LAW REFORM COMMITTEE

Inquiry into County Court appeals

Sydney — 10 April 2006

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Chief Judge Blanch, District Court of NSW.

Tape commences during opening speech by chair.

THE CHAIR — …and that is of course the equivalent of your Court here and in Victoria those appeals are heard de novo. In NSW obviously it is a sort of a hybrid system, it is not quite strictly on errors of law but it is on the transcript of the hearing from the Local Court. We have been exploring this morning both with the Chief Magistrate and also with the Office of Public Prosecutions the differences between the two systems and how they work. We are keen to get your observations and views about how it works in the Court of Appeal here and so I don't know whether you would like to make any introductory marks but if you would like to talk about the system since it changed in 1999 we would be very happy to hear about that but we have also got quite a few questions that we would like to ask you.

Judge BLANCH— My involvement with all this goes back to the time when I was the DPP and the system of de novo appeals where the evidence is heard, is a very time consuming and expensive procedure and it also ties up police resources very significantly because police are required to come along and attend court and give evidence in those cases.

It can also be a very trying time in respect of apprehended violence order appeals because we deal with - I am not quite sure - I would expect in Victoria it is probably dealt with in the same way but I am not absolutely certain. If you apply for an apprehended violence order in the Magistrates' Court and it is obtained or not obtained then you can appeal against the obtaining of it or not obtaining of it. To my observation, more particularly as a Judge, there are certain classes of those cases where people have used the appeal mechanism as another means of attacking their victims.

One illustration is an old lady who has been having an ongoing argument with her neighbours and she kept taking out apprehended violence orders against them. I think the first one began because she said that their cat was jumping over the fence and frightening the pigeons that she was feeding. But she failed to get her order and then she appealed against that and then because on the first instance the neighbours were brought along to court, then when she appealed the neighbours were brought along to court again and that vendetta went on for a number of years and her neighbours were dragged backwards and forwards to the various courts over quite a long period of time involving I think initially an expense but then they got used to the fact that these were fairly frivolous sorts or vexatious proceedings and they simply appeared for themselves thereafter, but of course that meant going to court all the time.

Another illustration- in fact the case that caused me to do something about it - again was a case of a young fellow who had been chased down the pacific highway towards the harbour bridge and he saw the police were following him so he flew off the side street, jumped out of the car and ran away. The police were in hot pursuit and the bystanders chased him down the street and they tackled him to the ground and the police came up to him and his defence was it wasn't him, he wasn't driving the car which was really quite ridiculous bearing in mind there was constant observation and the car belonged to his girlfriend. But that case - he appeared for himself, and he was obviously concerned about getting a conviction for doing whatever he was charged for doing and the whole of the North Sydney highway patrol were caught up in the court for two or three days while this case was going on, while he was cross-examining them about where they were standing at the various observation points and so forth.

When I said it caused me to do something about it - just backtracking a bit - I made some representations about all this when I was the DPP because of the expense and time involved in having these cases prepared, getting the witnesses all organised to come back to court again and of course in minor sexual assault cases you are dealing with vulnerable witnesses and so forth who have to be dragged back to court again to do that. When I was the DPP I was not successful in having anything done about it, but the case - I was hearing that appeal for that fellow and it was a

classic example of why the system should change and I made representations to the Attorney-General and on that occasion they were successful and that is how we came to have the system we have got.

It is still as you know a rehearing of the case but it's a rehearing of the case on the papers and no other evidence can be called, no witnesses can be re-called unless there is an application made to the court for that to occur and it is fairly seldom that leave is granted for further evidence to be called. And indeed we had a further amendment made such that where a person failed to appear in the Magistrates' Court and was convicted in their absence they could then still appeal to the Court and in such a case of necessity it had to be by way of calling all the evidence because it hadn't been heard before. So the amendment we had made then was that in those cases the appeal to this court should be against the Magistrate's refusal to reopen the case so that it comes up on that basis, we then send it back to the Magistrate and then the Magistrate hears the case in the first instance and then the person has the right of appeal to the court.

