LAW REFORM COMMITTEE

Inquiry into County Court appeals

Sydney — 10 April 2006

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Judge Derek Price, Chief Magistrate, Local Court of New South Wales.

The CHAIR — Judge, thank you very much for meeting with us. We really appreciate that; we know you are incredibly busy in the role that you hold. It will be very interesting for us to get the benefit of understanding how your system of appeals to the District Court works here and the way in which it is different from the appeals system in Victoria which is still de novo.

Perhaps you could talk to us briefly about the system of appeals from the Local Court. Obviously at the end we would like to ask questions and get a discussion going.

Judge PRICE — Certainly. I presume we are confining our discussions to criminal appeals.

The CHAIR — Yes.

Judge PRICE — The system of appeal works by way of appeal from the Local Court of NSW to the District Court of NSW by a re-hearing on the transcripts of evidence. It is not essentially a de novo hearing. There are two appeals: appeals against conviction and appeals against sentence. Appeals against conviction are by way of re-hearing on the basis of the certified transcripts of the evidence given in the original Local Court proceedings.

Fresh evidence is only adduced by way of leave of the District Court judge who can do so if he or she is satisfied that it is in the interests of justice that fresh evidence be given. That is also confined to the extent that the Crimes (Local Courts Appeal and Review) Act 2001 confines the interests of justice to require a determination by the District Court judge for fresh evidence to be given where the evidence that is required to be given on the re-hearing is that of a victim of an act of violence.

That victim can only be required to give evidence again when the act provides that there are special reasons why, in the interests of justice, leave should be granted to adduce further evidence. For other witnesses who are sought to be the subject of an application for leave to give evidence in the District Court, there must be substantial reasons. So there is a distinction between the types of witnesses sought to be adduced by way of leave in further evidence.

The system then requires the District Court judge on the all-grounds appeal, if I can refer to it as that — the appeal against conviction — to consider the evidence given in the Local Court. If there is no application for fresh evidence to be called, then the determination of the District Court judge in respect of the appeal is based solely on the certified transcript. The District Court judge does not have any recourse to the judgment of the magistrate unless both parties consent to that, which they do not normally. Of course it is not in the interests of the appellant to consent to the reasoning processes of the magistrate to be before the appeal court.

In my opinion that is a significant deficit in the current procedure in New South Wales. The reasoning behind it is that where you are confined as a judge purely to the evidence in the transcript, it is very hard to make a determination one way or another in certain instances where witnesses have not been troubled in cross-examination as to who is telling the truth because you do not have the ability to assess the credibility of those witnesses.

That could be overcome, and I made recommendations in New South Wales to this extent when the appellate process was being reviewed, in 2003 from recollection, that the judgment of the magistrate should be part of the evidence before the District Court judge on appeal. The appellate court can then consider the reasoning processes of the Local Court.

One of the problems that magistrates consider is presented by the appellate process is that their reasons are not before the appellate court, and when they get back a decision they sometimes feel badly done by because their reasons have not been considered. In addition to that it does not assist magistrates in providing comprehensive reasons when they realise that on appeal their reasons are not taken into account. In my view it also leads to inconsistencies in the District Court.

One of the difficulties with the Local Court proceedings in the appellate process as it currently is with the District Court is that there is inconsistency, and the reasoning of the District Court does not assist in providing clear direction to Local Court magistrates. That is emphasised by the fact that the judgment of their magistrate is not referred to. So instead of having proper guidelines from the District Court as to the approach in the Local Court, the current process in New South Wales in my opinion does not provide significant instruction to magistrates as to whether or not they may have been in error, because as I emphasised, their judgments are never considered and the process is purely by way of the transcript of the evidence before the magistrate.

In respect of what we colloquially refer to as the severity appeals — that is, appeals against a sentence only — again that is on the material presented to the magistrate. The judgment, the reasoning process of the magistrate is not considered by the judge in the District Court, and fresh evidence may only be adduced by leave of the court, and from recollection, by the Crown only where there is a special reason to do so. What happens in practice is that the appellant always goes into evidence, invariably in the District Court, to put before the court, the appellate judge, various subjective factors, and that material may or may not have been before the sentencing magistrate.

