Chapter 14: Criminal Case Reviews and Appeals

In this chapter an examination is made of the criminal law review and appeal processes available in the Solomon Islands. Simply stated, an appeal is an application to a higher court disputing the decision taken by a lower court and asking for the decision to be changed. The power to appeal is provided by statute.[1]

This text commenced by proposing that fact gathering, analysis of the facts and the application of the law to the facts was a central part of the criminal law trial process. The need to focus on this approach is equally applicable for practitioners when they engage with the review and appeal stage of the trial process.

Preparing for an Appeal

A critical part of the appeal process is the preparation of the appeal. It is necessary to read and analyse the evidence given at trial and the rulings of the judicial officer during the trial, and consider the basis of any objections and the final judgment. It is also appropriate to read the prosecution brief of evidence and, if acting for the accused/appellant, any written instructions.

Some of the issues that need to be considered include:

1. Was the accused competently represented? This may be able to be determined while considering some of the matters listed hereunder.

2. Was the available evidence as identified from statements, records of interview, and any reports, received into evidence at trial? If available evidence was not given before the tribunal of fact, are there reasons available on the record for this fact?

3. Were any objections to evidence properly considered by the judicial officer?

4. Does the delivered judgment show that the judicial officer gave appropriate consideration to the facts? For example, does the judgment reveal any factual errors, or are there significant factual matters that appear to have been overlooked?

5. Does the delivered judgment show that the judicial officer applied the correct law? For example, in the case of murder were all the elements of the offence identified and the facts relevant to them linked to each

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[1] Griffith CJ in *Sweeney v Fitzhardinge* [1906] HCA 73; (1906) 4 CLR 716,725, commented that, 'There is no doubt that, as a general rule, an appeal will not lie from a court unless an appeal is given by statute, and usually, when a new court is created and no appeal is given, prima facie, no appeal will lie'.

element? or if self-defence was raised did the judicial officer correctly apply the law?

6. In the case of a sentence appeal, did the judicial officer show that the facts were understood, take into account mitigating factors, apply relevant sentencing principles, and consider the range sentences from similar previous cases?

In the case of magistrates, or a judge sitting alone when deciding a case, it is necessary for them to identify the law that has been applied in order that any appeal court can determine if the judge or magistrate has misdirected himself or herself leading to a miscarriage of justice: see *Ion;*[2] *Fleming v R*.[3]

There is often reticence on the part of new practitioners to object at a trial where the magistrate or judge appears to be indicating that they have a view that may be different to the advocate's. In such circumstances it should be remembered that an appeal court could take the absence of objection to mean that the advocate made a tactical decision not to object and dismiss the ground of appeal.

It should also be remember that a robust defence of a client's interests is required, and the advocate is also an officer of the court who should assist the court to avoid falling into error. Where an objection is made and overruled it is important to make a record of the objection and the ruling. This is especially the case in the Magistrate's Court where the evidence at trial is not recorded. It may also be necessary for the legal representative to prepare an affidavit for the appeal that includes details of what happened during the relevant part of the trial.

In the case of the defence it is always important to have a conference with the client to advise on the merits of any appeal and to get instructions about whether to proceed. The defence practitioner acts on instructions and it is necessary to advise the client on the merits of the appeal in a balanced way that identifies the chances of success based on the evidence. Where instructions are given to run an appeal that has no merit there is no requirement to accept those instructions: the client can be referred to another practitioner for advice. In rare cases it may be that consideration needs to be given to an appeal if fresh evidence comes to light.

Where the defence appeals a sentence decision it is open for the appeal court to increase the sentence. This is a matter that should be discussed with a client prior to lodging an appeal. However, if the court intends to increase the sentence it should give an indication that this may happen and give the appellant an opportunity to withdraw the appeal: *Parker*.[4]

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2 (1996) 89 A Crim R 81, 85-86.
3 [1998] HCA 68.
4 (1993) 65 A Crim R 209.

In the case of an appeal by the prosecution or the defence it is essential that the practitioner be conversant with the relevant law. This will require researching the law for new cases and knowledge.

If it is intended to appeal a case to the Court of Appeal then reference should be made, *inter alia*, to the Court of Appeal Rules and the forms which are attached to the Rules and the *Court of Appeal Act*. The procedures to be followed to progress an appeal to hearing vary from time to time and reference should be made to directions given by the Registrar to find current practice. However, as in the case of an appeal to the High Court it will be necessary to file written submissions and provide a list of authorities. In the Court of Appeal it is also the practice to provide copies of the cases that are being relied upon.

Appeals from the Magistrate's Court

The *Magistrates' Court Act* provides a starting point when generally considering criminal appeals. Most criminal cases are heard in the Magistrates' Court and most appeals also come from this court. In the first instance appeals from the Magistrates' Court are made to the High Court.

Stated Cases

Section 43 of the *Act* allows for a stated case to be taken to the High Court. The section states:

> **Power to reserve question of law for the opinion of the High Court**
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> **43.** In addition to, and without prejudice to, the right of appeal conferred by this Act, a Magistrate may reserve for the consideration of the High Court on a case to be stated by him any question of law which may arise on the trial of any suit or matter, and may give any judgment or decision subject to the opinion of the High Court, and the High Court shall have power to determine, with or without hearing argument, every such question.

The section allows a magistrate to refer a question of law to the High Court. However, where an accused is represented it is usual for the defence lawyer to ask the magistrate to state the case. A prosecutor can also ask a magistrate to state a case. This occurs after a ruling has been made that the legal practitioner considers is wrong. The question of law to be referred can be done while the case is still proceeding, although in such cases it is not unusual to have an adjournment until the question is decided.

An example where an accused is represented is where a legal representative asks a magistrate to state a case and the magistrate decides to enter the fray and cross-examine the accused: a task that is properly the role of the prosecutor.[5] In such a case the defence lawyer should object and ask the magistrate to state the case. The facts of the case need to be provided, that is

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[5] This situation arose in the case of *R v Mede* [2010] SBCA 4 although at stated case was not sought and the case proceeded to appeal following conviction.

those facts relevant to the decision to cross-examine and the question asked by the magistrate: 'Was I correct to cross-examine the accused?' The High Court in answering the question is declaring what the law is.

Section 307 of the *Criminal Procedure Code*, which is included below, sets out in detail all the information a magistrate should provide to the High Court when stating the case.

In most cases it is probably easier at the end of a case to appeal the conviction or acquittal. The difficulties with case stated appeals were summarised by Street CJ in *Collins v State Rail Authority of New South Wales* when he stated:

> It should be recognised at the outset that a stated case is well-known as a cumbersome and often unsatisfactory means of bringing a matter up for consideration on appeal. There are occasionally issues of law which can conveniently be dealt with through this appellate procedure. In general, however, it is a procedure which is fraught with difficulties and the present case is no exception from that generality. This Court does not have the benefit of any distillation by the trial judge of the issues of law that emerged for decision. Nor does it have the benefit of an analysis by the trial judge of the significance of the various findings of fact upon the ultimate issues of fact and law that must be resolved… .'[6]

The *Criminal Procedure Code* contains a number of sections relevant for those who wish to proceed by way of a stated case. The sections are 298 to 309.

Section 298 of the *Code* allows for a case to be stated within one month from the date of determination of the magistrate. It states:

> **Case stated by Magistrate's Court**
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> **298.** (l) After the hearing and determination by any Magistrate's Court of any summons, charge or complaint, either party to the proceedings before the said Magistrate's Court may, if dissatisfied with the said determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within one month from the date of the said determination, including the day of such date, to the said Magistrate's Court to state and sign a special case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court.
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> (2) Upon receiving any such application the Magistrate shall forthwith draw up the special case and transmit the same to the Registrar of the High Court together with a certified copy of the conviction, order or judgment appealed from and all documents alluded to in the special case and the provisions of section 289 shall thereupon apply.

