THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: Crim:DHrg1583354

4 September 2018

The Hon Mark Speakman MP
Attorney General
GPO Box 5341
SYDNEY NSW 2001

Dear Attorney General,

Disqualification stayed pending appeal

I write to you on behalf of the Law Society in relation to the decision of *DPP v Kmetyk* [2018] NSWCA 156 (attached).

The interpretation of the legislation in *Kmetyk* is contrary to a long-standing view of how road transport and criminal appeal legislation operated and contrary to the shared assumption of the parties involved in the case.

Kmetyk is now authority for the proposition that a severity appeal lodged in the District Court against a sentence in a matter in which there is an automatic disqualification upon conviction does not stay the disqualification, as the disqualification was as a result of the conviction in the matter, and no conviction appeal was lodged. Their Honours suggest that on a strict reading of the legislation, it would be necessary to lodge a conviction appeal in order to stay the automatic disqualification.

Such an approach would result in unnecessary delay while conviction appeals are lodged, wasted resources by both the prosecution and defence in the preparation of those appeals and the associated transcripts, confusion amongst parties as to the operation of disqualification periods, confusion amongst appellants as to their status (as the stay would apply once leave is granted on a conviction appeal, but not before) and considerable injustice to those unaware of the decision.

Such was the concern with the decision that the NSW Director of Public Prosecutions sought to reopen the argument in *Kmetyk* and resolve the issues that the Court's interpretation of section 63 of the *Crimes (Appeal and Review) Act 2001* (NSW) was likely to cause. This was despite the fact that the interpretation sought by the Director was in Ms Kmetyk's interest (see *Director of Public Prosecutions (NSW) v Kmetyk (No 2)* [2018] NSWCA 195 (attached)). Nevertheless, the Court confirmed their original decision.

The relevant reasoning in *Kmetyk* reads:

> 53. Importantly, s 63(1) only applies when the sentence, penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension is one "in respect of which an appeal or application for leave to appeal is made".

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54. Contrary to what appears to have been the shared assumption of the parties, the stay effected by s 63(2) appears not to operate upon *all* penalties, disqualifications, losses or suspensions of a licence imposed upon a person who has filed an appeal. The stay effected by s 63(2) appears to apply only upon the sentences, penalties, disqualifications, losses or suspensions of a licence to which the section applies, namely, "such" sentences or "such" penalties, disqualifications, losses or suspensions of a licence as are made applicable by s 63(1), which is to say, those in respect of which an appeal, or application for leave to appeal, has been brought.

55. Ms Kmetyk appealed against her sentence. It is clear that the execution of the fine imposed by the Local Court was "the execution of any such sentence" and was stayed while her appeal remained undetermined.

56. To the extent that the Local Court ordered that she be disqualified for a period of 12 months as a result of her conviction, that too is part of the sentence imposed by the Court, and was stayed while her appeal remained undetermined. For the reasons already stated, such an order was not authorised and misapprehended the operation of s 54(8). As Fagan J observed in *Director of Public Prosecutions (NSW) v Armstrong* at [13], "The making of the order did not displace or alter the operation of the statute; the order was simply redundant".

57. However, although the statutory disqualification effected by former s 54(8) upon Ms Kmetyk being convicted readily answers the description of a "disqualification or loss or suspension of a licence", it does not follow that it is a disqualification or loss or suspension of a licence *in respect of which her appeal had been made*. The better view appears to be that it is not. When a person appeals his or her sentence, but not his or her conviction, and a disqualification is automatically imposed by statute upon the conviction, then it would seem to follow that the disqualification in not one "in respect of which" the appeal has been made. To the contrary, the person has chosen *not* to appeal against conviction, and that choice carries with it the consequence of not appealing against the automatic consequences statute attaches to that conviction.

58. If the construction propounded above is correct, then what follows is this.

    1. In the case of an appeal against conviction, a disqualification arising under the Act upon the conviction is "any such ... disqualification or loss or suspension of a licence or privilege" to which s 63(2) applies. Accordingly, the operation of the disqualification is stayed while the appeal is pending.

    2. In the case of an appeal against sentence, the execution of the sentence is stayed while the appeal is pending. However, a disqualification arising under the Act is not relevantly a "sentence" and not the consequence of a conviction in respect of which there is an appeal, or application for leave to appeal. Accordingly, the operation of the disqualification is not stayed while the appeal is pending.

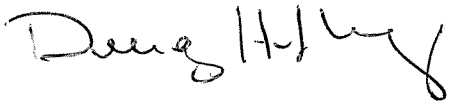
Our concern about the decision is that in these matters the defendant's severity appeal is often litigated solely on the issue of whether the disqualification (and therefore conviction) is appropriate. In these matters, defendants seeking a section 10 to avoid disqualification on appeal will now need to lodge a conviction appeal to stay the disqualification. If the matter involves a plea of guilty in the Local Court, then issues of leave will arise pursuant to section 12(1) of the *Crimes (Appeal and Review) Act 2001*.

The decision could also lead to considerable injustice in that people can serve a considerable amount of their disqualification period awaiting an appellate court to consider their appeal.

In light of the recent confirmation of the Court's interpretation of section 63 of the *Crimes (Appeal and Review) Act 2001*, we seek urgent legislative amendment to clarify that appeals against a decision of the Local Court stay all disqualifications, court imposed and mandatory, until the appeal is heard (except for the existing exception for immediate roadside licence suspensions by police, where the person remains suspended pending any appeal).

I look forward to hearing from you at your earliest convenience.

Yours sincerely,



Doug Humphreys OAM
President

Encl.

cc The Hon. Melinda Pavey, MP
Minister for Roads, Maritime and Freight

Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Director of Public Prosecutions (NSW) v Kmetyk [2018] NSWCA 156**
Hearing dates:	6 July 2018
Decision date:	19 July 2018
Before:	Meagher JA at [1]; Leeming JA at [2]; Sackville AJA at [67]
Decision:	1. Set aside the orders of the District Court made on 4 December 2017, and in lieu thereof, order that the appeal against sentence be allowed, set aside the fine of $450 imposed by the Local Court and in lieu thereof order that Ms Kmetyk be fined $300 with 28 days to pay. 2. Declare that Ms Kmetyk was convicted in the Local Court on 21 September 2017 of an offence of driving while suspended contrary to s 54(3) of the Road Transport Act 2013, and that by operation of s 54(8) of that Act she was disqualified from holding a driver licence for a period of 12 months from 1 November 2017. 3. Grant leave to either party to apply, within 14 days, to be heard in support of any further orders as may be appropriate in light of the operation of s 63 of the Crimes (Appeal and Review) Act 2001 and s 207(6) of the Road Transport Act. 4. No order as to costs, with the intention that the parties bear their own costs.
Catchwords:	COURTS – orders – reconciliation of differences between forms of orders entered on JusticeLink and pronounced in court and recorded in document placed on file signed by judge JUDICIAL REVIEW – jurisdictional error by District Court – appeal against sentence imposed by Local Court – whether District Court decision quashing conviction, re-convicting and imposing new sentence vitiated by jurisdictional error

TRAFFIC LAW – statutory disqualification upon conviction for driving while disqualified – where statutory regime altered after conviction and before hearing of appeal against sentence in District Court – whether District Court could apply new regime when no appeal was brought against conviction – consideration of provisions relating to automatic stay of execution pending appeal and counting time for the purposes of periods of disqualification – Road Transport Act 2013 ss 54 and 207 – Crimes (Appeal and Review) Act 2001, s 63

Legislation Cited:

Crimes (Appeal and Review) Act 2001 (NSW), ss 3, 11, 12, 17, 18, 19, 20, 63, 71
Crimes (Sentencing Procedure) Act 1999 (NSW), s 10
Criminal Procedure Act 1986 (NSW), s 193
District Court Act 1973 (NSW), s 176
District Court Rules 1973, Part 53 r 12
Interpretation Act 1987 (NSW), s 30
Road Transport Act 2013 (NSW), ss 54, 205A, 207
Road Transport Amendment (Driver Licence Disqualification) Act 2017 (NSW)
Suitors' Fund Act 1951 (NSW)
Uniform Civil Procedure Rules 2005 (NSW), r 42.1

