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Relationships Between Courts - How Appealing?

In June 1997 Mr Justice Peter Young ("PWY") wrote in his "Current Issues" column of the ALJ (Vol 71 at p408).

> *"Thirty years ago, a suburban magistrate when told by his clerk that a stated case had been returned with an answer by the Supreme Court, was accustomed to say, "Did they call me 'the Learned Magistrate?'" He tried his best, he did not mind being told he had been in error, but he expected that other courts higher in the hierarchy would treat him with respect. He was entitled to that view."*

After asserting that changes had become apparent since the sixties, and that in the nineties

- *attacks on courts are common place*
- *disappointed litigants apply to the Judicial Commission in respect of judges who find against them, and*
- *the Attorney General declines to support judges who are attacked (even by Ministers of State)*

PWY wrote

> *"Recently, judges have been attacked not only by litigants, but also by appellate courts. Gone is the expression, "the Learned Magistrate". Often magistrates and judges cut corners at the request of the parties or because late production of particulars or evidence means that it either has to happen or some litigant has to pay the costs of an expensive adjournment. It is not uncommon for the losing party (often appearing by a fresh set of lawyers) to complain of the short cut to an appellate court. Appellate judges are accustomed nowadays, to say that such a party has been "denied procedural fairness". The use of a passive verb does not disguise the fact that the appellate judge is saying that the trial judge was unfair. A greater insult to a trial judge that he or she has been unfair cannot be imagined. Furthermore, after such a comment, the successful litigant on the retrial, particularly a litigant appearing in person, often adopts the attitude that as the court was unfair to him or her previously, they should be allowed far greater scope for delay than would otherwise be the case. Again, the Press, doubtless spurred on by the party's public relations people, often mistakes a victory on a dry procedural point as victory on the merits.*
>
> *Probably no-one, except trial judges and magistrates, is at all concerned about this issue, even though its effect is to weaken the authority of the justice system. It should not, however, be allowed to pass without mention."*

Whilst ever the appeal process involves comments about judges by judges, the overt relationships and attitudes visible between various courts inevitably impact upon the

public perception of the entire system of justice. People may be very happy the appellate process affords them clear (or sometimes less clear) remedy against error below, but they do not benefit from the erosion of respect for generally competent and hardworking members of any court. And we all know that "with the greatest of respect" may mean anything but!

Language of respect

There is no doubt that ways in which judicial officers refer to those in other courts, or even to other members of their own court, may simply reflect a generational use of language. I am accordingly grateful to researcher Rose Polkinghorn and Professors Kathy Mack and Sharyn Roach Anleu of Flinders University for searching through various cases from the New South Wales and South Australian Supreme Courts and Courts of Appeal for terminology used to refer to Magistrates. Their searches covered periods in 2002 and 2007 and related not only to criminal but also civil matters, and to appeals both against factual findings and on sentence. They considered whether the term "learned" was added when the Appeal Court was critical of the court below, but whilst it did seem to them that it appeared somewhat more frequently than the plain "Magistrate" in such matters, this did not seem consistent and is by no means an overwhelming pattern. In one randomly selected decision the NSW Court of Appeal applied the same deferential "learned" to both the magistrate (at first instance) and the Associate Justice who heard the first appeal.[1]

It is also interesting to look at decisions of the High Court over many years and to observe some subtle distinctions between the ways in which different judges from time to time vary the way they refer to other members of their own Court. For instance, in an oft-quoted decision from 1977,[2] the former Chief Justice, Sir Garfield Barwick, referred invariably to "my brother Gibbs", whereas some other judges referred to "Gibbs J" and one never seemed to find it necessary to mention the names of other judges at all. In the same volume of the Reports, Barwick "agree(d) entirely" with his "brother Gibbs' reasons for judgement"[3] and other judges likewise

[1] Stylis v United Medical Protection Ltd – BC200703375 NSWCA 08/05/2007 Unrepd Jmts NSW
[2] Driscoll v The Queen [1977] 137 CLR 517
[3] Salemi v MacKellar (No 2) [1977] 137 CLR

referred with approval to, and adopted, decisions of their "brothers". The term "my brother" does seem to be most used when his views are being adopted.

Appeals from decisions of magistrates do occupy the High court itself from time to time, and in 1987, in Herbert Walden v Peter Baxter Hensler F.C.[4] concerning whether an elder of the Gungalida people from around Doomadgee in Queensland could exercise traditional rights to hunt or keep scrub turkeys, Justices Brennan, Dawson, Toohey and Gaudron referred to "the magistrate" while Justice Deane invariably referred to "the learned magistrate", who had convicted and fined the defendant.

Precise language has become a minefield for appeal courts, if they want to be really respectful and PC, with magistrates now being honoured rather than worshipped, and sex complicating things. Perhaps the maxims that "all lawyers are gentlemen" and "Man embraces Woman" should be revived, to overcome the need to know the gender of the judge or magistrate below. In one case in NSW which was appealed from a magistrate first to the District Court and then to the Supreme Court, the Appeal judge managed with *"the Learned Magistrate",* but couldn't get a consistent approach as to whether the District Court decision had been made by *"His"* or *"Her" Honour*[5] - perhaps a Freudian slip, since the finding included a determination that *"Her Honour committed the same error as the learned Magistrate."*

PWY's assumption over the years, shared by many members of the Bar and Bench, that all magistrates are desperate to be called "learned" whenever possible, was a source of considerable embarrassment to me, and potential damage to his client's case, when one Senior Counsel appearing before a University of Sydney Disciplinary Appeal panel repeatedly referred to me as "the learned Deputy Chancellor", a less that subtle way of distinguishing me from the then Chancellor, not a great fan of lawyers.

[4] [1987]HCA 54 (6 November 1987)
[5] Silvestro – Jiang Guang Ming – BC200701987 NSWSC 26/03/2007 Unrep Jmts NSW

Appeal process not everything

Before discussing the efficacy and limitations of the appeal process itself, it is important to realise there is a much wider context influenced by the myriad of ways different courts relate to each other and their work intersects. Attitudes of members of one court to members of another are not only displayed in judgments, or in the appeal process.

Judicial attitudes betrayed…

In circumstances where different courts' jurisdictions overlap (especially as between State and Federal Courts) conflicts do arise and a fertile ground of forum shopping is fuelled by perceptions about differing approaches noted by the legal profession, the media and litigants. Keeping off the turf properly the province of another Court is usually relatively straightforward – so (since the Court of Appeal said so[6]) the Licensing Court of NSW does not interpret planning legislation, the preserve of the Land & Environment Court - but where legislative provisions intersect on related factual circumstances, a decision in one court may influence or change likely outcomes in another. For instance, a Local Court apprehended violence order may freeze the status quo and preclude the making and executing of arrangements for access or contact, thus pre-empting Family Law outcomes. Some judicial officers seem more alert to such implications, and coolly resist the more extreme and unnecessary measures sought by both Police and Legal Aid or duty lawyers.