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6 (1986) 5 NSWLR 209, 211.

Section 299 allows for the provision of the stated case to the appellant. It states:

> **Appellant entitled to copy of stated case**
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> **299.** The appellant shall be entitled upon payment of a fee of five cents for every folio of seventy-two words to obtain from the registrar of the High court a copy of the stated case:
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> Provided that no charge shall be made for a copy of the stated case supplied to the Director of Public Prosecutions under this section.

Section 300 of the *Code* allows the Registrar of the High Court to set the case down for hearing. It states:

> **Notice of time and place of hearing**
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> **300.** Upon receipt of the stated case the Registrar of the High Court shall set down the case for hearing and shall cause notice to be given to the appellant or his advocate, and to the respondent and his advocate, of the time and place at which such appeal will be heard, and shall furnish the respondent or his advocate with a copy of the stated case.

Section 301 of the *Code* allows for a magistrate to refuse an application which is frivolous, but assumes an application from the Director of Public Prosecutions cannot be frivolous. It states:

> **Magistrate may refuse case when he thinks application frivolous**
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> **301.** If the Magistrate be of opinion that the application is merely frivolous, but not otherwise, he may refuse to state a case, and shall, on the request of the appellant, sign and deliver to him a certificate of such refusal:
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> Provided that the Magistrate shall not refuse to state a case when the application for that purpose is made to him by or under the direction of the Director of Public Prosecutions, who may require a case to be stated with reference to proceedings to which he was not a party.

Sections 302, 303, 304 and 305 of the *Code* allow an appeal from a decision under section 301 and govern the orders that can be made. They state:

> **Procedure on refusal of Magistrate to state case**
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> **302.** When a Magistrate has refused to state a case as aforesaid it shall be lawful for the appellant to apply to the High Court within one month of such refusal, upon an affidavit of the facts, for a rule calling upon such Magistrate and also upon the respondent to show cause why such case should not stated, and the High Court may make the same absolute or discharge it, with or without payment of costs, as to the

court shall seem fit, and the Magistrate, upon being served with such rule absolute, shall state a case accordingly.

High Court to determine the questions on the case; its decision to be final

303. (1) The High Court shall (subject to the provisions: of the next succeeding section) hear and determine the question or questions of law arising on the case stated, and shall thereupon reverse, affirm or amend the determination in respect of which the ease has been stated, or remit the matter to the Magistrate's Court with the opinion of the High Court thereon, or may make such other order in relation to the matter, and may make such order as to costs, as to the court may seem fit, and all such orders shall be final and conclusive on all parties:

Provided that no Magistrate who shall state and deliver a case in pursuance of this Part, or bona fide refuse to state one shall be liable to any costs in respect or by reason of such appeal against his determination or refusal.

(2) Any costs awarded under this section shall be recoverable in the manner provided by section 28 of the Penal Code.

Case may be sent back for amendment or rehearing

304. The High Court shall have power, if it thinks fit:

(a) to cause the case to be sent back for amendment restatement, and thereupon the same shall be amended or restated accordingly, and judgment shall be delivered after it has been so amended or restated;

(b) to remit the case to the Magistrate's Court for re hearing and determination with such directions as it may deem necessary.

Orders of the High Court to be certified to lower court

305. (1) When a stated case is decided by the High Court it shall certify its judgment or order to the court in relation to whose determination the case has been stated.

(2) The court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and shall take such steps as may be necessary to comply with or enforce such judgment or order.

Section 306 of the *Code* removes the right of appeal where a stated case has been sought. It states:

Appellant may not proceed both by case stated and by appeal

306. No person who has appealed under section 283 shall be entitled to have a case stated, and no person who has applied to have a case stated shall be entitled to appeal under section 283.

Section 307 of the *Code* sets out in some detail the information a magistrate must provide. It states:

Contents of case stated

307. A case stated by a Magistrate shall set out-

(a) the charge, summons, information or complaint;

(b) the facts found by the Magistrate's Court to be admitted or proved;

(c) any submission of law made by or on behalf of the complainant during the trial or inquiry;

(d) any submission of law made by or on behalf of the accused during the trial or inquiry;

(e) the finding and, in the ease of conviction, sentence of the Magistrate's Court;

(f) any question or questions of law which the Magistrate or any of the parties may desire to be submitted for the opinion of the High Court;

(g) any question of law which the Director of Public Prosecutions may require to be submitted for the opinion of the High Court.

Section 308 of the *Code* allows for one judge of the High Court to hear the case unless otherwise decided by the Chief Justice. It states:

Constitution of the court hearing case stated

308. A case stated for the opinion of the High Court shall be heard by one judge unless the Chief Justice shall otherwise direct.

Section 309 of the *Code* allows the High Court to extend the time for a stated case. It states:

High Court may enlarge time

309. The High Court may, if it deems fit, enlarge any period of time prescribed by section 298 or 302.

Stated Case to Court of Appeal

A High Court judge can also reserve a question of law on a case stated for a decision by the Court of Appeal where it appears to be a matter of general public importance. Section 37 of the *Court of Appeal Act [Cap 6]* provides for this type of stated case. Section 37 provides:

> **Power to reserve question of law for the decision of the Court of Appeal**
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> **37.** In addition and without prejudice to the right of appeal conferred by this Part of this Act, a judge of the High Court, at the conclusion of the hearing by him of any appeal or case stated from a Magistrate's Court in any criminal cause or matter, may reserve, on a case stated by him, any question of law which seems to him to be of general public importance and which may have arisen during such hearing, for consideration by the Court of Appeal, and shall give his judgment subject to the opinion of the Court of Appeal on such point of law. The Court of Appeal shall have power after hearing the appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears, to determine every such question and shall notify the High Court of its decision, and the judge shall make such order, conformable with the decision of the Court of Appeal, as may be necessary:
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> Provided that in the event of such judge dying or departing from Solomon Islands or being otherwise incapacitated from acting, another judge may make such order.

High Court Procedural Discretion

Section 44 of the *Magistrates' Court Act* gives a wide discretion for the High Court to entertain appeals from a Magistrate's Court.

Section 44 sates:

> **Discretionary power of High Court to entertain appeals**
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> **44.** Notwithstanding anything hereinbefore contained, the High Court may entertain any appeal from a Magistrate's Court, on any terms which it thinks just.

Section 45 of the *Act* empowers the High Court to receive appeals from the Magistrates' Court subject to any other Act and the Rules of the Court made under section 90 of the *Constitution*. Section 45 of the *Act* states:

> **Criminal appeals**
>
> **45.** Appeals in criminal causes shall lie to the High Court from any Magistrate's Court in accordance with any other Act for the time being in force relating to criminal procedure and of any Rules of Court made under the provisions of section 90 of the Constitution.

Section 90 of the *Constitution* states:

> **Rules of court**
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> **90.** There shall be a Rules Committee, consisting of the Chief Justice, the President of the Court of Appeal and the Attorney-General (who shall constitute a quorum) and such other persons as the Governor-General, acting after consultation with the Chief Justice, may appoint, which may make rules of court regulating the practice and procedure of the High Court and the Court of Appeal, prescribing the fees to be paid in respect of any proceeding and generally for making provision for the proper and effectual exercise of the jurisdiction of the High Court and the Court of Appeal, including the procedure for the making and hearing of appeals to the High Court from subordinate courts and for the making and hearing of appeals to the Court of Appeal from the High Court
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> Provided that rules regulating the admission of legal practitioners to practise as barristers and solicitors or in either of these capacities, or prescribing or affecting the amount of any fees or the recovery thereof, shall not come into operation unless approved, either before or after being made, by Parliament.

