

CRIMINAL APPEALS

APPEAL FOLLOWING SUMMARY TRIAL

FROM THE MAGISTRATES' COURT

A) TO THE CROWN COURT

If the defendant pleaded guilty, an appeal lies from the magistrates' court to the Crown Court against sentence only. If the defendant pleaded not guilty, he can appeal to the Crown Court against either conviction or sentence or both (s108(1) Magistrates' Courts Act 1980).

An appeal to the Crown Court takes the form of a complete rehearing of the case with witnesses but without a jury.

Powers of the Crown Court

The Crown Court has power to confirm, reverse or vary the decision under appeal, or to remit the case with its opinion thereon to the magistrates' court which made the decision (s48(2) Supreme Court Act 1981). If the appeal is decided against the accused, the Crown Court has power to impose any sentence which the magistrates' court could have imposed. This power is wide enough to allow the imposition of a punishment which is more severe, as well as one which is less severe, than that actually inflicted by the magistrates' court (s48(4) Supreme Court Act 1981).

Further appeal

A further appeal lies, at the instance of either the defence or the prosecution, from the decision of the Crown Court by way of case stated to the Divisional Court of the Queen's Bench Division, but only on the grounds that the decision is wrong in law or was given in excess of jurisdiction (s28(1) Supreme Court Act 1981).

B) TO THE QUEEN'S BENCH DIVISIONAL COURT

As an alternative to appealing to the Crown Court, an appeal may sometimes be taken direct to the Queen's Bench Divisional Court by way of case stated from the magistrates' court. Either the defence or the prosecution may take advantage of this procedure where it is alleged that the justices' decision is wrong in law or was given in excess of jurisdiction (s111(1) Magistrates' Courts Act 1980).

Procedure

The procedure by way of case stated is set in motion when either the defendant or the prosecutor makes written application to the magistrates' court to 'state a case' for the opinion of the Divisional Court. The application must include a statement of the point of law on which the opinion of the Divisional Court is required. The case stated by the magistrates will usually include a statement of the original information laid against the defendant, the facts as found by the justices, the submissions of the parties, the cases cited (if any), the decision of the justices and the question for decision by the Divisional Court.

The magistrates can refuse to state a case only if in their opinion the application is frivolous. However, refusal to state a case may enable

the applicant to seek, by way of judicial review, an order to compel the magistrates to state a case (s111(5) and (6) Magistrates' Courts Act 1980).

An appeal to the Divisional Court is not a rehearing. The case is decided on the documents and after considering arguments on points of law put forward by counsel for the parties.

Powers of the Q.B.D.C.

The Divisional Court may affirm, reverse or amend the magistrates' decision, or remit the case to the magistrates' court with its opinion, or "make such other order" as it sees fit, eg order a re-hearing by the same or a different bench (s6 Summary Jurisdiction Act 1857).

C) POWERS OF MAGISTRATES' COURTS TO RE-OPEN CASES TO RECTIFY MISTAKES

A magistrates' court may vary or rescind a sentence or other order imposed or made by it when dealing with an offender if it appears to the court to be in the interests of justice to do so (s142 Magistrates' Courts Act 1980, as amended by s26 Criminal Appeals Act 1995)

D) TAINTED ACQUITTALS

Section 54 of the Criminal Procedure and Investigations Act 1996 provides that where a defendant has been acquitted of an offence, and another person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in proceedings which led to the acquittal, the High Court may grant an order quashing the acquittal. Proceedings may then be taken against the acquitted person for the offence of which he was acquitted (54(4)).

Where it appears to the court before which the person is convicted of an administration of justice offence that (a) there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted, and (b) it would not be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted, the court shall certify that it so appears (s54(2)).

An application may then be made to the High Court for an order quashing the acquittal if the four conditions in s55 are satisfied (s54(3)). The conditions for making an order, in s55, are:

- (1) It appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted.
- (2) It does not appear to the Court that, because of lapse of time for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted.
- (3) It appears to the Court that the acquitted person has been given a reasonable opportunity to make written representations to the Court.
- (4) It appears to the Court that the conviction for the administration of justice offence will stand.

FROM THE Q.B.D.C. TO THE HOUSE OF LORDS

A further appeal may be taken by either party from the Queen's Bench Divisional Court to the House of Lords. This is so whether the case reached the Divisional Court via the Crown Court or direct from the magistrates' court. But the appeal to the House of Lords will only be possible if:

- (a) the Divisional Court has certified that the case involves a point of law of general public importance; and
- (b) the Divisional Court or the House of Lords has given leave to appeal on it appearing that the point is one which ought to be considered by the House of Lords (s1 Administration of Justice Act 1960).

Procedure in the House of Lords

Every appeal to the House of Lords must be heard by at least three judges. In practice, five of them usually sit together to form a court. Each judge may deliver his own separate judgment, called a "speech" or "opinion" in the House of Lords. The hearing of the appeal is not a retrial. No oral evidence is given; the judges read all the documents in the case and listen to counsel's arguments. The majority decision prevails. The House of Lords may exercise the same powers as those exercised by the Court of Appeal (see Appeal Following Trial on Indictment).