Again, the deficit in the system in my view is that the judgment of the magistrate was not before the District Court judge. There may be very good reasons why a sentence was imposed by that magistrate which are not brought to the attention of the appellate judge For example, the Local Court sits in 158 locations in New South Wales; we have 158 court houses, we are a very diverse state. There may be in some of those locations reasons why a particular sentence is imposed. In Blacktown, for example, one of our city courts has a very large number of disqualified drivers; it may be a very common offence in that locality. The magistrate may consider that a deterrent is particularly necessary in respect of a particular offence because of the predominance of that type of offence.

The appeal then goes to a judge sitting in the Downing Centre in Sydney. That judge may not have any idea that at Blacktown, to give a hypothetical example, there are a large number of those types of cases and the deterrent effect may be overlooked because the Crown usually does not make any submissions in the District Court on the appeal process, a conviction, an appeal against the sentence imposed by the magistrate.

This was all looked at — I am not aware if you know this — by the NSW Sentencing Council in 2004. The Sentencing Council was given a brief by the Attorney-General which was encapsulated by the question, 'How best to promote consistency in sentencing in the local courts'. The Sentencing Council considered the process, and I made submissions to the Sentencing Council.

In its report the Sentencing Council made a recommendation, which is recommendation 3 of its report at page 57, and I think it would be instructive to you to obtain a copy of that report — I say that of course with the greatest respect — because it was thoroughly looked at.

Recommendation 3 states:

> Appeals to the District Court against sentence imposed in the Local Court should be retained, but be by way of rehearing on the record of proceedings in the Local Court —

which it currently is —

> including reasons of the sentencing magistrate, and not be by way of hearing de novo.

In addition, they recommend:

> The reasons of the District Court, or if unavailable, the transcript, should be provided to the sentencing magistrate where an appeal against sentence is successful;

I will come back to that. It continues:

(b) Selected decisions of the District Court on sentencing should be regularly published.

In New South Wales the reasons of the District Court are not provided regularly to the sentencing magistrate. The reasoning behind that of course is that the magistrate's decision was not considered. It is in real terms a hearing purely on the record, without consideration of the magistrate's decision.

That is unhelpful in the Local Court, as I have said, because the magistrate does not know why the decision is interfered with. So you have in New South Wales the problem that the judge in the District Court does not consider the judgment of the magistrate in the Local Court, and the magistrate does not see the reasoning of the judge in the District Court. So there are certainly feelings of misunderstanding in New South Wales. But the reasons of the District Court judge would be of great significance if they included reference to the magistrate's decision and that that was considered.

That is probably an overall view, and of course, I am open to questions. I am sure I have forgotten one or two things which might emerge in questioning.

The CHAIR — In relation to the appeal against the severity of the sentence, do I take it that you can lead fresh evidence, basically, in that case if it is not strictly a re-hearing on the transcript?

Judge PRICE — With leave of the court, and leave is usually granted to the appellant. However section 26 — so I am precise in what I say — provides:

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 —

but only by the leave of the District Court.

Subsection 2 provides that:

Leave to give fresh evidence may be granted to the Director of Public Prosecutions, the Crown, only in exceptional circumstances.

So what usually happens is that the appellant gives evidence, and usually evidence of the subjective circumstances relevant on the appeal.

The CHAIR — And to what extent has that reduced the necessity for witnesses to appear, in your experience, in appeals against sentencing in the District Court?

Judge PRICE — Certainly none of the prosecution witnesses are called. There may be witnesses called on behalf of the appellant. They would be witnesses relevant to the subjective material that the appellant wishes to put before the District Court.

May I just say one thing about the appeal process which I have overlooked? No doubt the Chief Judge of the District Court — I understand he may be coming later this afternoon — will say to you something with which I entirely concur; that is, eliminating de novo hearings is of great assistance in the District Court because you are not going through unnecessary evidence and evidence which should not be the subject of a hearing the second time around. It saves the workload of the District Court considerably. My only criticism is confined to the fact that the reasoning process of the judgments of the magistrate is not part of the process.

