A BEGINNER'S GUIDE TO APPEALS BAIL IN THE LOCAL COURT

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In NSW, where a person is convicted or sentenced by the Local Court, they have a right of appeal to the District Court.[1] There are three grounds for an appeal: (i) against the sentence imposed ('severity appeal'), (ii) against a conviction imposed ('conviction appeal'), or (iii) against both ('all grounds appeal'). The focus of this paper will be bail applications pending appeal to the District Court, and more specifically, the process relating to the lodging of the Notice of Appeal and considerations that arise during the application. It will also outline basic considerations of a severity appeal.

An application for bail pending appeal arises most commonly where your client is sentenced to a period of full-time custody, having been bailed in the community beforehand. It is important to note that this paper is intended as an introductory, rather than comprehensive, guide for new practitioners.

This paper will be structured as follows:

[1] *Crimes (Appeal and Review) Act 2001* (NSW) s 11(1).

I. Sentences of full-time custody

It is an inevitable part of criminal law practice that you will have clients sentenced to a term of full-time imprisonment, having been bailed in the community beforehand. For some, this will be years into practice. For others, it will be on their first day with their first ever client. Any new criminal law solicitor should read Sailesh Rajan's paper Things I'm glad someone told me (or wish someone had) when I started.

However, add point 37: **you will have clients receive full-time custodial sentences, learn from it**. Managing expectations is a vital ingredient in legal practice. It is your duty to provide competent legal advice that fully informs the client in their decision making.[2] This includes informing them of the maximum penalties available for an offence. Admittedly, it is hard to tell a client that you think it is likely they will go into full-time custody. However, it is better for a client to expect full-time custody and receive an Intensive Corrections Order than vice versa.

II. Policy

However antithetical it seems, an appeals bail application is often heard before the sentencing magistrate.[3] This in itself can present an undue hurdle for practitioners. That is: a magistrate may raise that they have just imposed a full-time custodial sentence, and their view hasn't changed. As recognised in *McRoberts v The Queen* [2018] NTCCA 11 at [17] by Southwood ACJ:

> …the status of a person convicted and sentenced to a term of imprisonment is quite different from that of a person awaiting trial. The presumption of innocence is gone. In its place, there is what can be described as a presumption of guilt based on a further presumption that the trial has been conducted according to law and the jury has reached a verdict that was reasonably open on the evidence. The criminal justice system is an important part of the community fabric. The conviction and sentencing of wrongdoers is seen both as protecting the community and also properly punishing criminals. Public confidence in the administration of justice may well be weakened if too many defendants convicted of serious offences and sentenced to prison are seen to avoid serving the sentence forthwith by the simple expedient of filing a notice of appeal and being granted bail pending appeal.[4]

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[2] See for example the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 4.1.3 and r 7.

[3] There does not seem to be a legislative basis for this. However, it appears to be an accepted convention of the appeals bail process. It may be because you are sitting in a rural court with only one sitting magistrate. However, this also occurs in metropolitan courts. Note that some magistrates may give you the opportunity for the application to be heard in front of a different court.

[4] *McRoberts v The Queen* [2018] NTCCA 11 [17] (Southwood ACJ).

However, Southwood ACJ also recognised at [18] that:

> …it is necessary also to take into account that many appeals are successful; prosecutions can be misconducted; trial judges do err; and juries can reach unsupported or unreasonable verdicts. The public interest is not served by having persons incarcerated in circumstances where there is a real doubt about the validity of a guilty verdict. If a person who is denied bail is ultimately acquitted by the Court of Criminal Appeal an injustice has resulted. Justice and fairness in the criminal justice system are important values. The community expects that defendants get a fair trial.[5]

While *McRoberts* concerned a conviction appeal, this principle still has application to severity appeals. For example, a person is sentenced to full-time custody. They are then bail refused pending appeal. The District Court reduces their sentence to a non-custodial sentence on appeal. An injustice has resulted. This much was recognised in *Lane v The Queen* [2017] VSCA 170 by Maxwell P and Ferguson JA at [6] - [7]:

> As is made clear by the judgment in *Zoudi*, and by subsequent judgments of this Court, what enlivens the jurisdiction to grant bail pending appeal is the need to prevent injustice. Plainly, there will be injustice if an applicant serves time in custody which the appeal court subsequently concludes he or she should not have served. Self-evidently, such an outcome offends every principle of criminal justice.
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> If persuaded that there is a real risk of injustice of that kind occurring, the Court will strive to eliminate that risk. There are various ways in which that can be done. One of those is by a grant of bail.[6]

The considerations for bail pending appeal in NSW are largely legislated. It is a basic principle of statutory interpretation that each provision has a purpose. Where the sentencing magistrate does hear the application for bail pending appeal, they must *objectively* apply the legislative test (the sentence imposed being only one consideration).