Cases Cited:

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41
Bindaree Beef Pty Ltd v Riley (2013) 85 NSWLR 350; [2013] NSWCA 305
Carr v Western Australia (2007) 232 CLR 138; [2007] HCA 47
Director of Public Prosecutions (NSW) v Armstrong [2015] NSWSC 873
Frost v Kourouche (2014) 86 NSWLR 214; [2014] NSWCA 39
Gelle v Director of Public Prosecutions (NSW) [2017] NSWCA 245
Ghaderi v Director of Public Prosecutions (NSW) [2018] NSWCA 119
Henderson v QBE Insurance (Australia) Ltd [2013] NSWCA 480
In re Godfrey [1921] SASR 148
Morgan v District Court of New South Wales (2017) 94 NSWLR 463; [2017] NSWCA 105
Pelechowski v The Registrar, Court of Appeal (1999) 198 CLR 435; [1999] HCA 19
Regina v Sirocic [2000] NSWCCA 325
Roads and Traffic Authority of New South Wales v Papadopoulos (2010) 77 NSWLR 189; [2010] NSWSC 33

	Roads and Traffic Authority of NSW v Higginson [2011] NSWCA 151 Usama Razzaq v R (District Court (NSW), Yehia SC DCJ, unreported, 19 February 2018) Walsh v Law Society of New South Wales (1999) 198 CLR 73; [1999] HCA 33 Yousef Helwah v R (District Court (NSW), Bennett DCJ, unreported, 12 December 2017)
Texts Cited:	Nil
Category:	Principal judgment
Parties:	Director of Public Prosecutions (NSW) (Applicant) Alison Lee Kmetyk (First Respondent) District Court of NSW (Second Respondent)
Representation:	Counsel: A Mitchelmore (Applicant) A Moutasallem (First Respondent) Solicitors: Solicitor for Public Prosecutions (Applicant) Hepmac Lawyers (First Respondent) Crown Solicitor (Second Respondent, submitting)
File Number(s):	2018/69346
Publication restriction:	Nil
Decision under appeal	
Court or tribunal:	District Court of New South Wales
Jurisdiction:	Criminal
Citation:	Nil
Date of Decision:	04 December 2017
Before:	His Honour Judge Ellis DCJ
File Number(s):	2017/00246292

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

On 21 September 2017, Ms Kmetyk was convicted in the Local Court for driving while suspended, contrary to s 54(3) of the *Road Transport Act 2013* (NSW). She pleaded guilty to the offence, and was convicted and fined $450, and an order was recorded disqualifying her from driving for 12 months. Section 54(8) of the *Road Transport Act*

provided that a person convicted of an offence against s 54(3) "is disqualified by the conviction (and without any specific order) for the relevant disqualification period", which was defined as a period of 12 months. Section 54(10) further provided that "[t]he disqualification referred to in subsection (8) is additional to any penalty imposed for the offence".

Ms Kmetyk filed an appeal against the sentence imposed by the Local Court. The parties proceeded on the basis that the effect of s 63 of the *Crimes (Appeal and Review) Act 2001* (NSW) ("CAR Act"), which effects a stay of execution of sentence and other orders made as a consequence of conviction pending appeals, applied not only to the $450 fine but also to the 12 month disqualification.

At the hearing of Ms Kmetyk's appeal on 4 December 2017, the focus of the submissions was upon the disqualification, rather than the $450 fine, with particular attention to the repeal of subsections 54(8)-(10) on 28 October 2017. The primary judge allowed the appeal, and though there were discrepancies between (a) the orders as stated in the judgment, (b) a document signed by his Honour and placed on the file, and (c) the orders as entered on JusticeLink, his Honour purported to quash the orders of the Local Court, convict Ms Kmetyk and fine her $300, and to disqualify her from driving for a period of 3 months (concluding on 31 January 2018, to account for time during which her licence had already been suspended).

The Director filed a summons in this Court's supervisory jurisdiction seeking judicial review of the orders made in the District Court.

Held, by Leeming JA, Meagher JA and Sackville AJA agreeing:

Ms Kmetyk's appeal to the District Court being an appeal against sentence, the primary judge had no authority to quash the conviction or reconvict and impose a new sentence: at [36], [39]-[43].

Usama Razzaq v R (District Court (NSW), Yehia SC DCJ, unreported, 19 February 2018), disapproved.

The 12 month statutory disqualification effected by s 54(8) of the *Road Transport Act* was not affected by the automatic stay prescribed by s 63 of the CAR Act because the disqualification was an automatic consequence of the conviction, against which no appeal was brought, and hence the disqualification was not one "in respect of which" an appeal had been made for the purposes of s 63: at [57]-[58].

Consideration of the reconciliation of differences in the forms of orders entered on JusticeLink and pronounced in court and recorded in a document placed on the court file signed by the judge: at [28]-[34].

Consideration of the operation of the automatic stay of execution effected by s 63 of the CAR Act when appeals are brought from the Local Court to the District Court: at [19]-[21], [44]-[60].

JUDGMENT

1 **MEAGHER JA**: I have had the benefit of reading the draft judgment of Leeming JA. I agree with his Honour's reasons and proposed orders.

2 **LEEMING JA**: The Director of Public Prosecutions, by summons filed in this Court's supervisory jurisdiction, seeks judicial review of orders made by the District Court of New South Wales determining an appeal brought pursuant to s 11 of the *Crimes (Appeal and Review) Act 2001* (NSW) ("CAR Act") by Ms Alison Lee Kmetyk.

Background

3 For present purposes, there are no facts in issue, although, regrettably, the form of the orders made in the Local Court and the District Court is far from clear, and it will be necessary to address the evidence which was tendered as to those orders.

4 On 21 September 2017, Ms Kmetyk was convicted in the Local Court for driving a vehicle while her licence was suspended, contrary to s 54(3) of the *Road Transport Act 2013* (NSW). It was her first offence of that character. It was accepted that, by reason of the accumulation of demerit points, Ms Kmetyk's licence had been suspended for a three month period commencing on 1 August 2017 and until 31 October 2017.

5 The orders as entered in JusticeLink record the following:

> "A plea of guilty is accepted.
>
> The offender, ALISON LEE KMETYK, is ordered to pay the following: Fine $450.00.
>
> The court disqualified the offender ALISON LEE KMETYK from holding a driver's/rider's licence for 12 months."

6 Section 193 of the *Criminal Procedure Act 1986* (NSW) provides that if an accused person pleads guilty and does not show sufficient cause why he or she should not be convicted, and the court accepts the plea, then "the court must convict the accused person". It may be inferred from the first annotation that that is what occurred.

7 There was no issue that a fine of $450 was ordered. The disqualification recorded in the third annotation was much more problematic. A document from the Local Court file, headed "COURT ORDERS" had a handwritten annotation of "12 [months] from 21/9" next to the word "Disqualification".

8 Argument in the District Court in Ms Kmetyk's appeal proceeded on the basis that the disqualification period was as recorded in the Local Court file, 12 months commencing from her conviction on 21 September 2017. However, no attempt was made to defend that position in this Court. Ms Kmetyk's licence had already been suspended – that was an element of the offence to which she had pleaded guilty. Counsel for Ms Kmetyk accepted, very properly, that the period of disqualification started from the expiration of the existing period of suspension, which was until 31 October 2017. That was in accordance with s 54(8) of the *Road Transport Act*, which, at the time, provided:

> "(8) **Automatic disqualifications apply for certain offences**
>
> If a person is convicted by a court of an offence against subsection (1), (3), (4)(a) or (5), the person:
>
> > (a) is disqualified by the conviction (and without any specific order) for the relevant disqualification period from the date of expiration of the existing disqualification or suspension or from the date of such conviction, whichever is the later, from holding a driver licence, and
> >
> > (b) may also be disqualified, for such additional period as the court may order, from holding a driver licence.
>
> Note: Section 207 provides for the effect of a disqualification (whether or not by order of a court)."

