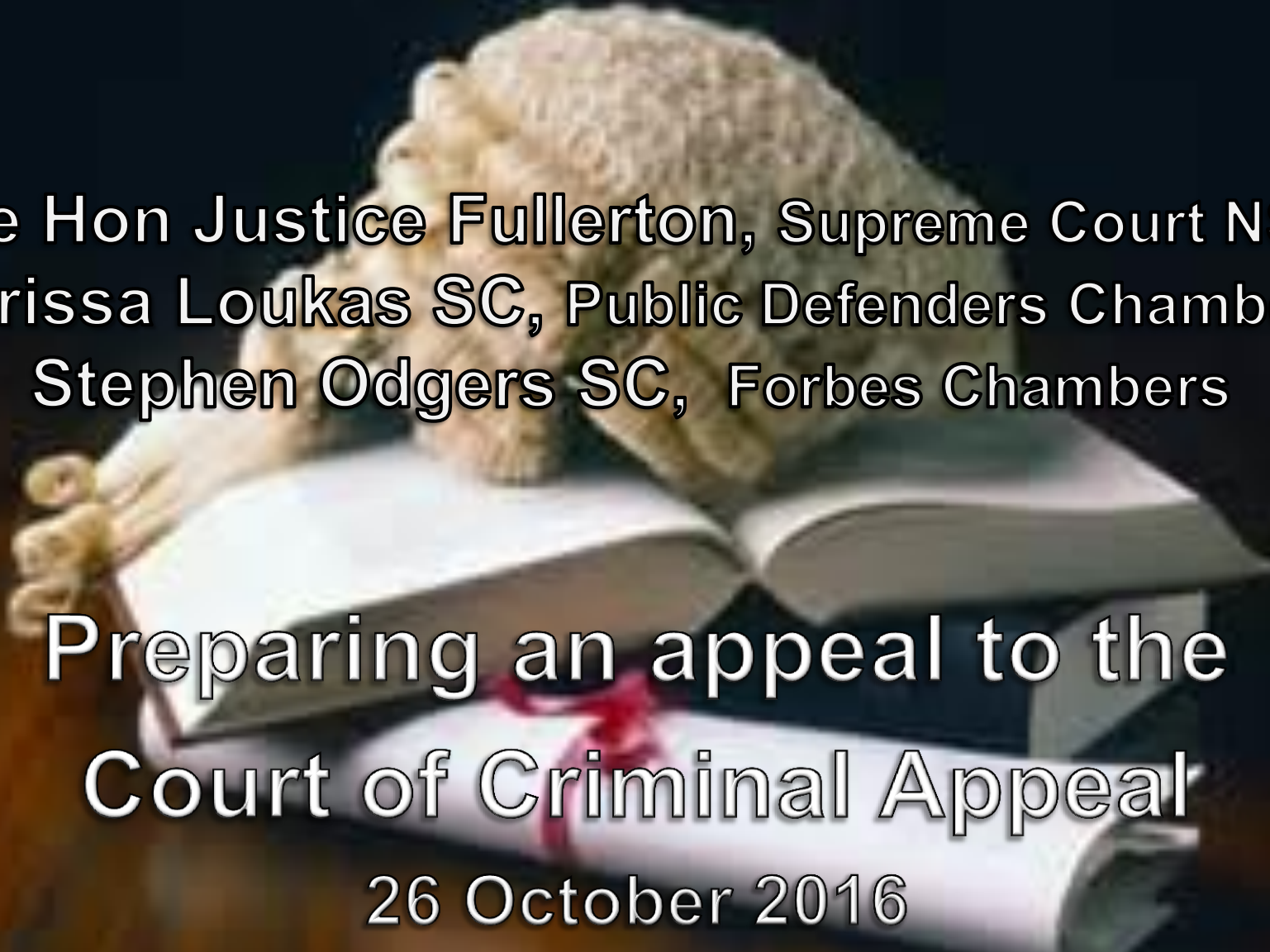


NSW Bar Association New Barristers Committee

A small, light-colored stuffed animal, possibly a koala or a bear cub, is resting its head on a stack of books and a rolled-up document. The books are open, and the document is tied with a red ribbon. The background is dark and out of focus.

