Legal Aid
NEW SOUTH WALES

Introduction to Indictable Appeals

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Contents

1. Introduction to Indictable Appeals

This document is intended as background information for solicitors about procedures and policies for appeals to the Court of Criminal Appeal. It is not intended to be exhaustive.

This guide has also been prepared recently after the introduction of new rules, practice note and forms applicable to appeals to the Court of Criminal Appeal. It is possible that practices may rapidly develop over the short to medium term after the preparation of this guide.

1.1 Essential reading

Essential reading for appeals to the Court of Criminal Appeal are the *Criminal Appeal Act 1912*, and *Supreme Court (Criminal Appeal) Rules 2021* and Practice Note SC CCA 1.

Other helpful sites are:

- Austlii
- JIRS
- LexisNexisAU
- Supreme Court
- The Public Defenders
- High Court

1.2 Appeals policies and procedure of Legal Aid NSW

Legal aid is available for CCA and High Court appeals where:

- the applicant meets the Means Test and Unpaid Contributions Test; and
- the matter meets Merit Test A; and
- the Availability of Funds Test; and
- Legal Aid NSW is satisfied that it is an appropriate expenditure of limited public legal aid funds.[1]

The purpose of Merit Test A is to assess whether it is *reasonable in all the circumstances* to grant legal aid. In deciding whether it is reasonable Legal Aid will take into account amongst other issues:

- the nature and extent of
  - any benefit that the applicant might expect to gain by receiving legal aid, or
  - any disadvantage or harm to the applicant that might result from being refused legal aid, **and**
- whether the applicant has reasonable prospects of success.

Counsel's advice is usually sought as to whether Merit Test A is met. However, when an applicant for legal aid is responding to a s.5F appeal brought by the Crown there is a presumption of merit (see further information at page 7).

1.3 The work of the Indictable Appeals Unit – an overview

The Indictable Appeals Unit assesses all applications for an appeal to the CCA and High Court. This is regardless of

1 Legal Aid NSW, Policy Online, sect 4.13.1

whether the applications are from in-house lawyers on behalf of existing clients (including via the Prisoners Legal Service) or from private practitioners, via the Grants process.

Allocating matters

All new applications are reviewed and allocated by the in-house unit and most matters are allocated in-house.

Where the in-house unit determines to transfer a matter to a private practitioner, the in-house practice will first consider transferring to the submitting practitioner.

Where the application has been received from the client, or a source other than a panel practitioner, matters will generally be assigned to the Indictable Crime panel.

Matters will initially be subject to a limited grant of aid for the purpose of determining merit (a *section 33* authorisation for expenditure).

How matters are prepared in-house

Legal support officers in the Indictable Appeal Unit request the transcript and exhibits relevant to the matter via the Reporting Services Branch and District Court. Clerks collate this material and ensure it is complete before providing to solicitors.

Solicitors then review this material and obtain a merit advice from counsel. Depending on the complexity of the case a decision is made to brief either a Public Defender, junior counsel from the Appellate Panel or senior counsel.

In-house solicitors prepare a Memorandum in each matter briefing counsel in which they set out useful observations on the case, and share their view about the prospects of the case as well as conveying the client's concerns about their case.

2. Appeals to the Court of Criminal Appeal

A person convicted on indictment, that is in the District or Supreme Courts, may appeal to the Court of Criminal Appeal. The *Criminal Appeal Act* 1912 prescribes appeal processes to the CCA.

A person who was convicted or who pleaded guilty and was sentenced in the District Court or Supreme Court may seek to appeal to the CCA against their conviction and/or sentence.

The process is commenced by lodging a Notice of Intention to Appeal ("NIA") with the CCA within 28 days of conviction or sentence.[2] An applicant has twelve months from the date of lodging the NIA to file the appeal. There is no ability to extend the length of this process. If the appeal is not ready to be filed within 12 months of the NIA being filed, leave to appeal out of time will be required.

Hearings in the CCA are usually held no earlier than about 10 months after an NIA is filed. Judgment is often reserved for several months following the hearing of the appeal. In many cases, it will be more than 12 months from the filing of the NIA to the delivery of the CCA's judgment. Expedition is possible in urgent cases.