9 The term "relevant disqualification period" was defined to mean, relevantly, 12 months "in the case of a first offence against (1), (3) or (4)(a)": s 54(9)(a). Section 54(10) further provided that "[t]he disqualification referred to in subsection (8) is additional to any

penalty imposed for the offence".

10 Accordingly, by the operation of s 54(8), in the form it then took, Ms Kmetyk was disqualified for a period of 12 months commencing from 1 November 2017. That subsection, read with (10), confirmed that she was "disqualified by the conviction", not by reason of any sentence imposed by the Local Court.

11 Although an order was made, and recorded in the court file and on JusticeLink (albeit in different terms as to the start date), the Director submitted that it was otiose, because the suspension was effected automatically, by statute. That submission should be accepted, for these reasons.

(1) First, it is the plain meaning of s 54(8) read with (10).

(2) Secondly, it is consistent with what was held of cognate legislation in *Regina v Sirocic* [2000] NSWCCA 325 at [14] and [21], and more recently in *Roads and Traffic Authority of New South Wales v Papadopoulos* (2010) 77 NSWLR 189; [2010] NSWSC 33 at [66]-[70] read with [33] and *Director of Public Prosecutions (NSW) v Armstrong* [2015] NSWSC 873 at [13]. Ms Kmetyk submitted, correctly, that those decisions did not deal with precisely the same issue. However, all three decisions emphasise the distinction between suspension effected by court order and suspension effected by statute.

(3) Thirdly, as will be seen below, it is consistent with the structure of the automatic stay of execution effected, when an appeal is brought from the Local Court to the District Court, by s 63 of the CAR Act.

(4) Fourthly, it is consistent with s 207(1) of the *Road Transport Act* (to which the note in s 54(8) refers), which provides:

> "If, as a consequence of being convicted of an offence by a court, a person is disqualified under the road transport legislation (whether or not by an order of the court) from holding a driver licence, the disqualification operates to cancel, permanently, any driver licence held by the person at the time of the person's disqualification."

12 Accordingly, on 21 September 2017, Ms Kmetyk's licence was cancelled permanently, and she was disqualified for a period of 12 months commencing on 1 November 2017.

The nature of Ms Kmetyk's appeal to the District Court

13 Ms Kmetyk filed an appeal against sentence on the following day, 22 September 2017, in the exercise of the right conferred by s 11(1) of the CAR Act, which provides:

> "Any person who has been convicted or sentenced by the Local Court may appeal to the District Court against the conviction or sentence (or both)."

14 Section 11(1A) provides, relevantly, that subsection (1) does not apply to an appeal against conviction if the person was convicted following a plea of guilty (in such a case, s 12 authorises an appeal but only by leave of the District Court). Nothing suggests that Ms Kmetyk ever sought to appeal against her conviction, or sought leave to do so.

15 Appeals are creatures of statute. One consequence is that "it is always important, where a process called 'appeal' is invoked, to identify the character of the appeal and the duties and powers of the court or tribunal conducting it": *Walsh v Law Society of New South Wales* (1999) 198 CLR 73; [1999] HCA 33 at [50]. Here, notwithstanding that they are conferred by the same provision, s 11(1), the right to appeal against

conviction is distinct from the right to appeal against sentence. The former is governed by s 18 while the latter is governed by s 17. Both are appeals "by way of rehearing", such that the District Court is bound to decide according to the facts and the law as they stand at the time the court makes its order: *Morgan v District Court of New South Wales* (2017) 94 NSWLR 463; [2017] NSWCA 105 at [29].

16 However, there are important procedural differences between the two.

(1) There are differences in the evidence on the basis of which that rehearing will be conducted, in that there are different powers as to the admission of fresh evidence (contrast s 17 with s 18(2)).

(2) In the case of an appeal against conviction, but not in the case of an appeal against sentence, there is power in certain circumstances to direct that testimonial evidence be given in person (s 19).

(3) Most importantly, there are different grants of power to the District Court to determine the two classes of appeals. Section 20 provides:

> "20 **Determination of appeals**
>
> (1) The District Court may determine an appeal against conviction:
>
> (a) by setting aside the conviction, or
>
> (b) by dismissing the appeal, or
>
> (c) in the case of an appeal made with leave under section 12 (1)—by setting aside the conviction and remitting the matter to the original Local Court for redetermination in accordance with any directions of the District Court.
>
> (2) The District Court may determine an appeal against sentence:
>
> (a) by setting aside the sentence, or
>
> (b) by varying the sentence, or
>
> (c) by dismissing the appeal."

17 Some care must be taken in construing the references in the CAR Act, including s 20, to "sentence" and "varying the sentence". "Sentence" is defined in s 3 to mean any of a wide range of orders made by the Local Court in respect of a person as a consequence of its having convicted the person of an offence, including "any order or direction with respect to restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege", and "any order made by the Local Court in respect of a person under section 10 or 11 of the *Crimes (Sentencing Procedure) Act 1999* on finding the person guilty of an offence." Subsections (3) and (3A) provided:

> "(3) In this Act, a reference to varying a sentence includes:
>
> (a) a reference to varying the severity of the sentence, and
>
> (b) a reference to setting aside the sentence and imposing some other sentence of a more or less severe nature.
>
> (3A) Without limiting subsection (3), a power conferred on an appeal court under this Act to vary a sentence includes the power to make an order under section 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."

18

Hence, the power to "vary a sentence" when determining an appeal against sentence includes the power to set aside a conviction and make an order under s 10 of the *Crimes (Sentencing Procedure) Act.* Section 10 empowers a court which finds a person guilty of an offence to make various orders "without proceeding to conviction", including orders that the person enter into a good behaviour bond. It will be necessary to return to the parties' submissions about the effect of (3) and (3A) expanding the meaning of "sentence" and "varying the sentence".

19 It was common ground that the filing of Ms Kmetyk's appeal engaged s 63 of the CAR Act. Section 63(1) and (2) of the CAR Act relevantly provided:

> "**63 Stay of execution of sentence pending determination of appeal**
>
> (1) This section applies to:
>
> (a) any sentence, and
>
> (b) any penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege that arises under an Act as a consequence of a conviction,
>
> in respect of which an appeal or application for leave to appeal is made under this Act.
>
> (2) The execution of any such sentence, and the operation of any such penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege, is stayed:
>
> (a) except as provided by paragraphs (b) and (c), when notice of appeal is duly lodged ..."

20 Paragraphs (b) and (c) of s 63(2)(a) are not relevant. Section 63(2A) displaces the operation of subsection (2) to the suspension or disqualification of a driver licence in certain circumstances, but these too are not presently relevant.

21 It will be seen that the execution of the *sentence* imposed by the Local Court (the fine of $450) was stayed upon the filing of the appeal against sentence by s 63(1)(a) and s 63(2). The parties proceeded on the basis that the operation of the disqualification effected by s 54(8) of the *Road Transport Act* was stayed by s 63(1)(b) and s 63(2). It will be necessary to return to this aspect of s 63 at the end of these reasons. For present purposes, the most important aspect of s 63 is the point already flagged: no differently from ss 54(8) and (10) of the *Road Transport* Act, s 63 of the CAR Act distinguished between the punishment imposed in the discretion of the court which had found her guilty of the offence, and the sanction imposed automatically, by operation of statute.

The hearing of Ms Kmetyk's appeal

22 Ms Kmetyk's appeal was heard by the primary judge on 4 December 2017. The transcript records that the focus of submissions was upon the disqualification, rather than the fine, and in particular upon amendments effected by the *Road Transport Amendment (Driver Licence Disqualification) Act 2017* (NSW), which had commenced on 28 October 2017. That statute repealed subsections 54(8)-(10), and made different provision for statutory disqualification following convictions for, inter alia, offences contrary to s 54(3). New s 205A was inserted in the following terms:

> "**205A Disqualification for certain unauthorised driving offences**
>
> (1) A person who is convicted of an offence against this Act specified in the Table to this section:
>
> (a) is automatically disqualified from holding a driver licence for the default period of disqualification specified in the Table in respect of that offence, or
>
> (b) if the court that convicts the person thinks fit to order a shorter or longer period of disqualification (but not shorter than the minimum period of disqualification specified in the Table in respect of that offence)—is disqualified from holding a driver licence for the period specified in the order.
>
> (2) Any disqualification under this section is in addition to any penalty imposed for the offence."

