PREPARING A SENTENCE APPEAL IN THE COURT OF CRIMINAL APPEAL: a practical overview

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This paper is written for the purpose of assisting the busy practitioner in obtaining a ready understanding of some of the practical issues that are involved in proceeding with an appeal against sentence to the Court of Criminal Appeal. The paper does not cover issues concerning conviction appeals. Hopefully, the paper will provide some useful information that might assist in advising a disappointed client who has received a harsher sentence than anticipated, of some of the procedures involved, and the law that applies to appeals from sentences imposed in the District or Supreme Courts.

Practical point number 1: No appeal as of right

There is no appeal as of right against the severity of a sentence passed by a District or Supreme Court. A severity appeal is an application for leave to appeal[1], although in practice the Court hears the application and the argument on the merits at the same time. As a practical matter a sentenced offender should be advised that whilst leave might be granted in many cases, the appeal might still be dismissed. They should also be advised that generally to succeed on a severity appeal an applicant needs to show either that the sentencing judge made an error of law, that he or she was guided by irrelevant or extreme considerations, or that the sentence was manifestly excessive, but more on this later.

An offender after sentence should be advised of the time periods that might apply in lodging the appeal, applying for legal aid (if appropriate) and obtaining a hearing date.

PROCEDURAL MATTERS

Lodging a Notice of Intention to Appeal with CCA

The appeal process is administratively commenced by the lodging of a Notice of Intention to Appeal. This form if referred to as Form No IVA Notice of Intention to appeal. This form can be found on the Supreme Court website on : www.lawlink.nsw.gov.au. (see attachment).

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[1] S 5 *Criminal Appeal Act* 1912

Time provisions: the period of time in which a notice of intention to appeal is to be lodged is within 28 days after the imposition of the sentence, however the Court has the power to extend the time in which notice is required to be given. If the notice of intention to appeal is outside the 28 day period then an application for leave to appeal out of time must be made. The Practice Note SC CCA 1 sets out some further information concerning the logistics of lodgement of these forms[2].

The relevant statutory provisions are found in the *Criminal Appeal Act* 1912 (NSW) and the Criminal Appeal Rules. **Section 10 of the *Criminal Appeal Act* 1912** sets out the method and time for an appeal. It stipulates:

> *(1) The following provisions apply to an appeal, or application for leave to appeal, under this Act against a person's conviction or sentence:*
>
> *(a) The person is required to give the court, in accordance with the rules of court, notice of intention to appeal, or notice of intention to apply for leave to appeal, within 28 days after the conviction or sentence.*
>
> *(b) The court may, at any time, extend the time within which the notice under paragraph (a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice.*
>
> *(c) The appeal, or application for leave to appeal, is to be made in accordance with the rules of court, which may include:*
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> *(i) provision with respect to any statement of grounds of appeal, transcripts, exhibits or other documents or things to accompany the appeal or application, and*
>
> *(ii) provision with respect to the timely institution and prosecution of the appeal or application, and*
>
> *(iii) provision with respect to the period during which the notice under paragraph (a) has effect.*
>
> *(2) For the purposes of any other Act or statutory instrument (whether enacted or made before or after the commencement of this subsection):*
>
> *(a) the period provided for making or lodging an appeal or notice of appeal to the court against a conviction or sentence is taken to be the period for giving the court notice of intention to appeal or notice of intention to apply for leave to appeal, or*

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[2] Practice Note SC CCA 1:

5. Any person intending to appeal against a conviction or sentence may deliver, send or facsimile a Notice of Intention to Appeal (Form IVA in the Rules) to the Registrar. The Registrar will acknowledge receipt of every notice lodged. The Registrar will require the intending appellant to provide information as to legal representation and an address to which a copy of the transcript and exhibits from the proceedings in the Court of Trial may be forwarded.

6. The Proper Officer of the Court of Trial, upon the request of an intending appellant, or the solicitor acting for the intending appellant, will arrange for the supply of a copy of the transcript and exhibits from the trial and/or sentence proceedings.

(b) an appeal against a conviction or sentence is taken to be pending in the court if notice of intention to appeal or apply for leave to appeal has been duly given to the court (unless the appeal or application has not been made within any time it is required to be made by the rules of court).

