LAW REFORM COMMITTEE

Inquiry into County Court appeals

Melbourne — 13 February 2006

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Associate Professor J. Willis, School of Law, La Trobe University.

The CHAIR — I welcome to this public hearing on County Court Appeals Mr John Willis, associate professor at the school of law at La Trobe University. Thank you for taking the time to speak with us this evening, and I apologise for the delay. I think you have appeared before us previously, but I will inform you that our inquiries are subject to the Parliamentary Committees Act, which means that the evidence you give today is subject to parliamentary privilege. It is being recorded by Hansard, and there is a presumption, as part of this public hearing, that we will publish the transcript on our web site. If there is any evidence you would like to give in camera, please let us know.

Assoc. Prof. WILLIS — I am not aiming to be defamatory!

The CHAIR — We will ask you to speak to your submission, and then we will ask questions.

Assoc. Prof. WILLIS — Thank you. I have just one or two issues. First of all, I am an academic but I also practise. I have done lots and lots of County Court appeals, both against conviction and against sentence. That is the first comment I would like to make. I am speaking partly theoretically, but also very much from a practical perspective.

I would also like at this stage to say thank you very much to Nathan Bunt who has been very helpful on the occasions when I have spoken to him. The first thing I would say is that there is an urgent need for data. It is true about a lot of these areas. The Magistrates Court, on the whole, because it is computerised, means there is access to material; but I went through the County Court reports and it is not absolutely clear whether the appeals finalised are finalised when they are adjourned, when they are withdrawn, or whether those figures refer only to the Melbourne County Court? Do they include circuit material? It is all very difficult to work out.

I do not know, in many cases, what the success rate is — however you define that — how many appeals are against sentence and how many are against conviction. I do not know what success rate is defined as perhaps a better outcome in the County Court than below - or in how many cases the sentence has been increased on appeal. I certainly sat in and watched that happen once. It was not one of mine, thank God, but I simply do not know how often that happens. It is hard to work these things out.

I have raised it with Nathan and I will say it here again: the whole question of intervention orders is floating around. They are not, strictly speaking, criminal, but they are very close to criminal; and not only that, they are very draconian in outcomes, or can be. If you are not allowed to be in a certain area, not allowed to do this, that and the other thing until further order, it is a big restriction. You lose your firearms licence and a range of other things. This can be seen as a slight on magistrates — 'We cannot trust them, therefore we run them again'. That having been said, my understanding is that while there are a lot of magistrates that in principle are opposed to County Court appeals, quite a number are not; and some who are not are highly respected at the bar, for example.

There has been no great change, as I can see over the years, in the number of appeals. Three judges are still, as I understand it, handling the total number of appeals. There is virtually no backlog; they are getting through everything. Once again I am guessing, but my understanding is that there is quite a high success rate, and by that I mean that the outcome in the County Court is better than it was in the Magistrates Court in terms of conviction versus non-conviction; suspended sentence versus community based order; jail versus non-jail; jail versus not as much jail, et cetera

My instinctive feeling is that there is a very high success rate. Some of it might be tinkering to keep everyone happy — and they probably do that in the Court of Appeal, too — but in a lot of cases, from jail to non-jail there is a significant change. My understanding further is that the bulk of appeals are against sentence, and I will say a word or two about that. They mostly do not take

long. Normally at the start of a day His or Her Honour comes in and says, 'We will have a call-over. How long will it take?', and 20 minutes or half an hour is the standard time.

In terms of appeals against conviction, there are not as many. Some of them take a long time, but most in my opinion do not take more than a day. Are there a lot of unmeritorious appeals? I simply do not know. All I can say is that if you are going to get legal aid for an appeal, you generally need to have someone who will write to legal aid and say there are grounds for an appeal 'for the following reasons'.

Secondly — and I am only speaking for myself and other colleagues I know — the issue of an increased penalty is very important in one's mind. Appellants have to be told by the registrar when they are lodging the appeal papers, but certainly before I recommend an appeal, I would be thinking very carefully. Firstly, you not know in front of whom you will be appearing; and if it is after 28 days you could be in trouble because you cannot abandon without showing exceptional circumstances. So I would have thought that most barristers are very concerned about that.