[6] Meagher v Bott CA (NSW) Full Court 40390/96 (See also Hill v King SC (NSW) 10 June 1993 Unrep, Kennedy v Emery SC (NSW) BC 9700340)

Most magistrates are careful where possible to leave open practical strategies for attending to mundane activities, but this respect for the imperatives in other jurisdictions and areas of law is not always reciprocated. Many magistrates have had experience of somewhat disdainful attitudes to them, and their Orders. At the risk of appearing precious, one might complain about being presented with Family Court "consent" orders including a term (no doubt drafted by canny legal practitioners) obliging a former wife to "have the Local Court DVO order annulled". A more appropriate and respectful condition may have been that she be obliged to apply to the Local Court for annulment, which is in fact what she did, but the problem remained, that "the settlement" was apparently predicated and approved on the assumption the Local Court would ignore its previous findings (made after a contested hearing in that Local Court) and comply with the request. When specifically asked in Court to indicate whether she reasonably continued in the fear of the ex-husband, which had grounded the order in the first place, she reluctantly answered affirmatively and the magistrate, who had heard the evidence on the original application, believed her. Her application was accordingly refused and the ex-husband thereupon put on a turn, pretty much demonstrating the reasonableness of her ongoing fears, and even how he had achieved the family law "settlement". No doubt the Family Court had not been made aware that the husband's principal reason for wanting an annulment was his insatiable desire to resume holding a firearms licence. It seems to me the other Court displayed neither knowledge of the apprehended violence laws and the reasons for and effects of AVO's, nor respect for the courts enjoined to deal with them. Potential overlaps in the exercise of jurisdiction require mutual care and respect between Federal State and Territory magistrates, and many specialist courts in their dealings with more mainstream ones.

So what do you do?

Structured interaction – Court Conferences, Symposia and Lectures

Other interactions which may well enhance (or erode) the relationships between courts occur at conferences specific to individual courts, where virtually all the members of that court are present, such as the New South Wales District Court Conference at which many judicial officers deliver presentations which instruct, and sometimes even entertain. The President of the Court of Appeal regularly attends the NSW District Court Conference to discuss frequently occurring issues in appeals to his Court from the District Court, Queensland Court of Appeal Justice Jerrard this year spoke about aspects of sentencing, evidence, and provision of reasons at the Queensland Magistrates' Court Conference, and at the NSW Local Court Conference Judge Sides of the NSW District Court has presented, for the last two years, most detailed and welcome papers on developments in Civil Claims, and this year South Australian Chief Justice Doyle made a guest appearance. It is over 15 years since magistrates made presentations on use and misuse of Interpreters, to the Local, District, and Compensation Courts in NSW and to a national Judges' Orientation program.

Cross fertilisation

In addition, relationships between the courts are greatly improved by attendances at conferences such as the present one where virtually all the attendees are judicial officers (give or take some senior academics who have by now earned "insider status"), although only a small proportion of judges actually attend, and even at others where their interaction is further complicated by the presence of non-judicial officers (such as the AIJA or the National Judicial College). There is no doubt the reluctance of most magistrates to attend in the past has been influenced by their experiences of attitudes that made them feel unwelcome. But on both sides this has changed; in part this is because the lower courts have been well served by some of their own members who have contributed on organising committees and as speakers and chairpersons.

Some better understanding of the respective jurisdictions and practices of other Courts is enhanced by appointments from and to Courts interrelated in the hierarchy,

such as Judges becoming heads of lower courts, or Magistrates becoming District Court and Supreme Court Judges, District Court or County Court Judges moving to the Supreme Courts, and State judicial officers moving into the Federal sphere. An example of productive use of the opportunities such movements offer is the application by Judge Jon Williams of the District Court of NSW of his ecumenical experience on both the Local and District Courts, presenting a paper, on Appeals from the Local Court, to the NSW District Court Conference in 2007. He set out legal and jurisdictional matters with absolute clarity, and also provided insights not otherwise available to the District Court, into processes and problems which constrain the Local Court.

With former Chief Magistrates both State and Federal sitting on the Family Court of Australia, and on the New South Wales Supreme and Industrial Courts, and former Magistrates on the District Courts and elsewhere, there is undoubtedly enhanced mutual understanding of the work of different Courts, and consequent enhancement of mutual respect.

Integrated Functions

The enactment of the Civil Procedure Act 2005 and the Uniform Civil Procedure Rules in August 2005 ushered in a new regime in civil court procedure for the Supreme Court, District Court, Local Court and the Dust Diseases Tribunal in NSW. Common Rules have been established between the Courts. The development of a common Bench Book to assist all judicial officers to consistently conduct civil trials has been a triumph of cooperation between members of the various benches and the Judicial Commission.

Guideline Judgments

Today not all instructions to trial courts from the Appellate courts are by way of appeal. Legislative provisions for applications for guideline judgments have created opportunities for sentencing blueprints without having to wait for a specific and suitable case to arise for an appeal. Not only can these judgments more conveniently address the relevance of a wider range of situations than arise in one particular case, the determination provides a broad instruction to many judicial

officers below, and receives widespread publicity. As a teaching tool, such a determination has the benefit of contextualising many individual cases in a way that individual judicial officers across the state cannot necessarily achieve on their own.

