HUYNH v R [2021] NSWCCA 148

MENTAL HEALTH DIVERSION AND NON-CONVICTION DISMISSAL IN DISTRICT COURT APPEALS

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1. INTRODUCTION

The New South Wales Court of Criminal Appeal (**CCA**) recently handed down the decision in the stated case of *Huynh v R* (***Huynh***).[4] The decision has implications on the District Court's ability to hear applications for mental health diversion (pursuant to section 32[5] / section 14[6] / section 20BQ[7]) and non-conviction dismissals (pursuant to section 10[8] / section 19B[9]), while sitting in its appellate jurisdiction.

Attached to this paper is a "ready reckoner" flow chart setting out the different avenues of appeal in light of the decision.

This paper is not intended to be a comprehensive review of the jurisprudence, but rather act as a practical guide in light of the decision in *Huynh,* because frankly, the decision raises as many new questions as it answered!

Simply put, the CCA gave answers to the following four questions that the District Court sought clarification on:

i) In a severity appeal to the District Court, can the District Court set aside a conviction and discharge the appellant under section 20BQ? **No**.

ii) In a conviction appeal to the District Court, can the District Court set aside a conviction and discharge the appellant under section 20BQ? **Yes.**

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[4] *Huynh v R* [2021] NSWCCA 148.
[5] Section 32 *Mental Health (Forensic Provisions) Act* 1990 (NSW).
[6] Section 14, *Mental Health and Cognitive Impairment Forensic Provisions Act.*
[7] Section 20BQ, *Crimes Act* 1914 (Cth).
[8] Section 10, *Crimes (Sentencing Procedure) Act* 1999 (NSW).
[9] Section 19B, *Crimes Act 1914* (Cth).

iii) In a severity appeal to the District Court, can the District Court set aside a conviction and make an order under s19B? **No.**

iv) In a conviction appeal to the District Court, can the District Court set aside a conviction and make an order under s 19B? **Yes.**

The key phrase to note in each of the above questions is "*set aside a conviction".*

2. REASONING OF THE COURT

The reasoning of the Court, constituted by Bathurst CJ, Beech-Jones and N Adams JJ, can be distilled to a few key propositions:

i) The *"Miscellaneous Powers"* provision in section 28(2) *Crimes (Appeal and Review) Act* (***CARA***) allows the District Court to exercise any function that the Local Court could have exercised. This section is the basis for the District Court to hear s.32/s.14 state-based mental health diversion applications (*Huynh* at [32]).

ii) The Commonwealth mental health diversion under s.20BQ applies to any person *"charged"*. The Court held that once a person is convicted, they do not cease to be *"charged",* in circumstances where that conviction is subsequently set aside. Therefore, the ability for the District Court to hear a s.20BQ application likely comes from the provision itself. However, even if this reasoning is incorrect, the power to impose s.20BQ also arises from s.28(2) *CARA* as outlined above (*Huynh* at [51]).

iii) For the District Court to finalise a matter by way of mental health diversion under s.32 / s.14 / s.20BQ, the District Court needs to first set aside the conviction imposed by the Local Court. This power only arises under a conviction appeal (*Huynh* at [33],[54]).

iv) In terms of "non conviction" dismissal, the District Court still needs to set aside the conviction imposed by the Local Court. The District Court can impose a state dismissal (or non-conviction CRO) (s.10) in a severity appeal because there is a specific statutory avenue under s.3(3A) *CARA* to set aside the

conviction (*Huynh* [57)]. However, this statutory avenue does not extend to s.19B Commonwealth dismissal and therefore to pursue a s.19B there needs to be a conviction appeal.

3. PRACTICAL TAKEAWAYS

I've already lodged a severity appeal, but I want to try for a s.32/s.14/s.20BQ can I change it to a conviction appeal?

The District Court can grant leave to amend an appeal or an application for leave to appeal under section 62 *CARA.*

Can I still amend my Notice of Appeal if the original appeal was lodged over 3 months ago?

This question potentially raises two different applications for leave, where the second only arises if the first is successful:

i) Leave to amend the appeal (s.62 *CARA*).
ii) Leave to pursue a conviction appeal after entering a plea of guilty in the Local Court (s.12 *CARA).*

The writers' view is that an amendment in category (i) above does not need to be made within 3 months. Therefore, you can seek this leave at any time before the matter is finalised.

However, the application for leave in category (ii) needs to be made within 3 months of the final disposition of the matter (s.13 *CARA*). If your client pleaded guilty in the Local Court and now seeks to pursue a mental health diversion or Commonwealth discharge (s.19B) in the District Court it seems like you needed to have applied for this leave within 3 months of the sentence date.

