DISTRICT COURT APPEALS FROM THE CHILDREN'S COURT

John Nicholson SC

1. In 2009 the District Court dealt to finality with about 7,500[1] appeals from the Local Court. I have assumed the Local Court, for the purposes of this statistic includes the Children's Court – although it may be useful for the purposes of securing an accurate picture of the District Court's work load to have that figure isolated in future counting. 6,000 of those appeals were against severity of sentence; the balance of about 1500 were conviction appeals. What can be extrapolated from those figures is about 20% of District Court appeals are conviction appeals, the 80% balance severity appeals.

2. Of course, the reason the statistics may not include a separate Children's Court category is that the definition of Local Court in the Crimes (Appeal and Review) Act 2001 (the Act) includes the Children's Court[2]. District Court centres such as Parramatta and the Downing Centre do not have any great abundance of Children's Court appeals. It may be that centres closer to juvenile detention centres deal with a greater number.

An overview of the Crimes (Appeal and Review) Act 2001

3. The appellate jurisdiction of the District Court comes primarily from the Act[3]. The Act provides an appeal as of right to any person who has been convicted in the Local Court (while present in court) or sentenced against that conviction or sentence[4]; or a defendant whose application for an annulment of a conviction has been refused, against that annulment[5]; and by the Director of Public Prosecutions (DPP) against sentence imposed on a person or costs ordered against him.[6] Those appeals must be lodged within 28 days of the sentence imposed, costs ordered or conviction recorded.

4. Leave is required and may be granted to a person to appeal against conviction following a plea of guilt; or to a person convicted in his/her absence, but in respect of the latter group only in certain circumstances[7]. The District Court quite frequently is asked for leave to appeal conviction following a guilty plea in the Local Court – and sometimes in the Children's Court. The latter group is less frequent, possibly because a greater number of children will be represented and the Children's Court may be more careful in accepting a guilty plea. Leave to appeal against conviction applications following a guilty plea must also be made within 28 days of the conviction being recorded.

5. Where a time frame of 28 days to lodge an appeal has been set by the Act, but not complied with, the Act provides for Late Applications for Leave to Appeal. A Late

---

1. NSW Criminal Court Statistics 2009 – Higher Courts p.113

2 s.3

3. Appellate powers may be found in other Acts such as s.84 Crimes (Domestic and Personal Violence) Act 2007 . But the jurisdictional approach set out in the Crimes (Appeal and Review) Act is incorporated into the appellate review structure; see s. 48 (4).

4 S. 11 The Act. However, in respect of taxation matters note the provisions of ss.11-13CA Taxation Administration Act 1953.

5 s. 11A.

6 s.23.

7 s. 12.

Application must be filed within 3 months of the imposition of the sentence or recording of the conviction[8].

6. The three month time limit is strictly applied, because of a lack of jurisdiction to deal with a leave application outside this time limit. Having said that, there appear to be two exceptions to this rule. The DPP may appeal outside his allocated 28 day period in circumstances where a defendant was given a s.23[9] discount for undertaking to assist law enforcement authorities, and failed wholly or in part to fulfil that undertaking.

7. The second exception occurs where the Court is persuaded to amend a notice of appeal or application for leave to appeal, from a sentence appeal to a conviction appeal. To do so the Court must be satisfied that the notice or application is capable of amendment and ought to be amended[10]. Such a situation may occur, for example, where the form was completed in gaol or detention custody by the would-be appellant or welfare officer, in circumstances where a conviction appeal may have been intended, or would have been advised had a legal practitioner been present to take instructions[11].

The Nature of the Appellate Jurisdiction

8. The notice of appeal or application for leave to appeal as pleaded is not to be regarded as invalid merely because of a defect, whether in substance or in form contained in the notice or application. The appeal court hearing the appeal or application may amend the notice if it is satisfied the notice or application is capable of amendment and ought to be amended[12]. The appeal or application for leave to appeal made in respect of one conviction or sentence, may be extended to permit the court to hear an appeal or application for leave to appeal in respect of any other convictions or sentence made or imposed on the same day as the originally nominated (primary) conviction or sentence[13].

