A guide to criminal appeals in New South Wales

By Wendy Abraham QC

Criminal appeals are a creature of statute.[1] Accordingly, an assessment of whether there is a basis to appeal is determined by the terms of the relevant legislation.

Clearly this topic is far too broad to be addressed fully in a paper of this nature, and consequently it provides no more than a brief overview relating to appeals in indictable matters. The provisions referred to herein apply to state offences and, by virtue of s 68 (1) of the *Judiciary Act 1903*, to Commonwealth offences (unless otherwise indicated).

Appeals lie to the Court of Criminal Appeal pursuant to the *Criminal Appeal Act 1912* (the *Act*)[2] (and the Rules), and in some circumstances, pursuant to the *Crimes (Appeal and Review) Act 2001.* There are four principal circumstances in which an appeal may be instituted:

- either party may appeal against an interlocutory judgment or order;[3]
- the Crown may appeal against a verdict of acquittal in limited circumstances;[4]
- a convicted person may appeal against that conviction on a question of law alone[5] or with leave of the court (or a certificate from the trial judge) on questions of fact, mixed fact and law or any other ground that is considered sufficient by the court;[6]
- either party[7] can appeal against any sentence passed.

The Court of Criminal Appeal is a court of error; in order to succeed, the moving party must establish error, and an adverse consequence thereof.

Importantly, an appeal is not an avenue to simply re-argue the case rejected below, or to argue the case again on a different basis.[8] As the court recently emphasised:

> The Criminal Appeal Act 1912 does not exist to enable an accused who has been convicted on the basis of one set of issues to have a new trial under a new set of issues which he could and should have raised at the first trial ...This ground, and a number of other grounds relied upon ... have the flavour of an 'armchair appeal', where counsel not involved in the trial has gone through the record of the trial in minute detail looking for error or possible arguments without reference to the manner in which the trial was conducted. (citations omitted)[9]

The CCA has never regarded itself as bound by its previous decisions, although it only departs from previous decisions with caution and only if it is satisfied that justice requires it to do so. Unlike the Court of Appeal, it does not require a grant of leave before an earlier decision is re-examined.[10] Ordinarily the court comprises three judges[11] however, as a matter of practice when it is to be argued that a previous decision ought to be overturned often a bench of five is convened.[12]

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It is also worth noting in relation to Commonwealth offences that, when construing and applying Commonwealth legislation, appellate courts apply a rule of comity with respect to decisions of intermediate appellate courts of other states dealing with the same legislation unless the reasoning is plainly incorrect.[13]

In practical terms an offender has 28 days in which to file a notice of intention to appeal which then allows six months in which to file the appeal grounds and the written submission in support of those grounds. An extension of time can be granted.[14] The written submission is of particular importance in this jurisdiction as the CCA will typically list three to four appeals for hearing on the one day.[15]

Bearing those general principles in mind the following addresses the four situations referred to above.

Interlocutory appeals – s 5F *Criminal Appeal Act* 1912

Essential to an appeal pursuant to s 5F of the *Act* is the existence of an 'interlocutory judgment or order,' a term not defined in the *Act*. Interlocutory orders by their very nature are designed to facilitate final judgments.[16] The issue is whether there is a final determination of the rights of the parties. The court looks at the 'character and effect' of the decision.[17]

For an appeal by an accused, rulings on the admissibility of evidence do not constitute judgments or orders,[18]

although if the argument involves a constitutional issue that may 'transform its nature' into a judgment or order for the purposes of the provision.[19]

However the Crown may appeal against a ruling on admissibility if the decision 'eliminates or substantially weakens the prosecution's case.'[20] Whether the impugned decision or ruling has that effect raises a jurisdictional issue.[21] The court must assess the Crown case in order to determine whether or not the excluded evidence substantially weakens it.[22] The Crown bears the onus of satisfying the court that this is the effect (or the accumulated effect)[23] of the impugned decision(s) or ruling(s).[24] A case which is otherwise likely, even very likely, to succeed, may still be substantially weakened if evidence of cogency or force is withheld.[25]

Appellate courts are always reluctant to fragment the criminal trial process and as such leave is only granted infrequently.[26] It is generally considered that, once commenced, criminal proceedings should be allowed to follow their ordinary course.[27] Against that background leave will only be granted where the decision the subject of the challenge is attended with sufficient doubt as to warrant consideration at that stage or where the interests of justice otherwise require it.[28] In practical terms, in an appropriate case, leave is more likely to be granted to the Crown (as it has no right of appeal against an acquittal by the jury). Of course if leave is refused to an accused his/her appellate rights are preserved and if convicted an appeal can then be instituted.