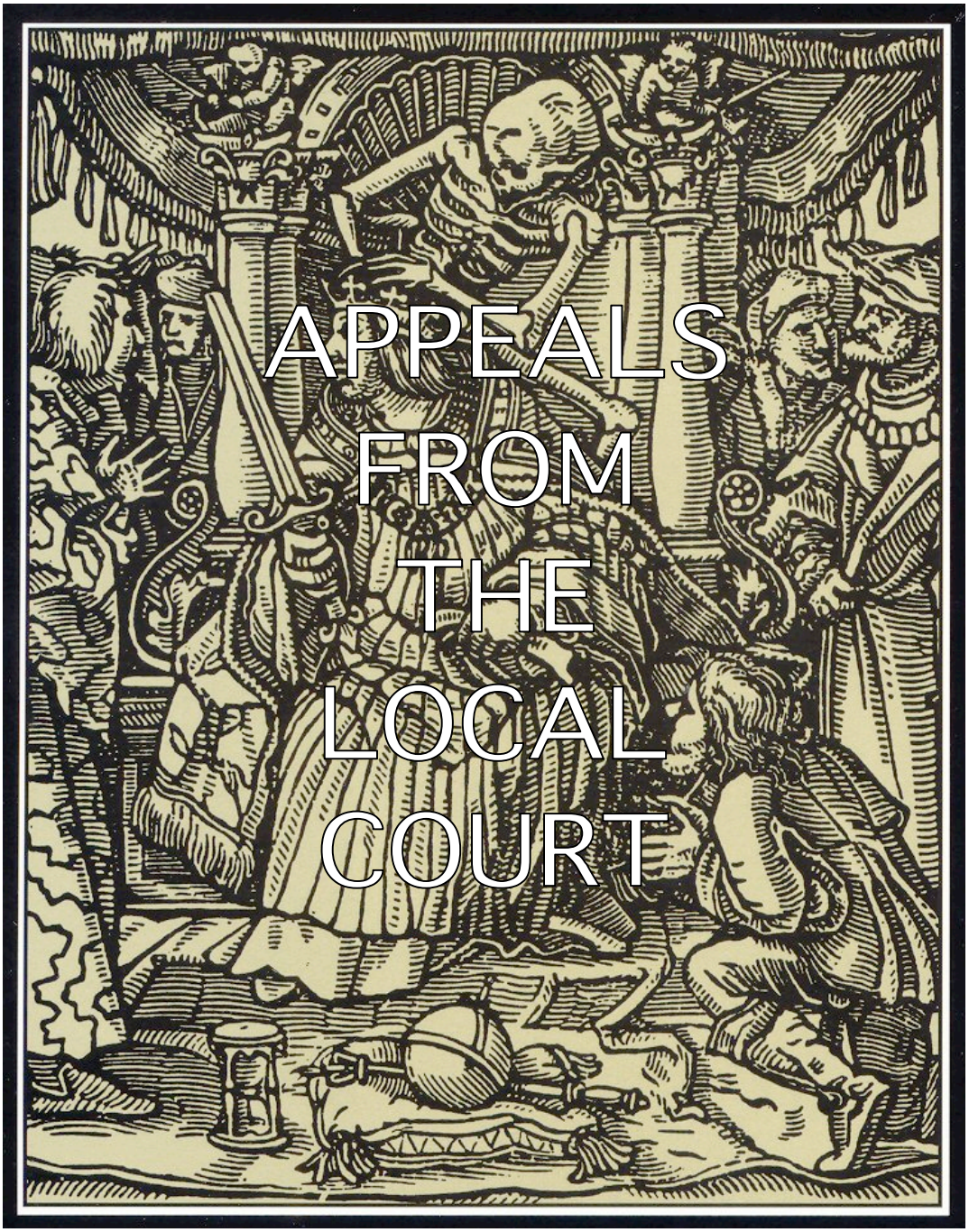
The magistrate or judge below has a convenient set of principles to appreciate before applying them to particular cases.

Appeals by Prosecutors

Appeals

The appeal process is accordingly but one of the ways in which relationships between courts are informed and grow. A brief summary of some provisions in relation to appeals (mostly criminal) from magistrates in different Australian jurisdictions[7], is contained in Annexure "A".

[7] for compilation of which I am principally indebted to Mr Hugh Donnelly, Acting Research Director, and Ms Rowena Johns, Acting Research Manager, Judicial Commission of NSW



In different States and Territories appeals from trial courts occur in different ways:

- from Local to Local Court
- from Local to District or County Court
- from Local to Supreme Court
- from District or County Court to Supreme Court.

Sometimes they take the form of rehearings, sometimes they are restricted to determinations of errors of law.

Those appeals from magistrates or other trial courts which have proved the most fertile area for misapprehension and resentment between the members of the respective benches seem to be those where the appeal lies to the next Court up in the hierarchical structure i.e. the Local Court to the District Court, or the District Court to the Supreme Court or Court of Appeal. Perhaps this is because the appellate relationships between courts involve more than the structural aspects, and it is worth considering the milieu in which the original hearing took place, the emotional and human dimensions of the adjudicator at first instance, and the contrasting circumstances in which the appeal is presented. In NSW, as the Court of Appeal pointed out in Wood v Director of Public Prosecutions[8] the District Court is not a court of error. But it remains useful for the District Court when considering material from the Local Court to heed the information in Judge Williams' paper,

> *"hearings in the Local Court can often extend over many, many months constituting a day here and a day there. This means that quite often, in long matters, there is not the same continuity of evidence one gets in a trial situation. This is because of Local Court listing and judicial arrangements, which often result in magistrates being displaced on a daily basis. For example a matter set down for a one day hearing at a particular courthouse will go over part-heard to another date if it doesn't finish in the day. That other date will depend on the listings for other cases and the magistrate being available at the particular court. If the situation blows out then this can result in hearing days occurring over many months. This is something that needs to be factored into a consideration of the transcript."*

This mirrors remarks of McClellan CJ at CL in Gianoutsos v Glykis [9]concerning "the burdens the workload of the Court imposes on District Court judges." In discussing what he found to be inadequate reasons for decisionand what they should have included he said (at p 76}

> *"This will impose practical limits on the length and detail required in reasons for judgment"*

Mortification

All judicial officers may be described as being lawyers "in the business of judging", but sometimes they are most affronted in the appeal process if their jury function of fact-finding is challenged and their factual determinations, rather than their interpretations of the law or even their sentences, are overturned. This probably arises from their perception of their own neutrality and fairness, their assumption

[8] [2006] NSWCA 240
[9] [2006]NSWCCA 137

they are trained and therefore are more reliable than lay juries, and that they are broadminded and can fairly assess the credit of witnesses. This sense remains strong, notwithstanding numerous presentations to various courts about systemic or unconscious bias, and about the unreliability of credit assessment without other cogent corroborative evidence. Moreover, after intensively listening to and watching protagonists in Court in emotionally charged situations of resentment and discomfort as the scenario unfolded, judges or magistrates themselves inevitably experience stronger emotional responses than are evoked when simply reading the evidence. With much evidence in chief presented in tendered statements, the opportunity to assess credit, especially of prosecution police witnesses, often depends on what happens under cross-examination, and that oral and aural part of the process may have far greater impact than that which is in written form. On a rehearing the appeal judge has *everything* in written form, without the opportunity to consider the demeanour of each witness, some of which may have seemed very telling especially during cross-examination.

In NSW the advent of the Court of Appeal's decision in R v Charara (2006) 164A Crim R39 has brought the expectation that, in conducting its rehearing on an appeal from a magistrate, the District Court will have not only the transcript and written evidence, but also the magistrate's reasons in relation to his or her factual conclusions. This had long been recommended by the Director of Public Prosecutions to the Criminal Law Review Division, and was also supported in the 2004 report to the NSW Sentencing Council[10] which noted however that the proposal was opposed by "the professional associations which represent those appearing for appellants." The rationale was of course that

> *'the magistrate had the advantage of observing the witnesses give their evidence at first hand and is thus considered best placed to make an assessment as to credit'*.