9. An appeal against conviction, sentence, and a DPP appeal against sentence are all to be by way of rehearing of the evidence given in the original Local Court proceedings[14]. In conviction appeals, fresh evidence may be given in the appeal but only by leave of the District Court. The court can only grant leave if satisfied doing so is in the interest of justice[15]. There is a further caveat on the power, namely where the conviction appeal concerns an offence involving violence against the person required to give evidence, the court must be satisfied there are special reasons why, in

---

[8] s. 13.
[9] S. 23 Crimes (Sentencing Procedure) Act 1999.
[10] s. 62.
[11] Although not entirely on point, a case showing a willingness of the Court of Appeal to accommodate prisoners who complete their appeal forms in the prison system without legal assistance is DPP v Dodds & Anor [2005] NSWCA 115. It should also be noted it is an appeal against a decision of this author.
[12] S.62.
[13] s.64.
[14] ss.18, 17, and 26.
[15] S.19.

the interest of justice, that alleged victim should attend. In all other cases there will need to be substantial reasons why in the interest of justice the person should attend.[16]

10. In sentence appeals fresh evidence may be given without any need to seek the court's leave[17]. However, in a DPP appeal, he must seek the leave of the Court to introduce fresh evidence[18].

11. Fresh evidence in relation to appeal proceedings means evidence in addition to, or in substitution of the evidence given in the proceedings from which the appeal proceedings have arisen[19]. Most applications for fresh evidence are targeted at the introduction of additional evidence to supplement evidence placed before the Magistrate. However, it is also open to seek leave to adduce evidence in substitution of evidence given in the Local Court.

12. All forms of appeal are undertaken by way of rehearing. It is a jurisdictional error to "review" the decision of the Magistrate rather than re-hear the evidence. Putting to one side the reception of fresh evidence, the rehearing is upon the evidence given in the original Local Court proceedings. In conviction appeals, that is usually accomplished by tender of certified transcripts and exhibits. In sentence appeals the practice is to tender the police facts before the magistrate and such other exhibits as were tendered in the Local Court.

13. Barwick CJ gave an analysis of appeal by way of rehearing, where further additional evidence is received, in 1971[20]. It is a useful starting point

> …The consequence of that description of the appeal is one of fact, as well as on law, and that the appellate court in deciding it may apply the law as it may then exist:
>
> Further, where additional evidence has been received it may do so much in the light of that evidence, along with what had been adduced before the court from which the appeal is brought. A rehearing is not, however a retrial of the issues…"

14. In 1993, when dealing with an appeal to the Land and Environment Court by way of rehearing, Kirby P reached a conclusion[21] that,

> "Appeal by way of rehearing" must, by the nature of the wording of the context of the subsection, be considered in the light of the words "on the evidence … given in the proceedings before" and "on any evidence given in addition to or in substitution for the evidence so given."
>
> Clearly, the "rehearing" proceeds by the terms of the subsection before the Land and Environment Court. This requirement is qualified by the facility of

---

[16] s. 19(1).
[17] S. 17.
[18] s. 26.
[19] S.3.
[20] Edwards v Noble (1971) 125 CLR 298 at p.304E.
[21] Cameilleri Stock Feeds Pty v EPA (1993) 32 NSWLR 683 at p.689

> "addition" to or "substitution" for such evidence. This must be so because the words are qualified by "and". The context does not lend itself to an interpretation of the conferral of jurisdiction of an original nature, such as a hearing de novo generally requires. In such a de novo appeal the matter is entirely re-litigated and determined on "*completely* new evidence" (emphasis in the original).

15. McClellan CJ at CL noted when addressing questions asked by the District Court in a stated case arising from an APVO appeal [22],

> 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 leave of the court."

