018***, Munro v ACP*** [2012] NSWSC 100, ***ACP v Munro*** [2012] NSWSC 1510, ***KC v Sanger*** [2012] NSWSC 98 and ***Fantakis v NSW Commissioner of Police & Ors*** [2013] NSWSC 1333.

53. In ***TS v James*** [2014] NSWSC 984 it was confirmed that the ***Evidence Act 1995*** applies to proceedings under the ***CFP Act*** in all courts including the Children's Court. It was suggested by the plaintiff in that case that there was some inconsistency between the decision in ***L v Lyons*** (2002) 137 A Crim R 93; 56 NSWLR 600 and the more recent decision of Fullerton J in ***LK v The Commissioner of Police & Anor*** (2011) 81 NSWLR 26 as to whether the ***Evidence Act*** applied to the hearing of these applications in the Local Court. The plaintiff had appealed an order made under the ***CFP Act*** on the basis that the affidavit sworn by the officer in charge in support of the application as required by s. 26 of the ***CFP Act*** contained, inter alia, hearsay material and hence was inadmissible.

54. On appeal to the Supreme Court there was no dispute between the parties that the ***Evidence Act*** applied to such proceedings; the dispute was as to the practical effect of that fact in circumstances where the affidavit was not relied upon to establish an offence, but, rather, to establish that the informant had "*reasonable grounds to believe that the suspect has committed an offence.*" That is, the material contained in the police officer's affidavit was not relied upon to prove the truth of the assertion therein, it simply formed the basis of the police officer's requisite state of mind. Unfortunately, this interesting issue did not need to be

determined in that appeal as the prosecution conceded the matter had to be remitted to the Local Court for reconsideration on a different basis (the affidavit had relied in part upon a transcript of material the result of a telephone intercept under the ***Telecommunications (Intercept and Access) Act* 1979** and applications for forensic procedures under the ***CFP Act*** are not exempt proceedings within the meaning of s. 5B of the ***Telecommunications (Intercept and Access) Act* 1979**).

Appeals by the Prosecutor against dismissal of charges

55. In ***Director of Public Prosecutions v Lopez-Aguilar*** [2013] NSWSC 1019 the DPP appealed against a decision by a magistrate to dismiss charges under s. 32 of the ***Mental Health (Forensic Provisions) Act* 1993** against an accused charged with a series of serious traffic offences. The prosecution case was that Ms Lopez-Aguilar had driven at 120 kph in a 60 kph zone and had failed to pull over when signalled by police. The DPP's appeal to the Supreme Court under s. 56 of the ***CAR Act*** was successful. Harrison J, in allowing the appeal, cited the decision of Button J in ***DPP v Soliman*** [2013] NSWSC 346 at [61] as to the requirement to give reasons when discharging an accused person under s. 32 of the ***Mental Health (Forensic Provisions) Act* 1993**.

56. ***Director of Public Prosecutions v Lopez-Aguilar*** is yet another reminder of the need for Magistrates to give reasons. There have been a number of ***CAR Act*** appeals in which the reasons of the magistrate have been found to be inadequate and such inadequacy has amounted to an error of law warranting the appeal being allowed: see for example ***DPP (NSW) v Elias*** [2013] NSWSC 28, ***DPP v Sukhera*** [2012] NSWSC 311 and ***DPP (NSW) v Wililo*** [2012] NSWSC 713. Although the Supreme Court has acknowledged the difficulty for magistrates delivering ex tempore judgments in the context of a busy Local Court list, as Johnson J observed in ***DPP v Illawarra Cashmart*** at [19]:"*It is not satisfactory that an appeal court is left to undertake an analysis of exchanges between the bench and counsel during submissions in an attempt to ascertain a magistrate's reasons for determination*". A good summary of the relevant principles regarding the necessity for reasons in decisions of magistrates can be found in Johnson J's decision in ***DPP v Illawarra Cashmart*** at [15]-[19].

