CITATION:	*Scott James Gibson v Northern Territory of Australia & Unknown* [2004] NTMC 021
PARTIES:	SCOTT JAMES GIBSON v NORTHERN TERRITORY OF AUSTRALIA AND UNKNOWN
TITLE OF COURT:	Local Court
JURISDICTION:	Crimes (Victims Assistance) Act
FILE NO(s):	20216139
DELIVERED ON:	13 April 2005
DELIVERED AT:	Darwin
HEARING DATE(s):	6 September 2004; 28 October 2004
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

CRIMES (VICTIMS ASSISTANCE) – APPEAL – NATURE OF APPEAL – WHETHER FRESH EVIDENCE CAN BE ADMITTED

Crimes (Victim's Assistance) Act, ss 5, 15A
Local Court Rules, Part 37, Rule 4
Supreme Court Act s 54
Justices Act (NT) Part VI.

Commonwealth Bank of Australia v Quade [1991] CLR 134.
CDJ v VAJ [1998] CLR 172
Wollongong Corporation v Cowan (1955) 93 CLR 435
Scott v Scott (1863) 3 Sw & Tr 319 at 326
White v Pink Batts Insulation Pty Ltd and Another (2002) 12 NTLR 23
Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd [1976] 135 CLR 616.
Harris v Callidine (1990) 172 CLR 84
Eastman v The Queen [2000] HCA 29,
Mickelberg (1989) 167 CLR 259 at 270
Do Carmo v Ford Excavations Pty Ltd [1981] 1 NSWLR 409
Knight v Knight (1971) 122 CLR 114
Alice Springs Town Council v Mpweteyerre Aboriginal Corporation (1997) 115 NTR 25.
Kevin v Minister for the Capital Territory [1979] 37 FLR 1
Wormald International (Aust) Pty Ltd v Aherne (NTSC, 23 June 1995, unreported)

Zuijs v Wirth Brother Pty Ltd (1995) 93 CLR 561 at 574
Messell v Davern (1981) 9 NTR 21
Meyering v Northern Territory of Australia (1987) 47 NTR 21
Davern v Messell (1983-1984) 155 CLR 21 at 27
Victims of Crime Fund v Brown (2003) 201 ALR 260

REPRESENTATION:

Counsel:

Appellant:	Ms Saraglou
First Respondent:	Mr Clift

Solicitors:

Appellant:	Withnall Maley
First Respondent:	Halfpennys

Judgment category classification:	A
Judgment ID number:	[2005] NTMC 021
Number of paragraphs:	47

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20216139

BETWEEN:

SCOTT JAMES GIBSON
Appellant

AND:

NORTHERN TERRITORY OF AUSTRALIA
First Respondent

AND

UNKNOWN
Second Respondent

REASONS FOR DECISION

(Delivered 13 April 2005)

Ms BLOKLAND SM:

Background and Decision of the Judicial Registrar

1. On 10 March 2004 Judicial Registrar Fong Lim refused an application brought by the Appellant for an Assistance Certificate pursuant to the Crimes (Victim's Assistance) Act. The learned Judicial Registrar published reasons in support of that decision on the same date. Those reasons disclose that the Appellant had been working as a security officer at three different premises on the evening of 5 November 2003; that at 4:00am he moved to "Discovery" nightclub and had stationed himself on a platform in the middle of the stairs leading to the corporate box. The learned Judicial Registrar noted that the Appellant stated that he stood in that position surveying the scene and that his next memory was waking up in hospital in a lot of pain later.

2. The Appellant's statutory declaration noted that another work mate "Drew" had told him that the person who assaulted him was someone called "Milton"; that a doctor from the emergency section said that he had swelling

to the right hand side of his face which was inconsistent with a fall. The learned Judicial Registrar noted a police report indicating that anonymous information had been received nominating one "Daryl Milton" as the offender; that the two work mates of the Appellant who found him unconscious confirmed that they did not know how the Appellant came to be at the bottom of the stairs; that the suspect "Milton" refused to co-operate and gave a statement advising police that he knew nothing about the incident.

3. Of the ambulance and medical records the learned Judicial Registrar acknowledged there was some evidence to support the allegation that the applicant was assaulted although the Ambulance Officer had noted "Not able to recall any events of tonight and fall". She also noted in her judgement that the hospital notes concerning the "Description of incident" was "allegedly assaulted……hit from behind fell down approximately 15 steps" and further nursing notes indicate a reference to "after being king hit". She notes that from then on, there is an assumption throughout the hospital notes that the Appellant had been assaulted. She also notes there is no independent evidence of the asserted assault.

4. The learned Judicial Registrar concludes after assessing the probabilities, (including the possibility that the Appellant could have slipped and fallen, could have fallen asleep and fallen or could have fainted) that there was not any evidence which would support one scenario or the other.

5. The learned Judicial Registrar concluded by stating she could not be satisfied that the Appellant was the victim of an assault.

The Notice of Appeal

6. The Appellant filed an Appeal against the learned Judicial Registrar's decision on 6 April 2004. I note that the right of appeal in proceedings such as these is provided in s 15A *Crimes (Victim's Assistance) Act* and in the

terms of that section is to be in accordance with Part 37 of the *Local Court Rules*. The Grounds of Appeal set out in the Form 37A "Notice of Appeal" all relate to evidence that was not placed before the Judicial Registrar. The Grounds read as follows:

> "(1) that new evidence indicates that the appellant was the victim of an offence;
>
> (2) the new evidence is in form of Affidavit by Pedro Pikos sworn on 5 April 2004 and is probative from time of offence (sic);
>
> (3) the referred evidence of Pedro Pikos was not relied upon by the appellant in his application for Crimes (Victims Assistance) at hearing on 9 March 2004 because he did not understand or appreciate the significance of independent evidence to establish what actually occurred to the appellant on the date of the incident, 1 January 2002;
>
> (4) the evidence of Pedro Pikos was not known by the appellant on 9 March 2004;
>
> (5) in light of the Affidavit from Pedro Pikos the appellant is entitled to relief pursuant to his application for assistance".