The Criminal Appeal Rules provide for the NIA to have effect for 6 months after the date it is filed, but this can be extended by the Court at any time before or after the expiry of that a period[3]. Specifically, the rules provide:

Rule 23 *A person who intends to appeal to the Court against his or her conviction or sentence is to send the Registrar a notice of intention to appeal or notice of intention to apply for leave to appeal (Form IVA) together with, where appropriate, a notice of application for extension of time to give the notice (Form VE).*

Rule 3A *(1) The following notices have effect for 6 months after the day of filing of the notice:*
(a) a notice of intention to appeal,
(b) a notice of intention to apply for leave to appeal.
(2) The Court may extend the period for which such a notice has effect, before or after the expiry of the period.

Rule 3B (1) A notice of appeal, or a notice of application for leave to appeal, in respect of a conviction or sentence may only be given:
(a) if a notice of intention to appeal or notice of intention to apply for leave to appeal has been given with respect to the conviction or sentence—within the period during which that notice of intention has effect, or
(b) if a notice of intention to appeal or a notice of intention to apply for leave to appeal has not been given with respect to the conviction or sentence—within the period of 3 months after the conviction or sentence.
(2) The period of 3 months referred to in subrule (1) (b) may be extended by the Court before or after the expiry of the period.

Leave to appeal out of time

Section 10(3) confers an unfettered discretion upon the court to extend the time where it is just in all the circumstances that such an order should be made. In *R v Young* [1999] NSWCCA 275 the authorities were considered on this point and

[3] See Practice Note SC CCA 1: *9. A Notice of Intention has effect for six months from the date of lodgment. An application for extension of time may be delivered, sent or facsimiled to the registrar (Form VF in the Rules). The application should set out the reasons for extension, and identify any difficulties in the receipt or preparation of documents for the purposes of the intended appeal.*

determined that where there is not an adequate or reasonable explanation for the delay then a miscarriage of justice is sufficient.

Considering Bail

For those persons appealing the imposition of a gaol sentence in either the District or Supreme Court bail may be a consideration. In practice, bail is seldom granted in such circumstances. An application for appeal bail may be made to either the Court of Criminal Appeal (s30 Bail Act) or to the Bail list of the Supreme Court, (s28).

S 30AA of the *Bail Act* 1978 states:

> *Notwithstanding anything in this Act, if:*
>
> *(a) an appeal is pending in the Court of Criminal Appeal against:*
> *(i) a conviction on indictment, or*
> *(ii) a sentence passed on conviction on indictment, or*
> *(b) an appeal from the Court of Criminal Appeal is pending in the High Court in relation to an appeal referred to in paragraph (a),*
>
> *bail shall not be granted by the Court of Criminal Appeal or any other court unless it is established that special or exceptional circumstances exist justifying the grant of bail.*

It is not sufficient to constitute "special or exceptional circumstances" to show that an applicant for bail has an *arguable* ground of appeal, although in a rare case when an appeal can be seen to almost certainly succeed that may be sufficient to satisfy the test: *R v Waters* (1990) 9 Petty SR 4016 (Badgery-Parker J); *R v Wilson* (1994) 34 NSWLR 1. In *R v Oliver and Hardy* (NSWCCA, 15 September 1993, unreported) this threshold was expressed as "extraordinarily high prospects of success."

A further consideration may be where a prisoner is serving such a short sentence that there is no chance the appeal will be heard before it expires. In *Chew v The Queen* (No 2) 66 ALJR concerning an appeal by special leave to the High Court in a criminal matter which had been heard and the decision reserved, exceptional circumstances were found to exist[4].

Applying for Legal Aid

After the lodgement of the NIA an application to the Legal Aid Commission ("LAC") should be made where aid is sought. The usual indictable LAC form is completed and submitted.

[4] See also *R v Velevski* [2000] NSWCCA 445; *R v Lawson* (Sup Ct NSW Levine J, unreported 28 June 1995); *R v Willard* (Sp Ct NSW Grove J; unreported 2 February 2000); *R v Campbell* (Sup Ct NSW Sperling J, unreported 24 August 1998)

The Indictable Appeals Unit of the LAC handle, at least in the early stages of the proceedings, the vast majority of matters that proceed to appeal before the Court of Criminal Appeal. The reasons for this are probably obvious: most persons appealing their sentences are prisoners, with little access to funds, making them eligible at least in respect of a means test.

