

**Limitations on the power of a Local Court to
accumulate sentences and the (sometimes
associated) problem of late elections by the
prosecution.**

Legal Aid NSW Criminal Law Conference 2022



What is the time for making an election ?

s.263 Criminal Procedure Act (CPA) provides:

263 Time for making election

- (1) An election to have an offence dealt with on indictment must be made within the time fixed by the Local Court.
- (2) An election may, with the leave of the Local Court, be made after the time so fixed if the Court is satisfied that special circumstances exist.
- (3) However, an election may not be made after the following events—
 - (a) in the case of a plea of not guilty—the commencement of the taking of evidence for the prosecution in the summary trial,
 - (b) in the case of a plea of guilty—the presentation of the facts relied on by the prosecution to prove the offence.
- (4) An election may be made on behalf of a corporation by a person appearing as a representative of the corporation.
- (5) The jurisdiction of the Local Court under this section may be exercised by a registrar.



Inconsistent Practice Notes

- Local Court Practice Note Crim 1 [**Crim 1**]: Covering summary proceedings (including indictable offences which are proceeding summarily)
- Local Court Practice Note Comm 1 [**Comm 1**]: covering committal proceedings which commenced prior to 30 April 2018.
- Local Court Practice Note Comm 2 [**Comm 2**]: Covering committal proceedings which commenced on or after 30 April 2018.

Nominated time for election

- Crim 1 and Comm 1: first return date after orders for service of brief
- Comm 2: No later than 14 days prior to hearing



When might late elections commonly occur?

Not limited to these situations, but increasingly occurs where:

- S.58 Crimes (Sentencing Procedure) Act 2002 is engaged
- Accused faces multiple sets of charges none of which were likely to result in election alone but together they do.
- Mental Health / Cognitive impairment – particularly if fitness to plead is raised.



Hall v R [2015] NSWCCA 298 per Johnson J (Simpson JA and Davies J agreeing)

Summary of case

- Accused before the Local Court for three sets of offences charged on different dates
- Proceedings running separately but ultimately joined
- Accused had an extensive criminal history and was on parole and bonds at the time of the offending

DPP did not elect initially and required leave to elect out of time

- cited number of matters coupled with record and parole meant that Local Court may not have sufficient sentencing discretion

Leave was granted by Magistrate to elect out of time – the accused appealed pursuant to 5F Criminal Appeal Act



Result – Appeal dismissed as incompetent

No Appeal available, the decision to grant leave to elect not an order made in committal proceedings. The Court nonetheless provided guidance regarding the grant of leave pursuant to s.263(2)

“Where a s.263(2) application is made, it is necessary to consider the reasons why election was not made by the prosecution within the relevant time period, for the purpose of determining whether the Court can be satisfied that special circumstances exist for granting leave for an election to be made out of time. To this end, something is required which distinguishes the case from others - that sets it apart from the usual or ordinary case”

Need to focus on why the election was not made in time and how long has passed

- Can consider: reasons why election should be permitted including consequences if leave not granted
- If arguing against leave focus on reasons why – particularly if were always known



Johnston v Director of Public Prosecutions (NSW) [2021] NSWSC 333 – Cavanagh J

Summary of the case

- Accused charged with offences of sexual touching
- Pleaded guilty and facts and record handed up. Was on parole at the time which had been revoked
- Magistrate voiced concern regarding sentencing discretion having regard to s.58 CSP Act
- On resumption later in day prosecutor advised that DPP had elected but he had not scrutinised his file closely and so did not see that notation until after the facts had been tendered

After hearing argument, Magistrate determined that election was made when prosecutor was advised by the DPP – ie. Prior to the date when the facts and record were tendered

- Accused appealed the decision of the Magistrate



Result: Error found but appeal dismissed

Cavanagh J held at [65]:

In my view, for the purposes of Ch 5 of the CPA, the manner in which an election may be made is that specified in reg 117(2), that is either orally to the Local Court or by filing a written notice with the Court. If it is not made in that manner, then for the purposes of Ch 5, it has not been made.

His Honour then noted, at 68:

An *ex officio* indictment has now been filed. The proceedings in the Local Court will be withdrawn. Even if I remit the matter back to the Local Court for further hearing according to law, the proceedings will be withdrawn and the Director will be proceeding in the District Court.

The appeal was dismissed and the plaintiff ordered to pay the respondents costs HH noting, at [91]

In my view, remitting the matter to the Local Court will inevitably result in the proceedings in the Local Court being withdrawn. The plaintiff may still wish to make application in the District Court on an abuse of process basis but that is not something I am considering and I am not offering any view about the merits of such an application.

There is thus no practical utility in quashing the decision of the Magistrate or remitting the matter back to the Local Court.



What is the purpose of s.58 and how does it work?

58 Limitation on consecutive sentences imposed by Local Court

- (1) The Local Court may not impose a new sentence of imprisonment to be served consecutively (or partly concurrently and partly consecutively) with an existing sentence of imprisonment if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began.
- (2) Any period for which an existing sentence has been extended under this or any other Act is to be disregarded for the purposes of this section.

