Appeals to the District Court

Children's Legal Service Conference

15 August 2015

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APPEAL FROM CHILDREN'S COURT TO THE DISTRICT COURT

Crimes (Appeal and Review) Act 2001 (*CAAR Act*)

Appeal from Children's Court

1. Appeals from the Children's Court lie to the District Court: *CAAR Act* s. 3 definition of Local Court includes Children's Court.

2. This includes appeals in relation to apprehended violence orders made under *Crimes (Domestic and Personal Violence Order) Act* 2007: s. 84.

3. These appeals are governed by the statutory provisions in Part 3 of the *CAAR Act*.

4. An appeal may brought by a child or on behalf of a child by:

   (a) the child's legal representative, or
   (b) except as provided by paragraph (c), by a person having parental responsibility for the child, or
   (c) if the Director-General of the Department of Community Services or a designated agency has the care responsibility for the child, by the Director-General: *CAAR Act* s.113.

Sentence Appeal – Right to Appeal

5. An appeal against sentence lies by right: *CAAR Act* s.11(1).

6. Any person whose application for annulment of a sentence has been refused by the Local Court may appeal to the District Court against the sentence: *CAAR Act* s.11(1B). An application to annul a conviction or sentence imposed in the absence of a person is made under *CAAR Act* s.4.

7. The definition of 'sentence' is a broad one: see *CAAR Act* s.3.

8. The lodging of an appeal stays the execution of any sentence: *CAAR Act* s.63. If the appeal requires leave to appeal the stay does not commence until leave is granted. If the appellant is in custody leave commences when bail is granted or dispensed with.

9. There is no automatic stay in relation to apprehended violence orders: *Crimes (Domestic and Personal Violence Order) Act* 2007 s.85.

10. The right to appeal applies also to sentences imposed for Commonwealth offences: *Director of Public Prosecutions (Cth) v Ede* [2014] NSWCA 282 at [21].

Conviction Appeal – Right to Appeal

11. An appeal against conviction lies by right subject restrictions: *CAAR Act* s.11(1).

12. Where a person pleaded guilty in the Local Court he or she may only appeal against conviction with leave of the District Court: *CAAR Act* ss.11(1A), 12(1).

13. Where a person was convicted in the Local Court in their absence he or she may only appeal against conviction with leave of the District Court: *CAAR Act* ss.11(1A), 12(1).

14. An application for leave may not be made where the defendant is entitled to make an application for annulment and has not done so, or the application for annulment has not yet been disposed of: *CAAR Act* s.12(2). An application to annul a conviction or sentence imposed in the absence of a person is made under *CAAR Act* s.4. A defendant whose application to annul a conviction has been refused may appeal against that refusal by right: *CAAR Act* s.11A(1).

15. The right to appeal applies against conviction applies also to Commonwealth offences: *Mulder v Director of Public Prosecutions (Cth)* [2015] NSWCA 92 at [24].

Appeal in relation to AVO – Right to Appeal

16. An appeal may be made to the District Court from the Children's Court

    (a) against the making of an AVO
    (a1) against the dismissal of an application for an AVO
    (b) against a costs order
    (c) against the variation or revocation of an AVO
    (d) against a refusal to vary or revoke an AVO: *Crimes (Domestic and Personal Violence Order) Act* 2007 s.84(2).

17. An appeal may only be made with leave of the District Court where the AVO was made by consent: *Crimes (Domestic and Personal Violence Order) Act* 2007 s.84(3)(b).

Limitations on appeals – time and number

18. An appeal and an application for leave to appeal must be made within 28 after the sentence has been imposed (an appeal against conviction cannot be made before the sentence is imposed) or the application for an annulment for conviction or sentence has been refused: *CAAR Act* ss.11(2), s.11A(2), 12(3).

19. Where an application is late the person must obtain leave of the District Court – the application for leave to appeal must be made within three months of the conviction, sentence or refusal to annul: *CAAR Act* s.13. No second appeal may be made to the District Court in relation to the same matter: *CAAR Act* s.29(1)(b).

20. An appeal against a refusal to annul a conviction may only be made once in respect of a particular conviction: *CAAR Act* s.11A(3).

21. No appeal may be made to the District Court where an appeal or application to appeal has been made from to the Supreme Court against the decision of the Local Court unless the Supreme Court has remitted the matter to the Local Court for redetermination and the matter has been re-determined, or the

Supreme Court has refused leave to appeal in relation to an appeal made on the ground of mixed law and fact: *CAAR Act* s.29(1)(c); (2).