It may be that the District Court accepts that this is merely a *"defect"* in the application and allows leave to be granted under the broad s.62 *CARA* power, but there remains an open question as to whether the power in s.62 *CARA* can overcome the requirement in s.12 *CARA.*

Now that I'm lodging a conviction appeal, won't I need to wait for transcripts to be prepared?

Upon lodging a conviction appeal, you can (and probably should) write to the Registrar and the DPP indicating that transcripts are not required and the only reason a conviction appeal is being pursued is to allow the District Court to divert/discharge the offender. That way the matter won't need to wait for transcripts to be prepared. The Court/DPP might come back that a conviction appeal requires transcripts under s.18 *CARA*, but it should be noted that neither the submissions nor the Magistrate's remarks are "evidence". The only evidence presented before the magistrate will likely be documentary and therefore s.18 will be satisfied without the need for a transcript.

How do I go about getting leave to appeal?

In order to seek leave to appeal, you need to lodge an "Application for Leave to Appeal" form alongside your "Notice of Appeal" form.

The question of leave is determined pursuant to s.16 *CARA.*

In practice, it is likely the question of leave will be heard alongside the merits of the matter itself and if there are merits to the diversion/discharge application leave will be granted.

Do I need to withdraw the plea?

Often in applications for leave under s.12 the District Court approaches the question of leave like a usual plea traversal i.e. why should the court permit this person to change their plea?

Some practitioners have raised concerns that decisions such as *R v Rae (No 2)* [2005] NSWCCA 380 hold that there needs to be a factor that goes to the integrity of the plea. However, two things are important to note in this respect.

Firstly, the circumstances highlighted in *Rae (No 2)* at [21] in which a defendant can traverse their plea are not exhaustive. The ability for a client to pursue a mental health diversion will now hopefully become a recognised circumstance in which a defendant can pursue a conviction appeal.

Secondly, while a District Court judge may naturally approach the matter like a plea traversal, it is important to remind the court that the defendant is not seeking to change their plea to defend the charge. Instead, leave is sought to bring a conviction appeal is being lodged so that if the Court deems that mental health diversion is appropriate, the Court is able to go down that avenue.

The decision in *Huynh* recognises that the District Court has the power to divert offenders under mental health provisions and for the Court to limit that on the basis of a grant of leave is putting form ahead of function and unnecessarily constraining the powers granted by *CARA.*

What if I'm refused leave?

It is hard to envisage situation where a Judge refuses leave if they thought the application itself had merit.

If this occurs, only two potential remedies exist – either a stated case under s.5B *Criminal Appeal Act* or prerogative relief under s.69 *Supreme Court Act.*

How does this impact the usual stay of the execution of a sentence pending appeal under s.63 CARA?

Under s.63 *CARA* a sentence imposed by the Local Court is stayed when a notice of appeal is lodged or where an appeal needs leave, the leave is actually granted. Meaning if you are seeking an appeal that requires leave, the obligations of the existing sentence will continue to operate up until the District Court grants leave to appeal.

If both a conviction appeal and severity appeal are lodged within 28 days, the severity appeal will be an appeal *"as of right"* and it is the writers' view that the execution of the sentence should be stayed at the time of filing – however make sure you pay close attention to this factor so you can properly advise your client!

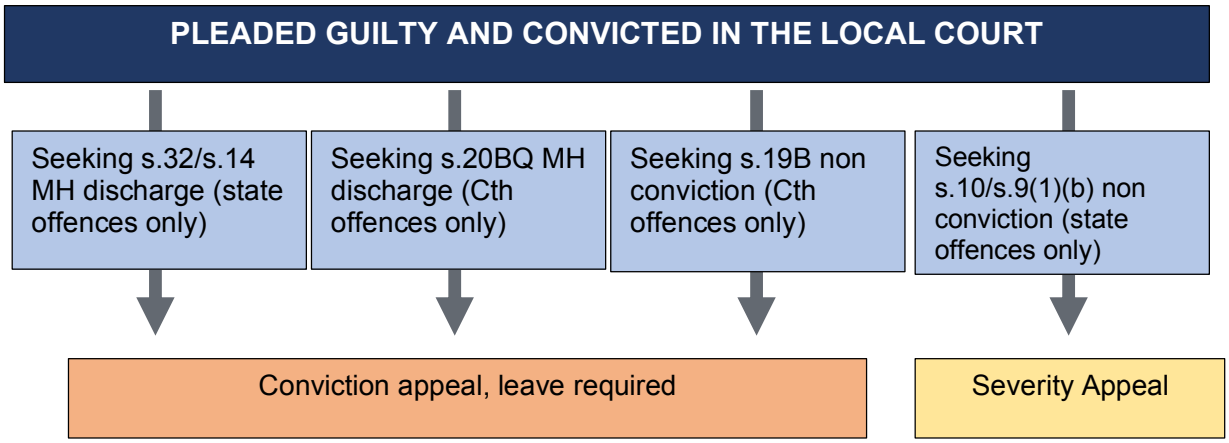
What does this all mean for the Children's Court matters?

