



Précis Paper

Forensic Procedure Orders

A discussion of the recent decision of *Lewis v Sergeant Riley* [2017] NSWCA 272

Discussion Includes

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Forensic Procedure Orders

In this edition of BenchTV, Felicity Graham (Barrister, Sir Own Dixon Chambers, Sydney) and Jeremy Styles (Principal Solicitor at the Aboriginal Legal Service, Sydney) discuss the recent decision of *Lewis v Sergeant Riley* [2017] NSWCA 272 and the availability of appeal to the Supreme Court for forensic procedure orders handed down in the Local Court.

Background facts

1. Kris Lewis, the principal applicant in the Court of Appeal, had a criminal history but at the time of the appeal he had not been in trouble with the criminal law for almost 15 years. He had, at that time, been convicted and sent to jail for an assault related offence. More than a decade later he was charged with another offence and that charge was dismissed in the Local Court of NSW.
2. This meant that he fell within two of the three essential criteria for being an untested former offender under the *Crimes (Forensic Procedure) Act 2000* (NSW). The third essential criteria is that his DNA be held on a DNA database maintained by forensic and analytic services of the government laboratories.
3. This meant that Lewis was on a list of people who did not meet the criteria. Police went through this list and asked everybody whether they consented to having their DNA put onto the database.. If they declined to consent, police made an application to the Local Court under Part 7B of the *Crimes (Forensic Procedures) Act 2000* (NSW) to collect the DNA of someone who otherwise met the criteria.
4. Lewis objected to having his DNA taken because he had not been convicted of an offence for over a decade. An application was made by police to the Local Court of NSW, and ultimately a magistrate ordered his DNA to be taken.

Options for appeal

5. Lewis was interested in appealing the order of the magistrate. Up until this case, orders made by the Local Court of NSW either granting or refusing application for forensic procedure had not (to the knowledge of Graham and Styles) been the subject of review in the District Court.
6. In terms of the nature of review in the Supreme Court, there are two options:
 - 1) Judicial review by way of the Supreme Court exercising its supervisory jurisdiction of the Local Court, seeking mandamus or certiorari, or other orders by way of review from the Local Court decision.

2) Statutory appeal that is provided for under s 115A of the *Crimes (Forensic Procedures) Act 2000* (NSW).

7. Section 115A sets out a very clear avenue for appeal from the making of an order in the Local Court, for the Supreme Court to be the forum in which that appeal may be brought in two circumstances:
 - For someone who has an order made against them for forensic procedure, or
 - For the prosecutor or applicant in the Local Court if there has been a refusal to grant their application from a Magistrate.
8. The regime in the *Crimes (Forensic Procedures) Act 2000* (NSW) sets up a number of different mechanisms by which a person may give or be compelled to give forensic sample, such as DNA, fingerprints, photographs of their body, and so on. This includes by consent, by the order of a senior police officer, or the order of a magistrate.
9. Orders by senior police officers may be administratively reviewed but in Ms. Graham's experience, it is not the kind of administrative decision that falls for scrutiny. A person who is in that situation and has their DNA taken may then be the subject of litigation through the criminal courts and the decision may be reviewed in that context, or the DNA is taken, criminal proceedings are not pursued and the DNA either remains in the database or it does not, depending on the rules that apply.
10. Generally, senior police are able to make decisions as to the collection of DNA when someone has been arrested because they are suspected of being involved in a criminal offence. In order for a senior police officer to be called upon to make the decision about whether to compel someone to provide their DNA, the individual involved must be capable of providing consent.
11. In terms of the way the legislation describes it, DNA evidence is for proving or disproving the commission of an offence and attaching a particular person's identity to the commission of that offence. DNA evidence is both an important and dangerous part of the criminal justice system. It can be a powerful tool to detect and prosecute offenders for serious crimes, but it can be misused.
12. With the advent of new technology, there has been an acknowledgement that this brings new and unprecedented powers to the police and to the state. With the ongoing normalization of these technologies and sciences, the interference of the state in the citizen's rights may become normalized.

13. The *Orban v Bayliss* [2004] NSWSC 428 case was one of the first appeals that proceeded to the Supreme Court under s 115A. In this case Justice Simpson emphasised that there is an importance that the provisions are strictly adhered to.