The CCA is constituted by three judges of the Supreme Court. The CCA is not bound by its previous decisions, but may depart from them when justice requires it.

The Criminal Appeal Act provides for a right to appeal against a conviction on any ground which involves the resolution of a question of law[3] and, with leave, on any ground which involves questions of fact, or of mixed questions

2 or an application for an extension of time is required
3 section 5(1)(a)

of fact and law.[4] Leave is also required where the severity of a sentence is challenged.[5] An appeal to the CCA is not a rehearing of the matter; the CCA is a Court of error. The Crown has a right to appeal the asserted inadequacy of a sentence.[6] This is regarded as an exceptional power to be exercised infrequently; primarily for the guidance of sentencing courts rather than the mere correction of errors.

In the majority of criminal cases the CCA is the final appeal court, as only a small number of its decisions subsequently make their way to the High Court.

2.1 Severity appeals

There is no appeal as of right against the severity of a sentence passed by a District or Supreme Court. A severity appeal is necessarily an application for leave to appeal. In practice, the Court hears the application and the argument on the merits at the same time. Leave to appeal will be granted in many cases, but the appeal may nevertheless be dismissed.

The grounds for an appeal against sentence are provided under s 6(3) of the Criminal Appeal Act:

> *the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.*

The courts have interpreted this apparently broad discretion as requiring the identification of an error by the sentencing court before the CCA can intervene and vary the sentence. Appeals against sentence are not re-hearings, and will not be allowed merely because the CCA disagrees with the sentence imposed. An error that has not operated to produce a sentence that is greater than was warranted will not provoke intervention by the Court.

Error in sentencing will be identified:

a. where the judge
    i. acts on a wrong principle;
    ii. allows irrelevant or extraneous matters to guide the decision;
    iii. mistakes the facts;
    iv. does not take into account a material consideration; or
b. where, on the facts, the sentence is unreasonable or plainly unjust.[7]

When considering a challenge to the sentence based on manifest excess, the Court will look to whether the challenged sentence is within the range appropriate to the objective gravity of the offence and to the subjective circumstances of the offender, and not whether the sentence is more severe, or more lenient, than that imposed upon another offender (other than co-offenders). The Court will not interfere with a sentence if it falls within the range of appropriate sentences considering all the subjective and objective aspects of the applicant's case.

In rare cases fresh evidence may be admitted as the basis for a severity appeal (eg. a serious medical condition in existence at the time of sentence, but of which the applicant was unaware). Generally speaking events occurring subsequent to sentence are inadmissible as fresh evidence (although they may be admissible on re-sentence).

If an appeal succeeds, the Court will proceed to re-sentence the applicant. It is important to have any additional favourable subjective available at the time of filing the appeal where possible. The CCA Practice Note at [22(f)]

4 section 5(1)(b)
5 section 5(1)(c)
6 section 5D
7 *House v The King* (1936) 55 CLR 499

requires submissions about this material to be included in the submissions filed with the appeal. The forms required to be filed at the time of appeal include a certification by the legal representative that the submissions comply with the practice note. Relevant material may include gaol reports, counselling attended, courses completed, family circumstances and work in custody. Material from the applicant should be put in an affidavit. There is more about this later in section [3.11].

Most gaols will not provide new reports, although they are required to provide reports that already exist and are on the client's file. An application can be made for such reports under the *Government Information (Public Access)* Act (GIPA)., or if the client has a good relationship with D&A or welfare or a work supervisor they can be asked to try to get them themselves.

A copy of the client's medical file can be obtained from the Corrections Health Service with the client's authority under the *Government Information (Public Access)* Act (GIPA).

2.2 Conviction appeals

There is an appeal as of right on a question of law, and an application may be made for leave to appeal on a question of fact, or a mixed question of law and fact.

The grounds on which the CCA can allow an appeal against conviction are:[8]

- an unreasonable verdict;
- a wrong decision on a question of law; or
- a miscarriage of justice.

In determining a conviction appeal, the CCA may:

- dismiss the appeal;
- find that the grounds are established but dismiss the appeal on the basis that no substantial miscarriage of justice has occurred[9] (the proviso);
- quash the conviction and order an acquittal;[10] or
- quash the conviction and order a retrial.[11]

Even when an appellant succeeds in making out a ground of appeal the Court can dismiss the appeal if it is satisfied that no substantial miscarriage of justice has occurred.[12] This proviso is the subject of much discussion and controversy.