Although the discretion to procedurally deal with an appeal from a magistrate's decision is wide, there are accepted approaches to its exercise. It would, for example, be unusual in the Solomon Islands for a decision of a magistrate, whether it is a conviction appeal or a sentence appeal, to be dealt with by way of an appeal *de novo*, which requires a complete rehearing of the case. However, in the event that it is necessary for the prosecution to prove its case on appeal it may need to do so by producing evidence to prove the charge in the usual way: *Sweeney v Fitzharding*;[7] *R v Longshaw*.[8]

Review of Decisions taken in the Magistrates' Court

Part VI of the *Magistrates' Court Act* provides for the review of decisions of magistrates by the High Court. It contains a number of sections that are designed to allow decisions of magistrates to be changed. This Part is probably most applicable where an accused was not represented and there has been a clear error of law that has led to a miscarriage of justice, or a sentencing decision that is manifestly excessive or mercifully weak to the extent that accepted sentencing principles have been abrogated.

Section 46 of Part VI of the *Act* requires every magistrate to send a list of completed criminal cases to the Chief Justice at the end of each month. It states:

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7 [1906] HCA 73; (1906) 4 CLR 716.
8 (1990) 20 NSWLR 554.

Monthly lists of criminal cases heard to be sent to a Judge

46. At the end of every month, every Magistrate shall send to the Chief Justice, or to such Judge as the Chief Justice shall from time to time designate for such purpose, either generally or in respect of any particular district, in such form as the Chief Justice shall from time to time direct, a complete list of all criminal cases decided by or brought before such Magistrate during that month, setting out the names, sex, and age of each defendant, the offence with which he was charged, such defendant's plea thereto and, if convicted, the date of the conviction, and the sentence or order in full, and a complete list of all civil cases, setting out the names of the parties and the substance of the claim or remedy sought and of the decision or order.

Section 47 of the *Act* outlines the procedures that are to be followed when cases are being reviewed. The review process is excluded where an appeal has been lodged. There is also a three month time limit to review cases; and if there is an order that prejudices a person under consideration the person or his or her legal representative has a right to be heard. Section 47 states:

Power of Judges to revise decisions of Magistrates

47. (1) Upon receipt of the list of criminal cases referred to in the preceding section the Judge receiving the same may, if he thinks fit, call for a copy of the record of any case included therein and, either without seeing such record or after seeing such record, as he may determine, and either without hearing argument or after hearing argument, as he may determine, may:

(a) subject to any enactment specifying any penalty, impose, reduce, enhance or alter the nature of any sentence:

Provided that:

(i) no sentence shall be imposed which the Magistrate's Court could not have imposed; and

(ii) no order shall be made under this paragraph to the prejudice of any person unless he has had an opportunity of being heard either personally or by counsel or solicitor in his defence;

(b) subject to any enactment requiring a particular order to be made, make, set aside or modify an order in such form as he thinks fit; or

(c) set aside the conviction, in which case the person convicted if under detention shall be forthwith set at liberty, or in the case of a fine such fine, if already paid, shall be refunded to the person fined, or if security has been required and given, he shall be freed from such security; or

(d) set aside the conviction and convict the accused person on the evidence of any offence of which he has not been specifically acquitted and of which he might have been convicted and sentence him accordingly; or

(e) set aside the conviction and substitute a special finding to the effect that the person convicted was guilty of the act or omission charged, but was insane so as not to be responsible for his action at the time when he did the act or made the omission, and order such person to be confined, until Her Majesty's pleasure shall be known, in a mental hospital, prison or other suitable place of custody; or

(f) set aside the conviction and order a new trial or a preliminary enquiry before the Magistrate who made the conviction in question or before any other Magistrate; or

(g) order further evidence to be taken either generally or on some particular point by the Magistrate who passed the sentence or by any other Magistrate, and order in the meantime any person who shall have been convicted and imprisoned to be liberated on bail or on his own recognisance; and

(h) make such other order as justice may require and give all necessary and consequential directions:

Provided always that when a person convicted shall have appealed against such conviction or any sentence imposed in respect thereof, or shall have applied for a case to be stated by the Magistrate under the provisions in that behalf contained in any other Act for the time being in force relating to criminal procedure and of any Rules of Court made under the provisions of section 90 of the Constitution, the Judge shall not exercise the powers conferred by this section.

(2) Upon receipt of the list of civil cases referred to in the preceding section the Judge receiving the same may, if he thinks fit, call for a copy of the record of any case included therein, and, either without seeing such record or after seeing such record, as he may determine, and either without hearing argument or after hearing argument, as he may determine, may alter or set aside the order of the Magistrate's Court, and may vary such order as justice may require and give all necessary and consequential directions.

(3) When action upon a list as prescribed in the preceding subsections of this section is complete or if the Judge shall decide to take no such action, the Judge shall direct that the list be filed; but such direction shall not have the effect of preventing him or his successor from subsequently taking any action prescribed in that subsection if he shall think fit:

> Provided that three months after the last day of the month to which such list relates the Judge shall become functus officio in respect of all cases upon the list in respect of which he shall not up till then have taken any action.
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> (4) Proceedings under this section may be taken by the Judge of his own motion or on the petition of any person interested praying for the exercise of the revisional powers of the High Court and such powers may be exercised notwithstanding that the relevant monthly list shall not have been transmitted to or received by the Judge.
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> (5) In respect of any monthly list, the Chief Justice shall have and exercise similar powers to those conferred on any Judge or Judges notwithstanding any designation made under section 46.
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> (6) Nothing in this section contained shall be deemed to authorise the conversion of a finding of acquittal into one of conviction.

Section 48 allows a judge to require a magistrate to provide a report on a case. It states:

> **Reports by Magistrates to Judges**
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> **48.** Any Judge may, whenever he shall so think fit to do, require any Magistrate to render to him, in such form as he shall direct, a report of any case civil or criminal which may be brought before him and such report shall be rendered accordingly.

Conviction and Sentence Appeals to the High Court: Provisions of the Criminal Procedure Code

Section 283 of the *Criminal Procedure Code* allows any party to appeal a magistrate's judgment, except only the Director of Public Prosecutions can authorise an appeal following an acquittal. The section also requires a magistrate to advise an unrepresented accused of their right of appeal, allows appeals on fact as well as law, and gives the Director of Public Prosecution standing where proceedings were instituted by a public prosecutor.[9] Section 283 of the *Act* states:

> **Appeal to High Court**
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> **283.** (1) Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a Magistrate's Court in any criminal cause or matter to which he is a party may appeal to the High Court against such judgment, sentence or order:
>
> Provided that no appeal shall lie against an order of acquittal

[9] "Public prosecutor" means any person appointed as such under section 71 and includes the Director of Public Prosecutions, and any other legal officer, police officer or other person acting under the direction of the Director of Public Prosecutions: Section 2 *Criminal Procedure Code*.

except by, or with the sanction in writing of, the Director of Public Prosecutions.

(2) When a person convicted on trial by a Magistrate's Court is not represented by an advocate he shall be inform by the Magistrate of his right of appeal at the time when sentence is passed.

(3) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(4) For the purposes of this Part the extent of a sentence shall be deemed to be a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor.