7. The Affidavit of Pedro Pikos sworn 5 April 2004 referred to in the Notice of Appeal states that he was at the Discovery Nightclub on 31 December 2001 attending a family function and that he drank two glasses of wine; that at around 4.30 am he went downstairs as the corporate box he was in was smoky; that he could see Scott Gibson (the appellant) when he (Pedro Pikos) was making his way up the stairs; that Scott Gibson was previously a brother-in-law but now they are both divorced; that Scott Gibson was standing on the right hand side of the stairs approximately ¾ of the way up the stairs, 10 – 15 metres away; that as he (Pedro Pikos) looked up he could see an arm "just above the left side of Scott Gibson's head" standing on the stairs above Scott; that he observed someone had attempted to punch Scott Gibson to the head area; that he could see a well built white man wearing a white short sleeved shirt standing a few steps up in front of Scott; that the arm that appeared over Scott's head had a white shirt sleeve; that the man

had a bigger frame than Scott Gibson; that he couldn't clearly identify the man with the white shirt because people were going up and down the stairs; that the nightclub was busy, smoky and not well lit. At paragraph four of his affidavit he states:

> "Immediately I saw the arm which appeared to be above Scott Gibson's head it seemed that Scott Gibson had been given such a punch that he literally flew down the stairs. Scott Gibson then landed at the bottom of the stairs where he was attended by various security guards of the Discovery Nightclub. I know one of the security guards is called "Drew". I did not get involved because there seemed to be so many people around him."

8. What has been a major question to be decided in this case is the nature of an Appeal against a Judicial Registrar's decision in the context of *Crimes (Victims Assistance)* claims. The Appellant has conducted the proceedings on the basis that he anticipates that "fresh evidence" is permitted.

The Relevant Legislation and Rules

9. It should be remembered that the *Crimes (Victims Assistance) Act* was substantially amended in 2002 (Act No.57, 2002) and amongst other matters those amendments granted Judicial Registrars of the Local Court the power to perform all the functions of the Court under the *Crimes (Victims Assistance) Act*.

10. The provisions covering appeals were also amended in the same legislation and are contained in s 15A *Crimes (Victims Assistance) Act* that reads:

> (1) A party to proceedings in respect of an application under section 5 may appeal to the Court constituted by a magistrate against a determination made by a Judicial Registrar that an assistance certificate is, or is not, to be issued.
>
> (2) A party to proceedings commenced under section 21 may appeal to the Court constituted by a magistrate against a determination made by a Judicial Registrar –
>
> (a) that the Territory is entitled to recover from an offender a specified amount; or
>
> (b) that the Territory is not entitled to recover any amount from an offender.

(3) An appeal under subsection (1) or (2) is to be in accordance with Part 37 of the Local Court Rules.

(4) A party to proceedings under this Act may appeal to the Court constituted by a magistrate against an order in those proceedings made by a Judicial Registrar or Registrar.

(5) An appeal under subsection (4) is to be in accordance with rule 4.04 of the Local Court Rules.

(6) A party to proceedings under this Act is not entitled to appeal to the Supreme Court against a determination or an order to which this section applies.

(7) An appeal under this section does not operate as a stay of the determination or order appealed against unless a magistrate orders otherwise.

11. These proceedings involve questions concerning *s 5 Crimes (Victims Assistance Act),* (that is a refusal to grant a Crimes Victims certificate) and are governed by Part 37 of the *Local Court Rules* by virtue of s 15A(1) and (3). By virtue of s 15A(1) the appeal lies to a Court constituted by a Magistrate. Although there was some discussion during the hearing about this, in my view it is Rule 37 of the *Local Court Rules* that applies here, rather than Local Court Rule 4.04. As can be seen, s 15A(4) establishes a separate right of Appeal to a Magistrate in the case of an "order" in these proceedings. Such Appeals are to be conducted in accordance with rule 4.04 of the Local Court Rules: (s 15A(4) and (5)). It is clear to me that appeals conducted pursuant to s 15A(4) and (5) concern all other orders (for example interlocutory orders) not included in s 15A(1) and (2). Had this matter been an appeal of the type contemplated under sub-sections (4) and (5), the procedure would have been relatively straight forward as *Local Court Rule* 4.04(2)(c) provides that such matters are heard by application and heard *de novo*. There would be no need to argue the legitimacy of admitting fresh evidence.

12. Regrettably neither s 15A *Crimes (Victims Assistance) Act* nor Part 37 of the *Local Court Rules* states what the nature of the appeal is when it is

brought pursuant to s 15A(1) *Crimes (Victims Assistance) Act*. Rule 37.09 *Local Court Rules* simply states:

> (1) The Court may give the directions it considers appropriate in respect of the hearing of an appeal.
>
> (2) If a respondent fails to attend the hearing, the Court may hear the appeal if it is satisfied that the notice of appeal was properly served on the respondent.
>
> (3) If an appellant fails to attend the hearing, the Court may dismiss the appeal or make the orders it considers appropriate.
>
> (4) If neither party attends at the hearing, the Court may make the orders it considers appropriate.