Now in terms of court time of course it's a huge saving in court time because if you hear one of these cases with all the evidence being called and the witnesses all being cross-examined then an all-ground appeal would generally take half a day to a full day for each case. Last year we dealt with 1,544 of those appeals on a state-wide basis.

The CHAIR —All ground appeals.

Judge BLANCH — All ground appeals. Obviously if you are dealing with 1, 500 and odd of those cases its going to take up a lot of time. If you allowed a day for each case which is probably too generous an allowance but just work on that figure for the moment you are talking about 1,500 days that's 300 weeks. A judge sits in NSW for about 40 weeks a year so you are talking about 7 or 8 Judge worth of time in dealing with those appeals. That's if you allow a day. As I said a day is probably too much to allow on an average basis. Some of them can take a week or two weeks. They very often take less so a realistic estimate would probably be between half a day and a day. That's just to give you some idea of the resource implications as far as the bench is concerned.

The CHAIR —Even with the change to just being on the transcript?

Judge BLANCH — Yes, well actually that makes a significant difference because I have over the last few years dealt with a very large number of those appeals in Sydney because I have been siting for most of the time in the criminal court that organises the listing of trials, the listing of sentences and the management of the criminal list. In that court room is where nearly all of these appeals are done and the way you can deal with these appeals is to read them before you go into court, and if you have read the papers before you go into court then the average length of time for these appeals in my court is half an hour to an hour.

The CHAIR —So you are saying that what was half a day to a day under the old system is now half an hour to an hour?

Judge BLANCH — Yes. That's a broad run down. You have no doubt got questions you want to ask me.

The CHAIR — And of those cases, how many would you in addition get on the question of sentence? If you have got the stats we can just take those.

Judge BLANCH — No I can just tell you. Last year we dealt with 5, 210 severity appeals as well as the 1,500 and whatever it was ….

The CHAIR —And how long would they generally take under this new system?

Judge BLANCH — Severity appeals? There is no change. There has been no change to the way severity appeals are dealt with. The reason for that is that in severity appeals you often get a change in circumstance of the appellant so that it may be relevant to have a pre-sentence report, or a psychiatric report or some other report that was not presented in the other court. We try to deal with severity appeals within two months of the appeal being lodged so there is not a lot of gap. We try to deal with all ground appeals within four months of the all grounds appeal being lodged. The reason for the longer period with all grounds appeals largely relates to the fact that because it is on a transcript you have to wait for the transcript to be done. Transcription is one of the bugbears of any legal system both as to cost and efficiency. It generally takes six weeks to two months for transcripts to become available and that of course is the cost, because that is a cost that you don't have if there is no transcript. But I think your system now is probably as ours was. They usually prepare the transcripts anyway because when they call the witnesses again they would want to cross examine them on what they have said in the Magistrates' Court. So that I think is the way your system would operate and on that basis there is no extra cost in getting transcript.

The CHAIR — In the all ground appeals how many - do you know out of those cases how often or how many the Judge would allow witnesses or grant leave for witnesses to be called again? Is that figure kept?

Judge BLANCH — No but I would say less than five percent. There are some but it is a low figure.

The CHAIR —So, five percent of the 1,540?

Judge BLANCH — Yes.

Mr HILTON —Is that five perecent of where witnesses allowed to be called or five percent where there is the application for witnesses?

Judge BLANCH — Where they are allowed to be called.

Mr HILTON —Would it be a significantly higher figure where there is an application?

Judge BLANCH — Not significantly higher. Probably ten percent where the application is made.

The CHAIR —So that's sort of in roughly half the cases.

Judge BLANCH —The legislation is framed so that there is a presumption that it will be dealt with on the papers. Practitioners understand and accept that that's the case so they don't generally come along and make really frivolous applications. So that if an application is made then generally speaking there is some reason behind it. Sometimes it's a good reason, sometimes it's not. But that is why the percentage of cases that succeed with that application is as high as that.

Ms HADDEN—Sorry so its 5 percent of 1,554 all grounds.