Limitations on Appeals

Section 284 of the *Criminal Procedure Code* places some limits on an appeal after a person has pleaded guilty,[10] disallows pleas where a fine does not exceed $10.00 and no substantive sentence has been passed for default, and disallows pleas where the person was ordered to keep the peace. The *Penalties Miscellaneous Amendments Act 2009* increased all $10.00 fines in the *Penal Code* to either $500.00 or $1,000.00. There does not appear to have been an amendment of section 284 to take account of this fact. Section 284 states:

Limitation of appeal on plea of guilty and in petty cases

284. (1) No appeal shall be allowed in the case accused person who has pleaded guilty and has been convicted of such plea by a Magistrate's Court, except as to the extent or legality of the sentence.

(2) Save with the leave of the High Court, no appeal shall be allowed in a case in which a Magistrate's Court has passed a sentence of a fine not exceeding ten dollars only, notwithstanding that a sentence of imprisonment has been passed by such court in default of the payment of such fine, if no substantive sentence of imprisonment has also been passed.

(3) No conviction or sentence, which would not otherwise be liable to appeal, shall be appealable merely on the ground that the person convicted is ordered to find security to keep peace.

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[10] See Chapter 14 for an examination of changes of plea and the need for a plea of guilty to be properly based in truth and fact.

Petitions[11] and Time Limits

Section 285 of the *Code* requires appeals to be lodged by way of petition within fourteen days of the magistrate's decision, unless 'good cause' can be shown to extend the limitation period. It states:

> **Appeal to be by way of petition**
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> **285.** (1) Subject to the provisions of any Rules of Court every appeal shall be in the form of a petition in writing signed by the appellant or his advocate and shall be presented to Magistrate's Court from the decision of which the appeal is lodged within fourteen days of the date of the decision appealed against:
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> Provided that the Magistrate's Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.
>
> (2) For the purposes of this section and without prejudice its generality "good cause" shall be deemed to include-
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> (a) a case where the advocate engaged by the appellant was not present at the hearing before the Magistrate's Court and for that reason requires further time for the preparation of the petition;
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> (b) any case in which a question of law of unusual difficulty is involved;
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> (c) a case in which the sanction of the Director of Public Prosecutions is required by virtue of section 283.

It is not uncommon for appeals to be filed out of time, and it is therefore necessary for practitioners to be aware of the principles involved where leave is being sought to extend the time, especially where an extension of time is being opposed. Section 54 of the *Interpretation and General Provisions Ac*t provides a general principle as follows:

> **54.** (1) Where no time is prescribed in an Act for the doing of any act or thing, it may or shall be done, as the case may be, with all convenient speed and as often as the occasion arises.
>
> (2) Where a court or an authority is empowered by an Act to extend the period of time within which any act or thing is required or permitted to be done or taken, the power may be exercised by the court or the authority notwithstanding that the period of time has expired when the power is so exercised.

The principles applicable to applications for extension of time are reasonably well settled. In *R v Faulkner (No 2)* Chief Justice Daly

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[11] 'The action of formally asking or humbly requesting; an entreaty, a supplication. . . from Latin petition*(n)* – lay claim to, ask, seek: Shorter Oxford English Dictionary.

concluded that an extension can only be granted where substantial grounds are provided for the delay.[12] The Chief Justice recognised with approval the following passage from *The Queen v Brown*:

> When the time prescribed by the Act has expired the party convicted has lost his right to appeal, and it is for the Court to say whether, taking all the circumstances into account, it is in the interests of justice that he should be permitted to institute and pursue his appeal…
>
> It seems to us that, if we have jurisdiction to sanction the institution of an appeal at this stage, then, in the exercise of our discretion, we ought not to do so unless we are satisfied that there is, at the least, grave reason to apprehend that justice has actually miscarried, that is to say, that the conviction was contrary to the truth and justice of the case.[13]

In *The Queen v William Adair* the Queensland Court of Appeal considered an application for extension of time in relation to an appeal by the Attorney-General against sentence.[14] The appeal was filed more than 4 months out of time. The only explanation for the delay was that the Attorney-General had changed his mind in respect of the appeal based on further advice. The Court regarded that as an unsatisfactory explanation for the delay. The Court found that two separate requirements must ordinarily be established in order for an extension of time to be granted: first, there must be a reasonable explanation for the delay and second there must be reasonable prospects of success if the application was granted. In this case, the extension of time was refused even though there were reasonable prospects of the appeal being successful given that the original sentence was beyond the statutory power of the sentencing magistrate.

In *R v Sunderland* it was held that an extension of time to appeal or to apply for leave will not be granted as a matter of course but only where there are substantial grounds for doing so.[15] In *Sunderland's* case there had been a delay of six months, and the court held that very exceptional circumstances would have to be advanced before an extension of time to appeal would be granted.

The Court of Appeal in *R v Alex Bartlett* stated:

> The Director would have to discharge the heavy onus of showing good cause in order to prosecute an appeal against acquittal lodged after that time.
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> In the circumstance of this case the Director has not discharged the onus of showing that the appeal should be allowed to proceed notwithstanding a delay of 8 months between acquittal and lodging its notice of appeal,

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12 *R v Faulkner* (No 2) [1983] SILR 282.
13 *The Queen v Brown* (1963) S.A.S.R 190, 191, 193.
14 *The Queen v William Adair* [1997] QCA 185.
15 R v Sunderland (1927) 28 SR (NSW) 26.

> particularly where no satisfactory explanation for that delay has been advanced. It would be unconscionable to allow the appeal to proceed.[16]

Section 286 of the *Criminal Procedure Code* requires the grounds of appeal to be contained in the initiating petition; allows for an unrepresented accused to have a petition prepared under the supervision of the Magistrate's Court; allows for an unrepresented accused who is in prison to have a petition prepared by the officer in charge; allows for additional grounds to be filed at any time up to three days before the hearing; allows for co-accused to have joint petitions and for them to be heard together; requires leave if an appellant gives evidence about a matter not included in the grounds; and allows an appellant or his advocate to peruse the original documents. Section 286 of the *Code* states:

> **Form and contents of petition**
>
> **286.** (1) Every petition shall contain in a concise form the grounds upon which it is alleged that the Magistrate's Court from the decision of which the appeal is lodged has erred.
>
> (2) If the appellant is not represented by an advocate the petition may be prepared by or under the directions of the Magistrate's Court.
>
> (3) If the appellant is in prison custody and is not represented by an advocate the petition may be prepared by the officer in charge of the prison and forwarded by him to the Magistrate's Court.
>
> (4) Additional grounds of appeal may be filed by leave of the High Court at any time not later than three days before the date fixed for the hearing of the appeal in accordance with section 289.
>
> (5) Where two or more persons have been jointly tried and convicted and their interests do not conflict one petition of appeal may be presented on behalf of all of them:
>
> Provided that in such a case the High Court may hear the appeals separately or together, as seems just.
>
> (6) Except by leave of the High Court it shall not be lawful for appellant on the hearing of the appeal to allege or give evidence on any ground of appeal not included in the petition or in the additional grounds, if any, filed under subsection (4).
>
> (7) If the case is one which requires the leave of the High Court under section 284 the application for leave to appeal shall be endorsed on the petition.
>
> (8) For the purpose of considering or preparing a petition of appeal a person entitled to appeal or his advocate or an officer in charge of a prison shall be entitled to peruse the original record of the

[16] (2009) SICOA 5.

proceedings at such time as the Clerk of Court or the Magistrate may allow.