III. Procedure

Unless backdated,[7] or directed to be served by way of an Intensive Corrections Order ('ICO'), a sentence of imprisonment requiring full-time custody commences on the day it is imposed.[8] Depending on the location of the court, a person may directly enter into the custody of Corrective Services, or await transfer in Police custody. It is always best practice to obtain instructions on appeal prior to the sentence. However, this is not always practical (or it may not appear necessary to the practitioner). If

[5] *McRoberts v The Queen* [2018] NTCCA 11 [18] (Southwood ACJ).
[6] *Lane v The Queen* [2017] VSCA 170 [6]-[7] (Maxwell P and Ferguson JA).
[7] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 47(2).
[8] *Crimes (Sentencing Procedure) Act 1999* (NSW), s 47(1).

possible, see your client in custody and take instructions on whether to appeal, and whether to apply for bail.

For ALS solicitors, the two essential forms required to lodge an appeal are a Notice of Appeal and a Fee Waiver. These forms must be lodged with the Registry.[9] After these forms are processed, the registry will provide a Notice of Listing specifying the date when the appeal is listed. For all sentences other than a custodial sentence, the penalty is immediately stayed upon lodging the Notice of Appeal.[10] However, for sentences of full-time custody, the penalty is only stayed when the person is granted bail.[11] Technically, an ICO is also only stayed upon the grant of bail.[12] However it may be prudent to allow an ICO to persist so that time served under the order may accrue. Any time served under an ICO may be taken into account during the appeal proceedings.

An application for bail pending appeal to the District Court is not inherent to the filing of a Notice of Appeal. It is always practical to note on the Notice the intention to make a bail application. In some courts, registries may not file the Notice until it is specified whether a bail application is, or isn't, sought.

Before giving advice, it is important to consider whether applying for bail is in the best interests of your client. This is a forensic decision that will inform your advice. For example; if your client has a history of custody for similar offences, and the appeal date is two months away, it may be in the client's interest to serve that time to further their appeal prospects.

[9] *Crimes (Appeal and Review) Act 2001* (NSW) s 14.
[10] Ibid s 63(2)(a); 63(5). Note also the effect of s 63(2A) on the suspension or disqualification of drivers licences.
[11] Ibid s 63(2)(c).
[12] See *Gelle v Director of Public Prosecutions* (NSW) [2017] NSWCA 245 for an example of the application of s 63(5).

IV. Appeals Bail Considerations

At the conclusion of sentence proceedings, bail ceases to have effect.[13] A persons previous grant of bail is not revived upon lodging a Notice of Appeal.[14] However, a new bail decision may be made:

> **Note.** Proceedings for an offence generally conclude if a person is convicted of and sentenced for the offence. If an appeal against the conviction or sentence is lodged after that conclusion, bail is not revived, but a new bail decision can be made.

This new bail decision is made pursuant to s 62 of the *Bail Act 2013* (NSW).[15] This section provides that the Local Court may hear a bail application where:

> (a) the court has convicted a person of the offence, and
> (b) proceedings on an appeal against sentence or conviction are pending in another court, and
> (c) the person has not yet made his or her first appearance before the court in the appeal proceedings.

As noted, if granted bail, a custodial sentence is stayed.

Practical Tip: If the opportunity presents itself, for example where the bail application is listed a day or two later, collate resources to support your application. This can include medical certificates, character acknowledgements, JIRS statistics (however, the usual caveat in *De La Rosa* applies), etc.[16]

a) Ordinary Bail Application

It was recognised by Davies J in *R v Mehajer* [2018] NSWSC 1687 at [16] that "There is no specific provision of the *Bail Act* dealing with a release application pending an appeal from the Local Court to the District Court (Cf. s 22 in respect of an appeal to the Court of Criminal Appeal)".[17]

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[13] *Bail Act 2013* (NSW) s 12 (1)(b).
[14] Ibid s 12(12).
[15] Ibid s 62.
[16] See *Director of Public Prosecutions (Cth) v De La Rosa* [2010] NSWCCA 194 at [304] in relation to the use of sentencing statistics.
[17] *R v Mehajer* [2018] NSWSC 1687 [16] (Davies J).

