

SUBMISSION NO. 6

Victorian Law Reform

03 JAN 2005

Committee

Re: County Court Appeals

1. Background

I am a barrister who practises mainly in the area of criminal law. I am also an Associate Professor in the School of Law La Trobe University and my main area of teaching and research is the criminal justice system generally.

2. The following briefly canvasses some of the more important issues that I see as relating to County Court appeals.

3. Data

Central to any full discussion of this issue must be the existence of reliable, empirical data. For the purposes of this submission, I have relied on data from the Annual Reports of the County Court for the financial years 1999/2000 to 2003/2004.

Table 1 sets out the number of appeals from the Magistrates' Court and the Children's Court finalised for the financial years 1999/2000 – 2003/2004.

Table 1

Year	No of appeals finalised
1999/2000	1591
2000/2001	1620
2001/2002	1759
2002/2003	2328
2003/2004	2242

Notes:

A. It is not clear whether these figures include appeals finalised in circuit courts.

B. The great bulk of these appeals are by defendants, with a very small number by the DPP.

4. Discussion

It would appear from the Annual Reports of the County Court that the County Court hears these cases quickly and that there is no backlog.

The Annual Reports also suggest that in Melbourne roughly 3 judges were allocated to hear these appeals. That number seems to have remained relatively stable over the five-year period, despite what looks like a significant increase in the number of appeals.

The 2003/2004 Annual Report states at page 25 that nearly three-quarters of the appeals were against sentence only in the financial years 2002/2003 and 2003/2004. Appeals against sentence generally do not take a long time. From my experience, the average length of such an appeal is somewhere around 30 minutes or perhaps a little longer.

I have no information about the average length of appeals against conviction. No doubt there will be some quite lengthy appeals, but my guesstimate is that the average length of an appeal against conviction is a day or perhaps a little less.

5. Some specific issues

A. The desirability of de novo appeals

It can be argued that, while de novo appeals were justified when large numbers of decision-makers in the lower courts were not legally qualified, that situation no longer exists. Indeed, it could be argued that the continued existence of de novo appeals amounts to a slight on the competence and professionalism of the magistracy.

There are, however, other considerations. The Magistrates' Court is very busy, especially the mention court where a magistrate can hear perhaps 50 cases or more in a day. This is a huge workload, but the efficiency of the Magistrates' Court depends on rapid turnover.

There is also the question of legal aid lawyers who handle many of these cases. Very often these lawyers have a huge workload. They might see half a dozen (or more) defendants in the cells. In addition, they might also see another group of defendants not in custody whose case is on that day. A careful and thorough analysis of such cases is generally impossible. There is no time to listen to taped records of interviews, there often will not be a police brief, but only a remand warrant. In many cases, the informant will not be present at court and only limited negotiations can be conducted with the prosecutor.

By contrast, a barrister will be briefed to do a plea for only one case (or perhaps two). The barrister has time to listen to tapes, take instructions, negotiate with the informant (and prosecutor) and obtain reports (medical, psychological). A plea in such cases will not only be better prepared, but it will also generally provide considerable assistance to the magistrate.

It is also probably true to say that there is at least an expectation that pleas will not take very long. Everyone, from co-ordinator, through magistrates to prosecutors and legal practitioners, operates on that expectation. It is, for example, uncommon to call

character evidence in pleas in a mention court. It is also a requirement that a consolidation plea be booked in.

De novo appeals need to be seen against this background. Magistrates are expected to deal with a large number of cases, often with not much import from counsel.

'Instinctive synthesis' at 100 miles per hour can lead to errors. The de novo appeal is the backstop.

B. Success rate of appeals

By 'success rate' I mean an outcome that is better than that obtained in the Magistrates' Court or the Children's Court. I do not know what the 'success rate' is, but my guesstimate is that is quite high.

It should be noted that a successful appeal does not necessarily reflect on the appropriateness of the decision in the Magistrates' Court or the Children's Court. The appeal is a re-hearing and it is often (generally?) the case that new plea material will be present to the County Court.

A high success rate would suggest that appeals are being brought where there is a good prospect of success.

C. Sentences being increased on appeal

It may be that County Court judges are rarely increasing sentences on appeal.

Certainly, the changes in 1999 were designed to bring that possibility to the mind of prospective appellants (and their legal advisors). If this is the case, the most likely reason is that there are not many unmeritorious appeals. I cannot speak for other barristers, but in general the possibility of an increased sentence on appeal is always a very important consideration. One always has to spell out that possibility to a client who is wanting to appeal against a decision in the Magistrates' Court or the Children's Court. Moreover, it is my understanding (I may be wrong) that an appeal will not be legally aided unless the relevant practitioner states that an appeal is justified.

D. Indictable offences triable summarily

There are a large number of indictable offences that can be heard summarily if the magistrate agrees *AND* the defendant also consents. The vast majority of property offences are in fact heard summarily. That is probably also the case with the offences of: reckless cause serious injury, intentionally and recklessly cause injury, threat to kill. A significant number of these cases finish as guilty pleas.

In this context, an important factor is the contest mention hearing. I do not have precise figures available to me at the moment, but it is, I believe, generally seen as a valuable tool in the resolution of many cases that might otherwise have gone to contest. Such an arrangement does not currently operate in the County Court. For practitioners, who are running contests in the Magistrates' Court, an important consideration is the existence of the de novo appeal. It should be remembered that there are many quite serious cases being heard in the Magistrates' Court with the likely outcome if unsuccessful being a significant prison term. For such contests, defence counsel has the police brief. However, while there will generally have been a contest mention, there will not have been a contested committal. In contrast to a County Court trial, a defendant in a contested case being heard in the Magistrates' Court is at a real disadvantage. It is also my understanding that acquittal rates are higher in County Court trials than in contested cases in the Magistrates' Court. For practitioners, the existence of the de novo appeal can be a real consideration in determining whether to advise summary jurisdiction.

It is possible that if de novo appeals were removed, there would be a significant number of indictable cases where summary jurisdiction would not be accepted by defendants. The incentive would be: committal, differential acquittal rates and, for some, delay.

It is hard to quantify comparative time and costs. For a contest in the Magistrates' Court, there will be a contest mention and a contest. For a County Court trial, there will be: filing hearing, committal mention, contested committal, direction hearings and trial. Moreover, contests being heard summarily tend to take quite a bit less time than jury trials: no jury selection, no opening addresses, no closing addresses, no summing-up.

The savings envisaged by abolishing de novo appeals may be more than balanced by an increase in County Court trials.

E. Supervision of sentencing in summary jurisdiction

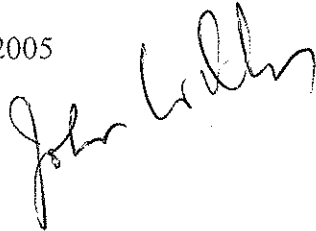
The Supreme Court has on occasion expressed the view that its function is not to hear appeals against sentence severity. Such appeals, to be successful, will require proof of error at law. The present arrangements are a de facto guide to magistrates and a protection to defendants. From time to time, certain magistrates have generated a very large number of appeals. The ease and existence of de novo appeals is important to protect defendants and (hopefully) sends a message to the relevant magistrate.

F. Intervention orders

Appeals against intervention orders may well increase. This has been an area of exponential growth in Magistrates' Courts and further toughening of police and court responses may well have flow-on effects.

Conclusion these are by way of some preliminary observations.

23 December 2005

A handwritten signature in cursive script, appearing to read "John Willis".

John Willis