What is a pre sentence report nsw

Continue

Name _____ Guided Practice

A **topic sentence** tells the reader what the paragraph is mostly, or mainly, about. It is usually found at the beginning of a paragraph.

Directions: Read the following rough drafts written by students. Both paragraphs are **missing a topic sentence**. Choose the sentence that would be the BEST topic sentence for each paragraph. Use the lines to **explain your thinking**.

1. My cat, named Tiger, is a black cat with orange stripes. I like to throw a ball of yarn and watch him chase it. I have a dog that I play Frisbee with. I toss the Frisbee and he jumps in the air to catch it. I also have a fish tank with many different colored fish. My favorite pet is my rabbit name Fluffy. I like to chase her as she hops all around the house. I love to play with all of my pets!

A I love animals because I can take care of them.

_____

B My fish tank has a lot of fish.

_____

C I have a lot of pets that I love to play with.

_____

D My favorite pet is my rabbit.

_____

2. I like to learn new things because my teacher makes it fun. We learn reading, writing, math, science and social studies. I am always learning something new. Recently, I learned how to do multiplication. My teacher put shaving cream on our desks and we wrote multiplication problems in the shaving cream. That was a lot of fun! In science I learned about the solar system. We did a science fair project. I enjoy school because I learn things in exciting ways!

A I like to do science experiments at school.

_____

B I like to go to school because I learn something new every day.

_____

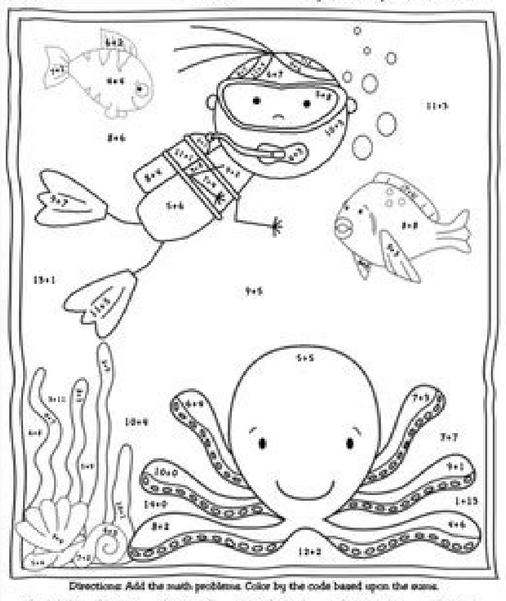
C My school is fun because we play every day.

_____

D My teacher is great.

_____

Name_____ Date _____ Summer Sum Puzzle #1

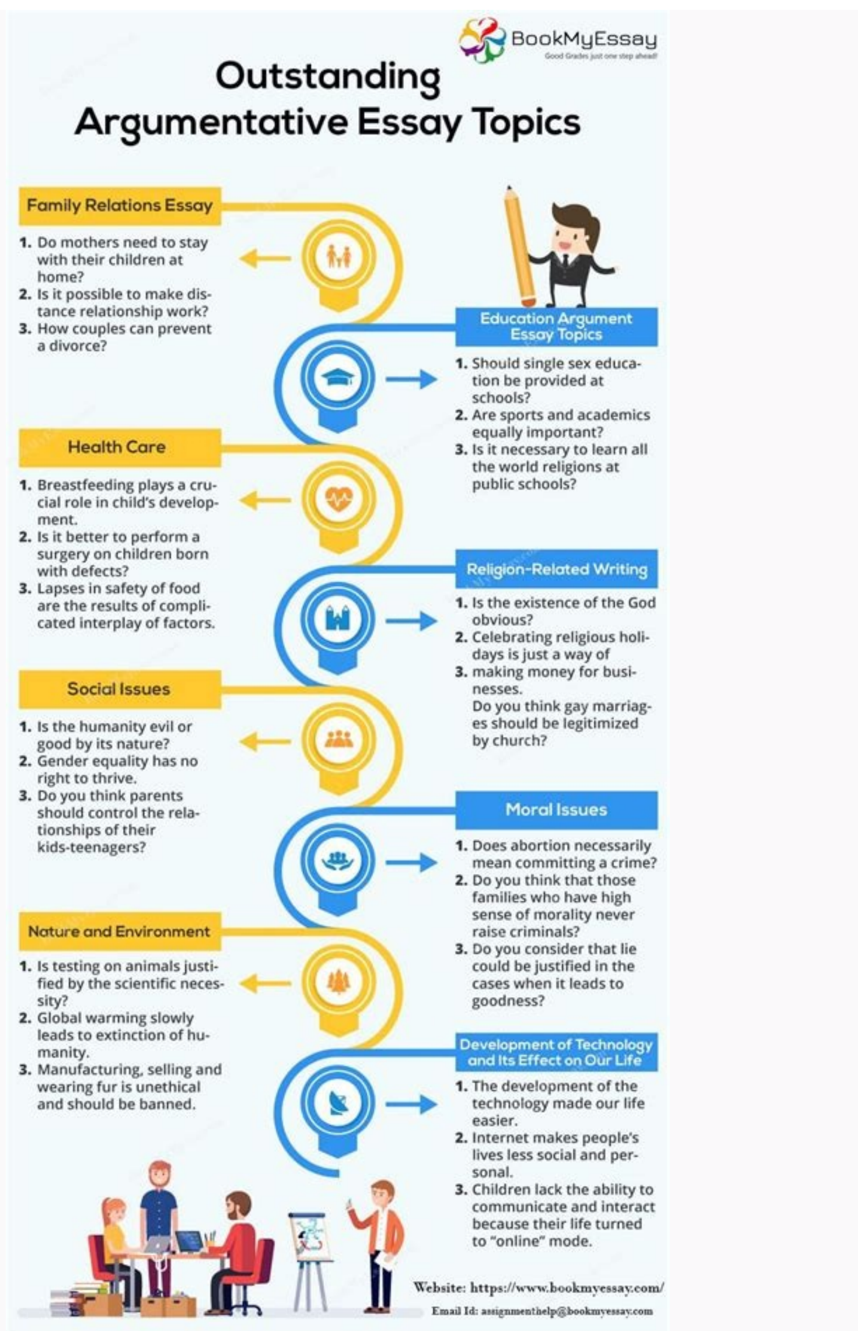


Directions: Add the math problems. Color by the code based upon the sums.

Color Code: Black = 7 Orange = 8 Light Pink = 9 Purple = 10 Green = 11
Yellow = 12 Tan = 13 Light Blue = 14 Brown = 15 Dark Blue = 16

CCSS: 1.OA.6 ; 2.OA.2 ; 3NBT.2 © 2013 Erica Hines

FOR	EXAMPLE SENTENCE: _____	LINK: REASON
AND	EXAMPLE SENTENCE: _____	LINK: MORE INFO
NOR	EXAMPLE SENTENCE: _____	LINK: NEITHER OPTION
BUT	EXAMPLE SENTENCE: _____	LINK: CONTRADICTION
OR	EXAMPLE SENTENCE: _____	LINK: EITHER OPTION
YET	EXAMPLE SENTENCE: _____	LINK: CONTRADICTION
SO	EXAMPLE SENTENCE: _____	LINK: CAUSE AND EFFECT



What happens at pre sentence report.