An application for bail pending appeal to the District Court employs the same principles as a standard Local Court bail application. That is, if the offence is a Show Cause offence, the offender must *show cause* before addressing the *unacceptable risk* test.[18] If the offence is not a Show Cause offence, then the relevant test to be applied is only the *unacceptable risk* test.[19] This is not to be conflated with the *special or exceptional circumstances* test under s 22.[20] Unacceptable risk can only be assessed after consideration of the s 18 factors.[21] Importantly, s 18(1)(j) is enlivened as part of this assessment:[22]

> (1) A bail authority is to consider the following matters, and only the following matters, in an assessment of bail concerns under this Division-
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> > (j) if the accused person has been convicted of the offence and proceedings on an appeal against conviction or sentence are pending before a court, whether the appeal has a reasonably arguable prospect of success.[23]

Section 18(1)(j) Reasonably arguable prospect of success

In relation to severity appeals, it would appear that this provision actually sets a relatively low bar. There is little case law relating directly to this consideration in the context of appeals to the District Court. However, guidance may be found in that relating to appeals to the Court of Criminal Appeal.[24] The Court in *Obeid v R (No 2)* [2016] NSWCCA 321 held at [17] that care must be had when commenting on the prospects of success during a bail application as:

> First, the argument before this Court on such an application can never be as fully developed as it might be. Secondly and consequently, this Court is confined to reaching only a broad overall view of an applicant's apparent prospects.[25]

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[18] See *Viavattene v R* [2018] NSWCCA 197 [23] (Hoeben CJ, McCallum J, and Beech-Jones J); see also *Barr (a pseudonym) v Director of Public Prosecutions* (NSW) [2018] NSWCA 47 [75] (Leeming JA). Section 16A of the Bail Act 2013 (NSW) sets out the show cause requirement, while s 16B outlines the offences to which it applies. Also, as held in *DPP (NSW) v Tikomaimaleya* [2015] NSWCA 83 at [25], note that the show cause and unacceptable risk tests are stand alone tests.
[19] Bail Act 2013 (NSW) s 19.
[20] This confusion may arise as pursuant to s 22 of the *Bail Act 2013* (NSW), when an appeal is pending in the Court of Criminal Appeal, a person must demonstrate special or exceptional circumstances that justify the grant of bail.
[21] Bail Act 2013 (NSW) s 18.
[22] *R v Mehajer* [2018] NSWSC 1687 [16] (Davies J).
[23] Ibid, s 18(1)(j).
[24] Keeping in mind that section 22 of the *Bail Act 2013* (NSW) applies to appeals to the Court of Criminal Appeal, requiring a person to demonstrate special or exceptional circumstances to justify bail.
[25] [2016] NSWCCA 321 [17] (Bathurst CJ; Hoeben CJ at CL; R A Hulme J).

In, *El-Hilli and Melville v R* [2015] NSWCCA 146*,* Hamill J stated at [24]-[27]:

> I should make it clear that I do not accept the suggestion that an applicant must establish that their appeal will either "inevitably succeed" or that success is "virtually inevitable". Neither the statutory language, nor the case law, supports such a strict test
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> …
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> When the merit of the appeal is relevant as part of a combination of factors, the preponderance of authorities suggest that the question is whether the proposed grounds of appeal are arguable or enjoy reasonable prospects of success…This approach also accords with the language of s 18(1)(j) of the Bail Act 2013.[26]

It was also noted in *McRoberts v The Queen* [2018] NTCCA 11 *at* [13]:

> However, in most cases, particularly if the application for bail is made very soon after conviction and sentence, it will be impossible to make any proper assessment of the prospects of success on appeal. In many instances the prospects of success of an appeal can only be viewed in very preliminary and cursory manner on a bail application.[27]

Note that *McRoberts* is from a different jurisdiction where bail pending appeal is largely dictated by common law.