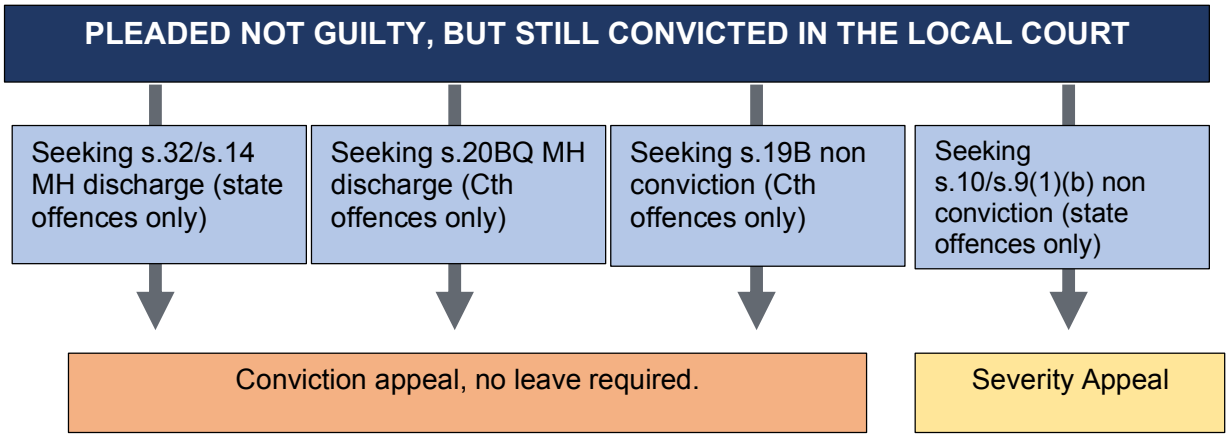
For abundant caution it is still recommended that appeals from the Children's Court follow the same formula, even though it strictly may not be required where a conviction has not been recorded against the young person.

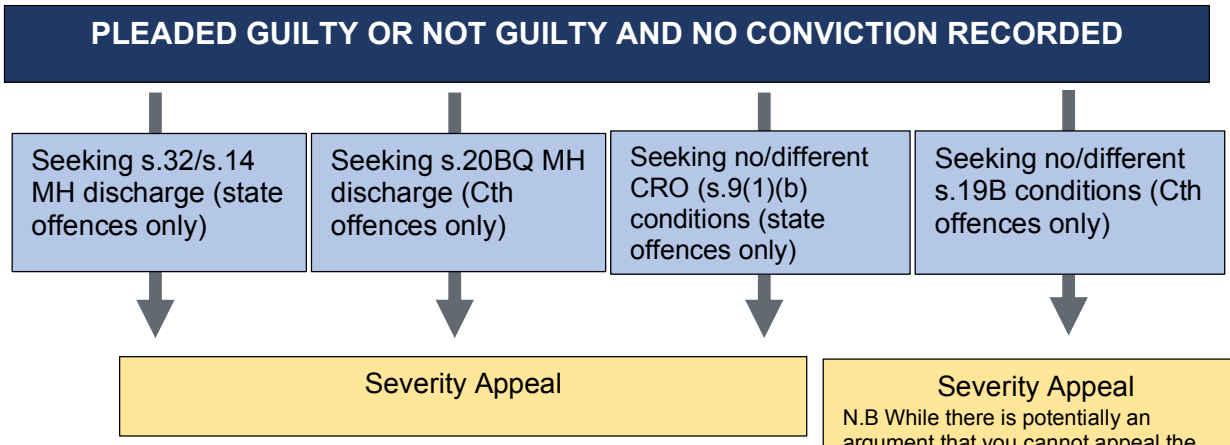
If a young person was not formally convicted but there was a finding of guilt, there is no conviction that needs to be set aside. However, issues may arise in relation to the ability for the District Court to set aside the finding of guilt in order to make a s.20BQ order. This same issue shouldn't arise with s.32/s.14 as these applications can be made at any time, including after a finding of guilt.

APPEAL PATHS TO DISCHARGE / DIVERSION

IN LIGHT OF *HUYNH v R*[10]







Severity Appeal

N.B While there is potentially an argument that you cannot appeal the conditions of a s.19B at all, the writers are of the view that a severity appeal does allow it as a Commonwealth "conditional discharge" is sufficiently similar to a State "conditional release order" for the purpose of s.3(3)(c).

This is beyond the scope of this paper, but please contact the writers if you wish to discuss this further.

[10] It should be kept in mind there are also avenues to appeal to the Supreme Court pursuant to s.52 and s.53 *CARA*.