The change following Charara has created pressure for magistrates to provide far more comprehensive reasons for their decisions than hitherto. In doing so, they do not always prove persuasive, as a recent high-profile Sydney case of alleged assault occasioning, and domestic violence, demonstrated. It is still the case that no amount

[10] 2004 report on "How Best to promote Consistency in Sentencing in the Local Court" – a report pursuant to s100J(1)(a) and (d) of the Crimes (Sentencing Procedure) Act 1999

of evidence from the more credible witness(es), when looked at in the cold light of day on the transcript, outweighs the need for convincing corroboration.

This is not new to colleagues in other states such as South Australia. There appeals go to a single judge of the Supreme Court, being treated in the same way as an appeal from a decision of the District Court, the decisions are published, and the outcome is generally communicated to the magistrate concerned. According to my magisterial colleague Ted Iuliano, magistrates overall are happy, although there is a perception that "a couple of judges like to tinker with sentences no matter what".

> *"We have to provide full reasons for decisions in the same way as District Court judges, even though we are very busy and do not have the same resources as judges and time out to write judgments. Some are quick to criticise if we fail to give adequate reasons for our judgments and sentencing remarks, others are a bit more sympathetic.*
>
> *Findings of credit are generally not interfered with."*

The fudamental purpose of the magistrate's reasons was made very plain by Napier J who said in Ghys v Crafter (1934) SASR 28

> *"I think I am bound to examine the reasons given by the Magistrate, as the Full Court would examine the direction of the judge to the jury".*

In general, in South Australia the appellate court will not interfere with the Magistrate Court's decision unless it is satisfied the decision is clearly wrong, and will cause a miscarriage of justice.

In the Northern Territory where appeals also lie to the Supreme Court the feeling is that the Supreme Court deals with decisions of magistrates in a fairly sympathetic manner, taking into account the time and work pressures under which the magistrates work and making some allowances for them – even when an appeal is upheld. Magistrates are not usually "named & shamed", indeed names are not often identified except where the court wishes to compliment the magistrate for some reason, or conceivably where a magistrate is proving somewhat intractable. There is also a general impression that the Court is more likely to assume that an experienced magistrate has taken into account the correct matters, even when they are not specifically stated. But in the area of sentencing on appeal, magistrates do

not always feel the Supreme Court's determination, whether the same as, or different from, the court below, is fully supported by reasons.

Consistency

This may well raise concerns as to whether consistency is necessarily promoted, since it must surely be a prime object of the appeal process.

Before the leap forward in NSW in 2006, it was the view of many magistrates that there was pretty much no reason for magistrates to elaborate their reasons in criminal matters, since no recourse was had to them (except of course by lawyers and clients trying to understand whose analysis and submissions closest accorded with the Magistrate's impressions). These views, and other concerns were outlined and largely supported by the NSW Sentencing Council in its 2004 report on "How Best to promote Consistency in Sentencing in the Local Court"[11]. Noting that in principle appeals against sentence have an important role in both promoting consistency and encouraging confidence in the justice system,[12] the Council concluded that the then current regime of appeals to the District Court had serious flaws, and was widely thought to impede consistency, and even to promote inconsistency:

"The submissions, from Magistrates in particular, created a strong sense that the current system for appeals against sentence was one of the single most important areas where change was needed in order to promote consistency in sentencing. It was generally perceived that whereas the appeal process from the District Court to the Supreme Court in

[11] –report pursuant to s100J(1)(a) and (d) of the Crimes (Sentencing Procedure) Act 1999
[12] as indicated by McHugh J in Everett v The Queen (1994) 181 CLR 295

respect of matters dealt with on indictment facilitates consistency, the same could not be said in relation to appeals from the Local Court to the District Court because different appeal provisions apply."

The Council went on

> *"Whilst it is 'inevitable and right' that appellate courts seek to 'guide and direct the work that is done at trial level",* [13] *it is not considered that the District Court in its appellate jurisdiction provides such guidance and assistance to the Local Court"*

For the time being reasons are important as to credit, but the appeal remains a rehearing, and not an assessment of fundamental error. In May 2007 NSW Chief Magistrate Henson wrote to Mr Stephen Olischlager, Legislation and Policy, NSW Attorney Generals Department, making several recommendations to Government in relation to the appeal process. In particular he said

> "*Under section 17 of the Act, appeals against sentences imposed in the Local Court are made by way of rehearing of evidence given in the original Local court proceedings and fresh evidence may be given in the appeal.*
>
> *A possible reason for this rehearing procedure was because the Courts of Petty Sessions did not produce any detailed written records of the cases before them, so the evidence had to be reheard. This, however, is no longer the case.*
>
> *Under section 18 of the Act, appeals against conviction are by way of rehearing on the transcripts of evidence given in the Local Court and fresh evidence may be introduced by leave of the District Court.*
>
> *In superior jurisdictions, appeals are based on error. In an appeal to the District Court, little if any regard is had to the decision of the Magistrate. One of the advantages of the Local Court is its ability to deal not only efficiently but also responsively to the criminal matters that come before it. In many cases Magistrates are more experienced in relation to local court matters and sitting as judges of both fact and law than Judges.*

[13] (per Hayne J) Rogers v Nationwide News P/L (2003) 77 ALJR 1739 @ para 82

The changes that have taken place in the NSW Local Court since the passage of the Local courts Act 1982 have altered the perspective from which appeals against decisions of the Local Courts should be viewed. It is my view that to continue an appeal process which was predicated at the time of its inception upon the lesser levels of professionalism and competence within the magistracy compared to judges is to ignore the years of development of a qualified, professional and increasingly well educated magistracy that is the product of the independent Local Courts that exist today.

I do not believe that a process which merely substitutes one judicial officer's view for another, is justified on the fiction that appointment to a different level of the judiciary carries with it a greater level of expertise in a jurisdiction in which that other judicial officer does not regularly preside. This approach is anachronistic and not necessarily conducive to attaining justice."

Chief Magistrate Henson has specifically made the following recommendations:

1 **Annulment Appeal**

(where a magistrate has declined an application to set aside a judgment entered in the absence of a defendant)

Rather than the matter being sent back to the Local Court upon a successful 11A appeal, the Act should provide for the District Court, where the matter is a plea of guilty, to deal with the matter to finality at that time. This could be achieved by allowing the district court to exercise the jurisdiction of the Local Court in relation to the matter, at the same time as hearing the section 11A appeal.

It is accepted that the annulment of a conviction for the purpose, in part of entering a plea of not guilty should be remitted to the Local Court for hearing.

2 Appeals generally to the District Court

Appeals against convictions should require the appellant to demonstrate an error on the part of the Magistrate in the lower court.

Appeals against sentence should require the same leave to give fresh evidence as appeals against conviction require and should be limited to sentences that are manifestly excessive. They should be based on the transcript evidence of proceedings in the lower court and the addresses and reasons for sentence given by the Magistrate. They should also be approached on the basis of whether the original sentence is outside the range for offences of the particular type and description. I see no reason why an approach similar to that taken by the court of Criminal Appeal in terms of requiring an appellant to demonstrate appellable error should not be implemented in any review mechanism concerning appeals from this Court."