It is important to bear in mind that the starting point for statutory interpretation is the statutory language used.[28] The language under s 18(1)(j) is *reasonably arguable prospects of success*. This, and the aforementioned limitations noted, supports the proposition that the applicant does not have to establish that the appeal will succeed.

For example; in relation to terms of imprisonment under two years, an arguable prospect of success may be: (i) the term is under two years, (ii) an ICO is available to the sentencing court (depending on the offence), thus (iii) as an ICO is not full-time custody, any time spent bail refused in custody would exceed that contemplated by the penalty.

An example of this consideration may be seen in *R v Badger* [2015] NSWSC 985 where it was contemplated by Hamil J at [24] - [25]:

> Sub-paragraph (j) is relevant to a resolution of the application concerning the sentence imposed in the Local Court for receiving. Again, in view of the fact that I do not want to be seen to be fettering the discretion of the District Court Judge who deals with that severity appeal, I should be somewhat circumspect in what I say.

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[26] El-Hilli and Melville v R [2015] NSWCCA 146 [24]-[27] (Hamil J).
[27] *McRoberts v The Queen* [2018] NTCCA 11 [17] (Southwood ACJ).
[28] *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCA 59 [24] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

> But, as is pointed out by his solicitor, the imposition of a three month full-time gaol sentence for an offence of receiving, committed in 2013 for a person with quite a short criminal history, at first blush appears to be a very stern sentence. Indeed, such a sentence should only be imposed once a Court had considered s 5(1) of the Crimes (Sentencing Procedure) Act 1999 (NSW) and a finding that it was the only suitable or available or reasonable sentence, given the facts. In the circumstances, I think the prospects of success are quite good.

Delay; and s 18(1)(h) the length of time the accused person is likely to spend in custody if bail is refused;

Another important factor to consider is whether a person is likely to serve the majority of the sentence imposed before having their appeal heard. That is, a submission relating to the *extinguishment of their appeal rights*. This directly relates to the injustice referred to above in *McRoberts* and *Lane*. While not referring specifically to s 18(1)(h), Johnson J in *R v Lyons* [2018] NSWSC 223 stated at [20] that a court must provide consideration:

> … (and significantly) to the question of whether a person would be required to serve a substantial part of the sentence whilst waiting for the appeal to the District Court to get on.[29]

In this case, Lyons was sentenced to a term of full-time custody. There was considerable time between them being bail refused, and when their appeal was listed to be heard. In granting bail, Johnson J stated at [26]:

> If the Applicant remained in custody, there is the distinct prospect that the period in custody would extend significantly beyond that date, thereby giving rise to a number of problems which I have mentioned, including the risk of the sentence being substantially served before any appeal could come on.[30]

Appellate courts across Australia have recognised that the relevant consideration is the custodial portion of a sentence (i.e. the non-parole period).[31] For example, Burns J in *Re Chetcuti* [2017] QSC 196 had regard to:

> "…that the sentence (or, in all events, the custodial part of the sentence) is likely to have been substantially served before the appeal is determined".[32]

This is of particular relevance where a client is sentenced to short periods of custody. In many country locations, the District Court has Circuit Sittings. If a client has been sentenced to a period of custody, for example, of three months, and the next District Court sitting is two months away, there are strong grounds to make this argument.

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[29] *R v Lyons* [2018] NSWSC 223 [20] (Johnson J).
[30] *R v Lyons* [2018] NSWSC 223 [26] (Johnson J).
[31] See *Re Zoudi* (2006) 14 VR 580 [25] (Maxwell P, Buchanan, Nettle, Neave and Redlich JJA); *Re Chetcuti* [2017] QSC 196; *McRoberts v The Queen* [2018] NTCCA [11] (Southwood ACJ).
[32] *Re Chetcuti* [2017] QSC 196 (Burns J).

However, contrast the facts of *Lyons* however with *Viavattene v R* [2018] NSWCCA 197. In this matter, Viavenette was sentenced to a 22 month non-parole period. At the date listed for his appeal, Viavenette would have served eight months out of the 22 month term. In an appeal against bail refusal, the NSWCCA recognised at [26]:

> In that regard, it is to be remembered that there is only now one month remaining before his appeal is heard. To refuse bail now would not render his appeal nugatory given that, from the time his appeal is listed, he is still to serve a minimum of 14 months in custody under his existing sentences.[33]

Viavenette involved a conviction appeal, and the Court had previously indicated their doubt as to the appeals prospects of success.

