The Shopfront
YOUTH LEGAL CENTRE

Appeals to the District Court

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September 2012

1 Introduction

This paper is aimed primarily at defence lawyers whose clients are lodging appeals against Local Court convictions and/or sentences.

Appeals from the Local and Children's Court to the District Court are governed by Part 3 of the *Crimes (Appeal and Review) Act* 2001 ("CARA"). All section references in this paper are to CARA unless otherwise stated.

2 Types of appeal

2.1 Appeal by defendant

A defendant may appeal to the District Court against any of the following decisions made by the Local Court (which includes the Children's Court[1]):

(a) a conviction ("conviction appeal", often still referred to as an "all-grounds appeal") (s11).

(b) a sentence ("severity appeal") (s11). Note the broad definition of "sentence" in s3. It includes ancillary orders such as disqualification, compensation, etc. It also includes a s11 bond (even though this does not amount to a final disposition of the proceedings) and a costs order made against the defendant in summary or committal proceedings.

(c) a refusal of an application for annulment of conviction or sentence (s11A)[2].

Appeals under CARA ss11 and 11A are as of right, subject to a few exceptions which will be discussed below.

2.2 Appeal by prosecution

The Crown may appeal as of right against:

(a) a sentence imposed for an indictable offence dealt with summarily, a prescribed summary offence[3] or an summary offence which was prosecuted by the DPP ("inadequacy appeal") (s23(1)).

[1] It also includes a Warden's Court, Licensing Court, or any magistrate's court exercising criminal jurisdiction – see s3

[2] s11A was introduced by the *Courts Legislation Amendment Act* 2004, with effect from 6 July 2004.

(b) A costs order made against a prosecutor in summary or committal proceedings (s23(2)).

2.3 Appeals in AVO matters

Crimes (Domestic and Personal Violence) Act s.84 provides that:

(a) An aggrieved applicant may appeal against the dismissal of an AVO application.

(b) A respondent may appeal against the making of an AVO.

(c) Either party may appeal against a costs order made in AVO proceedings.

(d) Either party may appeal also lies against a decision (or refusal) to vary or revoke an AVO.

The provisions of CARA apply to these appeals, except that there is no automatic stay of an AVO upon lodgement of an appeal (*Crimes (Domestic and Personal Violence) Act* s.85).

S84 of the *Crimes (Domestic and Personal Violence) Act* provides for interim orders to be made during appeal proceedings.

3 Is the District Court the appropriate forum?

A District Court appeal may be inappropriate (or even unavailable) in the following situations:

(a) If the magistrate has made a sentencing error (e.g. imposed a penalty greater than the maximum available) the appropriate remedy is an application to correct the sentencing error under *Crimes (Sentencing Procedure) Act* s43.

(b) If the defendant has been convicted and/or fined in his or her absence, the appropriate course is to make an annulment application under CARA s4. A District Court appeal may not be lodged until annulment rights have been exhausted (s12(2)).

(c) If the conviction is for an environmental offence, the avenue of appeal is to the Land and Environment Court under CARA Part 4.

(d) If you wish to appeal against an interlocutory order or an order made in relation to committal proceedings, the appropriate remedy is an appeal to the Supreme Court (s53) or an application to the Supreme Court for prerogative relief (*Supreme Court Act* s69).

(e) If you wish to appeal on a point of law, consider an appeal to the Supreme Court (s52). However, think carefully – unless your appeal point is a winner, you risk making some very bad law and incurring an adverse costs order! Also, pursuing a Supreme Court appeal will preclude you from having another try in the District Court (unless the Supreme Court remits the matter to the Local Court, and your client is then convicted or sentenced, in which case there will be a right of appeal to the District Court) (s29).

4 Lodgement of appeal and procedural matters

4.1 Time limits

A defendant's appeal must be lodged within 28 days of the sentence (s11(2)), refusal of annulment application (s11A(2)), or making of AVO (*Crimes (Domestic and Personal Violence) Act* s84 does not specify a time limit but provides that CARA applies to AVO appeals).

A defendant who wishes to lodge a conviction appeal must first wait until sentence is complete.

[3] This is defined in cl. 4 of the *Director of Public Prosecutions Regulation* 2010 and includes all summary offences except those that may be prosecuted only with the consent of a Minister.

Leave may be granted to appeal out of time but there is an absolute 3-month time limit (see below).

A Crown appeal must be lodged within 28 days of sentence, unless the defendant's sentence was reduced on an undertaking to assist law enforcement authorities and the defendant has since failed to honour that undertaking (s23(3) and (4)).

4.2 Lodgement

The appeal must be lodged at the Local or Children's Court which sentenced the defendant. An appellant in custody may lodge the appeal from the prison or detention centre (s14(1)) (although it is usually preferable for a solicitor to lodge the appeal on the client's behalf, as some correctional centres are not very reliable at ensuring appeals are lodged). In the author's experience, most courts are willing to accept notices of appeal signed by solicitors and lodged by fax.

The prescribed form may be downloaded from the Local Courts website at http://www.localcourt.lawlink.nsw.gov.au/localcourts/forms.html. An application for leave to appeal requires a separate form, which is also available on the website.

The notice of appeal must state the general grounds (s14(2)), which need be no more than "I am not guilty" or "the penalty is too severe". An application for leave to appeal must state the general grounds and, in the case of leave to appeal out of time, the reasons for the delay (s14(4)).

4.3 Leave to appeal

Leave to appeal must be sought in the following situations:

(a) If the appeal is lodged out of time, as long at it is lodged within three months of sentence or refusal of annulment application (s13).

(b) If the defendant wishes to lodge a conviction appeal after a plea of guilty (s12(1)).