It remains to be seen whether another great leap forward will transpire soon.

Explaining Determinations of Fact

But explaining a view of the facts is not always simple and various types of errors may be (and are regularly) detected in, or by virtue of omissions from, reasons. Errors may be by oversight or by fundamental failure to consider matters at all. To date in NSW magistrates have not been encouraged, particularly by virtue of the circumstances and pressure of their busy Courts, to provide lengthy ex tempore reasons. Most particularly they have been discouraged from adjourning to prepare notes for judgment, or from reserving their decisions to be delivered in writing on another day. Were they to adopt an invariable practice of doing so the case flow management results and efficiencies achieved in the system over recent years would blow out very quickly. However the NSW Chief Magistrate has now stated that in appropriate cases magistrates should take the opportunity to reflect on their reasons, and reserve where necessary. How far adjournments become the norm may well depend on how persuasive their decisions prove: if they are able to render their findings plausible, fewer of their convictions should be overturned on appeal.

NSW magistrates have a way to go – but so do many of the courts to which the provision of reasons is not new but where they are often found wanting. It now behoves various court education committees to deliver some measure of advice on how to structure and deliver reasons, on determinations of fact, law and sentence.

In civil matters, even NSW magistrates are used to having their decisions reviewed on matters of law, and the searches conducted by the Flinders University team to

which I made reference earlier turned up quite a few statements by Supreme Court judges to the effect that it was

> *"open to the learned (or not learned) magistrate to make the findings made in her oral reasons",*

and where it was specifically stated that

> *"It is my view that the Magistrate made it clear what she was deciding and why"*

and that

> *"it is not incumbent for the Magistrate to reproduce all those submissions in her judgment. In my view the Magistrate gave sufficient reasons."*[14]

Slings and Arrows

Reflecting on how the most diligent judicial officer may be affected by the experience of having their decision reviewed, and overturned or upheld, the comments of the members of the Local Court to the Sentencing Council demonstrated a great deal of resentment directed at the Appeal Court, which in my view was, in some respects, not quite fair. The system simply did not marry the needs of the two jurisdictions, which was the main reason the process could not provide any guidance to the lower court either in relation to its reasons or its sentences. In relation to sentences on pleas of guilty with agreed statements of fact, magistrates were and remain entitled to demand some explanation for what they perceive to be overwhelming and consistent leniency by the District Court. However, even then there is limited information provided from the proceedings below, and quite different material

[14] Kaduthodil v NRMA Insurance Ltd – BC200703447 NSWSC 09/05/2007 Unreported Judgments NSW

presented by the defence on sentence. Where the appeal is against conviction after a plea of not guilty, since the facts found on a rehearing were often different there could be little relevance in comparing sentencing. Perhaps a new era has dawned, as members of the Local Court find new sympathy for the District Court judges.

Following Charara, issues in relation to reasons for factual findings by magistrates now pretty much mirror what was already required of the District Court judges themselves.

Feel for the litigant, but what about the judge?

Whether civil or criminal, the experience of the court at first instance is typified in *Goodrich Aerospace Pty Ltd v Arsic* (2006) 66 NSWLR 186. One can only imagine the various ways in which District Court Judge Ainslie-Wallace may have reacted to the learned and detailed judgment of the Court of Appeal, delivered by Ipp JA, in which he said (at page 189)

> *"Individuals who have been parties in trials in superior courts usually remember the event for the rest of their lives. The demeanour findings made in those trials will usually affect the parties far more than any legislative Act or decision by the executive government. Indeed, the difference between success in life and ruin may turn on a single demeanour finding."*

In my view, it is unlikely that Judge Ainslie-Wallace was not aware of such a flow-on effect of judicial findings.

But one wonders whether the Court of Appeal, so mindful of the effect on a litigant, considers as sympathetically the flow-on effect on a judge whose judgement about demeanour and its interrelationship with other evidence is found to be seriously compromised and is remitted for rehearing. Sometimes the decision amounts to public humiliation, which even if deserved will smart for a very long time. (I have not discussed this case with the judge, but believe she is robust enough not to be permanently maimed by it.)

The problem in this case was whether the judge's findings in relation to credit and demeanour were appropriately balanced with other evidence, and whether other evidence if admitted might have made a difference.

An important case, worthy of attention: Reasons and other matters

Judge Ainslie-Wallace may justifiably have felt enormously complimented that Ipp JA and his brethren found this case appropriate as the vehicle for a superb essay of instruction on the powers of Appellate Courts to overturn findings of fact, as this issue interacts with the special (or not so special) observations of demeanour available to the Court at first instance. No one could but admire the resounding expression of the law in Ipp JA's words at p188

> *"Stern sentinels have long barred the gateway to appellate success against findings of fact substantially dependent on demeanour and credibility. These formidable guardians are the line of cases epitomised by Devries v Australian National Railways Commission (1993) 177 CLR 472 and Abalos v Australian Postal Commission (1990) 171 CLR 167. The opening of the portals is dependent on passwords that, in practice, are rarely invoked successfully. These are: "the trial judge's failure to use or palpable misuse of his or her advantage," or the judge making findings "inconsistent with incontrovertible facts," or acting on "glaringly improbable evidence," or making findings "contrary to compelling inferences". There are signs, however, that entry to the citadel can now more easily be achieved*."

She would no doubt have been awed by the catalogue of eminent judges and jurists whose cases and writings and speeches required quotation in the instructive decision. They included (not necessarily in this order) from the High Court, Justices Gleeson, Kirby,[15] Gummow, Callinan, Heydon,[16] McHugh and Hayne[17], from the

[15] Fox v Percy (2003) 214 CLR 118 at 128 "for a very long time judges in appellate courts have given as a reason for appellate deference to the decision of a trial judge, the assessment of the appearance of witnesses as they give their testimony that is possible at trial and normally impossible in an appellate court. However, it is equally

New South Wales Court of Appeal Samuels JA,[18] Tobias JA[19] and Mason P,[20] from the USA Justice Jerome Frank[21] and Harvard Professors Schacter and McNally, UK jurists Sir Thomas Bingham, Lords Atkins,[22] Devlin, Browne and Sumner, McKenna J, and Sir Richard Eggleston QC, and finally Mr A M Gleeson (as he then was) writing of what he dubbed the "Pinocchio theory" in the ALJ in 1979[23]. These are in the main the very same eminent jurists who would extol the retention of trial by the lay jury as a fundamental rock upon which our system of justice depends.

"…..and that M'lud, concludes the case for the prosecution."

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true that, for almost as long, other judges have cautioned against the dangers of too readily drawing conclusions about truthfulness and reliability solely or mainly from the appearance of witnesses."