23 The Table provides, in the case of a first offence contrary to s 54(3), a default period of disqualification of 6 months, and a minimum period of disqualification of 3 months. That may be contrasted with the automatic disqualification of 12 months imposed by (former) s 54(8).

24 On behalf of Ms Kmetyk, it was said:

> "Your Honour, this is a situation where in a court below [she] got the automatic or mandatory period of disqualification for twelve months and since that time, your Honour, the law has been altered such that the automatic period –
>
> HIS HONOUR: She can get three months.
>
> MACKIE: – is six or can be reduced to three".

25 The Crown said in response, reflecting what may have been an altered approach to a common class of appeals to the District Court, that:

> "it is now the position of my office that the District Court does not have jurisdiction to disturb a licence disqualification period where the Local Court imposed that sentence before 28 October 2017."

26 The Crown referred to s 71 of the CAR Act, which is relevant to ground 2 of the summons, and which provides:

> "71 **Variation of sentences of Local Court**
>
> (1) An appeal court may not vary a sentence so that the sentence as varied could not have been imposed by the Local Court.
>
> (2) An appeal court may not make an order or impose a sentence that could not have been made or imposed by the Local Court.
>
> (3) Any sentence varied or imposed by an appeal court, and any order made by an appeal court under this Act, has the same effect and may be enforced in the same manner as if it were made by the Local Court."

27 During argument, the primary judge expressed the view that, contrary to the Crown's submission, s 71 did not prevent the District Court from imposing a sentence which could have been imposed in December 2017 by the Local Court. The primary judge was alert to the fact that Ms Kmetyk's licence had already, prior to her conviction, been suspended until 31 October 2017, and so, if the new legislative provisions applied, the three month period would commence on 1 November 2017.

The reasons and orders of the primary judge

28 The hearing was brief (it occupies 4 pages of transcript). The entirety of his Honour's *ex tempore* judgment (as revised) was as follows.

> "The appeal is upheld. The orders of the magistrate are quashed but, having set aside all the orders of the magistrate, she is convicted. She is fined $300 and disqualified for a period of three months. I indicate that the disqualification should date from 1 November, which is the expiration of a previous suspension and indicate that the disqualification will expire on 31 January, meaning that she would be eligible to get her licence back on 1 February but she will have to go to the RMS in order get that licence back on that date."

29 There are discrepancies between (a) the orders as stated in his Honour's (revised) judgment, (b) a document obtained from the file, which is signed by his Honour, and (c) the orders as entered on JusticeLink.

30 On the version on the file signed by the primary judge, the orders are formulated as follows:

> "In relation to the count of Drive motor vehicle while licence suspended, the appeal is upheld and the orders of the Local Court are quashed.
>
> In lieu, the offender is convicted and fined $300.00 with 28 days to pay.
>
> The appellant is disqualified for a period of 3 months TDF 01/11/2017 to expire on 31/01/2018."

31 On JusticeLink, the form of the orders is as follows:

> "Sentence Appeal Upheld – Order Varied
>
> In relation to the count of Drive motor vehicle while licence suspended, the appeal is upheld and the orders of the Local Court are quashed. (ID 40407513)
>
> The offender, ALISON LEE KMETYK, is ordered to pay the following:
>
> Fine $300.00. (ID 40407664)
>
> The court disqualified the offender Alison Lee Kmetyk from holding a driver's/rider's licence from 1 November 2017 until 31 January 2018."

32 The orders recorded in JusticeLink do not record a conviction imposed by the District Court, although that was what was pronounced in Court and recorded in the document signed by his Honour.

33 Both parties proceeded on the basis that the order in the form signed by the primary judge was the best evidence of the order which was made. That submission was candidly acknowledged by Mr Moutasallem, who appeared for Ms Kmetyk, to be necessary to his argument, which turned upon the conviction in the Local Court being set aside.

34 It will not be necessary finally to resolve the discrepancy between the orders pronounced by the primary judge and in the document signed by his Honour and in the form recorded on JusticeLink. That said, the orders in the form signed by the judge and placed with the file are the most authoritative, which accords with provision in the rules relating to the entry of any judgment or order, signed by the Judge, on the appropriate court file: District Court Rules 1973, Part 53 r 12.

The decision discloses jurisdictional error

35 No further appeal lies from the District Court in the exercise of its appellate jurisdiction to this Court. However, it is well-settled that this Court's supervisory jurisdiction is available, and that it is necessary (in light of s 176 of the *District Court Act 1973* (NSW))

to establish jurisdictional error: see (by way of recent example) *Ghaderi v Director of Public Prosecutions (NSW)* [2018] NSWCA 119 at [7] and [11]. Further, mere error of law on the face of the record of the District Court is not jurisdictional error: see for example *Gelle v Director of Public Prosecutions (NSW)* [2017] NSWCA 245 at [4] and [72].

36 If (as the primary judge pronounced and as is recorded in the signed document on the file) his Honour quashed *all* of the orders made in the Local Court, including Ms Kmetyk's conviction, and then reconvicted her on 4 December, then that discloses jurisdictional error. The District Court's jurisdiction was governed by the CAR Act. The Court had jurisdiction to hear and determine her appeal *against sentence*. No challenge was made to her conviction and there was no authority to set it aside or reimpose it. Section 20(2) of the CAR Act conferred no power to set aside the conviction, while s 20(1) was not available, the appeal being an appeal against sentence.

37 Ms Kmetyk sought to defend what had occurred by pointing to the power in a sentence appeal to vary a sentence by setting aside a conviction and making an order under s 10 of the *Crimes (Sentencing Procedure) Act*. Of course, that is not what occurred in the present case. However, Ms Kmetyk submitted that that power, as contained in s 3(3) and (3A) of the CAR Act, was but one instance given in the statute, referring to the inclusive definition in subsection (3) and the words "without limiting subsection (3)" with which subsection (3A) commences. Hence it was submitted that there was a more general power to quash a conviction when determining an appeal against sentence. That submission cannot be accepted. Regard must be had to the limiting words in (3A) "for that purpose". The extension in (3A) of the power to vary a sentence to include power to set aside a conviction is limited to those circumstances where, in the exercise of the power to vary a sentence, the District Court is minded to make an order under s 10 of the *Crimes (Sentencing Procedure) Act*. There was nothing to suggest that such an order was ever even sought, and indeed the conviction and (reduced) fine that was imposed on appeal are inconsistent with such an order.

38 The submissions based on the inclusive language in these provisions must also be rejected. The operative provision in subsection (3A) is limited in its terms to cases where an order under s 10 is made. The opening words in (3A) do not qualify that subsection. Rather, they are directed to fending off a construction that subsection (3) is somehow limited by subsection (3A). True it is that subsection (3) is an inclusive definition, but the two included paragraphs are in terms limited to altering a "sentence", and that bears its ordinary meaning of a penalty imposed *as a consequence of* the person's conviction, which is conceptually and temporally distinct from the conviction itself.

39 Ms Kmetyk also relied upon the decision of the District Court constituted by Yehia SC DCJ in *Usama Razzaq v R* (unreported, 19 February 2018). The contrary view had previously been reached by Bennett DCJ in *Yousef Helwah v R* (unreported, 12 December 2017). Her Honour relied upon the power to make an order setting aside a

conviction in a sentence appeal for the purpose of making an order under s 10 of the *Crimes (Sentencing Procedure) Act*, rejected a submission based on s 71, and relied on statements in the extrinsic materials to the effect that the amendments were directed to the penalties being "fairer and more effective in reducing recidivism". While it is true that s 71 had little to do with the issue, with respect, her Honour did not have regard to the limitation attending the power to set aside a conviction for the purpose of making an order under s 10 of the *Crimes (Sentencing Procedure) Act*, and did not address the fact that in other cases the conviction of an appellant in a sentence appeal remained that entered in the Local Court. Further, generally expressed statements of the purpose of the amendments do not assist in resolving the question whether they apply to a person who does not appeal from his or her conviction which conviction was imposed under the previous legislative regime: see *Carr v Western Australia* (2007) 232 CLR 138; [2007] HCA 47 at [6] and *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; [2009] HCA 41 at [11] and [51].