57. In ***DPP v Langford*** [2012] NSWSC 310 the DPP took over a prosecution by the RMS in relation to a high range PCA offence. In the Local Court the magistrate had refused to exercise her discretion to admit a certificate of analysis in relation to the taking of a blood sample from the defendant at a hospital. The roadside breath test had not registered the presence of alcohol in circumstance where the defendant appeared heavily intoxicated. A constable was then directed to convey the defendant to a hospital for blood and urine sample to be taken. Although the Sergeant relied upon certain provisions of the ***Road Transport (Safety and Traffic Management) Act 1999*** it was accepted by the prosecution on appeal that there was no such power to do so. The appeal turned on the proper application of s. 138 of the ***Evidence Act*** pertaining to the admission of improperly obtained evidence. Justice Fullerton allowed the appeal finding that on a fair reading of the magistrate's remarks her Honour had had regard to the probative value of the certificate and its importance to proof of the prosecution case but the magistrate erred in placing undue emphasis on matters of policy.

58. In ***DPP (NSW) v Fairbanks*** [2012] NSWSC 150 the defendant had been charged with one count of possessing a prohibited weapon without a permit contrary to s. 7(1) of the ***Weapons Prohibition Act* 1998**. The weapon in question was a flick knife. The DPP appealed against the magistrate's dismissal of the charge on the basis that the magistrate had misunderstood the mental element of the offence. The appeal

was brought under s. 56 of the ***CAR Act*** and came before Rothman J. Justice Rothman allowed the appeal and held that an offence of possessing a prohibited weapon under s. 7(1) of the ***Weapons Prohibition Act*** requires proof by the prosecutor that the accused knew that he or she possessed the item but does not require proof that he knew the location of the item nor that the item was physically on or about the accused at the time of the commission of the offence.

59. In ***DPP (NSW) v Gatu*** [2014] NSWSC 192 Button J allowed an appeal brought by the prosecutor under s. 56(1)(c) of the ***CAR Act***. In that decision a magistrate had determined a criminal matter in Chambers prior to the adjourned date for hearing without providing notice to the prosecutor. Button J held that this was an error of law. It was also a breach of fundamental principle not to provide reasons, not to give parties a right to be heard and to adjudicate as between the parties in chambers rather than a court room. The matter was remitted to the Local Court to be dealt with according to law by a magistrate other than the magistrate who had previously dealt with it.

Appeals by the defendant:

60. In ***Azar v DPP*** [2014] NSWSC 132 the defendant was convicted in the Local Court of offences of possession of cocaine, dealing with the proceeds of crime, failing to comply with the direction of a police officer without reasonable cause and resisting police in the exercise of his duty. The appeal was under s. 52 of the ***CAR Act***. It was contended that the magistrate had failed to consider s. 21 of the ***Law Enforcement (Powers and Responsibilities) Act* 2002** ("***LEPRA***") properly. That section provides police with the power to stop, search and detain a person without a warrant for various reasons including when they have a reasonable suspicion that a person has in possession a prohibited plant or prohibited drug. Adamson J dismissed the appeal. Her Honour was of the view that there were reasonable grounds for the suspicion held by the police officers. The decision contains a helpful summary of the authorities on the question of the meaning of "*reasonable grounds for suspicion*": see in particular from [38]to [45].

61. For another recent ***CAR Act*** appeal dealing with police powers under LEPRA see the decision of the Court of Appeal in ***Poidevin v Semann*** (2013) 85 NSWLR 758; [2013] NSWCA 334.

62. In ***RH v DPP (NSW)*** [2013] NSWSC 520 a defendant appealed to the Supreme Court on a question of law alone in relation to the presumption of *doli incapax*. The appeal turned on whether the Magistrate erred in in law in applying an objective test to the question of whether the presumption of *doli incapax* was rebutted beyond reasonable doubt and in relying on factual matters that constituted no more than the commission of the offence itself to rebut the presumption. RH was twelve years old at the time of the offence. Hoeben CJ at CL found error in the Magistrate relying upon some of the material he did in finding the presumption rebutted, but found that the finding was still open to the magistrate and dismissed the appeal.