Accordingly interlocutory appeals are ideally suited to issues which go to the heart of the proceedings (for example an argument as to the validity of the indictment). If such an appeal is instituted, counsel must be prepared to argue its merit within days of its filing as the trial below is not necessarily adjourned to enable an appeal to be heard, particularly if a jury has been empanelled.

An appeal against an acquittal – s 107 *Crimes (Appeal and Review) Act 2001*

Since December 2006, an appeal by the attorney general or director of public prosecution against, *inter alia*, an acquittal of a person 'by a jury at the direction of the trial judge' or an acquittal from a trial without a jury is available, but only on a ground which involves a question of law alone.[29] That first aspect, directed acquittals, applies to both state and Commonwealth offences.[30] However, as s 80 of the *Constitution* requires trial by jury for Commonwealth offences, the second aspect does not arise in federal prosecutions.

The concept of 'a question of law alone' is referred to below in relation to a different provision, but generally is a question that can be answered without reference to the facts.[31]

The court may either confirm or quash the acquittal; it cannot proceed to convict. [32] It has a discretion whether to order a retrial, although it should not do so if a retrial would render a verdict of guilty unsafe and liable to be overturned on appeal.[33]

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Enacted at the same time was a provision which abolished double jeopardy in limited circumstances (so as to allow a retrial after a person has been acquitted).[34] This provision is yet to be used here, although a similar provision in the UK has recently been applied which has resulted in the court overturning an acquittal for murder and ordering a re-trial.[35]

Appeal against a conviction – s 5(1)(a) and (b), s 6(1) and (2) Criminal Appeal Act 1912

While an appeal against a conviction typically occurs where an accused has been found guilty after a trial, in very limited circumstances there can be an appeal against a conviction which resulted from a guilty plea.[36]

There are two practical considerations in instituting an appeal. First, s 5(1) of the Act requires an applicant to obtain leave to appeal against his conviction unless the ground(s) of appeal involves 'a question of law alone.' Unlike some other jurisdictions the issue of obtaining leave is addressed during the hearing of the appeal rather than in a separate process.[37] The necessity to address the issue has been the subject of remarks by the court in circumstances where there has been a failure to do so.[38] The court considers that the requirement for leave should not be treated as a mere formality.

Secondly, Rule 4 of the *Criminal Appeal Rules* requires the grant of leave where the ground of appeal complains about a direction or the admissibility of evidence where no objection was taken below. The Rule does not constitute 'some mere technicality which may simply be brushed aside'. The failure to take a point at trial, including seeking a direction, will often indicate that the point was not considered to have been important in the circumstances of the trial. Unless there is a convincing reason why the matter was not raised at trial, and unless there is a possibility of a real injustice, the court considers that an accused should be held to what was done at trial.[39]

Section 6 of the *Act* involves a two stage process. The appellant must establish one of three circumstances:

(i) the verdict was unreasonable or cannot be supported
(ii) by the evidence (in which case a verdict of acquittal is entered); or

(iii) there was a wrong decision on a question of law; or

(iv) there was, for any other reason, a miscarriage of justice.

An appeal is ordinarily decided on the evidence before the trial court although there is some scope in limited circumstances for 'fresh evidence' to be adduced in the CCA.

If either (ii) or (iii) is established, the issue of the proviso arises: the court may dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred.

As to the first limb of s 6, the principles are well established. The appellate court must conduct its own independent examination of the evidence to determine if it was open to the jury/judge to convict,[40] paying due regard to the advantage the jury had in seeing and hearing the witnesses. On all arguments alleging error, but on this limb in particular, it is important to remember as the High Court in *Hillier v The Queen* stated, 'neither at trial nor on appeal, is a circumstantial case to be considered piecemeal.'[41]

Of course, as to the second limb, a wrong decision on a question of law can only arise where there has been a decision; if there has been no ruling or decision below there may be no 'wrong decision' and this aspect would not apply. In those circumstances reliance is often placed on establishing the third limb.