Section 287 of the *Code* requires a magistrate to forward the appeal to the Registrar of the High Court. It states:

Petition to be forwarded to the High Court

287. Upon receiving petition of appeal the Magistrate shall forthwith forward the petition of appeal together with the record of the proceedings to the Registrar of the High Court.

Petitions appealing a magistrate's decision are filed in the Magistrate's Court not the High Court. It is appropriate for legal practitioners to check that the Magistrate's Court forwards the petition and other relevant documents to the High Court within a reasonable time.

Section 288 of the *Criminal Procedure Code* allows for the summary dismissal of an appeal where a judge is satisfied that there are insufficient grounds for an appeal. It states:

Summary dismissal of appeal

288. (1) When the High Court has received the petition of appeal and the record of proceedings a judge shall persue [sic] the same.

(2) Where an appeal is brought on the grounds that the decision is unreasonable or cannot be supported having regard to the evidence or that the sentence is excessive and it appears to the Judge that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily dismissed by an order of the Judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint.

(3) Wherever an appeal is summarily dismissed notice of such dismissal shall forthwith be given by the Registrar of the High Court to the appellant or his advocate.

Section 289 sets out the steps to be taken by the Registrar of the High Court upon receiving an appeal from the Magistrate's Court. It states:

Notice of hearing

289. If the High Court does not dismiss the appeal summarily the Registrar shall-

(a) enter the appeal for hearing;

(b) serve a notice of hearing on the parties;

(c) supply the respondent with a copy of the petition and a copy of the judgement or order appealed against;

(d) except when the appeal is against sentence only, supply the respondent with a copy of the proceedings;

(e) where additional grounds of appeal are filed by the appellant under the provisions of subsection (4) of section 286, serve notice on the respondent of such filing and supply the respondent with a copy of the document containing such additional grounds of appeal.

Appeals to the Court of Appeal: The Court of Appeal Act

The *Court of Appeal Act* [Cap 6] establishes the Court of Appeal, which is the final appeal court in the Solomon Islands. Section 3 of the *Act* states:

Name of Court and general jurisdiction

3. (1) The Court of Appeal shall be called "the Solomon Islands Court of Appeal".

(2) The Court shall have-

(a) power and jurisdiction to hear and determine all appeals which lie to the Court by virtue of the Constitution, this Act or of any other law for the time being in force;

(b) all such powers and jurisdiction as are or may from time to time be vested in the Court under or by virtue of the Constitution, this Act or any other law for the time being in force.

Section 6 of the *Act* provides for not less than three judges to determine cases, except in certain circumstances where two judges can preside with a split decision resulting in the dismissal of the case, otherwise the majority opinion prevails. Section 6 states:

Number of judges

6. (1) For the purpose of hearing and determining appeals the Court of Appeal shall be summoned in accordance with directions given by the President and the Court shall be duly constituted if it consists of not less than three judges, but provision may be made by rules of court for the hearing and determining of special classes of cases by two judges of the Court of Appeal.

(2) Notwithstanding the provisions of the preceding subsection, the Court of Appeal shall be duly constituted if it consists of not less than two judges in any case or cases where the President is of opinion that it is impracticable to summon a Court of three judges.

(3) In all appeals and applications brought before the Court of Appeal the determination of any question shall be according to the opinion of the majority. If on the hearing of an appeal or application the Court of Appeal is equally divided the appeal or application as the case may be shall be dismissed.

Section 7 of the *Act* allows the President of the court to determine sitting times and places. The court usually sits twice per year, but has sat more when the demand was present. Section 7 states:

Sessions of Court of Appeal

7. The Court of Appeal shall sit at such places from time to time as the President may determine.

Section 9 of the *Act* follows the common law tradition and excludes a judge from hearing an appeal from his own judgment. It states:

Judges not to sit on appeals from their own decisions

9. A judge of the Court of Appeal shall not sit as a judge on the hearing of an appeal from any order, judgment or decision made by himself or on the hearing of an appeal against a conviction or sentence if he was the judge by or before whom the appellant was convicted.

Right of Appeal in Criminal Cases - Questions of Law and Fact

Part IV of the *Court of Appeal Act* governs appeals in criminal cases. Section 20(a) of the *Act* allows for an appeal to the Court of Appeal from a conviction appeal in the High Court on questions of law alone. Section 20(b) allows for an appeal with the leave of the Court of Appeal or with the certificate of the judge on a question of fact or mixed law and fact. Leave of the Court of Appeal is required for a sentence appeal unless it is a sentence fixed by law: section 20(c). Section 20 states:

Right of appeal in criminal cases

20. A person convicted on a trial held before the High Court of Solomon Islands may appeal under this Part of this Act to the Court of Appeal-

(a) against his conviction on any ground of appeal which involves a question of law alone;

(b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and

> (c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.

A question of law involves a question that is capable of resolution by applying legal principle. A question of fact involves resolution by finding fact or drawing inferences from facts. The distinction between fact and law and mixed fact and law are considered in some detail in the Australian High Court case of *Da Costa v R*.[17] In some Australian cases it has been held that an error of fact in a sentence appeal can only be established if there was no evidence to support the finding, or the evidence was all the one way, or if the judge misdirected himself: *O'Donoghue*;[18] *R v Khouzame*.[19]

Where an appeal is based on a finding of fact by the trial judge a Court of Appeal only intervenes where the conclusion reached by the trial judge is clearly wrong. In *Morris Bolama and John Leigna v Regina* the Court of Appeal noted:

> It has long been recognised that an appellate court should be slow to interfere with findings of fact made by the trial judge who has had the advantage of seeing and hearing the witnesses. It will only do so if the conclusions are not supported by the evidence or are clearly wrong. In the case of Keke v R [2006] SBCA 1, this Court explained:
>
> 'It has been stated many times that an appellate court will only interfere with the trial judge's assessment of the credibility and weight of the witnesses at trial if they are clearly wrong or cannot be supported on the evidence as a whole. The reason is plain. The judge in the lower court has the benefit of having seen and heard the witnesses and is in a much better position to evaluate their evidence than the appellate judges who can only rely on the written record of evidence.
>
> 'Counsel provided detailed submissions in support of this ground. We have been through them with care and are satisfied the learned judge's conclusions as to credibility and truth can reasonably be decided on the evidence before him and we do not find any reason to interfere.'[20]

Appeals by the Director of Public Prosecutions

Section 21 of the *Court of Appeal Act* allows the Director of Public Prosecutions to appeal an acquittal after trial in the High Court on a question of law alone, or from a sentence imposed in the High Court that is manifestly inadequate. Where the Court of Appeal decides that the High Court decision should be varied or set aside on a question of law, it can remit the matter to the High Court or make orders that the High Court could have made. Section 21 states:

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17 [1968] HCA 51.
18 (1988) 34 A Crim R 397.
19 [2000] NSWCCA 505.
20 Criminal Appeal Case No. CA 9 of 2011, [23].

Rights of appeal in case acquittal or where sentence is manifestly inadequate

21. (1) Subject to the provisions of this section, the Director of Public Prosecutions may appeal under this Part of this Act to the Court of Appeal where-

(a) a person is tried before the High Court in the first instance and acquitted, (whether in respect of the whole or part of the indictment) on any ground of appeal which involves a question of law only; or

(b) in the opinion of the Director of Public Prosecutions the sentence imposed by the High Court is manifestly inadequate.

(2) On an appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the High Court should be set aside or varied on any ground of a wrong decision on any question of law, make such order which the High Court could have made or remit the case, together with the judgment or order to the High Court for determination whether or not by way of trial de novo or re - hearing, with such directions as appear to the Court of Appeal to be necessary or expedient.