63. RH then successfully appealed to the Court of Appeal: ***RH v DPP (NSW)*** [2014] NSWCA 305. The appeal to the Court of Appeal was brought under s. 101(2)(h) of the ***SC Act*** hence leave was required. Leave was opposed in reliance upon the principle that "*ordinarily, leave will only be granted in matters which involve issues of principle, questions of general public importance, or an issue which is reasonably clear in the sense of going beyond what is merely arguable*" (at [19]).

64. Basten JA granted leave observing, inter alia, at [20] that: *the question of public interest has quite a different connotation with respect to a challenge to a criminal conviction, based on an error of law.* The appeal was

allowed and the finding of guilt set aside. Given that it had been four years since the commission of the offence the Court of Appeal did not remit the matter to the Local Court for a re-hearing.

JUDICAL REVIEW OF LOCAL COURT DECISIONS

65. Section 69 of the ***SC Act*** provides that the Supreme Court can make orders in the nature of the old prerogative writs. That simply means that the NSW Supreme Court retains its general supervisory role over all inferior courts and tribunals. Hence if an inferior court such as the Local Court either falls into jurisdictional error (such as exceeding its jurisdiction) or makes a (non-jurisdictional) error of law apparent on the face of the record the Supreme Court can correct the error by (usually) sending the matter back to be dealt with properly. Judicial review is not merits review. The proceedings are not an appeal in the strict sense. Rather, the purpose of judicial review is to keep a check on inferior court judges and magistrates to ensure they have acted lawfully. Judicial review is protected by s. 73 of the Commonwealth Constitution and hence it cannot be taken away by any state legislation, at least to the extent it enables correction for jurisdictional error: ***Kirk v Industrial Court of New South Wales*** [2010] HCA 1; (2010) 239 CLR 531 ("***Kirk***").

66. For many criminal lawyers the prospect of seeking judicial review of a decision of a Magistrate may seem somewhat daunting at first. To make matters worse there is very little in the way of legal resources that focus specifically on judicial review of decisions of inferior courts in NSW as opposed to administrative decision-makers beyond the commentary in the LexisNexis and Thomson Reuters Services. The definitive text book and one that is often referred to by judges in their judgments is Judicial Review of Administrative Action 5th Ed by Mark Aronson and Matthew Groves published in 2013 by Thomson Reuters. A new edition is currently in preparation. Although an excellent reference book it is not aimed at criminal lawyers seeking to review the decision of a magistrate as opposed to an administrative decision maker. Moreover, most of the recent leading High Court authorities dealing with judicial review principles are Immigration cases.

67. I will venture to observe that in my experience the two most important matters for criminal lawyers to be aware of in proceedings for judicial review are, first that you are able to identify the relief you seek and, second, that you can identify the purported error as either jurisdictional or non-jurisdictional (ie within jurisdiction). I will briefly address these two areas.

Available remedies – what relief do you seek?

68. Section 69(1) of the ***SC Act*** refers to the writs of prohibition, mandamus and certiorari. Although these prerogative writs are no longer available, s. 69 of the ***SC Act*** preserves the power of the Supreme Court to grant relief in the nature of those prerogative writs. Don't be put off by the names of the old prerogative writs. Relief in the nature of **certiorari** is an order that quashes the unlawful or wrong decision below. Relief in the nature of **mandamus** is an order requiring the Magistrate to perform his or duty according to law and relief in the nature of **prohibition** is an order preventing a Magistrate from acting in an unlawful way.

69. There are other forms of relief available as part of judicial review such as declaratory relief: s. 75 of the ***SC Act*** provides that the Supreme Court can make a declaration. Section 65 also provides for the power to order any person to fulfill a duty.

70. The types of orders you would seek in a summons for judicial review of a decision in the Local Court are:

    - An order that the record of the Tribunal below be brought up and quashed (certiorari);

- An order prohibiting the Magistrate from doing a certain act (prohibition);
- An order that the Magistrate do a certain thing (mandamus); and/or
- A declaration that the Magistrate erred

Jurisdictional or non-jurisdictional error?