While many fall within the third limb, establishing an error or irregularity is not sufficient: it must constitute a miscarriage of justice.[42] This limb encompasses a wide variety of errors and irregularities.[43]

Section 6 of the Act is the 'common form' appeal provision reflected in the corresponding legislation of each State. Not surprisingly its application has been the subject of many judicial pronouncements, in recent years most particularly as to when and how the proviso is to be applied. It is for the Crown to establish that the proviso ought to be applied. In *Weiss v The Queen*[44] (and a number of cases thereafter)[45] the High Court has emphasised that it is the statutory language which is to be applied; the question is whether the Court considers 'no substantial miscarriage of justice has actually occurred'.[46] That necessarily involves a consideration of the nature of the error in the context of the trial and the possible effect it may have had on the outcome. That includes the terms of the direction, the evidence and the issues at trial.[47] *Weiss* identified that a necessary, although not necessarily sufficient step to the application of the proviso, is for the appellate court to undertake its own independent assessment of the evidence on the whole of the record, making due allowance for the natural limitations that exist in proceeding in that manner, to determine whether the appellant was proved to be guilty of the offence beyond reasonable doubt.[48] It follows that one circumstance where the proviso may not be engaged is if the appellate court is not so satisfied.[49] There may be some errors or irregularities which, by their very nature would render the proviso inapplicable, regardless of the strength of the evidence or whether an appellate court concluded that the appellant had been proved guilty beyond a reasonable doubt.[50]

An appeal is ordinarily decided on the evidence before the trial court although there is some scope in limited circumstances for 'fresh evidence' to be adduced in the CCA.[51] The circumstances are summarised in *R v Abou-Chabake*[52]. Where an acquittal is sought and the further evidence is of such cogency that innocence is shown to the court's satisfaction, or the court entertains a reasonable doubt as to guilt,

the guilty verdict will be quashed and the Appellant discharged regardless of whether the evidence is fresh. However, where a new trial is sought, that outcome will only be achieved where the evidence is fresh, credible and, in the context of the evidence given at trial, it is likely to have caused the jury to have entertained a reasonable doubt about the guilt of the accused or, put another way, there is a significant possibility that the jury acting reasonably would have acquitted the accused.[53]

However, it is insufficient to establish simply that counsel was not aware of it below, there may be an issue of whether with due diligence the evidence ought to have been known. Issues to be addressed are how the information could have been used and what, if any, effect would it have had on the verdict.

An application for special leave is significantly different from and more difficult to obtain than what is ordinarily required to obtain leave to appeal to a state appeal court. The application must have a 'special feature'. The High Court is not a Court of Criminal Appeal.

Appeal against sentence – s 5(1)(c), s5D, s 6(3) *Criminal Appeal Act* **1912**

As with an appeal against conviction, in relation to an appeal against sentence it is also insufficient to merely establish error, as the court will nonetheless dismiss the appeal if it is of the opinion that no lesser sentence is warranted,[54] or on a Crown appeal exercise its discretion not to intervene.[55]

Probably the most frequently alleged ground on an offender's appeal is that the sentence is manifestly excessive, although this will only succeed if on the facts and applying correct legal principles, it was not open to the sentencing judge to impose the sentence pronounced. The appellate court is not considering what sentence it would have imposed. However, if a discrete error is established, the court will decide whether no lesser sentence is warranted, which is clearly a different task to manifest excess. On this latter aspect the court can take into account evidence as at the date of the hearing of the appeal, and can therefore take into account events that have occurred since sentence was imposed. The resentencing is to occur by reference to the relevant legal principles and facts as they exist at the time of resentencing.[56]

There have always been particular considerations relevant to Crown appeals against sentence which reflect the role of the Crown; it is only where there is a specific error which ought to be corrected which may include that the sentence imposed is manifestly inadequate so much so that the court intervenes to maintain standards of punishment appropriate for the offending. Of significance is that in recent times the concept of double jeopardy as it applied to Crown appeals has been abolished,[57] although there still exists a discretion in the court to refuse to intervene even if error (including inadequacy) is established.[58]

Conclusion

There is only *one* opportunity to appeal against a conviction or sentence: if the appeal is refused a further application cannot be made at a later stage. The CCA has no power to reopen an appeal once judgment had been delivered and the orders perfected.[59] However amendments to the *Criminal Appeal Rules* now permit the court on an application or on its own motion to set aside or vary an order within 14 days as if the order had not been entered.[60] It follows that if, upon receiving judgment, it is apparent there is an error, steps must be taken immediately to address it.