Mr LUPTON—This morning Judge it was mentioned to us that the Magistrate's reasons are not part of the material that comes before the Judge and because it's a rehearing on the transcript and likewise the reasoning of the District Court Judge doesn't seem to make its way back to the Magistrate either. I was wondering whether you would comment on both aspects of that.

Judge BLANCH —The first aspect, the reason that the Magistrate's reasons form no part of the papers to be considered is because it is a rehearing. If you are going to have a rehearing then that's the appropriate thing to do. So far as the Judges reasons are concerned the results of the appeals are always sent back to the Magistrates' Courts so they know what the outcome is.

The CHAIR —The decision, but not the reasoning I think was Tony's point.

Judge BLANCH — The reason that the reasoning isn't made available is simply because of the extra transcription cost I would think. There have been occasions when we have been asked for the reasons and they have been made available. The tape or the transcripts have been made available if there has been one. But the other aspect of that is that it's not as though the Magistrate is being marked on the Magistrate's reasons for the decision or whether the Magistrate made a mistake or didn't make a mistake in deciding the case. It's a rehearing of the case as opposed to an appeal which is an appeal in the strict sense where for example something from this court goes to the court of criminal appeal. Then it goes there as an appeal on the basis that there has been, or said to be some error in the decision that has been made here and then the court of criminal appeal looks at that and says yes or no and so on. If there is an error then there is a transcript to tell you all about what it is.

Mr LUPTON —It's certainly logically correct that the only material that comes in front of the court is the transcript and not the Magistrate's reasons. But some of the people we spoke to this morning suggested that it does make it, or could make it difficult for the District Court judge to make decisions particularly as to the creditability of witnesses and so forth. Why the Magistrate has come to a particular view without having that material available not withstanding the inherent illogicality of including that material in it, do you think it is a useful thing that we might consider?

Judge BLANCH — Well you could consider it and that is the particular point that many people focus on and have always focused on in this debate. The answer to it as far as I am concerned is this - that if magistrates or judges for that matter make decisions based on the demeanour of witnesses in the witness box in court rooms, then their judgement is very likely to be very much astray because I think there is a fairly general acceptance, certainly I accept it, that demeanour of witnesses is a very, very unreliable measure to use. What can I tell you about that? Aborigines for example refuse to look you in the eye -it's not because they are being evasive, it's because they are, particularly tribal Aborigines, or people that come from an aboriginal culture of any sort, regard it as rude to be looking at, somebody that they regard as superior, in the eye. Over my years as a barrister I have seen many policemen come along to court and give absolutely wonderful evidence with blue eyes twinkling and a very straight face but telling the most appalling lies.

Judge BLANCH —We ran a training program for Judges - well it wasn't a training program it was one of the education committee programs, that we were doing at a conference. We just ran this thing as a bit of a, entertainment more than anything else. They filmed a test that was done on various people who were talking to a camera. You had to say whether that person was telling the truth or telling a lie. In America they gave this test to some kindergarten kids who apparently managed to pick it with 55% accuracy. We gave it to the Judges and we only got 50% accuracy.

There have been a few statements about this I think more recently in the High Court but one of the problems of course is that the court rooms are a very artificial atmosphere. You can try as you might to make people feel comfortable and you can only go a certain way down that path. But, it is a very artificial atmosphere for people and people become nervous and they react differently when they are nervous. I, as I said, if someone told me that they had decided the case, a criminal case, purely and simply on the demeanour of the witness, then I would regard that decision as being highly suspect.

The CHAIR —It raises that question then what a court judge is actually looking at when they look. What are they looking for when they look at the transcript because to a certain extent the credibility of witnesses does get weighed, if not their demeanour but certainly their credibility as witnesses and even though it's a rehearing are you actually looking for errors of fact or law? Or what are you actually doing?