16. One of the more thorough reviews of s.18 of the Act is to be found in the judgment of Mason P[23],

> [17] The appeal is to be by way of rehearing on the Local Court transcripts, 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.
>
> [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, i.e. recognising the advantage enjoyed by the Magistrate who saw and heard the witnesses called in the lower court.
>
> [19] The nature of an appeal *"by way of rehearing"* has been discussed in many cases. The procedure to be adopted, powers to be exercised and functions to be performed must first be sought in the language of the particular statute. One thing, however, is clear "*the rehearing*" does not involve a completely fresh hearing in the appellate court of all of the evidence. That court proceeds on the basis of the record and any fresh evidence that, exceptionally, it admits." (emphasis supplied in original; references omitted).

17. An issue that may arise in an appeal hearing, where a rehearing on the evidence is called for, is whether the appeal judgment is confined to repairing or confirming the judgment, as it ought to have been given in the court below in the original hearing – time and circumstance and law frozen to reflect time, circumstance and law at the time of the original judgment. Or can the rehearing on the evidence take cognizance of time, circumstance and law as it exists at the time of judgment? Frequently, for example in AVO appeals, or a sentence appeal there may be significant changes in circumstances between the time of the Local Court hearing and the time of appeal.

---

[22] Gianoutsos v Glykis (2006) 65 NSWLR 539 at 544.
[23] Kirby and Hoeben JJ concurring in Charara v The Queen(sic) [2006] NSWCCA 244.

18. This aspect was fully dealt with in a majority judgment[24] of Jacobs and Holmes JJ, who were seeking to distinguish between an appeal in the strict sense of that term and a "rehearing" by commencing with a passage from an English Court of Appeal judgment:

> On an appeal strictly so called such a judgment can only be given as ought to have been given in the original hearing; but on a rehearing such a judgment may be given as ought to be given if the case came at the time before the court of first instance.
>
> … The distinction generally to be drawn is a distinction between an appeal which, although it may involve a reconsideration of the evidence, can only involve a reconsideration of evidence already given in the lower court in the light of the law as it existed at the time of the lower court's decision and an appeal by way of rehearing which would usually involve a duty to give a decision appropriate in fact and in law as at the date of the hearing of the appeal.

19. Also the subject of judicial discussion has been the extent to which the reasons or judgment of the Magistrate needs to be considered at the appeal. Three High Court judges[25] observed that a court conducting an appeal by way of rehearing on the record is required to observe the limitations of such an appeal, including,

> … the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and 'feeling' of a case which an appellate court, reading the transcript, cannot always fully share…

20. Beasley JA, in a 2010 case[26], having referred to that passage then turned to Mason P's opinion expressed in *Charara* four years earlier,

> The Local Court reasons will doubtless include an explanation why the conviction was entered at first instance; including an assessment of the credibility issues touching any factual dispute. Without reference to the reasons the District Court would be driven to speculation or deciding the issue entirely afresh. Neither such course would be consonant with the statutory scheme. In civil appeals the Court of Appeal is not entitled to ignore the reasons in which findings based on credibility are to be found. There is no basis in principle for a different approach in the criminal law. (reference omitted).

21. Beasley JA continued:

> [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

---

[24] Ex Parte Currie v Dempsey (1968) 70 SR 1 at 10.
[25] Gleeson CJ, Gummow and Kirby JJ, in a joint judgment in Fox v Percy [2003 HCA 22; 214 CLR 488.
[26] Director of Public Prosecutions (NSW) v Earl Burns & Anor [2010] NSWCA 265 at [26]. The appeal was against a decision of this author.

> Magistrate, for example, misused the advantage of seeing and hearing the witness (reference omitted).

22. Later in the same case Beasley JA provided two further instances where the appeal judge was entitled to reject the Magistrate's credibility findings:

> [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 [the District Court judge] was entitled to accept that evidence as establishing lawful excuse.