40 For completeness, the position which obtains if (as the JusticeLink records suggest) the primary judge did not interfere with Ms Kmetyk's conviction should be considered. In that case, then a period of disqualification of 12 months was imposed by dint of (former) s 54(8). There was no power on the part of the District Court to make an order reducing the effect of the statutory disqualification. It was not suggested by any party that the fact that s 54(8) had been repealed made any difference to that position, nor could it be. Persons who had been convicted of offences contrary to s 54(3) in the twelve months prior to October 2017 did not, when s 54(8) was repealed, thereupon become relieved of the 12 month disqualification effected by that subsection. To the contrary, s 30(1)(b) of the *Interpretation Act 1987* (NSW) provides that the repeal of an Act does not affect the previous operation of the Act or anything duly suffered, done or commenced under the Act. The imposition of the 12 month disqualification was something which was "duly suffered" under the Act before it was repealed. There are no specific transitional provisions in the *Road Transport Amendment (Driver Licence Disqualification) Act 2017* displacing the general provision of s 30(1)(b).

41 The foregoing reflects the substance of grounds 1 and 3 of the Director's summons, which were the Director's primary grounds. In fairness to the primary judge, it should be said (as Ms Kmetyk emphasised in this Court), that those arguments appear not to have been advanced to his Honour.

42 Ground 2 of the summons relied on s 71 of the CAR Act. Although s 71 was invoked before the primary judge, that section had nothing to say about the statutory disqualification effected upon Ms Kmetyk being convicted. Once again, in fairness to his Honour, the Crown's reliance on s 71 may have served to distract him from the distinction which mattered, which was that the statutory disqualification, which was a consequence of Ms Kmetyk's conviction, could not be altered by the District Court which only had before it an appeal against sentence. It is not necessary for present purposes to consider the construction of s 71. Even if it may be inferred (from what was

said during the brief hearing, because the Court's reasons are silent) that the Court proceeded on an incorrect view of its legal meaning, that would not of itself amount to jurisdictional error.

Orders

43 Any order made by the District Court quashing Ms Kmetyk's conviction was vitiated by jurisdictional error. The order made purporting to reduce the period of her disqualification for a period expiring on 31 January 2018 is likewise vitiated by jurisdictional error. The District Court being an inferior court, those orders are nullities: *Pelechowski v The Registrar, Court of Appeal* (1999) 198 CLR 435; [1999] HCA 19. The statutory disqualification for a 12 month period commencing 1 November 2017 was unaffected by the repeal of s 54(8). It is not contended that any error attended the reduction in the fine.

44 The only outstanding question is the interaction between the 12 month statutory disqualification effected by s 54(8), the automatic stay effected by s 63 of the CAR Act and a related provision, s 207(6) of the *Road Transport Act*, which provides:

> "Any period for which a stay of execution is in force under section 63 of the *Crimes (Appeal and Review) Act 2001* is not to be taken into account when calculating the length of a period of disqualification under this Division."

45 When the appeal was heard, the parties appeared to proceed on the common basis that (a) s 63(1)(b) read with s 63(2) had the effect of staying the operation of the automatic disqualification of Ms Kmetyk's licence while her appeal to the District Court was pending, and (b) s 207(6) meant that some or all of those approximately 10 weeks were to be disregarded for the purposes of calculating the period of disqualification imposed upon her.

46 The Court raised with the parties the unlikelihood that statute would on the one hand automatically impose a period of disqualification with a stay during the pendency of an appeal, but on the other hand would then provide that irrespective of the outcome of the appeal, time continued to run. If that were the proper construction, then there would be an incentive to bring meritless appeals and to prolong them to take advantage of the automatic stay during which period time continued to run, directly contrary to the statutory purpose of imposing a sanction independently of the sentencing process. The Court gave both parties the opportunity to be heard further on that construction, and written submissions were received on 10 and 12 July 2018.

47 The Director submitted, by reference to *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151, that s 207(6) should be construed as applying in its entirety to all disqualifications made as a consequence of a person being convicted, with the result that the period from 1 November 2017 until 4 December 2017, during which the stay effected by s 63 was in force, should be disregarded. The result was, according to the Director, that Ms Kmetyk's period of disqualification would not end until 4 December 2018.

48

Ms Kmetyk agreed that s 207(6) "precludes the absurd outcome of one filing an appeal, having the benefit of the stay of the disqualification period and never having to serve the driving disqualification for the period of time the appellant had the benefit of the stay." She agreed with the construction propounded by the Director.

49 In light of the way the issue emerged during the hearing, it is understandable that the parties' supplementary submissions were directed to the construction of s 207(6). However, it may be that the key to the effect of these two provisions is to consider s 63(1) in its terms, and in particular to notice the easily overlooked words "in respect of which" in s 63(1) and "any such sentence" and "any such ... disqualification or loss or suspension of a licence" in s 63(2). It is convenient to reproduce the provisions again, emphasising those words:

> "**63 Stay of execution of sentence pending determination of appeal**
>
> (1) This section applies to:
>
> (a) any sentence, and
>
> (b) any penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege that arises under an Act as a consequence of a conviction,
>
> **in respect of which** an appeal or application for leave to appeal is made under this Act.
>
> (2) The execution of **any such sentence**, and the operation of **any such** penalty, restitution, compensation, forfeiture, destruction, **disqualification or loss or suspension of a licence** or privilege, is stayed:
>
> (a) except as provided by paragraphs (b) and (c), when notice of appeal is duly lodged ..."

50 The relative pronoun "which" and the relative adjective "such" both require reference to an antecedent noun which has appeared previously in the provision. In each case, there is some subtlety in parsing the language.

51 First, the words "in respect of which" in s 63(1) plainly apply distributively, to each of the cases mentioned in paragraphs (a) and (b). In cases where s 63(1)(a) applies, the antecedent of "which" is "sentence". In cases where s 63(1)(b) applies, the antecedent of "which" is potentially ambiguous. As a matter of grammar, it is necessarily a noun in paragraph (b), but it could refer to the "conviction"; alternatively, it could refer to the "penalty, restitution etc" earlier in paragraph (b). However, the statute must be read as a whole, and it makes provisions for and distinguishes between appeals against conviction and appeals against sentence. It is tolerably clear, having regard to the nature of appeals (which are against conviction or sentence) and the structure of the subsections, that the word "which" must refer, in a case to which paragraph (b) applies, to the "conviction".

52 Secondly, s 63(2) does not apply to every sentence and every statutory penalty, restitution, etc to which an appellant is subject. That is because of the words "such" in subsection (2). The word "such" can give rise to debate, in part because it is used in a number of senses, some of which are less than precise, as has long been recognised: see *In re Godfrey* [1921] SASR 148 at 152. However, the symmetry between

paragraphs (a) and (b) in s 63(1) with the words following each instance of "such" in s 63(2) means that the words following "such" in subsection (2) correspond with the "sentence" in (1)(a) and the "penalty ... disqualification or loss or suspension of a licence" in (1)(b). The force of "such" is that s 63(2) only applies to (i) a particular sentence, in the case of paragraph (a) being made applicable, or (ii) to a particular penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension, in the case of paragraph (b) being made applicable.

53 Importantly, s 63(1) only applies when the sentence, penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension is one "in respect of which an appeal or application for leave to appeal is made".

54 Contrary to what appears to have been the shared assumption of the parties, the stay effected by s 63(2) appears not to operate upon *all* penalties, disqualifications, losses or suspensions of a licence imposed upon a person who has filed an appeal. The stay effected by s 63(2) appears to apply only upon the sentences, penalties, disqualifications, losses or suspensions of a licence to which the section applies, namely, "such" sentences or "such" penalties, disqualifications, losses or suspensions of a licence as are made applicable by s 63(1), which is to say, those in respect of which an appeal, or application for leave to appeal, has been brought.

55 Ms Kmetyk appealed against her sentence. It is clear that the execution of the fine imposed by the Local Court was "the execution of any such sentence" and was stayed while her appeal remained undetermined.