Practical Tip: Find out likely appeal listing dates from the Registry ahead of making the application. Additionally, some country circuits will transfer the appeal to a full-time sitting court should appeals bail be refused.

Previously on bail; section 18(1)(f) whether the accused person has a history of compliance or non-compliance with any of the following—(ii) bail conditions;

Perhaps one of the most widely distributed ALS cases is that of *R v Reece Darren Crowe* (Sup Ct NSW Howie J, unreported 7 July 2008).[34] While it is often relied on in relation to injustice and the denial of appeal rights, it also contemplates the consideration that: where a person has complied with their bail conditions prior to sentence, this is supportive of why appeals bail should be granted. As Howie J noted on p 2:

> I simply do not understand how the Magistrate could refuse bail on an appeal when the applicant was on bail before he was sentenced and there was no suggestion he had breached those bail conditions.[35]

Note that *Crowe*: (i) was decided prior to the enactment of the *Bail Act 2013* (NSW) and does not relate to any specific provision, (ii) the offender had almost no criminal record, and (iii) there was significant *delay*.

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[33] *Viavattene v R* [2018] NSWCCA 197 [26] (Hoebden CJ, McCallum and Beech-Jones JJ).
[34] (Sup Ct NSW Howie J, unreported 7 July 2008).
[35] *R v Reece Darren Crowe* (Sup Ct NSW Howie J, unreported 7 July 2008) p 2.

While this proposition has not been expressly considered by an appellate Court, it is worth noting that some regard was had to it in *McGlone v Director of Public Prosecutions (Cth)*.[36] In this matter, McGlone was on bail for a period of two and a half years prior to his trial.[37] He had complied with his bail conditions.[38] White JA, with whom Harrison and RA Hulme JJ agreed, stated at [20]-[21]:

> The risk of flight is not greater now than it was when the applicant was on bail before his trial. He complied with his bail then
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> …
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> In concurring in the Court's decision to grant bail, I was satisfied that the applicant's strong family connection, the unlikelihood that he would risk his friend's surety by fleeing, and his record of having complied with his bail conditions before his trial satisfactorily address the bail concerns in s 17.[39]

It is important to be aware that an acceptable person in *McGlone* agreed to forfeit $150,000 in equity in a property as a surety.

b) Intersection of Bail Considerations

While the aforementioned cases illustrate the importance of individual considerations, the s 18 factors must ultimately be weighed together.[40] This was noted by Davies J in *R v Mehajer* [2018] NSWSC 1687 at [32]:

> The applicant makes the further point that if he is not released to bail the likelihood is that his period in custody before he is released on the recognizance order will have expired before the appeal comes on for hearing. However, the evidence at the present time indicates that the only reason that is so is that the applicant has not advanced his appeal at all since filing the amended notice of appeal. Further, this point cannot be assessed separately from the issue of the likely success of the appeal. If the prospects were good, this would be a very valid point. Since there is no material suggesting the prospects are good, this matter has no weight.[41]

While *delay* was identified as a serious consideration, the court also considered the intersection of other factors. Davis J assessed the appeal as having limited prospects of success.[42] Furthermore, he also identified the lengthy criminal history of the appellant.[43] Bail was ultimately refused.

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[36] [2019] NSWCCA 99.
[37] Ibid [6].
[38] Ibid [7].
[39] Ibid [20]-[21].
[40] *Barr (a pseudonym) v Director of Public Prosecutions* (NSW) [2018] NSWCA 47 [95] (McCallum J).
[41] *R v Mehajer* [2018] NSWSC 1687 [32] (Davies J).
[42] *R v Mehajer* [2018] NSWSC 1687 [32] (Davies J).
[43] Ibid [55] (Davies J).