71. There are two types of error that can warrant remedies in the nature of prerogative relief: jurisdictional error or non-jurisdictional error. Non-jurisdictional error is referred to as error of law on the face of the record. You need to be able to identify your error as being within or without jurisdiction for at least two practical reasons.

72. First, the nature of the error can dictate the nature of the relief available. It is necessary to establish jurisdictional error in order to obtain relief in the nature of either mandamus or prohibition. It is not necessary to establish jurisdictional error in order to obtain relief in the nature of certiorari or to be granted declaratory relief under s. 75 of the ***SC Act*** (declarations have their origin in equity rather than the common law and can issue in respect of any error or law whether it is a jurisdictional error or not). One issue to be aware of when considering what relief to seek is that these remedies are discretionary and there has historically been some caution about allowing judicial review proceedings to fragment criminal proceedings, although that reluctance is reduced where the parties have no other means of redress.

73. The second reason you need to know the nature of the purported error is that it will dictate what affidavit evidence you will be allowed to provide to the Supreme Court in support of your summons. If you rely upon a jurisdictional error then everything that was before the Magistrate and more (if you can establish its relevance) can be before the Supreme Court. If you rely instead on an error of law on the face of the record then you are confined to "the record" in order to establish your error. Certiorari is available to cure non-jurisdictional error so long as it appears on the face of the record. Section 69(4) of the ***SC Act*** defines "*the record*" to include the reasons expressed by the court or tribunal for its ultimate determination. This amendment was to overcome the decision in ***Craig v South Australia*** (1995) 184 CLR 163 in which (at 182) the High Court stated that the "record" is confined to any documentation which initiates the application, the pleadings (if any) and the orders made. It is often very difficult to identify any error on the face of those documents. The enactment of s. 69(4) means that in NSW, the definition of the record has been expanded to include the reasons of the inferior court or tribunal: ***Kirk*** at [89].

74. So how do you identify an error as being jurisdictional error? There is no straightforward answer to this question and it is beyond the scope of this paper to address it properly. For practical purposes a helpful starting point can be found in ***Kirk*** where the majority of the High Court comprising French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ noted at [71] that "*It is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error*". Despite the High Court's disinclination to authoritatively define "*jurisdictional error*" the majority went on to helpfully state: "*Professor Aronson has collected authorities recognising some eight categories of jurisdictional error".* The High Court has thus approved the eight categories of jurisdictional error set out at what is now page 18 of the latest edition of Professor Aronson's book. Those eight categories are as follows:

    i. *A mistaken assertion or denial of the very existence of jurisdiction;*
    ii. *A misapprehension or disregard of the nature or limits of the decision maker's functions or powers;*

iii. *Acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances;*

iv. *Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact or other requirement, when the Act makes the validity of the decision maker's acts contingent on the actual or objective existence of those things, rather than on the decision maker's subjective opinion;*

v. *Disregarding a relevant consideration which the Act required to be considered or paying regard to an irrelevant consideration which the Act required not to be considered, in circumstances where the Act's requirements constitute preconditions to the validity of the decision maker's act or decision;*

vi. *Misconstruing the decision maker's Act in such a way as to misconceive the nature of the function being performed or the extent of the decision maker's powers;*

vii. *Acting in bad faith; and*

viii. *Breach of natural justice* (*procedural unfairness*).

75. The categories that most commonly arise in the context of judicial review of a judgment of a Magistrate in the Local Court are (v), (vi) and (viii) above. As to (v) and (vi) such errors have been described as a "*constructive failure to exercise the jurisdiction*". As the High Court noted in ***Minister for Immigration and Multicultural Affairs v Yusuf*** (2001) 206 CLR 323 at [41]:

> "*… There is said to be a "*constructive failure to exercise jurisdiction*" when a tribunal misunderstands the nature of its jurisdiction and, in consequence, applies the wrong test, misconceives its duty, fails to apply itself to the real question to be decided or misunderstands the nature of the opinion it is to form*".