Orders that can be made to finalise an appeal or application

23. Before an appellant can withdraw an appeal or application for leave to appeal, leave of the appeal court must be granted[27]. A withdrawal application may be made at any time. Upon granting leave, the appeal court may make such orders as are necessary to place the appellant, as nearly as practicable, in the same position as if the appeal or application for leave to appeal had not been made. Interestingly, any such order made as a consequence of granting leave to withdraw the appeal is deemed to have been made by the Local Court. Presumably that means that time to appeal to the District Court against those deemed Local Court orders begins to run from the date withdrawal and such consequential orders as are made. A withdrawal of an appeal or application for leave to appeal is not the same as "dismissing" the appeal; consequently an order dismissing the appeal may be an error[28].

24. When finalising a conviction appeal, the District court may determine the appeal by setting aside the conviction, or dismissing the appeal. The question of the appropriate orders to be made when finalising an appeal was a subject in respect of which Beasley JA made the following observations[29],

> [42] A question arose during the course of appeal as to how an appeal under s.11 should be fully and finally resolved where the District Court determines that the conviction be set aside. Under s. 20, an order may be made setting aside the conviction or dismissing the appeal. The setting aside of a conviction is not equivalent to dismissing a charge or to finding a person not guilty, although on a successful appeal under s11 that would be the intention behind setting aside the conviction…
>
> [46] Under the *Crimes (Appeal and Review) Act*, [when dealing with a conviction appeal] there is no express power to dismiss the charge or remit the matter to the Local Court…
>
> [55] … Under the express powers, the conviction is set aside and the conviction must be endorsed to that effect. That is sufficient to notify the

[27] S.67.
[28] DPP v Dodds & Anor [2005] NSWCA 115 at [23].
[29] Ibid.

> prosecuting authorities of the outcome of the appeal. Should the prosecuting authorities seek to again bring the person to trial, the person is entitled to raise a plea in bar. (References to sections of the Act omitted).

25. The District Court gains no power to "quash" a conviction from the Act[30], although Basten JA thought the use of such language should not be treated as determinative, as it might merely reflect an ingrained habit arising from the use of both "quash" and "set aside" in the earlier provisions of the *Justices Act 1902* (NSW) s. 125."[31].

26. A sentence appeal can be resolved in one of three ways: setting aside the sentence; varying the sentence or dismissing the appeal[32]. If the sentence is to be varied the appeal court cannot vary it to, make an order or impose a sentence that is, one the Local Court could not have imposed[33]. Of importance so far as RTA disqualifications are concerned is a power for the appeal court to adjust the date when confirming or varying convictions or sentences.

27. In respect of dealing with court ordered[34] disqualification of a driver's licence as part of a sentence appeal, the Court may take into account any period during which the licence was suspended under s.205 of the Road Transport (General) Act 2005 and any other period after committing the offence to which the sentence relates during which the defendant held – or did not hold – a driver's licence that would have permitted the defendant to drive a motor vehicle[35]. Such an order will have effect despite any stay of execution that has been in force in respect of the sentence appealed against[36].

28. When confirming or varying a conviction or sentence appeal, the court may order that it is to take effect, as confirmed or varied, on and from a specified date. Where a sentence has been partly served and interrupted by say, bail or parole, the court can order that partly served sentence is to recommence (as confirmed or varied) on and from a specified date, being the date on which the order is made or some earlier date.

29. Where an appeal (against conviction or sentence) or an application for leave to appeal has been dismissed because of a failure of the appellant to appear, an application may be made by the appellant within a 12 months period to have that dismissal set aside, either unconditionally or upon conditions provided the appellant shows sufficient cause for the failure to appear and it is in the interest of justice that the appeal or application be heard[37].

---

[30] ibid at [72].
[31] ibid at [78].
[32] s. 20.
[33] s. 71.
[34] See RTA v Higginson [2011] NSWCA 151 for a determinative discussion on the difference between court ordered disqualification and automatic and/or statutory period of disqualification.
[35] s. 68(1A).
[36] ibid.
[37] s. 22

30. When determining a prosecution appeal against sentence the appeal court cannot take double jeopardy into account so as to dismiss the prosecution appeal against sentence; or select a less severe sentence than the court otherwise would have set[38].