The Hon Justice Fullerton, Supreme Court NSW
Chrissa Loukas SC, Public Defenders Chambers
Stephen Odgers SC, Forbes Chambers

Preparing an appeal to the
Court of Criminal Appeal

26 October 2016

THE BASICS : s.5

Criminal Appeal Act 1912

- A CRIMINAL APPEAL IS A CREATURE OF STATUTE :
- S.5(1)(c) Criminal Appeal Act 1912:
 - 5 (1) A person convicted on indictment may appeal under this Act to the court:
 - (a) **against the person's conviction** on any ground which involves a question of **law alone**, and
 - (b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal **against the person's conviction** on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal, and
 - (c) **with the leave of the court against the sentence passed on the person's conviction.**



SENTENCE : THE BASICS : s.6(3)

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 therefore, and in any other case shall dismiss the appeal.



ERROR ON SENTENCE

- The Court of Criminal Appeal is a Court of error
- An appeal is not an avenue to simply re-argue the case
- The applicant must establish that the sentencing judge has made an error in the exercise of the discretion



HOUSE v THE KING

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, then his determination should be reviewed and the appellate 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 judge 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 which the law reposes in the court of 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. (Emphasis added)

House v The King (1936) 55 CLR 499 at 505



SPECIFIC ERROR

Kentwell v The Queen (2014) 252 CLR 601 at [42]:

“Spigelman CJ's analysis in *Baxter* should be accepted. When a judge acts upon wrong principle, allows extraneous or irrelevant matters to guide or affect the determination, mistakes the facts or does not take into account some material consideration, the Court of Criminal Appeal does not assess whether and to what degree the error influenced the outcome. **The discretion in such a case has miscarried and it is the duty of the Court of Criminal Appeal to exercise the discretion afresh taking into account the purposes of sentencing and the factors that the Sentencing Act, and any other Act or rule of law, require or permit.** As sentencing is a discretionary judgment that does not yield a single correct result, it follows that a range of sentences in a given case may be said to be “warranted in law”. **A sentence that happens to be within the range but that has been imposed as the result of a legally flawed determination is not “warranted in law” unless, in the exercise of its independent discretion, the Court of Criminal Appeal determines that it is the appropriate sentence for the offender and the offence.** This is not to say that all errors in the sentencing of offenders vitiate the exercise of the sentencer's discretion.



MANIFEST EXCESS

Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted **simply because the result arrived at below is markedly different** to other sentences imposed for other cases: *Hili v The Queen* (2010) 242 CLR 520 at [59].

Intervention is only justified where the **difference is such** that the court concludes that there must have been some **misapplication of principle**, even though where and how cannot be discerned from the reasons: *Hili v The Queen* at [59].



RECEPTION OF EVIDENCE FOLLOWING FINDING OF ERROR

Kentwell v The Queen (2014) 252 CLR 601 at [43]:

After having identified specific error of the kind described in *House*, the Court of Criminal Appeal may conclude, taking into account all relevant matters, **including evidence of events that have occurred since the sentence hearing** (*Douar v The Queen* (2005) 159 A Crim R 154 at 178 [124]; *Baxter v The Queen* (2007) 173 A Crim R 284 at 287 [19] per Spigelman CJ), that a lesser sentence is the appropriate sentence for the offender and the offence. This is a conclusion that that lesser sentence is warranted in law. ... **The occasions calling for the Court of Criminal Appeal to grant leave, allow an offender's appeal and substitute a more severe sentence are likely to be rare. Were the Court to grant leave in such a case, convention would require that it inform the appellant of its intended course so that he or she might abandon the appeal** (*Neal v The Queen* (1982) 149 CLR 305 at 308 per Gibbs CJ; *Parker v Director of Public Prosecutions* (1992) 28 NSWLR 282 at 290 per Kirby P, citing *Reischauer v Knoblanche* (1987) 10 NSWLR 40 at 45 per Kirby P (Samuels JA agreeing at 47, Priestley JA agreeing at 48)).



RECEPTION OF EVIDENCE ...

cont

Betts v The Queen [2016] HCA 25 @ [2]:

As a general rule, the appellate court's assessment of whether some other sentence is warranted in law is made on the material before the sentencing court **and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentence hearing. For the purposes of that assessment, an offender is not permitted to run a new and different case.** This general rule does not deny that an appellate court has the flexibility to receive **new evidence** where it is necessary to do so in order to **avoid a miscarriage of justice**. In this appeal, the general rule applied because the new evidence sought to be adduced by the appellant was **inconsistent** with the case that he ran in the sentencing court and its rejection in the circumstances did not cause justice to miscarry.