Legal aid is available for matters in the Court of Criminal Appeal where there is "a reasonable chance of getting a reduction in sentence". A grant of aid is subject to Means Test A, Merit Test A and State Criminal Law Guidelines, namely, an "appropriateness of spending limited public legal aid funds" test. In a practical sense this means on appeal that there is a reasonable prospect of improving a sentence on appeal. This requires a merit advice, usually from counsel, as to whether such prospects exist. In practice however, counsel who find merit, simply move straight to the drafting of the Grounds of Appeal and Submissions, drafting merit advices only when "merit" or "no reasonable prospects of success" have been found.

Once the legal aid application is submitted then letters need to be sent to the DPP and the sentencing court seeking transcript of the proceedings on sentence, remarks on sentence, exhibits and depositions. Special attention should be given where there are co-accused. Parity considerations usually require that material concerning the sentencing proceedings relating to all co-accused are also obtained. Where a co-accused is sentenced separately and delays occur in waiting for those sentences to be completed, then an extension of time should be sought for the filing of the Grounds of Appeal should be lodged, to ensure the time for filing does not expire (Form VE).

"Reasonable prospects of success" merit test may be impacted, even unconsciously, by the fact that the success rate of sentence appeals is less than 50%. Public Defender Chrissa Loukas' paper "Court of Criminal Appeal Update: Review of 2009" March 2010 (PD website): stating that successful severity appeals reached a high point of 45.2% in 2004. There has been a steady decline to 39.2% in 2007. Since then I am told anecdotally that a recent survey of legally aided CCA severity appeals put the "success" rate at around 43% in 2009, that is 43% of those cases deemed to have "reasonable prospects of success" resulted in the imposition of lesser sentences.

Briefing Counsel

Once transcript and exhibits have been received counsel should be briefed to advise of prospects, or appear on appeal. It is desirable that a Memorandum to Counsel contains the following:

- The Court, judge and date of decision appealed from;
- The charges; the outcome in respect of each individual charge;
- The date of filing of the appeal; any particular unusual features;
- A brief outline of any particular matters raised by the client;
- A note of any missing material and the reason for it;

- The date of expiry of the NIA.

Documents that ought to be contained are the following:

- The Notice of Appeal and any Application for Extension of time;
- Transcript of Proceedings On Sentence,
- Remarks on Sentence;
- Exhibits including criminal records; custodial records; medical reports; affidavits, references;
- Written submissions from the Crown or Counsel who appeared on sentence;
- Written correspondence from the client; and
- All of the above concerning any co-accused.

Observations might also include:

- Relevant law that might relate;
- JIRS statistics (located on the Judicial Commission of NSW website: see http://sis.judcom.nsw.gov.au);
- Any relevant sentencing tables (sentencing tables can be located at the Public Defenders Office website at www.publicdefenders.nsw.gov.au); and
- Any sentencing diagrams that might assist in complex and multiple sentences (see attached)

Preparing for Hearing

Should merit be granted in a legal aid matter, and the appeal be going ahead the following documents will need to be filed within the 6 month period, or within the extended period allowed by the Court:

- Notice of Application for leave to appeal against sentence;
- grounds of appeal
- written submissions in support of the appeal
- a certificate filed by the applicant's solicitor that the transcript of the proceedings and the remarks on sentence is available
- a statement nominating the solicitor and counsel appearing for the applicant. (**Rule 23C**)

Also note the provisions of Practice Note SC CCA 1:

> *10. If an appeal is to proceed, at least four copies of the notice of appeal or a notice of application for leave to appeal (as the case may be) must be lodged with or sent to the Registrar. The notice must be accompanied*

by the documents specified in Rule 23C of the Rules, namely, a Statement Nominating Legal Representation, the Grounds of Appeal, the Submissions in support of the appeal, and a Certificate stating that all transcripts and exhibits are available from the Proper Officer of the Trial Court.