The CHAIR — Just in looking at the evidence that we have on the rate of appeals, it seems that historically there have been a larger percentage of appeals from the Local Court to the District Court in New South Wales than in Victoria, over a long period of time. But obviously there has been a decline in the number of appeals since the abolition of de novo hearings. Are you

able to elucidate as to why there have been a large number of appeals from the Local Court comparatively speaking?

Judge PRICE — I do not know if you are looking at percentages. The Local Court of New South Wales finalises a very large number of cases. I think we finalised something like 250 000 criminal matters last year and there were somewhere in the area of 10 000 appeals. I do not know how that compares with finalisations in Victoria. I could only speculate, I have no idea.

Mr LUPTON — One of the things that has concerned us and a lot of witnesses that have come before us in Victoria is the possible effect on the way in which hearings are conducted in the Magistrates Court if we were to go away from hearing de novo appeals and restrict the appeal in some way, such as on questions of law and so forth. One of the reasons we were interested in coming to New South Wales was to try and gain some kind of insight into the effect, if any, there has been on the hearing process in the Local Court since these changes were introduced.

Judge PRICE — A fundamental principle behind this is to ensure that parties adduce all of the evidence that they intend to adduce in the Local Court, and that is usually the case. In my view because you do not have a de novo hearing of appeal, the hearing in the Magistrates Court of Victoria, if you adopt this process, should be better conducted, so that people do the work the first time around and ensure that all the evidence is adduced that ought to be adduced, whereas if you have a de novo hearing as of right, you can do a sloppy job the first time around and second time around you have another bite at the proverbial cherry.

Mr LUPTON — Do you think that was the experience in New South Wales, that it caused a change in hearing process and probably culture?

Judge PRICE — Yes, I think so. I think it has meant that proceedings in the Local Court are conducted with greater rigour than they may have been previously.

Mr LUPTON — What sort of changes do you think were necessary in the way the court operates, and perhaps in the way it is resourced and staffed?

Judge PRICE — What that means of course is that the hearings in the Local Court will be longer, and that has been our experience.

Mr HILTON — It has been put to us that the magistrates themselves, or a significant magistrate cohort, in Victoria are actually very much in favour of retaining de novo appeals because they feel given the pressure of the work they are under — dealing with so many matters in the day — there is always a possibility that there may be a mistake and they like to feel that there is some security in having these matters reheard. I am interested in whether there was such a feeling among the magistrates in New South Wales before these de novo appeals were abandoned, and if that feeling changed when the new system came into practice.

Judge PRICE — I think what one needs to consider is the evolution of the Local Court or the magistrates courts. I would hazard a guess in other states as well but there has been a very great change in New South Wales. There are far better people on the bench these days. No longer is it public servant-based, we have people from the bar, from the Crown being appointed — we had a QC appointed recently as a magistrate. There is now greater intellectual rigour and the view is, 'I provide my reasons and my reasons should be considered'. It is not a question of hoping to have some umbrella for mistakes to go into but there is one of intellectual challenge to ensure that you get it right the first time around, and if there is an appeal from it, that appeal is founded on some error in the reasoning process, basically.

Mr HILTON — I suppose my question really is that when these changes were made, which I think was in 1999, was there a significant body within the magistrates which was reluctant to embrace that change?

Judge PRICE — No. The answer in short is no. May I say that the view is that they are pleased by the rigour that the appellate process provides but they would like their decisions to be considered.

Ms BEATTIE — You talked about once the de novo appeals were scrapped in New South Wales it slowed down proceedings in the Local Court. Can you talk to us about the resource implications that that has had?

Judge PRICE — It is hard without any actual research to say categorically that it has slowed down proceedings in New South Wales; again I making an educated guess on it. The number of defended hearings in New South Wales is increasing. We have gone up from about 18 per cent of our case load to around about 23 per cent of our case load in New South Wales by way of defended hearings. There are a lot of reasons for that. I would suspect that the appellate process is purely one of many different reasons. That has an implication of course. The more defended hearings you have, the harder it is to reach the time standards and get through your case load, and then one looks to further resources.

Mr LUPTON — Just following on from that, another element of this that is argued in Victoria is that more defendants will choose to go for committal and trial in the County Court in Victoria if there were changes to the de novo appeals system, rather than having their case heard summarily in the Magistrates Court in the first instance. I am not entirely sure whether the systems are comparable but has there been any similar kind of outcome here?