Persuasiveness of DNA evidence

14. DNA evidence has great power in front of a jury. We know from jury studies and the way that television pervades the consciousness in terms of this type of investigative tool being used successfully to clinch the offender, that it is very powerful evidence.
15. The danger in its power is that it is not sufficiently understood. As science progresses, scientists are able to detect even more miniscule amounts of DNA, and DNA itself is a moveable object. Therefore the significance of any particular person's DNA being found in a particular location or on an article of clothing, for example, is undermined by the increasing awareness among scientists about just how moveable DNA is. If the ability to detect DNA is so great, the question arises as to how significant can it truly be that someone's DNA is found in any one spot?
16. The outcome of the *Lewis* case is that it has broad application. Despite his particular appeal relating to a back capture DNA order, it will apply to orders made against a whole range of different categories of persons: suspects, untested former offenders, children and so on.
17. This appeal came about because the second applicant had an order for forensic procedure made against him in his absence by a magistrate. The related second applicant was better known to the law, but he had other factors that meant he wanted to make an argument about the appropriateness of his DNA going on the register given his significant history with mental health issues. This led to a process of searching for an annulment application which is available to criminal defendants in Local Court proceedings where magistrates have made findings against them,
18. In the *Local Court Act 2007* (NSW), there is an annulment provision that boosts a matter from the *Local Court Act 2007* (NSW) to the *Crimes (Appeal and Review) Act 2001* (NSW). Under section 70(1)(b) and (c) of the *Local Court Act 2007* (NSW), the appeal can be made to the District Court, or to the Supreme Court.
19. Motions were then filed in the District Court for Mr. Lewis, asking the Court to find that it had jurisdiction because it was a controversial issue. Without making a declaration on the substance or the merit of District Court appeals, the District Court declined to find jurisdiction to hear the appeal. Therefore this decision was amenable by way of review to the NSW Court of Appeal.

Decision of the Court of Appeal

20. The Court of Appeal held that you can appeal to the District Court. A decision can be appealed through the apparatus of the *Crimes (Appeal and Review) Act 2001* (NSW) by virtue of s 70(1)(b) of the *Local Court Act 2007* (NSW), providing a jurisdiction to the District Court to hear such matters..
21. A conviction appealed to the District Court is a much broader appeal than an appeal to the Supreme Court. Statutory appeal to the Supreme Court applies in criminal law through the *Crimes (Appeal and Review) Act 2001* (NSW) which is transposed into operation by s 115A of the *Crimes (Forensic Procedures) Act 2000* (NSW). This applies a threshold that there needs to be a question of law, from which you have an appeal as of right, or alternatively a mixed question of law and fact which requires leave.
22. The procedural obligations on the appellant in the Supreme Court are significantly greater than the obligations on an appellant to the District Court. An appeal hearing in the District Court is a rehearing on the evidence below. The critical operation of that provision is that the transcript and the evidence in the Local Court becomes the foundational evidence in the appeal. The essential question is whether the evidence was sufficient to make out the offence, or make out the application. There is a matter of controversy about whether that requires a finding of error.
23. In *AG v DPP (NSW)* [2015] NSWCA 218 Basten JA determined that error was required, while Simpson JA held that error was not required because of the long history of reviews of those District Court appeals. The third judge held that the argument was not fit for determination in the proceedings. Regardless of whether error is required, that error is likely to be a simpler proposition to make out than it would be in the Supreme Court on a question of law appeal.
24. This case has added to the work of the District Court and has provided an appeal from forensic procedure orders of magistrates in the nature of a conviction appeal. It has broadened the jurisdiction and has made forensic procedure orders made by Courts more open to reconsideration.
25. Judicial review in the Supreme Court is more costly, takes longer to get an outcome and is a much more complicated, intensive procedure. The availability of an avenue for appeal in the District Court is much more democratic. More people will have the means both financially and in terms of getting an efficient outcome by being able to pursue the review that is available in the District Court

26. This is important as this issue relates to serious infringements upon a person's rights; their right against self-incrimination, to privacy, and so on. The State's interference in this matter impacts upon the liberty of all people when there are these serious encroachments by the state into any citizen's rights. So to the extent that the relationship between the state and the citizen can be scrutinized through another avenue of appeal which is much more accessible to people, is a good thing.
27. Police need to not only take their own steps to exercise their powers responsibly, but they also need to be open to scrutiny.

Argument of police

28. In this case, the police's argument was that the appeal that existed under s 115A of the *Crimes (Forensic Procedures) Act 2000* (NSW) operated by way of statutory interpretation to trump any other kind of appeal by way of statute. They argued that s 115A excluded the possibility of a District Court appeal pursuant to s 70(1)(b) of the *Local Court Act 2007* (NSW), in conjunction with the *Crimes (Appeal and Review) Act 2001* (NSW).
29. The three pieces of legislation work together in this way where one might create an appeal but borrows the structure from another appellate regime in order to give effect to that jurisdiction and the procedure that applies.
30. The rule provided for in *Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trade Union of Australia* (1932) 47 CLR 1; [1932] HCA 9 was not properly engaged in the current case because there were two sets of legislative provisions in relation to possible appeal avenues. They operated in different ways and set up different structures or different forums in which an appeal could be brought.
31. Section 115A is a permissive provision which provides certain avenues for appeal, but so too does the *Local Court Act 2007* (NSW) in section 70. Justice Fagan undertook an analysis of the statutory history in the matter at length, and came to the same view that the *Anthony Hordern* case did not apply.
32. There are a number of different tests that apply depending on whether you are a suspect, or an untested former offender, or fall into one of the other categories. Generally speaking at the end of any decision making process there is a question to be asked as to whether an order is justified in all of the circumstances. It is a discretionary decision that is to be made based on the evidence brought before the Local Court.