Generally speaking, errors of law arise because of misdirections to the jury, improper admission of evidence or rejection of properly admissible evidence. Questions of fact on appeal usually relate to whether a verdict constitutes a miscarriage of justice. There may also be fresh evidence issues.

A conviction appeal in circumstances where the appellant pleaded guilty at first instance is possible, but requires the applicant to first show the court that leave to go behind the plea should be granted. This is difficult. The Court will usually regard the plea as a confession of all the elements of the offence.

Rule 4 of the *Criminal Appeal Rules* prevents reliance being placed on a question of law where no objection was taken by counsel at trial, without leave of the court. Affidavits may need to be obtained from prior representatives if

8 Section 6(1)
9 Section 6(1)
10 Section 6(2)
11 Section 8
12 Section 6(1)

Rule 4 might be a problem. You may be required to obtain either a waiver of privilege or authority from the client to obtain information from prior representatives.

The Practice Note at [19(c)(iv)-(v)] requires submissions in conviction appeals to include things such as the 'corrected' wording of a direction where an appeal alleges misdirection by the judge; as well as a statement about whether Rule 4 is engaged and if so, why leave to raise the ground should be granted.

2.3 Crown appeals

The Crown appeals inadequacy of sentence, interlocutory orders (eg permanent stay of trial proceedings), and sentence where a discount was given for assistance and the respondent subsequently failed to honour an agreement to give evidence (s.5DA *Criminal Appeal Act*).

These appeals are usually listed for hearing quickly, and clients may not be in custody. It is important to give them attention early, so that appropriate affidavits and reports can be obtained. Fresh evidence can always be tendered on Crown appeals on the question of whether the Court should exercise its discretion not to interfere with a sentence, even having found error.

When preparing a Crown appeal be aware that if the Crown is successful in setting aside the original sentence imposed that the court will re-sentence your client. It does so on the facts and circumstances as at the time of re-sentencing. It is therefore necessary to prepare the matter as if it is a sentence matter.

2.4 Other appeals

Section 5F appeals are from interlocutory orders in trial proceedings. These would normally be conducted by the solicitor/counsel with conduct of the trial.

Assessing merit when responding to a s. 5F Appeal or Crown Appeal

Merit Test A applies to applications for legal aid to respond to an interlocutory appeal under s.5F or to respond to a Crown sentence appeal under s.5D, s.5DA, s.5DB, and s.5DC of the *Criminal Appeal Act 1912* (NSW) (Criminal Law Policies 4.13.1 and 4.13.2). Criminal Law Guideline 1.14.2 provides guidance on considering whether the applicant satisfies Merit Test A when responding to an appeal. Guideline 1.14.2 says there is a presumption of merit on the basis that there is a judgment or order that is favourable to the applicant and is the subject of the appeal brought by another party to the proceedings. In considering Merit Test A, you should take into consideration the following:

- Would a grant benefit the applicant by assisting them to retain the favourable decision or at least minimising any harm that might arise from altering the favourable decision;
- Would a grant avoid the harm and delays that might arise from the applicant being unrepresented on appeal;
- That a favourable decision would indicate reasonable prospects of success; and
- That the CCA has a strong preference for parties to be appropriately represented as:
    - the Court may want to raise its own arguments or ask the parties questions;
    - the respondent may be able to argue in some circumstances that even where the trial judge has made a mistake the Court should exercise its discretion and allow the decision to stand; and
    - it would avoid delays.

Note: these considerations can also be taken into account when applying the "appropriate expenditure of limited legal aid funds" test.

Trial counsel is generally retained where the applicant for legal aid is responding to a Crown s. 5F appeal, unless circumstances require new counsel (eg: the complexity of the matter, a lack of relevant experience by the trial barrister, the availability of counsel and the timing of the hearing). Legal Aid NSW will determine the most appropriate counsel in the circumstances.

Where the Applicant is seeking a grant of aid for a s. 5F appeal, then there is no presumption of merit (ie Guideline 1.14.2 does not apply) so that a new grant is required and therefore potentially a new barrister (if the trial counsel is not on the appellate panel).