I will just mention briefly section 116 of the Children and Young Persons Act, which allows appeals against family division orders, interim protection orders and that sort of thing. My understanding is that there are not that many — perhaps 20 a year — and very few are successful, as I understand it. They are anomalous in the sense that they are not really criminal at all, and generally they are lengthy. For family division contested matters in the Children's Court, 5 days or 10 days is standard. They probably take longer in the County Court. And, of course, if the matter was heard by the President of the Children's Court it has to go up to the Supreme Court.

My understanding is that some of the Environment Protection Authority and occupational health and safety matters are re-runs. I do not know what you do about that. I do not know how many of them there are and how much time they take. In terms of intervention orders, they are not criminal; however, they are quasi- criminal. I do not know the data, but I suspect there probably will be more rather than less appeals against them, but that is a guess.

If you were to change things, how would you do it? I presume you could only appeal on a question of law either to the County Court — that would be interesting — or to the Supreme Court. Here is what is I think might happen, and I say it is very much speculative because we simply do not know, and this is from talking to some magistrates as well: there is no doubt that there is a risk of injustice in those cases. I suppose you have spoken to legal aid, but I know various legal aid people and some would say, 'I had a bad day today. I saw 10 people in the cells, I saw 7 other people, I did 15 pleas and 5 bail applications'. Wow! Just think about it. How long have you got to deal with any of those? With people in the cells, some of them are still on drugs and cannot listen to you. They are just saying, 'Get me out! Get me out! Get me out!'. That is their big line. Sometimes you say to them, 'Grow up, Sonny. You're not going anywhere'. But you have to lay it on the line. To do a plea for those people is hard. You have not seen a tape, often the prosecutor has a remand warrant and that is all you have. There is no-one to negotiate with.

What happens here is that legal aid people do the best they can on small material, and it is crucially important to how the system works. Some of them are extremely good — they have a good nose for things. Against that, let us say it will only be an appeal on a question of law. If I were a magistrate who will get bumped around in the Supreme Court, I am going to do the following things: I am going to slow it down, I am going to have to give written reasons which will all be transcribed, and I will go into much greater detail.

I have just fished out one case for you as an example, and there is no shortage of these sorts of cases. It is the decision of Justice Gillard in the case of *DPP v. Harika*. It is a bail matter. It was an appeal against a magistrate granting bail. The magistrate granted bail, and if you do not give reasons the grant of bail is null and void. That is extraordinary. Someone is wandering outside when the reasons have not been given — someone who should not be on bail. But be that is it may, the learned magistrate said:

> Reasons for granting bail: age, supports, structure, has shown cause.

The magistrate said a number of things and imposed stringent conditions. Here is what Justice Gillard said:

> What the magistrate recorded in the order, as a statement of reasons for making the order, was, in my opinion, the barest minimum. Judicial officers should explain in more detail the reasoning which led to the order.

Now, once again, what she or he wrote down was:

> … age, supports, structure, has shown cause.

And, in the context, had somewhere to go, had set up a scheme for seeking drug counselling and so on. That is the barest minimum. You give someone six months jail, and you will have to sit down and write it out and spell it out; and, especially if it is a stiff jail sentence, explain why. It will take longer. It simply will take longer, and that is for magistrates.

Mr LUPTON — But on that point, before we move off it, why it is not a good idea for defendants now to be told, in proper terms, why they are being sent to jail?

Assoc. Prof. WILLIS — It is an excellent idea, but it is a question of how much detail you want. Sometimes you do feel that some Supreme Court justices operate on counsels of perfection, and that one might have thought that in this case, 'age, supports, structure, has shown cause' against the context was clear, and everyone knows what they are talking about. But that is the barest minimum. There are cases on section 464 of the Crimes Act, concerning forensic samples, where one Children's Court magistrate was told that the reasons were quite unsatisfactory and so forth.