COURT CRAFT WHEN APPEALING TO THE DISTRICT COURT

31. Appeals from the Children's Court fall into two groups – conviction appeals, or sentence appeals. Of course sometimes a particular client will require both.

Some General Matters

32. So far as Parramatta, the Downing Centre, and those country centres where I have sat, can I say there is no generic area of dissatisfaction among the District Court judges of the way in which Children's Court appeals are conducted. That is not to say there may not be dissatisfaction with the personal approach of individual advocates.

33. There is an inclination among many practitioners to shield their clients – or significant support persons from the witness box. The advantage of calling a client, less so but still available if calling a significant support person, is that it gives to the presiding judge an insight into the human dynamic of the client. I suspect that practitioners are fearful the client will not perform well, or may perform disastrously. Remember, the charge and the antecedents, and possibly the Juvenile Justice report may have already painted an unsavoury picture. The judicial officer's expectations may be already fixed at a relatively low point on the spectrum. The placing of a client into the witness box may well improve the judge's perception of him/her, and more likely will humanise the client in the eyes of the judge.

34. I am reminded by one of my colleagues the juvenile custody history printouts are not the easiest documents to follow. Some judicial officers will be assisted if you and the other side are agreed upon the custody details – and spell them out orally, or better still have a coversheet of matters that are of importance.

Appeal Instruction Sheets

35. You will have all seen the DPP's appeal instruction sheet. Those sheets are invaluable because they contain a summary of all the important information. Many judicial officers use them to commence their adjudication remarks.

36. Is it a laziness by defence counsel – or simply something that has not been thought about – but I have never had a summary sheet handed up to me by the defence. Is that simply because defence are willing to let the prosecution make the running. Think about it – if that is so – who is the more relied upon advocate in the courtroom.

Agreed Facts

37. Let me give you another example of that. We live in an age of agreed facts. Which is the side that invariably composes the agreed facts? So far as my experience

[38] s. 68A

goes there is only one defence advocate who troubles herself about drafting the agreed facts. Sure the defence are able to put the black pen through proposed agreed facts – I'm not suggesting the defence don't participate. What I am putting to you is perception of reliability in the courtroom by the judicial officer. Does the judicial officer automatically turn to the defence for information when you are presenting.

38. There is a second reason why defence should take up drafting agreed facts. The selection of words to describe agreed facts may colour the facts more favourably for one side or the other. Ours is a craft depending upon word selection. Advocates are about selecting the right words for their side to describe a particular factual or legal situation.

39. Finally, frequently at the appeal hearing the terms of the police facts as exhibited before the Local Court are disputed. The true status of police facts, when compiled is that they amount to no more than allegations made by a police officer[39]. However, if no issue is made in respect of them at the Local Court hearing the Magistrate is entitled to take a view the allegations are uncontested. If there is to be a dispute of the police allegations on appeal, then it may be that fresh evidence – perhaps a defence prepared agreed set of facts – may be tendered in substitution for the police allegation of facts before the Magistrate.

Preparation

40. Come to court knowing precisely what it is you want from the court. If a conviction appeal what precisely is it that you want from the court. If you are for the prosecution – where the attack upon the conviction most likely to be made. If you are for the appellant – which element of the offence is it that the prosecution has failed to prove and why. Be able to refer the judge to the precise witnesses you would have expected the evidence to come from – and point out precisely where they failed.

41. In conviction appeals far too frequently the judge has to tease this information out from advocates who seem only speak in general terms – the conviction is unsafe, there was insufficient evidence of this or that – but with no targeting of it in terms of elements of the offence and failure of specific witnesses to deliver that evidence. The consequence then become the judge has to look through all of the evidence.

42. While it doesn't happen so much in Children's Court appeals, there are some appeals that are set down for a day or more. If a matter is so complicated as to require that time frame – there is still a need to draw the court's attention to specific areas. To save court time witnesses whose evidence is not contested should be summarised – and the judge should be given a summary of that witnesses evidence so he/she understands how the witness fits into the framework of testimony, but can skip the reading of, say, 40 pages of questions and answers.