13. This question of the nature of the appeal is of significance. It is obviously important that litigants place all relevant material before the primary decision maker to facilitate the proper hearing of the matter. It is also important to promote expedient and legitimate finalization of matters at first instance so the parties won't be exposed to further costs of litigation in relation to appeals based on material that could have been placed before the primary decision maker (here, the Judicial Registrar). It is also significant that by virtue of s 15A(6) *Crimes (Victims Assistance) Act*, an appeal no longer lies to the Supreme Court, but rather to a Magistrate of the Local Court. Although I presume a prerogative writ may still apply in relevant circumstances, aside from that possibility, the Local Court is now the final appeal. Whether the appeal contemplated permits fresh evidence is somewhat problematic in the face of these considerations.

14. On 6 September 2004 when the hearing of this appeal commenced, I queried counsel for the Appellant concerning the fresh evidence ground, in particular, I sought further information on why the proposed fresh evidence was not placed before the Judicial Registrar and ordered accordingly. This order however pre-supposed there was a right to call fresh evidence on Appeal, something counsel for the respondent disputes.

Appellants Arguments on the Nature of The Appeal

15. On behalf of the Appellant it was argued that by virtue of *Rule 37 Local Court Rules* the Court has wide powers on appeal, in particular Rule 37.07 (Amendment of Grounds) and Rule 37.09 (the court may give directions it considers appropriate). On this basis the Appellant argued that the appeal was not in the *strict sense*; that the Court in this situation possesses wide powers to conduct and regulate hearings and to receive fresh evidence. It was also argued that I should be informed by the beneficial nature of the *Crimes (Victims Assistance) Act* in determining the nature of an appeal; the need on the part of applicants to prove the commission of an offence and that evidence concerning the commission of an offence may not always be at hand. Here, it is argued the Appellant did not have the witness statement of Pedros Piko at the time of the hearing.

16. Both counsel have drawn on principles laid down in *Commonwealth Bank of Australia v Quade* [1991] CLR 134. That case involved the discovery that post-judgment in a Federal Court matter, the successful party had failed to comply with discovery orders. The only ground in the subsequent appeal was "fresh evidence." The general approach to be taken in such matters was described as follows (at 139):

> "The general rule identifying the circumstances in which an appellate court is justified in setting aside a verdict merely on the grounds of fresh evidence was identified by Dixon J. in *Orr v. Holmes* (1948) 76 CLR 632 in a passage which is quoted in the judgment of Burchett J. in the present case. Subsequently, in *Wollongong Corporation v. Cowan* (1955) 93 CLR 435, Dixon C.J. repeated the substance of those comments in a judgment in which the other members of the Court (Williams, Webb, Kitto and Taylor JJ.) concurred. In the later case, his Honour said ibid., at p 444: "If cases are put aside where a trial has miscarried through misdirection, misreception of evidence, wrongful rejection of evidence or other error and if cases of surprise, malpractice or fraud are put on one side, it is essential to give effect to the rule that the verdict, circumstances could rarely, if ever, be a ground for a new trial unless certain well-known conditions are fulfilled. It must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to

make it unreasonable to suppose the contrary. Again, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial."

"The words "rarely, if ever" in the above passage leave open the possibility of exceptional circumstances justifying a departure from the general rule even in the class of case to which the general rule is directed. It is not, however, necessary to pursue that aspect of the matter for the purposes of the present case. Nor is it necessary to consider whether the somewhat obscure qualification expressed by Dixon C.J. in the words "or, if it is not reasonably clear that it would have been produced, it must have been so highly likely as to make it unreasonable to suppose the contrary" represents other than an illusory relaxation of the primary test (i.e. "reasonably clear that an opposite result would have been produced"). As the above quotation makes plain, the general rule formulated by Dixon C.J. is directed to the ordinary case where all that is involved is that relevant fresh evidence has come to the notice of the unsuccessful party after the trial."

17. Ms Saraglou argued the plaintiff's case met the criteria laid down in *Commonwealth Bank of Australia v Quade* . She argued that it is reasonably clear that if the Pedros Pikos evidence was available, there would have been the opposite result; that the evidence was provided as it came to hand and that the witness statement was not available at the first hearing; that the demands of justice in such circumstances dictated that the fresh evidence be admitted; that it was not until after 25 March 2004 when Ms Saraglou spoke to the appellant about the reasons on why his case was not successful that the witness came forward.

Arguments on Behalf of the Respondent

18. The respondent argued that the nature of these proceedings could be seen in one of two ways. First, the appeal might on one view be seen as an application for a new hearing based on fresh evidence or secondly it may be regarded as an appeal, the nature of which is yet to be determined but according to the respondent should be an appeal in the strict sense. In relation to whether these proceedings should be viewed as an application for a new hearing, counsel referred to *s 15A Crimes (Victims Assistance) Act* at

the outset. The question comes down to whether *Appeal* in that section admits of an interpretation to allow an application for a re-hearing. Counsel for the respondent referred the court to *CDJ v VAJ* [1998] CLR 172 where the High Court considered whether the Full Family Court had been in error in admitting fresh evidence pursuant to *s 93A(2) Family Law Act.* That section expressly allowed the Full Family Court to receive *further evidence* and is immediately distinguishable from the statute at hand, however there are a number of relevant observations concerning the construction of statutes granting a right of appeal.