Unless there are grounds to seek special leave to the High Court from the judgment, there is no other avenue to pursue. Although there is a right to apply for special leave, that application of itself is not an appeal.

The criteria on which the High Court grants special leave are set out in s 35A of the *Judiciary Act 1903*, which specifies that in considering an application for special leave the Court may have regard to any matters it considers relevant but *shall have regard* to whether the application relates to a question of law 'that is of public importance, whether because of its general application or otherwise', or whether the Court is required 'to resolve differences of opinion between different courts' and 'the interests of the administration of justice, either generally or in a particular case, require

consideration by the High Court of the judgment to which the application relates*'.*

It follows that simply a complaint about a factual finding in an individual case or that a sentence imposed is excessive[61] will not be sufficient. An application for special leave is significantly different from and more difficult to obtain than what is ordinarily required to obtain leave to appeal to a state appeal court.[62] The application must have a 'special feature'.[63] The High Court is not a Court of Criminal Appeal.[64]

The High Court has repeatedly emphasised its reluctance to grant leave on applications from interlocutory judgments even if the application raises important questions for consideration.[65] There must be some exceptional or special circumstances.[66] It is to be noted that the court has no authority to receive evidence which was not before the court below[67]. Rather, as a court of error, it determines whether there was error on the part of the court below, considering the material which was before that court.

If 'new' grounds come to light after an appeal the only avenue of redress is to seek a reference to the CCA or an inquiry pursuant to the *Crimes (Appeal and Review) Act 2001*.[68]