Appeals by offenders against sentences imposed by the Drug Court

Section 5AF Criminal Appeal Act 1912. All sentence appeals from the Drug Court go to the CCA.

Part 7 of the Crimes (Appeal and Review) Act 2001

Part 7 of the Crimes (Appeal and Review) Act provides for applicants with fresh evidence or material not previously considered at trial or in an appeal to have their convictions reviewed.

3. Procedures in CCA appeals

3.1 The NIA process

An NIA against conviction may be, and usually should be, lodged promptly after conviction. There is no requirement to wait until an applicant is sentenced.

A NIA is in effect for twelve months from the date of filing. This means there are twelve months in which to complete the merit determination and for the appeal, if it is to proceed, to be filed.

Upon receiving a new matter it is important to make a note of the NIA expiry date. Where an NIA expires or none is filed, it is difficult to obtain the necessary materials, the client is not able to apply for bail pending appeal until an appeal proper is filed, and if an appeal is filed, an application for leave to appeal out of time is also required.

3.2 Gathering the material

For conviction appeals, counsel generally requires transcript of arraignment, voir dire proceedings and judgments, and each day of trial.

For severity appeal for a sentence imposed after trial, counsel generally requires transcript of Proceedings after Conviction (PAC), Proceedings on Sentence for each date between verdict and sentence (POS), and Remarks on Sentence (ROS).

For severity appeals after a plea of guilty, counsel generally only requires the POS and ROS.

Occasionally an applicant wishes to appeal their conviction, having pleaded guilty. There is a high bar to such an appeal. In these matters transcript of the POS and ROS is required. Additionally, the instructing solicitor should take a detailed proof from the client as to the circumstances of entry of their plea for use as the basis for an affidavit if the matter is to proceed.

Requests for transcript should be made to the Reporting Services Branch: rsb-nia@justice.nsw.gov.au.

Requests for exhibits should go to the court of trial: cca-ldc-crime@justice.nsw.gov.au for the District Court or supremecourt.criminal@justice.nsw.gov.au for the Supreme Court.

Where a solicitor was not the legal representative in the court below, it can be difficult to identify all relevant dates for which transcript is required. Once received, transcript should be carefully reviewed to ensure all relevant dates are obtained. Additionally, judgments are transcribed and provided separately to general proceedings, so transcript should be carefully checked to ensure these are all obtained before counsel is briefed.

Copies of all exhibits and MFIs tendered at trial or sentence, including voir dire proceedings, and pre-recorded evidence hearings, should be obtained. Some exhibits will not be kept with the court file, but will have been marked by the associated as returned to the adducing party. Where this occurs it will be necessary to approach the adducing party to obtain a copy of the exhibit. All possible care should be taken to obtain the marked copies of exhibits. The CCA Practice Note provides that the prosecutor must take reasonable steps to assist an applicant to obtain the exhibits.

3.3 Briefs to Counsel to Advise

Once all transcript and exhibits have been received, counsel should be briefed to advise on the merit of the appeal or application for leave to appeal. Matters are briefed to members of the Appellate Criminal Law Barrister Panel (if junior counsel is briefed) or the Public Defenders, unless there are exceptional circumstances that warrant briefing non-panel counsel.

Senior counsel is often briefed in conviction appeals and matters where senior counsel appeared at first instance. Senior Counsel is always briefed in High Court cases.

The Memorandum to Counsel should include at least the following:

- The Court, Judge and date of decision appealed from;
- The charges;
- The outcome in relation to each;
- Date of filing of the Notice of Intention to Appeal and the expiry date;
- Any particular unusual features;
- A brief outline of any particular matters raised by the client;
- A note of any material missing from the brief and the reason;
- A note of any approved reading fee beyond the fee scale items.

Documents in the brief should include at least copies of the following, organised with tabulation and dividers:

- The Notice of Intention to Appeal
- Transcript of the trial (including interlocutory judgments) and sentence;
- Exhibits, including criminal records, medical reports etc (organised, not just the bundle of material forwarded by the Court of Trial);
- Any material forwarded by the client;
- Any other relevant correspondence;
- Sentence Administration records.

Observations on the brief should be as thorough as possible. Counsel's attention should be drawn to relevant law of which you may be aware. In sentence appeals, JIRS statistics and the PD's sentencing tables may be of assistance.