RECEPTION OF EVIDENCE ...

cont

Betts v The Queen [2016] HCA 25 @ [11]: (limited basis)

It is accepted, however, that the appellate court may receive evidence of the offender's progress towards rehabilitation in the period since the sentence hearing (*Kentwell v The Queen* (2014) 252 CLR 601 at 618 [43] per French CJ, Hayne, Bell and Keane JJ, citing *Douar v The Queen* (2005) 159 A Crim R 154 at 178 [124] per Johnson J). **Evidence of this description is routinely received by the Court of Criminal Appeal on the limited basis that it may be taken into account in the event the Court comes to re-sentence** (*R v Deng* (2007) 176 A Crim R 1 at 8 [28] per James J). It is evident that the Court of Criminal Appeal treated the material tendered on the appellant's behalf as having been admitted on this limited basis (*Betts v The Queen* [2015] NSWCCA 39 at [43] per RS Hulme AJ (Meagher JA agreeing at [1], Hidden J agreeing at [2])).



SENTENCE OTHER GROUNDS / ERROR

- Failure to properly apply principles relating to mental illness / intellectual disability
- Failure to properly apply discount for guilty plea
- Use of guideline judgments
- Aggregate sentences
- Failure to take into account periods of broken custody
- Failure to properly apply parity



SENTENCE

OTHER GROUNDS / ERROR cont

- Application of s.21A *Crimes (Sentencing Procedure) Act* 1999
- Assessment of objective seriousness
- Special circumstances
- Failure to consider alternatives to imprisonment, e.g. ICO
- Standard non-parole periods
- Procedural fairness



WEIGHT

The failure of a judge to attribute sufficient weight to an issue at sentence is not a ground of appeal that falls within the types of error in

House v The King (1936) 55 CLR 499;

Bugmy v The Queen (2013) 249 CLR 571 at [22], [53];

CMB v Attorney General for NSW (2015) 317 ALR 308 at [48].

The principle applies whether the proceeding is a Crown appeal or a severity appeal.



FACTUAL FINDINGS

Factual findings are binding on the appellate court unless error shown:

- No evidence to support a finding
- Evidence all one way
- Judge has misdirected self



FACTUAL FINDINGS cont

Clarke [2015] NSWCCA 232

at [19]-[36] per Basten JA [sufficient to find sentencing judge made mistake in finding of facts – do not need to find error of law]

at [96]-[99] per Garling J [must find sentencing judge error fell into error on the basis that the finding of fact was not open to the sentencing judge]

at [129]-[138] per Hamill J [do not need to decide in this case but agree with Basten AJ – finding of mistake sufficient – but contrary to majority of current opinion – need High Court or 5 judge bench to decide]



FACTUAL FINDINGS cont

Turnbull v Chief Executive of the Office of the Environment and Heritage [2015] NSWCCA 278 – not needing to decide issue

at [1] per Meagher JA [agreeing generally with Button J]

at [2]-[3] per McCallum [reserving view as to whether traditional approach correct]

at [26]-[36] per Button J [subtle difference between a mistake of fact by a sentencing judge that was material to sentence and a finding of fact that was not open to a sentencing judge will usually have no effect on the result – where there is a difference prefer traditional approach]



NOT RAISED AT FIRST INSTANCE

Zreika v R 223 A Crim R 460 @ [81]-[82]:

81 The Victorian Court of Appeal has emphasised recently, that in sentencing appeals, the Court is reviewing the exercise of a discretionary judgment and not rehearing a plea of mitigation. It is not the occasion for the revision and reformulation of the case presented below. **The Court will not lightly entertain arguments that could have been put, but were not advanced on the plea, and will have an even greater reluctance to entertain arguments that seek to resile from concessions made below or are a contradiction of submissions previously made.** The Court spoke of the need for exceptional circumstances before this can be done, where it can be shown that there was most compelling material available on the plea that was not used or understood, and which demonstrates that there has been a miscarriage of justice arising from the plea and sentence: *Romero v The Queen* (2011) 32 VR 486; 206 A Crim R 519 at [11]; *Keane v The Queen* [2011] VSCA 156 at [13], [18]; *Bayram v The Queen* [2012] VSCA 6 at [28]-[29].