Procedural Requirements

22. An appeal and application for leave to appeal must be lodged with the registrar of the Children's Court or the person in charge of the place the appellant is in custody: *CAAR Act* s.14

23. The appeal and application for leave to appeal must contain a statement of general grounds and reasons why the appeal is late if relevant: *CAAR Act* s.14.

> *Dodds [2005] NSWCA 115 as an example of a case where an inmate attempted several times to lodge an appeal from custody, the matter was withdrawn by mistake and then reinstated by another District Court judge – the Court of Appeal took a sympathetic and practical approach which ensured the matter was returned to the District Court to consider the merits of the appeal.*

24. A notice of appeal or application for leave to appeal is not invalid merely because of a defect in substance or form and may be amended if the appeal court is satisfied it should be made: *CAAR Act* s.62:

> *In Holten [2007] NSWDC 58 at [40]-[49] Berman SC DCJ used this section to justify amending a conviction appeal to include a sentence appeal in circumstances where there was no prejudice to the crown.*

Granting of Leave to Appeal

25. The court may only grant leave to appeal if 'satisfied that it is in the interests of justice': *CAAR Act* s.16(3).

26. There is no statutory definition of 'interests of justice.

> *In Herron v AG (1987) 8 NSWLR 601 at 613 the Court of Appeal, in considering an application under the Coroners Act 1980, stated that the words 'interests of justice' are words of the 'widest possible reference'*
>
> *Jane Sanders[1], suggests leave to appeal against a guilty plea will generally involve similar considerations to an application to withdraw a guilty plea.*

[1] Principal Solicitor, The Shopfront Youth Legal Centre, Appeals to the District Court, Sept 2012

Nature of Appeal

27. An appeal is by way of rehearing on the basis of the evidence given in the Local Court: *CAAR Act* s.17 (sentence); s.18(1) (conviction).

28. Early appeals under the *Justices Act* were de novo appeals – this was changed by the *Justices Legislation Amendment (Appeals) Act* 1998 to appeals by way of rehearing. This has been continued in the *CAAR Act.*

29. The appeal is not by way of a hearing de novo:

> *Gianoutsos v Glykis (2006) 162 A Crim R 64 at [31] (NSWCCA) (appeal in relation to Apprehended Violence Order); AG v DPP (NSW) [2015] NSWCA 218 at [5] per Basten JA.*

30. The appeal is not an exercise of supervisory jurisdiction / judicial review:

> *DPP v Emanuel (2009) 193 A Crim R 552 NSWCA at [19]-[25]; DPP v Burns (2010) 207 A Crim R 362 NSWCA at [38]-[41.].*

31. The burden of proof remains on Crown (or person seeking AVO):

> *Gianoutsos v Glykis (2006) 162 A Crim R 64 (NSWCCA) at [42]-[43]; Charara v the Queen (2006) 164 A Crim R 244 NSWCCA at [22]; Garde v MD [2009] NSWDC 389 at [18]-[19].*

32. The role of the District Court Judge on appeal is to form his or her own judgment of the facts:

> *Gianoutsos v Glykis (2006) 162 A Crim R 64 (NSWCCA) at [33]-[41]; Wood v DPP [2006] NSWCA 240 at [5], [7]; Charara v the Queen (2006) 164 A Crim R 244 at NSWCCA [18], [22]; Woodhouse v DPP [2015] NSWCCA 40 at [9]; Dyason v Butterworth [2015] NSWCA 52 at [27].*

33. In doing so the judge must recognise the advantage enjoyed by the Magistrate who heard and saw the witnesses give evidence in the Local Court.

> *Wood v DPP [2006] NSWCA 240 at [7]; Charara v the Queen (2006) 164 A Crim R 244 at NSWCCA [18], [22]; Woodhouse v DPP [2015] NSWCCA 40 at [9]; Dyason v Butterworth [2015] NSWCA 52 at [27]; AG v DPP (NSW) [2015] NSWCA 218 at [105] per Simpson JA (Basten JA considers the practical difficulties this causes a judge who is called upon to make his or her own assessment where the case rest primarily on the credibility of a complainant).*

34. The question of whether an appellant must first establish error does not seem to be completely settled. Some cases have clearly stated there is no requirement that a judge on appeal must first find an error: *Gianoutsos v Glykis* (2006) 162 A Crim R 64 (NSWCCA) at [33]-[41]; *Wood v DPP* [2006] NSWCA 240 at [5], [7]. In both *Dyason v Butterworth* [2015] NSWCA 52 at [28] and *Mulder v Director of Public Prosecutions (Cth)* [2015] NSWCA 92 at [28], however, the Court referred to the requirement of error. In *AG v DPP (NSW)* [2015] NSWCA 218, both Basten JA and Simpson JA considered the legislation and cases on the issue but did not decide the question. Basten JA at [8]-[15] appears to favour the requirement of an error, where Simpson JA forms the tentative view that error is not required [74]-[101].