(c) If the defendant wishes to lodge a conviction appeal after being convicted in his or her absence (s12(1)). He or she must first have exhausted his or her rights to annulment under s4 (s12(2)). If the annulment application is unsuccessful, time for appeal starts to run from the date the annulment application is disposed of (s12(3)).

(d) If a defendant wishes to appeal against an AVO made by consent (*Crimes (Domestic and Personal Violence) Act* s.84).

The issue of leave to appeal is usually dealt with when the appellant first appears in the District Court.

Apart from providing that leave to appeal out of time must not be granted unless the District Court is satisfied that it is in the interests of justice (s16(2)), the Act provides no guidance as to the factors to be considered when dealing with leave applications.

In the author's experience, leave to appeal out of time is usually readily granted if the applicant is young and/or disadvantaged (due to factors such as homelessness, mental illness or disability).

There is some authority on leave to appeal against conviction after a plea of guilty. The common law principles are substantially the same with applications to withdraw pleas of guilty[4]. If the defendant was unrepresented when the plea was entered, this will of course strengthen the leave application.

Once leave to appeal has been granted, the court may proceed to hear the appeal immediately (and, in the case of a severity appeal, will usually do so) or may adjourn the proceedings (s16(4)).

[4] There are a number of authorities on this point, many of which were summarised in *Van v R* (2002) 129 A Crim R 229. See further the commentary in *Butterworths Criminal Practice and Procedure*, at para [20 – 200.15], in Volume 3, Tab 20 ("*Appeals*").

4.4 Fees

The prescribed fee is currently $102 for an appeal against one conviction or sentence, and $158 for more than one offence arising from the same court appearance.

The *Criminal Procedure Regulation* 2010 provides that the fee may be waived, remitted or postponed (cl. 14). The fee is usually remitted as a matter of course for children or people in custody. It will usually be remitted in cases of financial hardship if the appellant provides details of his or her financial situation. Local Court registry staff have apparently been directed to ensure that no-one is denied access to appeal rights because of inability to pay the fee.

If the appellant is legally aided (or represented by a CLC, pro bono service, etc), and the fee has not already been remitted, it *must* be postponed until judgment is given in the proceedings. The fee must then be remitted if judgment is given against the applicant, or is given in his or her favour but no costs are awarded in his or her favour (cl. 15).

4.5 Listing of appeal

When the appeal is lodged, the Local or Children's Court will usually contact the relevant District Court immediately and obtain a listing date. In metropolitan areas this will normally be a few weeks away; in country areas it could be considerably longer. If the appellant is a juvenile and/or is in custody, the appeal will usually be expedited. If you are lodging the appeal on behalf of your client, let the court know your available dates and they will often be able to accommodate you.

(a) A *severity* appeal will usually proceed on the date when it is first listed in the District Court. There may be a possibility of an adjournment, for example, if there was no pre-sentence report available at the Local Court and you wish the District Court judge to order one.

(b) A *conviction* appeal will first be listed for mention/call-over. At the Downing Centre this will usually be in a Registrar's Court, but at other District Courts the call-over is usually conducted by the list judge. The appeal will not be set down for hearing until transcripts have been obtained from the Local Court and the appellant has indicated whether they wish to apply to cross-examine witnesses or call fresh evidence (see below).

4.6 Defects in notices of appeal

A notice of appeal is not invalid merely because of a defect, and the court has power to amend notices of appeal to remedy defects (s62).

If an appellant appeals against a conviction or sentence, the court may also hear an appeal against any other conviction or sentence imposed the on same day, even if these were not included in the notice of appeal (s64). This provision is handy when your client has been dealt with for a whole lot of matters and you have overlooked one or two of them when lodging the notice of appeal.

5 Appeals bail

If the Local Court has not imposed a custodial sentence, there is no need to apply for appeal bail, nor does the appellant have to enter a “recognisance to prosecute” as was the case under the old legislation. The position is similar to bail being dispensed with.

If a defendant is appealing against a custodial sentence (including home detention or an intensive correction order – see CARA s63(5)), the question of bail will need to be considered.

CARA does not set out provisions governing appeals bail, but *Bail Act* s6 makes it clear that bail may be granted for the period between the lodging of an appeal and its determination. The court also has power to dispense with bail.

Although there is no presumption in favour of bail once someone stands convicted of the offence (*Bail Act* s9(2)(b)), it is not uncommon for appeal bail to be granted.

The bail decision is made by the same Local Court that convicted the appellant. Sometimes the bail decision is made in chambers, and sometimes in open court, depending on the practice of the particular court. If the appeal is lodged immediately upon sentence, the bail application will usually be held in open court before the same magistrate, as soon as the notice of appeal is lodged. If refused bail by the Local Court, the appellant is of course entitled to apply for Supreme Court bail.

6 Stay of sentence and orders pending determination of appeal

When an appeal is lodged, s63 provides that the sentence and any consequential orders will be stayed pending the final determination of the appeal, except where:

(a) there is an application for leave to appeal, in which case the stay will operate from the date when leave to appeal is granted; or

(b) the defendant is in custody (which includes subject to an intensive correction order or home detention order) when the appeal is lodged or when leave to appeal is granted, in which case there will be a stay only if bail is granted or dispensed with.

Subsection 63(2A) provides that a suspension or disqualification of a driver licence is not stayed if, immediately before the proceedings giving rise to the conviction, a suspension was in force under division 4 of part 5.4 of the *Road Transport (General) Act* for the offence to which the conviction relates. However, subs(2B) allows the District Court to stay such a suspension or disqualification if appropriate in the circumstances.

An AVO will not be stayed by the lodgement of an appeal, unless the Local Court grants a stay (*Crimes (Domestic and Personal Violence) Act* s85).