19. In discussion generally on the admission of fresh evidence, Her Honour Gaudron J referred to the previous High Court decision of *Wollongong Corporation v Cowan* (1955) 93 CLR 435 concerning the common law rules that govern "the grant of new trials on the ground of the discovery of fresh evidence". Citing *Wollongong Corporation* Gaudron J notes those rules apply only if the evidence in question was not available at the trial and could not have been obtained by the exercise of reasonable diligence; further, it must be reasonably clear that, if the evidence had been available at trial, "an opposite result would have been produced or…must have been so highly likely as to make it unreasonable to suppose the contrary". The majority also discuss this matter noting that at common law a jury verdict might be set aside in one of two ways (page 197 –199). First, it might be set aside by writ of error, or second where a jury had given a general verdict subject to an opinion *in banc* on a question of law. Once the judgement had been entered, the common law courts would not allow a fresh action to set aside the judgement, however judgement could be delayed until the next Term and in the interim the disaffected party could move for a new trial. Their Honours note that the new trial was an exercise in original jurisdiction, not appellate jurisdiction, comparable to proceedings taken by prerogative writ. Among the grounds to base a motion for a new trial included fraud or the discovery of new evidence. Their Honours note that

the principles expressed in *Woollongong Corporation* are to be understood in the context of procedures of the common law courts. Further, their Honours express the view that those cases are not relevant to the question of the construction of a statutory power to admit further evidence on appeal; indeed reliance on those cases in such a context would be in error: (at page 198). An exception to this further consideration is in circumstances where a statute adopts the common law procedures: (the majority discuss, in that context *Scott v Scott* (1863) 3 Sw & Tr 319 at 326, noting that case concerned the *Matrimonial Causes Act 1858 (UK)* providing for a grant of rules nisi for a new trial).

20. By application of those principles discussed in *CDJ v VAJ* it is clear that the rules concerning common law procedures do not apply to appeals brought under *s 15A Crimes (Victims Assistance) Act*. This being a statutory appeal, the question should be directed to whether the orders made below should be set aside and if so, what orders should be made in their place to determine the out come of the litigation. Of the possible orders available in a statutory appeal, the majority in *CDJ v VAJ* state that a retrial *is one, but not the only, order that the appellate court can make. Moreover, such an order is an order of last resort.*:(*CDJ v VAJ* at 199). I also note the adoption of the reasoning of the majority in *CDJ v VAJ* by the Court of Appeal (NT) in *White v Pink Batts Insulation Pty Ltd and Another (2002)* 12 NTLR 23 especially per Angel J at 26 and 28. Their Honours were there dealing with *s 54 Supreme Court Act* that allows the Court of Appeal in the Northern Territory *in its discretion, to receive further evidence.*

21. What is further clarified in *CDJ v VAJ* is that the content of a statutory right of appeal is to be guided by the statute and the context of the type of litigation. In *CDJ v VAJ*, aside the statutory provision to allow further evidence, the Court considered it was relevant to consider the nature of the litigation (being a family law, custody dispute) where facts arising since the making of the orders might be relevant, alternatively, there are procedures

for fresh applications if circumstances have changed. Within the context of the *Crimes (Victims Assistance) Act*, it is important to bear in mind the beneficial nature of the legislation but also the need for finality for all parties (bearing in mind that not only respondents, but applicants would want to have some security in the finality of an order to grant an *Assistance Certificate* in the sense that it should not be lightly re-litigated*).*I confirm that I am treating this appeal as a statutory appeal where the line must not be blurred between original and appellate jurisdiction: (*CDJ v VAJ* emphasises the necessity of this distinction even though the statute conferring the right of appeal expressly allowed further evidence on appeal). I am not treating the matter as an application for a re-hearing in the sense contemplated at common law. To do so would be inappropriate in the context of a statutory scheme and fund such as the *Crimes (Victim's Assistance) Act.*

22. As to the nature of an appeal under *s* 15A(1) *Crimes (Victims Assistance) Act* for the reasons mentioned in general discussion above in paragraph 11, it is clear to me that this is not an appeal by way of hearing *de novo* as would be the case had it been an appeal governed by *Local Court Rule 4.04.* I agree with the propositions in a general sense put by counsel for the respondent that the question of the nature of a statutory appeal must be governed by statutory construction, the language and context of the appeal; consideration must also be given to the powers vested in the appellate body; that unnecessary restrictions should be avoided; that if the statute expressly or by necessary implication indicates an appeal in the strict sense, then there can be no fresh evidence. If that is the case, a determination must be made on the correctness of the decision with a power only to dismiss, set-aside or substitute a decision.

23. As mentioned, counsel for the respondent has drawn my attention to *s 54 Supreme Court Act* that allows *further evidence* to be taken on the hearing of appeals to the Court of Appeal. No such provision exists in *s 15A(1) Crimes (Victim's Assistance) Act* . In my view the failure to provide specifically for

a provision to expressly allow *further evidence* is one consideration but is not fatal to the question of whether *fresh evidence* ought to be allowed on appeal. It is important also to bear in mind that the procedures under the *Crimes (Victim's Assistance) Act* are less formal than common law actions and less formal than a number of other statutory schemes. A competing consideration is that given the less formal procedures generally in the *Crimes (Victim's Assistance) Act,* the legislature may have contemplated that the Local Court through the Local Court Rules would provide for the nature and content of appeal proceedings. As has been indicated already, *Local Court Rule 37* permits the Court to give potentially wide ranging directions on the hearing of an appeal. If all that is contemplated by way of an appeal is an appeal in the strict sense, there are very few directions beyond the need for clarity of grounds of appeal that would ever actually be made.

24. The respondent places significant weight on the lack of any express legislative definition on the nature of the appeal as grounds for an argument in favour of this form of appeal being regarded as a *strict sense* appeal not amenable to fresh evidence. I was referred to *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* [1976] 135 CLR 616. In that matter, a licensee dealt with by the Builders Licensing Board (NSW) was entitled under the relevant disciplinary statute to an appeal to the District Court that was required to be "dealt with by way of rehearing". The District Court determined that the re-hearing would mean a hearing *de novo.* The discussion by Mason J emphasised the following principles: an appeal is not a common law proceeding, it is a remedy given by statute; upon an appeal *stricto sensu* the question considered is whether the judgment was right when given; an appeal *stricto sensu* is to be distinguished from an appeal by way of rehearing; the appeal by way of rehearing had its origins in Chancery; that this form of appeal involves rehearing of the cause at the date of the appeal, that is by "trial over again" on the evidence used in the

court below; but there is a special power to receive further evidence; this form of appeal did not call for a fresh hearing or hearing *de novo*. Justice Mason made several references to the various meanings given to the term *rehearing* in diverse contexts and jurisdictions but in the end he said the reasoning process comes back to the issue of elucidating the legislative intent. Added to this are the observations of Jacobs J concerning how far evidence might be received on a re-hearing in the absence of statutory provision. His Honour said (page 629) the procedure adopted will depend on what is fair and reasonable in the circumstances, including considerations of the nature of the body that made the original decision; he also considered that the relevant procedure may be found in the court rules or established practise.