Judge BLANCH —It may be you are looking for errors of law, if you come across an error of law then that certainly assists the process. Generally speaking you aren't looking for an error of law. What you are looking at is whether or not the evidence is sufficient to satisfy you beyond a reasonable doubt of the guilt of the appellant. And that amounts to weighing up the various pieces of evidence and seeing whether you can come to that conclusion. Very often it's a question of the number and types of witnesses who are giving evidence. Whether they are police witnesses or lay witnesses, just the usual gamut of things that you look at in terms of prejudice, accuracy as well as honesty, identification issues, opportunities of identification and so forth. It's really in most cases just a reassessment of the various bits of evidence.

Mr HILTON —What sort of impact do you think that has on the Magistrates if they believe that their judgment decisions can be reviewed as to their accuracy?

Judge BLANCH — They always have been, that's the way the system works and it always has worked in that way. Whether it is done, that exists on a re-hearing, in a rehearing system whether it's by way of paper or otherwise so it doesn't really impact on that. If you are thinking about doing away with that altogether then….is there any system in Australia where they have done away with it all together and it is only done by error of law?

Mr LUPTON – We don't believe so. We thought not.

Judge BLANCH —I think not, in England it's certainly done the same way that we do it

Mr BUNT —There are some that are described that way but I think you are right Judge. South Australia for example - some people have suggested that it is error of law but it seems to boil down more that the appellants has to make out detailed grounds which arguably could shade into having to demonstrate some sort of error. So, it's a bit of a grey question that in South Australia I think.

Judge BLANCH —Subject to that I don't know of any system where that occurs so you would be breaking entirely new ground if you did do that and I would certainly caution against it because you are leaving people in the situation where they have no right of redress against an unusual decision by a Magistrate. Bearing in mind the number of cases the Magistrates hear, the appeal rate I would suspect is not huge but that doesn't mean that there aren't some quite odd decisions made by the Magistrates on the facts from time to time.

The CHAIR — I am wondering if you could just talk to us a little bit about the process. There is an appeal lodged, the onus obviously is still on the prosecution to prove that the person is guilty beyond reasonable doubt, you have read the transcript - how would you then conduct that case? How does it then occur in the actual court? On all grounds appeals I am talking.

Judge BLANCH —I suspect the answer to that may be different if you are talking to different Judges. The way I do it, because I have a busy list and am always in a hurry, is I have read the papers, I have formed a tentative view about it - that the appeal is, if I have formed the view that the appeal is hopeless, then I just go into court and say to the appellant's representative 'what do you want to say about this, isn't the case this, this and this, isn't the evidence that, that and that?' 'What do you want to say?'. If I have formed the view that the appeal is quite a strong appeal then I would go into court and say to the Crown 'as I understand it your prosecution case is this, but I have these difficulties with it - do you want to say anything about those matters?'

In other cases where it has been - it normally is pretty clear one way or the other - in the other cases it's just a matter of listening to both sides.

The CHAIR — Do you think now that its been in operation for seven years - do you think there are any improvements you would personally like to see made to how the system operates? Is there any refinements?

Judge BLANCH — No I don't think so, I think it works quite well. The one refinement that was needed was that situation where the person didn't turn up in the Magistrates' Court at all and were convicted in their absence and then subsequently arrested and sentenced by the Magistrate. The amendment that was made there was to allow - to give to the defendant a right to request a rehearing in front of the Magistrate saying I didn't have the chance to put my case before I would like to put it now - and if the Magistrate refuses to do that then there can be an appeal to the Court against that and it can be sent back for the Magistrate to rehear. That was a refinement that was necessary but other than that no.

From my point of view it's certainly been highly successful in the sense that we have reduced the demand on court time and because of that we have reduced significantly the time that it takes appeals to be heard. You probably would have looked at the Productivity Commission's reports which compare the times that it takes appeals to be heard. I can't remember what they were now, but I would suspect that our times are much shorter than Victorians times and that is because of that. I think all of those things are good things. There has been as I said a significant saving of police time because the police aren't required to come to court. There has been a significant positive impact so far as vulnerable witnesses are concerned in the sense that they are not dragged back to court a second time. The whole process comes to an end much faster and everybody can put it behind them

The CHAIR — Justice Price, whom we met with this morning, indicated two things that I think he has put up at various time including to the Sentencing Council as suggestions and I think Tony mentioned these earlier. One was that he felt it would be useful if the Court Judge had the reasons for the decision of the Local Court Judge and secondly he thought it would be useful to the Magistracy if the reasoning, I think this is obviously for learning purposes, the reasoning of the court Judge was made available to the Local Court judge in terms of his or her judgement. Do you have any comment on those two aspects?