76. In the Local Court context if the Magistrate has completely misinterpreted a statutory provision, taken an irrelevant consideration into account or failed to take a relevant matter into account that may constitute jurisdictional error. Similarly, a breach of procedural fairness is considered to be a jurisdictional error: ***Re Refugee Review Tribunal; ex-parte Aala*** (2000) 204 CLR 82 as is making a finding of fact for which there is ***no*** evidence: ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321; ***Kostas v HLA Insurance Services Proprietary Limited t/as Homeowners Warranty*** (2010) 241 CLR 390.

77. A recent example of an error within jurisdiction that was held to warrant relief in the nature of certiorari for an error of law on the face of the record is ***DPP (NSW) v Kevin Frederick Edward Gardner & Anor*** [2013] NSWSC 557 in which certiorari was granted for an error in relation to a magistrate ruling a Court Attendance Notice bad for duplicity.

78. The above principles are perhaps best demonstrated by some examples.

Prohibition

79. ***Gaudie v Local Court of New South Wales and Anor*** [2013] NSWSC 1425 is a case dealing with relief in the nature of prohibition under s. 69 of the ***SC Act***. The plaintiff, Mr Gaudie, was the defendant in Local Court proceedings for knowingly contravening a restriction specified in an apprehended domestic violence order contrary to s. 14(1) of the ***Crimes (Domestic and Personal Violence) Act*** **2007**. He was represented in the Local Court by the Aboriginal Legal Service ("ALS") who made an application that the Local Court Magistrate at Forbes recuse himself from hearing Mr Gaudie's matter on the basis of apprehended bias. The Magistrate refused to do so.

80. The Plaintiff sought relief in the Supreme Court in the alternative. The primary relief sought was prerogative and declaratory relief under ss. 69 and 75 of the ***SC Act*** so as to prohibit the Magistrate from hearing the

criminal charge against him. In the alternative, leave to appeal was sought under s. 53(3)(b) of the ***CAR Act*** against the interlocutory order of the Magistrate refusing to disqualify himself from hearing the charge against the Plaintiff. Both the first defendant (the Local Court of New South Wales) and the second defendant (the informant) submitted to the orders of the Court (save as to costs) leaving the court with no contradictor. In those circumstances the Attorney General was granted leave to intervene in the proceedings.

81. The facts were not in dispute. The Magistrate had given an interview to *"The Australian"* newspaper in which he was said to be critical of the way in which domestic violence prosecutions of indigenous persons are conducted and the way in which the ALS conducted them. The proceedings turned on whether the test for apprehended bias was made out in circumstances where the plaintiff was an indigenous man, represented by the ALS and charged with a "*domestic violence*" offence. The parties agreed that the relevant test to be applied is that the Magistrate should be disqualified if a fair minded lay observer might reasonably apprehend that the Magistrate might not bring an impartial mind to the resolution of the questions to be considered at the hearing of the criminal charge against the Plaintiff. The Attorney General's position was that the Plaintiff had not articulated the logical connection between the matter suggesting bias and the feared deviation from the course of deciding the Plaintiff's case on its merits.

82. Ultimately Johnson J was satisfied that the Plaintiff has established jurisdictional error and granted prerogative relief in the nature of prohibition under s. 69 of the ***SC Act***. His Honour was not satisfied that the refusal to disqualify himself was an interlocutory "*order*" so as to come within the terms of s. 53(3) of the ***CAR Act***. His Honour relied upon decisions in ***R v Rogerson*** (1990) 45 A Crim R 253 at 255; ***R v Reid*** [2004] NSWCCA 301; 148 A Crim R 425 at 428-429 [12]- [15] and ***Gurung v R*** at [41]-[44] in support of this conclusion. His Honour noted at [206] that although the Supreme Court will ordinarily decline to exercise its jurisdiction to grant relief under s. 69 where a statutory appeal is available (***Meagher v Stephenson*** (1993) 30 NSWLR 736 at 738-739; ***Hill v King*** (1993) 31 NSWLR 654 at 656, 658-659), it remains open to the Court to grant relief under s. 69 in an appropriate case: ***Director of Public Prosecutions v O'Conner*** [2006] NSWSC 458; 181 A Crim R 294 at 310 [45].

