BAR ASSOCIATION QUEENSLAND ANNUAL CONFERENCE – 7 MARCH 2015

SHERATON MIRAGE, GOLD COAST

MASTER CLASS 2 – CRIMINAL LAW

"MAKING YOUR APPEALS MORE APPEALING"

The Honourable Justice Margaret McMurdo AC

President, Court of Appeal*

Thank you for giving up your Saturday afternoon to participate in this master class. We could be out surfing, having an afternoon kip, playing with the kids, walking the dog on the beach or sipping an exotic cocktail in the bar as we watch the waves. But those things are not nearly as appealing! And nor do they give us CPD points! A preliminary caveat: my remarks deal with appeals in the Court of Appeal and not appeals to the District Court.

As in the *Sound of Music,* I propose to start at the very beginning, a very good place to start, with the institution of the appeal and some preliminary matters. I will then briefly discuss applications to adduce evidence, followed by the written outline and finally oral submissions. I will pause between each of the four sections for discussion and observations. I expect this master class to be interactive. I anticipate you will learn from each other more than from me. And I genuinely invite your suggestions as to how the Court of Appeal registry and the judges of appeal can do things better.

Instituting the Appeal and Some Preliminary Matters

Make sure your appeal is filed within time. If you have not brought your appeal or application for leave to appeal within the statutory time limit, you must apply for an extension of time. You will need to file and serve supporting affidavits and submissions, explaining why the appeal is out of time and why the Court should extend time. Most commonly, this will be because there are promising prospects of success on appeal so that the interests of justice warrant the granting of the extension.[1] But remember, it is much easier and less expensive to file your originating process within time in the first place.

* I gratefully acknowledge the assistance of my Associate, Anne Crittall LLB (Hons) for her research and editing assistance and my Executive Assistant, Kelly Morseu, for her typing and editing assistance.

Most appeals to the Queensland Court of Appeal against conviction or applications for leave to appeal against sentence must be lodged within one calendar month of the conviction or the sentence appealed against.[2] If your client has been convicted but the sentence adjourned, the time for appealing against conviction runs from the date of the jury verdict, not sentence.

You may be surprised to know that, strictly, under s 668D (1)(b) *Criminal Code* 1899 (Qld), you need leave to appeal against conviction on a ground of appeal which involves a question of fact alone or a question of mixed fact or law. But long before the Court of Appeal was established, the practice developed to treat applications for leave to appeal against conviction as appeals against conviction. The form 26, "Notice of Appeal or Application for Leave to Appeal Against Conviction or Sentence (for appeals other than under the *District Court Act* 1967, s 118)", provides for this. It does not require any distinction to be made between an application for leave to appeal against conviction and an appeal against conviction. It is rare for the question of leave to appeal against conviction to be raised in the Court of Appeal.[3] Despite the terms of s 668D (1)(b), for the moment you can safely proceed on the basis that you have a right to appeal against conviction.

Although an appeal against sentence is only by way of leave, the Court of Appeal generally hears and determines the arguments as to the merits of the appeal against sentence in deciding whether to grant the application for leave to appeal.

Appeals to the Court of Appeal under s 118(3) *District Court Act* 1967 (Qld) from a District Court Judge's decision under s 222 *Justices Act* 1886 (Qld) on appeals from criminal matters in the Magistrates Court are by way of leave. These applications for leave must be filed within 28 days.[4] In these applications, too, the Court of Appeal usually hears the merits of the proposed appeal when determining the leave application.

If you contend that the question of leave only should be determined as a preliminary question before the appeal hearing, apply to the registry and inform the other parties as soon as possible and ascertain their attitudes.

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[1] Practice Direction 3 of 2013, para 3 and 7.
[2] *Criminal Code* 1899 (Qld) s 671.
[3] *R v NM* [2012] QCA 173 Holmes JA [2] - [6], Martin J agreeing.
[4] *Uniform civil Procedure Rules* 1999 (Qld) (UCPR) Rule 748.