7 Hearing of severity appeals

7.1 Nature of severity appeal

A severity appeal is a rehearing of the evidence given at the Local Court, but fresh evidence may be given (s17). It is common for appellants to tender further material (psychiatric reports, testimonials, etc), call oral evidence or seek updated pre-sentence reports.

As the appeal is in the nature of a rehearing, the judge may take account of changed circumstances since the Local Court sentence was imposed[5].

7.2 Procedure

The Crown will tender a bundle containing the notice of appeal and the material that was before the Local Court, including the CAN, fact sheet, criminal record, pre-sentence report and any material that was tendered on behalf of the defendant. The bundle will have a cover sheet with details such as the maximum penalty for the offence, the sentence imposed, and the length of pre-and post-sentence custody. The appellant's legal representative will be given a copy of the bundle.

You would often run a severity appeal as you would conduct a plea or sentence matter in the Local or Children's Court. However, the judge may circumvent this process by asking you what you want and/or giving you a preliminary view immediately after reading the papers. It is, of course, an advantage to know your judge so you know whether to run your appeal like a conventional plea or to immediately cut to the chase and indicate what result you are after.

[5] See paras 17 and 18 of John Nicholson SC DCJ's paper on *"District Court Appeals from the Children's Court"* (2011), available at www.criminalcle.net.au, and *Ex Parte Currie: Re Dempsey* (1968) 70 SR (NSW) 1 at 10.

7.3 Orders available to District Court

The District Court may set aside the sentence, vary the sentence or dismiss the appeal (s20).

A judge who is varying a sentence is limited to the sentencing options that were available to the Local or Children's Court at the time (s71).

Although most District Court judges are reasonably familiar with Local Court sentencing options, many have do not have a good grasp of Children's Court sentencing options or the appropriate sentencing range. Be prepared to tender relevant provisions of the *Children (Criminal Proceedings) Act* and *Young Offenders Act*, and possibly some relevant JIRS statistics.

If the judge indicates that he or she is going to allow the appeal and substitute a more lenient sentence, don't be surprised when you then hear His or Her Honour say "appeal dismissed". The formal orders in a successful severity appeal are "appeal dismissed, conviction confirmed, sentence imposed by the learned magistrate set aside, and in lieu a sentence of ...". This appears to be a hangover from the days when every District Court appeal was technically an appeal against conviction.

7.4 Power to increase sentence and *Parker* direction

The judge may increase the sentence should he or she consider the existing one too lenient (s20(2)(b) allows the court to vary a sentence; s3 defines this to include increasing it).

However, most practitioners would be aware of the "Parker warning" or "Parker direction", a well-established rule of procedural fairness which requires the judge to warn the appellant of the intention to increase the sentence[6]. Parker warnings may be very general, and the judge is only required to indicate that he or she is considering an increased sentence[7].

If you receive a Parker warning, take immediate instructions from your client, who will probably instruct you to seek leave to withdraw the appeal. Leave is required to withdraw an appeal (s67(1)) and is almost always granted even though the court is not bound to grant it[8].

7.5 Withdrawal of appeal

If leave to withdraw the appeal is granted, the judge may make such orders as are necessary to place the appellant in the same position as if the appeal had not been made (s67(2)).

7.6 Status of sentences, orders, licence disqualification after appeal

If the District Court confirms or varies a sentence on appeal, the starting date of that sentence must be specified, and may be back-dated (s68(1)).

Unless the court orders otherwise, a good behaviour bond that is confirmed on appeal will continue to have effect according to its terms (which means it will run from the date it was imposed by the Local Court) despite any stay that was in force pending the appeal (s69).

If licence disqualification is a component of the sentence, the court may take into account any period during which the licence was suspended under *Road Transport (General) Act* s205 and any other period since the offence when the appellant did or did not hold a licence (s68(1A)). This is despite any stay that was in force pending the appeal (s68(2)). This seems to have dealt with the problem arising under the old *Justices Act*, where the District Court was required to impose licence disqualification from the date of determination of the appeal.

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[6] *Parker v DPP* (1992) 28 NSWLR 282

[7] *Hughes v DPP* (1994) NSWCA, Unreported.

[8] *Roos v DPP* (1994) 34 NSWLR 254 at 259-260

8 Hearing of Crown appeal against sentence

A Crown inadequacy appeal proceeds in substantially the same manner as a severity appeal.

However, leave to call fresh evidence will be granted to the DPP only in exceptional circumstances (s26(1)).

A court dealing with a Crown inadequacy appeal may set aside or vary the sentence, or dismiss the appeal (s27).

Just as an appellant can have their sentence increased on a severity appeal, a judge hearing an inadequacy appeal may reduce the sentence. This is because a reference to varying the sentence includes a reference to "setting aside the sentence and imposing some other sentence of a more or less severe nature" (s3).

The District Court must not dismiss a Crown appeal, or impose a less severe sentence than the court would otherwise consider appropriate, because of any element of double jeopardy involved in the respondent being sentenced again (s68A).

9 Hearing of appeal against refusal of annulment application

The right of appeal against the refusal to annul a conviction or sentence (provided by s11A) was a later introduction to CARA, operative from 6 July 2004.

DPP v Schiebel & Anor [2004] NSWCA 187 concerned a decision by the Chief Judge, Blanch J, to overturn a magistrate's refusal to annul a conviction and to remit the matter to the Local Court. The DPP applied to the Court of Appeal for prerogative relief on the basis of jurisdictional error. The court held that the District Court had no jurisdiction to hear an appeal against a refusal of an annulment application and to remit the matter back to the magistrate. However, by time judgment was delivered, a Bill was already before Parliament to provide a right of appeal against the refusal of an annulment application.

The District Court may deal with such an appeal by granting or dismissing the annulment application. If the application is granted, the matter is to be remitted to the Local Court, which must deal with the original matter afresh is accordance with s9 (s16A).

