Annulment Applications in the Local Court

Reasonable Cause Conference

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There are approximately five thousand applications for annulment in the Local Court of NSW every year, about 80% of which are granted, and yet there is precious little that has been written about them. Partly this is because the reported decisions tend to be from the Local and District courts. From my own experience, the approach of courts, defence lawyers and prosecutors tends to be pretty haphazard. The purpose of this paper is to summarise the current law on the issue, and point out some policy issues and questions that are raised.

By way of background, the current form of annulment application is the result of a significant recast in 1997. As can be seen from the second reading speech[1], the legislation was intended to broaden the circumstances in which a defendant could be convicted in their absence, but with a corresponding widening of the grounds by which a Local Court could annul the conviction and sentence.

1. Legislative Framework

CRIMES (APPEAL AND REVIEW) ACT 2001 - SECT 8

8 Circumstances in which applications to be granted

(1) The Local Court must grant an application for annulment made by the prosecutor if it is satisfied that, having regard to the circumstances of the case, there is just cause for doing so.

(2) The Local Court must grant an application for annulment made by the defendant if it is satisfied:
(a) that the defendant was not aware of the original Local Court proceedings until after the proceedings were completed, or
(b) that the defendant was otherwise hindered by accident, illness, misadventure or other cause from taking action in relation to the original Local Court proceedings, or

(c) that, having regard to the circumstances of the case, it is in the interests of justice to do so.

2. Prospective or Retrospective

This is an important consideration in traffic matters as illustrated below.

[1] NSW Parliamentary Debates, Legistlative Assembly, 15 October 19878, 817

On 1 January 2017 John is apprehended after testing positive to a roadside drug test. He is taken to the police station and the second test is positive. He is suspended for the 48 hour period and awaits the final test results. Meanwhile, he keeps driving.

On 1 March John's test comes back positive, and a court attendance notice is 'served' upon him by post. John lives in a block of units, and the mail often goes missing. He is not aware of the court attendance notice, or the court dates, and is convicted and disqualified in his absence on 1 May 2017.

On 7 May 2017, John is driving his children to school and gets apprehended for driving whilst disqualified. He immediately lodges a s4 Application which is not opposed and is granted on 10 May 2017.

But what of his drive whilst disqualified charge?

> 10 Effect of annulment of conviction or sentence
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> (1) On being annulled, a conviction or sentence ceases to have effect and any enforcement action previously taken is to be reversed.
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> (2) The annulment of a conviction for an offence that has been heard together with another offence for which a conviction has been made does not prejudice the conviction for the other offence.
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> (3) If a fine is annulled, any amount paid towards the fine is repayable to the person by whom it was paid.
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> (4) The Consolidated Fund is appropriated to the extent necessary to give effect to subsection (3).

In NSW *Police v Le Platrier* [2014] NSWLC 10, Magistrate Farnan was dealing with a similar situation and succinctly posed the question at 4:

> Put simply, does an annulment of a conviction and sentence on a section 4 application take effect *abinitio*, or only prospectively from the date of the annulment?

She concluded at 31.

> Even giving the section the most beneficial interpretation available I do not consider the words "ceases to have effect" in section 10 mean other than that the annulment is prospective rather than retrospective. While the decision in *Porret* is not directly on point, the reasoning of the court in that matter is supportive of such a conclusion.

There are alternate approaches; however Magistrate Farnan's reasoning has been confirmed in the decision of *Re Culleton [No 2]* [2017] HCA 4. In that case, the 'Senator' had, as at the date of his election, a conviction in NSW which was annulled after the election. The issue

was whether he was eligible to be elected, and this in turn required determination as to the effect of the annulment – was it prospective, or retrospective?