Endnotes

1. *Grierson v The King* (1938) 60 CLR 431 at 436; *Commissioner for Railways NSW v Cavanough* (1935) 53 CLR 220 at 225; *Gipp v The Queen* (1998) 194 CLR 106 at [117]; *Byrnes v The Queen* (1999) 199 CLR 1 at [84]
2. For a history of the criminal appeal process see *Conway v The Queen* (2002) 209 CLR 203; *Weiss v The Queen* (2005) 224 CLR 300
3. S 5F *Criminal Appeal Act* 1912
4. *Crimes (Appeal and Review) At 2001* s 107
5. S 5(1)(a) *Criminal Appeal Act* 1912
6. S 5(1)(b) *Criminal Appeal Act* 1912
7. Crown: s5, s5DA; accused S 5(1)(c) *Criminal Appeal Act* 1912
8. And see: *Gately v The Queen* (2007) 232 CLR 208 at [77]; *Crampton v The Queen* (2000) 206 CLR 161 at [14] – [20][156] – 163]; *Heron v The Queen* (2003) 77 ALJR 908 at [5][10][60]
9. *Darwiche v R* [2011] NSWCCA 62 at [170] and see: *R v Abusafiah* (1991) 24 NSWLR 531 at 536; *R v Fuge* (2001) 123 A Crim R 310 at [40] – [45]; *Ilioski v R* [2006] NSWCCA 164 at [155]
10. *R v Mai* (1992) 26 NSWLR 371
11. Although it can be comprised of two judges for an appeal against sentence: s 6AA *Criminal Appeal Act* 1912
12. For example: *Onuorah v R* (2009) 76 NSWLR 1; *Swansson v R* (2007) 69 NSWLR 406
13. *R v Parsons* [1983] 2 VR 499 at 506; *Australian Securities Commission v Marlborough* (1993) 177 CLR 485; *R v Gent* (2005) 162 A Crim R 29 at [29]
14. s 10 *Criminal Appeal Act* 1912. If the offender fails to file a notice of appeal or application to appeal within the 6 months the notice of intent will lapse. An application to the Court for an extension of time would be required: see *R v Lawrence* (1980) 1 NSWLR 122 at 148 in relation to the principles to be applied in determining the application. Where there is any considerable delay exceptional circumstances will be required. And see *R v Gregory* [2002] NSWCCA 199 at [41]
15. The requirements for written submissions see: Practice Note SC CCA 1 at [19]; the submission shall contain a brief statement in narrative form of the Crown case and the case raised for the Appellant, the terms of the appeal grounds should be set out in full, pages references to transcript relating to any evidence referred to, appropriate citations of authorities relied upon.
16. *R v Saunders* (1994) 72 A Crim R 347
17. *R v OM* [2011] NSWCCA 109; *R v Cheng* (1999) 48 NSWLR 616 at [9] – [14]; *Dao v R* [2011] NSWCCA 63
18. *Cheikho v R* (2008) 75 NSWLR 323; *R v Steffan* (1993) 30 NSWLR 633 at 636 – 639; *R v Bozatsis* (1997) 97 A Crim R 296 at [10][17]
19. *Cheikho v R* (supra) at [25] – [33]
20. S 5F(3A) *Criminal Appeal Act* 1912
21. *R v Shamouil* (2006) 66 NSWLR 228 at [27]
22. *R v Shamouil* (supra) at [29]
23. *R v Nguyen* [2010] NSWCCA 97
24. *R v Shamouil* (supra) at [30]
25. *R v Shamouil* (supra) at [37]
26. *Gedeon v Commissioner of the NSW Crime Commission* (2008) 236 CLR 120 at [23] and see *R v Steffan* (1993) 30 NSWLR 633 at 644 - 645; *R v Einfeld* (2008) 71 NSWLR 31 at [23] – [25]
27. *Rozenes v Beljajev* (1995) 1 VR 533 at 571 Special leave to appeal to the High Court from this judgment was refused. And see: *Sankey v Whitlam* (1978) 142 CLR 1 at 24-25; *R v Iorlano* (1983) 151 CLR 678 at 680; *Yates v Wilson* (1989) 168 CLR 338 at 339 and see *Agius v R, Abibadra v R, Jandagi v R, Zerafa* [2011] NSWCCA 119 at [10]; *R v Einfeld* (supra); *Cheikho v R* (2008) 75 NSWLR 323 at [172] – [174]
28. *Agius v R, Abibadra v R, Jandagi v R, Zerafa v R* (supra) at [10]; *R v Dinh* (2000) 120 A Crim R 42 at [34]; *R v Steffan* (supra) at 644 - 645
29. S 107 (2) *Crimes (Appeal and Review) Act* 2001
30. *R v LK* (2010) 241 CLR 177
31. For discussions as to what amounts to a question of law alone see: *Rasic v R* [2009] NSWCCA 202 at [12]; *Williams v The Queen* (1986) 161 CLR 278; *R v Bunting and Wagner* (2005) 92 SASR 215 at [171] (the Court of Criminal Appeal adopted the reasons in this regard of Perry J: *R v Bunting and Wagner* (2004) 92 SASR 146 at [671] – [698]); *R v Vaughan* (2009) 105 SASR 532 at [29]-[30]
32. S 107 (7)
33. *R v PL* (2009) 261 ALR 365
34. Section 99 - 100, An application can be made to the Court of Criminal Appeal for an order for a retrial, in relation to an offence where the maximum penalty is life imprisonment on the basis of '*fresh and compelling evidence*,' or if the maximum penalty is 15 years or more on the basis that the acquittal was '*tainted*.' An order can be made if either of those two circumstances are established and it is in the interests of justice that the order be made.
35. *R v Dobson* [2011] EWCA Crim 1256
36. *Elmir v R* (2009) 193 A Crim R 87
37. For example South Australia and Victoria
38. *Rasic v R* (supra) ; *Carlton v R* [2008] NSWCCA 244 at [10] – [12]; *Krishna v DPP* (2007) 178 A Crim R 220
39. *R v Tripodina* (1988) 35 A Crim R 183