Judge BLANCH — So far as the reasoning of the Magistrate - that always is transcribed. It doesn't form part of what is being considered in the court, but it's always there on the papers if you want to read it. So far as transcribing reasons of the Court and giving them back to the Magistrate concerned, in an ideal world that would be a useful thing to do. I don't have a view about it, I suppose it's a good thing rather than a bad thing to do but it is something that requires resources.

Mr HILTON —Can I just clarify that, so the Judge has the discretion to read the reasoning of the Magistrate in a rehearing?

Judge BLANCH —What I am saying is that the Magistrate's reasons are there with the file but they don't form any part of the actual hearing itself.

Mr HILTON— But the judge has access to that if he wished?

Judge BLANCH — Yes

Mr LUPTON —That is different or more information than we had earlier. We were not aware that the Judge had access to that.

Judge BLANCH —The whole thing before the Magistrate is transcribed including the Magistrates reasons. Although it doesn't form any part of the argument in court, there have been a number of occasions where I have read the Magistrates reasons just to sort out what the case was all about. If it's a huge case involving a lot of issues and so forth and you look at a pile of papers this thick and think what on earth is all this about, and the Magistrate will have summarised the facts. But the reason that it's not part of the appeal process itself, is because you are not focusing on whether the Magistrate made a mistake in the course of coming to that decision. You are in terms of making the decision, you must make your own decision based on the material itself.

The CHAIR — Just trying to actually clarify the exact nature of the change. We have just got some information here that according to a paper done I think by the Justice Department in 1992 that the de novo appeals as they existed then were actually, did involve looking at the Local Court transcripts. I am actually just trying to - is that the qualitative change in 1999, not the introduction of the Local Court transcripts so much but the fact you don't hear the witness again? Is that the real change?

Judge BLANCH —Yes, well. Yes it is. I suppose there is a simple answer to that. The transcripts have always been available and they would be available in Victoria I would expect.

Mr LUPTON —That does not seem to be the case

Judge BLANCH —Doesn't it?

Ms HADDEN —It's a resource issue

Ms MASON —Yes. You can get them but you have to pay for them.

Mr LUPTON —They are just not as a rule…

Ms HADDEN —They are available here as a right? Once the appeal is activated.

The CHAIR —They have to be.

Judge BLANCH —They always were in NSW and the reason for that is because the barrister for example who appeared in the Magistrates' Court and cross-examined the witness and then there was an appeal and the witness came back to give evidence again - they would want to say to them – 'I asked you this question', and 'you gave me that answer' and so on. So the transcripts always have been important. I should point out, but I can't tell you how significant this is, that in quite a few cases before this law was changed, in quite a few cases all grounds appeals were dealt with on the papers in any event. There were very often cases where the lawyer appearing for the appellant would say I am happy for you to deal with this case on the papers and not call witnesses. The transcripts always have been available, as I have said, and sometimes they were dealt with on police statements. That method of dealing with things always did occur. The nature of the change was to ensure that is what happened in every case.

The CHAIR —Nathan did you want to say something about the availability of transcripts in the Magistrates' Court in Victoria?

Mr BUNT—Yes it's basically what we said – they are not available routinely. I think it's the case that audio tapes are made and they are retained for three months so that if for example if the DPP or somebody wants a transcript then they can go and order it.

The CHAIR —But you have to ask?

Mr BUNT—Yes that is my understanding. You have to ask for it to be transcribed from a tape.

The CHAIR — This is a clarifying point in relationship to the statistics on all grounds appeals - do they include for example intervention orders as well? Are they covered in your annual report? In terms of your Court, does it include intervention orders as well?

Judge BLANCH – What are intervention orders?

Ms HADDEN —AVO order here

The CHAIR — Apprehended violence order?