[16] CSR Ltd v Della Maddalena (2006) 80 ALJR 458

[17] Waters Authority v Fitzgibbon (2005) 79 ALJR 1816

[18] Travel Industries of Australia Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326 @ 348

[19] Walden v Black [2006] NSWCA 170 "reliance on the 'subtle influence of demeanour' requires careful consideration in each case before it is permitted to trump appellate intervention"

[20] Article "Unconscious Judicial Prejudice" (2001) 75 Australia Law Journal 676.

[21] Quoted in L Sharp "Cognitive Heuristic Decision – Making" (1995) 20 Bulletin of the Australian society of Legal Philosophy 71): *"There can be no greater hindrance to the growth of rationality than the illusion that one is rational when one is the dope of illusions".*

[22] Sociéte d' Advances Commerciales (Societe Anonyme Egyptienne) v Merchants' Marine Insurance Co (The "Palitana") (1924) 20 LIL Rep 140 at 152.'…I think that an ounce of intrinsic merit or demerit in the evidence that is to say, the value of the comparison of evidence with known facts, is worth pounds of demeanour.'

[23] A M Gleeson "Judging the Judges" (1979) 53 Australian Law Journal 338 @ 334: "Reasons for judgment which are replete with pointed references to the great advantage which the trial judge has had in making the personal acquaintance of the witness seem nowadays to be treated by appellate courts with a healthy measure of scepticism. What might be called the Pinocchio theory, according to which dishonesty on the part of a witness manifests itself in a fashion that does not appear on the record but is readily discernible by anyone physically present, seems to be losing popularity."

Branded a Failure?

Ipp JA chose a particular passage from Hayne J (2005) [24] to quote,

> *"…Rather, because the primary judge was bound to state the reasons for arriving at the decision reached, the reasons actually stated are to be understood as recording the steps that were in fact taken in arriving at that result. Understanding the reasons given at first instance in that way, the error identified in this case is revealed as an error in the process of fact-finding. In particular, it is revealed as a failure to examine all of the material relevant to the particular issue."*

Ipp J then concluded that a failure by a judge making a demeanour finding to deal with an improbability constituting a 'governing fact' in the *SS Hontestroom* sense, may constitute *"an error in the process of fact finding"* as explained by Hayne J.

One may hope Judge Ainslie-Wallace was gratified that her reasons were so extensively pored over and quoted, including her specific reference to inconsistencies in the plaintiffs evidence which she found were excusable when she regarded the evidence as a whole and "taking into account the plaintiffs demeanour as a witness". She had accepted his evidence despite internal inconsistency to which she made reference, as previous cases have permitted. But the Court of Appeal also examined evidence of another witness which was "unchallenged but diametrically opposed" as well as submissions about aspects of that evidence which were not mentioned in her reasons, and ultimately commented

> *"The judge's failure to comment upon these matters suggests that her Honour did not appreciate the significance of this evidence. This impression is strengthened by her honour's comment: "Much of Mr Maslic's evidence was supportive of the plaintiff's account of the reject cage and how it was … used". In fact, on this fundamentally important question, Mr Maslic's evidence was directly antithetical to that of Mr Arsic.*
>
> *In my view, the omission to examine and deal with this evidence constitutes an error in the process of fact-finding, namely, a failure to examine all of the material relevant to the particular issue in the sense explained by Hayne J in Waterways Authority v Fitzgibbon* (at 1835 [130]; 428 [130])."

The determination of the facts was remitted, although the case report indicates that the parties made application to the High Court for special leave, the result of which is not known to me.

[24] Waters Authority v Fitzgibbon (2005) 79 ALJR 1816 @ 1835

Fundamental Errors in Process of Fact-finding

Finally it must be said that the ratio of this case, published for all to read in the 2006 New South Wales Law Reports, simply says

> *"Where there are fundamental errors in a trial judge's process of fact-finding, for example a failure to examine all the material relevant to an issue of fundamental importance, the intervention of an appellate court is warranted. This is notwithstanding that the factual findings were substantially based on demeanour and the traditional appellate deference to such findings."*

That ratio will remain there (subject to the High Court of course) for the rest of the lifetime of the distinguished and learned judge. Its stern conclusion as to her fundamental error is not ameliorated by any corresponding reference in the headnote to those parts of her lengthy reasons and complex analysis which were actually approved by the Court of Appeal, including her assessment of damages in excess of $200,000, which was confirmed within a margin of 1%.

But why stop at transcripts of evidence and reasons?

Deciding on the transcript

Evidence is recorded on sound and often transcripts leave a lot unclear. Video recording is not yet in general use by courts except in "protective" or "security-sensitive" or distance-effected situations, but the technology is available and it may

not be too far off as a means of recording the entire proceedings. Recent cases have highlighted in the review process the limitations of transcripts, which sometimes fail to record much more than demeanour as it applies to a witness giving evidence.

In his paper to the District Court Conference in 2007, Judge Williams considered the NSW case of Makucha v Brian Tucker & Associates Pty Ltd [25] in which the Court of Appeal, in its unanimous decision written by Hunt AJA, was highly critical of a magistrate's behaviour in conducting a civil case, her decision in which Supreme Court Master Malpass had declined to overturn. During the proceedings the magistrate had cited the then unrepresented defendant for contempt, and whilst he was in custody she finished the hearing and found against him. Both the Master and the Court of Appeal had reviewed the decision on the transcript of the proceedings.

The Boot on the other Foot?

A Judicial Commission Conduct Division panel, comprising former Court of Appeal Judge (and esteemed former President of the JCA) Simon Sheller, Supreme Court Justice (currently President of the AIJA) Virginia Bell JA and the Hon Justice Monica Schmidt, dealt with a complaint laid about the magistrate by a member of the public who had no connection with the case itself. The panel was in turn critical of the Court of Appeal (which regrettably did not have access to the tapes) for failing to

[25] Makucha v Brian Tucker & Associates Pty Ltd [2005] NSWCA 397

appreciate that looking at a transcript is one thing, listening to the actual evidence can produce quite a different result. The panel concluded that it was the litigant rather than the magistrate who was at fault in the proceedings, and that some of the Court of Appeal's conclusions were based on quite incorrect assumptions as to what was happening in the courtroom in front of the magistrate. At 11.5.5 the panel said

> *"It should be acknowledged that reviewing the written transcript does not necessarily provide a sufficient insight into the mood of a hearing, or the proper context in which questions have been rejected"*

and at 11.7.2

> *""the audio tapes gave a dimension to the proceedings ……..not readily discernable from the written transcript. In this regard the Conduct Division has an undoubted advantage over the Court of Appeal in appreciating what occurred on the day. …….the audio tapes indicate that throughout the hearing the Magistrate remained calm and polite. This accords with the recollection of… (witnesses including Counsel)…Mr Makucha's tone, on the other hand was insolent, rude and aggressive. He continually spoke over and interrupted the magistrate in a manner that was seeking to take control of the proceedings"*