25. Counsel for the first respondent argues that the legislature in *s* 15A(1) *Crimes (Victims Assistance) Act* would have used the word "*rehearing"* or the phrase "*appeal by rehearing"* if that was what was intended.

26. Similarly it was argued that *Harris v Callidine* (1990) 172 CLR 84 stood for the same proposition. Concerning the use of the word "review" in relation to the question of delegated powers of registrars of the Family Court, Gaudron J stated (pages 153-154): "In so far as that sub-section provides for the "review" of the "exercise of [a] power" delegated to a registrar or deputy registrar in accordance with that section, it was clearly intended that there should be a process enabling complete consideration of the matter as dealt with and not merely a process, such as is involved in the appeal process under *s 94* of the Act, directed to remedying errors of law. Such a review entails consideration of whether, quite apart from legal or other error, a different result should be arrived at."

27. In *Eastman v The Queen [2000] HCA 29*, Gummow J adopted the statement made by Mason CJ in *Mickelberg (1989)* 167 CLR 259 at 270 that in 1900 "a mere grant of appellate jurisdiction without more would not be

understood as carrying with it a power to receive further evidence." His Honour said he would not grant leave to re-open the question. Similarly, McHugh J stated in *Eastman* [at paras 104 – 107 (footnotes omitted)]:

> "When the Constitution was enacted in 1900, a grant of appellate jurisdiction was not seen as carrying with it a power to receive further evidence. An appeal meant and, in my view, still means "the right of entering a superior Court, and invoking its aid and interposition to redress *the error of the Court below*." (emphasis added) When the appeal is an appeal in the true sense, therefore, no appealable error exists if the trial court has correctly found the facts on the material before it and correctly applied the law to those facts in the course of deciding the issues raised before it for determination. Because that is so, the grant of appellate jurisdiction to a court does not authorise it to decide the case on the basis of a change in the law since the original decision was made. Nor does a grant of appellate jurisdiction authorise it to hear evidence that was not before the court whose order is the subject of appeal. As Isaacs J pointed out in *Werribee Council v Kerr,* "[t]he appellate Court judges for itself whether there has been an error from materials which were before the Court below, so far as it can".
>
> "Authority for an appellate court to receive further evidence must come from a grant of legislative power in addition to a mere grant of appellate jurisdiction. It does not come from the simple grant of appellate jurisdiction because an appeal is the right of entering a superior court to redress the error of the court below and whether that court erred is to be determined on the materials before it. The power to receive further evidence is usually expressly granted but it may be implied where the appeal is stated to be one by way of re-hearing. There does not appear to be any case where a court has held that the simple grant of appellate jurisdiction carries with it the right to admit further evidence in hearing the appeal. Furthermore, where a court is given jurisdiction to hear "appeals" but with power to re-hear the matter or to take new evidence, it is not exercising appellate jurisdiction in its true sense. In such cases, as Jessel MR pointed out in *Quilter v Mapleson,* the jurisdiction exercised by the appellate court is an amalgam of appellate and original jurisdiction.
>
> Most appellate courts today are given a statutory power to receive further evidence on appeal. In some cases, if the appeal is by way of re-hearing, it may be possible to infer an implied power to receive further evidence. When such a power is conferred, expressly or inferentially, the "appellate" court decides the case on all the facts as

> it finds them to exist as at the date of the hearing. But the court is not exercising appellate jurisdiction in its true sense.
>
> When no statutory power to receive evidence has been conferred, the court must decide the case on the basis of the evidence before the trial court…"

28. This is obviously a strong statement of principle but I do discern a significant point of distinction given that His Honour is referring to appeals going from one court to a superior court. The relevant court in this instance is the Local Court, whether at first instance or on "appeal". The way the Local Court is constituted changes between first instance and "appeal" but it is the same court. There is a further matter that at first instance in matters such as this one, a Judicial Registrar is not the court but is a delegate authorized to exercise certain powers and functions of the court: (*s 9 Local Court Act).* The use of the word "appeal" in this context is not as clear cut as the circumstances His Honour was discussing as being a process involving entering a superior court.

29. Counsel for the first respondent has also drawn my attention to *Do Carmo v Ford Excavations Pty Ltd* [1981] 1 NSWLR 409 concerning the nature of appeals from the Supreme Court Master in New South Wales to a Judge. Justice Cross noted the English practice and Victorian practice was that of hearing such appeals *de novo.*. His Honour also noted that prior to amendments in 1970 to the New South Wales *Supreme Court Act,* the High Court had held that the Master or Registrar was a delegate exercising certain powers of the court rather than the court itself. His Honour also noted that in *Knight v Knight* (1971) 122 CLR 114 South Australia, Victoria and the Commonwealth all intervened to argue again that Registrars and Masters were the courts. All were unsuccessful. It appears those states had argued the point (unsuccessfully) that the consequence of Masters and Registrars not being "the court" would mean the judges of the court would be taken up with adjudicating minor matters. The New South Wales *Supreme Court Act* was amended to make it clear that the Master was the Court itself. *Do*

Carmo is also authority for the proposition that final appeals ordinarily would be appeals in the true sense.