Remember, it is always easier to work from the present to the past when tracing your family history. A good place to start is with yourself: write down your date of birth and then other important dates such when you were married and when your children were born. Continue recording this basic... Subjects: Immigration / Shipping Guide This Guide highlights the key records and available indexes, relating to passengers arriving in New South Wales, 1788-1922. While most of the records relate to passengers disembarking in Sydney, records of arrivals in other ports are also included. Records relating to departures are also listed... Subjects: Between 1788 and 1842 about 80,000 convicts were transported to New South Wales. Of these, approximately 85% were men and 15% were women. Almost two thirds of convicts were English (along with a small number of Scottish and Welsh), with the Irish making up the remaining one third. Convicts were... Subjects: Probate Packets (wills) Guide A grant of probate is the authority given by the Supreme Court NSW to the executor(s) to deal with a deceased person's estate. The will in the Probate packet is considered by the Court to be the only legal document. Records in a Probate packet include: the last will and testament codicils (... Subjects: A guide for researchers who may have difficulty tracing individuals because they changed their name. It outlines some of the reasons for changes of name and, if the change of name has been registered, suggests where evidence of the name change may be found. Subjects: Convict assignment records On arrival, a convict was either retained by the Government or assigned to an individual. Assigned male convicts were generally employed as field labourers, or tradesmen; women became domestic servants. Government convicts were most often engaged on public works projects. The majority of women... Subjects: Convict Pardons: Conditional and Absolute Convicts with a life sentence could receive a pardon but not a Certificate of Freedom. The two main types of pardons were: Conditional pardon - the convict was free as long as they remained in the colony. The vast majority of convicts granted pardons were granted a... Subjects: Convict discipline depended not only on punishment but also on incentives and rewards. Governor King introduced the ticket of leave system in 1801. It helped reduce costs by allowing those who could support themselves honestly to do so and was also a reward for good behaviour. A ticket of... Subjects: Convicts: Clothing, rations & stores Subjects: Families of convicts sometimes accompanied their convict relations or came out later. Marriages in the Colony were encouraged, the authorities believing family life served moral ends and brought stability to society. Various inducements such as tickets of leave, pardons and assistance with... Subjects: First pardon granted (at a cost) The convict James Freeman was found guilty in the Criminal Court on 29 February 1788 of stealing flour. The fledgling Colony was barely a month old, and supplies of food were limited. Theft of such items was therefore viewed with the utmost seriousness, hence the draconian death sentence that... Subjects: Hyde Park Barracks, deisgned by Francis Greenway, opened in 1819 as housing for convicts. This page include a brief overview and a list of the convict-related record series. ... Subjects: Promised in marriage, courting in Colonial NSW Free men and women who courted were considered to be 'promised in marriage'. Expectations were set as to how the forthcoming marriage would advantage both parties socially and economically. When a promise of marriage was broken—or breached—the offending party could be... Subjects: Acknowledgement of Country We acknowledge the traditional custodians of the Country on which we live and work, and pay respect to Elders past, present and emerging. We acknowledge the impact colonialism has had on Aboriginal Country and Aboriginal peoples and that this impact continues to be felt today. Was, is, and always will be Aboriginal land. The section first discusses appeals for matters dealt with on indictment and then appeals from the Local Court. An appeal against sentence is a creature of statute. The precise nature of an appeal against sentence depends on the language and context of the statutory provision(s): Dinsdale v The Queen (2000) 202 CLR 321 at [57]; Lacey v Attorney-General of Queensland (2011) 242 CLR 573 at [8]. [70-010] Overview of Court of Criminal Appeal sentence appeals 2000–2018 Tables 1–4 list appeal success rates for the periods specified. They provide a general picture only and do not disclose the specific legal basis for intervention by the court. Table 1 — Severity appeals under s 5(1)(c) Criminal Appeal Act 1912 (2000–2018) Year Severity appeals Allowed N n % 2000 305 124 40.7 2001 339 135 39.8 2002 325 149 45.8 2003 269 111 41.3 2004 281 137 48.8 2005 317 141 44.5 2006 255 103 40.4 2007 239 95 39.7 2008 214 83 38.8 2009 226 78 34.5 2010 217 85 39.2 2011 188 93 49.5 2012 167 64 38.3 2013 223 57 25.6 2014 191 60 31.4 2015 206 75 36.4 2016 177 60 33.9 2017 192 61 31.8 2018 195 79 40.5 4526 1790 39.5 Source: Judicial Commission NSW Court of Criminal Appeal database Note: The severity appeals listed above include a small number of applications for an extension of time for leave to appeal against sentence that have been refused. Table 1 shows the frequency of, and success rates for, severity appeals in NSW for the period 2000–2018. Putting aside 2013, the success rate for severity appeals has hovered around 30–50%, with an overall success rate of 39.5%, for the relevant period. The highest success rate for severity appeals was recorded in 2011 (49.5%), while the lowest success rate was recorded in 2013 (25.6%). An earlier study undertaken by the Judicial Commission for appeals in the period 1996–2000 found that "[j]ust over one-third (34.9%) of sentence severity appeals were successful": P Poletti and L Barnes, "Conviction and Sentence Appeals in the New South Wales Court of Criminal Appeal 1996–2000", Sentencing Trends & Issues, No 22, Judicial Commission of NSW, 2002, Conclusions, p 8. Table 1 also shows a general decline in the frequency of severity appeals between 2001–2018. The highest recorded frequency of severity appeals occurred in 2001 with the lowest recorded in 2012. There was a noticeable increase in the frequency of severity appeals in 2013 which coincided with an increase in the number of severity appeals for standard non-parole period (SNPP) offences (see below). Table 2 — Severity appeals under s 5(1)(c) Criminal Appeal Act 1912 — SNPP offences (2004–2018) Year Severity appeals Allowed N n % 2004 6 5 83.3 2005 40 23 57.5 2006 56 31 55.4 2007 47 18 38.3 2008 63 26 41.3 2009 67 21 31.3 2010 77 31 40.3 2011 77 44 57.1 2012 64 32 50.0 2013 115 32 27.8 2014 73 25 34.2 2015 92 39 42.4 2016 79 26 32.9 2017 79 21 26.6 2018 87 33 37.9 1022 407 39.8 Source: Judicial Commission NSW Court of Criminal Appeal database Table 2 shows a subset of cases in severity appeals. It lists the frequency of, and success rates for, severity appeals in NSW for the period 2004–2018 where the principal offence committed by the applicant carried a standard non-parole period (SNPP severity appeals): Table to Pt 4 Div 1A Crimes (Sentencing Procedure) Act 1999. The lowest success rate for SNPP severity appeals was recorded in 2017 (26.6%). On 5 October 2011, the High Court handed down its decision in Muldrock v The Queen (2011) 244 CLR 120. See further Standard non-parole period offences — Pt 4 Div 1A at [7-890]ff. The decision had the effect of increasing the number of appeals for SNPP offences particularly appeals out of time (see [70-020] below). Prior to 2015, only three of 30 post-Muldrock applications for an extension of time to appeal against sentence were successful. This may be contrasted to 2015 when there were 14 post-Muldrock applications for an extension of time to appeal against sentence, nine of which were successful (64.3%). This change may be accounted for by the decision in Kentwell v The Queen (2014) 252 CLR 601. The High Court held that it is not necessary for an applicant to show that substantial injustice would be occasioned by the sentence (see the discussion under Section 5(1)(c) severity appeals at [70-020]). Part 7 inquiries into sentence Part 7 Crimes (Appeal and Review) Act 2001 provides that an offender can make an application to the Supreme Court for an inquiry into sentence after exhausting his or her appeal rights under s 5(1)(c) Criminal Appeal Act 1912. Part 7 has been utilised to correct Muldrock type sentencing errors: see the discussion at [7-955]. To avoid double counting, these appeals are not included in Tables 1 or 2. Between 2014–2018, there were a total of 24 Pt 7 appeals of which 15 were allowed (62.5%). The majority were dealt with in 2014 (17) with a success rate of 52.9%. All three Pt 7 appeals in 2016 and three of the four appeals in 2017 were successful. All but two between 2014–2018 involved grounds of appeal relating to Muldrock, of which 14 were successful. There were no Pt 7 applications in 2015 or 2018. Table 3 — Crown appeals under s 5D Criminal Appeal Act 1912 (2000–2018) Year Crown appeals Allowed N n % 2000 84 42 50.0 2001 56 35 62.5 2002 81 50 61.7 2003 66 32 48.5 2004 101 51 50.5 2005 57 36 63.2 2006 77 47 61.0 2007 57 35 61.4 2008 61 31 50.8 2009 44 27 61.4 2010 70 49 70.0 2011 33 15 45.5 2012 32 12 37.5 2013 32 18 56.3 2014 53 34 64.2 2015 26 12 46.2 2016 41 28 68.3 2017 25 18 72.0 2018 30 17 56.7 1026 589 57.4 Source: Judicial Commission NSW Court of Criminal Appeal database Table 3 shows the frequency of, and success rates for, Crown appeals in NSW for the period 2000–2018. The data reveals an overall success rate of 57.4% for the relevant period. Table 4 — Crown appeals under s 5D Criminal Appeal Act 1912 for SNPP offences (2004–2018) Year Crown appeals Allowed N n % 2004 8 6 75.0 2005 6 5 83.3 2006 23 16 69.6 2007 21 14 66.7 2008 19 12 63.2 2009 22 16 72.7 2010 25 18 72.0 2011 14 9 64.3 2012 13 7 53.8 2013 10 5 50.0 2014 23 18 78.3 2015 10 2 20.0 2016 16 11 68.8 2017 13 10 76.9 2018 8 6 75.0 231 155 67.1 Source: Judicial Commission NSW Court of Criminal Appeal database Table 4 shows a subset of cases within Crown appeals. It lists the frequency of, and success rates for, Crown appeals where the principal offence carried a standard non-parole period (SNPP Crown appeals). The overall success rate for SNPP Crown appeals (67.1%) is higher than the overall success rate for all Crown appeals (57.4%). [70-020] Section 5(1)(c) severity appeals Section 5(1)(c) Criminal Appeal Act 1912 provides that a person convicted on indictment may appeal against sentence to the Court of Criminal Appeal with leave. Time limits and applications out of time The provisions of the Criminal Appeal Act and the Criminal Appeal Rules relating to time limits and applications out of time are explained in Kentwell v The Queen (2014) 252 CLR 601 at [11]–[13]. Section 10(1)(a) Criminal Appeal Act provides that a notice of intention to apply for leave to appeal is required to be given within 28 days from the date of sentence. If the notice of intention to apply for leave is not given, a notice