Certiorari

83. Another case where prerogative relief was granted in the absence of a statutory right of appeal was ***LS v Director of Public Prosecutions (NSW) and Anor*** [2011] NSWSC 1016. The plaintiff sought prerogative relief under s. 69 of the ***SC Act*** with respect to a ruling made in criminal proceedings against him before the Children's Court. The relief turned on the proper construction of ss. 18 and 19 of the ***Evidence Act***. The Magistrate had held that it was not open to the mother of LS to object under s. 18 of the ***Evidence Act*** to being called as a prosecution witness in the case against him. Johnson J ultimately came to a different conclusion.

84. His Honour agreed that s. 53(3)(b) of the ***CAR Act*** did not apply as a ruling on evidence is not an *"interlocutory order":* ***R v Steffan*** (1993) 30 NSWLR 633; ***R v EK*** [2009] NSWCCA 4; 75 NSWLR 302 at 304-306. His Honour also observed that s. 53(3)(b) does not confer jurisdiction on the Supreme Court to grant leave to appeal against an *"interlocutory decision"*, only an *"interlocutory order"*: ***Salter v Director of Public Prosecutions (NSW)*** [2009] NSWCA 357; 75 NSWLR 392 at 396 [32]. His Honour held that (at [76]) the Magistrate's decision was in the nature of a determination of the threshold question as to whether the procedure in s. 18 of the ***Evidence Act*** was available, in the face of s. 19 of the Act. His Honour went on to hold that relief in the nature of certiorari should be granted as follows (at [79]-[81]):

> "*[79] Both the Plaintiff and the First Defendant contend, and I accept, that the Magistrate fell into jurisdictional error in this case in that there has been misconstruction of the relevant statute, thereby misconceiving the nature of the function which the Children's Court was performing and the extent of the powers of that Court in the circumstances of the case**: Kirk v Industrial Court of New South Wales** [2010] HCA 1; 239 CLR 531 at 573-574 [72]; **Hoffenberg v District Court of New South Wales** [2010] NSWCA 142 at [21].*
>
> *[80] It has been demonstrated that the learned Magistrate misconceived the nature of the power he was required to exercise in hearing and determining an objection by the Plaintiff's mother to the giving of evidence under **s.18 Evidence Act 1995 .***
>
> *[81] Even if the circumstances of this case did not reveal jurisdictional error, I am satisfied that error of law on the face of the record has been established for the purpose of relief in the nature of certiorari under s.69 **Supreme Court Act 1970** : **Re Don** [2006] NSWSC 1125 at [18]; s.69(3), (4) **Supreme Court Act 1970***".

Mandamus

85. Another recent case illustrating how prerogative relief may be the only avenue of review in Committal proceedings is ***Thompson v DPP*** [2014] NSWSC 522. That was an appeal from the decision of a magistrate conducting committal proceedings against the Plaintiff brought pursuant to s. 53(3) of the ***CAR Act*** and by way of prerogative relief in the alternative. The Magistrate had declined to make an order under s. 91 of the ***Criminal Procedure Act*** ("the ***CP Act***") in relation to the requirement that a witness for the prosecution give evidence in the committal proceedings finding that "*substantial reasons*" for doing so had not been established. The Plaintiff submitted that it was not reasonably open for the Magistrate to refuse the s. 91 application.

86. Davies J held that a direction or a refusal to make a direction under s. 91 of the ***CP Act*** is not "*an order*" made by a magistrate in committal proceedings: ***R v Colby*** (1995) 84 A Crim R 125; ***Nanevski v Haskett*** [2006] NSWSC 1114 at [25]. His Honour found, however, that prerogative relief would be available if the error was established. At [28] Davies J relied upon Johnson J's decision in ***Director of Public Prosecutions (NSW)*** *v* ***O'Conner*** [2006] NSWSC 458; (2006) 181 A Crim R 294 concerning the relationship between ***CAR Act*** appeals and prerogative relief and extracted [37]-[45] of that decision. In ***O'Conner*** Johnson J at [100] had made an order in the nature of mandamus and an order quashing the direction given by the magistrate in relation to a s. 91 application.