As you prepare your appeal for filing, consider if you wish it to be conducted electronically. If so, apply to the registry so that the Court can determine your application.[5] Usually, electronic appeals follow when the trial was conducted electronically. You should also inform the registry:

- if a child is a party (the appeal will be expedited);
- whether there are other pending appeals involving similar legal issues;
- whether the appeal is from an interlocutory or non-final order;
- if you consider the appeal should be expedited (for example, your client is serving a short sentence);
- if you are contending that a previous decision of the Court should not be followed;
- if the appeal raises a particularly important issue of law, identifying that issue (if the Court agrees, three judges of appeal will be listed);
- if the Court determining the appeal should be constituted by five judges and your reasons for this; or
- if any judge of appeal or trial division judge other than the judge whose order is the subject of appeal, has made adverse findings as to the credit of a party or for any other proper reason cannot hear the appeal (this avoids later listing issues).[6]

The originating process for appeals against conviction, form 26, directs you to set out, briefly and precisely the grounds or reasons why you say your conviction should be quashed or your sentence reduced. Your grounds of appeal are your first opportunity for advocacy. They are probably the first thing the judges of appeal will look at.

Ideally the grounds of appeal, the written outline of argument and the oral argument will operate harmoniously and seamlessly. But in reality, grounds of appeal in criminal matters are usually drafted by the lawyers at first instance, who are seldom briefed or funded to run the appeal. Applications for legal aid are not considered until well after a notice of appeal has been lodged and the appeal record book prepared. Commonly, grounds of appeal are amended or completely reworked on or close to the hearing. Remember leave is needed to amend your grounds and you should file a proposed amended notice of appeal. Amendments may be unavoidable but they are unfortunate if they result in an adjournment or in the other party filing written submissions after the hearing.

[5] Practice Direction 3 of 2013, para 7.
[6] Above, para 8.

The grounds of appeal should not be an outline of argument. Confine them to the fundamental issues which you will argue in your written outline and in your oral submissions. Effective grounds of appeal will clearly and succinctly articulate your complaint. Despite constant judicial pleas, the most common ground of appeal against conviction remains that it is "unsafe and unsatisfactory". These are weasel words; unrelated to the terms of the appropriate legislative provision, s 668E (1) *Criminal Code,* which require a consideration of whether the guilty verdict is "unreasonable and cannot be supported having regard to the evidence." Without more, this ground of appeal requires the judges to review all the evidence and determine whether it was open to the jury to be satisfied beyond reasonable doubt of the appellant's guilt. For busy appellate judges, this can be an herculean task especially where the trial was lengthy. If you are not relying on this ground, abandon it. If you are, succinctly set out the particulars which you contend support it.

If your client is alleging in a ground of appeal that trial counsel was incompetent or not acting on instructions, ensure that you prepare, file and serve the necessary affidavit material from your client and any other relevant witnesses well before the hearing to avoid an adjournment and to allow the respondent time to deal with the issue. Inform the registry well before the hearing if you wish to cross-examine a witness.

If the appeal is from a discretionary exercise, you have the difficult task of persuading the Court to find error in the *House v The King*[7] sense. Make sure your grounds clearly articulate the error of law or fact. If the complaint is manifest excess, that is the ground of appeal, not that the judge gave insufficient or too much weight to one factor or another.

If your client is in custody, do not tick the box on the form 26 that he or she wishes to be present at the appeal unless you have those instructions. It can be an unwelcome and uncomfortable interruption to their prison routine. If they do wish to appear as the hearing date approaches, you can apply to the registry.

Liaise with the registry staff at an early time as to hearing dates. They will try to accommodate you but in the end they must list efficiently and ordinarily their decision is final.[8]

[7] (1936) 55 CLR 499, 507.
[8] Above, para 9.