It is like everything else: if you do not know, you will take longer. People should be told, but they are told in broad terms. That is my experience. But how fully do they want to be told? That is what I am talking about. Will we get the kind of County Court sentence which goes on for four or five pages? You will not get that. Or if you do, the workload will increase immensely.

I do not know whether any of you people have actually gone to a mention court. It might be an illuminating experience for you. The prosecutor comes in with a big bag and there are a whole lot of people waiting to see him, and he has all of the briefs, and he pushes them out in alphabetical order on a wide table. There are generally three columns of them, starting at Z and getting down to A, with a few extras. He might have 60 there; he might have 80. Some will be adjournments, some will be struck out, and there might be 50 or 60 left to be dealt with. The magistrate sits up there, and a prosecutor reads out a summary. The magistrate asks the defence counsel, if there is one, 'Well, are you happy with that?'. 'Yes' is the reply. 'Is there anything known?' are the magic words. 'Yes', and you hand up his or her prior convictions. They are read and agreed to.

The magistrate reads them, and I have had cases where the prior convictions go for 15 pages. Frisky! The magistrate then might be given one or two psychological reports. He sits there and reads them. If it is some psychologists I can think of, they will be single-spaced, 10 pages long and unbelievably repetitive. We expect the magistrate to get on top of the whole lot, listen to a submission and then form a judgment. You have to hear everything, read between the lines, listen to what is being said there. It is very demanding. Then there are other cases where they have nothing — no psychological report, no nothing. You have to read between the lines there, too.

I think those mostly the magistrates do an extraordinarily good job. That is my view. But I do think there is potential, and that is from hearing from magistrates, that things will take a lot longer. You do not want to be caned by the Supreme Court. I think it was Judge Kelly at the County Court who once wrote down 10 rules for County Court judges — the 10 commandments — and the 10th was, 'Thou shalt not look over thy shoulder at the Court of Appeal', but everyone does!

The other matter is indictable offences that are triable summarily. There are a lot of them. I wrote about this a long time ago, but basically the bulk of thefts, burglaries, frauds, deceptions, intentionally causing injury, recklessly causing injury, recklessly causing serious injury — I would guess that 95 per cent of those charges are heard summarily. They are all indictable, the defendant has to consent to summary jurisdiction, and the magistrate has to agree to hear it.

Mostly these days they do consent for a range of reasons. One is that legal aid, at least the last time I looked, would not grant aid unless it is heard summarily. However, acquittal rates for these matters are much higher in the County Court than in the Magistrates Court.

If it is heard in the Magistrates Court you do not have a committal, and in many cases you cannot see what witnesses are made of until you find them on the day. If you lose, you can appeal. You can have another go. It is the backstop. In nasty cases if you cannot appeal I would be advising clients, 'Go upstairs', for these reasons: firstly, you get a committal and you can have a look at the witnesses — see what they are made of. In one rape case I had, in particular, the prosecutor just said to me, 'Well, the rape is gone'. Similarly, in other cases you say to your client afterwards, 'You're gone.' That can happen at the end of a committal.

People are concerned about victims. My instinctive guess about this, and I might be wrong — I am thinking of sex cases but not only — is that most of them are on closed-circuit television these days, they are not in the same room, and I do not really believe it is as stressful giving evidence in a Magistrates Court as it is before a jury. I just think it is different. I might be wrong about that.

I cannot say what happens except in cases I know something about. Magistrates these days will not tolerate a heavy-handed approach towards particularly young witnesses — at least, that has been my experience. Already there is any number of rules — for example, you have to give a fortnight's notice if you want to ask a witness about previous sexual behaviour, then argue it. For example, you have a six-year-old and the allegation is that she had played doctors and nurses with her cousin. But you have to have a written notice, reasons, the questions you are going to ask and why. All that stuff is there; I make no comment about it suffice it to say you do not have a jury. I think it is less stressful for victims.