11. Where the effect of a notice of intention has expired, an application for extension of time to appeal (Form V in the Rules) must be lodged with the notice of appeal or notice of application for leave to appeal.

12. The notice will be registered and the appeal listed for callover before the Registrar where a hearing date will be allocated.

13. In urgent appeals, the Registrar may waive or relax the requirements of Rule 23C.

14. If a decision is taken not to pursue an appeal or application for leave to appeal after a notice of intention has been given, no further documents need be sent to the Registrar; the effect of the notice of intention will lapse after 6 months (or if the effect of a notice has been extended, after that further extension).

15. The overall effect of the giving of a notice of intention to appeal is to facilitate the obtaining of necessary transcripts, exhibits and other documents so that a decision may be taken as to whether an appeal or application for leave to appeal should be instituted, and to ensure that, when instituted, all material is available to enable the expeditious listing and determination of the appeal or application.

17. The Registrar, when fixing a date for the hearing of an appeal or applications, will direct both the appellant or the applicant (as the case may be) and the respondent to file and serve written submissions on or before particular dates prior to that hearing. In appeals against conviction, or applications for leave to appeal against sentence, ordinarily the appellant's or applicant's submissions will have been filed with the notice of appeal or notice of application for leave to appeal, pursuant to clause 23C of the Rules.

18. The party filing written submissions shall lodge at least four copies of the submissions with the Registrar.

21. In an application for leave to appeal against sentence, the applicant's submissions shall contain:
-a brief statement in narrative form of the Crown case which led to the conviction, but only where such case is not sufficiently apparent from the sentencing judge's remarks on sentence;
-a statement of the particular objections to the sentence and to the reasons of the sentencing judge which are to be argued;
-a brief statement of the argument as to why leave to appeal should be granted; and
-a separate list of any authorities to which it is expected that the members of the

Court may have to turn during the argument.

22. The Crown need not file written submissions in relation to applications for leave to appeal against sentence, but it may do so, and it should do so if it is suggested that there is some significant error of fact or principle in the applicant's submissions.

Further material for hearing

It is important to prepare further evidence should the court move to re-sentence the offender. This needs to be filed in the court registry prior to the hearing of the appeal. This material might include information obtained from the Department of Corrective Services (via a Freedom of Information request to obtain the custodial case management file), Justice Health, the applicant, or family members who are able to give information into the applicant's prospects of rehabilitation, health, conditions of custody, or family circumstances. This is usually done by way of an affidavit in the name of the solicitor as relates to agencies documentations.

A word of caution about this material: attaching large quantities of material obtained from agencies has attracted judicial criticism, where material is simply attached to an affidavit without comment. See Howie J's comments in *Bushara v R* [2006] NSWCCA 8; (2006) 13 Crim LN 150 [2000] at [38]-[44]:

> 38 In the event that this Court might have to re-sentence the applicant, a large amount of material was placed before the Court by way of affidavit. As is usually the situation, the Crown objected to none of it and little of it could have a significant impact upon the Court's discretion having regard to the findings of the Judge. It seems to me that this material is prepared as a matter of routine in almost every application for leave to appeal against sentence. Of course the Court will use none of the material unless it finds error. Very frequently this material is prepared at public expense because the applicant has legal aid.
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> 39 Very often it appears that the applicant has been given an open slather to put in affidavit form anything that he or she might wish to place before the Court, whether or not it has any relevance or significance. Almost all of the affidavits I have seen by applicants contain expressions of remorse and contrition and resolutions not to offend again. The present is no exception. If the sentencing judge found that the applicant was remorseful and was unlikely to re-offend, this material takes the matter no further as this Court is unlikely to come to a different view than the Judge simply because there is no fresh material to support the findings. If the judge did not make those findings, it is highly unlikely the Court is going to come to a different conclusion based upon such material.
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> 40 On many occasions the material either was placed, or should have been placed, before the sentencing judge: see ***Gonzalez v R*** [2006] NSWCCA 4 per Basten JA. The applicant should make the best case before the sentencing judge and not before this Court. I have very serious doubts that this Court should routinely accept evidence, even on the limited basis that it might be used in re-sentencing the applicant, if that material could reasonably have been placed before the sentencing judge.
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> 41 In the present case there were 38 pages of fresh material much of it obtained through an application made to the Corrective Services Commission pursuant to provisions of the ***Freedom of***

Information Act. This again appears to me to be a frequent practice of the Legal Aid Commission whether or not it is likely to produce any material of significance. No doubt this application resulted in public cost and the expenditure of valuable time by public officers even before multiple copies of the material were made so that it could be filed and served.