87. Davies J went on to note that in addition to ***O'Conner*** other cases demonstrate clearly that prerogative relief is available in "*appeals*" brought to the Court by defendants in committal proceedings: ***O'Hare v Director of Public Prosecutions*** [2000] NSWSC 430 at [54]- [63]; ***Sim v Magistrate Corbett*** [2006] NSWSC 665 at [19]; ***Dawson v Director of Public Prosecutions*** [1999] NSWSC 1147 at [30]. In addition, the CCA in ***Colby*** said that administrative law relief was available as an alternative (in that case, to a s. 5F application) for consideration of a magistrate's determination under s. 48AE of the ***Justices Act*** 1902, a predecessor to s. 93 of the ***CP Act***. His Honour then noted at [31]–[32]:

> *"[31] It is clear, however, from all of these cases that relief will only be granted where there has been an actual or constructive failure by the magistrate to exercise jurisdiction under the relevant Act. It will not be sufficient for the Plaintiff to show an error of law. It will only be jurisdictional error if the magistrate makes a decision outside the limits of the functions and powers conferred on him or does something which he lacks power to do. Incorrectly deciding something which he is authorised to decide is an error within jurisdiction: Re Refugee Review Tribunal; ex parte Aala [2000] HCA 57; (2000) 204 CLR 82 at [163].*
> *[32] For the Plaintiff to establish jurisdictional error he would need to demonstrate that there was only one answer that was reasonably open to the question whether DH should be required*

> *to attend to give oral evidence: McKirdy v McCosker [2002] NSWSC 197 at [37]. If I concluded only that the Magistrate came to a different view from the view to which I would have come, that would only be an error within jurisdiction: McKirdy at [36]".*

88. Although relief in the nature of mandamus was not granted in that matter (jurisdictional error having not been established) it was held to be an available avenue of relief in such cases.

Judicial Review of costs decisions

89. I should mention also the decision of Beech-Jones J in ***O'Brien v Hutchinson*** [2012] NSWSC 429. In that matter the plaintiff (the defendant in the Local Court prosecution) had successfully defended a charge under s. 33 of the ***Impounding Act* 1993** but the Magistrate then refused to make a costs order under s. 231(1) of the ***CP Act.*** Although the definition of "*sentence*" in s. 3 of the ***CAR Act*** includes a costs order made against a defendant, it does not include a refusal to make a costs order hence such an order does not fall into the category of orders that can be appealed under the ***CAR Act***. In the absence of an express right of appeal under the ***CAR Act***, the plaintiff relied upon s. 69 of the ***SC Act*** and brought proceedings for judicial review of the Magistrate's decision. Beech-Jones J did not find any error, jurisdictional or otherwise, in the Magistrate's consideration of s. 213 and the summons was dismissed. For a helpful summary of the relevant principles relating to judicial review of a decision of a Magistrate in such a matter I refer you to [4] – [14] of that judgment.

Procedural requirements

90. Before leaving the topic of judicial review it is important to be aware of the Rules pertaining to commencement of such proceedings. Part 59 of the ***UCPR*** came into effect from 15 March 2013 and applies to proceedings commenced on or after that date. For the first time it prescribed a time limit for the commencement of proceedings. ***UCPR*** 59.10 provides that such proceedings must be commenced no later than three months from the date of the decision. The time can be extended by the court pursuant to Rule 59.10(3).

91. Another change to the existing procedure brought about by ***UCPR*** 59 was that now it is a requirement to set out the grounds of judicial review. Under Part 59 you have to specifically identify the grounds of judicial review. Under Rule 59.5 a summons must be filed and the defendant must file a response stating whether the relief sought is opposed and if so on what grounds.