30. Of the relevant indicia on whether an appeal should be *de novo* or *strict sense* counsel for the respondent relied on *Builders Licensing Board v Sperway Constructions (Std) Pty Ltd and Another [1976] 135 CLR 616.* His Honour Justice Mason notes (pages 621-622) that generally when a right of appeal is given to a court from a decision of an administrative tribunal, a provision that the appeal will be by way of re-hearing usually means it will be *de novo*, although there is no absolute rule. His Honour notes such matters as whether or not there is provision for a hearing at first instance; whether a record of the first instance hearing is made; whether the rules of evidence apply; whether the issues that arise are non-justiciable or whether the first instance decision maker is required to furnish reasons. Those matters might be indicators of a *de novo* hearing on appeal. On the other hand, indicators favouring an appeal of a stricter type include the determination of justiciable issues in advance; the conduct of a hearing where the parties are legally represented; presentation of oral evidence subject to cross examination; the requirement to keep a record such as a transcript; to apply the rules of evidence and the requirement to give reasons.

31. It is worth noting that hearings assessing whether or not there will be an *Assistance Certificate* proceed by written application served on the Solicitor for the Northern Territory: *(s 6 Crimes (Victims Assistance) Act);* the hearing shall be conducted with little formality and technicality and with expedition: (*s 15 Crimes (Victims Assistance) Act);* the Court is not bound by the rules of evidence but may inform itself on any matter in such a manner as it thinks fit: *(s 15(3) Crimes (Victims Assistance) Act).* All evidence in proceedings is given by affidavit with a discretion to allow cross examination. The Court may also admit a transcript of proceedings in another court: *(see generally s 17 Crimes (Victims Assistance) Act.* Overall

the proceedings are designed to be informal, particularly with respect to fact-finding, however the hearing at first instance is still a comprehensive hearing on affidavit at which parties are mostly represented, the issues are clearly defined and there is a record of the proceedings and reasons given. With respect I agree with the observation in *Kevin v Minister for the Capital Territory* [1979] 37 FLR 1 that a provision dispensing with the need to comply with the rules of evidence refers primarily to technical matters. A court or tribunal faced with such a provision might still use the rules of evidence to inform itself depending on the nature of the proceedings. Similarly, although there is no formal requirement to provide reasons for decision, anyone with any familiarity with the process know that reasons are always given in *Victims Assistance* matters, particularly in contested matters. A Judicial Registrar is performing a judicial function in the exercise of their powers under the *Crimes (Victims Assistance) Act.* In my view the proceedings sit somewhere between the two types contemplated by Mason J in *Builders Licensing Board.*

32. Counsel for the respondent has also argued that because *Local Court Rule 37.09* grants no power to receive fresh evidence, it cannot be assumed that such a power exists or is incidental generally to the grant of a right of appeal. Neither does *Rule 37* provide for the powers that can be exercised on the completion of the hearing of the appeal. Reference was made to *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 115 NTR 25. In that case the Court of Appeal (NT) was dealing with a matter that was heard by the Local Government Tribunal constituted by a Magistrate. The appellant appealed to the Local Government Appeal Tribunal constituted by a judge of the Northern Territory Supreme Court and subsequently the matter came before the Court of Appeal. His Honour Justice Mildren discussed a number of issues with respect to the nature of the appeal but he referred also to the "extraordinary omission" of the legislature to state what powers the Supreme Court has on appeal. His

Honour referred to and adopted his approach in *Wormald International (Aust) Pty Ltd v Aherne* (NTSC, 23 June 1995, unreported) stating:

> "It is well established that whenever a new court is established, there is no appeal from it unless it is conferred by statute: *Holmes v Angwin* (1906) 4 CLR 297 at 304, per Griffiths CJ. It is a necessary corollary of that principle that both the nature of the appeal and the powers of the court in disposing of the appeal must be found in the wording of the statute: *Da Costa v Cockburn Salvage and Trading Pty Ltd* [1970] 124 CLR 192".

33. His Honour agreed with the Court below that the omission to state the powers of the court on appeal meant that the powers of the court were severely restricted. His Honour however said that where by an Act of Parliament a right or power is created, there must by implication be the power to do everything which is indispensable for the purpose of exercising the right or power, or fairly incidental or consequential to the power itself. In the circumstances of *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* Mildren J considered the options were to dismiss the appeal if there was no error; if error is disclosed, to allow the appeal if the decision depends on the error; if the error vitiates the decision, the remedy is to be tailored to meet the nature of the error identified. In certain circumstances identified by His Honour, it was held there was power to order a fresh hearing and applying *Zuijs v Wirth Brother Pty Ltd* (1995) 93 CLR 561 at 574 it was held that in other circumstances there was a power to find and declare, or make a substituted decision.

Decision Concerning the Nature of the Appeal Under the Crimes (Victim's Assistance) Act

34. During argument concerning this matter I mentioned *Messell v Davern* (1981) 9 NTR 21 to counsel. In that matter the Full Court considered the nature of an appeal under *Pt VI* of the *Justices Act (NT).* Those provisions granted the right of appeal to the Supreme Court by the prosecutor or defendant in respect of conviction for a minor indictable offence.