Without canvassing whether the Appeal should have been upheld on all or any of the appeal points, there are a few points in the Court of Appeal's judgment worth considering, particularly in the light of the report of the Conduct Division:

- In para.12, after noting some challenging words apparently said by the defendant and the defendant's subsequent query

  > *"Would you like me to take it back?"*

  the Court of Appeal misinterpreted this as an offer to take back words, whereas the defendant was in fact referring to a bundle of documents he had just placed on a table

- At para 14 the Court of Appeal actually acknowledged "the transcript has limitations", but then jumped to an heroic conclusion:

  > *"so far as the transcript can reflect the way in which words are said, the interventions give the strong impression that the magistrate was irritated"*

- At para 24 the Court remarked

  > *"To suggest that someone seeking the transcript of a half-day's hearing should have been aware that it would not be available within three weeks surprises me, and it would no doubt be astonishing to a litigant who is appearing in person."*

  Have we got news for you!! As the Local Court would ask:

"Transcript?? What transcript??"

- At para 33 the Court said

> *"The fact that English was unambiguously not the defendant's first language is made very apparent from the sound recorded transcript, and it was therefore unfortunate that the magistrate attempted more than once to force the word "withdraw" on him when he continually made it clear that he wanted the allegation of bias determined first, without accepting that he was withdrawing from the proceedings completely".*

This conclusion about English was particularly noted by the Panel, at 5.32

> *"An immediate comment about the first sentence in paragraph 33 is appropriate. It is not apparent which part of the transcript led Hunt AJA to this conclusion. The Conduct Division has had the advantage of listening to the tape recordings of the significant parts of the proceedings in the Local Court. The audio tapes indicate that Mr Makucha speaks English without the trace of an accent, and that he is not only reasonably articulate, but also familiar with legal terms. The recording gives no indication at any stage that English was not the defendant's first language. He spoke English clearly and fluently and without any trace of a ''foreign' accent. In the statement obtained from him by the Crown Solicitor Mr Makucha says that he is 60 years old and arrived in Australia with his family from the Ukraine in 1949. At the bail application on the 13th of July 2004, Mr Stidwill, his solicitor, said that Mr Makucha 'grew up in Queensland but he has lived in Sydney for over 20 years… He is a company director and has been a company director for over 20 years'. Counsel Assisting submitted that 'although English might not have been his mother tongue, it might as well have been.' Of the rather unusual statement 'I speak the language of Australia correctly', Mr Makucha said in his statement that he meant that he had made submissions in a plain and direct was, which was the Australian way."*

- At para.37 the Court said

> *"It is difficult to imagine how the defendant could have uttered these words in a manner which was offensive or otherwise inappropriate"….."the Magistrate's response was wholly inappropriate…" …*

The Conduct Division Panel, on the other hand, said at 11.9.1:

> *"the difficulty encountered by his Honour…could have been readily overcome had his Honour been favoured with the audio tapes….that revealed times that Mr Makucha's tone was redolent with both sarcasm and insolence. The transcript shows that Mr Makucha interrupted the Magistrate mid-sentence, as he had done earlier in the day. The audio tape which contains Mr Makuch's apology demonstrates that Mr Makucha interrupted the Magistrate to proffer his 'apology', which is expressed in a rhetorical way, and does not amount to a sincere apology."*

How much more obvious could matters have been had the proceedings been comprehensively videotaped?

As Every Solicitor and Civil Servant Knows Once a File Goes Off it Stays Off

My enquiries suggest that in the case in question, several other magistrates had disqualified themselves from hearing the case because of earlier encounters with the defendant – and it was allocated at random to the magistrate – clearly the "luck of the draw". Whilst many magistrates would have handled the particular situation differently, I believe most would agree that contempt proceedings are not lightly commenced by magistrates, and usually eventuate only after great provocation. They are not for the faint-hearted, and even the most learned and courageous of our brothers and sisters would expect to receive little support from above, well knowing the waters will be muddy.

The Conduct Division Report noted the High Court's observation [26]

> *"the expression 'contempt of court' is often popularly misunderstood. In a case such as the present, the offence consists not in affronting the dignity of the court, but in interfering with the due administration of the law…"*

and specifically said

> *"the magistrate clearly understood the distinction. Mr Makucha was cited not for abusing the bench but for "his repeated attempts to ensure the proceedings did not continue"*

Most magistrates would also believe that some litigants in person actually have vast experience and know a lot more about the processes, time frames, and case-

[26] Lane v The Registrar Supreme Court of New South Wales (Equity) Division (1981) 148 CLR 245 @ 257

management imperatives in the Local Court, and how to manipulate them and to invoke special treatment, than do Court of Appeal judges.

Naturally, the magistrate, like any judicial officer at first instance, was not a party to the Appeal Court proceedings. This means she had no control over what was in the transcript, or what the parties on either side said, or conceded, or failed to put, in the Appeal proceedings, about her or the Local Court proceedings.

It is particularly noteworthy that the complaint to the Judicial Commission was made not by anyone connected with the actual case, but by an independent citizen with no personal interest in the affairs of Mr Makucha and who was never present in court during the case. Her complaint specifically arose some time after she read, on line, a newspaper report of the decision of the Court of Appeal, which provided a link to the text of the decision. Her only information about the magistrate's conduct came from the Court of Appeal. Perhaps in the long run the magistrate was fortunate that, notwithstanding doubts about the standing of the complainant to ventilate the complaint to the Conduct Division, its Panel actually reviewed and determined the complaint (in the magistrates favour on all counts), putting to rest some damaging conclusions of and published by the Appeal court.

Finally, the magistrate who cited Mr Makucha is certainly not the only judicial officer to have serious concerns about what some particular Appeal judges derive from transcripts, or the effects of their decisions on the public view of courts of first instance. This is one area, at least, where members of Local and District Court benches seem to be in harmony.

No Court is an Island

Judge Robert Katzmann of the United States Court of Appeal for the Second Circuit, in a paper presented to the 2005 National Conference on Appellate Justice[27], refers to a "fundamental truth", that governance in the United States is a process of interaction among institutions – legislative, executive and judicial – with separate and sometimes clashing structures, purposes, and interests. He argues that constructive tension among those branches of government promotes liberty and the public good.

While principally focussing on legislative-judicial relations, he emphasises the importance of other institutional forces affecting the courts, which function within the context of a judicial system. The appellate courts are affected by decisional jurisprudence of the Supreme Court, as well as the decisions of the High Court not in individual cases but in a systemic way, making impacts on sentencing in appellate and district courts, and they are also influenced by determinations of the Judicial Conference of the United States.