Some of the principles governing Crown appeals against sentence are: that they should be exceptional and a rarity; that even if the sentence is manifestly inadequate, the Court has discretion as to whether or not to intervene; that discretion should take into account the fact that the offender faces double jeopardy; and the Court should give recognition to the principle of double jeopardy by imposing a sentence somewhat less than the sentence which the Court believes should have been imposed at first instance. In *R v Wall* Wood CJ at CL states:

> The Crown contends that not only was the sentence imposed inadequate on its face, but also that the sentencing judge made a number of errors of principle in determining that it was appropriate to proceed under s 19B of the *Crimes Act 1914*. Before considering these submissions it is important to note the principles which apply in relation to the determination of a Crown appeal against sentence:
>
> (a) The normal restriction upon appellate review of the exercise of a discretion, as set out in *House v The King* (1936) 55 CLR 499, applies to Crown appeals against sentence: *Dinsdale v The Queen* (2000) 202 CLR 321; with the result that this Court cannot merely substitute its opinion, as to the appropriate sentence, for that of the sentencing judge: *Lowndes v The Queen* (1999) 195 CLR 665 at 671; rather, it may interfere only where error either latent or patent is shown; *R v Tait* (1979) 46 FLR 386 at 388; and *Wong and Leung v The Queen* (2001) 76 ALJR 79 at para 58 and 109.

(b) Appeals by the Crown should generally be rare; *Malvaso v The Queen* (1989) 168 CLR 227 at 234, and unless there is a clear error of principle identified, it would be exceptional for the Court to interfere: *R v Baker* [2000] NSWCCA 85.

(c) A Crown appeal against sentence is concerned with establishing matters of principle "*for the governance and guidance of courts having the duty of sentencing convicted persons*": per Barwick CJ in *Griffiths v The Queen* (1977) 137 CLR 293 but this power extends to doing what is necessary to avoid manifest inadequacy or inconsistency in sentencing, that is, where the sentence is definitely outside the appropriate range for the case in hand: *Everett v The Queen* (1994) 181 CLR 295 at 299; *Dinsdale v The Queen* (2000) 202 CLR 32, at paras 61 and 62, and *Wong & Leung v The Queen* at para 109.

(d) The Court has a lively discretion to refuse to intervene even if error has been shown, and in deciding whether to exercise that discretion, it should have regard to the double jeopardy that a convicted person faces as a result of a Crown appeal: *R v Allpass* (1993) 72 A Crim R 561, *R v Papazis* (1991) 51 A Crim R 242 at 247, and *Wong and Leung v The Queen* at para 110.

(e) A sentence which is imposed as a consequence of a successful Crown appeal will generally be less than that which should have been imposed by the sentencing court: *R v Holder and Johnston* (1983) 3 NSWLR 245 at 256, and will generally be towards the lower end of the available range of sentence: *Dinsdale v The Queen* at para 62.[21]

It is regarded as insufficient for a Crown appeal to succeed simply by showing that the Court of Criminal Appeal would have imposed a more severe sentence. The Crown must establish that the sentence was outside the discretionary range available to the sentencing judge. The inadequacy must be such that it is indicative of error or departure from principle: *Griffiths v The Queen*.[22]

The principles outlined above are applied in the Solomon Islands. In *Saukora v R*, the Court decided that it would only interfere with a sentence if the trial judge fell into error in acting on a wrong principle of law, or had misdirected or wrongly assessed the facts of a case.[23] This approach was followed in *Tariani v R*.[24]

A factor in determining whether or not to exercise the discretion to intervene is the question of whether or not the Crown has allowed the sentencing judge to fall into error. In *Everett v The Queen* McHugh J states:

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21 [2002] NSWCCA 42, [70].
22 [1994] HCA 49; (1977) 137 CLR 293, 310.
23 [1983] SILR 275.
24 (1989) unreported, SICA.

> 6. It is well established that, in the exercise of its discretion to grant leave to appeal against a sentence, a Court of Criminal Appeal must take into account the attitude of the Crown in the sentencing court ((10) Tait (1979) 24 ALR at 477; Wilton (1981) 28 SASR at 367-368; Reg. v. Jermyn (1985) 2 NSWLR 194 at 203-205; Economedes (1990) 58 A Crim R 466 at 469-470.). Even when it appears that the sentencing judge has erred in a fundamental way that may affect the administration of justice, fairness to the sentenced person requires that the Crown's concurrence with, or failure to object to, a proposed course of action by the sentencing judge must be weighed in the exercise of the discretion. This is particularly so when the convicted person has been given a non-custodial sentence. Private litigants who appeal against judgments and orders are not usually allowed to withdraw concessions made or concurrences expressed in the course of litigation. As a general rule, neither should the Crown be permitted to depart from a course of action that may have induced the sentencing judge to take the course that he or she did.
>
> 7. In the present case, the Crown was aware that the sentencing judge was contemplating suspending the sentences of imprisonment. But the Crown did not suggest that it would be an error for him to do so. As the judgment of the other members of this Court demonstrates, neither of the majority judges in the Court of Criminal Appeal gave proper weight to the attitude of the Crown before the learned sentencing judge. In those circumstances, the exercise of the discretion to grant leave to the Crown was vitiated by their Honours' errors and the appropriate course for this Court was to deal with the matter itself.[25]

Appeals Originating from a Magistrate's Court: Question of Law

Section 22(1) of the *Court of Appeal Act* allows a party on a question of law alone to appeal to the Court of Appeal a decision of the High Court that was an appeal from the Magistrate's Court. However, there are a number of limitations on this type of appeal: it does not include an appeal on severity of sentence, and there is no appeal where the High Court has confirmed a verdict of acquittal first entered in the Magistrate's Court.

Section 22(2) allows an appeal from a case stated in the High Court. Section 22(3) allows the Court of Appeal on a question of law to remit the case to the High Court or Magistrate's Court, or make orders that those courts could have made. Further, in respect of a conviction appeal the Court of Appeal should not alter the sentence imposed unless it was unlawful or involved an error of law. Section 22(4) allows for the alteration of sentence where there has been an improper conviction on one charge but a proper conviction on another. Section 22(5) allows for a conviction and sentence on facts where the charge was wrong and needs to be substituted for another charge. Section 22(6) allows for the Court of Appeal to favour the appellant's ground(s) of appeal yet dismiss the appeal on the basis that there has been no miscarriage of justice. Section 22(7) allows the High Court to

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[25] [1994] HCA 49.

grant bail pending an appeal to the Court of Appeal.[26] Section 22(8) provides for sections 25, 26, 30, 32, 33, 34, 35, and 38 to be applied in a way to fit with section 22. Section 22 states:

> **Appeals to High Court in its appellate, etc., jurisdiction in criminal cases**
>
> **22.** (1) Any party to an appeal from a Magistrate's Court to the High Court may appeal, under this Part of this Act, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence):
>
> Provided that no appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a Magistrate's Court.
>
> (2) For the purposes of this section, a decision of the High Court in the exercise of its revisional jurisdiction or on a case stated, under the provisions of the Criminal Procedure Code, shall be deemed to be a decision of the High Court in such appellate jurisdiction as aforesaid.
>
> (3) On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the Magistrate's Court or of the High Court should be set aside or varied on the ground of a wrong decision on any question of law, make any order which the Magistrate's Court or the High Court could have made, or may remit the case, together with its judgment or order thereon, to the Magistrate's Court or to the High Court for determination, whether or not by way of trial de novo or re - hearing, with such directions as the Court of Appeal may think necessary:
>
> Provided that, in the case of an appeal against conviction, if the Court of Appeal dismisses the appeal and confirms the conviction appealed against, it shall not (save as provided in the next succeeding subsection) increase, reduce or alter the nature of the sentence imposed in respect of that conviction, whether by the Magistrate's Court or by the High Court, unless the Court of Appeal thinks that such sentence was an unlawful one or was passed in consequence of an error of law, in which case it may impose such sentence in substitution therefor as it thinks proper.
>
> (4) If it appears to the Court of Appeal that a party to an appeal brought under this section, though not properly convicted on some charge, has been properly convicted on some other charge, the Court may, in respect of the charge on which it considers that the appellant has been properly convicted, either affirm the sentence passed by the Magistrate's Court or by the High Court or pass such other sentence (whether more or less severe) in substitution therefor as it thinks proper.