35. Section 176 of the *Justices Act* provided that "subject to section 176A, no evidence shall be received on the hearing of the appeal other than such documents as are mentioned in sections 174 and 175 and a record, made by means of sound recording apparatus or shorthand , of the depositions of a witness in the relevant proceeding produced out of the custody of the clerk for the relevant district, except by consent of the parties or by order of the Supreme Court on appeal." Section 176A read as follows:

> *(1)* For the purpose of this Part, the Supreme Court may, if it thinks it necessary or expedient in the interest of justice-
>
> (a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case;
>
> (b) order any witness who would have been a compellable witness in the proceedings from which the appeal lies to attend for examination and be examined before the Supreme Court, whether or not he was called in those proceedings; and
>
> (c) subject to sub-section (3), receive the evidence, if tendered, of any witness.
>
> *(2)* Without prejudice to sub-section (1), where evidence is tendered to the Supreme Court that Court shall, unless it is satisfied that the evidence, if received, would not afford any ground for allowing the appeal, exercise its power of receiving it if-
>
> (a) it appears to it that the evidence is likely to be credible and would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and

(b) it is satisfied that the evidence was not adduced in those proceedings and there is a reasonable explanation for the failure to adduce it.

36. In considering the nature of an appeal under the *Justices Act* the Full Court summarised the relevant authorities and said :

> "An appeal *stricto sensu* is to be distinguished from an appeal by way of re-hearing. If the nature of an appeal to this court is an appeal *stricto sensu,* such a judgment can only be given as ought to have been given at the original hearing. Put another way, this court's function on the hearing of an appeal *stricto sensu* would be to decide whether the judgment complained of was right when given on the material which the lower court had before it (*Ponnamma v Arumogan [1905] AC 383 at 388*). But on a re-hearing such a judgment may be given as ought to be given if the case came at that time before the court of first instance. An appeal by way of re-hearing is, generally speaking, a trial over again on the evidence used in the court below, although there may be a special power to receive further evidence: per Dixon J (as he then was) 46 CLR at 107-110 citing Jessel MR in *Quilter v Mapleson* (1882) 9 QBD 672 at 676, and in *Re Chennell; Jones v Chennell* (1878) Ch D 492 at 505.

37. Their Honours noted the express provision to allow fresh evidence and also the comparison with the *Justice Act (SA)*, being the legislative ancestor to the Northern Territory Act. Their Honours expressly disapproved of a tendency, based on historical factors to treat Justices Appeals as appeals in the strict sense (page 26). Their Honours also said it was significant that their powers on determination of an appeal were not proscribed in any way by limitations on the court's discretion (page 27). As the Court's function on appeal was to determine the appeal on the material before it; and as that function was not confined to the material before the lower court, the court held its function went far beyond deciding whether the judgment complained of was right when given on the material which the lower court had before it. At the same time, their Honours took the view that it may not be appropriate to label the proceedings as a re-hearing, given the different meanings attached to that term: (at 27-28). In conclusion, their Honours found that

such an appeal "is not an appeal in the strict sense and is not a hearing *de novo.* It is a rehearing, ie a new trial of the issue raised by notice of appeal using the evidence in the court below with a discretion to receive further evidence".

38. Although there are obvious distinctions with *Messell v Davern* given the powers to receive evidence under certain conditions enumerated in the *Justice Act*, the approach taken by their Honours is still to the best of my knowledge the approach taken on *Justices Appeals* despite amendments to that part of the *Justices Act* since *Messell v Davern.* The reasoning of *Messell v Davern* was influential in *Meyering v Northern Territory of Australia* (1987) 47 NTR 21 concerning the question of the nature of an appeal brought pursuant to the provisions of the *Lands Acquisition Act (NT). Meyering v Northern Territory* was the first appeal brought to the Supreme Court under that legislation and at the time of hearing no Rules of Court had been enacted. His Honour Justice Muirhead noted that the directions sought by the appellant would envisage that certain other evidence by way of reports would be admitted on appeal. The respondent argued the appeal should be conducted on the evidence before the Tribunal, save for in special circumstances there could be further evidence with leave. Justice Muirhead noted the nature of the hearings and functions of the Tribunal. He noted that members of the Tribunal must be qualified including the chair who must be a legal practitioner; that at the hearing persons may be legally represented; that evidence may be given on oath; that the Tribunal is not bound by any rules of evidence but may inform itself on any matter in such a manner as it thinks fit and is not bound to act in a formal manner and shall act without regard to legal forms and technicalities.

39. The right to appeal simply provided "A person aggrieved by a determination of the Tribunal under Sections 58 or 81 may appeal to the Supreme Court." His Honour noted that this contrasted with the more "elaborate procedures" of the *Justices Act* and the *Work Health Act* the latter of which restricted

appeals to "questions of law". His Honour noted the *Lands Acquisition Act* was silent on the nature of the Appeal, although it did grant the Supreme Court certain powers upon determination of the appeal: (to confirm, vary, substitute or dismiss). In those circumstances, His Honour took the view that the appeal should be conducted as a hearing *de novo.*. His Honour did note that by comparison, the *Lands Acquisition Act* did not grant the same powers as the *Justices Act* within the relevant appeal provisions. He also noted that the decision in *Messell v Davern* drew some criticism from Gibbs CJ in *Davern v Messell* (1983-1984) 155 CLR 21 at 27 when the Chief Justice stated the sections "strongly suggest that the intention of the legislature was that an appeal under *s 163* should proceed upon a record of the evidence taken at first instance and that an order that further evidence be received should be made only in exceptional circumstances when for some reason it became necessary to call a particular witness."

40. The difficulty in this case of applying the relevant principles is that the *Crimes (Victims Assistance) Act* context and appeal provisions do not readily mirror the circumstances of the provisions that have been the subject of the decided cases. I was initially struck by the argument that use of the term "appeal" in itself was indicative of the necessity to proceed in the *strict sense* when there was no other indication of how to proceed. That point is strongly made in *Eastman.* However, as mentioned above, this is not a case of the "appeal" being from one court to another. This concerns an appeal within the Local Court from a Judicial Registrar exercising delegated powers. I am confident this is not the situation the High Court had in mind when enunciating those principles. I have come to the conclusion that when the *Local Court Act and Rules* and the *Crimes (Victims Assistance) Act* use the term "appeal", it is not necessarily the intention to confine the nature of the "appeal". In some respects that is self evident under s15A (4) and (5) *Crime (Victims Assistance) Act.* In relation to "appeals" against that category of proceedings, the "appeal" is to be in accordance with *Local*

Court Rule 4.04. As has been mentioned, that "appeal" is by way of "hearing de novo".