3.4 Assessing Merit

The prevailing consideration in the determination of the legal aid application is whether it has merit as per Merit Test A, primarily focussing on whether the case has reasonable prospects of success.

There is no mathematical formula for assessment of "reasonable prospects of success". It may indeed vary according to the likely benefit, including the broader public interest, if the appeal is upheld. The potential benefit to the broader community in seeking clarity of, or overturning, a legal issue will also be a significant factor, notwithstanding the appeal may have weaker prospects of success.

Achieving a reduction in a sentence of imprisonment, however slight, or reducing a custodial sentence to a non-custodial sentence, is an important benefit to the applicant.

The assessment of the merits of the case, and its prospects of success are learnt and partly intuitive processes, based on the practitioners experience and understanding of the *Criminal Appeal Act*, relevant authorities, and the procedural requirements that need to be fulfilled for an appeal to succeed.

The prospects of success of an appeal is only one aspect of the Merit Test A. The test also requires an objective assessment as to whether it is reasonable in all the circumstances to grant aid. This includes an assessment of the nature of any benefit, or extent of any disadvantage, that will flow from the decision to grant or refuse the application for legal aid.

If a decision is made to refuse an application on the basis that it does not have reasonable prospects of success, an assessment as to the corresponding benefit or harm that may be occasioned to the applicant is not required. However, if the appeal has reasonable prospects of success these factors must be weighed.

In determining an application for a sentence appeal the benefit to the applicant will be assessed in terms of whether there is likely to be a reduction of a custodial term.

In relation to an application for a conviction appeal the benefit of a successful appeal is that the matter is either remitted for retrial or a verdict of acquittal entered. The denial of an opportunity to have a potentially meritorious appeal argued, either against sentence or conviction, is a serious disadvantage to an applicant for legal aid as in either scenario the applicant is potentially at risk of remaining in custody for longer than they ought to and/or loses an opportunity of an acquittal.

3.5 Granting and Refusing Aid

Advice Received

Once counsel has advised on merit a determination is made on the grant of legal aid. Grants and refusals of aid are made by the Grants Division. A recommendation is made by submitting an application for extension of aid to appear at the hearing of an appeal in Grants Online.

No merit

If counsel advises the case does not have merit, an advice will be prepared setting out the reasons for this conclusion. The client is advised of this decision and formally refused legal aid and advised of their right to appeal to LARC.

Once the determination has been made, the client should immediately be advised of the refusal of legal aid. The opinion would normally be sent to the client, unless it contains sensitive material (eg. child sexual assault matters, or assistance given to the police). If the opinion is not sent, the client should be advised that it is available if required, or may be discussed by phone.

An NIA expires 12 months after being filed and consequently there is no need to advise the Court that we no longer act.

Merit

Counsel can advise that the appeal meets Merit Test A by way of a brief email or short note in accordance with the Practice Standards for the Appellate Criminal Law Barrister Panel (see also the Complex Criminal Law Solicitor Practice Standards at Chapter 6).

The solicitor can then formally request a grant of aid by way of extension on Grants Online.

Counsel then prepares grounds of appeal and submissions to be filed in support of the appeal. Counsel is not paid separately for preparation of the advice and subsequent grounds of appeal and submissions. The applicable Legal Aid NSW fee scale provides that counsel will be paid for either the opinion on the prospects of the matter or for the preparation of submissions. This policy is intended to save both time and money.

The grounds of appeal and other necessary documents must be filed with the Registry and served on the DPP. We call this the “appeal pack”.

The Registrar will then register the case as an appeal and list it in the weekly call over (usually within two weeks of filing). At the call over a hearing date will be set. The available hearing dates are listed on the court’s website in the days before the callover.

If a client is granted aid for only part of the aid sought - for example, if they are granted aid for severity but not conviction – a merit advice should be provided for the matter not proceeding to appeal and the client may appeal this determination to LARC.

3.6 Crown Appeals

Merit Test A applies to applications for legal aid to respond to a Crown sentence appeal under s.5D, s.5DA, s.5DB, and s.5DC of the *Criminal Appeal Act 1912* (NSW). Criminal Law Guideline 1.14.2 provides guidance on considering whether the applicant satisfies Merit Test A when responding to an appeal. Guideline 1.14.2 says there is a presumption of merit on the basis that there is a judgment or order that is favourable to the applicant and is the subject of the appeal brought by another party to the proceedings (see further info on page 7).