In criminal matters the appeal record book is ordinarily prepared by the registry in hard copy.[9] A useful searchable electronic appeal record book in pdf format is also prepared. Appeal record books are costly to produce and bulky to archive after the hearing. The Court encourages parties to only include relevant material. But do be sure to include all relevant material. If the appeal ground turns on a pre-trial hearing or on the evidence of children or special witnesses given under s 93A *Evidence Act* 1977 (Qld), or pre-recorded under s 21A *Evidence Act,* or on counsel's addresses, ensure that that material is included. Additional bundles or supplementary record books cause confusion, take time to prepare and are an unnecessary cost.

Ordinarily, few barristers would choose to forego an oral hearing conducted in the actual presence of the appeal judges. But there may be cases and times when practicality requires that you appear at the oral hearing by video or telephone link, or even that you forego an oral hearing and have the matter determined on the papers. If so, you can apply through the registry as soon as possible after instituting the appeal and a judge will consider your request.

In preparing for this master class, I asked registry staff if they wished me to raise any matters. These were:

- Outlines of argument, lists of authorities and the authorities should be filed in accordance with Practice Direction 3 of 2013. Registry staff are constantly chasing practitioners to meet timeframes.
- Notices of Abandonment need to be signed by the appellant not the solicitor or barrister. Failure to comply delays completion times and the de-listing of the matter which may prevent another matter from being listed.
- When parties require opening or closing addresses to form part of the appeal record book, they must inform the registrar as soon as possible. This saves the time and cost of preparing a supplementary appeal record book, and finally,
- It would be helpful to include solicitors in the Court of Appeal Pro Bono Scheme.

Applications to Adduce Evidence

[9] Above, para 31.

Ordinarily, appeals against conviction and sentence will be determined only on the evidence before the court below. If you wish to adduce fresh, new or further evidence, you must bring an application.[10]

The principles concerning the admission of fresh, new or further evidence on appeals against conviction are well established in *Mickelberg v The Queen*[11] and *R v Katsidis ex-parte A-G (Qld)*.[12] Australian courts have long recognised a distinction between admitting fresh evidence and new or further evidence on the hearing of an appeal. Fresh evidence is evidence which either did not exist at the time of trial or which could not then with reasonable diligence have been discovered.[13] New or further evidence is evidence on which a party seeks to rely in an appeal which was available at the trial or which could with reasonable diligence then have been discovered. The distinction between fresh and new evidence in criminal matters remains live.[14] Where appellants in appeals against conviction rely on fresh evidence, the test is whether they have established that there is a significant possibility (or that it is likely) that, in the light of all the admissible evidence including the evidence at trial, a jury acting reasonably would have acquitted the appellant. [15] The courts, however, also recognise that there is a residual discretion in exceptional cases to receive on appeal new or further evidence which is not within the category of fresh evidence, if to refuse to do so would lead to a miscarriage of justice.[16] In determining an appeal which turns on new or further evidence there are strictly two questions: first, whether the Court should receive the evidence and second whether that evidence, if received, when combined with the evidence at trial requires that the conviction be set aside to avoid a miscarriage of justice. Frequently the two questions merge.[17]

On an application to adduce further evidence in an appeal against sentence, the Court of Appeal has a discretion to admit new evidence, notwithstanding that it was not fresh in the technical sense if its admission shows that some other sentence, whether more or less severe was warranted in law.[18] Further evidence will be received to show the true state of

[10] Practice Direction 3 of 2013, paras 10, 11 and 33.
[11] (1989) 167 CLR 259, 273, 275, 292, 301 - 302.
[12] [2005] QCA 229 [2] – [4], [11] – [19], [36].
[13] *Ratten v The Queen* (1974) 131 CLR 510, 516 - 517; *Lawless v The Queen* (1979) 142 CLR 659, 674 - 676; *Mallard v The Queen* (2003) 28 WAR 1, 6 - 9; *Beamish v The Queen* [2005] WASCA 62, [8] - [9].
[14] See *Mallard v The Queen*, above.
[15] *Gallagher v The Queen* (1986) 160 CLR 392, 397 and 407 and *Mickelberg v The Queen* (1989) 167 CLR 259.
[16] *R v Condren*; ex-parte Attorney-General [1991] 1 Qd R 574, 579; *R v Young* (No 2) [1969] Qd R 566; *R v Daley* ex-parte A-G (Qld) (2005) QCA 162; and *R v Main* (1999) 105 A Crim R 412, 416 - 417 [16] - [17]; 417 - 418 [22] - [24].
[17] *Main,* above [22] – [23] and *Katsidis* [4].
[18] Section 668E(3) *Criminal Code.*

affairs existing at the time of sentence. See *R v Maniadis*.[19] Let the registry know well ahead of the hearing if you wish to cross-examine a witness.