of application for leave to appeal may be given within three months after the sentence: r 3B(1)(b) Criminal Appeal Rules. The court may extend the three month period: r 3B(2). The Rules confer a discretion to extend that period in a case where no notice of intention to apply for leave to appeal has been filed. Section 10(2)(b) provides the court may, at any time, extend the time within which the notice under s 10(1)(a) is required to be given to the court or, if the rules of court so permit, dispense with the requirement for such a notice. The provisions of the Criminal Appeal Act and Rules which permit an extension of time have been repeatedly engaged in "Muldrock error cases". See also Correcting sentences imposed pre-Muldrock at [7-960]. The applications should not be approached by requiring the applicant to demonstrate that substantial injustice would be occasioned by the sentence: Kentwell v The Queen at [4], [30], [44]; O'Grady v The Queen (2014) 252 CLR 621 at [13]. In considering whether a court should grant an extension of time it must consider what the interests of justice require in the particular case. The principle of finality does not provide a discrete reason for refusing to exercise the power to extend the time limit where the sentence is being served: Kentwell v The Queen at [32]; Abdul v R [2013] NSWCCA 247 at [53] disapproved. The prospect of success of the appeal is relevant. This involves consideration of the merits of an appeal. That issue is addressed by reference to s 6(3) Criminal Appeal Act: Kentwell v The Queen at [33]–[34]. As to the approach the court must take to s 6(3), see further below at [70-040]. The courts have drawn a distinction between an order refusing leave to appeal and an order dismissing a severity appeal. In the former case, an applicant may return to the court and make subsequent applications. Where a subsequent application for leave raises issues determined by the court in a previous application, there may be a discretionary bar, but no jurisdictional bar to the application: Lowe v R [2015] NSWCCA 46 at [14]. [70-030] The ordinary precondition of establishing error Severity appeals under s 5(1)(c) Criminal Appeal Act 1912 are not rehearings. It is not enough that the appeal court considers that had it been in the position of the judge, it would have taken a different course: Lowndes v The Queen (1999) 195 CLR 665 at [15]. Nor is an appeal "the occasion for the revision and reformulation of the case presented below": Zreika v R [2012] NSWCCA 44 per Johnson J at [81]. The applicant must establish that the sentencing judge has made an error in the exercise of his or her discretion: House v The King (1936) 55 CLR 499 at 505. In Markarian v The Queen (2005) 228 CLR 357 at [25], Gleeson CJ, Gummow and Callinan JJ said: As with other discretionary judgments, the inquiry on an appeal against sentence is identified in the well-known passage in the joint reasons of Dixon, Evatt and McTiernan JJ in House v The King … itself an appeal against sentence. Thus is specific error shown? (Has there been some error of principle? Has the sentencer allowed extraneous or irrelevant matters to guide or affect the decision? Have the facts been mistaken? Has the sentencer not taken some material consideration into account?) Or if specific error is not shown, is the result embodied in the order unreasonable or plainly unjust? It is this last kind of error that is usually described, in an offender's appeal, as "manifest excess", or in a prosecution appeal, as "manifest inadequacy". See also the explanation of specific error in Kentwell v The Queen (2014) 252 CLR 601 at [42]. Manifest inadequacy of sentence, like manifest excess, is a conclusion and intervention on either ground is not warranted simply because the result arrived at below is markedly different to other sentences imposed for other cases: Hili v The Queen (2010) 242 CLR 520 at [59], referring to Dinsdale v The Queen (2000) 202 CLR 321 at [6] and Wong v The Queen (2001) 207 CLR 584 at [58]. Intervention is only justified where the difference is such that the court concludes there must have been some misapplication of principle, even though where and how cannot be discerned from the reasons: Hili v The Queen at [59]. It was an error for the Court of Criminal Appeal in Hili to find that "manifest error is fundamentally intuitive": Hili v The Queen at [60]. Failure to attribute sufficient weight to an issue The failure of a judge to attribute sufficient weight to an issue at sentence is not a ground of appeal that falls within the types of error in House v The King (1936) 55 CLR 499: Bugmy v The Queen (2013) 249 CLR 571 at [22], [53]; CMB v Attorney General for NSW (2015) 256 CLR 346 at [48] approving the approach taken by the CCA to a ground of appeal; Majid v R [2010] NSWCCA 121 at [40]; Cole v R [2010] NSWCCA 227 at [79]; Yang v R [2012] NSWCCA 49 at [25]. The principle applies whether the proceeding is a Crown appeal or a severity appeal: Majid v R at [40]. A ground of appeal asserting that a judge attributed insufficient weight to an issue has the inherent problem of implicitly acknowledging that some weight has been placed on the issue: DF v R [2012] NSWCCA 171at [77]; Hanania v R [2012] NSWCCA 220 at [33]. The only means to test an assertion of that kind is to examine the sentence: Hanania v R at [33]. Failure of defence to refer to matters at first instance later relied upon It will be rare for an applicant to succeed in a severity appeal where appellate counsel relies upon a subjective matter open on the evidence but barely raised before the sentencing judge: Stewart v R [2012] NSWCCA 183 at [56]. This is because appeals are not an opportunity to reformulate the case below: Stewart v R at [56], citing Zreika v R [2012] NSWCCA 44. Errors of fact and fact finding on appeal Factual findings are binding on the appellate court unless they come within the established principles of intervention: AB v R [2014] NSWCCA 339 at [44], [50], [59]; R v Kyriakou (unrep, 6/8/87, NSWCCA); Skinner v The King (1913) 16 CLR 336 at 339–340; Lay v R [2014] NSWCCA 310 at [52]. These principles require that error be shown before the CCA will interfere with a sentence: AB v R at [52], [59]; R v O'Donoghue (unrep, 22/7/88, NSWCCA); Kentwell v The Queen (2014) 252 CLR 601 at [35]; Hopley v R [2008] NSWCCA 105 at [28]. It is necessary to identify specific error within the terms of House v The King (1936) 55 CLR 499 as a ground of appeal: Carroll v The Queen (2009) 83 ALJR 579 at [8], [24]; Camm v R [2009] NSWCCA 141 at [68]; Cao v R [2010] NSWCCA 109 at [48]. It is incumbent on the applicant to show that the factual finding was not open: Turnbull v Chief Executive of the Office of Environment and Heritage [2015] NSWCCA 278 at [26], [32]. A factual error may be demonstrated if there is no evidence to support a particular factual finding, or if the evidence is all one way, or if the judge has misdirected himself or herself. Error can be identified, either in the approach to the fact finding exercise, or in the principles applied: AB v R at [59]. The court cannot review the finding of fact made and substitute its own findings: R v O'Donoghue at 401. In Clarke v R [2015] NSWCCA 232 at [32]–[36] and Hordern v R [2019] NSWCCA 138 at [6]–[20], Basten JA (Hamill J agreeing in each case) disapproved of R v O'Donoghue and opined that it was enough if the judge had made a mistake with respect to a factual finding that was material to the sentence. However that view has failed to receive support in subsequent judgments of the court: see Yin v R [2019] NSWCCA 217 at [27]; Gibson v R [2019] NSWCCA 221 at [2]–[6]; TH v R [2019] NSWCCA 184 at [1]; [22]–[23]. If the factual findings of the sentencing judge are not challenged on appeal, the appeal court must consider the appeal having regard only to those factual findings by the judge: R v MD [2005] NSWCCA 342 at [62]; R v Merritt (2004) 59 NSWLR 557 at [61]; Carroll v The Queen (2009) 83 ALJR 579 at [8], [24]. There is a distinction between a sentencing judge's assessment of facts and what they are capable of proving, and factual findings which the CCA might make were it to come to its own view of agreed facts: Lay v R at [51]; Aoun v R [2011] NSWCCA 284. Where a factual error has been made in the House v The King sense, the CCA does not assess whether, and to what extent, the error influenced the outcome. The sentencing discretion having miscarried, it is the duty of the CCA to exercise the sentencing discretion afresh: Lay v R at [53] applying Kentwell v The Queen at [40]–[43]. [70-040] Section 6(3) — some other sentence warranted in law Section 6(3) Criminal Appeal Act 1912 provides: On an appeal under section 5(1) against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal. It is only open to the CCA to quash the sentences if it is of the opinion stipulated in s 6(3) as one "that some other sentence … is warranted in law and should have been passed": Elliott v The Queen (2007) 234 CLR 38 at [34]. The phrase "is warranted in law" assumes no change in the relevant law between the imposition of the sentence and the determination of the appeal against it: Elliott v The Queen at [36]. Once a specific error of the kind identified in House v The King (1936) 55 CLR 499 has been established, it is the duty of the CCA to exercise the discretion afresh taking into account the purposes of sentencing and any other Act or rule of law: Kentwell v The Queen (2014) 252 CLR 601 at [42] citing Spigelman CJ in Baxter v R [2007] NSWCCA 237 at [19] with approval. The task does not involve assessing the impact of the error on the sentence or merely adjusting the sentence to allow for the error identified: Baxter v R. The court must exercise its independent discretion and determine whether the sentence is appropriate for the offender and the offence: Kentwell v The Queen at [42]; Thammavongsa v R [2015] NSWCCA 107 at [4], [44]. Any comparison of the proposed re-sentence with the original sentence is only made for the purposes of checking that the sentence arrived at by the appellate court does not exceed the original sentence: Thammavongsa v R at [5]–[6]. The point of comparison with the original sentence is undertaken at the end of the process required under s 6(3): Thammavongsa v R at [5]–[6], [25]. Not all errors vitiate the exercise of the sentencing discretion, for example, setting the term of the sentence first where the law requires the non-parole period to be set first: Kentwell v The Queen at [42]. In Lehn v R (2016) 93 NSWLR 205, the court convened a five-judge bench to consider whether, if there is an error affecting only a discrete component of the sentencing exercise, the court is required under s 6(3) Criminal Appeal Act 1912 to re-exercise the sentencing discretion generally, or, only in respect of the discrete component affected by the error. The court held that if the sentencing judge's discretion miscarries for a discrete component of the sentencing process it is necessary for the CCA to re-exercise the sentencing discretion afresh under s 6(3): Lehn v R per Bathurst CJ at [60] with other members of the court agreeing at [118], [125], [128], [141]. Section 6(3) requires the court to