NOT RAISED AT FIRST INSTANCE cont

Zreika v R 223 A Crim R 460 @ [81]-[82]:

82 In rare circumstances, a factor which may operate in mitigation of penalty (and which appears clearly from the material before the sentencing judge) may have been overlooked by defence counsel and the sentencing judge. In such a case, this Court may be invited to have regard to it, often in circumstances where the Crown will accept that the relevant material raised a factor which should unequivocally operate in the offender's favour on sentence. As Warren CJ said in *Bayram v The Queen* at [29], it may “render a serious injustice” if an offender was not able to correct the error in such a case. **This approach reflects the primacy of the rule that appeal grounds should relate to arguments put, and decisions made, at first instance. At the same time, criminal appellate courts should be able to correct a miscarriage of justice, or serious injustice, in the clear and rare cases where the relevant matter has not been relied upon at first instance.**



NOT RAISED AT FIRST INSTANCE cont

White v R [2016] NSWCCA 190 @ [128]:

128 I have concluded that this is a case where justice does demand intervention. Two errors are to be found in the sentencing process, each of which is of the kind referred to by Johnson J in [81] of *Zreika*, but also comes within the exception referred to in [82] of that judgment. (Per Simpson JA).



CONVICTION

s.6 CRIMINAL APPEAL ACT 1912

6 Determination of appeals in ordinary cases

- (1) The court on any appeal under section 5 (1) against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is **unreasonable, or cannot be supported**, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the **wrong decision of any question of law**, or that on any other ground whatsoever there was a **miscarriage of justice**, and in any other case shall dismiss the appeal; provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that **no substantial miscarriage of justice has actually occurred**.



CONVICTION GROUNDS

- Unsafe / Unreasonable / Inconsistent verdicts
- Admission / Failure to admit specific evidence
- Tendency / co-incidence evidence – admissibility / directions
- Refusing permanent stay
- Crown Prosecutor - cross-examination and address
- Validity of charge / indictment



CONVICTION GROUNDS cont

Error in directions

- Directions as to tendency / co-incidence
- Directions as to element of offence
- Directions as to defence / alternative verdicts
- Directions as to circumstantial evidence
- Direction as to character
- Directions – warnings
- Directions – evidence as consciousness of guilt
- Directions – basis for conviction
- Directions – presumption of innocence
- Summing Up



CONVICTION GROUNDS cont

- Response to jury question as to disagreement / majority verdict
- Failure to discharge jury
- Error in accepting guilty plea
- Error in material left / not left to jury
- New / fresh evidence
- Incompetence / failure of defence counsel
- Error in allowing / not allowing cross examination / re-examination
- Separate / Joint trials error
- Sleeping Judge



CONVICTION GROUNDS cont

- Failure to inform unrepresented accused of rights
- Crown case changed / lacked sufficient clarity and particularity
- Finding evidence constituted prior consistent statement
- Error in applying test for unfitness
- Inappropriate line of reasoning for jury
- Application for finding of mental illness on appeal
- Competency of complainant to give evidence
- Procedure in complainant giving evidence
- Refusal to grant judge alone trial
- Holding view in absence of accused
- Improper conviction on back up charge
- Procedural unfairness



WRITTEN SUBMISSIONS: PRACTICE NOTES

- **PRACTICE NOTE SC CCA 1**
- **PRACTICE NOTE SC GEN 20**



WRITTEN SUBMISSIONS : THE ESSENTIALS

- **BEST GROUND FIRST / RUN ONLY GOOD POINTS**
- **SUCCINCT – JUDGES ARE BUSY**
 - **DRAFT JUDGMENT**
- **MAKE LONGER SUBMISSIONS USER FRIENDLY /
ATTRACTIVE TO THE EYE**



ORAL ADVOCACY 1

- **ORAL STRUCTURE / ROAD MAP**
- **QUESTIONS FROM THE BENCH :
ANSWER STRAIGHT AWAY**



ORAL ADVOCACY 2

TOP 10

- 1. Preparation**
- 2. Watch the Bench**
- 3. Be succinct**
- 4. Be frank always**
- 5. Be courteous**
- 6. Careful presentation of the law**
- 7. Use your language carefully**
- 8. Appellate court is not a jury**
- 9. Be brave**
- 10. Work out your own style**