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[26] Chapter 2 deals with bail applications in the Court of Appeal.

> (5) Where a party to an appeal brought under the provisions of this section has been convicted of an offence and the Magistrate's Court or the High Court could lawfully have found him guilty of some other offence, and on the finding of the Magistrate's Court or of the High Court it appears to the Court of Appeal that the court must have been satisfied of facts which proved him guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the Magistrate's Court or by the High Court a conviction of guilty of that other offence, and pass such sentence (whether more or less severe) in substitution for the sentence passed by the Magistrate's Court or by the High Court as may be warranted in law for that other offence.
>
> (6) On any appeal brought under the provision of this section, the Court of Appeal may, notwithstanding that it may be of the opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has in fact occurred.
>
> (7) Without prejudice to the application of sections 33 and 35, in any case where an appeal under the provisions of this section is pending a judge of the High Court may in his discretion grant bail to any convicted person who is a party to such appeal.
>
> (8) The provisions of sections 25, 26, 30, 32, 33, 34, 35, and 38 shall apply mutatis mutandis to appeals brought under the provisions of this section.

Section 22(6) governs the proviso of dismissal of the appeal where there has been no substantial miscarriage of justice and it operates in a way that requires the Crown to show that the applicant has not lost 'a chance which was fairly open to him of being acquitted': *Mraz v R (No 1),*[27] or 'a real chance of acquittal' as noted by Barwick CJ in *R v Storey*:

> 34. I take this opportunity to emphasise that the question before a Court of Criminal Appeal is not disposed of by the discovery of error in the trial. If error be present, whether it be by admission or rejection of evidence, or of law or fact in direction to the jury, there remains the question whether none the less the accused has really through that error or those errors lost a real chance of acquittal. Put another way, the question remains whether a jury of reasonable men, properly instructed and on such of the material as should properly be before them, would have failed to convict the accused: or were the errors such that if they were removed a reasonable jury might well have acquitted.[28]

Moreover, errors can be so fundamental that they exclude the operation of the proviso. In *Wilde v R* the Court found:

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[27] [1955] HCA 59; (1955) 93 CLR 493, 514.
[28] [1978] HCA 39; (1978) 140 CLR 364, 376.

> It is one thing to apply the proviso to prevent the administration of the criminal law from being "plunged into outworn technicality" (the phrase of Barwick C.J. in Driscoll v. The Queen, at p 527); it is another to uphold a conviction after a proceeding which is fundamentally flawed, merely because the appeal court is of the opinion that on a proper trial the appellant would inevitably have been convicted. The proviso has no application where an irregularity has occurred which is such a departure from the essential requirements of the law that it goes to the root of the proceedings. If that has occurred, then it can be said, without considering the effect of the irregularity upon the jury's verdict, that the accused has not had a proper trial and that there has been a substantial miscarriage of justice. Errors of that kind may be so radical or fundamental that by their very nature they exclude the application of the proviso: see Reg. v. Hildebrandt (1963) 81 WN (Pt 1) (NSW) 143, at p 148; Reg. v. Henderson [1966] VicRp 8; (1966) VR 41, at p 43; Reg. v. Couper (1985) 18 ACrimR 1, at pp 7-8.[29]

It is sometimes submitted by the prosecution that section 22(1) of the *Act* does not allow the Court of Appeal to consider sentence because of the words, 'on any ground of appeal which involves a question of law (not including severity of sentence)'. In *Arthur Kemahaku v Regina* the court noted that such submissions were groundless.[30] It stated:

> [18] The phrase 'not including severity of sentence' in section 22(1) is ambiguous and was considered by this Court in the cases of Elima, Hou, Angitalo and Gerea v R [2004] Criminal Appeal No 23 of 2004, 4 August 2005, where the same point had been taken by the Crown. The Court concluded
>
> '. . . it would be strange if there were no right of appeal against an error of law leading to a particular sentence when section 22 (3) of the same Act recognises that where the Court of Appeal dismisses an appeal against conviction it may if it thinks that " such sentence was an unlawful one or was passed in consequence of an error of law, in which case it may impose such sentence in substitution therefor as it thinks proper".
>
> 'Moreover the provision of section 22 (1) does not state clearly that no appeal shall lie against severity of sentence where a question of law is raised. . . . . In our view it is open to the appellants to contend that there has been an error of law albeit this is one which leads to a submission that the sentence is too severe. . . . In our view, however, the Court of Appeal has power to review the decision of the High Court where it finds that the sentence is the result of an error of law only.'[31]

Unreasonable Conviction

Section 23(1) allows the Court of Appeal to set aside a conviction it regards as unreasonable, except where there has been no substantial miscarriage of justice. Section 23 states:

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29 [1988] HCA 6, [10]; (1988) 164 CLR 365, 76 ALR 570.

30 Criminal Appeal Case No. 16 of 2011.

31 Ibid.

Determination of appeal in ordinary cases

23. (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision on any question of law or that on any ground there was miscarriage of justice, and in any other case shall dismiss the appeal:

Provided 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 substantial miscarriage of justice has occurred.

(2) Subject to the special provisions of this Act, the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial.

(3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, or may dismiss the appeal or make such other order as they think just.

When referring to a conviction being 'unreasonable' practitioners and judges often use the term 'unsafe and unsatisfactory', but the words used in grounds of appeal should be: 'The convictions are unreasonable and/or cannot be supported having regard to the evidence': *Fleming v R*.[32] In *R v Dwyer* Dunford J states:

> The verdicts are unsafe and unsatisfactory. That is not the correct way to express the relevant ground which is that: The convictions are unreasonable and/or cannot be supported having regard to the evidence: see *Fleming -v- The Queen* (1998) 158 ALR 379, *R -v- Maxwell* (CCA - unreported - 23 December 1998) at 21-2. Nevertheless the principles on which this Court should determine such grounds remain as set out in *M -v- The Queen* (1994) 181 CLR 487. Having regard to the whole of the evidence, I am satisfied that a jury properly instructed and acting reasonably, and with the advantage of seeing the witnesses, could have been satisfied beyond reasonable doubt of the guilt of the appellant provided that they believed the complainant. For these reasons this ground fails and the appropriate order is for a new trial.[33]

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32 [1998] HCA 68; (1998) 197 CLR 250; 73 ALJR 1.
33 [1999] NSWCCA 47.