form an opinion as to whether some other sentence is warranted in law. As a matter of language, s 6(3) does not provide that, if a discrete error is found, the sentence can be adjusted to take account of that error: Lehn v R at [68]. The High Court in Kentwell v The Queen at [42] held that the CCA's role on finding error causing a miscarriage of the discretion was not to assess whether, and to what degree, the error influenced the outcome. The CCA's task is to re-exercise the sentencing discretion afresh and form its own view of the appropriate sentence but not necessarily re-sentence: Lehn v R at [77] quoting Kentwell v The Queen. Those remarks are equally appropriate where the discretion miscarried in respect of a discrete component of the sentencing process: Lehn v R at [78]. There will be occasions when, notwithstanding error, it is not necessary to re-exercise the sentencing discretion: Lehn v R at [72]. For example, where an arithmetical error occurs in calculating commencement and end dates of a sentence, which was arrived at in the proper exercise of discretion, or where there is error in the calculation of the effect of a discount for a plea or assistance to the authorities, where the extent of the discount was reached in accordance with proper principles: Lehn v R at [72]. In Greenyer v R [2016] NSWCCA 272, the court held that the judge's error (a mathematical slip in calculating the backdate) did not require a full reconsideration of the sentence: Greenyer v R at [34], [44]. In that case, both parties agreed to the confined approach adopted by the court. The sentencing error in Lehn v R of allowing a utilitarian discount of 20% for a guilty plea entered in the Local Court (instead of 25% and without indicating an intention to grant a lesser discount) was not related to only a discrete component of the sentencing discretion: Lehn v R at [64]–[65], [118], [120], [129], [141]. The approach taken by the judge directly related to the sentencing purpose of ensuring the penalty reflected the objective gravity of the offence: Lehn v R at [64]. The Crown conceded the judge's approach denied the applicant procedural fairness; such an error entitles the aggrieved party to a rehearing: Lehn v R at [65], [118], [128], [140]. The CCA may conclude, taking into account all relevant matters, including evidence of events that have occurred since the sentence hearing, that a lesser sentence is the appropriate sentence for the offender and the offence; this is a conclusion that a lesser sentence is warranted in law: Kentwell v The Queen at [43]. If the court concludes either that the same sentence or a greater sentence should be imposed, it is not required to re-sentence: Kentwell v The Queen at [43]. Only in rare cases could the court substitute a harsher sentence. Convention requires the court to inform the applicant of its proposed course to provide an opportunity for the applicant to abandon the appeal: Kentwell v The Queen at [43] citing Neal v The Queen (1982) 149 CLR 305 at 308. The practice of the Crown relying in an appeal on the bare submission that "no other sentence is warranted in law" should cease: Thammavongsa v R at [3], [16]. Such a submission lacks clarity, suggesting that the original sentence is "within range" and the appeal should be dismissed for that reason: Thammavongsa v R at [16]. Reception of evidence following finding of error As a general rule, the appellate court's assessment of whether some other sentence is warranted in law under s 6(3) is made on the material before the sentencing court and any relevant evidence of the offender's progress towards rehabilitation in the period since the sentencing hearing: Betts v The Queen (2016) 258 CLR 420 at [2], [11]; Kentwell v The Queen (2014) 252 CLR 601 at [43]. The court takes account of new evidence of events that have occurred since the sentence hearing: Kentwell v The Queen at [43] citing Douar v R [2005] NSWCCA 455 at [124] and Baxter v R at [19] with approval. In Douar v R at [126], the court took into account the applicant's provision of assistance to authorities after sentence in holding that a lesser sentence was warranted. In the ordinary case, the court will not receive evidence that could have been placed before the sentencing court: R v Deng [2007] NSWCCA 216 at [43]; R v Fordham (unrep, 2/12/97, NSWCCA). The appellant cannot run a "new and different case": Betts v The Queen at [2]. It is not the case that once error is demonstrated, the appellate court may receive any evidence capable of bearing on its determination of the appropriate sentence: Betts v The Queen at [8], [12]–[13] approving R v Deng [2007] NSWCCA 216 at [28]. The conduct of an offender's case at the sentence hearing involves forensic choices, such as whether facts are to be contested. That a sentencing judge's discretion is vitiated by House v The King (1936) 55 CLR 499 error does not, without more, provide a reason for not holding the offender to those forensic choices: Betts v The Queen at [14]. Refusing to allow an appellant to run a new and different case on the question of re-sentence does not cause justice to miscarry: Betts v The Queen at [14]. In Betts v The Queen, there was no error in refusing to take new psychiatric evidence as to the cause of the offences into account when considering whether a lesser sentence was warranted in law under s 6(3). The appellant had made a forensic choice to accept responsibility for the offences and the psychiatric opinion was based on a history which departed from agreed facts: Betts v The Queen at [57]–[59]. The power to remit under ss 12(2) and 6(3) Section 12(2) Criminal Appeal Act 1912 provides: "The Court of Criminal Appeal may remit a matter or issue to a court of trial for determination and may, in doing so, give any directions subject to which the determination is to be made". The question of whether the appellate court is empowered to remit the determination of a sentence appeal under the supplemental powers conferred by s 12(1) is controversial: Betts v The Queen at [17]. The issue was unnecessary to determine in Betts v The Queen at [7]. However, the extrinsic material for the amending Act which inserted s 12(2) does not provide support for the conclusion that s 12(2) qualifies the re-sentencing obligation imposed by s 6(3): Betts v The Queen at [17]. The utility of the remittal power is evident where the sentence hearing has been tainted by procedural irregularity as in O'Neil-Shaw v R [2010] NSWCCA 42: Betts v The Queen at [19]. It was held in O'Neil-Shaw v R at [56] that s 6(3) ought not to be utilised to determine an appeal where it emerges that the resolution of a factual dispute at first instance was tainted by a procedural irregularity and a denial of procedural fairness. In such a case, the appellate court is not in a position to determine the matter itself: O'Neil-Shaw v R at [32]. Remittal under s 12(2) Criminal Appeal Act is the more appropriate course since this will permit a judge to determine the question of sentence upon the evidence adduced in the second hearing: O'Neil-Shaw v R at [57]. The meaning of "sentence" in s 6(3) An aggregate sentence imposed under s 53A Crimes (Sentencing Procedure) Act 1999 is a "sentence" within s 6(3): JM v R [2014] NSWCCA 297 at [40]; see also [7-508] Appellate review of an aggregate sentence. There are a multitude of cases, subsequent to JM v R, where it has been said that the appeal is against the aggregate sentence rather than the individual indicative sentences: see, for example, R v Kennedy [2019] NSWCCA 242 at [78]; DS v R [2017] NSWCCA 37 at [63]–[64]. It is quite settled law. In determining whether an aggregate sentence is manifestly excessive, regard may be had to the indicative sentences: JM v R at [40]; Gibson v R [2019] NSWCCA 221 at [88]. In the past there was an issue about whether the word "sentence" in s 6(3) refers only to a specific sentence for a particular offence and did not include a reference to an overall effective sentence: see R v Bottin [2005] NSWCCA 254 (as to the latter) and Arnaout v R [2008] NSWCCA 278 at [21] (as to the former). That debate was noted in Nahlous v R (2010) 77 NSWLR 463 at [12] and by Hodgson JA in McMahon v R [2011] NSWCCA 147 at [2]–[4]. [70-060] Additional, fresh and new evidence received to avoid miscarriage of justice The Court of Criminal Appeal has flexibility to receive new evidence where it is necessary to do so in order to avoid a miscarriage of justice: Betts v The Queen (2016) 258 CLR 420 at [2], [10] citing R v Abbott (unrep, 12/12/85, NSWCCA); R v Goodwin (unrep, 3/12/90, NSWCCA); R v Araya (unrep, 17/7/92, NSWCCA); R v Fordham (unrep, 2/12/97, NSWCCA) and Gallagher v The Queen (1986) 160 CLR 392 at 395. A distinct set of principles has emerged as to the admission and use of additional evidence: Khoury v R [2011] NSWCCA 118 at [105]; Tran v R [2014] NSWCCA 32 at [12]; Grant v R [2014] NSWCCA 67 at [55]. More than one approach has been adopted (as explained below). The conventional approach is for the court to ask whether the additional evidence is "fresh", that is, evidence which the applicant was unaware of and could not have obtained with reasonable diligence: R v Goodwin (unrep, 3/12/90, NSWCCA); R v Abou-Chabake [2004] NSWCCA 356 at [63]. Fresh evidence is to be contrasted with new evidence which is not received. It is evidence that was available at the time, but not used. It is evidence which could have been obtained with reasonable diligence: Khoury v R at [107]; R v Many (unrep, 11/12/90, NSWCCA). Even if evidence is fresh, it will not be received by the court unless it affects the outcome of the case: R v Fordham at 378. For example, the evidence in Bajouri v R [2016] NSWCCA 20 of images on Facebook showing the victim doing activities such as jet skiing 10 months after the assault offence and 18 months before his victim impact statement could not qualify as fresh evidence. It did not contradict or cast doubt on the contents of the victim impact statement: Bajouri v R at [44], [46], [51]. Evidence of facts that have arisen entirely after sentence The past tense used in s 6(3) "some other sentence, whether more or less severe is warranted in law and should have been passed" has the effect according to Simpson J in Khoury v R [2011] NSWCCA 118 at [110] that: … evidence of events or circumstances or facts that have arisen entirely since sentencing cannot be taken into account, no matter how compelling they may be. If the facts did not exist at the time of sentencing, it cannot have been an error for the sentencing judge not to have taken them into account … [Emphasis added.] See also Agnew (a pseudonym) v R [2018] NSWCCA 128 at [38]. While there is some flexibility with respect to the application of this principle (see Agnew v R at [39]–[40] and the discussion below) the view, for example, that a post-sentence reduction in a custodial sentence for assistance to authorities can be achieved by means of an appeal where no error or miscarriage has been found should not be encouraged: Agnew v R at [40]–[42]. Evidence that an applicant assisted authorities post sentence: JM v R [2008] NSWCCA 254, or had a medical condition that did not exist at sentence, has not been received by the