ORAL ADVOCACY 3

- **Appellate Advocacy : Chief Justice R S French AC**
- **Appellate Advocacy : D F Jackson QC**
- **4 P's of Advocacy**



PREVIOUS DECISIONS

- **CCA Not bound by previous CCA decisions**
- **Only departs if satisfied that justice requires**
- **Bench of 5**



Severity appeals under s.5(1)(c) Criminal Appeal Act 1912

Year	Severity Appeals	Allowed	
	N	n	%
2000	313	127	40.6
2001	343	138	40.2
2002	331	148	44.7
2003	272	109	40.1
2004	285	131	46.0
2005	318	141	44.3
2006	259	106	40.9
2007	242	94	38.8
2008	216	83	38.4
2009	230	78	34.3
2010	216	84	38.9
2011	188	93	49.5
2012	168	65	38.7
2013	224	57	25.4
2014	191	61	31.9
2015*	208	74	35.6
	4004	1589	39.7

Source: Judicial Commission NSW Court of Criminal Appeal database



Resources for Further Reading

TEXT BOOKS

- *“Appeals & Appellate Courts in Australia and New Zealand”*, The Hon Justice Margaret J Beazley AO, President, Court of Appeal, Supreme Court of New South Wales; Dr Paul Vout with S Fitzgerald on NZ, Lexis Nexis, 2014
- *“Appellate Practice”*, editors Graeme Blank & Hugh Selby
The Federation press, 2008
- *“The Appellate Jurisdiction of the Courts in Australia”*, Dean Mildren AM RFD QC,
The Federation press 2015
- *“Sentence”*, 3rd Ed Stephen J Odgers SC,
Longueville Books



Resources for Further Reading

ARTICLES

- Abraham QC, Wendy, 'A guide to criminal appeals in New South Wales' (2011) *Bar News: The Journal of the NSW Bar Association*, Winter, 73-78.
- Beckett, Sophia, 'Preparing a Sentence Appeal in the Court of Criminal Appeal: A Practical Overview' (Speech delivered at the University of New South Wales CLE, Sydney, November 2010) http://criminalcpd.net.au/wp-content/uploads/2016/09/CCA_SENTENCE_APPEALS.pdf.
- Craigie SC, Chris, 'Advising on Merit Appeals: The Reasonable Prospect of Success' (2004) *Public Defenders* http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_advising_merit_appeals.aspx.



Resources for Further Reading cont

- French AC, Chief Justice Robert, 'Appellate Advocacy in the High Court of Australia' (Speech delivered at the World Bar Conference, London, 29 June 2012)
<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj29june12.pdf>
- Hugh Donnelly, 'Sentence Appeals in New South Wales: Success Rates and Recent Law' (Speech delivered at the Judicial Commission of NSW Sentencing Conference, National Judicial College of Australia, February 2008).
- Jackson QC, David, 'Appellate Advocacy' (1992) 8 *Australian Bar Review* 245
- Loukas SC, Chrissa, 'Court of Criminal Appeal Update' (2007-16) *Public Defenders*
http://www.publicdefenders.nsw.gov.au/Pages/public_defenders_research/Papers%20by%20Public%20Defenders/public_defenders_papers_pd.aspx



Resources for Further Reading cont

- McClellan, Justice Peter, 'A Matter of Fact: The Origins of the Court of Criminal Appeal' (2012) NSWJSchol 44. Found at:
<http://www.austlii.edu.au/au/journals/NWJSchol/2012/44>
- Tilmouth, Sydney, 'The Wrong Direction: A Case Study and Anatomy of Successful Australian Criminal Appeals' (2015) 40 *Australian Bar Review* 18. Found at:
<http://netk.net.au/CrimJustice/Tilmouth.pdf>



Resources for Further Reading cont

BENCHBOOK

Judicial Commission of New South Wales, *Sentencing Bench Book*, [70-000] Appeals
<http://www.judcom.nsw.gov.au/publications/benbks/sentencing/appeals.html>

PRACTICE NOTE

Supreme Court of New South Wales, *Practice Note No. SC CCA 1 – Court of Criminal Appeal - General*, 30 September 2013.