If they go into the higher court there will be a committal. There will be a filing hearing, a committal mention; the police will then have to produce a full hand-up brief with jurated statements from everyone, a list of exhibits, and so on and so forth. Then you have another committal mention where you have to demonstrate why you need certain witnesses present, to cross-examine them. If you are granted that, and you generally are, then the case is set down for a one-day, a two-day or a two-week — whatever it is — committal down the track in which you cross-examine various of the witnesses; then that is produced as depositions.

We have a directions hearing, one or two of them; then we have a trial where you are armed with the original statement of witnesses and what they said on oath at a contested committal. It is all longer. There may well be quite a few more of them. I cannot say there will be, but that is my feeling about it. Every time you lose a matter being heard summarily for a trial it costs a whole lot more. I think victims are going to be under greater stress.

I do not have data on this, but how many cases of indecent assault or indecent acts are heard in a Magistrates Court? I have certainly done a few of them and I presume so have lots of others. How many of those are appealed? I do not know. I simply have not the slightest idea. I do not know whether you, Mr Bunt, have data on that sort of thing. I have spoken to Mr Bunt on any number of occasions, and I think he has done the best he could, but that is a real problem.

I suspect there are not that many, but that is a suspicion. Victoria Legal Aid might be in a better position to tell you how many they have aided. Chief Judge Rozenes may well know — I do not know. However, if you change this, I think you run a big risk of all of those sorts of things happening.

Beyond that, I suppose the other comment to make is that the present situation is simple. One of the great things about the Magistrates Court and magistrates' power among others is that they have all these forms: you press a button and out they come. How do you appeal? Easy. You go down there and say, 'I want to appeal against the sentence' or conviction, and the registrar down there asks, 'Right, what court were you in? Who was the magistrate? What is your name?', and out it all comes. You fill in a few bits of paper and it is all done then and there. The registrar gives the appellant a talking to about the fact that they can get more in the County Court — that has to be done. It is simple.

If it is going up to the Supreme Court, first of all you have 28 days and then you have to fill in a form. There has to be an affidavit, then you go before probably Master Kings these days, and they fix the order. Then we have an order to work out when it will be. I did one the other day; it was said, 'Do you want this on early?'. 'Yes'. 'Good, how does June suit you?'. 'Very nicely'. Yet, that was one in a hurry!

The Supreme Court, in a number of decisions which no doubt you have been referred to — they are certainly old — has indicated it is not keen on dealing with sentencing matters from the Magistrates Court. That has certainly been said in cases in the past. If it has to be done, it will be done. You can tell them and they will have to do it. My view at the moment is: if it is not broken, leave it alone; but that is just my view.

Mr LUPTON — One of the reasons that the Supreme Court is not keen on dealing with sentencing matters is because they regard it essentially as a matter of discretion — that is, how you dispose of somebody in a sentencing matter — and it is just as well taking care of it at one level of the judicial system as at another. Is that a fair comment?

Assoc. Prof. WILLIS — Until very recently about once a week the DPP has appealed against the leniency of sentencing in the County Court, and three-quarters of those appeals have been successful. Ellis is one I can think of where people were not in jail and finished up in jail. Craig Johnston was another one, and there are others.

So while it is a matter of discretion, yes, that is true; but this is from a County Court judge. I think of John Smallwood, who is an absolutely outstanding judge — humane, smart and thoughtful. A lot of them are allegedly, according to the Court of Appeal, getting it wrong. I hear what you are saying. It is a matter of discretion, but their 'discretion has miscarried' is the great phrase.

Mr LUPTON — Does that not seem to you to be a vindication of the notion that appeals on sentence ought to be on the grounds that they are manifestly excessive, or not — manifestly inadequate if you want to take the Crown proposition?

Assoc. Prof. WILLIS — That is the grounds.

Mr LUPTON — But not at moment from a magistrate of the County Court?

Assoc. Prof. WILLIS — Yes, it is. It is a de novo hearing, but you would normally say, 'You are appealing against sentence on the ground that it is excessive'. It is implicit if you think about it. If you think it is seriously lenient, you would have to be odd to be appealing. The other thing that has to be said, and I have certainly had a magistrate say it, 'You have just got six months jail. You talk to Mr Willis. He will tell you how you can appeal'. That has been said on more than one occasion.