court: Khoury v R at [111]–[112]. Evidence of factual circumstances which existed at sentence The Court of Criminal Appeal has received additional evidence of facts or circumstances which existed at the time of sentencing, even if not known, or imperfectly understood, at that time: Khoury v R [2011] NSWCCA 118 at [113]. That is, circumstances existed which were known at sentence but their significance was not appreciated: Khoury v R at [114]–[115]. See the examples referred to in Springer v R [2007] NSWCCA 289 at [3]. The rationale for the receipt of the additional evidence is that the sentencing court proceeded on an erroneous view of the facts before it: Khoury v R at [113]. The decision to admit additional evidence is discretionary and caution must be exercised: Khoury v R at [117]; Wright v R [2016] NSWCCA 122 at [19], [71]. The applicant must establish a proper basis for the admission of the evidence: Khoury v R at [117]. Relevant factors to be taken into account according to Simpson J in Khoury v R at [121] include: … the circumstances of, and any explanation for, the non-production of the evidence — a deliberate decision on the part either of the applicant, or his or her legal representatives, ignorance in the applicant of the significance of the evidence, resulting in its not being communicated to the legal representatives, incompetent legal representation [and] … the potential significance of the evidence to have affected the outcome at first instance … Two categories of case have emerged: medical evidence cases: Khoury v R at [115] assistance to authorities cases: R v Many (unrep, 11/12/90, NSWCCA). The general principle is that parties will not normally be able to produce fresh or new evidence on appeal. The principle reflects the importance of finality: Cornwell v R [2015] NSWCCA 269 at [39]. However, evidence as to a medical condition may form the basis for an exception to this principle where it is in the interests of justice: Cornwell v R at [39], [57], [59]; Turkmani v R [2014] NSWCCA 186; Khoury v R [2011] NSWCCA 118 at [115]; Dudgeon v R [2014] NSWCCA 301. In Turkmani v R, the court at [66] identified three categories of case where fresh evidence is sought to be adduced in relation to the health of an offender. First, where the offender was only diagnosed as suffering from a condition after sentence but was affected at the time of sentence; secondly where, although the symptoms of a condition may have been present, their significance was not appreciated and; thirdly where a person was sentenced on the expectation that they would receive a particular level of medical care in custody but did not. See the discussion of Turkmani v R in Wright v R [2014] NSWCCA 186 at [73]. The discretion to admit fresh evidence of an offender's medical condition was permitted in Cornwell v R on the basis that he was clearly suffering Huntington's disease at the time of sentencing which was likely to make custody more burdensome for him: Cornwell v R at [59], [64]. The evidence established that the pre-sentence instructions given by the applicant to his legal representatives — that he did not wish to undergo testing for the disease — were justified by psychological factors including the fear of a positive diagnosis following his experience of family members with the same disease: Cornwell v R at [58]. In Wright v R, the applicant was sentenced upon the basis that he was in poor health and was of advanced age. Following sentence he was subsequently diagnosed with Alzheimer's disease. Although the evidence qualified as fresh evidence that the court could receive, the court exercised its discretion not to admit it because the evidence would not have made a significant difference to the sentence imposed by the judge: Wright v R at [1], [20], [84], [98], [100].The sentence already represented a lenient outcome: Wright v R at [86]. As to psychological conditions, there is an unresolved issue as to whether the additional evidence is the psychological condition existing at the time or the later diagnosis by the expert in a report prepared after sentence proceedings: Khoury v R at [118], quoting Basten JA in Einfeld v R [2010] NSWCCA 87 at [45], [50]. A psychological report prepared after sentence is not necessarily fresh or new evidence because it was prepared after sentence: Khoury v R at [120], but see R v Fordham at 377–378. Assistance to authorities In the particular circumstances of ZZ v R [2019] NSWCCA 286, the court concluded that information provided by the applicant in an interview with police upon her arrest which, after the sentence proceedings, resulted in arrests overseas, qualified as fresh evidence and resulted in a reduction of her sentence on appeal: at [29]–[30], [33]–[34]. [70-065] Miscarriage of justice arising from legal representation The general rule as set out in R v Birks (1990) 19 NSWLR 677 at 683 and 685 that "a party is bound by the conduct of his or her counsel, and counsel have a wide discretion as to the manner in which proceedings are conducted" applies to sentencing proceedings: Khoury v R [2011] NSWCCA 118 at [104]; Tran v R [2014] NSWCCA 32 at [12]; CL v R [2014] NSWCCA 196. However, fresh evidence has been admitted by the Court of Criminal Appeal without error being established where a miscarriage of justice occurred because the applicant was incompetently or carelessly represented at sentence: R v Fordham at 377–378, citing R v Abbott (unrep, 12/12/85, NSWCCA); Munro v R [2006] NSWCCA 350 at [23]–[24]. Where evidence was available to the defence at the time of sentencing, a miscarriage of justice will rarely result simply from the fact that the evidence was not put before the sentencing judge, even if the evidence may have had an impact upon the sentence passed: R v Fordham at 377. Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked better: Ratten v R (1974) 131 CLR 510 at 517; R v Diab [2005] NSWCCA 64 at [19]. In Khoury v R, counsel said it did not occur to him to call psychiatric evidence concerning the applicant's low intellectual functioning. Evidence was received on appeal by the Court of Criminal Appeal because of its significance in the case: see the explanation of Khoury v R in Grant v R [2014] NSWCCA 67 at [57]. Conversely, in Grant v R, the court refused the admission of two psychological reports prepared many years after sentence proceedings: Grant v R at [58]. A miscarriage of justice was found in Grant v R where the applicant pleaded guilty to manslaughter on the basis of excessive self-defence because the legal representative: failed to explain to the client the various states of mind within the offence of manslaughter; failed to obtain clear instructions from the client on that issue; and, informed the court what he thought was his client's intention without having obtained clear instructions on the issue: Grant v R at [71], [77]. [70-070] Crown appeals for matters dealt with on indictment Section 5D(1) Criminal Appeal Act 1912 provides: The Attorney-General or the Director of Public Prosecutions may appeal to the Court of Criminal Appeal against any sentence pronounced by the court of trial in any proceedings to which the Crown was a party and the Court of Criminal Appeal may in its discretion vary the sentence and impose such sentence as to the said court may seem proper. Although the Attorney General (NSW) has a statutory right to appeal against sentence, it has only been exercised once since the establishment of the office of an independent Director of Public Prosecutions (DPP) by the Director of Public Prosecutions Act 1986 (NSW). See CMB v Attorney General for NSW (2015) 256 CLR 346. The decision to institute a Crown appeal is made by the DPP, although the Executive government sometimes requests that the DPP consider an appeal on behalf of the Crown to correct a sentence perceived to be inadequate. Time limits to appeal and specifying grounds Neither s 10(1) Criminal Appeal Act (which provides that an appeal must be filed 28 days from the date of sentence), nor r 3B Criminal Appeal Rules apply to Crown appeals: R v Ohar (2004) 59 NSWLR 596. While there is no formal time limit, the delay in bringing such an appeal is relevant to the court's exercise of its discretion to intervene: Green v The Queen (2011) 244 CLR 462 at [43]. Rule 23E Criminal Appeal Rules headed "Notice of Crown appeal" provides that a notice of a Crown appeal is to be sent to the registrar by the appellant and the appellant is to serve a copy of the notice on the respondent as soon as practicable after sending the notice to the registrar. Rule 23E makes no reference to the notice of a Crown appeal containing grounds. This is to be contrasted with the equivalent r 23C directed at severity appeals which require the leave of the court. At some stage a formal document identifying the grounds should be brought into existence in a Crown appeal: R v JW (2010) 77 NSWLR 7 at [33], [35]. The court acknowledged in R v JW at [33] that it is a desirable "rule of practice", within the meaning of r 76, that a Crown appeal should identify grounds of appeal in the notice of appeal. However, that practice does not require grounds to be identified when the notice is first filed and failure to do so does not render the appeal incompetent: R v JW at [33]. The High Court decision of Carroll v The Queen (2009) 83 ALJR 579 does not imply a contrary position: R v JW at [35]. [70-080] Matters influencing decision of the DPP to appeal The NSW Prosecution Guideline Chapter 10: DPP appeals, at [10.2], states in part that the DPP will only lodge an appeal if satisfied that: 1. all applicable statutory criteria are established 2. there is a reasonable prospect that the appeal will succeed 3. it is in the public interest. The Guideline states, at [10.4] Appeals against sentence, that the primary purpose of DPP sentence appeals to the Court of Criminal Appeal is to allow the court to provide governance and guidance to sentencing courts. The Guideline recognises that such appeals are, and ought to be, rare. The Guideline states they should be brought in appropriate cases: 1. to enable the courts to establish and maintain adequate standards of punishment for crime 2. to enable idiosyncratic approaches to be corrected 3. to correct sentences that are so disproportionate to the seriousness of the crime as to lead to a loss of confidence in the administration of criminal justice. The Prosecution policy of the Commonwealth: guidelines for the making of decisions in the prosecution process (issued by the CDPP in July 2021) sets out the Director's policy in relation to Commonwealth prosecution appeals against sentence. It can be accessed from "Prosecution Process" on the CDPP website. Guideline 6.35 of the Commonwealth prosecution policy states that the prosecution right to appeal against sentence "should be exercised with appropriate restraint" and "consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful". Guideline 6.36 further states that an appeal against sentence should be instituted promptly, even where no time limit is imposed by the relevant legislation. [70-090] Purpose of Crown appeals The primary purpose of a Crown appeal is to lay down principles for the governance and guidance of courts