The Written Outline

Soon after you have filed your originating process, the registrar will provide a timetable for lodging outlines of argument and any reply. Be sure to note these important dates. Set aside adequate time in your schedule to prepare your outline which is every bit as important as your oral submissions at the hearing. If you need an extension, ask the registrar, explaining your reasons.

The purpose of the outline is:

- to enhance the utility of your oral argument at the hearing;
- to ensure that each party is aware of the contentions of every other party; and
- to shorten the hearing by ensuring the real issues are understood by the parties and the Court beforehand.[20]

Written outlines, including any chronology or factual summary, must not exceed 10 pages unless leave is given. In straight forward cases the outline may be a lot shorter than 10 pages. They must be printed double-sided on A4 paper in type face no smaller than 12 point Times New Roman font or 11 point Arial font and no less than single line spacing.[21]

The appellant's written outline of argument must address the issues raised in the grounds of appeal. It must:

- concisely state those grounds of appeal being argued and those being abandoned;
- identify errors made by the court below and the basis in principle or authority for that contention;
- where it is contended that a finding of fact should not have been made or that a finding of fact which was not made should have been made, set out the basis for that contention by reference to the evidence;
- where it is contended that the judge below erred in law, set out the precise error or errors of law and the basis in principle or authority for that contention; and

[19] [1997] 1 Qd R 593, 597.
[20] Practice Direction 3 of 2013, para 13.
[21] Above, para 5.

- when alleging judicial errors in a ruling or in judicial directions to the jury or when referring to evidence at trial, set out the corresponding appeal book references.[22]

Make sure your outline fits seamlessly with your grounds of appeal. If not, apply to amend them and ensure your outline clearly identifies and relates to those amended grounds. Face the most powerful argument against you head-on and deal with it early in the outline.

In an application for leave to appeal against sentence, remember that Court of Appeal decisions dismissing an application for leave to appeal against sentence or an Attorney-General's appeal against sentence are of limited assistance as precedents. Ordinarily they do no more than demonstrate that the sentence imposed in that case was within range.

In an application for an extension of time, the first paragraph of your written outline must state the reason for the delay and why the extension should be granted.[23]

Should you decide when drafting your outline of argument that the appeal is hopeless after all, remember you have an ethical obligation not to argue the inarguable. Those principles also apply where the registry has approached you to appear in a matter under the Court of Appeal Pro Bono Scheme. In those circumstances you should abandon the ground or, where appropriate, the appeal. If your client will not allow you to do so, withdraw from the case or argue what you can legitimately argue and allow the client to argue what you consider to be unarguable.[24] On the other hand, in a clear case where the appellant's arguments are plainly meritorious, the respondent will fairly and properly concede the point so that at the hearing the Court can make favourable orders with minimal oral argument.

The respondent's written outline of argument should confront the worst of the case against it and must:

- not repeat matters set out in the appellant's written outline which are not contested;
- clarify matters not in dispute; and

[22] Above, paras 14, 15 and 34.
[23] Above, para 36.
[24] Above, para 38.