No more than one appeal may be made under s11A with respect to the same conviction or sentence (s11A(3)). So, if your client has an annulment application granted by the District Court, then fails to appear back at the Local Court, gets re-convicted, and is refused an annulment, bad luck! However, he or she may still appeal against the conviction and/or sentence under s11.

10 Hearing of conviction appeals

10.1 Nature of appeal

Before CARA was enacted, District Court appeals were covered by the now-repealed *Justices Act*.

Until amendments to the *Justices Act* in 1999, an appeal against conviction was a *de novo* hearing of the matter. However, a conviction appeal is now a re-hearing on the transcript of the Local Court hearing, unless the District Court grants leave for fresh evidence to be called or directs witnesses to attend for cross-examination (see below). A free copy of the transcript must be provided to each party (s18(3)).

An appeal against conviction is sometimes referred to as an "all-grounds appeal". This is technically incorrect but is a relic of the days when an appeal against conviction was also an appeal against sentence.

10.2 Fresh evidence and attendance of witnesses for cross-examination

The court may grant leave for fresh evidence to be given if satisfied that it is in the interests of justice (s18(2)).

The legislation provides no guidance as to "the interests of justice", and to the best of the author's knowledge there are no cases directly on point, but there is abundant case law considering "the interests of justice" in different contexts[9].

The court may direct a person (generally a prosecution witness) to attend and give evidence if:

(a) in the case of an offence involving violence, there are special reasons in the interests of justice;

(b) in any other case, there are substantial reasons in the interests of justice (s19(1)).

The regulations may make provision with respect to determination of special or substantial reasons (s19(5)) but, to the best of the author's knowledge, no such regulations have been made.

The wording of s19 is similar to *Criminal Procedure Act* ss91 and 93 which relate to attendance of witnesses at committal proceedings. The legislative intention appears to be that similar principles will apply[10]. There are a number of authorities in relation to special and substantial reasons in a committals context[11]. In view of the wealth of commentary available on committal proceedings, these principles will not be discussed in this paper[12].

The history and purpose of sections 18 and 19 were discussed by Mason P in *Charara v R* (2006) 164 A Crim R 39:

> [12] Sections 18 and 19 substantially re-enact ss132-133 of the Justices Act 1902, provisions inserted by the *Justices Legislation Amendment (Appeals) Act 1998*. The Attorney-General's speech upon the second reading of the Bill for that Act explained the policy behind the repeal of the old law relating to "all grounds" appeals to the District Court which involved *"a full de novo hearing before the District Court requiring the court to rehear all the available evidence in relation to the matter"* (New South Wales Parliamentary Debates, Legislative Council, 17 September 1998, p7595). The Bill arose out of concern about the amount of time the District Court was having to allocate to the hearing of appeals from decisions of Magistrates. There was also concern that, because of the delay in dealing with all-ground appeals, by the time they were heard the prosecution often had trouble obtaining the witnesses to reappear and give evidence again before the District Court.
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> 13 The Attorney explained that the government had therefore decided to limit appeals to the District Court to a rehearing on the depositions of the Local Court, with provision for fresh evidence to be given by leave. (This policy was embodied in the provision now found in s18.) However, the Law Society and the Bar Association had argued that parties to appeal proceedings should continue to be able to recall witnesses on appeal who earlier gave evidence before the Local Court. Accordingly, the predecessor of s19 (ie s133 of the *Justices Act*) was inserted *"to permit the parties to recall witnesses who gave evidence in the earlier proceedings before the Local Court if similar criteria to those set out in* section 48E *of the Justices Act, which applies in relation to the calling of witnesses in committal hearings, can be satisfied.* (Section 48E has its present counterparts in ss91 and 93 of the *Criminal Procedure Act* 1986.)

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[9] For a discussion of this case law, see the commentary in *Butterworths Criminal Practice and Procedure*, at para [4 – s18.5], in Volume 1, Tab 4 ("*Appeal and Review*")

10 See the second reading speech made by the then Attorney-General the Hon. Jeff Shaw, Legislative Council Hansard, 17 September 1998 at 7595.

[11] For example, on "substantial reasons" see *DPP v Losurdo* (1998) 103 A Crim R 189; on "special reasons" see *B v Gould* (1993) 67 A Crim R 297.

[12] See, for example, Mark Dennis' paper *Contested Committals: a Defence Perspective* (2012) at www.criminalcle.net.au.

In *Larobina v R* [2009] NSWDC 79, Bennett SC DCJ commented on the purpose of the provisions covering District Court appeal procedure:

> [78] The legislation was introduced to facilitate resolution of these appeals without the time consuming and costly exercise of repeating what went before in the Local Court. The powers of the court with regard to the conduct of appeals were therefore re-aligned with that goal. The amendments included the manner in which the appeals were to be determined and provided language to be used when the decision was made: *Director of Public Prosecutions v Emanuel* ibid.

If you intend to call fresh evidence on the appellant's behalf, or to seek leave to cross-examine prosecution witnesses, you must indicate this at the call-over. You will then need to file a Notice of Motion seeking leave to adduce fresh evidence, and/or seeking a direction that certain witnesses attend to give evidence in person. It will usually need to be accompanied by affidavit evidence concerning the reasons for the application, and in particular why the witnesses were not called or cross-examined in the Local Court.

Leave will usually be granted where the defendant was unrepresented, or for some other reason did not have a proper opportunity to present his or her case, at the Local Court hearing. The fact that he or she was represented by a busy Legal Aid solicitor who did not have time to properly prepare for the hearing is unlikely to be sufficient[13].

10.3 Rehearing not de novo hearing

A District Court appeal is usually described as a rehearing.