Judge PRICE — No. In fact more work is being dealt with in the Local Court rather than in the District Court. That is basically because of the charging policies of the Director of Public Prosecutions. The Director of Public Prosecutions is electing to retain work in the Local Court rather than put it out to the District Court. There could be a number of different reasons to the situation in Victoria. We have what are referred to as table 1 and table 2 offences in New South Wales. A table 1 offence is a serious criminal offence. It is indictable by nature and the parties can elect to have it dealt with in the District Court. We are finding the election rate is decreasing over time, and more work is being dealt with to finalisation in the Local Court of New South Wales.

The CHAIR — Can I just check something: in relation to appeals against sentence by way of re-hearing the evidence and obviously appeals against conviction based on the transcript, is the appeal against conviction on the transcript strictly based on an error of law?

Judge PRICE — No. It is as of right.

The CHAIR — It is an as-of-right appeal?

Judge PRICE — That's right.

The CHAIR — But it is not de novo in the sense that all the witnesses are called before the District Court? You do not have to establish that there is an error of law in order to lodge an appeal?

Judge PRICE — No. It is as of right and the only restriction is on the transcript of the proceedings and with the possibility of leave being granted to call fresh evidence.

Mr LUPTON — That raises an interesting point. We have really been grappling with whether or not you really have a de novo hearing process here because of the interesting way it is constructed.

Judge PRICE — Yes.

Mr LUPTON — But it seems it probably is a hearing de novo because you re-hear the thing from the start without any qualification on your ability to appeal. But it is not de novo in the sense that you have all of the witnesses reappearing in ordinary circumstances?

Judge PRICE — That is right. The restriction is that you are confined to the transcript unless leave is granted for fresh evidence to be called. As I said, the District Court judge does not have regard to the reasons of the magistrate, so there is no question of error in law. In addition to that, the District Court judge must be satisfied beyond reasonable doubt on the evidence in front of the judge — which can be only the transcript — that the person has committed the offence. In my view that causes a problem in certain instances because as District Court judge you are confined only to consideration in certain instances of the transcript and it is sometimes terribly hard — having sat through quite a number of years in the District Court — to consider evidence purely on the transcript.

For example, you may get a transcript where there is one Crown witness, the complainant, the alleged victim and five witnesses for the accused saying something different. You read the transcript and none of the witnesses appears to have been greatly challenged in cross-examination. However, the magistrate had the ability to see the witnesses and to take into account the usual things you have when you see witnesses, such as demeanour and whatever else. But as the appellate judge you do not have that. It is particularly difficult with questions of credit.

That is why I have expressed the view that as part of the material before the District Court judge you should have the actual decision of the magistrate, because the magistrate may have made a critical finding on credit and as the District Court judge, in my hypothetical example, you are not allowed to have regard to the fact that you obviously know who the magistrate found in favour of because the defendant would not be appealing. But you have to put that out of your mind. In real terms this is a de novo hearing subject to the fact that the evidence is confined to the certified transcript before the District Court judge.

The CHAIR — I was just going to ask how it works in practice, and perhaps we can ask that of Judge Blanch. You said you have served in the District Court?

Judge PRICE — I am a District Court judge and I sit in the Local Court.

The CHAIR — So there is an appeal against conviction. How does it proceed in the court? How does it actually work? For example, is the convicted person there?

Judge PRICE — Yes. The appellant is there. The alleged victim may or may not be there. If it is purely on the transcript, the certified copy of the transcript is handed up to the judge. In order to cut things down the parties will tell you what parts of the transcript they consider to be of particular relevance. The judge will go and read the transcript in chambers and then make a decision based on the transcript. Prior to that time the appeal will have gone through a case management procedure which Chief Judge Blanch will tell you about. In that case management procedure there will be applications by the appellant to call witnesses. That may or may not be granted depending upon the interests of justice, special reasons in the case of victims, victims of acts of violence and substantial reasons otherwise.

If there are witnesses to be called, the transcript will be tendered. The witness who the court has previously given leave to will be called and cross-examined. Usually their evidence in chief is tendered and then subject to cross-examination. Leave to further cross-examine will usually be confined to that point of the application that they were successful in persuading the District Court that that witness ought to be recalled on.