Whilst many distinctions could be drawn, the complex interrelationships between courts, both state and federal, in Australia mirror those to which Katzmann referred, and the extent to which the independent role of the courts may be strengthened or weakened depends on their standing together. Common interest should impel courts to join ranks rather than acting in stand-off mode towards each other, and to take care of each other.

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Daphne kok

[27] The Journal of Appellate Practice and Process Vol. 8, No. 1 (Spring 2006) p115

APPENDIX A

APPEALS FROM LOCAL COURTS

Appeals in NSW from the Local Court to the Local Court, and the Local Court or Children's Court to the District Court are extensively reviewed by Judge Jon Williams in his paper delivered to the 2007 District Court Conference, and the provisions are not repeated here

1. **NSW:** ***Crimes (Appeal and Review) Act 2001 at Part 3***

    - Division 1 – Appeals by defendants

    To District Court by way of rehearing

    - Division 2 – Appeals by prosecutors

    To District Court by way of rehearing

    - Division 3 - Miscellaneous

The legislation allows for appeals from both a defendant and a prosecutor but in regard to the latter only in respect to annulment of conviction or sentence.

Appeals lie from:

Local Court to Local Court.
Local Court to District Court.
Children's Court to District Court.
Local Court to Land and Environment Court.
Local Court to Supreme Court.

NSW Criminal Appeals:

The area of criminal appeals that cause the most angst is in relation to conviction appeals where **s18** of the Act specifies that the appeal is to be by way of re-hearing based on the certified transcripts of the evidence given in the Local Court.

Fresh evidence can be given if it is in the interests of justice to do so. "Fresh evidence" in that context seems to have the same meaning as is applied to appeals to the Court of Criminal Appeal and the Court of Appeal.

2. **Victoria – *Magistrates' Court Act 1989***

- The defendant may appeal against a "sentencing order" to the County Court: s83(1). [Note: this option is abolished if the defendant appeals to the Supreme Court on a question of law: s83(2).]

- The Director of Public Prosecutions may appeal against a "sentencing order" to the county Court: s84(1).

- The definition of "sentencing order" in a s3 includes "the recording of a conviction".

- The appeal is conducted as a rehearing: s85

3. **Queensland – *District Court of Queensland Act 1967; Justices Act 1886***

- Any appeal from the Magistrates Court must be made to the District Court, not the Supreme Court: (ss111-114 *District Court of Queensland Act)*.

- A person who "feels aggrieved as complainant, defendant or otherwise by an order made… in a summary way on a complaint for an offence" may appeal to a District Court judge: (s222(1) *Justices Act)*.

- An appeal under s222 is by way of rehearing on the original evidence unless the District Court gives leave to adduce new evidence if the court is satisfied there are special grounds: s223.

- There are some limited exceptions where summary convictions and sentences cannot be appealed under s222, for example, when the District Court, hearing a charge presented on indictment, also hears and decides a summary offence by the consent of both parties under s651 of the *Criminal Code*. Another exception applies where the Attorney General exercises the power under s669A of the *Criminal Code* to appeal to the Court of Appeal against any sentence pronounced by a court of summary jurisdiction which has dealt with an indictable offence summarily.

4. **South Australia – *Magistrates Court Act 1991***

- Either party to a criminal action may appeal against any judgment given in the action: s42(1)

- "*judgment* means a judgment, order or decision and includes an interlocutory judgment or order": s3.

- Commentary from Lexis Nexis confirms that the broad definition of "judgment" means that the power of appeal under s42 covers appeals against sentence, conviction and (to a limited extent) acquittals. e.g. see [65,110.1], [65,110.8], [65,110.24] & [65,110.24A].

- The appeal is to a single judge of the Supreme Court: s42(2).

- The appellate court may, if the interests of justice so require, rehear any witnesses or receive fresh evidence: s42(4)

- South Australia does have a District Court but its criminal jurisdiction focuses on trials. Judges of the District Court hear appeals only in a variety of non-criminal areas of law. For general information, visit www.courts.sa.gov.au

5. **Western Australia – *Criminal Appeals Act 2004***

- A "person who is aggrieved" by a decision of the Magistrates Court may appeal to the Supreme Court: s7(1)

- The Attorney General has an identical power under s7(2).

- The definition of "decision" includes a decision to convict or acquit, and a sentence imposed: s6.

- The Supreme Court is constituted by a single judge: s6.

- The appeal is decided on "the evidence and material that were before the lower court" but this "does not prevent an appeal court from considering any evidence that the lower court refused to admit": s39.

- Western Australia has a District Court but it only hears appeals from the Magistrates Court in civil matters. For general information, visit www.districtcourt.wa.gov.au

6. **Tasmania – *Justices Act 1959; Criminal Code***

- Tasmania does not have an intermediate court. Appeals from the Magistrates Court are to the Supreme Court, constituted by a single judge: s110(1) of the *Justices Act*.

- A person who is "aggrieved by an order of justices may ….. move the Supreme Court to review that order": s107(1)

- An order is defined at s116 to include "conviction, dismissal of a complaint, determination, and adjudication". This broad definition covers sentences.

- The Supreme Court shall review the order "upon consideration of the evidence and materials adduced and brought before the justices and such further evidence (if any) as it thinks fit": s110(2).

- Notwithstanding anything in s110, the appellant may apply that the matter be heard and determined de novo: s111.

- A separate power exists under the *Criminal Code* to deal with certain indictable offences that are prosecuted summarily (under s5 of the Code). Appeals against conviction or sentence in these cases are heard by the Court of Criminal Appeal: s308(9) and Chapter XLVI (Appeals) of the Code. The CCA is constituted by 3 judges, or by 2 judges if the parties do not object: s400.

7. **Australian Capital Territory - *Magistrates Court Act 1930***

- Part 3.10 Criminal (s207 etc) Supreme Court hears appeals from decisions of the Magistrates Court by way of orders to review under division 3.10.3

- Part 4 Civil (s272 etc) Evidence on appeal - the Supreme Court must have regard to the evidence given in the proceeding in the Magistrates Court out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence.

8. Northern Territory - Justices Act S163, S176 (Criminal);

- The Northern Territory does not have an intermediate court. Appeals from the Magistrates Court are to the Supreme Court, constituted by a single judge.

- A party to proceedings before the Court may appeal from a conviction, order, or adjudication of the Court on a ground which involves sentence, or an error or mistake on a matter of fact alone, or a matter of law alone, or both –S163.

- Evidence on appeal from the Supreme Court shall be limited to exhibits and record of proceedings below, except as may be allowed for …reasons.

- The appeal shall be dealt with by the Supreme Court in a summary way, may mitigate or increase any penalty, may affirm quash or vary, or remit –S176

- Local Court Act S19 (Civil)

- A party to proceedings before the Court may appeal from an order to the Supreme Court on a question of law–S19.