42 This material was simply handed to the Court without being the subject of any particular submission by counsel for the applicant as to what the Court was to make of it or what impact it was to have on the exercise of the Court's discretion. The Crown took no objection to its admissibility, nor commented on its content in submissions. This is almost always the way this material is presented. The Court was left to wade through the material to see if there was anything in it that might be admissible or remotely relevant. Much of the material was simply case notes and other documents from the applicant's prison file. There were also copies of a large number of certificates received by the applicant as a result of courses undertaken by him while in custody. In the present case the Judge found that the applicant did have prospects for rehabilitation notwithstanding his failure to take advantage of all the Drug Court programme had to offer so that the material added little, if anything, to that finding. It was certainly not going to lead this Court to find that some lesser sentence was warranted.

43 This criticism may seem carping and uncharitable but, where that material could not significantly affect the exercise of this Court's discretion on re-sentencing, it is simply a waste of money in preparing it, often from the limited finances of the Legal Aid Commission, and a waste of the Court's time in reading material that is largely irrelevant. On a day where the Court has five or six sentencing matters before it, it is an unnecessary burden imposed upon the Court by legal practitioners who, with respect, do not appear to me to be having sufficient regard to the nature of the material or its purpose.

44 I do not intend by these remarks to single out the conduct of the particular counsel appearing and the instructing solicitor for the applicant in this matter as being in any way different from what has become common practice. I am merely using this case as an example of what I believe is a course of practice that has come to be adopted, possibly because the Crown has not sought to object to the material and the Court has not chosen to be more strict in limiting the material that it is willing to receive. It is a suitable vehicle to raise this criticism because of the amount of material that was placed before the Court that could have no real bearing on the determination of the appeal. But even this fact does not make it an exceptional case.

Generally, the better way of dealing with this material is by way of an affidavit that attaches the material, but highlights in the body of the affidavit the material that is relied upon. This should only be done where there is some general purpose to the material. See attachment as an example.

Determination of Sentence Appeals.

S 6(3) of the Criminal Appeal Act states:

> *On an appeal under section 5 (1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.*

Section 6(3) permits the Court of Criminal Appeal to impose a lesser sentence if 'some other sentence in law was warranted in law and should have been imposed'. It has been held that as a result it is not sufficient in a sentence appeal to establish that there has been an error of law in the sentence proceedings. It is also necessary to satisfy the court that some other sentence was warranted in law and should have been imposed: *Simpson* (2001) 53 NSWLR 704 at para [79]; *R v Cocking* [1999] NSWCCA 311; (1999) 6 Crim LN 81 [1000], applying *R v Anstill (No 2)* (1992) 64 A Crim R 289.

The establishment of error in itself does not permit the court to substitute a different sentence, nor will the court intervene simply because the court themselves would have imposed a lesser sentence: *Skinner v R* (1913) 16 CLR 336.

There are some well known principles that are established by the following cases.

1. The essence of the error principle is set out in ***House v The King*** (1936) 55 CLR 499. In ***House***, Dixon, Evatt and McTiernan JJ, said at p504-505:

> It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, and his determination should be reviewed and the appellant court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary has reached the result embodied in his order, but if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion on which the law reposes in the court at first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.

2. ***Simpson*** (2001) 53 NSWLR 704 at para [79]: The court will interfere where there has been an error of principle or a mistake of fact or law so that the sentencing discretion of the trial judge has miscarried, and will correct a sentence which is out of line with the commonly accepted pattern: *R v Visconti* [1982] 2 NSWLR 104. The court will not compare the sentence under challenge directly with that imposed upon another offender (who is not a co-offender) simply because the two offenders may have similar characteristics and may have committed similar crimes, because what must be looked at is whether the challenged sentence is within the appropriate range and not whether it is more or less severe than some other sentence which merely forms part of the range: *R v Morgan* (1993) 70 A Crim R 368; *R v Salameh* (NSW CCA 9 June 1994); *R v Trevanna* [2004] NSWCCA 43; *R v George* [2004] NSWCCA 247; (2004) 11 Crim LN 90 [1763].