So the evidence before the Local Court by way of cross-examination and evidence in chief will still be the evidence on appeal subject to this additional evidence given in the re-hearing and on the appeal. Of course, if there are other witnesses they will be cross-examined, et cetera and the judge

makes his or her determination on that evidence before him or her, and the court has to be satisfied beyond reasonable doubt.

Sometimes the parties will consent to the magistrate's decision being part of the court record enabling the District Court judge to have regard to those reasons — sometimes. But in my experience it is not too often. So usually the crown is very happy to consent; the appellant does not want you to see why the magistrate may have found one particular way, of course.

Mr LUPTON — It seems to place a pretty high burden on the District Court judge to make judgments about credit and a whole range of those sorts of issues without the ability to see the witnesses. How in your experience do the District Court judges regard that part of the process?

Juge PRICE — I can certainly say how I regard that part of the process. In certain instances I have found it particularly difficult, where you do not have the opportunity to see a critical witness on credit, and you are confined to the transcript.

Mr LUPTON — Further if you were to adopt the sort of reforms that you have made submissions to the government about, would that tend to transform the system in practice towards more of an error of law-type appeal, because a District Court judge would have the reasons, and as soon as you put the reasons in front of an appellant tribunal, I assume it is going to start looking at whether or not those reasons stand up, and you will then have submissions based on the reasoning process rather than purely on the evidence?

Judge PRICE — I do not think it will, because the proceedings will still be by way of a hearing on the transcript. It may assist the actual appeal process, because if the parties could point to the errors in the reasoning process, that would expedite matters. But on the other hand, most decisions are based on questions of fact, not so much on law; and if somebody has made an error of law then there is an appeal on an error of law — only in New South Wales, to the Supreme Court; and they are very few and far between. I do not think it will change the process significantly but in my view it will certainly assist the court in determining if there are issues in relation to credit.

There should be a further amendment or a further reform which I have suggested, that if a magistrate has made a finding on the credit of a critical witness, then the appellate court should not overturn that finding on credit without that witness being called. An assessment has been made by a judicial officer on the demeanour and whatever else of the witness that it is wrong; I do not think there should be a different decision purely on the transcript.

That is not to say that the District Court judge, when the District Court judge considers the transcript, makes consciously a different decision to that of the magistrate, because the District Appeal Court is in real terms a de novo hearing, reading the transcript; but the District Court judge may well find, reading the pure transcript — there is one witness, the complainant, there are five others for the defendant and all have given consistent evidence — that a determination cannot be made. That is because it looks really good for the five for the accused and one for the complainant; they all look good, so how do you know; whereas the magistrate has the ability to make that assessment.

Mr LUPTON — Presumably the District Court judge at the moment, knowing there has been a conviction, has to try and read between the lines and work out why it was that the five who appear to be quite credible witnesses were not accepted over the one that was.

Judge PRICE — That is wrong. You are not allowed to do so because it is a de novo hearing. That would be the easy way for you, but you have to get that out of your mind because that would mean that every appellant who came in front of you in an appeal against conviction would be behind the eight ball.

You would be saying, 'Why are you appealing? There must somebody from downstairs who found something wrong with you'. You are really switching the onus of proof. You are making the appellant prove why they are innocent, but that is not the way the system works. The system works that on appeal the prosecution still has to prove its case beyond reasonable doubt on the transcript and on what other evidence is called.

The CHAIR — It appears that the change, given that it does not completely abolish the notion of a de novo hearing, is primarily directed at where there has been a conviction in the Local Court preventing a scenario whereby the District Court witnesses will be called again and will have to go through all the trauma of having to give their evidence because there is a distinction made in the second-reading speech between appeals against sentence and appeals against conviction.

I am interested in the grounds on which a District Court judge might grant the opportunity to the appellant to call witnesses again. You said that it was in the interest of justice. Can you expand on that a little further — when and in what circumstances would a District Court judge typically allow witnesses and victims of violence to be called again?