40. *M v The Queen* (1994) 181 CLR 487 at 493 – 494 and see *Nguyen v The Queen* (2010) 85 ALJR 8
41. (2007) 228 CLR 618 at [48]
42. For example: *Nudd v The Queen* (2006) 80 ALJR 614 at [24][25]; *Cesan v The Queen* (2009) 236 CLR 358 at [81] – [89], [112] – [122]
43. Cases which have fallen within (or it was argued they fell within) that category include errors in procedure (for example empanelling the jury, the validity of the indictment), the conduct of counsel (for example incompetent or breach of Crown duties by a prosecutor), the conduct of the trial judge (for example sleeping), the conduct of the jury (for example accessing the internet etc), admissibility of evidence, directions to the jury in summing up.
44. (2005) 224 CLR 300
45. For example: *Cesan v The Queen* (supra); *Gassy v The Queen* (2008) 236 CLR 293; *Nudd v The Queen* (supra); *Darkan v The Queen* (2007) 227 CLR 373
46. *Weiss v The Queen* (supra) at [31] – [35][42]; *Cesan v The Queen* (supra) at [123]; *Gassy v The Queen* (supra) at [34]
47. *Gassy v The Queen* (supra) at [34]; *AK v Western Australia* (2008) 232 CLR 438 at [52] – [55]; *Glennon v The Queen* (1994) 179 CLR 1 at 8
48. *Weiss v The Queen* (supra) at [41] – [44][46]; *Cesan v The Queen* (supra) at [124]; *AK v Western Australia* (supra) at [53] – [55]; *Gassy v The Queen* (supra) at [18]
49. *Weiss v The Queen* (supra) at [46]; *Gassy v The Queen* (supra) at [18]
50. *Weiss v The Queen* (supra) at [45]; *Darkan v The Queen* (supra) at [94]); *Nudd v The Queen* (supra) at [6][7] (for example if there is a failure of process or departures from the requirements of a fair trial or a failure to observe the conditions of a fair trial); *Gassy v The Queen* (supra) at [18][33] For example; *AK v Western Australia* (supra) (this Court concluded that the failure to comply with s 120 (2) of the *Criminal Procedure Act* which required a reasoned decision, but no reasons were given in relation to a central issue, it could not be said that there was no substantial miscarriage of justice: at [59])
51. S 12 *Criminal Appeal Act* 1912
52. (2004) 149 A Crim R 417 at [63] Kirby J with whom Mason P and Levine J agreed
53. For example see: *Mickelberg v The Queen* (1989) 167 CLR 259; *Mallard v The Queen* (2005) 224 CLR 125
54. s 6(3) *Criminal Appeal Act* 1912
55. s 5D(1) *Criminal Appeal Act* 1912
56. *Baxter v R* (2001) 173 A Crim R 284; *R v Simpson* (2006) 53 NSWLR 704
57. S 68A *Crimes (Appeal and Review) Act* 2001; *R v JW* (2010) 199 A Crim R 486; *R v Carroll* (2010) 200 A Crim R 284
58. *R v JW* (supra) at [141]
59. *Burrell v The Queen* (2008) 238 CLR 218
60. *Criminal Appeal Rules* R50C and see: *R v Green and Quinn* [2011] NSWCCA 71
61. *Radenkovic v R* (1990) 170 CLR 623
62. *Morris v R* (1987) 163 CLR 454 at 475
63. *Morris v The Queen* (supra)
64. *Liberato v The Queen* (1985) 159 CLR 507; *Warner v The Queen* (1995) 69 ALJR 557
65. *R v Elliott* (1996) 185 CLR 250 at 257 for a recent application see: *Abibadra v The Queen*, *Jandagi v The Queen, Zerafa v The Queen, Aguis v The Queen* [2011] HCA Trans 171
66. *Rozenes v Beljajev* (1995) 1 VR 533 at 571 Special leave to appeal to the High Court from this judgment was refused. And see: *Sankey v Whitlam* (1978) 142 CLR 1 at 24-25; *R v Iorlano* (1983) 151 CLR 678 at 680; *Yates v Wilson* (1989) 168 CLR 338 at 339; *Gedeon v The Commissioner of the NSW Crime Commission* (2008) 236 CLR 249 at [23] – [25] This exception may apply in cases brought at an early point of time involving questions of law that emerge from undisputed facts: *Chief Executive Officer of Customs v Jiang* (2001) 111 FCR 395 at [12]
67. *Eastman v The Queen* (2000) 203 CLR 1 at [9], [18],[69],[111],[184],[290]; *Mickelberg v The Queen* (supra)
68. For example: *Kearns v R* [2011] NSWCCA 103; *GAR v R* [2010] NSWCCA 163; *R v JJT* (2006) 67 NSWLR 152; *Mallard v The Queen* (supra)