3. ***Baxter v Regina*** [2007] NSWCCA 237 Kirby J, Spigelman CJ and Latham J concurring, held the judge had misstated the maximum penalty which is an important error. However, at [55] to attract intervention, an error "must be material and some other sentence must be warranted in law and should have been passed". Kirby J at [60] stated: "*I accept that the applicant does not have to establish the sentence was manifestly excessive. To be a material error, it is enough that such error may, as a matter of inference, have infected the reasoning of the sentencing judge such that, absent error, some other and lesser sentence may have been imposed***.**"

Chrissa Loukas in her paper Court of Criminal Appeal Sentencing Law Update 2007[5], succinctly summarised the correct approach as follows:

- error is established
- s.6(3) requires the Court to consider the re-exercise of the sentencing discretion
- in forming the opinion under s.6(3) the Court can take into account post-sentence conduct of the applicant once error established
- identification of error does not create an entitlement of the part of an applicant to a new sentence;
- an error must be a material error. An error is a material error if it has the capacity to infect the exercise of sentencing discretion: Baxter [2007] NSW 237 at [60].

Common sentencing errors

Chris Craigie in his paper: "The Reasonable Prospect of Success[6]" listed the following areas where sentencing judges commonly make errors:

- Failure to properly apply the discrete allowance for a timely plea, represented by the utilitarian value of the objective fact of the plea as indicated in the guideline judgment constituted by ***R v Thomson; R v Houlton*** (2000) 29 NSWLR 383.
- The use of guideline ranges, such as that indicated for armed robberies in ***R v Henry*** (1999) 46 NSWLR 346 as a purported starting point, as opposed to a guide. See ***R v Karacic*** (2002) 121 A Crim R 7.
- Referring to the strength of the Crown Case when assessing the utilitarian value in the plea of guilty. The strength of the Crown case may be considered as a factor going to contrition and is only otherwise where the Crown case was in fact so weak as to suggest greater utility in the plea. The most recent in a long line of statements by Howie J consistently decrying this error is ***R v Sutton*** [2004] NSWCCA 225, 6 July 2004.
- Misapplication of the practical requirements of sentencing for multiple offences, in accord with the principles in ***Pearce v The Queen*** (1998) 194 CLR 610, typically by loading-up one count rather than assessing individual matters before considering totality, concurrence or cumulation. This is a rich field of error, as one discovers by simply typing " Pearce" into any database of CCA decisions.

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[5] See PD website

[6] See PD website

- Failure to take into account periods of broken custody referable to the offence currently being subject to sentence but sometimes "lost" in consideration of a complex sentencing record.
- Failures in regard to proper allowance for assistance.
- Failures in regard to proper examination of issues relating to parity or proportionality. The latter is sometimes being overlooked when the former is not strictly applicable but there remains a need to have some regard to the sentence imposed on a co-offender.
- Failure to apply factors relating to mental illness or intellectual disability or rejecting them as only being relevant where there is a causal connection to the offence. The latter connection is usually context in which such evidence is considered but it is not an exclusive situation. The broader relevance of mental illness etc is considered in see
- Misapplication of the principles relating to those offences where a standard non-parole period applies. Specifically in application of the standard period to matters in which there has been a plea and regarding the standard period as mandating a starting point. See ***R v Israil*** [2002] NSWCCA 255 per Spigelman CJ ***R v Way*** NSWCCA 131, 23 June 2004 error in relation to standard non parole periods, specifically applying them to matters where there has been a plea or regarding them as a starting point. ***R v Wickham*** NSWCCA 193 , 17 June 2004

- Regarding the fact of a prior record as a matters specified as one of aggravation, pursuant to s.21A(2) of the **Crimes (Sentencing Procedure) Act** without taking into account the preservation of the Common Law specified in s.21A(4). The latter has the effect of preserving the principle that prior record is not an aggravating factor but may go to matters including rehabilitation and protection of the community. The decision represents a caution against using s.21A as a check-list, as opposed to a series of factors that should be considered.