The court found at 28:

> Section 10(1) of the Appeal and Review Act provides that "[o]n being annulled, a conviction ... ceases to have effect and any enforcement action previously taken is to be reversed." This provision states the extent to which the annulment may affect the legal position established by the conviction. The annulment of the conviction was not apt to expunge the legal rights and obligations arising from it, save in relation to the future and in the reversal of things done under it. The provisions of the Appeal and Review Act to which reference has been made indicate that a conviction is annulled only for the future: these provisions do not purport to operate retroactively to deny legal effect to a conviction from the time that it was recorded….
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> But the point for present purposes is that, at the date of the 2016 election, the conviction recorded against Senator Culleton was legally in effect and that position was not altered by the annulment because the effect of s 10 is that an annulment under the Appeal and Review Act does not purport retrospectively to treat the conviction as if it had never occurred.

Returning to John. He was indeed disqualified as at 7 May 2017. He may have a 'defence' of honest and reasonable mistake of fact, and depending on the circumstances of the case that may be hard to disprove once raised. Indeed, it is a situation where representations could result in the charge being withdrawn, and I have seen this occur regularly in my court.

3. Section 8(2) Considerations – A wide construction

The history of one of the predecessors to s8 was considered by Young CJ in EQ in *Miller v Director of Public Prosecutions* [2004] NSWCA 90 at 32 and I have emphasized a portion in bold.

> Up until Act No 28 of 1967, there was no redress available to a person who had been convicted in what was then a Court of Petty Sessions if that person had not become aware of that conviction within the 28 day period in which there could be a rehearing in the District Court. The only avenue of redress was to petition the Governor for a pardon which, in an appropriate case, the Governor would graciously give, though usually with an order for retrial.
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> The initial amendments had their problems (cf the Commentary in (1971) Petty Sessions Review Vol 2 p 643). Further, it was held in *McLachlan v Pilgrim* (1980) 5 Petty Sessions Review 2182 per Yeldham J that the then sections 100A and 100B were the only ways of annulling a magistrate's conviction.
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> There were a number of minor amendments up until 1997 when the Part was recast by the *Justices Amendment (Procedure) Act* 1997 No 107.
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> **As Sheller JA has pointed out, the Second Reading Speech gives the clear impression that the aim of the amendments was to liberalize the circumstances in**

which convictions before magistrates where the accused had not appeared could be annulled.

Under the 1967 legislation, the Act covered a series of discrete situations including where the accused was not aware of the adjourned hearing date.

However, under s100K (2)(a), the defendant can apply if he or she was not aware of the relevant proceedings until after their completion, but cases where there was some problem with communication of the adjourned date or a date was wrongly written down in somebody's diary ceased to be matters explicitly mentioned in the statute.

This must lead to the view that the general paragraphs of subsection (2)(b) and (c) of s 100K (2) or s 8(2) of the 2001 Act should be widely construed. Thus in (b) the word "misadventure" should be read widely.

Further, it is significant that the word "hindered" is used. Although Martin J said in *Hogben v Chandler* [1940] VLR 285, 288, that "hindered" "is a somewhat vague term", it nonetheless clearly means something less than prevention, namely making something more or less difficult but not impossible (per Lord Atkinson *Tennants (Lancashire) Ltd v Wilson (CS) & Co Ltd* [1917] AC 495, 518). Alternatively, as Lord Dunedin put in the same case, the word has "the general sense of in any way affecting to an appreciable extent" the activity in question, a statement which was approved by Mason J in the High Court in *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32, 45.

This wide approach has been favoured in the District Court of New South Wales. An example is *Willis v R* [2014] NSWDC 325 per Cogswell SC DCJ at 7

> The reason given by Mr Willis for missing the hearing is that his life was in disarray between his release on bail in January and the hearing date because of his addiction to the prohibited drug ice. He had lost the bail slip which contained the date. In fact he was regularly reporting as he was required to do by the bail conditions. His father accompanied him in this. But as soon as he realised that he had missed the date, as he said, he left town. He was concerned about being arrested.

And at 10….

> Minds may differ over whether a disordered life brought about by self-induced addiction to a powerful drug of addiction should qualify as a hindrance by way of illness or misadventure. I am inclined to think that it would….Self-induced drug intoxication could well be regarded as an illness or a misadventure and certainly as an "other cause."