56 To the extent that the Local Court ordered that she be disqualified for a period of 12 months as a result of her conviction, that too is part of the sentence imposed by the Court, and was stayed while her appeal remained undetermined. For the reasons already stated, such an order was not authorised and misapprehended the operation of s 54(8). As Fagan J observed in *Director of Public Prosecutions (NSW) v Armstrong* at [13], "The making of the order did not displace or alter the operation of the statute; the order was simply redundant".

57 However, although the statutory disqualification effected by former s 54(8) upon Ms Kmetyk being convicted readily answers the description of a "disqualification or loss or suspension of a licence", it does not follow that it is a disqualification or loss or suspension of a licence *in respect of which her appeal had been made*. The better view appears to be that it is not. When a person appeals his or her sentence, but not his or her conviction, and a disqualification is automatically imposed by statute upon the conviction, then it would seem to follow that the disqualification in not one "in respect of which" the appeal has been made. To the contrary, the person has chosen *not* to appeal against conviction, and that choice carries with it the consequence of not appealing against the automatic consequences statute attaches to that conviction.

58 If the construction propounded above is correct, then what follows is this.

(1)

In the case of an appeal against conviction, a disqualification arising under the Act upon the conviction is "any such ... disqualification or loss or suspension of a licence or privilege" to which s 63(2) applies. Accordingly, the operation of the disqualification is stayed while the appeal is pending.

(2) In the case of an appeal against sentence, the execution of the sentence is stayed while the appeal is pending. However, a disqualification arising under the Act is not relevantly a "sentence" and not the consequence of a conviction in respect of which there is an appeal, or application for leave to appeal. Accordingly, the operation of the disqualification is not stayed while the appeal is pending.

59 On that construction, it also follows that the construction of s 207(6) does not arise in this appeal, for there was no relevant stay of execution under s 63. The unlikely consequences mentioned above do not arise in this case, although it may not have been appreciated at the time that the disqualification remained in force while the sentence appeal was pending.

60 There remain some difficulties with the construction indicated above. One is how it operates when there is an appeal against sentence and the appellant seeks a s 10 order. Another is reconciling the above with the "permanent" disqualification effected by s 207(1). There may be others. I am also conscious that the parties seem to have proceeded upon an assumption that s 63 operates more expansively, and have not been heard as to the construction outlined above.

61 In those circumstances, it is appropriate to make final orders in respect of those issues as to which the parties have been fully heard, and permit either party to be heard further as to the operation of s 63 read with s 207(6).

62 There is no need to quash orders made by the District Court which are nullities. However, that does not prevent their being set aside, as occurred in *Morgan v District Court of New South Wales*, and doing so will, as the Director submits, make the position clearer. Declaratory relief is also available, and appropriate, in light of the complex way in which the statutory regime operates. Although it is clear that Ms Kmetyk was and is subject to a 12 month period of disqualification, whether that period expires on 1 November 2018 or 4 December 2018 depends upon a construction of s 63, read with s 207(6), as to which the parties have not been heard. The declaration framed below makes it clear that the disqualification is presently in force, but leaves open the question as to which the parties have not been heard.

63 Although costs were sought in the Director's summons, no submissions were advanced, either orally or in writing, in support of an order for costs. The Director's summons in this Court is a civil proceeding, to which the general rule in UCPR r 42.1 applies. However, there is good reason to displace the general rule, because the Director's success is based upon submissions which were not made to the primary judge.

64 For her part, Ms Kmetyk sought a certificate under the *Suitors' Fund Act 1951* (NSW). There have been inconsistent decisions as to the availability of a certificate in proceedings, such as these, in the nature of judicial review: see (without being

exhaustive) *Bindaree Beef Pty Ltd v Riley* (2013) 85 NSWLR 350; [2013] NSWCA 305 at [110] and *Henderson v QBE Insurance (Australia) Ltd* [2013] NSWCA 480 at [57]. However, it was Ms Kmetyk who had invited the primary judge to adopt the course which he did, which brought about the need to file these proceedings. Further, she sought to defend that position in this Court, rather than consenting to the orders sought by the Director. The position resembles that considered in *Frost v Kourouche* (2014) 86 NSWLR 214; [2014] NSWCA 39 at [48]. This is not an appropriate case for a certificate.

65 The appropriate order is that there be no order as to costs, with the intention that each party bear his or her own costs.

66 I propose the following orders:

1. Set aside the orders of the District Court made on 4 December 2017, and in lieu thereof, order that the appeal against sentence be allowed, set aside the fine of $450 imposed by the Local Court and in lieu thereof order that Ms Kmetyk be fined $300 with 28 days to pay.

2. Declare that Ms Kmetyk was convicted in the Local Court on 21 September 2017 of an offence of driving while suspended contrary to s 54(3) of the *Road Transport Act 2013*, and that by operation of s 54(8) of that Act she was disqualified from holding a driver licence for a period of 12 months from 1 November 2017.

3. Grant leave to either party to apply, within 14 days, to be heard in support of any further orders as may be appropriate in light of the operation of s 63 of the *Crimes (Appeal and Review) Act 2001* and s 207(6) of the *Road Transport Act.*

4. No order as to costs, with the intention that the parties bear their own costs.

67 **SACKVILLE AJA**: I agree with the orders proposed by Leeming JA and with his Honour's reasons.

****

Decision last updated: 19 July 2018

Court of Appeal
Supreme Court
New South Wales

Medium Neutral Citation:	**Director of Public Prosecutions (NSW) v Kmetyk (No 2) [2018] NSWCA 195**
Hearing dates:	On the papers
Decision date:	03 September 2018
Before:	Meagher JA; Leeming JA; Sackville AJA
Decision:	1. Grant leave to the applicant to be heard in support of further orders. 2. Otherwise dismiss the notice of motion filed on 8 August 2018. 3. No order as to costs, with the intention that the parties bear their own costs.
Catchwords:	TRAFFIC LAW – statutory disqualification upon conviction for driving while disqualified – appeal against sentence – whether automatic stay of execution applied to disqualification consequence upon unchallenged conviction – Road Transport Act 2013 ss 54 and 207 – Crimes (Appeal and Review) Act 2001, s 63
Legislation Cited:	Crimes (Appeal and Review) Act 2001 (NSW), s 63 Crimes (Sentencing Procedure) Act 1999 (NSW), s 10 Justices Act 1902 (NSW), ss 105, 127 Road Transport Act 2013 (NSW), ss 54, 207
Cases Cited:	Director of Public Prosecutions (NSW) v Kmetyk [2018] NSWCA 156 Roads and Traffic Authority of NSW v Higginson [2011] NSWCA 151
Category:	Consequential orders (other than Costs)
Parties:	Director of Public Prosecutions (NSW) (Applicant) Alison Lee Kmetyk (First Respondent) District Court of NSW (Second Respondent)
Representation:	Counsel: A Mitchelmore (Applicant) Solicitors:

Solicitor for Public Prosecutions (Applicant)
Hepmac Lawyers (First Respondent)
Crown Solicitor (Second Respondent, submitting)

File Number(s): 2018/69346

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Decision under appeal **Court or tribunal:** District Court of New South Wales

Jurisdiction: Criminal

Citation: Nil

Date of Decision: 04 December 2017

Before: His Honour Judge Ellis DCJ

File Number(s): 2017/00246292

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

JUDGMENT

1 **THE COURT**: Ms Alison Kmetyk pleaded guilty to an offence of driving while suspended, contrary to s 54(3) of the *Road Transport Act 2013* (NSW), and was convicted in the Local Court on 21 September 2017. Her licence was suspended until 31 October 2017. Ms Kmetyk appealed against her sentence to the District Court. When that appeal was heard on 4 December 2017, the District Court set aside her conviction, reconvicted her and imposed a lesser sentence. By judgment delivered on 19 July 2018, this Court set aside the orders made by the District Court for jurisdictional error: *Director of Public Prosecutions (NSW) v Kmetyk* [2018] NSWCA 156. Relevantly, what was left in place was Ms Kmetyk's conviction on 21 September 2017, and a statutory disqualification for 12 months effected by s 54(8) of the *Road Transport Act* in the form it then took:

> "(8) **Automatic disqualifications apply for certain offences**
>
> If a person is convicted by a court of an offence against subsection (1), (3), (4)(a) or (5), the person:
>
> (a) is disqualified by the conviction (and without any specific order) for the relevant disqualification period from the date of expiration of the existing disqualification or suspension or from the date of such conviction, whichever is the later, from holding a driver licence, and
>
> (b) may also be disqualified, for such additional period as the court may order, from holding a driver licence.
>
> Note: Section 207 provides for the effect of a disqualification (whether or not by order of a court)."