92. Rule 59.7(1) provides that evidence is to be by way of affidavit. Rule 59.8 provides that the parties must prepare and file a white folder with dividers that contain a copy of the summons, the response, the written submissions, the judgment, an agreed chronology and the parties list of objections to the evidence. The white book must be filed and served by the plaintiff at least seven working days before the hearing.

93. Another interesting change brought about by the new ***UCPR*** is that each party is confined to ten pages for their written submissions with any reply sought to be filed by the plaintiff not to exceed five pages. Despite this, if you require more than ten pages to set out your legal arguments you can approach the Registrar at a directions hearing and seek leave to exceed the ten page limit by agreement.

94. Unlike in ***CAR Act*** appeals where the court is not to be named as a party, ***UCPR*** 59(3)(4) provides that the body responsible for the decision (the Local Court) must be joined as a defendant but not as the first defendant unless there is no other defendant.

95. Costs follow the event in judicial review proceedings.

Pleading CAR Act relief/Judicial Review in the alternative

96. It has become quite common to plead judicial review as an alternative form of relief when appealing to the Supreme Court from the Local Court under the ***CAR Act***. There are at least two good reasons to adopt this course.

97. First, you may be in some doubt as to whether your complaint really does concern a "question of law" within the meaning of s. 52 of the ***CAR Act***.

98. Second, you might not have a statutory right of appeal in any event – see for example the cases of ***Gaudie*** and ***Thompson v DPP*** described above.

99. There has been no criticism by any Supreme Court judges in my researches to this course being taken. It is not uncommon to read at the beginning of a judgment on a ***CAR Act*** appeal that relief was sought in the alternative but given that the judge is satisfied that relief under the ***CAR Act*** is available there is no need to consider the alternative basis upon which relief was sought, namely, prerogative relief.

100. On a final practical note can I suggest that when seeking prerogative relief in the alternative in this way you should ensure that an order is sought from the Registrar at an early directions hearing that the submissions be more than 10 pages so as not to be in potential breach of UCPR 59.

THE LRC REPORT – SUGGESTED REFORMS

101. As stated above, the LRC was asked to review the avenues of appeal in all criminal matters in NSW with a view to simplifying and streamlining the appeal provisions and consolidating them into a single Act. The two recommendations relevant to this paper are recommendations 4 and 6.

102. The LRC was of the view that having two separate Acts covering criminal appeals, namely the ***CAR Act*** and the ***CA Act,*** creates a criminal appeals framework that is "*disjointed and complicated*" (see Executive Summary at point 6).

Recommendation 4

103. The LRC recommended that the Acts be abolished and replaced with the new single ***Criminal Appeal Act*** (Recommendation 4.1). One of the interesting recommendations of the LRC was in relation to the constitution of the CCA. The LRC noted that whereas the CCA is constituted under the ***CA Act*** the Court of Appeal and the divisions of the Supreme Court including the Common Law Divisions are provided for under the ***SC Act***. The LRC noted that the difference is the result of a historical anomaly.

104. Recommendation 4.2 of the LRC was that the CCA be recognised in the ***SC Act*** as part of the Supreme Court. It went on to note that if the CCA could become part of the Supreme Court then it could be assigned to hearing judicial review applications arising out of criminal proceedings rather than the Court of Appeal: Recommendation 4.3.

Recommendation 6

105. Given the low numbers involved, the LRC considered whether appeals should continue to lie to the Supreme Court from certain Local Court decisions. The recommendation was that the current avenues of appeal to the Supreme Court be retained except that for the ability to appeal against conviction or sentence

on a question of fact or mixed fact and law; these should be removed on the basis that the District Court can adequately deal with these factual questions: Recommendation 6.1.

106. Consistent with Recommendation 4.3 the LRC recommended that the appeal from the Supreme Court to the Court of Appeal with leave be abolished and replaced with an avenue of appeal to the CCA: Recommendation 6.2. That is, the CCA should have jurisdiction over all criminal appeals.

107. I understand that the Government is currently preparing a response to this report. It remains to be seen whether there will be reform in this area as suggested by the LRC.

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