- summarise the respondent's answers to an appellant's argument, referring to the authorities relied on and the evidence of any factual assertions made (with appeal book references), particularly if the facts relied on by an appellant are contested.[25]

A reply will often not be necessary. If it is, the reply must indicate what part, if any, of a respondent's written outline is accepted.[26]

Do not let your outline become diffuse or verbose. If it exceeds 10 pages, you will cause grief to the over-stretched registry staff who must follow you up. Your application to file a longer outline will go to a busy judge of appeal. In any case, the 10 page limit is a helpful discipline in making you identify and thoroughly understand the central issue, or perhaps issues if there really is more than one. When I last spoke and wrote on this topic, I urged barristers to adopt the intellectually rigorous KISS principle, refined slightly by me to Keep It Simple and Succinct.[27] I heard Justice Keane recently re-defining the KISS principle as the MISS principle. His Honour rightly identified that truly great advocates do more than KISS, they **Make** It Simple and Succinct (MISS).

Consider making your opening paragraph a summary of what the appeal is about, as if it were the opening paragraph of the reasons for judgment.

Once you are content that, in accordance with the KISS/MISS principle, you have made your outline simple and succinct as it effectively and comprehensively explains your case and answers the case against you, thoroughly edit it. Ensure your references to legal principle and the cases you cite are correct. Ensure your recitations of fact and transcript references are correct. Check your syntax and grammar.

Remember to lodge copies of your lists of authorities (cases and legislation) no less than two days before the hearing. Part A must list all cases and legislative provisions upon which you are relying at the hearing. Part B must list authorities to which you may refer.[28] Bundles of Part A authorities are to be provided prior to the hearing. It is unnecessary to provide

[25] Above, para 16.
[26] Above, para 14(4).
[27] The Hon Justice Margaret McMurdo AC, "Written Submissions" in Graham Blank and Hugh Selby (eds) *Appellate Practice* (The Federation Press, 2008) 166, 175 and 180; The Hon Justice Margaret McMurdo AC, "Common Mistakes in Appeals" (Speech delivered at the Bar Association of Queensland Annual Conference, Sheraton Mirage, Gold Coast, 5 March 2011) 8.
[28] Practice Direction 3 of 2013, para 22(1).

authorities reported in the Commonwealth Law Reports or the Queensland Reports or legislation contained in Carter's Criminal Law of Queensland loose-leaf services Volumes 1 to 3. Show restraint. If you are able, try and develop an agreed bundle between the parties, saving trees and the backs of all involved.[29]

In summary, the written outline of argument should effectively and comprehensively mirror the grounds of appeal and the argument which counsel will put at the hearing. There should be a symbiotic, complimentary relationship between the written advocacy in the grounds of appeal and outline, and the oral advocacy at the hearing. MISS: Make it simple and succinct. Write in a persuasive way that would allow the judges to adopt your words in their reasons for judgment. What greater compliment to an advocate - especially if it is acknowledged.

Oral Submissions

At the hearing, take a moment to set up comfortably at the bar table. Ensure the lectern is close to the microphone. Speak clearly. Judges with failing hearing do not appreciate having to strain to hear mumbling barristers. It is not good advocacy to make the judges listen keenly to your whispers. They are likely to mishear your submissions and become grumpy with you.

Judges do not appreciate barristers who, like the worst of self-represented litigants, simply throw up, in a completely undisciplined way, every conceivable grievance in respect of the primary hearing, apparently in the hope that somewhere in that dog's breakfast there may be a winning point. I recall one barrister, when asked to articulate precisely what it was he said constituted a miscarriage of justice, responded, "It's the vibe your Honours".

The KISS/MISS principle is equally applicable to your oral argument. It is the measure of a great advocate to effectively communicate complex matters simply and clearly.

Reading out your written submissions is not advocacy. The Court will have perused the grounds of appeal, the outlines of argument and the decision, rulings and evidence referred to in the outlines. But they are unlikely to have your deep knowledge of the case. Begin by

[29] Above, para 22(3).

gaining their interest, but in a way that appreciates they have some familiarity with the case; do not be condescending. As in your written submissions, confront the worst of the case against you early and answer it. Refer the judges to the paragraphs of your outline on which you are relying at that part in your oral submissions so that you do not have to repeat them. And in refuting your opponent's arguments, refer to the paragraphs in your opponent's outline as you refute them.