Judge PRICE — I will use a crib note here rather than develop something fresh, because I just happen to have something in front of me which refers to interests of justice. This is from one of our legal practices; it is *Lexis-Nexis* by Butterworth, so I do not plagiarise their work, which is very unwise at the present time. I quote from page 912 on *One of the Practice*, and it might also be of assistance to you if some of these pages were provided, because it goes into very great detail on present context:

> The interest of justice would appear to include the following factors:
>
> (a) the interest in securing relevant testimony —

in other words, somebody may not have been available at the summary trial in the Local Court —

> (b) the interest in ensuring that a person who is accused of a crime is convicted if guilty and acquitted if innocent —

after he has had a fair trial. There may be material put before the appellant court that it was not a fair trial in the local court:

> (c) the public interest in the due administration of justice;
>
> (d) the interest in keeping parties to the cases which they ran at first instance.

It goes on to say:

> Ordinarily the parties seeking to adduce the fresh evidence should offer some explanation as to why the evidence was not called in the Local Court and satisfy the court that it is in the interest of justice that the evidence should be given on appeal.

That does not provide you with specific examples, but it could well be that somebody overlooked a point in the proceedings of the Local Court or there has been some fresh information at a later stage or the witnesses were not available, as I previously said. There could also be a change of counsel on the appellate process and the new counsel may say, 'We want to adopt this approach which we did not adopt in the trial at first instance'.

The CHAIR — Just switching your hat back to that of the Chief Magistrate for a second, we have had evidence given to us in Victoria that sometimes people turn up at court and are given a duty solicitor half an hour before the hearing; there is not sufficient time to properly brief them or to decide what further witnesses should be called; the case goes on and it is heard.

In your experience are there cases where it is clear that the alleged offender has not had time to properly prepare their case or has not had time to properly organise legal aid, and there may well be evidence that they could have led in their defence that they did not lead but on the basis of the evidence before you, you have to convict?

Judge PRICE — That can quite often be the case, particularly in the position of self-represented defendants. We have a high level of self-represented defendants. I think from recollection it is around about 52 per cent of people who appear in our courts represent themselves, and self-represented defendants may not present their case well. They can suffer a considerable disadvantage by that fact. That is one instance.

On the question of people not being briefed in adequate time, our current case-handling procedures should ensure that the majority of people when they are legally represented are adequately represented. I would be mainly concerned with the case of people who are not legally represented at the initial hearing.

The CHAIR — As a matter of practice, do your magistrates indicate to someone who is self-representing that they have a right to legal representation or that they could have the case adjourned and could seek legal aid?

Judge PRICE — We go through all that in the case managing processes well and truly before a case gets set down for hearing. The case is not set down for hearing until we are satisfied that they have gone through the legal aid processes. Quite a few people fall between the gaps with the restrictions on legal aid funding, and they just do not qualify for legal aid, or for either financial reasons or their own reasons they do not wish to be legally represented, so they are not legally represented in a hearing in the Local Court.

The CHAIR — Just to finish that point, would you attribute the reason for what seems to be a comparatively high level of self-representation to the unavailability of legal aid or just the fact that people think they are not entitled to legal aid, or do you think that people say, 'No, I will just go to the court and get it over and done with. I don't need a lawyer. I do not need anyone to represent me'? With that being the case in just over half the cases, why is that figure so high?

Judge PRICE — I think the majority of people who are not legally represented do not qualify for legal aid, and they then do not have the funding, having regard to the high cost of legal professional fees, to fund their own private representation. The legal aid financial restrictions are significant; they are very low, and people fall between the cracks.

Mr LUPTON — When people come before the Local Court unrepresented, has there generally been an opportunity for them to obtain some form of advice about whether to plead guilty, for instance, or not? Whether they are represented in the court is one thing, but whether they are coming there without any advice being given to them and any consideration being given to the course that they take is another, so could you perhaps just expand on that?

Judge PRICE — Sure. The case management procedures in the Local Court involve, first of all, when somebody comes before the court, if they wish to have an adjournment for the purpose of obtaining legal advice, they are given an adjournment. Then if they come back and they have not obtained legal advice and they say despite that fact they wish to enter a plea of not guilty, a direction is made where they are served with the full prosecution brief. All the evidence is in writing, and it is served upon them. That occurs in virtually all cases. The time for service of the brief is usually six weeks, so they have that time, and then they have at least a two-week period after that to consider their position, having been served with all the evidence. So they have the opportunity to see all of the evidence, to consider it and then also to obtain advice.