Judge BLANCH —Yes it does.

The CHAIR — So are they comparable?

Judge BLANCH —Yes. I was talking, Michael Rozenes rang me and we were talking. About - there was one aspect of something that is done in Victoria. I think it was child care appeals where we do deal with those child care appeals from Magistrates but we deal with them in our civil jurisdiction not in our criminal jurisdiction. I think it was that and I think I got the impression from Michael that they are dealt with in criminal jurisdiction in Victoria.

The CHAIR —In relationship to children court matters? Protection matters? I think it would depend - there is a criminal and protective division, they are dealt with separately in the Children's Court. I am not sure how they are dealt with on appeal.

Mr LUPTON —They go on appeals to the County Court on a normal appeals list.

The CHAIR — Yes and it would depend on how many of those there were. In Victoria our intervention orders are recorded in a separate category, so I am wondering in terms of your apprehended violence orders whether you could tell us out of that total number of all grounds appeals how many of those – do you know or are you able to identify how many of those are there likely to be apprehended violence orders so we could compare like with like?

Judge BLANCH —No, no I couldn't. It would be less than ten percent it might be five percent - in that sort of rough order but that's about as good as I could do. My guess would be about five percent.

The CHAIR — Nathan did you want to ask a question?

Mr BUNT — Just one question. In Victoria there has been a concern about appeals being abandoned, so they will be lodged and then they might be abandoned either at the hearing or at some point leading up to the hearing. Victoria brought in some changes in 1999 to try to deal with that in part. It' hard to gauge the success of those changes but I just wondered whether the NSW 1999 changes had any influence on abandonment's and adjournments or even if that's a problem in the NSW system?

Judge BLANCH —I think the answer to it is that it's just not a problem. Severity appeals, those numbers that I quoted you obviously make up the vast majority of cases. They are the sorts of cases where you are more likely to get somebody to abandon their appeal. There are no implications of that, because there is no transcript taken out in severity appeals, there is no transcript prepared of what's happened in the Magistrates' Court it's just the sentence that the magistrate imposed. There are no resources issues and the matter turns up in my court today and I just look at the material that's been tendered to the Magistrate. If the person comes in and says 'I want to abandon the appeal', very often if they are in jail and they are saying that, very often I say 'take a seat for two minutes' whilst I take a quick look at the papers to satisfy myself that they are not making a stupid decision about this. But otherwise if they are represented and the lawyer turns up and says 'I want to abandon the appeal' they just abandon the appeal and I say 'thank good ness for that' and I move on to the next case.

Mr HILTON — Those severity of sentence appeals, what percentage would be successful?

Judge BLANCH —Well I have just finished dealing with four this morning and I think they were all successful. They were all successful. Actually I dealt with six and they were all successful.

Ms BEATTIE —100 % then

Judge BLANCH —Yes one hundred percent but that's not always the case though. I mean you will get a different answer to that question when you speak to different judges of course. I find that the success rate in front of me, the majority, perhaps 2/3 or even more do succeed, there is a reduction. That could be for a number of factors. The obvious factor might be that I have a more lenient approach to sentencing than most Magistrates. But I don't know that that is necessarily correct. I think it's because many of the cases that involve jail sentences, cases where the legal aid commission appears for the accused, and they don't give legal aid unless they are satisfied that there is some sort of merit in the appeal. I think the legal profession generally adopt that sort of approach. I mean that might look like a lot of severity appeals that we dealt with last year but it's only a very small percentage of the total number of sentences that the Magistrates handed out, so there is a certain amount of selectivity in the cases that actually get before the Court. It's filtered out by the lawyers, to cases that they feel they have got a chance of succeeding in.

Mr LUPTON —The lawyers are really making a judgement themselves at first instance that it's really outside the range and that will often be a correct judgement.

Judge BLANCH —Yes.

The CHAIR — You would expect that variability given the number of magistrates, the different types of locations they are working in, and perhaps the lack of general guidance they may well get in relationship to sentencing matters in many instances.