Use of Evidence from Local Court

35. Prior to 2009, s.18(1) read:

> *An appeal against conviction is to be by way of rehearing on the basis of certified transcripts of evidence given in the original Local Court proceedings, except as provided by section 19.*

36. The requirement of certified transcripts was removed by *Crimes (Appeal and Review) Amendment Act* 2009. According to the Explanatory Notes this is to make clear:

> *that an appeal to the District Court against a conviction is to be by way of rehearing on the evidence that was before the original court rather than on the basis of certified transcripts of the original proceedings.*

37. Simpson JA explains the rationale behind the change in *AG v DPP (NSW)* [2015] NSWCA 218 referring to the Attorney General's Department of the NSW Government "Report on the Statutory Review of the [Appeal and Review] Act" in August 2008:

> *[99] The authors of the Report wrote:*
>
> *"The requirement that appeals be dealt with by way of a rehearing on transcripts of evidence limits the material from the original hearing that may be before the District Court. If narrowly construed, it suggests that the District Court is unable to rely on exhibits before the magistrate in the Local Court without giving leave. Similarly, other material such as the reasons given by the magistrate, that does not constitute evidence, are not included in the transcripts of evidence.*

> *The District Court is at a disadvantage rehearing the proceedings without the benefit of seeing or hearing the witnesses.*
>
> *…*
>
> *Assessments by the magistrate on issues of credibility would provide the District Court with a greater understanding of the conduct of the case and the decision made in the original proceedings. The comments by Mason J [sic – Mason P] in Charara recognise that it is consistent with the nature of an appeal by way of rehearing that the reasons given by the magistrate be available to reduce these 'natural limitations'."*

It was, accordingly, recommended that the Parliament:

> *"Amend the Act to provide that an appeal to the District Court … against conviction and sentence is to be a rehearing on the basis of the transcript of the proceedings and other material before the original Local Court."*

38. Several cases have explicitly stated an appeal should include a consideration of the reasons of the Magistrate:

> *Charara v the Queen (2006) 164 A Crim R 244 NSWCCA at [23]-[24]; Woodhouse v DPP [2015] NSWCCA 40 at [11]; Dyason v Butterworth [2015] NSWCA 52 at [27].*

Other Functions on Appeal

39. On appeal the District Court may exercise 'any function that the Local Court could have exercised in the original Local Court proceedings': *CAAR Act* s.28(2). This includes the power to amend the wording of a charge: *Larobina* [2009] NSWDC 79 at [79—[83].

40. In relation to whether the District Court is bound by the rulings of the Magistrate, Jane Sanders[2] properly said:

> *"It has always been generally accepted that a District Court judge hearing an appeal may revisit evidentiary rulings made by the magistrate. Often a District Court appeal is lodged (and won!) on the basis that the magistrate has incorrectly admitted an ERISP, evidence obtained in consequence of an illegal search, etc.*
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> *It has recently been suggested by one District Court judge that the District Court has no such power, and that an appeal is a rehearing on all the evidence that was before the Local Court. With respect, it is suggested that this view is incorrect.*

[2] Principal Solicitor, The Shopfront Youth Legal Centre, Appeals to the District Court, Sept 2012

Section 18(1) provides that "An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings". It does not say "all the evidence" or even "the evidence".

It is clear that the District Court, when hearing a conviction appeal, is not bound by the Local Court magistrate's factual findings. Nor is it bound by the magistrate's legal reasoning as to the ultimate issues in the matter. In the author's opinion, it would therefore be perverse if the District Court were bound by the magistrate's factual findings or legal reasoning on an intermediate matter, such as the admissibility of evidence following a voir dire.

To allow the District Court to revisit a magistrate's decision not to admit evidence (as it clearly may, by granting leave to call fresh evidence under s.18(2)), but not a decision to admit evidence, cannot be what the legislature intended. It would mean, for example, that an unrepresented accused may have inadmissible evidence admitted against him of her in the Local Court (because he or she did not understand the rules of evidence and the right to object), yet the District Court would be precluded from rectifying this on appeal (short of making orders under ss18 and 19 to facilitate a complete re-hearing of the prosecution case).'