with the duty of sentencing convicted persons: Green v The Queen (2011) 244 CLR 462 per French CJ, Crennan and Kiefel JJ at [1], [36], quoting Barwick CJ in Griffith v The Queen (1977) 137 CLR 293 at 310. See also R v DH [2014] NSWCCA 326 at [19]; R v Tuala [2015] NSWCCA 8 at [98]. Their Honours in Green v The Queen continued at [36]: That is a limiting purpose. It does not extend to the general correction of errors made by sentencing judges. It provides a framework within which to assess the significance of factors relevant to the exercise of the discretion. The High Court affirmed the above passage in CMB v Attorney General for NSW (2015) 256 CLR 346 at [55]. Severity appeals on the other hand are concerned with the correction of judicial error in particular cases: Green v The Queen at [1]. The purpose of Crown appeals extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing: Lacey v Attorney General of Queensland (2011) 242 CLR 573 at [16]; Everett v The Queen (1994) 181 CLR 295 at 300; Dinsdale v The Queen (2000) 202 CLR 321 at [61]–[62]. The two hurdles in Crown appeals In a Crown appeal against sentence, the Crown is required to surmount two hurdles: firstly, it must identify a House v The King [(1936) 55 CLR 499 at 505] error in the sentencing judge's discretionary decision; and secondly, it must negate any reason why the residual discretion of the CCA not to interfere should be exercised: CMB v Attorney General for NSW, above, at [54] citing Everett v The Queen (1994) 181 CLR 295 at 299–300 and R v Hernando [2002] NSWCCA 489 per Heydon JA at [12] with approval. The discretion is residual only in that its exercise does not fall to be considered unless House v The King error is established: CMB v Attorney General for NSW at [33], [54]. Once the discretion is enlivened, it remains incumbent on the Crown as the appellant under s 5D to demonstrate that the discretion should be exercised: CMB v Attorney General for NSW at [33], [54]. Error and manifest inadequacy The court may only interfere where error, either latent or patent, is established: Dinsdale v The Queen at [61]; Wong and Leung v The Queen (2001) 207 CLR 584 at [58], [109]. The bases of intervention in House v The King (1936) 55 CLR 499 at 505 are not engaged by grounds of appeal which assert that the judge erred by (a) failing to properly determine the objective seriousness of the offence, or (b) failing to properly acknowledge the victim was in the lawful performance of his duties, or (c) by giving excessive weight to an offender's subjective case to reduce the sentence: Bugmy v The Queen (2013) 249 CLR 571 at [22], [53]; R v Tuala [2015] NSWCCA 8 at [44]. These are just "particulars of the ground that the sentence was manifestly inadequate": Bugmy v The Queen at [22], [53]. Assessment of objective seriousness It is open to an appeal court in a Crown appeal to form a different view from the sentencing judge as to the objective seriousness of an offence where the (only) House v The King error asserted is that the sentence is "plainly unjust": Carroll v The Queen (2009) 83 ALJR 579 at [24]. However, in reaching its conclusion, the appeal court cannot discard the sentencing judge's factual findings where the findings are not challenged: Carroll v The Queen at [24]. In Decision Restricted [2014] NSWCCA 116 at [79]–[89], Simpson J expressed reservations about the authority of Mulato v R [2006] NSWCCA 282 in light of the approach in Carroll v The Queen at [24] described above: Sabongi v R [2015] NSWCCA 25 at [70]. Spigelman CJ had said in Mulato v R: Characterisation of the degree of objective seriousness of an offence is classically within the role of the sentencing judge in performing the task of finding facts and drawing inferences from those facts. This Court is very slow to determine such matters for itself … Mulato v R was applied in Stoeski v R [2014] NSWCCA 161 at [46]. A subsequent application for special leave to appeal to the High Court, on the basis her Honour's statement at [46] was wrong in principle, was refused: Stoeski v The Queen [2015] HCA Trans 19. The court in Sabongi v R at [72] held, after reference to Stoeski v R [2014] NSWCCA 161 at [46] that: "… the observations of Spigelman CJ and Simpson J in Mulato should be applied in New South Wales". The court in Ramos v R [2015] NSWCCA 313 held that notwithstanding what the High Court said in Carroll v The Queen at [24] — that "it was open to the Court of Criminal Appeal to form a view different from the primary judge about where, on an objective scale of offending, the appellant's conduct stood" — neither Carroll v The Queen nor Mulato v R represent any departure from the principles laid down in House v The King (1936) 55 CLR 499: per Basten JA at [41] and Campbell J agreeing at [72]. The relevant question is whether the assessment of the objective seriousness of the offending was outside the range properly available to the sentencing judge: Ramos v R at [41]. See earlier discussion under Errors of fact and fact finding on appeal in [70-030]. Specific error alone is not enough to justify interference in a Crown appeal; the Crown must also demonstrate that the sentence is manifestly inadequate: R v Janceski [2005] NSWCCA 288 at [25]. In a Crown appeal, the court must make an express finding that the sentence imposed at first instance is manifestly inadequate and the power to substitute the sentence is not enlivened by a finding that the court would have attributed less weight to some factors and more to others: Bugmy v The Queen at [24]; R v Tuala at [44]. The court must be satisfied that the discretion miscarried, resulting in the judge imposing a sentence which was "below the range of sentences that could be justly imposed for the offence consistently with sentencing standards": Bugmy v The Queen at [24], [55]. If that is the case, the court has to then consider whether the Crown appeal "should nonetheless be dismissed in the exercise of the residual discretion": at [24]. As to the residual discretion see further below at [70-100]. Manifest inadequacy and reasons Manifest excess or inadequacy of a sentence is shown by a consideration of all of the matters that are relevant to fixing a sentence. By its nature, manifest inadequacy does not allow lengthy exposition: Hili v The Queen (2010) 242 CLR 520 at [60]. Reference by the Court of Criminal Appeal to the circumstances of the offending and the personal circumstances of an offender, may sufficiently reveal the bases for a conclusion that a sentence is manifestly excessive: Hili v The Queen at [60]. As to the application of the parity principle in Crown appeals see Parity at [10-850]. Section 5D Criminal Appeal Act permits the Crown to appeal "against any sentence pronounced". The Crown cannot appeal an indicative sentence (the sentence that would have been imposed for an individual offence under s 53A(2)(b) Crimes (Sentencing Procedure) Act) because it is neither pronounced nor imposed: R v Rae [2013] NSWCCA 9 at [32]. Where an aggregate sentence is imposed only one sentence is pronounced: R v Rae at [32]. The appellate court can, however, consider submissions as to the inadequacy or otherwise of an indicative sentence in determining whether an aggregate sentence is inadequate: R v Rae at [33] citing the approach in the previous decisions of PD v R [2012] NSWCCA 242 at [44] and R v Brown [2012] NSWCCA 199 at [17]. Double jeopardy principle The Crimes (Appeal and Review) Amendment (Double Jeopardy) Act 2009 abolished the principle of double jeopardy in Crown appeals on sentence. A new s 68A entitled "Double jeopardy not to be taken into account in prosecution" was inserted into the Crimes (Appeal and Review) Act 2001. It provides: (1) An appeal court must not: (a) dismiss a prosecution appeal against sentence, or (b) impose a less severe sentence on any such appeal than the court would otherwise consider appropriate, because of any element of double jeopardy involved in the respondent being sentenced again. (2) This section extends to an appeal under the Criminal Appeal Act 1912 and accordingly a reference in this section to an appeal court includes a reference to the Court of Criminal Appeal. The terms of s 68A(1), "[an] appeal court", and s 68A(2), "extends to an appeal under the Criminal Appeal Act 1912", on their face appear also to apply to Crown appeals from the Local Court to the District Court. The Agreement in Principle Speech and Explanatory Notes to the Bill can be found in the recent law item for the amending Act on JIRS. The expression "double jeopardy" in s 68A is limited to "the element of distress and anxiety which a respondent suffers from being exposed to the possibility of a more severe sentence": R v JW (2010) 77 NSWLR 7 at [54]. Chief Justice Spigelman said at [141] (with support of other members of the Bench at [205] and [209]): (i) The words "double jeopardy" in s 68A refer to the circumstance that an offender is, subject to the identification of error on the part of the sentencing judge, liable to be sentenced twice. (ii) Section 68A removes from consideration on the part of the Court of Criminal Appeal the element of distress and anxiety to which all respondents to a Crown appeal are presumed to be subject. (iii) Section 68A prevents the appellate court exercising its discretion not to intervene on the basis of such distress and anxiety. (iv) Section 68A also prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of such distress and anxiety. (v) Section 68A prevents the Court from having regard to the frequency of Crown appeals as a sentencing principle applicable to an individual case by taking either step referred to in (iii) or (iv), or otherwise. Application of s 68A to Commonwealth Crown appeals The High Court held in Bui v DPP (Cth) (2012) 244 CLR 638 that ss 289–290 Criminal Procedure Act 2009 (Vic) (which are materially similar double jeopardy provisions to s 68A) do not apply to Crown appeals against sentence for a Commonwealth offence. The court made explicit reference to the NSW decision of DPP (Cth) v De La Rosa (2010) 79 NSWLR 1 in deciding the issue. See also DPP (Cth) v Afiouny [2014] NSWCCA 176 at [75]. Section 80 Judiciary Act 1903 (Cth), which enables State courts to exercise federal jurisdiction, allows the common law to apply where it has not been modified by State legislation and so far as the laws of the Commonwealth are not applicable or their provisions insufficient: Bui at [27]. The High Court held that no question of picking up the Victorian provisions arose because the issue can be resolved by reference to s 16A Crimes Act 1914 (Cth) itself. In short, there is "no gap" in the Commonwealth laws: Bui at [29]. Section 16A does not accommodate the common law principle of "presumed anxiety": Bui at [19]. The same reasoning applies to s 68A. Although presumed anxiety cannot be read into the text of s 16A(1), actual mental distress can be taken into account under s 16A(2)(m) both when the court is determining whether to intervene and in resentencing: Bui at [21]–[24], approving DPP (Cth) v De La Rosa. Simpson J's view in that case of s 16A(2)(m) at [279]–[280] — that it is limited to a condition of distress and anxiety which is the subject of proof — is to