The nature of District Court appeal against conviction was considered by the Court of Criminal Appeal in *Gianoutsos v Glykis* [2006] NSWCCA 137. The following extract from the judgment of McClellan CJ at CL summarises the differences between various types of appeal:

> [27] In *George Pakis* (1981) 3 A Crim R 132 at 136, O'Brien CJ of Cr D said that "[t]he expression 'by way of rehearing' may in some contexts give rise to difficulties." This is because, as Viscount Sankey LC noted in *Powell v Streatham Manor Nursing Home* [1935] AC 243 at 249, "There are different meanings to be attached to the word 'rehearing.'" The meaning given to the word will differ according to the type of appeal in question. The following passage from Glass JA's decision in *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 is illuminating:
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> > "Appeal is a term loosely employed to denote a number of different litigious processes which have few unifying characteristics. They vary greatly in the extent to which the appellate court may interfere with the result below. Graded in ascending order, in accordance with the width of the corrective power exercised by the appeal court, they are as follows:
> >
> > (a) *Appeals to supervisory jurisdiction*. Only errors going to jurisdiction or denials of natural justice can be ventilated.
> >
> > (b) *Appeals on questions of law only*, e.g. from the Workers' Compensation Commission. Undetermined or wrongly determined issues of fact must be remitted.
> >
> > (c) *Appeals after a trial before judge and jury*. The result below will be disturbed if the judge fell into error of law, or if the jury's errors of fact transcend the bounds of reason. But, except for the assessment of damages, issues of fact must be redetermined in a new trial.
> >
> > (d) *Appeals from a judge in the strict sense*, e.g. appeals to the High Court. If the judge has fallen into error of law, or has made a finding of fact which is clearly wrong, the appellate court will substitute its own judgment. Only such judgment can be given as ought to have been given at the original hearing.

[13] Further discussion of ss18 and 19 may be found in *Butterworths Criminal Practice and Procedure,* at paras [4 – s18-5], [4 – s19-5] and [4 – s19-10], in Volume 1, Tab 4 ("*Appeal and Review*")

> Later changes in the law are disregarded and additions to the evidence are not allowed: *Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v Dignan* [(1931) [1931] HCA 34; 46 C.L.R. 73, at p. 107].
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> (e) *Appeals from a judge by way of rehearing*, e.g. appeals under s. 75A of the Supreme Court Act, 1970. Judicial opinion differs on whether a power to receive fresh evidence is implied: *Ex parte Currie; Re Dempsey* [(1968) 70 S.R. (N.S.W.) 1; 88 W.N. (Pt. 2) 193]. Almost invariably, however, it is expressly conferred. If errors of law or wrong findings of fact have occurred below, the appellate court will try the case again on the evidence used in the court below, together with such additional evidence as it thinks fit to receive. Since it will decide the appeal in the light of the circumstances which then exist, changes in the law will be regarded: *Ex parte Currie; Re Dempsey* [(1968) 70 S.R. (N.S.W.) 1; 88 W.N. (Pt. 2) 193] *Edwards v. Noble* (1971) [125 C.L.R. 296, at p. 304].
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> (f) *Appeals involving a hearing de novo*, e.g. appeals from a Court of Petty Sessions to a Court of Quarter Sessions. All the issues must be retried. The party succeeding below enjoys no advantage, and must, if he can, win the case a second time: *Sweeney v. Fitzhardinge* [(1906) [1906] HCA 73; 4 C.L.R. 716]."

His Honour went on to say:

> [31] It is clear from the terms of s 18 that an appeal to the District Court by a defendant in the Local Court is not merely a mechanism which, once invoked, allows the trial to be started afresh. The appeal is to be conducted on the basis of certified transcripts of the evidence given in the Local Court, and fresh evidence may only be given with the leave of the court.

Gianoutsos v Glykis was followed in *Charara v R* (2006) 164 A Crim R 39, where Mason P discussed the history of ss18 and 19, and said:

> [14] These reforms have altered the manner in which appeals from the Local Court to the District Court are to be conducted, apparently more significantly than may be generally appreciated. Before 1998, Part 5 Div 4 of the *Justices Act 1902* allowed an appeal to the District Court against conviction. Section 126 of that Act permitted the deposition of any witness called and examined at the hearing before the justice to be read as evidence for either party at the hearing of the appeal if the other party consented or if certain prescribed conditions were fulfilled. Subject to those provisions, however, the evidence was taken afresh. The power of the District Court judge hearing an appeal under Div 4 of Pt 5 was set out in s125. The Court's obligation was to determine the matter of the appeal afresh.
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> [15] This "all grounds" appeal was often referred to as being by way of rehearing (see eg *Sweeney v Fitzhardinge* [1906] HCA 73; (1906) 4 CLR 716 at 728, 730), but always in a context explaining that the District Court (as successor to the Quarter Sessions) was obliged to hear the matter *de novo*. In *R v Longshaw* (1990) 20 NSWLR 554, Gleeson CJ (at 561) described *Sweeney* as holding that *"the appeal was by way of re-hearing, in the widest sense of the term, that is to say a hearing de novo"*.
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> [16] Appeals to the District Court are no longer of this nature. Recently, in *Gianoutsos v Glykis* [2006] NSWCCA 137, this Court held that the clear language of s18 precludes the District Court from treating an appeal of this nature as a hearing de novo (see the reasoning of the Chief Judge at Common Law at [24]-[31]).
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> [17] The appeal is to be by way of rehearing on the Local Court transcripts (s18(1)), obviously supplemented by reference to any exhibits tendered in the Local Court. Fresh evidence may be given by leave, subject to the District Court being satisfied that it is in the interests of justice that this should occur (s18(2).
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> [18] The District Court is then required to apply the principles governing appeals from a judge sitting without a jury. The Judge is to form his or her own judgment of the facts so far as able to do so, ie recognising the advantage enjoyed by the magistrate who saw and heard the witnesses called in the lower court (*Bell v Stewart* [1920] HCA 68; (1920)

28 CLR 419 at 424-5, *Paterson v Paterson* [1953] HCA 74; (1953) 89 CLR 212, *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118).