41. Given the wide range of directions the court may give under *rule 37.09,* notwithstanding the statute provides only for "appeal", the context in which the appeal is brought leads me to the conclusion that the nature of the appeal is a rehearing of the matter on the materials before the Judicial Registrar with a discretion to admit fresh evidence in strict and exceptional circumstances envisaged by cases such a *Quaid.* The discretion exists by necessary implication given the context of the *Crime (Victims Assistance) Act* and the *Local Court Rules.* Given the whole scheme adopts a flexible approach to hearing matters, that philosophy ought to carry through to the appeal process unless there is an indication it should not. Although the beneficial nature of the *Crimes (Victims Assistance Act)* informs the interpretation of the Act, that principle is not particularly helpful in resolving this issue. I note it is important that I should not construe the statute restrictively: *(Victims of Crime Fund v Brown* (2003) 201 ALR 260). In my view provided the principles in *Quaid* and other like cases are followed, there should be a minimal risk of prejudice to opposing parties.

42. In conclusion, on this point, in my view the content of the right to appeal should be one of re-hearing on the materials before the Judicial Registrar with a limited discretion to hear fresh evidence. The conditions for the reception of such fresh evidence are that it must be reasonably clear that if the evidence had been available at the first trial and had been adduced, an opposite result would have been produced. Further, reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the first trial and the failure to produce the evidence must be properly explained.

Application of the Principles to the Circumstances of this Case

43. I have set out the arguments favouring reception of the appellant's evidence above at paras 15 – 17. Upon fuller reflection of the content of the supporting affidavits and the material before Judicial Registrar Fong Lim I am not persuaded that the proposed evidence of Mr Pikos would lead to a different result. I am not persuaded that the evidence could not have been placed before the Judicial Registrar. There is no mention of Pedros Pikos in the original affidavit of the Appellant sworn 5 November 2003. He does state that he was discharged into his brother-in law's care at paragraph nine of that affidavit. In the Appellant's statutory declaration annexed to his affidavit he makes a number of references to his brother-in-law who he does not name, including a reference to his neck chain being at his brother-in-law's place. The Surgical Discharge Summary annexed to the Appellant's affidavit also refers to the appellant being "discharged to his brother-in-law's house where he will have someone at home with him most of the time." There is also a notation in the hospital notes dated January 1 2002 at 7.30: "Friend Pedro took pts. Belongings including watch/gold coloured chain and mobile phone". I agree with the submission made by the respondent that on the materials currently before the court it would appear that the "brother-in-law" mentioned by the Appellant was in fact Mr Pikos. Mr Pikos' affidavit states (at paragraph 4) "I did not get involved because there seemed to be so many people around him." The material indicates that he was involved with the Appellant at the hospital and had direct contact with him. This reflects very negatively on the Appellant's application to have Mr Pikos' evidence admitted on appeal. Ms Saraglou's affidavit sworn 9 Septemeber 2002 (paras 8, 9 and 10) indicates that she or other practitioners at her firm discussed problems with the Appellant's case with him and that "…it is clear that the Appellant could not obtain details of witnesses prior to and up to the date of the hearing on 9 March 2004." It emerges that after the decision of the Judicial Registrar the Appellant was

spoken to about witnesses who did not come forward. Ms Saraglou's affidavit indicates the Appellant said he would make inquiries. On 5 April 2004 Mr Pikos contacted her firm stating "everybody knows who hit Scott, guy has ties with Hell's Angels". In my view all the evidence points to Mr Pikos being aware of the alleged incident and the Appellant's connection with Mr Pikos. Ms Saraglou's affidavit indicates the Appellant was aware of Mr Pikos but that Mr Pikos would not be prepared to name the assailant. He says he didn't name him because of ties with the Hell's Angels.

44. In terms of the name of the assailant, Ms Saraglou's affidavit indicates the Appellant had been told the name of the offender as he had been given the name by friends or acquaintances. He does not name those friends or acquaintances. There is no credible explanation of how or when the proposed fresh evidence came to light.

45. The language used to describe the alleged assault is equivocal. Pedros Pikos states in his affidavit sworn 5 April 2004 (para 3) that " it looked as if the arm was above Scott Gibson's head..". "I observed that some-one had attempted to punch Scott Gibson to the head area." At paragraph four he says "..it seemed that Scott Gibson had been given such a punch that he literally flew down the stairs.." I find the proposed fresh evidence unconvincing and of questionable credibility when assessed against the rest of the evidence. I am by no means persuaded that if admitted there would be a different outcome. Neither am I persuaded that the Appellant did not know of the existence of the proposed fresh evidence. I am not persuaded that the Appellant has exercised due diligence.

46. I dismiss the appeal. I will post this decision to the parties in order that they have some time to consider it. I will list the matter for the formal order and for any argument on costs on 13 April 2005 at 10.00 am.

47. I request that if the first respondent disagrees with the ruling on the nature of the appeal that it either seeks a review of that part of the decision or

considers advising government to amend the *Crimes (Victim's Assistance) Act* to clarify the intent on the nature of this type of appeal. I mention this in the hope of clarity for future cases.

Dated this 13th day of April 2005.

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J Blokland
STIPENDIARY MAGISTRATE