be preferred to the views expressed by Allsop P and Basten JA: Bui at [23]. Section 16A(2)(m) refers to the actual mental condition of a person, not his or her presumed condition. A condition of distress or anxiety must be demonstrated before s 16A(2)(m) applies: Bui at [23]. Counsel for the respondent in R v Nguyen [2010] NSWCCA 238 at [125]–[127] unsuccessfully relied upon the offender's anxiety and distress suffered as a consequence of the Crown appeal. It was long established at common law that appeals by the Crown should be rare: Malvaso v The Queen (1989) 168 CLR 227. The application of that factor has been abolished, see R v JW at [141] in (v) (see above). In R v JW at [124], [129], Spigelman CJ said that insofar as "rarity" was intended to apply as a sentencing principle by way of guidance to courts of criminal appeal, it should be understood as reflecting the double jeopardy principle, now abolished. Other reasons for the frequency or otherwise of such appeals are not matters that are generally of concern to a court of criminal appeal. They are directed to the prosecuting authorities. [70-100] The residual discretion to intervene Once error is identified in a Crown appeal, the court is not obliged to embark on the resentencing exercise: R v JW (2010) 77 NSWLR 7 at [146]. The court has a discretion to refuse or decline to intervene even if error is established: R v JW at [146]; Green v The Queen (2011) 244 CLR 462 at [1], [26]; R v Reeves [2014] NSWCCA 154 at [12]. It is an error for the court to fail to consider the exercise of its residual discretion to dismiss the Crown appeal despite finding error: Bugmy v The Queen (2013) 249 CLR 571 at [24]; Reeves v The Queen (2013) 88 ALJR 215 at [60]–[61]. Two questions are relevant to the exercise of the residual discretion: first, whether the court should decline to allow the appeal even though the sentence is erroneously lenient; and second, if the appeal is allowed, to what extent the sentence should be varied: R v Reeves at [13]; Green v The Queen at [35]. The purpose of Crown appeals is not simply to increase an erroneous sentence. The purpose is a "limiting purpose" to establish sentencing principles and achieve consistency in sentencing: R v Reeves at [14]–[15]; Griffiths v The Queen (1977) 137 CLR 293 at [53]; R v Borkowski [2009] NSWCCA 102 at [70]. Where the guidance provided to sentencing judges is limited, for example, because the proceedings are subject to non-publication orders, it may be appropriate to dismiss the appeal in the exercise of the residual discretion: HT v The Queen (2019) 93 ALJR 1307 at [51]; [55]; [90]. In determining whether to exercise the residual discretion, it is open for the appellate court to look at the facts available as at the time of the hearing of the appeal, including events that have occurred after the original sentencing: R v Reeves at [19]; R v Deng [2007] NSWCCA 216 at [28]; R v Allpass (unrep, 5/5/93, NSWCCA). The onus is on the Crown to negate any reason why the residual discretion should be exercised: R v Hernando [2002] NSWCCA 489 at [12], cited with approval in CMB v Attorney General for NSW (2015) 256 CLR 346 at [34], [66]. Previous cases, such as R v Loveridge [2014] NSWCCA 120 at [248]–[249]; R v Gavel [2014] NSWCCA 56 at [125] and R v Smith [2007] NSWCCA 100 at [34], [66], which hold either that the onus is on the respondent or there is no onus on either party, are contrary to CMB v Attorney General for NSW at [34], [66], [69]. Section 68A(1) expressly removes double jeopardy as a discretionary consideration for refusing to intervene: R v JW at [95] but it "leaves other aspects untouched" and "there remains a residual discretion to reject a Crown appeal" for reasons other than double jeopardy: R v JW per Spigelman CJ at [92], [95] (other members of the court agreeing at [141], [205], [209]). The residual discretion, where it is exercised, necessitates an immediate and highly subjective assessment of the circumstances of the case at hand: R v Holder and Johnston [1983] 3 NSWLR 245 at 256. Factors that bear upon the residual discretion The category of factors that bear upon the residual discretion are not closed. Rarity and the frequency of Crown appeals is no longer a relevant consideration: R v JW at [129]. A consideration weighing strongly against interference is a Crown concession before the sentencing judge that a non-custodial sentence is appropriate: CMB v Attorney General for NSW at [64]. The Crown has a duty to assist a sentencing court to avoid appellable error: CMB v Attorney General for NSW at [38], [64]. The failure of the Crown to indicate that a proposed sentence is manifestly inadequate is a material consideration in the exercise of the CCA's residual discretion: CMB v Attorney General for NSW at [64]. When the Crown asks the CCA to set aside a sentence on a ground, which was conceded in the court below, the CCA in the exercise of its discretion should be slow to interfere: CMB v Attorney General for NSW at [38], [64], [68]; citing R v Jermyn (1985) 2 NSWLR 194 at 204 with approval. The forensic conduct of the Crown at first instance such as lack of challenge by the Crown or positively leading the court into error is an important consideration: R v Allpass (unrep, 5/5/93, NSWCCA); R v Chad (unrep, 13/5/97, NSWCCA); R v JW at [92]. Some of the other factors that may favour the exercise of the discretion are as follows: delay by the Crown in lodging the appeal: R v Hernando at [30]; R v JW at [92]; R v Bugmy (No 2) [2014] NSWCCA 322 at [19], [101] conducting a case on appeal on a different basis from that pursued at first instance: R v JW at [92] delay in the resolution of the appeal: R v Price [2004] NSWCCA 186 at [60]; R v Cheung [2010] NSWCCA 244 at [151]; R v Hersi [2010] NSWCCA 57 at [55] the fact a non-custodial sentence was imposed on the offender at first instance: R v Y [2002] NSWCCA 191 at [34]; R v Tortell [2007] NSWCCA 313 at [63] the fact the non-parole period imposed at first instance has already expired: R v Hernando at [30]; or the fact the respondent's release on parole is imminent: Green v The Queen at [43] the fact the offender has made substantial progress towards rehabilitation: CMB v Attorney General for NSW at [69] "the effect of re-sentencing on progress towards the respondent's rehabilitation": Green v The Queen at [43] where resentencing would create disparity with a co-offender: R v Bavin [2001] NSWCCA 167 at [69]; R v McIvor [2002] NSWCCA 490 at [11]; R v Cotter [2003] NSWCCA 273 at [98]; R v Borkowski at [67]; Green v The Queen at [37]. See Crown appeals and parity at [10-850] the deteriorating health of the respondent since sentence: R v Yang [2002] NSWCCA 464 at [46]; R v Hansel [2004] NSWCCA 436 at [44] the fact that, were the court to impose a substituted sentence, the increase would be so slight as to constitute 'tinkering': Dinsdale v The Queen (2000) 202 CLR 321 at [62]; R v Woodland [2007] NSWCCA 29 at [53] the guidance provided to sentencing judges will be limited and the decision will result in injustice: Green v The Queen at [2]; CMB v Attorney General for NSW at [69] the case is unlikely to ever arise again: CMB v Attorney General for NSW at [69]. [70-110] Resentencing following a successful Crown appeal If a Crown appeal against sentence is successful and the appellate court resentences the respondent, it does so in the light of all the facts and circumstances as at the time of resentencing: R v Warfield (1994) 34 NSWLR 200 at 209, following R v Allpass (unrep, 5/5/93, NSWCCA). The court will admit evidence of matters occurring after the date of the original sentencing to be taken into account on this basis: R v Deng [2007] NSWCCA 216 at [28]. Section 68A(1)(b) prohibits an appeal court from imposing a less severe sentence "than the court would otherwise consider appropriate because of any element of double jeopardy involved in the respondent being sentenced again". Section 68A prevents the appellate court from reducing the sentence which it otherwise believes to be appropriate on the basis of distress and anxiety suffered by the respondent: R v JW (2010) 77 NSWLR 7 at [98], [141], [205], [209]; affirmed in R v Parkinson [2010] NSWCCA 89 at [49]–[51]. For appeals by the Crown against a person who fails to fulfil an undertaking to assist authorities, see Power to reduce penalties for assistance to authorities at [12-240]. [70-115] Judge may furnish report on appeal Section 11 Criminal Appeal Act 1912 provides that judges may furnish the registrar with their notes of the trial and a report, giving their opinion of the case or any point arising in the case. A s 11 report should only be provided in exceptional circumstances: R v Sloane [2001] NSWCCA 421 at [13]. The report's function is not to provide a reconsideration of sentence or to justify or explain why a judge dealt with a matter in a particular way: Vos v R [2006] NSWCCA 234 at [26]; R v Sloane at [9]. The relevant and permissible functions of a report are set out in R v Sloane at [10]–[12]; see also Zhang v R [2018] NSWCCA 82 at [37]–[39]. [70-120] Severity appeals to the District Court Any person who has been sentenced by the Local Court may appeal to the District Court against the sentence: s 11(1) Crimes (Appeal and Review) Act 2001. The appeal is 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: s 17. The nature of an appeal "by way of rehearing" was discussed in Fox v Percy (2003) 214 CLR 118. Referring to the "requirements and limitations of such an appeal" the court said at [23]: On the one hand, the appellate court is obliged to "give the judgment which in its opinion ought to have been given in the first instance". On the other, it must, of necessity, observe the "natural limitations" that exist in the case of any appellate court proceeding wholly or substantially on the record. These limitations include the disadvantage that the appellate court has when compared with the trial judge in respect of the evaluation of witnesses' credibility and of the "feeling" of a case which an appellate court, reading the transcript, cannot always fully share. [Citations omitted.] See Toth v DPP (NSW) [2017] NSWCA 344 at [80]–[83], where no regard for the "natural limitations" of the District Court amounted to jurisdictional error in an appeal against conviction under s 18 Crimes (Appeal and Review) Act. Section 20(2) Crimes (Appeal and Review) Act empowers the District Court on a sentence appeal to set aside or vary the sentence or dismiss the appeal. "Sentence" is exhaustively defined in s 3. "Varying a sentence" is