Fresh Evidence

41. Fresh evidence means:

> *evidence in addition to or in substitution for the evidence given in the proceedings from which the appeal proceedings have arisen: CAAR Act s.3*

42. Fresh evidence may be given in a sentence appeal where there is no statutory restriction on the admission of the evidence: *CAAR Act* s.17.

43. Fresh evidence may be given on a conviction appeal only with leave of the District Court and only if satisfied in the interests of justice: *CAAR Act* s.18(2).

44. This section applies to Crown as well as an appellant: *Landsman* [2014] NSWCCA 328 at [68]:

45. In *Herron v AG* (1987) 8 NSWLR 601 at 613 the Court of Appeal, in considering an application under *the Coroners Act* 1980, stated that the words 'interests of justice' are words of the 'widest possible reference.'

46. In *Landsman* [2014] NSWCCA 328 the Court found the test required consideration of the circumstances and competing interests including interests of parties, legal principles, public interest and policy considerations.

> *[69] It is apparent from the various contexts in which the phrase "interests of justice" is found that it will involve the balancing of various interests that are in play in the particular context in which the phrase is used. Although the "interests of justice" will include the interests of the parties, the concept will invariably be wider than that and include larger questions of legal principle, the public interest and policy considerations: see BHP Billiton v Schultz (2004) 221 CLR 400.*
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> *[70] In some cases, "the interests of justice" will override other recognised legal principles or matters of public policy. Thus, in Mickelberg (1989) 167 CLR 259 at [35], Deane J observed that there were circumstances in which "the interests of justice may override the public policy that there should be an end to litigation". That statement was made in the context where the applicant had been convicted on false evidence. The present case does not involve the same circumstances with which the Court was concerned in Mickelberg. However, his Honour's remarks demonstrate that there are occasions when the interests of justice may predominate over other competing legal principles such as the finality of litigation, which is now recognised as a fundamental tenet of our legal system: D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1.*

47. The District Court may direct witnesses to attend and give evidence if satisfied there are substantial reasons, or, if the offence involves violence against that witness, special reasons why, in the interests of justice, they should do so: *CAAR Act* s.19(1). When considering whether substantial or special reasons exist must take into account whether appellant was legally represented at Local Court: *CAAR Act* s.19(6).

48. In *AG v DPP (NSW)* [2015] NSWCA 218 at [24]-[25] Basten JA raised the question as to whether the fact that the conviction is based solely on the credibility of the complainant might constitute 'special reasons'.

Sentence Appeal - Results

49. On appeal the court may set aside the sentence, vary the sentence or dismiss the appeal: *CAAR Act* s.20(2).

50. Varying a sentence includes making an order under section 10 of the *Crimes (Sentencing Procedure) Act* 1999 and, for that purpose, to set aside a

conviction made by the original Local Court (without setting aside the finding of guilt on which the conviction is based) to enable the order to be made: *CAAR Act* s.3(3A).

51. Varying the sentence includes increasing it: *CAAR Act* s.3(3):

> *"Where a District Court judge is considering increasing the sentence he or she should warn the appellant and give them opportunity to withdraw the appeal: Scott v DPP [2015] NSWCA 60, applying Parker v DPP (1992) 28 NSWLR 282 at 295 and Yousaf v DPP [2012] NSWCA 397 at [37]."*

52. Varying a sentence on appeal operates prospectively not retrospectively – this includes where the variation is to set aside the conviction under s.10 *Criminal Appeal Act*: *Roads and Maritime Services v Porret* [2014] NSWCA 30 at [28]-[36].

53. In varying a sentence the District Court is limited to a sentence that was available at first instance: *CAAR Act* s.71. For Commonwealth offences the sentence must comply with Commonwealth sentencing legislation: *Director of Public Prosecutions (Cth) v Ede* [2014] NSWCA 282 at [25].

54. The Court must specify the starting date and can backdate the sentence: *CAAR Act* s.68(1). In varying sentence Court must not take into account double jeopardy: *CAAR Act* s.68A. Where a court confirms a good behaviour bond on appeal the bond will continue from the original date of imposition despite the stay provisions, unless otherwise ordered by the Court: *CAAR Act* s.69.

Conviction Appeal – Results

55. On hearing a conviction appeal the District Court may either set aside the conviction or dismiss the appeal: *CAAR Act* s 20(1)(a), (b).