33. In this case the relevant provision was s 75L of the *Crimes (Forensic Procedures) Act 2000* (NSW) which is the order provision within Part 7B for back capture. However there are other provisions throughout the Act that invest in the discretion at the end of the process in terms of making an order. For example, in relation to suspects there is quite a prescriptive list of factors that the Court must take into account in terms of whether an order should be made or not.

Impact of this decision

34. This case underscores the importance of running these matters at first instance with a mind to that review or appeal being available. It is a good idea to look ahead when preparing and appearing in the Local Court so that all of the evidence you need to adduce is adduced, and is then available on the transcript when/if it comes to a de novo hearing.
35. If you are someone who has been subjected to a forensic procedure order in the Local Court then you now have an easy, straightforward appeal to the District Court. Unless there is some other justification to prefer an appeal to the Supreme Court with all of their cost, time and complexity, then the District Court is likely to be the avenue that would be worthwhile exploring.
36. Inevitably moving forward there will be more appeals of this nature. It is an area of criminal investigation and decision making in the law courts that should be subject to scrutiny and inevitably it will be. It may have a positive impact upon the way that police run these applications at first instance because of course they will be aware that there is this level of scrutiny that is available to respondents in the Local Court.
37. There may be increased flow of appeals, but this may then send the message to the police about how they run these matters at first instance. They must also think about the evidence that they need to bring to bear, or whether it is appropriate for them to bring an application at all.
38. Graham and Styles suggest that anyone who is in a situation where they are asked by a police officer to provide their consent to a forensic procedure should refuse consent. There are other avenues for the police to obtain consent, but only if it is appropriate for them to do so.
39. This is an area where the Aboriginal Legal Service has been very successful in protecting the rights of Aboriginal persons at police stations because of the availability of the 24 telephone system. If you are not in a situation where you have ready access to a lawyer over the phone through a legislative regime, you should still exercise your rights to seek the assistance of a lawyer.

BIOGRAPHY

Felicity Graham

Barrister, Sir Owen Dixon Chambers, Sydney

Felicity was admitted as a lawyer in 2008 and called to the Bar in 2015. She has extensive experience appearing across NSW in criminal matters in the summary jurisdiction and on indictment. Most recently Felicity was Principal Legal Officer and Trial Advocate at the Aboriginal

Legal Service (ACT/NSW) Ltd in the Western region. Before her admission as a solicitor, Felicity worked as tipstaff to his Honour Justice Graham Barr in the Supreme Court of New South Wales.

Jeremy Styles

Principal Solicitor at the Aboriginal Legal Service, Sydney

Jeremy Styles is the Criminal Practice Principal Solicitor for the Aboriginal Legal Service (NSW/ACT) Limited. He has represented clients facing charges from offensive language to murder. As a solicitor advocate he has run jury trials and appeals to the Supreme Court, along with innumerable contested matters in Local Courts. Prior to his current role, Jeremy was Tipstaff to the Hon. John Dowd AO QC (then Supreme Court Justice); and former secretary of the NSW Council for Civil Liberties. Furthermore, Jeremy is a member of the Criminal Law and Ethics Committee of the Law Society.

BIBLIOGRAPHY

Focus Case

Lewis v Sergeant Riley [2017] NSWCA 272

Benchmark Link

[*Lewis v Sergeant Riley* \[2017\] NSWCA 272](#)

Judgment Link

[*Lewis v Sergeant Riley* \[2017\] NSWCA 272](#)

Cases

Orban v Bayliss [2004] NSWSC 428

AG v DPP (NSW) [2015] NSWCA 218

Anthony Hordern & Sons Ltd v Amalgamated Clothing and Allied Trade Union of Australia (1932) 47

CLR 1; [1932] HCA 9

Legislation

Crimes (Forensic Procedures) Act 2000 (NSW), Part 7B, s 115A, s 75L

Evidence Act 1995 (NSW) s 138

Local Court Act 2007 (NSW), ss 70(1)(a), ss 70(1)(b), ss 70(1)(c), s 4

Crimes (Appeal and Review) Act 2001 (NSW)