43. Again a defence summary sheet prepared to show the elements of the offence – the particular element – or ingredient of an element under challenge; and the reasons for the challenge would be a tremendous time saver for the judge, and a reassurance that the defence advocate has a clear idea of what he/she is doing and wants.

[39] Lovelock v The Queen (1988) 19 ALR 327

Additional material

44. If fresh evidence is being sought – is leave required? In a sentence appeal, leave is not required. In a conviction appeal leave is required. The issue to be addressed is how are the interests of justice served by the introduction of the evidence. That will vary depending upon the factual matrix of the appeal. It may vary from an expert to an eye, or an alibi witness. The advocate should be clear in his/her mind what aspect of what element of the offence the witness will impact upon and how. Those are the matters that need to be addressed. Is the evidence to supplement evidence already given – if so by way of expansion or insight or how? If the evidence is in substitution for evidence already given – what was the problem with the existing evidence and why the need for substitution? What purpose will the fresh evidence serve? Is the tender of the fresh evidence by consent, or to be opposed?

45. If the offence is one of violence and the application for fresh evidence involves re-calling the victim, then special reasons as to why it is in the interests of justice are required. It may not be enough that the expected evidence of the victim will impact upon some element of the offence. The special reasons will usually go to a failure or reason why this issues was not addressed in the earlier proceedings – an absence of legal representation – the discovery of material previously unknown, that sort of thing.

46. Your preparation should have resulted in you having a clear proof of evidence of what the witness will say. That can be obtained from the witness. Far too many advocates are prepared to put a witness in the box on hearsay information given to them via their clients instructions. Advocates who are prepared to place a witness in the box on hearsay information given by their clients deserve what they get – usually a poor professional reputation.

47. There is in existence a very telling graph of the intellectual deficiencies of prisoners. The graph has the well-known bell curve of the intellectual profile of the community. Superimposed on that graph are several column graphs placing the intellectual capacity of members of the prison population at relevant positions on the bell curve. The point to be made is the majority of prisoners fall into groups on the left hand side of the bell curve – that is on the side below or well below the average intelligence.

48. If you were seeking financial advice, or advice about your health, you would not be looking to persons falling on the left hand side of the bell curve without doing your own checking first. Likewise if you have someone's future in your hands, it is important you understand the decision to call or not call a witness is yours. How you conduct a case is a matter for your professional judgment. Further, how can you give a client advice if you do not know from any source other than your client what the proposed witness is going to say?

49. Too frequently in appeals a meeting is arranged with a witness on the day of the hearing – and the professional tells the witness what evidence is expected of the witness – rather that the professional satisfying himself /herself what precisely the witness can say and why. Those hurried meetings moments before the appeal

hearing deny to the advocate an opportunity to have a written proof of evidence. There can be nothing more embarrassing to an advocate that to hear the cross-examiner ask the witness devastating questions that should have been asked of the witness before he/she entered the witness box.

Presentation of the appellant

50. By and large judges consider themselves relatively relaxed about how a client appears. Judges tend to understand socio-economic pressures and tensions can be reflected in dress and personal appearance. There is a high degree of tolerance among those on the bench. All that is true.

51. However, there is a difference between accepting the tolerance and understanding of the bench and making a positive impression. If the client wants to make an impression – he/she should be encouraged to do so, and advised how to do so. First impressions are always made of others, by their choice of clothes, personal appearance, and equally importantly how that person comports himself/herself. Of course, many juveniles within the criminal justice system may have issues about their image, and the way they like to present themselves through their body posture. As I say – judges will tolerate much of that – but if the client wants to impress – they should understand whatever they do, they are sending signals or messages to the bench.

Level of maturity

52. A juvenile's level of maturity is an important factor. Impressions of an appellant's maturity are gained immediately upon the judicial officer seeing the young person. Some of that information is conveyed by dress, personal presentation and body language. Some of it will be contained in reports, and if the young person gives evidence in his/her responses to questioning.