- (4) In this section—

existing sentence means an unexpired sentence, and includes any expired sentence or unbroken sequence of expired sentences with which the unexpired sentence is being served consecutively (or partly concurrently and partly consecutively).

sentence of imprisonment includes an order referred to in section 33 (1) (g) of the *Children (Criminal Proceedings) Act 1987*.



Stoneham v DPP [2021] NSWSC 725

Summary of the case

- 2017: Accused sentenced for serious driving offences to 6 years NPP 4 years
- Feb 2020 charged with further serious driving offences – on parole and also bonds at time
- May 2020 DPP elect but in July 2020 election is withdrawn – accused pleads guilty – SAR ordered
- August 2020 appears for sentence – 2017 parole due to expire in October
- After hearing argument including all submissions on sentence - Magistrate determines (on own motion) to adjourn until after parole expiry
- 14 October 2020: sentenced to 3 years 2months wholly cumulative on now expired previous sentence

Appeal lodged citing two grounds

1. Jurisdictional error occurred when proceedings adjourned
2. Regardless, to achieve purpose of s.58, existing sentence should be read as ‘existing at the time the new sentence commences.’



Result: Ground 1 upheld – matter remitted

Ierace J held:

The decision to adjourn the sentence proceeding part-heard to a date after 2 October 2020, in order to defeat the legislative intention that was apparent in s 58, was not a valid exercise of legislative power. While one can readily appreciate his Honour's concern in view of the disparity between the period that the plaintiff had spent in custody exclusively on these matters and his view of the sentence that they warranted taking all relevant matters into account, he was nevertheless required to exercise his sentencing discretion within the bounds of s 58.

In essence the matter was ready to proceed in August, reports were before the court and all submission made. Magistrate was required to proceed within the bounds of s.58. What he did instead was to effectively, and impermissibly, attempt to subvert the law.

Ground 2 dismissed:

- The relevant time that a previous sentence needs to be existing/unexpired was the date of sentence
- The effect being that the 5 year period 'reset' once all prior sentences expired



Perrin v R [2021] NSWDC 408

Summary of case

- August 2019 CP sentenced to a number of ICO's longest is 15 months
- September 2019- CP arrested following revocation of the ICO – sentence to expire 21/11/2020
- Feb 2020: while in custody CP charged with many DV offences said to have occurred over the preceding approx. 4 years
- 19/5/2011: after extensive negotiations CP pleads guilty to 16 charges with a further 6 on a Form 1
- Local Court sentences to aggregate term 5 years NPP 3 years 2 months
- Sentence is backdated so as to be partly concurrent with revoked (but by then expired) ICO
- Overall effective sentence (including revoked ICO) 5 years 11 months

CP appeals to DC – heard by Haesler DCJ



Result District Court Appeal

As to the aggregate sentence His Honour said:

Each of the matters for sentence individually and collectively called for terms of imprisonment. Their number and severity meant even making allowance for the Perrin's undiagnosed mental illness and background of deprivation an aggregate sentence of over 5 years could be justified.

However, in light of CP's pleas his Honour determined to reduce the aggregate to 4 years 6 months

When setting the commencement date his Honour said at [94]:

Reading s 58(4) into s 58(1) in the context of this sentencing exercise –

The [District Court on appeal] may not impose a new sentence of imprisonment to be served ...partly concurrently and partly consecutively with **[any unbroken sequence of expired sentences]** if the date on which the new sentence would end is more than 5 years after the date on which the existing sentence (or, if more than one, the first of them) began. (emphasis added to perenthsised part of quotation)

The sentence was backdated further so that the overall effective sentence was 5 years

It is noted that the bolded section is not consistent with the terms of s.58 – The Crown appealed
- judgment in the CCA has been reserved



Anomolies

1. A person who on arrest is serving balance of parole on a 5 year sentence which expires tomorrow. If sentencing today, the Local Court could not extend the term of imprisonment, however if sentencing took place in two days time the 5 year period would have reset such that accumulation would be limited only by the combined effect of maximum penalties of the charges before the court.
2. In the second of the above scenarios, if the Magistrate were sentencing for 3 Break enter steal offences, then an aggregate sentence of up to five years could be imposed, noting that it is a single sentence imposed after all earlier sentences had expired. But if the Magistrate intended to impose individual sentences totalling 5 years (2 + 2 + 1), then the first sentence could validly be imposed making it an existing (unexpired) sentence. Sentences 2 and 3 could not be imposed since they are accumulated on the existing sentence, sentence 1, which, relevant to sentences 2 and 3, becomes part of an unbroken series of sentences which included the expired 5 year sentence.
 - Put simply, the early sentence is ignored for the purpose of imposing sentence 1, but is then picked up by sentence 1 such that the s.58 restriction applies to sentences 2 and 3.
3. Similarly, if an accused had matters before multiple courts then, for the reasons shown in example 2, he would be better off being sentenced individually at each court, so as to achieve the latter scenario, rather than drawing all matters together and risking a single (and longer) aggregate sentence.



Questions?