APPEAL FOLLOWING TRIAL ON INDICTMENT

FROM THE CROWN COURT TO THE COURT OF APPEAL

A) APPEALS BY THE DEFENDANT

(i) Appeal against conviction

The defendant may appeal but only with leave of the Court of Appeal or trial judge against conviction in the Crown Court, to the Court of Appeal, criminal division, on a question of law. On a question of fact, or on a mixed question of fact and law, leave of the Court of Appeal is required, unless the trial judges has granted a certificate that the case is fit for appeal (s1 Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995).

Where leave is required it may be granted by a single judge of the Court of Appeal. If the single judge refuses leave, the appellant can have his application considered by the court itself (s31 Criminal Appeal Act 1968).

Procedure in the Court of Appeal

The actual appeal against conviction must be heard by at least three judges in the Court of Appeal. The hearing of appeal by the Court of Appeal is not a retrial. The appeal is determined after reading the documents in the case and hearing counsel's arguments. In the criminal division, normally only one judgement is delivered, either by the presiding judge or by another member of the court on his direction. Separate judgements can be delivered in the criminal division only where the presiding judge states that in his opinion the case involves a question of law on which it is convenient that separate judgements

should be pronounced. This rule is designed to prevent the regular recording of dissenting judgements on the criminal law where certainty is of especial importance.

Powers of the Court of Appeal

The Court of Appeal's powers to dispose of an appeal are mainly set out in s2(1) of the Criminal Appeal Act 1968 (as amended by the Criminal Appeal Act 1995). The Court of Appeal may allow an appeal against conviction if they think:

- (a) that the conviction is unsafe and
- (b) shall dismiss such an appeal in any other case.

Proviso Power

Section 2(1) also contained, before it was abolished by the Criminal Appeal Act 1995, what was known as the "proviso": "that the court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no miscarriage of justice has actually occurred." It seems from the decided cases that the proviso would be applied mainly where the Court of Appeal considered that a properly directed jury would have reached the same verdict of guilty; or where a material irregularity (such as the admission in evidence of an inadmissible confession or hearsay) did not produce a miscarriage of justice.

Substitute Convictions

The Court of Appeal has an additional power. Where the jury could have found the defendant guilty of some other offence, and must have been satisfied of the facts proving him guilty of that other offence, the court may substitute a conviction of that other offence and sentence the defendant accordingly (s3(1) Criminal Appeal Act 1968).

Fresh Evidence

At the hearing of an appeal, the Court of Appeal has power to admit fresh evidence (even though it was available but not called at the trial) if to do so is necessary or expedient in the interests of justice (s23(1) Criminal Appeals Act 1968). If certain conditions are satisfied the Court of Appeal is under a duty to admit the fresh evidence. The conditions are (a) that the evidence appears to be credible and (b) might render the defendant's conviction unsafe and would have been admissible at the trial, and (c) that there is a reasonable explanation for the failure to adduce it at the trial (s23(2) Criminal Appeal Act 1968, as amended by the Criminal Appeal Act 1995).

Retrial

The Court of Appeal also has a general power to order a retrial. This discretion is not limited to fresh evidence cases but is exercisable whenever the Court of Appeal allows an appeal against conviction under s2(1) of the Criminal Appeal Act 1968 and the interests of justice require the defendant to be retried (s7 Criminal Appeal Act 1968).

(ii) Appeal against sentence

The defendant may appeal against the sentence of the Crown Court, to the Court of Appeal with leave of the Court of Appeal (ss9(1) and 11(1) Criminal Appeal Act 1968).

Leave may be granted by a single judge of that court or, if he refuses it, by the full court. Leave of the Court of Appeal to appeal against sentence is not required if the Crown Court judge who passed the sentence grants a certificate that the case is fit for appeal against sentence (ibid.).

The actual appeal against sentence only may be heard by two judges. On an appeal by the defendant against sentence, the Court of Appeal cannot increase the sentence but is limited to confirming it, or reducing it, or varying it from one form of detention to another (s11(3) Criminal Appeal Act 1968). The Court of Appeal will not interfere with the discretion of the judge below and will only interfere if the sentence is wrong in principle or manifestly excessive.

B) THE ATTORNEY-GENERAL'S REFERENCE

The prosecution has no right of appeal to the Court of Appeal following an acquittal on indictment, not even on a point of law. There is, however, provision for a "reference" to be made by the Attorney-General in such a case. By s36(1) of the Criminal Justice Act 1972:

The Attorney-General may, if he desires the opinion of the Court of Appeal on a point of law which has arisen in the case, refer that point to the court, and the court shall, in accordance with this section, consider the point and give their opinion on it.

The acquittal of the defendant is not affected by the opinion of the Court of Appeal. The Attorney-General's reference to the Court of Appeal is a useful procedure for clearing up doubtful points in the criminal law, where certainty is particularly important. The Court of Appeal may refer the point of law to the House of Lords if of the opinion that it ought to be considered there (s36(3) Criminal Justice Act 1972).