The nature of an appeal by way of rehearing was discussed in *Fairfax Digital Australia & NZ Pty Ltd v Ibrahim* [2012] NSWCCA 125, per Bathurst CJ at paras 21-23:

> [21] Accepting that there is a right of appeal, with leave, to this court, the next question concerns the nature of the proceedings in this court. Section 14(5) appears to envisage a rehearing involving not merely a right to call fresh evidence, but evidence which is not "fresh" in the conventional sense of not being available at the time of the original hearing, but also other evidence "in addition to, or in substitution for" the evidence given when the decision was made. Where an appeal is brought from a magistrate to the District Court, it is said to be "by way of rehearing on the basis of evidence given in the original Local Court proceedings": *Crimes (Appeal and Review) Act* 2001 (NSW), s 18(1). There is power for the District Court, not only to permit fresh evidence to be given by leave (s 18(2)), but also to rehear the original evidence in the circumstances identified in s 19. By contrast, s 14(5) imposes no such restrictions on the circumstances in which additional evidence or evidence in substitution for that given below is to be permitted.
>
> [22] There is a potential inconsistency between the description of an appeal as being "by way of rehearing" and provisions which permit evidence to be taken again. As explained by Gleeson CJ, Gaudron and Hayne JJ in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194:
>
> > [13] If an appellate tribunal can receive further evidence and its powers are not restricted to making the decision that should have been made at first instance, the appeal is usually and conveniently described as an appeal by way of rehearing. Although further evidence may be admitted on an appeal of that kind, the appeal is usually conducted by reference to the evidence given at first instance and is to be contrasted with an appeal by way of hearing de novo. In the case of a hearing de novo, the matter is heard afresh and a decision is given on the evidence presented at that hearing.
> >
> > [14] Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers only if satisfied that there was error on the part of the primary decision-maker. That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error. However, the conferral of a right of appeal by way of a hearing de novo is construed as a proceeding in which the appellate body is required to exercise its powers whether or not there was error at first instance.
>
> [23] These observations provide a helpful summary of functional distinctions between different kinds of appeal; the use of many qualifiers in the descriptions indicates that no strict categorisation of appellate procedure and powers was intended. It is also possible that a provision of a statute may operate differentially with respect to different courts or tribunals. The possibility that an appeal in relation to an interlocutory order involving suppression of publication of information, where the appeal may need to be dealt with as a matter of urgency, should automatically invoke a jurisdiction requiring this court to deal with the matter de novo is unattractive. The situation may be different in other courts.

10.4 Appellate not supervisory jurisdiction

An appeal to the District Court is not an exercise in judicial review. The appellant is not required to satisfy the judge of any error on the part of the magistrate. Indeed, if the District Court is concerned solely with considering whether there has been error on the part of the magistrate, it will not be properly exercising its jurisdiction (see *Vince Sunter v District Court of NSW* [2008] NSWCA 313, per Allsop P at paras 24 and 25). However, this does not preclude the District Court from finding that there has been an error on the part of the Magistrate.

The nature of a District Court appeal was discussed in *DPP v Emanuel* [2009] NSWCA 42. In that case, the Local Court had refused to grant the accused an adjournment as was required by s.57 of *Legal Aid Commission Act*. The hearing proceeded with the defendant unrepresented and he was convicted. On appeal, Hosking DCJ held that the Local Court had no jurisdiction to proceed to the conviction, quashed the conviction and remitted the matter to the Local Court.

Spigelman CJ discussed the nature of a District Court appeal at paras 19 and 20, citing *Gianoutsos v Glykis* and *Charara*. His Honour held that the District Court judge had exercised "what can only be characterised as a supervisory jurisdiction" and was not exercising his jurisdiction to hear an appeal. He also noted (at para 17) "it was common ground in the submissions before this Court that the District Court had no power to order a remitter to the Local Court".

In *DPP v Earl Burns and another* [2010] NSWCA 265*,* the DPP sought prerogative relief under s.69 of the *Supreme Court Act,* in relation to a conviction appeal heard by Judge Nicholson in the District Court. Nicholson DCJ had found that the accused had not been given a fair hearing in the Local Court, largely due to the manner in which the magistrate had presided over the hearing.

Among the DPP's grounds was that "His Honour acted without jurisdiction or in excess of jurisdiction by reviewing the decision by the magistrate in the court below rather than conducting the hearing and basing his determination on the evidence."

At paras 21-30, Beazley J discussed the authorities on the nature of a District Court appeal. Her Honour then said:

> [33] First, the DPP submitted that it was apparent from Nicholson DCJ's comments that his Honour considered there had been unfair intervention by the Magistrate, in that the Magistrate had adopted the mantle of a prosecutor. It was submitted that it was apparent from his Honour's reasons that he considered there had been a mistrial and for that reason, he was proposing to find the respondent not guilty because he could not order a retrial.