In *Boulghourigan v Ryde City Council* [2008] NSWDC 310 Bennet DCJ was dealing with an appeal from a refusal to annul in the Local Court. The appellant, who was fighting a parking ticket, "mixed up his dates" and did not attend at the hearing. At 80 the court found:

> Failure of an accused wishing to defend the charges against them to attend court, through mere oversight, should not result in a finding of guilt and conviction as a matter of course. Where an accused person has made an error, such as by losing the note of the date of the hearing, and whilst operating under the genuine but mistaken belief that his day in court was to be on a day other than on the day upon which the

> matter was in fact to be heard, he or she has been hindered by misadventure or otherwise from doing an act in relation to the proceedings, namely from attending on the appointed day.

In my opinion I would, unencumbered by authority, disagree with this broad approach. In particular, the *ejusdem generis* rule would seem to me to limit the words "other cause" to something similar in nature to illness or misadventure. Arguably, those factors have in common that they are outside the control of the defendant. A car broken down, a sudden heart attack, all are outside the control of the applicant. Being in disarray because of a drug addiction or mere forgetfulness seems to me to be of a different nature altogether.

Very recently the Court of Appeal in *Boensch v Commisioner of Fines Administration* [2017] NSWCA (9 February 2017) perhaps began to lean in that direction. In that case the court was dealing with a person who was "pre-occupied with being unwell" and who was seeking an annulment of a fine, was challenging the original court decision that

> "There is no evidence that it pre-occupied him to the extent of preventing him from carrying out his employment and, if he were not stopped from carrying out his employment there was nothing to preclude him attending to the penalty notice….a failure by a person to lift a finger to make any inquiry does not constitute being hindered by any external events, such as accident, illness, misadventure or other cause".

The Court of Appeal found no error in that approach.

4. The Interests of Justice – Strength of the Prosecution Case

In *Rakavina v DPP* [2008] NSW DC 214 per Bennett DCJ the applicant had not attended court because he mistook the date for another, and had lost his bail adjournment notice. He supplied medical certificates on the application to the effect that he suffered from poor memory as a result of an injury. He conceded that he ought to have telephoned the court to check the dates. The court quoted from *Miller v DPP* and concluded that whilst the legislation had been amended since, that ss4 - 8 "have not reversed or introduced limitations to that liberalization". The court found that an error resulting in a genuine belief constituted a hindrance by misadventure and thus the Local Court ought to have granted the annulment as sought. At paragraph 63 the court found:

> "However, as the Court of Appeal has made abundantly clear, the legislation was not intended to produce injustice. Those accused who wish to defend the charges brought against them must be permitted to do so. The strength of the Crown Case was an irrelevant consideration to the question whether the annulment ought to have been granted. Even those facing what might be an overwhelming case are entitled to have the prosecution prove the charges brought. That said, there might in some cases be scope for the consideration of the strength of the Crown case when assessing the credibility and reliability of the evidence of an applicant…."

A somewhat different approach to this issue is evidenced in *Gino Robert Cassaniti v Director of Public Prosecutions* [2008] NSWDC 2 (25 January 2008) per Nicholson DCJ at 17:

> "in circumstances where the applicants chances of non-conviction in the Local Court on these two charges had no prospects of success there would be little point in annulling the convictions"

In this case, involving a taxation offence, the court found that whilst many other factors weighed in favour of the applicant, that as the offence was absolute, there were simply no prospects of success in defending the matter, and thus did not annul the convictions.

In *Alessi v DPP* [2008] NSWDC 146, Nicholson DCJ was considering an appeal of an annulment in the Local Court. He described the 'fundamental proposition' at 12:

> which is that the appellant bona fide was seeking to defend this case and the defence was capable of answering it

He also referred to the appeal as of right between the Local Court and the District Court

> The very fact that he has an appeal as of right suggests to me that the legislature is keen that those who are bona fide in seeking to defend a matter have the opportunity so to do.