Sentence appeals – they can be used pro actively

53. Given the nature of a rehearing, and that time and circumstance are not frozen, sentence appeals to the District Court offer opportunities that sentence appeals to the Court of Criminal Appeal do not offer. The advocate handling a sentence appeal to the District Court is entitled to take advantage of the time to improve the client's position. That is a luxury usually unavailable in the Court of Criminal Appeal – unless there is a Crown appeal.

54. In deciding whether to launch an appeal, a realistic assessment needs to be made as to why the appeal is being undertaken. Is it being undertaken because the Children's Court Magistrate made a mistake and gave too much? Is it being undertaken because the young person is at a crucial point and really was making progress that the Magistrate failed to appreciate, and can significantly improve his/her position in the weeks that it takes to advance the appeal? Is it that the sentence imposed by the Magistrate has been a trigger and the would-be appellant is now ready to bite the bullet and undertake a rehabilitation program of some kind and improve his/her position in the face of the sentence imposed by the Magistrate?

55. In other words, I'm asking you whether you are using appeals pro-actively, or simply as a mechanism for reducing sentences that were excessive. All of you who practice in the Children's Court understand that time in custody is potentially damaging to the young person and may create criminogenic factors for him/her and perhaps others in the community from which that child came. Are you seeing the appeal process as a vehicle that may assist you to encourage a young person to work for a better rehabilitative outcome?

56. As I say, when considering whether to appeal, you need to take two approaches into consideration. The hearing is a hearing on the transcripts and any fresh evidence you may adduce. I am suggesting you consider two aspects – the manifestly excessive aspect that will ground an appeal; and the pro-active aspect – can this appeal be used as a trigger, to bring about change in an appellant that can be presented to the District Court. In respect of this second choice a realistic assessment needs to be made. It would be doomed to failure in the absence of fresh evidence – and probably some inter curial progress. By that I mean some progress by the young person being made between the time of the Magistrate's sentence and the time of the appeal hearing.

57. Judges are generally impressed with the quality of juvenile justice reports. However, in the event that the appeal centred upon a "new beginning" it is important to bring evidence from some program source, or psychologist/psychiatrist as to the existence of a program, or plan, or treatment course.

58. I have already spoken about the significance of the juvenile or significant support person giving evidence. In an appeal centred upon a "new beginning" the significance of the young person giving evidence should not be underestimated – not only to impress the judge, but to give the young person some sense of ownership (at least before the judge) of the program he/she is prepared to undertake.

Mentoring

59. In our profession we are just beginning to understand the value of mentors. There are some mentoring programs around. Some are well recognised and respected. If a suitable mentoring program is unavailable, I can't see any reason why a sensible private arrangement for mentoring would not be acceptable, provided the court was satisfied there were certain skills the proposed mentor possessed, and certain attributes the mentor did not have. But assuming those matters were satisfactorily resolved, a mentoring arrangement with defined parameters and purposes may be a matter that a court would accept. That should be tendered in documented form so that the court, the mentor and young person have clear understanding of what the mentoring program is designed to achieve.

Conclusion

60. In each area of the law advocates have particular responsibilities. A common responsibility is the contribution advocates make daily to defining and clarifying the parameters of the Rule of Law through their court work. The Children's Court work of advocates on both sides of the record is of tremendous importance. That importance springs, not just from defining and clarifying the parameters of the Rule of

Law in so far as it effects children – and in the modern society there is much vital work to be done there; but also because those advocates deal daily with the most precious resource this nation has – our young folk. In this area of law, more than any other, skills as an advocate are not enough. What is needed is a vast array of social and welfare skills and sensitivities not normally called for in other areas of work. Children Court advocates are not only impacting upon the law, but their work is impacting upon young lives. Frequently, their presentation and interaction will be one of the saner, calmer, and more enlightened events that will happen in that young person's day, week or sometimes life.

61. To those of you who work as Children's Court advocates I acknowledge your work is likely undervalued by your clients, their families and the community – but it is not the less important for that. I congratulate you all on the work that you do. To me, at least, it is inspiring.