The Court in *Re Zoudi* (2006) 14 VR 580 at [27] also recognised:

> Axiomatically, whether bail will be granted in a particular case will depend on all of the circumstances, of which the expiry of the non-parole period will only be one. There may be countervailing considerations, of the "unacceptable risk" variety, which mean that bail will be refused despite the fact that the non-parole period (or the suspended portion of a partly suspended sentence) will have expired before the appeal is heard. The question of whether the applicant can establish that he or she has reasonable prospects of success is another factor that must be considered. That is not to say that an application will fail because of the applicant's inability to demonstrate the existence of such prospects. In some — perhaps many — cases, it will be difficult to make any meaningful assessment of the prospects of success.[44]

c) Bail Concerns

Failure to Appear

In relation to a concern of *failing to appear*, it is not uncommon for a prosecutor to raise the fact that a term of imprisonment was imposed to found this concern. This was the case in *R v Lyons* where the Crown submitted at [21]:

> …that there is an unacceptable risk that the Applicant would fail to appear if bail was granted. In this respect, it was noted that she has been found guilty and sentenced to a term of imprisonment for these matters, that this constitutes an incentive not to appear and reference has been made to other features of the evidence.[45]

The logic behind this being that prior to sentencing full-time custody is a speculation, post-sentencing it is a realisation.

While a full-time custodial sentence can found a concern of failure to appear, it can also support an argument against. Firstly, a counter submission can be made that: (i) this is a severity appeal, (ii) a term of full-time custody was imposed, thus (iii) if an offender fails to appear at their appeal, the initial sentence will be enforced, and they will be returned to custody. This line of reasoning was recognised at [37] in *Samandi v Director of Public Prosecutions* (NSW) [2020] NSWCCA 102 where the court held that "It would also be inimical to Mr Samandi's prospects of success on appeal if he were to fail to appear in order to prosecute it".[46]

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[44] *Re Zoudi* (2006) 14 VR 580 [27] (Maxwell P, Buchanan, Nettle, Neave and Redlich JJA).
[45] *R v Lyons* [2018] NSWSC 223 [21] (Johnson J).
[46] *Samandi v Director of Public Prosecutions* (NSW) [2020] NSWCCA 102 [37] (Harrison, R A Hulme, and Wright JJ).

Secondly, in most instances of this arising, a person on bail attends court to be sentenced knowing that full-time custody is an option. It is arguable that this is demonstrable evidence that notwithstanding the high likelihood of full-time custody, that person attended court. Therefore, it is also likely this person will appear at their appeal.

Further, if this concern is raised, it is prudent to consider: (i) the length of time the person was on bail before sentence, (ii) the conditions of that bail, and also (iii) their criminal history. If a person was on relaxed bail conditions prior to the appeal, offer stricter conditions that ameliorate the risk of flight. Similarly, if a person has a lengthy record, but no record of FTA, use that as a demonstrable history of court attendance.

Interfere with witnesses or evidence

Lastly, in relation to severity appeals, it is arguable that the concern of *interfere with witnesses or evidence* can hold little to no weight. That is because a client has either pleaded guilty, or been found guilty, and is not disputing the conviction. As such, the only dispute relates to the sentence imposed. Whilst stated in relation to a bail application pending conviction appeal to the CCA, Rothman J in *Gray (a pseudonym) v R* [2020] NSWSC 390 noted at [8] that:

> The trial has been held; the witness has given evidence. Presumably, given the nature of the offence, the evidence was recorded and probably played as a recording during the course of the trial. As a consequence, it is almost impossible to interfere with a witness or evidence. That evidence would be available in any subsequent trial, in any event.[47]

Further, in summing up at [22], Rothman J omitted reference to this concern entirely when assessing the bail concerns.

V. Appeals Bail Refused by the Local Court

The Local Court may refuse to grant bail to an appellant pending an appeal to the District Court. Where this occurs, a further application for the grant of bail may be made to the District Court.[48] Section 74 of the *Bail Act 2013* (NSW) has no application to a further release application in the District Court due to the change in jurisdiction. For courts with a full-time sitting District Court, there may be limited to no

[47] *Gray (a pseudonym) v R* [2020] NSWSC 390 [8] (Rothman J).
[48] Pursuant to s 61 of the *Bail Act 2013* (NSW).

delay in the hearing of this application. However, for regional locations with Circuit Sittings, there may be lengthy delay in the application being heard at that location. This delay may be overcome by lodging the application at the closest sitting District Court to the ODPP office appearing in the appeal.

Furthermore, this process may also be employed to expedite the hearing of an appeal where: (i) the appellant is a Young Person, and (ii) they have been denied bail by the Children's Court. An application may be made to the closest sitting District Court to the ODPP office with carriage of the matter to have the severity appeal urgently heard at that court.

