



Précis Paper

Appeals Against Sentence

What evidence must be read on an appeal to the District Court on sentence? An interesting review of the Court of Appeal analysis by Michal Mantaj and Justin Wong.

Discussion Includes

- The facts and findings in *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290
- The operation of sections 17 & 18 of the *Crimes (Appeal and Review) Act 2001* (NSW)
- The way in which an appeal against sentence from the Local Court to the District Court should be determined, In particular whether or not the District Court should have regard to evidence given in the Local Court or if it is sufficient for the District Court to rely on the findings of fact made at Local Court level

Précis Paper

Appeals Against Sentence

1. In this edition of BenchTV, Michal Mantaj (solicitor) and Justin Wong (solicitor) discuss the recent NSW Court of Appeal (McColl, Macfarlan and Leeming JJA) decision in *Engelbrecht v Director of Public Prosecutions (NSW)* [2016] NSWCA 290 which considered appeals against sentence from the Local Court to the District Court.

The Local Court prosecution

2. Mr Engelbrecht was charged with 5 offences, ranging from aggravated indecent assault to common assault. The offences were alleged to have been committed against the same complainant, an intellectually disabled young man, whom Mr Engelbrecht had been a carer for in a group home. Mr Engelbrecht plead not guilty to all 5 offences in the Local Court and the matters proceeded summarily. He was found not guilty of 4 offences but found guilty of aggravated indecent assault.
3. Mr Engelbrecht was subsequently sentenced by way of a community service order of 300 hours. To assist the Magistrate in sentencing a pre-sentence report was prepared on the basis of the police report, which was redacted by the parties to reflect the contested nature of the hearing.

The District Court severity appeal

4. Mr Engelbrecht then appealed to the District Court against the severity of the sentence imposed on the basis that the Local Court Magistrate came to incorrect conclusions on findings of fact.
5. An appeal against sentence from the Local Court to the District Court is governed by section 17 of the *Crimes (Appeal and Review) Act 2001* (NSW):

SECTION 17:

Appeals against sentence to be by way of rehearing of evidence

An appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings.

6. Prior to the appeal hearing there was significant disagreement between the parties as to what evidence should be before the District Court. It was the offender's understanding that the same redacted police report and the Magistrate's remarks on sentence would be before

the District Court and that the Magistrate's judgment in relation to the conviction would not be evidence in the District Court. The DPP nevertheless sought to place the conviction judgment before the District Court and the offender sought to have relevant sections of the transcript placed before the District Court judge to provide context. However, the District Court judge (Sides DCJ) decided s 17 did not require him to have regard to the transcript of the Local Court proceedings (although very limited excerpts were admitted).

Court of Appeal proceedings alleging jurisdictional error

7. Mr Engelbrecht then made an application to the Court of Appeal alleging jurisdictional error in the way the District Court judge had construed s 17. The essential issue was whether or not s 17 required the judge hearing the appeal to have regard to the relevant transcript of the Local Court proceedings.
8. Ultimately, the Court of Appeal by a majority of McColl and Macfarlan JJA (Leeming JA dissenting) agreed that the District Court judge ought to have had regard to the relevant transcript of the Local Court proceedings (i.e. those sections that dealt with the charge that was the subject of the appeal).
9. Justice McColl contrasted section 17 and section 18 appeals under the *Crimes (Appeal and Review) Act*. Her Honour determined that section 18 requires a rehearing and therefore the appellant must determine an error at first instance. On the other hand, a section 17 appeal is a hearing 'de novo' and does not require an error at first instance. Accordingly, the District Court should have exercised its fact finding and discretionary sentencing functions afresh.

SECTION 18:

Appeals against conviction to be by way of rehearing on the evidence

- (1) *An appeal against conviction is to be by way of rehearing on the basis of evidence given in the original Local Court proceedings, except as provided by section 19.*
 - (2) *Fresh evidence may be given, but only by leave of the District Court which may be granted only if the Court is satisfied that it is in the interests of justice that the fresh evidence be given.*
 - (3) *The parties to an appeal are each entitled to be provided with one free copy of the transcripts of evidence relevant to the appeal and, if fresh evidence is given, one free copy of the transcript of the fresh evidence.*
10. The majority adopted the finding in *Charara v R* [2016] NSWCCA 244 that reasons of the Local Court Magistrate are not "evidence" in severity appeals but there is an implied direction in the legislation that an appeals court should consider the reasons in determining the appeal.

Significance of the Court of Appeal decision

11. This decision is authority for the proposition that in determining an appeal against severity of sentence, the District Court must have regard to all of the relevant evidence given in the Local Court. Arguably, Justice McColl's finding that appeals pursuant to s 17 are to be heard 'de novo' is not authority (unless it is subsequently adopted in later judgments) because the other justices did not consider this question.
12. The presenters note that a consequence of Justice McColl's approach might be that a District Court judge hearing an all-grounds appeal (on conviction and sentence) will need to apply different principles in fact-finding for each ground of appeal.
13. It is clear that where there is a dispute between the parties regarding findings of fact at first instance, the parties are open to tender the transcript of the first instance proceedings to the appeals court and insist that the court have regard to it.

BIOGRAPHY

Michal Mantaj

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Michal is a director at Conditis Lawyers, where Michal and other advocates accept instructions from other solicitors to appear in all matters including trials, in much the same way as solicitors would instruct counsel. Michal has over 15 years' experience as a criminal law practitioner. In that time, Michal has advised and represented thousands of clients charged with criminal offences spanning the whole spectrum of the criminal law, from minor traffic matters to offences attracting a maximum penalty of life imprisonment such as murder and large scale drug trafficking. He has appeared as solicitor advocate in the Local, District and Supreme Courts. Additionally, Michal is a Law Society accredited specialist in criminal law, a member of the Law Society Criminal Law Committee, a lecturer at a Traffic Offender Intervention Program and frequently presents papers at MCLE seminars.

Justin Wong

Solicitor, Streeton Lawyers - Sydney

Justin Wong is Principal Lawyer at Streeton Lawyers in Sydney, a specialist criminal law firm. He is a Law Society Accredited Specialist in Criminal Law. Prior to establishing Streeton Lawyers, Justin was a solicitor with the Commonwealth Director of Public Prosecutions, prosecuting a large number of complex federal prosecutions. After graduating in law from the University of New South Wales, Justin commenced his career at one of Sydney's largest commercial firms. He also has a degree and background in economics. Justin was named as a leading criminal lawyer in the 2016 Doyle's Guide.

BIBLIOGRAPHY

Focus Case

Engelbrecht v Director of Public Prosecutions (NSW) [2016] NSWCA 290

Benchmark Link

https://benchmarkinc.com.au/benchmark/composite/benchmark_28-10-2016_insurance_banking_construction_government.pdf

Judgment Link

<https://www.caselaw.nsw.gov.au/decision/580941b6e4b058596cba09f6>

Cases

Charara v R [2016] NSWCCA 244

Legislation

Crimes (Appeal and Review) Act 2001 (NSW)