Although one judge may have more thoroughly prepared the matter before the hearing than the others, remember you must persuade at least two of the three judges. All three will have considered the case carefully before judgment is given. Even if one judge is asking all the questions, the other judges are just as important to your client. In responding to one judge do not disengage or alienate the others. The Honourable Michael Kirby AC CMG calls this "differential advocacy." In his article "Differential Advocacy before Appellate Courts",[30] he provides this pearl of wisdom from an experienced but unnamed High Court advocate:

> "The advocate has one purpose and one purpose alone: to advance his/her client's cause by every legitimate means. Along the way, some interesting law may be raked over. But getting to a win is what matters … The law is not only hierarchical but very clannish. At the end of the day, the greats in this game (and Sir Maurice Byers was the greatest of my lifetime) managed to synthesise the various views as they come tumbling off the Bench, so that the entire Bench feels as though it is being looked after and given The Answer, as each member is looking differently at the problem. That 'political' ability to be appealing to all is probably the magic art at its finest."[31]

If you are thoroughly prepared, you will be comfortable in answering even demanding questions from the Bench posed in the Socratic method and in meeting the challenge of differential advocacy. Listen to the judges' questions and answer their concerns. Do so in a way that brings the bench back to the strengths of your case. If a judge raises a matter which requires an amendment to your grounds unless completely confident it is unmeritorious apply to amend the grounds of appeal and to make written submissions after the hearing. The judges' points are, like the judges' jokes, often the best ones. But if on consideration the point is without merit, explain why in your submissions or subsequent written outline and abandon the ground.

[30] Michael Kirby, "Differential Advocacy before Appellate Courts", article prepared for the *Australian Law Journal*, 2011.
[31] Above, 15.

If you have decided not to rely on a ground of appeal and written submissions in support of that ground, get instructions before the hearing to abandon it. As soon as you do, inform the Court and the other parties. Judges will give you full credit for concentrating on your best point or points.

It is trite to say barristers must not misstate the facts or the law. I am confident that none of you would do this deliberately, but if you inadvertently misstate the facts or law there is a chance that judges may think this was deliberate. They have long memories and talk to other judges. If you realise you have made a mistake in expressing a fact or legal principle, whether in your written or oral submissions, immediately admit the error and correct it. If you realise your mistake only after the appeal hearing, apply for leave to lodge written submissions succinctly and frankly correcting the error. [32] The submissions must be as short as possible and you must provide a copy to the other parties.

Appeal judges were once advocates. They know all the tricks. They recognise chicanery, insincere flattery and filibustering. They do not appreciate the extravagant, rhetorical flourishes or the righteous indignation which may titillate or overwhelm juries, the media or the public. Nor do they appreciate barristers being discourteous to opponents, to first instance judges or to judges of appeal. Good advocacy involves objectively and dispassionately arguing the facts and the law in a way that allows the appellate judges to independently become indignant about the injustice done to your client.

Appeal judges respect barristers who work hard, give their best, are ethical and courteous and who thoroughly prepare their cases. If you meet these criteria, they will forgive honest mistakes. Another admired quality is courage, albeit courteous courage. Good advocates always make sensible concessions and retreat to regroup when necessary. But do not abandon your strongest, genuinely arguable point or points, simply because a judge or judges are giving you a testing time. Your duty to your client is to argue his or her best legitimately arguable case. Judges may change their views after hearing your responsive oral argument or when revisiting your written submissions and the transcript of the oral argument after the hearing. And there is always the High Court!

[32] Practice Direction 3 of 2013, para 28.

Read books and articles on appellate advocacy (Soraya Ryan QC has prepared a comprehensive list available online from the Supreme Court library) and attend lectures and master classes like this. You are sure to pick up some points. But be comfortable in your own skin. If you know your brief inside out, you adhere to the KISS/MISS principle, you do not mislead the Court, and you engage with the judges differentially in your own style, your client and the Court will be well served.

I will end with a genuine compliment. While we can all strive to do better, the Queensland judges of appeal consider the standard of written outlines and oral advocacy in criminal appeals is, on the whole, very pleasing. We thank you for that.