The "relevant disqualification period" in the present case was 12 months.

2 What was and is controversial is the effect of s 63 of the *Crimes (Appeal and Review) Act 2001* (NSW) ("CAR Act") upon the 12 month automatic period of disqualification following Ms Kmetyk's conviction. It appears to be the case that the parties proceeded on the basis that while Ms Kmetyk's appeal against sentence was pending, time did not run for the purposes of the s 54(8) period of disqualification. In its judgment, this Court construed s 63 so that it did not apply to stay the automatic disqualification of Ms Kmetyk by reason of her conviction. The Court took the view that s 63 did not apply because Ms Kmetyk had not challenged her conviction, but only her "sentence" (which did not include the automatic period of disqualification).

3 The practical consequence for Ms Kmetyk is that on the construction indicated in this Court's earlier judgment, the 12 months for which she is disqualified commenced on 1 November 2017 and will expire on 31 October 2018 (at which stage she may apply if she chooses for a new licence). On the construction on which the parties appear to have proceeded, and for which the Director of Public Prosecutions has applied for leave to be heard further, the 12 months commenced on 4 December 2017 when her appeal to the District Court was determined, and will expire on 3 December 2018.

4 Further, it may be that Ms Kmetyk was driving in the period from 1 November 2017 until 4 December 2017 in the belief that the statutory disqualification period did not start while her appeal was pending. There is no evidence one way or the other as to whether she was using her licence or, if she was, what her state of mind at the time was.

5 This Court addressed the question of construction tentatively, conscious that the parties had not had a full opportunity to be heard on the point, given the basis on which they had proceeded. It is as well, in order that this judgment stands alone, to reproduce the entirety of the reasoning on this issue, which was at [45]-[61]:

> 'When the appeal was heard, the parties appeared to proceed on the common basis that (a) s 63(1)(b) read with s 63(2) had the effect of staying the operation of the automatic disqualification of Ms Kmetyk's licence while her appeal to the District Court was pending, and (b) s 207(6) meant that some or all of those approximately 10 weeks were to be disregarded for the purposes of calculating the period of disqualification imposed upon her.
>
> The Court raised with the parties the unlikelihood that statute would on the one hand automatically impose a period of disqualification with a stay during the pendency of an appeal, but on the other hand would then provide that irrespective of the outcome of the appeal, time continued to run. If that were the proper construction, then there would be an incentive to bring meritless appeals and to prolong them to take advantage of the automatic stay during which period time continued to run, directly contrary to the statutory purpose of imposing a sanction independently of the sentencing process. The Court gave both parties the opportunity to be heard further on that construction, and written submissions were received on 10 and 12 July 2018.
>
> The Director submitted, by reference to *Roads and Traffic Authority of NSW v Higginson* [2011] NSWCA 151, that s 207(6) should be construed as applying in its entirety to all disqualifications made as a consequence of a person being convicted, with the result that the period from 1 November 2017 until 4 December 2017, during which the stay effected by s 63 was in force, should be disregarded. The result was, according to the Director, that Ms Kmetyk's period of disqualification would not end until 4 December 2018.

Ms Kmetyk agreed that s 207(6) 'precludes the absurd outcome of one filing an appeal, having the benefit of the stay of the disqualification period and never having to serve the driving disqualification for the period of time the appellant had the benefit of the stay.' She agreed with the construction propounded by the Director.

In light of the way the issue emerged during the hearing, it is understandable that the parties' supplementary submissions were directed to the construction of s 207(6). However, it may be that the key to the effect of these two provisions is to consider s 63(1) in its terms, and in particular to notice the easily overlooked words 'in respect of which' in s 63(1) and 'any such sentence' and 'any such ... disqualification or loss or suspension of a licence' in s 63(2). It is convenient to reproduce the provisions again, emphasising those words:

> '**63 Stay of execution of sentence pending determination of appeal**
>
> (1) This section applies to:
>
> (a) any sentence, and
>
> (b) any penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension of a licence or privilege that arises under an Act as a consequence of a conviction,
>
> **in respect of which** an appeal or application for leave to appeal is made under this Act.
>
> (2) The execution of **any such sentence**, and the operation of **any such** penalty, restitution, compensation, forfeiture, destruction, **disqualification or loss or suspension of a licence or privilege**, is stayed:
>
> (a) except as provided by paragraphs (b) and (c), when notice of appeal is duly lodged ...'

The relative pronoun 'which' and the relative adjective 'such' both require reference to an antecedent noun which has appeared previously in the provision. In each case, there is some subtlety in parsing the language.

First, the words 'in respect of which' in s 63(1) plainly apply distributively, to each of the cases mentioned in paragraphs (a) and (b). In cases where s 63(1)(a) applies, the antecedent of 'which' is 'sentence'. In cases where s 63(1)(b) applies, the antecedent of 'which' is potentially ambiguous. As a matter of grammar, it is necessarily a noun in paragraph (b), but it could refer to the 'conviction'; alternatively, it could refer to the 'penalty, restitution etc' earlier in paragraph (b). However, the statute must be read as a whole, and it makes provisions for and distinguishes between appeals against conviction and appeals against sentence. It is tolerably clear, having regard to the nature of appeals (which are against conviction or sentence) and the structure of the subsections, that the word 'which' must refer, in a case to which paragraph (b) applies, to the 'conviction'.

Secondly, s 63(2) does not apply to every sentence and every statutory penalty, restitution, etc to which an appellant is subject. That is because of the words 'such' in subsection (2). The word 'such' can give rise to debate, in part because it is used in a number of senses, some of which are less than precise, as has long been recognised: see *In re Godfrey* [1921] SASR 148 at 152. However, the symmetry between paragraphs (a) and (b) in s 63(1) with the words following each instance of 'such' in s 63(2) means that the words following 'such' in subsection (2) correspond with the 'sentence' in (1)(a) and the 'penalty ... disqualification or loss or suspension of a licence' in (1)(b). The force of 'such' is that s 63(2) only applies to (i) a particular sentence, in the case of paragraph (a) being made applicable, or (ii) to a particular penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension, in the case of paragraph (b) being made applicable.

Importantly, s 63(1) only applies when the sentence, penalty, restitution, compensation, forfeiture, destruction, disqualification or loss or suspension is one 'in respect of which an appeal or application for leave to appeal is made'.

Contrary to what appears to have been the shared assumption of the parties, the stay effected by s 63(2) appears not to operate upon all penalties, disqualifications, losses or suspensions of a licence imposed upon a person who has filed an appeal. The stay effected by s 63(2) appears to apply only upon the sentences, penalties,

disqualifications, losses or suspensions of a licence to which the section applies, namely, 'such' sentences or 'such' penalties, disqualifications, losses or suspensions of a licence as are made applicable by s 63(1), which is to say, those in respect of which an appeal, or application for leave to appeal, has been brought.

Ms Kmetyk appealed against her sentence. It is clear that the execution of the fine imposed by the Local Court was 'the execution of any such sentence' and was stayed while her appeal remained undetermined.

To the extent that the Local Court ordered that she be disqualified for a period of 12 months as a result of her conviction, that too is part of the sentence imposed by the Court, and was stayed while her appeal remained undetermined. For the reasons already stated, such an order was not authorised and misapprehended the operation of s 54(8). As Fagan J observed in *Director of Public Prosecutions (NSW) v Armstrong* at [13], 'The making of the order did not displace or alter the operation of the statute; the order was simply redundant'.