Findings of Fact

The court is bound by the findings of fact found by the sentencing judge where that finding was open on the evidence before it, only being able to be set aside where it is establish
ed that there has been some error in the finding of the fact in issue. The court in *R v Khouzame* citing House stated at [41] that "it is only if the judge "mistakes the facts" in the sense that these authorities have referred to that the findings of fact may be set aside and in that event, the court may reach the opinion that some other sentence should have been passed and might pass that other sentence should it be warranted in law".

Fresh evidence

Often something arises after sentence, that an applicant may wish to rely upon in the determination of their appeal. The court may receive such evidence where it is in the interests of justice to do so and where "proper grounds are established": *R v Lanham* [1970] 2 NSWLR 217 and *R v Cartwright* (1989) 17 NSWLR 243. As stated in Butterworths at [20-270.1] to be admissible, the evidence must have real significance to the sentencing discretion, if known to the appellant its significance was not realised by him, and its existence was not made known to the appellant's legal advisers at the time of sentence: *L r v Goodwin* (1990) 51 A Crim R 328. A

In summary, in order to adduce fresh evidence on a sentence appeal the evidence must:

- be of such significance that the sentencing judge may have regarded it as having a real bearing on the sentence;
- the appellant did not know or did not realise the significance of the material; and
- the appellant's legal advisers did not know of it.

See *Sims* (1995) 83 A Crim R 1, *De Marco* (1996) PD 284.

Further examples of fresh or new evidence might be *post-sentence conduct* which may be allowed into evidence in exceptional cases where, although error in the original sentence cannot be demonstrated, that evidence of post-sentence events will be received in order to do justice in all the circumstances of the case[7].

Those exceptional cases have included cases where a medical condition which existed at the time of sentencing was later found to be extremely serious[8]. That evidence may, in appropriate circumstances, cause this Court to intervene and resentence: *Iglesias v The Queen* [2006] NSWCCA 261 per McClellan CJ and CL at [10]. In that case his Honour cited Lee J with whom Maxwell and Yeldham JJ agreed in *R v Bailey* (1988) 35 A Crim R 458:

> In my opinion in a case such as the present where it is clear that the disease with which the appellant is now suffering, was in fact, in existence at the time he was sentenced, it is proper for this Court to allow evidence to that effect to be given on the appeal and to reopen the matter of the proper sentence to be imposed. It has for a long period of time, been the practice in this Court to take into account circumstances which make the incarceration of the prisoner more burdensome upon him that would be the case of the ordinary gaol inmate. Considerations of health are in this category.

[7] *Springer v The Queen* (2007) 177 A Crim R 13 , per McClellan CJ at CL at [2]-[3] and [29]; *Scullion v The Queen* (unreported, Court of Criminal Appeal, NSW No 60105 of 1991, 15 July 1992) Clarke JA

[8] See also *Smith v R* (1987) 27 A Crim R 315 at 316 re diagnosis of AIDS after sentence but which existed at the time of sentence.

Other circumstances might exist where by reason of incompetent representation the sentencing judge was left to impose the sentence without fundamental facts: *R v Abbott* (1984) 17 A Crim R 355

Manifest excess: the role of other cases and statistics

The court will consider official sentencing statistics in order to ascertain the prevailing and general pattern for sentencing particular offences: *R v Visconti* [1982] 2 NSWLR 104. The use of statistics by the court was considered in *R v Bloomfield* (1998) 44 NSWLR 734; 101 A Crim R 404; (1998) 5 Crim LN 52 [874] where it was held that statistics may be less useful than surveys of decided cases, and caution needs to be exercised in using sentencing statistics, but they may be of assistance in ensuring consistency in sentencing and may provide an indication of general sentencing trends, standards and an appropriate range. It was also stated that statistics may be useful in determining whether a sentence is manifestly excessive or manifestly inadequate but are less likely to be useful when the circumstances of the individual instances of the offence vary greatly, such as manslaughter. At 739, Spigelman J reviewed a number of decisions from NSW, SA and Vic and proceeded to set out the following eight points on the use of sentencing statistics:

> '(i) The sentence to be imposed depends on the facts of each case and for that reason bald statistics are of limited use.
> (ii) Statistics may be less useful than surveys of decide cases, which enable some detail of the specific circumstances to be set out for purposes of comparison.
> (iii) Caution needs to be exercised in using sentencing statistics, but they may be of assistance in ensuring consistency in sentencing.
> (iv) Statistics may provide an indication of general sentencing trends and standards.
> (v) Statistics may indicate an appropriate range, particularly where a significant majority or a small minority fall within a particular range. Also when a particular form of sentence such as imprisonment is more or less likely to have been imposed.
> (vi) Statistics may be useful in determining whether a sentence is manifestly excessive or manifestly inadequate.
> (vii) Statistics are least likely to be useful where the circumstances of the individual instances of the offence vary greatly, such as manslaughter.
> (viii) The larger the sample the more likely the statistics are to be useful."

In *R v BGS* [1999] NSWCCA 89 [23] Virginia Bell J noted that the CJ in *Bloomfield* had drawn together many of the court's decisions and had given detailed consideration to the use to which statistical material may be put. However her Honour observed

that statistics may be less useful than surveys of decided cases for the purposes of comparing sentences …"[9]

In *Dieguez* [2008] NSWCCA 147 Latham (Bell JA; Grove J agreeing) said at [24] that:

> To call in aid the Judicial Commission statistics in order to demonstrate manifest excess, as the applicant does, is not always helpful. It is apparent that the applicant's sentence is at the upper end of the range of sentences imposed for this offence, according to those statistics. The fact remains that it is nonetheless within the range of sentences imposed for an offence carrying a maximum penalty of 15 years imprisonment. Caution should be exercised when having regard to this data. As Hulme J observed, with the concurrence of the other members of the Court in *Ma & Pham v R* [2007] NSWCCA 240 at [91] :
>
> > Subliminal in the reference to the statistics and the observation that the sentences here fall into the highest end of the range is the proposition that that is indicative of error. The proposition must be rejected. As this Court has said on many occasions, the range extends to the maximum penalty set by Parliament and it is against that that an offender's conduct must primarily be judged. Certainly, the statistics may at times inspire further reflection on the sentence in a particular case and perhaps give some limited guidance but, of themselves, they do not demonstrate error. Particularly is this so because, within each category, they provide no details of the cases reflected in them.

The case of *Han v R* [2009] NSWCCA 300 (2010) 17(2) Crim LN 18 [2676] – involved the comparison of other cases on sentence. CCA discussed the relevance of sentencing statistics and comparable cases when determining whether a sentence is manifestly excessive or not. It was held, per Campbell JA, Rothman J with whom Howie J agreed (dismissing the appeal): that it is impermissible to compare, in the sense one compares sentences for co-offenders, sentences imposed on offenders for *different* offences.

As a matter of practice, as a solicitor (and now as counsel where I am running a manifestly excessive ground) I always attached tables of comparable cases and the statistics. They are both tools of trade, and they both have their limitations. **Attached are copies of examples of tables relied upon**.

Parity considerations

Issues of parity may arise after the offender has been sentenced, where a co-offender is sentenced for the same offence, or a different offence arising from the

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[9] See also *Allen* [2008] NSWCCA 11; *Derrington* [2008] NSW CCA 94, and *Wood* [2008] NSWCCA 257 on further discussion on the use of statistics.

same circumstances. Where there is a considerable degree of disparity between sentences (arising from the same offence, or circumstances) a ground of appeal may arise if one of the offender has a legitimate sense of grievance. Courts should endeavor to be even-handed[10]. Parity of sentence applies if all other things are equal.[11] Attached is a parity table that might assist the court in readily understanding any parity issues that might arise.

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Barrister

NOTE: There are many excellent papers on sentencing and Crown appeals. See annual papers written by Chrissa Loukas PD and several papers written and delivered by Hugh Donnelly, Judicial Commission of New South Wales.

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[10] The law can be fairly stated by quoting Dawson J in *Lowe v The Queen* (1984) 154 CLR 606

[11] *R v Doan* (Unrep, 27/9/96, NSWCCA)