5. The Interests of Justice

In NSW v Gavrilov [2015] NSWLC 6, Buscombe LCM as he then was, was dealing with a contested annulment application. The medical certificate relied on simply stated that the applicant had "attended for assessment of illness today". On cross-examination the defendant could not remember what illness he had been suffering from that day. The court declined to make an annulment finding at 42:

> There is no basis on the evidence for any finding that the applicant was too ill, or had an accident or some other misadventure that caused him not to be at Court….when the conviction was recorded"

On the interests of justice test, the court found at 45:

> The phrase 'interests of justice' should be construed widely, and is not only concerned with the interest of an accused. There are the interests of the complainant and the prosecution to consider, as well as the interest of the community generally in having allegations of domestic violence heard at the earliest opportunity.

In *NSW Police Force v Sullivan* [2015] NSW LC 28 Keogh LCM was dealing with a submission that it was in the interests of justice for the conviction to be annulled as there were solid prospects that the defendant would be dealt with under s32 of the *Mental Health (Forensic Provisions) Act 1990* rather than at law. In that case there was a hearing on the

merits in the presence of the applicant. In that judgment, the court looked in detail at the presumption of finality of proceedings, and considered that a later realisation that a matter could have been dealt with differently was not encompassed by the phrase "in the interests of justice".

6. The underlying issue of prejudice – thoughts on reform

Sadly, I have seen unscrupulous uses of annulment provisions, particularly in domestic violence and drug cases. It can be difficult to get domestic violence victims to court once, let alone twice. I have seen examples where defendants do not turn up at defended hearings of domestic violence matters, are convicted in their absence, and then seek an annulment on a medical certificate which lists an ailment or two. Often such annulment applications are not opposed by the prosecution, thus giving the defendant two shots at the "no show" defence.

In drug cases, I recently have had the experience of an annulment application made some months after a possession charge was dealt with in the defendant's absence. Again, the application was unopposed. Upon the conviction being annulled, the defendant entered a plea of not guilty, and stated that the 'drug is in issue'. Of course, the drug having been destroyed, the prosecution were going to have real difficulties in proving their case.

Although not directly comparative, some assistance can be obtained from civil law. In *Akari v Sole* [2008] NSWSC 59 Hall J at 29 restated in cogent terms the law relating to the exercise of the discretion to set aside default judgment:

> Accordingly, in general terms, the relevant matters to be addressed on an application to set aside a default judgment include the issues of delay, and explanation for any delay or default which occasioned the entry of default judgment, whether a defence on the merits has been established and the question of whether any prejudice would be occasioned to the plaintiff by the making of an order setting aside the judgment.

This tried and true formula, enabling the court to consider the prejudice of such an application, may well be worthy of consideration in criminal matters also.

7. Miscellaneous Issues

In terms of procedure, s7(2) of the *Crimes (Appeal and Review) Act 2001* provides that an application for annulment may be dealt with in the absence of the parties and 'in private'. Although this provision has not been judicially determined, I would have thought that principals of natural justice would tend toward an open hearing with both parties being able to be heard. I have dealt with such applications in chambers where it is non-controversial. An example is where a defence lawyer mis-diarised a mention for a matter and this led to conviction. Upon realising the error, the defence lawyer made an application for annulment, and this was accompanied by a letter from the police prosecutor agreeing with the application.

Finally, one of the key issues in annulment applications is the issue of service of original proceedings. Under the *Local Court Rules 2009*, regulation 5.9 provides that a court attendance notice commencing proceedings for a summary offence may be served personally, by fax, by email or by post. Obviously, it is far more economic for prosecuting agencies to serve the court attendance notices by post than personally, and in my experience that is why there are so many annulment applications. Whilst personal service is no guarantee of appearance, it seems to concentrate the mind of the person served to some extent. Service by post for the homeless, the itinerant and the chaotic is likely to be an unreliable method of notification. In my own court, annulment applications for detectable level drug driving cases are running at about three per week for exactly this reason. Another area ripe for reform perhaps.

Magistrate David Heilpern

15 March 2017