C) THE A-G'S REFERENCE OF UNDULY LENIENT SENTENCES

The prosecution cannot appeal to the Court of Appeal against the sentence imposed on the defendant. However, by s36(1) of the Criminal Justice Act 1988:

If it appears to the Attorney-General ... that the sentencing of a person in a proceeding in the Crown Court has been unduly lenient ... he may, with the leave of the Court of Appeal, refer the case to them for them to review the sentencing of that person; and on such a reference the Court of Appeal may-

- (i) quash any sentence passed on him in the proceeding; and
- (ii) in place of it pass such sentence as they think appropriate for the case and as the court below had power to pass when dealing with him.

Leave must be applied for within 28 days from the day when the original sentence was passed. The Court of Appeal has power to increase or decrease the sentence. The time spent by the defendant in custody pending the outcome of the review is taken into account.

The term of any sentence of imprisonment imposed by the Court of Appeal as a result of the review begins to run, unless otherwise directed, from the time when it would have begun to run if passed originally by the Crown Court.

TAINTED ACQUITTALS

Section 54 of the Criminal Procedure and Investigations Act 1996 provides that where a defendant has been acquitted of an offence, and another person has been convicted of an administration of justice offence involving interference with or intimidation of a juror or a witness (or potential witness) in proceedings which led to the acquittal, the High Court may grant an order quashing the acquittal. Proceedings may then be taken against the acquitted person for the offence of which he was acquitted (s54(4)).

Where it appears to the court before which the person is convicted of an administration of justice offence that (a) there is a real possibility that, but for the interference or intimidation, the acquitted person would not have been acquitted, and (b) it would not be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted, the court shall certify that it so appears (s54(2)).

An application may then be made to the High Court for an order quashing the acquittal if the four conditions in s55 are satisfied (s54(3)). The conditions for making an order, in s55, are:

- (1) It appears to the High Court likely that, but for the interference or intimidation, the acquitted person would not have been acquitted.
- (2) It does not appear to the Court that, because of lapse of time for any other reason, it would be contrary to the interests of justice to take proceedings against the acquitted person for the offence of which he was acquitted.
- (3) It appears to the Court that the acquitted person has been given a reasonable opportunity to make written representations to the Court.
- (4) It appears to the Court that the conviction for the administration of justice offence will stand.

FROM THE COURT OF APPEAL TO THE HOUSE OF LORDS

A further appeal may be taken by either the defendant or the prosecutor from the Court of Appeal, criminal division, to the House of Lords. But this appeal will only be possible if:

- (a) the Court of Appeal has certified that the case involves a point of law of general public importance; *and*
- (b) the Court of Appeal or the House of Lords has given leave to appeal on it appearing that the point is one which ought to be considered by the House of Lords (s33(2) Criminal Appeal Act 1968).

Pending the outcome of the appeal in the House of Lords, the Court of Appeal has power to order that the defendant be detained or not be released except on bail (s37 Criminal Appeal Act 1968).

Procedure in the House of Lords

Every appeal to the House of Lords must be heard by at least three judges. In practice, five of them usually sit together to form a court. Each judge may deliver his own separate judgment, called a "speech" or "opinion" in the House of Lords. The hearing of the appeal is not a retrial. No oral evidence is given; the judges read all the documents in the case and listen to counsel's arguments. The majority decision prevails. The House of Lords may exercise the same powers as those exercised by the Court of Appeal.

CRIMINAL CASES REVIEW COMMISSION

Before 31 March 1997, any person convicted on indictment could at any time apply to the Home Secretary, under s17 of the Criminal Appeal Act 1968, asking him to refer the case for review by the Court of Appeal. Without such an application, the Home Secretary could still refer the case to the Court of Appeal at any time on his own initiative. The Home Secretary could refer the whole case or "any point arising in the case" (eg, the sentence imposed at first instance). It was possible for the Home Secretary to refer a case for review under this procedure even though there had already been an unsuccessful appeal. Although no such limitation was specified in s17 itself, the Home Office had a practice of referring cases only if there is fresh evidence or a new consideration of substance which might affect the safety of the conviction.

The Criminal Appeal Act 1995 repealed s17. The Criminal Cases Review Commission took over responsibility for referring possible miscarriages of justice to the Court of Appeal, on March 31 1997. The powers of the Commission (under the 1995 Act) include the following:

- (a) At any time to refer to the Court of Appeal the conviction and/or sentence of any person tried in the Crown Court (s9).
- (b) At any time to refer to the Crown Court the conviction and/or sentence of any person tried by a magistrates' court (s11).
- (c) To investigate matters referred to it by the Court of Appeal (s23A, see below).
- (d) To consider any matter referred to it by the Home Secretary in connection with the exercise of the prerogative of mercy (s16).

On an appeal against conviction the Court of Appeal is able to direct the Commission to investigate and report on any matter if: (i) the matter is relevant and ought to be resolved before the case is decided; (ii) the matter is likely to be resolved by the court as a result of the investigation; and (iii) the matter cannot be resolved without an investigation (s23A).