They have at least two and a half months before they come back to court, and at that stage when they come back to court the case is then set down for hearing, and that could be two months away.

We try to get through the majority of our cases within six months, but they will have about four months before they actually come on for hearing, if not longer, to do something about legal aid. If they come back to court and say we have made an application for legal aid and it has been rejected, but we wish to appeal against it, then the court cannot proceed to have their case heard until the legal aid appeal is dealt with.

We also have in all our courts legal aid solicitors. They can either be members of the Legal Aid Commission of New South Wales or they can be private solicitors who are there as duty solicitors. They have the opportunity to go and talk to them on the particular day they come back to court, so they have ample opportunity to consider the question of whether or not they are entitled to legal aid or to obtain private representation.

We also have in a lot of our courts duty barristers and duty solicitors who are provided by the New South Wales Bar Association and the Law Society of New South Wales, so there are at least three tiers: there is legal aid, duty barristers and duty solicitors. People who end up not being legally represented are people who know that they had these opportunities open to them to obtain legal representation. What usually happens is that they are people who do not have the funds to pay for private representation, and they do not qualify, because of their incomes, for legal aid.

Mr LUPTON — But nonetheless they have had a fairly reasonable opportunity to get advice about at least whether to plead guilty or not, for instance. It seems from what you are saying that the defendant in Local Court proceedings probably gets more material than they do in Victoria in terms of essentially a full prosecution brief.

Judge PRICE — The Criminal Procedure Act requires that a full prosecution brief — that is, all the statements of witnesses, together with photographs of the exhibits — must be served on a defendant.

Mr LUPTON — So the ability to get some decent advice before your case comes on would be reasonably straightforward in that sense.

Judge PRICE — Greatly enhanced. We went away from the proverbial trial by ambush — to use that terminology — in the mid-1990s.

Mr LUPTON — Is it possible that some of the people who are coming up as unrepresented have gone through that process of getting advice and they have been advised, quite properly, that you really do not have any good defence to this and it is not a useful use of resources in terms of legal aid?

Judge PRICE — That could well be the case, that they have been advised that they ought to plead guilty to the charge, but they have just decided they have no intention of doing that, that they will take their chances; they will run the prosecution to full proof.

The CHAIR — Although in those cases presumably representation might help in terms of mitigation of sentence. I am not sure how. Even assuming someone says, 'I did it, and there is no point in my having representation', you could, presumably, with representation be able to properly lay the ground for saying that the circumstances should be taken into account for sentence.

Mr LUPTON — I was probably talking more about a plea of not guilty.

Judge PRICE — I understood that, and I agree with you, Mr Chairman, that of course having legal aid on sentences is of great assistance as well — or legal representation, I should put it that way.

Ms HADDEN — The ordering of transcripts of evidence, when is that triggered and who pays for it?

Judge PRICE — The act provides that transcripts be provided, and the transcript is provided at no cost to the appellant. As soon as the appeal is lodged, then a direction is made through the director of local courts, that transcript be provided to both parties, so it is then available to the District Court.

Ms HADDEN — You mentioned the full prosecution brief being served on the defendant.

Judge PRICE — In a defended hearing, yes.

Ms HADDEN — Has that presented problems for safety and security of witnesses?

Judge PRICE — No, because if there is any concern about safety or security, the witnesses details are deleted.

Ms HADDEN — So personal details like date of birth and address are deleted?

Judge PRICE — That is all gone, yes. It is not there. The statements are vetted so that there is no personal information.

Ms BEATTIE — I just want to go back to a question that the Chair asked you before. We have received evidence that if we scrapped de novo appeals it might be better for some of the witnesses because of the stress and the pain, particularly in regard to sexual crimes such as rape. But it seems to me, and please tell me if I am wrong, that does not happen in that sort of crime, that almost always the complainant is called again.