In dismissing the DPP's application and finding that the District Court had not failed to exercise jurisdiction, Her Honour said:

> [36] In addition, the DPP relied upon the language used by Nicholson DCJ in making his order 'quashing' the conviction. It was submitted that that was the language of judicial review, a function which his Honour was not exercising. Pursuant to s20, the only order his Honour was entitled to make was to set aside the conviction or dismiss the appeal.
>
> [37] The essence of the DPP's argument was that it was apparent from pp 5-6 of his Honour's reasons that his decision to 'quash the conviction' was based on his conclusion that the respondent had not been given a fair trial. To the extent that he engaged with the facts in the case, he did so in such a cursory way that it was apparent that there had not been an appeal by way of rehearing.
>
> [38] It is correct to observe that his Honour's remarks, to the effect that the Magistrate had acted improperly and that as a consequence the respondent had not been afforded a fair trial, have the flavour of judicial review. Had that been all Nicholson DCJ said, jurisdictional error may well have been established. However, there was more. Before making the comments as to the absence of a fair trial, Nicholson DCJ had set out all the evidence. Following those remarks, his Honour went on, "Well I'll tell you this, let me just complete this ... I want to highlight the reason that I am doing this ...". His Honour then referred to Ms Burns' version of events and noted that she had not been cross-examined to the effect that what she said was untrue or that she was concocting the story.
>
> [39] His Honour's subsequent comments during the course of an exchange with the Crown (see [20] above) made it apparent that his Honour considered that on Ms Burns' unchallenged evidence an inference could be drawn that the respondent had established a lawful excuse for having the implements in his possession. It is clear that in reaching this conclusion, his Honour rejected the Magistrate's credibility finding in respect of Ms Burns. His Honour was entitled to do so in defined circumstances, including in circumstances where the Magistrate misused his advantage as the primary fact finder who saw and heard the witness.

> [40] In this case, the Magistrate engaged in an adversarial cross-examination of Ms Burns in respect of the lip balm which appeared to be the foundation of his finding that her evidence "stretch[ed] [credulity] to its very limit". His Honour was not required to accept that credibility finding. In circumstances where Ms Burns had not been directly challenged that she had concocted her evidence, Nicholson DCJ was entitled to accept that evidence as establishing lawful excuse.
>
> [41] The DPP conceded that if that was Nicholson DCJ's approach to the determination of the matter, namely, that his Honour was satisfied there was some evidence to support the defence, there was no jurisdictional error. In my opinion, that was his Honour's approach. His Honour considered all of the evidence and directed his mind as to whether on that evidence there was a lawful excuse and drew an inference that there was. Notwithstanding his Honour's remarks as to an unfair trial, he exercised the jurisdiction conferred by s18 by determining the appeal by way of rehearing on the transcript of the evidence.

In *Emanuel,* Basten JA suggested that it may be open to the District Court to set aside a Local Court conviction on the basis that the proceedings in the Local Court had miscarried (see in particular paras 45-49, 57, 58).

In *Burns*, Basten JA also referred to *Emanuel* and said (at para 80):

> [80] On the basis that, the appeal to the District Court is by way of rehearing, as opposed to an 'appeal' where there is a fresh hearing in the higher court, the appellate court will usually be entitled to intervene where it finds a material error: *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] HCA 47; 203 CLR 194 at [14] (Gleeson CJ, Gaudron and Hayne JJ). In the case of procedural unfairness invalidating a conviction, the failure of an intermediate appellate court to identify such error on an appeal may itself constitute jurisdictional error on the part of the intermediate appellate court: see *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1; 239 CLR 531 at [108]. Although it is not necessary to decide the point, it is at least arguable that the jurisdiction of the District Court extends to setting aside a conviction invalidly obtained.

10.5 Who bears the onus of proof?

In *Gianoutsos v Glykis*, it was made clear that the prosecution (or, in a case of an AVO-related appeal, the applicant) continues to carry the onus of proof throughout the appeal:

> [42] Although the appeal was by way of rehearing the onus remained on the appellant (Dr Gianoutsos) to prove his case to the relevant standard. The duty of the District Court judge was to determine the matter having regard to the evidence tendered in the Local Court and any further evidence admitted on the appeal: (see *Camilleri's Stock Feeds Pty Ltd* at 692).

See also *Paul Garde* v MD [2009] NSWDC 389, per Nicholson SC DCJ at paras [18] and [19].

10.6 Relevance of magistrate's reasons and findings as to credit of witnesses

The magistrate's reasons are included in the Local Court transcript and the District Court may have regard to them, although they are of course not evidence in the proceedings.

In *Charara* it was held that the judge hearing the appeal must form his or her own view of the facts taking into account the advantage enjoyed by the magistrate who saw and heard the witnesses called in the lower court. The judge is entitled to consider the reasons of the magistrate, including the resolution of issues of credibility by the magistrate based upon the evidence called at the hearing (see paras 18 – 24).

See also *DPP v Earl Burns and anor*, per Beazley JA at paras 23-27. Beazley JA said, at para 27:

> "This does not mean that a District Court judge exercising jurisdiction under s.18 is obliged to accept the credit findings of the Magistrate, if the Magistrate has, for example, misused the advantage of seeing and hearing the witness".

In that case, Beazley JA held that the Magistrate had misused his advantage as the primary fact-finder who saw and heard the witness, in part because he engaged in an adversarial cross-examination of the relevant witness. Her Honour held that Nicholson DCJ was not obliged to accept the Magistrate's finding as to the witness's credibility.

See also *Paul Garde* v MD [2009] NSWDC 389, per Nicholson SC DCJ at paras 14-1, in which His Honour commented on the relevance of the Local Court's reasons.

There is extensive discussion of this issue in Ken Averre's 2012 paper *"District Court Appeals"*[14].

10.7 Is District Court bound by evidentiary rulings made by Local Court?

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.

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.

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).

10.8 Powers of District Court in dealing with appeal

Section 20(1) provides that the District Court may determine an appeal against conviction:

> (a) by setting aside the conviction, or
>
> (b) by dismissing the appeal, or
>
> (c) in the case of an appeal made with leave under section 12 (1) *(ie. an appeal against a conviction imposed in the defendant's absence or following a plea of guilty)* —by setting aside the conviction and remitting the matter to the original Local Court for redetermination in accordance with any directions of the District Court.