defined in s 3(3) to include: (a) a reference to varying the severity of the sentence, (b) a reference to setting aside the sentence and imposing some other sentence of a more or less severe nature, and (c) a reference to varying or revoking a condition of, or imposing a new condition on, an intensive correction order, community correction order or conditional release order. The power conferred to vary a sentence includes the power to make an order under s 10 of the Crimes (Sentencing Procedure) Act 1999 and, for that purpose, to set aside a conviction made by the original Local Court (without setting aside the finding of guilt on which the conviction is based) to enable the order to be made: s 3(3A). The exercise of a power to set aside or vary a sentence under s 20 operates prospectively: Roads and Maritime Services v Porret (2014) 86 NSWLR 467 at [33]. This extends to cases where the variation includes the imposition of a s 10 order and the setting aside the conviction: Roads and Maritime Services v Porret at [33]. The exercise of the power to impose a s 10 order does not render the effect of the sentence up to the time of the appeal a nullity: Roads and Maritime Services v Porret at [33]. Where the judge is contemplating an increased sentence, the principles in Parker v DPP (1992) 28 NSWLR 282 require the judge to indicate this fact so that the appellant can consider whether or not to apply for leave to withdraw the appeal: at 295. See further discussion in Procedural fairness at [1-060]. The court is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71. Any sentence varied or imposed and any order made has the same effect and may be enforced in the same manner as if it were made by the Local Court: s 71(3). [70-125] Appeals to the Supreme Court from the Local Court A person who has been sentenced by the Local Court, otherwise than with respect to an environmental offence, may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone: s 52 Crimes (Appeal and Review) Act. However, such a person may appeal to the Supreme Court on a ground that involves a question of fact, or a question of mixed law and fact, if the court grants him or her leave to do so: s 53. A person sentenced by the Local Court with respect to an environmental offence may appeal to the Supreme Court against the sentence, but only on a ground that involves a question of law alone, and only by leave of the Supreme Court: s 53(2). A question of law alone does not include a mixed question of fact and law: R v PL [2009] NSWCCA 256 at [25]. A question concerning the application of correct legal principle to the facts of a particular case is a question of mixed fact and law; while a question concerning the application of incorrect legal principle to the facts of a particular case can give rise to a question of law alone: Brough v DPP [2014] NSWSC 1396 at [49]. In that case, an appeal founded upon a critique of the way in which a sentencing magistrate applied well-established principles of totality to the evidence was not a question of law alone: Brough v DPP at [50]–[51]. To identify an error by the Local Court in the exercise of its sentencing discretion in terms that amount to an error of the kind identified in House v King (1936) 55 CLR 499 at 504, does not of itself answer the question posed by s 56(1), that is, whether the court answered a question of law alone incorrectly, or otherwise made an assumption as to the existence of a legal principle which was wrong: Bimson, Roads and Maritime Services v Damorange Pty Ltd [2014] NSWSC 734 at [46]. If it is apparent that the court had acted on a "wrong principle", then the question of law would be whether that principle was wrong or correct and, if wrong, whether the trial judge acted on that principle and whether that materially affected the outcome: Bimson at [48]. A conclusion that the exercise of judicial discretion was unreasonable or plainly unjust may enable the appellate court to infer there was error but it does not necessarily enable the appellate court to infer that the error was one that involved the lower court applying or adopting a wrong legal principle. It will often be a distraction to attempt to label a sentence appealed from as manifestly inadequate or excessive. Instead, the appellant should isolate the question of law or legal principle that the lower court adopted or assumed and then demonstrate that it was wrong and material to the outcome: Bimson at [53]. Therefore an assertion that a sentence is manifestly inadequate does not identify a question of law alone as required by s 56(1)(a): Bimson at [57]. It is not the court's function under s 56(1)(a) to embark on an inquiry into the adequacy or even manifest inadequacy of a Local Court sentence: Bimson at [93]. A ground of appeal alleging that the magistrate had incorrectly characterised the seriousness of the offences did not raise a question of law alone; however a ground alleging that the magistrate had applied an incorrect maximum penalty and jurisdictional limit did raise a question of law alone: Bimson at [66], [77]. In determining a severity appeal from the Local Court, the Supreme Court has the power to set aside or vary the sentence, dismiss the appeal, or to set aside the sentence and remit the matter to the Local Court for redetermination: s 55(2). The Supreme Court does not have jurisdiction to hear an appeal against a sentence imposed in the Local Court if an application for leave to appeal in the District Court has been dismissed and the magistrate's order has been confirmed: Devitt v Ross [2018] NSWSC 1675 at [60]–[62]. [70-130] Crown appeals on sentence to the District Court Section 23 Crimes (Appeal and Review) Act 2001 provides that the DPP may appeal to the District Court against a sentence imposed on a person by a Local Court in proceedings for: (a) any indictable offence that has been dealt with summarily: s 23(1)(a) (b) any prescribed summary offence (within the meaning of the Director of Public Prosecutions Act 1986): s 23(1)(b), or (c) any summary offence that has been prosecuted by or on behalf of the DPP: s 23(1)(c). An appeal pursuant to s 23 is of a different nature to a Crown appeal to the Court of Criminal Appeal under the Criminal Appeal Act. Section 26 Crimes (Appeal and Review) Act provides that a s 23 Crown appeal against sentence is to be by way of a rehearing of the evidence given in the original Local Court proceedings. The court may also grant the DPP leave to lead fresh evidence, but only in exceptional circumstances: s 26(2). For the appeal to be upheld, error must be found: DK v Director of Public Prosecutions [2021] NSWCA 134 at [32]. The District Court is empowered on an appeal to dismiss the appeal, set aside or vary the sentence: s 27(1); but is prevented from ordering a new sentence, or varying an existing sentence, to one that could not have been made or imposed by the Local Court: s 71. The court has a residual discretion to decline to intervene, on a similar basis to the Court of Criminal Appeal: DK v Director of Public Prosecutions at [434]–[445] (see further [70-100]–[70-110] above). The discretion may not be exercised on the basis of double jeopardy. [70-135] Crown appeals to the Supreme Court The Crown may appeal to the Supreme Court against a sentence imposed by a Local Court in any summary proceedings, but only on a ground that involves a question of law alone: s 56(1)(a) Crimes (Appeal and Review) Act. Sentences imposed with respect to environmental offences may be appealed by the Crown but only with the leave of the court and on a question of law alone: s 57(1)(a). See [70-125], above, for discussion of what constitutes a question of law alone. A Crown appeal alleging manifest inadequacy of sentence does not itself raise an error of law: Morse (Office of the State Revenue) v Chan [2010] NSWSC 1290 at [5], [39]; Bimson, Roads and Maritime Services v Damorange Pty Ltd [2014] NSWSC 734 at [51]. The function of the Supreme Court on appeals under s 56(1) is to identify and correct legal error, not to ensure consistency in sentencing for similar offences by magistrates across New South Wales: Bimson at [54]. In determining a Crown appeal on a question of law alone, the Supreme Court has the power to set aside or vary the sentence, or to dismiss the appeal: s 59(1). The court is prevented from imposing or varying a sentence to one which could not have been imposed in the Local Court: s 71. In addition, the court retains a discretion to decline to intervene where an error of law has been established. In Bimson, an appeal under s 56, the court declined to intervene although error was established on the basis that the error was caused solely by a statement made to the court by counsel for the prosecution: see [94]. Judicial review is another type of appeal available against a District Court judgment following an appeal from the Local Court. There is no right of appeal from the judgment of the District Court given in its criminal jurisdiction, on an appeal to it from the Local Court: Hollingsworth v Bushby [2015] NSWCA 251; Toth v DPP (NSW) [2014] NSWCA 133 at [6]. Section 69C Supreme Court Act 1970 applies to proceedings for judicial review of a determination made by the District Court in appeal proceedings relating to a conviction or order made by the Local Court or sentence imposed by the Local Court. The proceedings are instituted in the supervisory jurisdiction of the Court of Appeal with respect to a judgment of the District Court: Tay v DPP (NSW) [2014] NSWCA 53 at [1]. The execution of a sentence imposed as a consequence of a conviction, or of any other order, is stayed when proceedings seeking judicial review are commenced: at s 69C(2); Tay v DPP (NSW) at [5]. Part 59 Uniform Civil Procedure Rules 2005 (NSW), dealing with judicial review proceedings, requires that proceedings must be commenced within three months of the date of the decision sought to be reviewed: r 59.10(1); Toth v DPP (NSW) at [6]. Section 176 District Court Act 1973 relevantly provides: "No adjudication on appeal of the District Court is to be removed by any order into the Supreme Court". Section 176 prevents the Court of Appeal exercising its supervisory jurisdiction for error of law on the face of the record: Hollingsworth v Bushby at [5], [84], [92]; Toth v DPP (NSW) at [6]. The provision does not preclude relief under s 69 Supreme Court Act on the ground of jurisdictional error: Hollingsworth v Bushby at [5], [84], [92]; Garde v Dowd (2011) 80 NSWLR 620.

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