56. The Court has no general power on hearing a conviction appeal to enter its own conviction or remit the matter to the Local Court: *Spanos v Lazaris* [2008]

NSWCA 74 [39]; *DPP v Emanuel* (2009) 193 A Crim R 552 NSWCA at [16]-[17] per Spigelman CJ, Tobias JA agreeing.[3]

57. The District Court does have the power to remit a matter to the Local Court in relation to an application against a refusal to annul a conviction made under s.11A. Where the Court grants the application it must remit the matter: *CAAR Act* s.16A(3). The Local Court then deals with the matter afresh as if no conviction or sentence has been previously imposed: *Boulghourgian, John v Ryde City Council* [2008] NSWDC 310 at [84].

58. On 30 March 2009 a power to remit a matter to the Local Court was introduced only for appeals against a conviction where the appellant originally pleaded guilty in the Local Court or was convicted in their absence: *CAAR Act* s.20(1)(c).

Extension of Appeal

59. In hearing an appeal the District Court may hear and determine an appeal in respect of any other conviction or sentence made or imposed on the same day although an appeal has not been duly made in respect of that sentence or conviction: *CAAR Act* s.64.

60. In *Tyron Yates v the Commissioner of Corrective Services* [2014] NSWSC 653 at [28] Rothman J pointed out this allows the court to vary related sentences imposed consecutively or partially concurrently with the sentence appealed against.

61. In *Chokr v Liverpool City Council* [2008] NSWLEC 58 at [4] Pain J ruled this section applied only to a different conviction or sentence from that appealed against and did not extend to cover a sentence where an appeal against conviction had been lodged in time but there had been no appeal against sentence.

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[3] In *DPP v Emanuel* (2009) 193 A Crim R 552 NSWCA at [50]-[60] Basten JA considered the possibility of an implied power to remit. This was rejected by Beazley JA in *DPP v Burns* (2010) 207 A Crim R 362 NSWCA at [53] as not expressing a concluded view and dealing with a different case: see *AG v DPP(NSW)* [2015] NSWCA 218 at [17] per Basten JA.

Appeals Not to Succeed on Narrow Technical Grounds

62. An appeal should not succeed on the basis of an omission or mistake in the form of the conviction or order or an error of law in the order or sentence if it appears to the District Court there were sufficient grounds before the Local Court to have authorised a conviction, order or sentence free from the omission, mistake or error: *CAAR Act* s.65.

63. This section was referred to in passing in *RH v DPP* [2014] NSWCA 305:

> *[27] … The application of the wrong test to the critical question in issue before the magistrate did not involve a mistake in the form of any conviction or order for the purposes of s 65(1)(a). Nor did it involve "an error in law in the order or sentence" within the scope of paragraph (b). Provisions of this kind have a long history since the enactment of Jervis' Act in England in 1848. They are designed to ensure that orders, convictions and sentences are not set aside for mere want of form or for breach of a technicality not casting doubt on findings as to all the ingredients of the offence: see Ex parte Lovell; Re Buckley (1938) 38 SR(NSW) 153 at 167-168 and 173-174 (Jordan CJ; Davidson and Halse Rogers JJ agreeing). (Similar principles operate in relation to s 16 of the Criminal Procedure Act 1986 (NSW).)*
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> *[28] It is no doubt correct, as stated by Brereton J in Maritime Authority of New South Wales v Rofe [2012] NSWSC 5; 84 NSWLR 51 at [107]-[108], that an appeal will not be upheld if an identified error "has not affected the order" or "could have made no difference to the result." However, the manner in which such considerations operate in a criminal case will differ from civil cases, whence Brereton J derived the language used in that passage. It would be a startling result to conclude that the error of the trial judge in applying an objective rather than a subjective test in determining the capacity of the accused "could have made no difference to the result", the result being dependent upon the court being satisfied by the prosecution beyond reasonable doubt. Nor did the Chief Judge make such a finding.*

Failure to Appear

64. Sections 21-22 deal with the circumstances where an applicant fails to appear, the appeal is dismissed and the applicant applies to set aside the dismissal.

Prosecution Appeals

65. Sections 23-27 deal with Prosecution appeals against sentence or costs orders.

66. An appeal against sentence will be conducted by way of rehearing: *CAAR Act* s.26(1). Fresh evidence may be given with leave of the District Court. Leave will only be granted to the DPP in exceptional circumstances: *CAAR Act* s.26.

67. Appeals must be lodged within 28 days of sentence unless the appeal is against a failure to honour an undertaking to assist law enforcement authorities: *CAAR Act* s.23(3), (4).

Helpful References

- Jane Sanders, Principal Solicitor, The Shopfront Youth Legal Centre, *Appeals to the District Court*, Sept 2012.
- Ken Averre, *District Court Appeals*, ALS Conference, 2.8.2010.
- John Nicholson SC, *District Court Appeals from the Children's Court*