VI. Severity Appeals

Severity appeals will often be a practitioner's first introduction to appellate advocacy. A severity appeal operates as a hearing *de novo*. That is, "the matter is heard afresh and a decision is given on the evidence presented at that hearing".[49] This is specifically legislated under s 17 of the *Crimes (Appeal and Review) Act 2001* (NSW):

> *An appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings, although fresh evidence may be given in the appeal proceedings.*

Therefore, fresh evidence (in the form of medical reports, support letters, etc.) that was not tendered to the Local Court may be adduced.[50] It is important to note that no transcript is provided to the Court in a severity appeal. It is often conducted largely like a Local Court Sentence.[51]

How the specific District Court operates will largely dictate how the matter is mentioned. That is, whether the Judge calls through the list or awaits solicitors to mention their matters. For a detailed procedure, see Jane Sanders paper Appeals to the District Court. However, a general example of how severity appeals are mentioned is:

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[49] *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* [2000] 203 CLR 194 [13] (Gleeson CJ, Gaudron, and Hayne JJ).

[50] This may also be a good submission on bail (see s 18(1)(l) of the *Bail* Act). Often clients may not proactively bring subjective material to a Local Court sentence. Obtaining these documents can be harder with your client in custody. If bail is refused, make sure to obtain a written consent before the client is transported to a Correctional Centre.

[51] Sanders, Jane, *Appeals to the District Court*, The Shopfront, 2012, https://criminalcpd.net.au/wp-content/uploads/2016/09/Appeals_to_the_District_Court.pdf.

> **Appellant:** Your Honour, the matter of John SMITH. It is in today for an appeal of sentence. My name is BOURKE for the record, that's B-O-U-R-K-E. I appear on behalf of the appellant.
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> > **Crown:** JOHNSON for the Crown. Your Honour, I tender the Crown bundle in the matter.
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> **Appellant:** No objection, Your Honour.

As clearly outlined by Jane Sanders, the Crown Bundle contains "the notice of appeal and the material that was before the Local Court, including the CAN, fact sheet, criminal record, *[sentencing assessment report]* and any material that was tendered on behalf of the defendant. The bundle will have a cover sheet with details such as the maximum penalty for the offence, the sentence imposed, and the length of pre-and postsentence custody". The Crown Bundle is obtained from the DPP, and not the Court.

Parker Warning

In a severity appeal, the District Court is empowered to set aside a penalty, vary a penalty, or dismiss the originally appeal.[52] Varying a penalty includes both a decrease or an *increase* of the penalty imposed.[53] One principle of a severity appeal that a new practitioner should be aware of is the *Parker* direction.[54] It may be as subtle as a Judge stating to you "I'm considering giving your client more time", or even simply "You may wish to take instructions on withdrawal". As stated in *Parker v DPP* (1992) 28 NSWLR 282 at 295:

> There is an established practice or convention in District Court appeals…that a judge, contemplating an increase in the sentence under appeal, will signal that possibility to the appellant. This is well-known. Although it is not a rule of law, it is an established practice. It should rarely, if ever, be departed from. The basis of the practice is to be found in a species of the double-jeopardy principle
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> …
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> If the second judicial officer knows of the penalty imposed by the first and contemplates a higher penalty, it is proper to indicate this fact so that the appellant can consider whether or not to apply for leave to withdraw the appeal.[55]

It is always prudent to obtain instructions in relation to a *Parker* direction prior to the severity appeal. If you already have instructions, seek leave to withdraw the appeal.[56] If not, ask the court for a moment to obtain instructions and advise your

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[52] *Crimes (Appeal and Review) Act 2001* (NSW) s 20(2).
[53] Ibid s 3(3)(b).
[54] *Parker v DPP* (1992) 28 NSWLR 282.
[55] *Parker v DPP* (1992) 28 NSWLR 282 [295].
[56] *Crimes (Appeal and Review) Act 2001* (NSW) s 67(1).

client of the effect of a *Parker* direction. On almost all occasions your client will instruct you to seek leave to withdraw the appeal.

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**please feel free to contact me on joseph.bourke@alsnswact.org.au to discuss this further.
***the views expressed in this paper are my own and do not necessarily reflect that of the ALS. This paper is largely based on my experience as a solicitor in the Western Zone of NSW. I encourage any person who reads this to conduct their own research, as this is intended as an introductory guide only. Please contact me with any errors or updated case law so the paper may be updated.