The hearing date may be fixed at the first call over whether or not the respondent is legally represented. The Registrar will at the time of fixing the hearing date make directions for the filing of submissions by Crown and Respondent and the filing of affidavit material.

The Crown obtain and serve the transcripts and exhibits.

It is wise to brief counsel as soon as you have a date even if you don’t yet have the transcript or exhibits. You may ask the Crown to serve this material on you when available, in advance of the Crown’s submissions. Once you obtain the majority of the material, prepare a brief to counsel.

In the meantime, start working on the subjective material and make a GIPA request to the Department of Corrective Services. You can also obtain a brief report from Corrective Services NSW which will include whether the client has incurred any custodial infringements. You may request this via an email to Sentence.Admin@justice.nsw.gov.au, providing the client’s name and MIN and confirming that you act for them.

Obtain instructions from the respondent about what has happened post-sentence; whether there are mental health issues; programs whilst in prison; prison classification/protection; anxiety from potential resentence; family situation; plans upon release. These matters may form the basis for an affidavit when submissions in reply are due. Such an affidavit may be relevant to the discretion to intervene and/or resentence.

3.7 Call overs

Call overs are conducted online, weekly, on Thursdays. The list is available on the court's website the day before court. The registry can provide dial-in details on request.

At the call over the court will expect to be provided with a hearing estimate. As a very rough guide, a standard severity appeal would be listed for about one hour and a standard conviction appeal, about two hours. Counsel should be able to provide this estimate if you are unsure.

The court will also ask whether the client wishes to attend the hearing via AVL. All attendance of inmates is via AVL unless there is a particular reason that physical attendance is sought. Inmates are not required to attend if they do not wish to do so.

The court will give a timetable which at the time of writing includes the following dates:

1. the applicant's re-sentence material, if any, is to be filed;
2. the filing of an agreed appeal book index;
3. a further call over date to ensure the appeal book index has been filed;
4. the filing of exhibits;
5. the crown is to file their submissions and any material on re-sentence; and
6. the hearing date.

Note the Registrar's power as provided also includes a power to make other orders, including the provision of appeal books: Practice Note at [13].

3.8 Affidavits

Affidavits are most usually filed in sentence and Crown appeals to address post sentence issues. The new CCA Practice Note at [22(f)] requires submissions on sentence appeals to include what findings are sought in relation to such material. This indicates it is the court's expectation that such material is obtained prior to filing.

Bearing in mind that there may be many months between the filing and hearing of the appeal, material filed and submissions made at the time of filing may be stale or inaccurate by the time of hearing. In such cases it may be necessary to file supplementary material.

Note that the Crown's material is generally not ordered to be filed until shortly before the hearing. It is therefore important to ensure that material filed and submitted on at the time of filing remains accurate at the time of hearing to avoid inconsistency or dispute between the parties. It may become necessary to file additional material.

Material to be used in an affidavit can be obtained under a GIPA request to Corrective Services and Corrections Health as well as communicating directly with the client. You may also obtain an updated report from Sentence Administration (see above).

Care must be taken in drafting affidavits. It is important for solicitors bear in mind that affidavits are not only truthful but that they are not by omission misleading.

See Bushara v Regina [2006] NSWCCA 8 (see in particular from [38] to [45]) for some comments by the CCA with respect to affidavits. Note more is not better:

> *38 In the event that this Court might have to re-sentence the applicant, a large amount of material was placed before the Court by way of affidavit. As is usually the situation, the Crown objected to none of it and little of it could have a significant impact upon the Court's discretion having regard to the findings of the Judge. It seems*

> *to me that this material is prepared as a matter of routine in almost every application for leave to appeal against sentence. Of course the Court will use none of the material unless it finds error. Very frequently this material is prepared at public expense because the applicant has legal aid.*
>
> *39 Very often it appears that the applicant has been given an open slather to put in affidavit form anything that he or she might wish to place before the Court, whether or not it has any relevance or significance. Almost all of the affidavits I have seen by applicants contain expressions of remorse and contrition and resolutions not to offend again. The present is no exception. If the sentencing judge found that the applicant was remorseful and was unlikely to re-offend, this material takes the matter no further as this Court is unlikely to come to a different view than the Judge simply because there is no fresh material to support the findings. If the judge did not make those findings, it is highly unlikely the Court is going to come to a different conclusion based upon such material.*