It depends. Some little heroes, if you will excuse the expression, come in and are unhappy about this, that and the other thing. Then they get sent to goal and it gives them a serious fright. They are given appeal bail. You get them outside and you metaphorically beat them around the ears and tell them, 'First, get a job; two, I want you to go and see someone, and in two months time I want you

with six clean urine analyses. Now, get on, and I will ring you in a week and if you have not done anything, I will come around and beat you up', or something.

There is a fair bit of blunt talking of this kind. In some cases — I have had them — they get their act together. You stand before the County Court judge and say, 'He has done three burglaries, he was drug addicted — the police and everyone else. I now hand up to you six clean urine analyses. He has a girlfriend who is here, he has been to counselling and to drug rehabilitation, he has a job and is doing well, and he is 19'.

None of that was true in the Magistrates Court. It is now true. From a community point of view I see that as absolutely to the good. He may reoffend but at least for the moment he has a whole series of important supports, and that is sometimes best achieved by giving him a hell of a fright and then getting him to do something, for what it is worth.

The CHAIR — So you are saying the de novo appeal process has a preventative element to it?

Assoc. Prof. WILLIS — I think it does.

The CHAIR — It can have a deterrent impact because you are hearing the case again but the situation has moved on?

Assoc. Prof. WILLIS — Sometimes it has and sometimes it has not, but at least it is important, and in many cases you have more time. You have some fellow, for example, who has gone berserk because he thinks his girlfriend is cheating on him. He goes off, he punches her up and kicks in the car, and he spends the next five days in Larundel or somewhere. There is no psychiatric report down in the Magistrates Court. The magistrate understandably says, 'This is outrageous behaviour; I am jailing you'. I understand that.

By the time you get to the County Court you have a psychiatrist's report which states that he might be intellectually handicapped. His girlfriend is convinced he is doing much better. She jumps in the witness box and says so, and he has got work. A lot of those things need to be thought about. It is six months since it happened and he has not done anything since.

Mr LUPTON — Is it the nature of the way this process works that quite often the magistrates and defence counsel or solicitors, the legal aid and the prosecutors all know each other reasonably well? Do you think the ability for somebody to appeal effectively without grounds simply by lodging the appeal has the potential to affect the way a magistrate will sentence somebody and possibly on a number of occasions lead to them getting a more severe sentence on the basis that they know, for instance, that Mr Willis is for this defendant and he is going to go outside and give him a good talking to, fix him up, and it will all get fixed up later on by somebody else?

Assoc. Prof. WILLIS — I would be very surprised if that happened for two reasons. First of all, there are clients who do not appeal. You can tell them. I did a case up in the country where in my opinion the magistrate was 'Wrong, wrong, wrong', and I thought, 'The defendant should appeal, but he is not going to'.

Mr LUPTON — Maybe he knows best!

Assoc. Prof. WILLIS — No, he is hopeless. He would have to be pinned by the ears and dragged along everywhere. A significant number of these people are intellectually handicapped, with mental illness problems. You would be surprised how many there are. I keep on being amazed at how many people you appear for who are functionally illiterate. They cannot read the stuff.

I do not know that magistrates do that. I think most of them do their absolute best with varying degrees of skill and competence. A lot of them are seriously good.

The CHAIR — Are there further questions? If not, the submission has been very clear and some of the practical examples you have provided today about the value of de novo appeals have been valuable to us as a committee in our considerations. We appreciate your taking the time not only to write to us but to expand on that submission by way of those examples.

Assoc. Prof. WILLIS — It is an important part of the of the system which expects magistrates — I am amazed sometimes when I hear a summary. I have had from 8 to 10 to 12 pages of prior convictions. It might take me half an hour to go through them, to work out what is relevant and what is not relevant. The magistrate is expected to get through it quickly and form a view, and they can get it wrong. In legal aid we have six more coming up —. probably they do not have time. It happens.

The CHAIR — Thank you very much. We appreciate your submission.

Committee adjourned.