Judge BLANCH —I don't know. I mean it depends. I don't know what the situation is in Victoria. The situation with Magistrates has or I suppose I can say the quality of Magistrates has improved gradually over the years and now in New South Wales generally speaking people who are appointed as Magistrates are practitioners of some real experience. But, you certainly do get in the number of Magistrates that we have got, a significant variation. There are some Magistrates who have a very tough attitude towards drink driving for example. I had a case a couple of weeks ago of a Magistrate with some fellow who had been charged with drink driving. The reading was only about 0.9 or thereabouts, he had a previous drink driving, a special reading of drink driving where he was on his P's and had 0.01, he probably had a piece of Christmas cake or something, it was a very, very low reading and that was all. The magistrate sentenced him to nine months jail and then refused him bail when he launched the appeal. By the time it came to me he had been in custody for 10 days and I of course let him out straight away with all the appropriate disqualifications and so forth. You do get that, no doubt you get them in Victoria as well.

Ms HADDEN — Well I am sure he won't re-offend.

The CHAIR — He would have had the fright of his life.

Ms HADDEN — Ten days that should be enough in New South Wales prisons.

Judge BLANCH — You would think so. The Magistrates do get the results of those appeals and they know that that sentence has been appealed against. When the appeal is dealt with the papers are sent back to the court and the Magistrate can find out what the result of the appeal is.

The CHAIR — Are there any parts of the system where things might go wrong, for example do tapes go missing and therefore transcripts can't be produced. Are there any logistical problems with this sort of appeal on the transcript that you experience in the Court?

Judge BLANCH — That has certainly happened in one case that I am aware of over the last few years, but it has only been in one case, where they have lost the tape or have not been able to locate it and in that case the matter has to be listed for a full hearing with all the witnesses being called again. That is not a fatal error, it is just a complete rehearing of the case with all the

witnesses being called. It has only been in one case over the last number of years that I have come across it. It is fortunately rare.

The CHAIR — Is there any ongoing debate about the reforms,? Does the Law Institute or the Criminal Bar Association or any of those bodies, do they say look really as a result of this narrowing or tightening of the way in which appeals are done, that this is causing injustice and it shouldn't . Is there any debate in New South Wales to that effect?

Judge BLANCH — No there is no debate. The debate has always been that other issue that you raised about the Magistrate having the opportunity of to actually see the witnesses give evidence. The Judge doesn't have the opportunity of seeing the witnesses give evidence and what significance that has and what do you do when you have got a word against word case. When you have got one witness on one side and one witness on the other side and the Magistrate convicts somebody on the basis of that person's word against that person's word. My answer to that is, well if that's what you have got in a criminal case then if there is absolutely nothing else then it is for the prosecution to prove beyond a reasonable doubt the guilt of the accused and if it is one persons word against another persons word and there is no observable reason why you should prefer that person's account on the basis that it is to be accepted beyond a reasonable doubt then you should acquit.

The CHAIR —Right

Judge BLANCH — Those issues are the issues.

Mr LUPTON - I suppose historically in the Magistracy in Victoria, I think the view probably was that a police informant against another defendant - you believe the police informant. I don't know whether that was any different in New South Wales. It's just a, I suppose something that a lot of people have a bit of difficulty with this notion that a Judge is able to make those determinations without hearing the witnesses themselves and even just an inflection of voice. I suppose we can imagine the situation where a witness says something to the effect of 'You *may* believe that' or '*You* may believe that' and it's a completely different meaning and on paper it doesn't appear to be any different. It's all those nuances of the court room I suppose that some people have reservations about - but you don't seem to think that that's been a problem?

Judge BLANCH — No, I don't think so and as I said if what we are talking about here is proof beyond a reasonable doubt and if the only factor that you can rely on is something like that in a court room or demeanour in a court room situation, then it is a pretty unreliable basis from which to say I am satisfied beyond a reasonable doubt

The CHAIR —Is there any other questions? Our hour is up and we really appreciate your time it was a real privilege to have this opportunity to talk to you about how it actually works in practice in New South Wales and it has been incredibly informative so thank you very much, we appreciate it.