If the appeal is allowed, the conviction is "set aside" rather than "quashed", and the charge is not formally "dismissed", although the practical effect may be largely the same: *DPP v Earl Burns and another* [2010] NSWCA 265 (per Beazley J at paras 42-55).

[14] Available at www.criminalcle.net.au

Except as provided by s20(1)(c), there is no power to remit the matter to the Local Court to deal with in accordance with law (*DPP v Earl Burns and another* [2010] NSWCA 265 per Beazley JA at paras 45, 52-55; *Gianoutsos v Glykis,* per McClellan CJ at CL at Para 39) .

However, Basten JA, in both *Emanuel* and *Burns,* suggested that the District Court may in fact have power to remit a matter to the Local Court, even though the Act does not directly provide for this (see judgement of Basten JA in *Emanuel,* paras 50-60). His Honour suggested that a power to remit may be an order "necessary to give effect to the judgment setting aside the conviction and was therefore within the implied powers of the District Court".

The District Court also has other implied powers when dealing with an appeal, for example, to allow the prosecution to amend the charge being dealt with on appeal is formulated differently to the one heard in the Local Court (see *Sasterawan v Morris* [2007] NSWCCA 185, and *Larobina v R* [2009] NSWDC 79, per Bennett SC DCJ at paras 67-79).

10.9 Appeal against severity of sentence if appeal against conviction dismissed

In the old days of "all-grounds" appeals, an appeal against conviction was also a severity appeal. If the conviction was upheld on appeal, the sentence was "up for grabs" (with the risk of a Parker warning and/or a more severe sentence).

If the appellant's notice of appeal does not specify that the appeal is against both conviction *and* sentence, s64 would usually allow an appellant to pursue an appeal against sentence following the dismissal of an appeal against conviction.

11 Sections 32 and 33 of *Mental Health (Forensic Provisions) Act*

A refusal to deal with a matter under s32 or 33 of the *Mental Health (Forensic Provisions) Act* is not appellable as such (unless of course you go to the Supreme Court on a point of law).

However, if the Local Court then goes on to convict and sentence your client, there is of course a right of appeal. As the District Court may exercise any function the original Local Court could have exercised (s28(2)), it is of course open to the judge to dismiss the matter under s32 or 33. In the author's experience, many District Court judges know very little about ss32 and 33, but are prepared to make orders if you are clear about what you are seeking.

Technically, if you are seeking a section 32 or 33 dismissal, you should lodge an appeal against conviction as well as sentence. This is because you want to get rid of the conviction, and have the charge dismissed without a finding that the offence has been proved. A s32 or 33 order may be made in a severity appeal, but the appellant would still be stuck with a finding that the offence is proved.

A more difficult issue arises where the defendant wishes to appeal against the conditions of a s32 or 33 order. Given that a person may be brought back to court for a breach of s32 conditions, a defendant may have an interest in appealing against conditions which they regard as too onerous.

If a s32 or 33 order is made after the defendant has been convicted (effectively as a sentencing option) it may be appellable to the District Court. It could be argued that such an order is within the definition of "sentence" in CARA s3, as it is "an order made by the Local Court … as a consequence of it having convicted the person of an offence".

However, it seems it would not be possible to appeal to the District Court against conditions of a s32 or 33 order which is imposed in the more usual way, that is, without any finding of guilt being made.

It appears that the Crown cannot appeal to the District Court against a magistrate's decision to dismiss a matter under s32 or 33 (unless, perhaps, the s32 or 33 order is made after conviction, and amounts to a "sentence").

12 Failure to appear at appeal hearing

If an appellant fails to appear at the appeal hearing, the court may dismiss the appeal and/or may issue a warrant.

The legislation appears to be silent on this, but it seems that the court will generally dismiss an appeal if the original sentence was non-custodial and where the defendant does not have to be taken back into custody to serve the sentence. However, if the sentence was a custodial one, and the appellant is out on appeal bail, the court will need to issue a warrant to bring the appellant back before the court so that the sentence can be confirmed and the appellant returned to custody.

If the court dismisses an appeal, or an application for leave to appeal, because the appellant failed to appear, this order may be vacated (s22(1)). An application to vacate the order must be made within 12 months after the dismissal (s22(2)). The District Court must be satisfied that the appellant has shown "sufficient cause" for failing to appear and that it is in the interests of justice to vacate the order (s22(3)).

13 Where to from here?

So you have comprehensively stuffed up your District Court appeal (or, more likely, you have encountered an outrageous judge who refuses to hear you and/or increases your client's sentence beyond the maximum penalty available). Apart from raging at the injustice of it all, is there anything you can do?

Section 176 of the *District Court Act* provides that "no adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". The predecessor to this provision, *Justices Act* s146, was considered in several cases. The prevailing view is that the section does not prevent the granting of prerogative relief for error of jurisdiction or denial of procedural fairness[15]. Orders in the nature of prerogative relief may be granted by the Supreme Court under *Supreme Court Act* s69.

Another option is the stated case procedure under *Criminal Appeal Act* s5B. The appellant may request the judge to submit a question of law to the Court of Criminal Appeal. This used to have to be done while the appeal was still on foot; however, it is now possible to state a case within 28 days after the appeal has been determined.

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September 2012

I am indebted to John Nicholson SC DCJ for his 2011 paper "District Court Appeals from the Children's Court" and to Ken Averre for his 2012 paper on "District Court Appeals" (both available at www.criminalcle.net.au).

I have endeavoured to state the law as 12 September 2012. Any errors or omissions are solely my responsibility. In this regard I would welcome any feedback via email at jane.sanders@freehills.com.

[15] See commentary in *Butterworths Criminal Practice and Procedure,* at para [4 – s20-10], in Volume 1, Tab 4 ("*Appeal and Review*")