However, although the statutory disqualification effected by former s 54(8) upon Ms Kmetyk being convicted readily answers the description of a 'disqualification or loss or suspension of a licence', it does not follow that it is a disqualification or loss or suspension of a licence in respect of which her appeal had been made. The better view appears to be that it is not. When a person appeals his or her sentence, but not his or her conviction, and a disqualification is automatically imposed by statute upon the conviction, then it would seem to follow that the disqualification in not one 'in respect of which' the appeal has been made. To the contrary, the person has chosen not to appeal against conviction, and that choice carries with it the consequence of not appealing against the automatic consequences statute attaches to that conviction.

If the construction propounded above is correct, then what follows is this.

1. In the case of an appeal against conviction, a disqualification arising under the Act upon the conviction is 'any such ... disqualification or loss or suspension of a licence or privilege' to which s 63(2) applies. Accordingly, the operation of the disqualification is stayed while the appeal is pending.

2. In the case of an appeal against sentence, the execution of the sentence is stayed while the appeal is pending. However, a disqualification arising under the Act is not relevantly a 'sentence' and not the consequence of a conviction in respect of which there is an appeal, or application for leave to appeal. Accordingly, the operation of the disqualification is not stayed while the appeal is pending.

On that construction, it also follows that the construction of s 207(6) does not arise in this appeal, for there was no relevant stay of execution under s 63. The unlikely consequences mentioned above do not arise in this case, although it may not have been appreciated at the time that the disqualification remained in force while the sentence appeal was pending.

There remain some difficulties with the construction indicated above. One is how it operates when there is an appeal against sentence and the appellant seeks a s 10 order. Another is reconciling the above with the 'permanent' disqualification effected by s 207(1). There may be others. I am also conscious that the parties seem to have proceeded upon an assumption that s 63 operates more expansively, and have not been heard as to the construction outlined above.

In those circumstances, it is appropriate to make final orders in respect of those issues as to which the parties have been fully heard, and permit either party to be heard further as to the operation of s 63 read with s 207(6)."

6 This Court made orders permitting the parties to be heard further, if they chose, on the issue. By notice of motion filed on 8 August 2018 (within a period which had been extended consensually) the Director has applied to be heard further, by way of written submissions. Ms Kmetyk has indicated that she does not wish to be heard further. The Director has advised that he is content for the Court to determine the application on the papers.

7 It is appropriate to grant leave to the Director to be heard further on a point which is of general importance and not without complexity, and in respect of which without fault by any party full submissions had not previously been made.

The Director's further submissions

8 The Director accepts that there is much force in the construction explained in this Court's previous judgment, namely, that the stay effected by s 63 applies only to (relevantly) disqualifications, losses or suspensions of a licence as are made applicable by s 63(1), which is to say, those in respect of which an appeal, or application for leave to appeal, has been brought. However, he submits that there is an alternative construction, such that:

> "s 63(1) would be read in a manner that:
>
> (a) focuses upon the reference, at the conclusion of the subsection, to the making of "*an* appeal or *an* application for leave to appeal" (emphasis added), which would cover an appeal or application for leave in respect of conviction or sentence, or both; and
>
> (b) construes paragraphs (a) and (b) of s 63(1) as intending to cover the field of orders and other statutory consequence which may arise under an Act by reason of a conviction."

9 The Director submits that:

> "On that construction of s 63(1), s 63(2)(a) would operate to stay the execution of 'any such' sentence *and* 'any such' statutory penalty when, relevantly for present purposes, a notice of appeal or application for leave – in relation to conviction, or sentence, or conviction and sentence – is duly lodged".

10 That is to say, the Director propounds the construction which was implicitly applied by the parties, which in its application to the facts of this case, means that there was a stay of the statutory disqualification upon conviction, even though Ms Kmetyk's appeal was only against sentence.

11 The Director submits that this construction may better reflect the purpose of the section. He submits that the use of "any" between s 63(1)(a) and (b) and in s 63(2) is consistent with the general application of the words "an appeal" and "an application for leave to appeal" at the conclusion of s 63(1), such that any appeal will operate to stay the operation not only of a sentence, but also any other statutory consequence, pending its resolution.

12 The Director makes three submissions as to the operation of the provisions. First, he submits that the construction would better accommodate an appeal against sentence in which the appellant contended that the sentence be varied so as not to record a conviction pursuant to s 10 of the *Crimes (Sentencing Procedure) Act 1999*. Secondly, he submits that this construction would lead to consistent results in cases when an appeal is brought in a case where a statutory disqualification period is in place, and in cases where a magistrate orders a greater or lesser period of disqualification. Thirdly, he submits that this will discourage the bringing of conviction appeals for the sole

purpose of effecting a stay of the statutory disqualification period, while preserving the utility of a conviction appeal where the sentence imposed may ultimately fall away if the conviction is set aside.

13 The Director noted that the disqualification effected by s 207(1) of the *Road Transport Act* would not be affected by this construction. He submitted that the extrinsic material was relevantly unhelpful, and that there was no authority touching on the issue. He noted that the statutory predecessors of s 63 were ss 105 and 127 of the *Justices Act 1902* (NSW), provisions which even more clearly than s 63 focussed on the orders made by the Local Court rather than the statutory consequence of a conviction.

Consideration

14 As is accepted by the Director, there is no clear-cut answer to the question of construction. It seems likely that s 63 and its predecessors were drafted in a fashion which focussed upon the need to stay the effect of orders imposed by the Local Court in order to maintain the efficacy of the right of appeal, without necessarily giving close consideration to the automatic statutory consequences of a conviction. The Director properly exposes the difficulties (flagged at [60] of this Court's earlier judgment) where a person pleads or is found guilty, seeks an order under s 10 of the *Crimes (Sentencing Procedure) Act 1999* but where the Local Court records a conviction and imposes, say, a fine. In those circumstances, the person has a right of appeal against sentence, but on the construction outlined in the earlier judgment the person will be disqualified until such time as the appeal is heard. If the appeal is allowed and the conviction set aside and an order under s 10 made in lieu, then the person will have in fact been disqualified for a period of time which, having regard to the outcome of the appeal, should not have occurred.

15 On the other hand, there are real difficulties with the alternative construction outlined by the Director. It seems passing strange that a person like Ms Kmetyk, who pleaded guilty and did not ask for an order under s 10 should, by dint of exercising her right to appeal against the fine imposed on her, achieve a stay of the disqualification imposed by statute. That can scarcely effectuate the purpose of the automatic period of disqualification for a conviction, and it would seem to encourage meritless appeals against sentence.

16 Nor is a stay of the automatic period of disqualification necessary to ensure that the appeal against sentence is not rendered futile. A successful appeal against sentence will not, except in the case of an order under s 10, affect the automatic disqualification effected by statute.

17 In an area such as this where improbable outcomes are unavoidable and reference to legislative purpose and extrinsic materials unhelpful, the appropriate course is to respect the ordinary meaning of the statutory text. The grammatical structure of s 63(1) is quite careful, and reflects a distinction between appeals against sentence and

appeals against conviction. The legal meaning outlined in this Court's earlier judgment is the natural meaning of the language. The Director candidly accepts the force of that construction.

18 The competing construction raised by the Director devalues the elaborate structure of the legislation, in the form of the distinction in paragraphs (a) and (b) of subsection (1) and the linking of the descriptions in subsection (1) with the same terms in subsection (2) preceded by "any such". What emerges clearly from the elaborate and qualified drafting in s 63 is that the stay does not extend to *all* consequences of a conviction in every appeal. *Most* of the words in s 63 would be verbiage if its meaning was to stay the operation of *every* penalty imposed, whether by court order or directly by statute, during the pendency of *every* appeal, whether against conviction or sentence.

Orders

19 For those reasons, the preferable construction of s 63 is that outlined in this Court's earlier judgment, reproduced above. The consequence is that Ms Kmetyk's period of disqualification will end on 31 October 2018. None of the additional orders sought by the Director should be made. Noting that neither party sought costs, there should be no order as to the costs of the motion.

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Amendments

03 September 2018 - [5], second sentence: change "produce" to "reproduce". [13], third sentence: "s" added to "provision" and comma moved to precede "provisions".

Decision last updated: 03 September 2018