Also see Douar v Regina [2005] NSWCCA 455 where the court used post sentence evidence to conclude that a lesser sentence was warranted under s6(3)

> *125 The Applicant submits that this Court should impose a different sentence in exercise of its function under s.6(3) of the Act.*
>
> *126 I have concluded that it is open to the Court to receive evidence of post-sentence conduct of the Applicant, including evidence of his assistance to the authorities in the prosecution arising from the shooting of Mr Darwiche. In the light of all the evidence, is the Court in a position to conclude that a sentence of imprisonment of three years with a non-parole period of two years and three months was outside the appropriate range for the circumstances of the particular case unaffected by that error? If such a finding is made, the s.6(3) test, as explained in Johnson, would be satisfied.*

3.9 Outcome of the appeal hearing

If the appeal is reserved (which it usually is), when judgment is finally delivered the registry will email the office a day or two before and tell you where and when the judgment is being delivered. The client will not be told and no arrangements will be made for their attendance. The email will say that no attendance is required or sought. If you wish to attend court for judgment you may reply to the email and you will be provided with a phone number to dial by way of attendance. It is possible to attend in person if this is required due to a client's bail or otherwise desired; this may be requested by reply email. Appearances are not taken and practitioners are not called upon.

A copy of the judgment is usually uploaded to Caselaw on the date of judgement and may be provided by the associate of the presiding judge by email.

When you collect the judgment, your next step depends on if it was a win or a loss. If a sentence appeal is dismissed, there is usually not much to do except contact your client and counsel.

If the sentence appeal succeeds, and results in an earliest release date in the near future, you should ensure that the Registry sends the warrant to the gaol as soon as possible. If your client's non-parole period has just been significantly shortened and they are due for parole shortly, but the sentence exceeds 3 years, you should write to the Parole Authority to advise them of the successful appeal and ask that they consider your client's parole as soon as possible. This is because it takes about 6 weeks for the Authority to accumulate the reports it needs to consider parole, and if they are not aware of the suddenly shortened non-parole period, there may be a delay.

If you have won a conviction appeal, and an acquittal was ordered, there should be nothing to do but cheer. Your client should be released within hours. You should ensure the Registry sends out the warrant urgently and contact the Records section of the gaol to ensure he is released.

If a retrial has been ordered, you must consider whether a bail application is appropriate.

Where a retrial has been ordered, or a matter is remitted to a lower court for re-sentence, a new grant of aid is required in Grants Online and a new determination will be made about whether that grant is transferred or is kept in-house.

4. The High Court

If, after receiving judgment in a CCA hearing, the client wishes to pursue an application for special leave to appeal in the High Court, a new application would be required in Grants Online. This application will be referred to the inhouse unit for consideration about whether to transfer.

The High Court is not simply a second tier of appeal. It is necessary to show that there is something special about the case before the Court will take the matter on appeal. Appeals to the High Court are subject to grant of special leave under section 35A of the Judiciary Act 1903 (Cth). In determining whether to grant leave the Court must have regard to

a. *whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:*
    i. *that is of public importance, whether because of its general application or otherwise; or*
    ii. *in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and*
b. *whether the interests of the administration of justice, either generally or in the case, require consideration by the High Court of the judgment to which the application relates.*

While there are no strict guidelines as to the circumstances in which a case might attract a grant of special leave, in general, the High Court will only grant special leave to appeal to cases which raise questions of general importance, that is, cases which involve issues of broad principle which will have ramifications for other cases in the legal system.

In High Court matters counsel is required to provide a merit advice in all cases, ie: whether counsel considers there is merit or not. Where counsel finds merit, their advice is required to be submitted before approval will be given to prepare and file an application for special leave.

5. Where to go for information

The appeals unit is happy to provide guidance.

This is available by contacting the Indictable Appeals unit at cca.appeals@legalaid.nsw.gov.au.