Judge PRICE — No, I would not think that is the case, because in the appeal process in order to call a victim of violence, which the complainant in a sexual assault proceedings would fall within, in order to have that person called you have to satisfy the District Court that there are special reasons why, not just substantial reasons but special reasons — and 'special' means special. I would think it would not be in many cases that the complainant on a hearing in the District Court was called. So the complainant's evidence would be on the transcript of the proceedings.

Mr LUPTON — You always have to allow for some possibility of recalling someone.

Judge PRICE — That is why you have to establish that there are special reasons.

Mr LUPTON — It is a high hurdle.

Judge PRICE — It is a high hurdle.

The CHAIR — Going back to that question of the number of appeals against conviction as against the number of appeals against sentence — and we just made some comment on the fact that representation would be helpful in the mitigation of sentence — do you know of the appeals that are lodged from the Local Court to the District Court is it primarily on sentence most of the time?

Judge PRICE — Yes, it is. The vast majority are on severity of sentence, if I can use that colloquial term, because that is why people are appealing, against the severity of the sentence imposed by a magistrate — that is, appeal against sentence as distinct from the all-grounds appeal which is the appeal against conviction. The vast majority — and I cannot remember precisely but I think it is about 1 in 10 — are those which are all-grounds appeals.

The CHAIR — And it appears from the enactment of the Justice Legislation (Amendment) Bill in 1999 that was primarily to try to reduce the number of appeals against conviction to the District Court. Has that occurred?

Judge PRICE — You will have to ask the chief judge that. What I can say is that it has assisted the District Court very considerably because the District Court is not being required to have a de novo hearing, and the speed with which appeals can be dealt with in the District Court has increased very significantly.

The CHAIR — Is there evidence for that?

Judge PRICE — I am sure that Chief Judge Blanch will be happy to provide you with that material. But from my own experience sitting in the District Court, the speed with which you can deal with an appeal is greatly enhanced because you are just dealing with transcript and not going through the whole thing again.

The CHAIR — And looking at the reverse of that, we were talking before about laying the grounds for an appeal in the Local Court; in your view are any of the defence barristers or lawyers who appear before you unnecessarily seeking to do that? In other words they are just making sure they have covered — theoretically — all the possible grounds of appeal in a way that is perhaps not necessary for the adjudication of that case?

Judge PRICE — No. Because they are aware they can have it reheard on the transcript in the District Court, it is not an appeal confined to questions of law. If it was an appeal confined to questions of law, that may occur, but it is an appeal on the transcript of the proceedings which the Crown has to prove beyond reasonable doubt in the District Court.

Mr HILTON — What percentage of appeals on severity of sentence are allowed?

Judge PRICE — I cannot give you that figure. I am sorry, I did not come armed with that.

Mr LUPTON — That is a District Court figure.

The CHAIR — The recording of the decision by the District Court judge, which comes back to the local magistrate. How much information is included in that, and in your view, apart from the reservations you have expressed so far, is it adequate?

Judge PRICE — In my view it is inadequate. All that comes back is a record of the actual decision of the judge on appeal. It just says, for example, that the term in prison was quashed and another sentence was substituted for it. It does not say why. The lack of instruction is not helpful, but I restricted my view about that by saying that the District Court should have the reasons of the magistrate. Unless the reasons of the magistrate are considered, then to have a process whereby you have the reasons of the District Court judge is not that great an advantage to the Local Court because it has been a de novo hearing in real terms without any consideration of the reasoning processes of the magistrate. I think you need a combination of the two. As I said, in my opinion that is the most significant defect in the current appeal process.

Mr BUNT — Judge, I am interested in the question of abandonments and adjournments and whether they have declined following the 1999 changes.

Judge PRICE — You mean in respect of the actual appeals?

Mr BUNT — Yes.

Judge PRICE — I think you would need to ask Chief Judge Blanch. I am sure he will be able to assist you there.

The CHAIR — Thank you very much for appearing before us. We appreciate it.

Judge PRICE — My pleasure.

Mr LUPTON — You will get our reasons!

The CHAIR — Yes, you will get a full copy of our report, and we do really appreciate you taking the time out of your busy schedule to appear before us today.

Judge PRICE — I await with interest what your determination is. It may assist me in my battles here in New South Wales.. Thank you very much.

The CHAIR — It has been very informative. Thank you.

Witness withdrew.