In *M v The Queen* the Australian High Court considered how a court of appeal should determine whether a conviction is unreasonable.[34] It found that the decision to find the conviction unreasonable should be based on 'a doubt experienced by an appellate court' and that such a doubt is a doubt that 'a jury ought also to have experienced'.[35] The court stated:

> Where a court of criminal appeal sets aside a verdict on the ground that it is unreasonable or cannot be supported having regard to the evidence, it frequently does so expressing its conclusion in terms of a verdict which is unsafe or unsatisfactory. Other terms may be used such as "unjust or unsafe" (6 See Davies and Cody v. The King(1937) 57 CLR 170 at 180) , or "dangerous or unsafe" (7 See Ratten v.The Queen (1974) 131 CLR at 515). In reaching such a conclusion, the court does not consider as a question of law whether there is evidence to support the verdict (8 See Raspor v. The Queen (1958) 99 CLR 346 at 350-351; Plomp v. The Queen (1963) 110 CLR 234 at 246, 250). Questions of law are separately dealt with by s.6(1). The question is one of fact which the court must decide by making its own independent assessment of the evidence (9 Morris v. The Queen (1987) 163 CLR 454) and determining whether, notwithstanding that there is evidence upon which a jury might convict, "none the less it would be dangerous in all the circumstances to allow the verdict of guilty to stand" (10 See Hayes v. The Queen (1973) 47 ALJR 603 at 604). But a verdict may be unsafe or unsatisfactory for reasons which lie outside the formula requiring that it not be "unreasonable" or incapable of being "supported having regard to the evidence". A verdict which is unsafe or unsatisfactory for any other reason must also constitute a miscarriage of justice requiring the verdict to be set aside. In speaking of the Criminal Appeal Act in Hargan v. The King, Isaacs J said (11 (1919) 27 CLR 13 at 23) :
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> > "If (the appellant) can show a miscarriage of justice, that is sufficient. That is the greatest innovation made by the Act, and to lose sight of that is to miss the point of the legislative advance."
>
> And as the Court observed in Davies and Cody v. The King (12 (1937) 57 CLR at 180.), the duty imposed on a court of appeal to quash a conviction when it thinks that on any ground there was a miscarriage of justice covers:
>
> > "not only cases where there is affirmative reason to suppose that the appellant is innocent, but also cases of quite another description. For it will set aside a conviction whenever it appears unjust or unsafe to allow the verdict to stand because some failure has occurred in observing the conditions which, in the court's view, are essential to a satisfactory trial, or because there is some feature of the case raising a substantial possibility that, either in the conclusion itself, or in the manner in which it has been reached, the jury may have been mistaken or misled."
>
> Where, notwithstanding that as a matter of law there is evidence to sustain a verdict, a court of criminal appeal is asked to conclude that the verdict is

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34 [1994] HCA 63; (1994) 181 CLR 487, paras 6,7,8,9.

35 Ibid.

unsafe or unsatisfactory, the question which the court must ask itself is whether it thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (13 See Whitehorn v. The Queen(1983) 152 CLR at 686; Chamberlain v. The Queen (No.2) (1984) 153 CLR at 532; Knight v. The Queen (1992) 175 CLR 495 at 504-505, 511) . But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations (14 Chamberlain v. The Queen (No.2) (1984) 153 CLR at 621).

It was with those considerations in mind that some members of this Court (15 See Whitehorn v. The Queen (1983) 152 CLR at 660,687; Chamberlain v. The Queen (No.2) (1984) 153 CLR at 532-534)have thought it necessary to qualify the statement by Barwick CJ in Ratten v. The Queen (16 (1974) 131 CLR at 516) that: "It is the reasonable doubt in the mind of the court which is the operative factor". Barwick CJ went on to say:

> "It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration."

The qualification was that no circumlocution was involved in speaking of a doubt which a reasonable jury ought to have entertained because account must be taken of the advantage which a jury has in seeing and hearing the witnesses. To ask only whether the court has a doubt may place insufficient emphasis upon the fact the jury, having seen and heard the evidence given, was in a position to evaluate that evidence in a manner in which a court of appeal cannot.

But it is, we think, possible to make too much both of the view expressed by Barwick CJ and of the qualification suggested. In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence (17 Chamberlain v. The Queen (No.2) (1984) 153 CLR at 618-619; Chidiac v. The Queen (1991) 171 CLR 432 at 443-444). In

> doing so, the court is not substituting trial by a court of appeal for trial by jury, for the ultimate question must always be whether the court thinks that upon the whole of the evidence it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty (18 Chidiac v. The Queen (1991) 171 CLR at 443,451, 458, 461-462). Although the propositions stated in the four preceding sentences have been variously expressed in judgments of members of the Court in previous cases, we have put aside those differences in expression in order to provide authoritative guidance to courts of criminal appeal by stating the propositions in the form in which they are set out above.[36]

The ground that the conviction was unreasonable will be made out when the court on its own assessment of the evidence concludes that it was not open to the jury to be satisfied beyond reasonable doubt.[37] In Australia it has been found that a conviction may be quashed on the basis that it is inconsistent with a verdict of acquittal and is an affront to logic and commonsense: *MacKenzie*.[38]

The grounds of appeal filed on behalf of an appellant when a conviction is being disputed usually include matters that go beyond the conviction simply being unreasonable. They are based on errors of law and fact. The grounds of appeal will depend on the facts, the law and how they are applied in each case.

Substitution of Counts and Sentences

Section 24(1) of the *Act* allows the Court of Appeal to substitute counts and sentences, and also deals with the conviction of an insane appellant. Section 24(2) states:

> **Powers of Court in special cases**
>
> **24.** (1) If it appears to the Court of Appeal that an appellant, though not properly convicted on some count or part of the information has been properly convicted on some other count or part of the information, the Court may either affirm the sentence passed on the appellant at the trial or pass sentence in substitution therefor as they think proper and as may be warranted in law by the verdict on the count or part of the information on which the Court consider that the appellant has been properly convicted.
>
> (2) Where the appellant has been convicted of an offence and the judge could on the information have found him guilty of some other offence, and on the findings of the judge it appears to the Court of Appeal that the judge must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge a verdict of guilty of that other

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36 Ibid.

37 *Morris* (1987) 163 CLR 454, M (1994) 181 CLR 487, 69 ALJR 83, (1994) 76 A Crim R 213.

38 (1996) 90 A Crim R 468.

> offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity.
>
> (3) If on any appeal it appears to the Court of Appeal that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Court may quash the sentence passed at the trial and order the appellant to be kept in custody in such place and in such manner as the Court shall direct until the Governor-General's pleasure be known, and the Governor - General may thereupon and from time to time give such order for the safe custody of the appellant during pleasure and in such place and in such manner as to the Governor - General may deem fit.

This section gives the Court of Appeal the power to leave in place sentences or substitute sentences and convictions erroneously entered on a count where there is another count on the information where a conviction had been properly entered: section 24(1). The section also allows the Court of Appeal to substitute a verdict of guilty on an alternative count, and substitute a sentence as long as it is not of greater severity: section 24(2). Section 24(3) allows the court to quash a sentence imposed on an insane person and direct the person to be dealt with at the Governor-General's pleasure.

Suspension of Orders for Payment of Compensation

Section 25 provides that any orders made for compensation payments or restitution of property are automatically suspended for thirty days from the date of conviction, and where there is a notice of appeal until the appeal is determined. Where the conviction is quashed any order in respect of property shall have no effect. Section 25 states:

> **Suspension of order for restoration of payment of compensation or expenses, etc.**
>
> **25.** (1) The operation of any order made on conviction by the judge before whom the conviction takes place for the payment of compensation or of any of the expenses of the prosecution or for the restoration of any property to any person, and the operation of the provisions of any law re - vesting in the case of any such conviction in the original owner or his personal representative the property in stolen goods, shall (unless the judge before whom the conviction takes place directs to the contrary in any case in which in his opinion the title of the property is not in dispute) be suspended-
>
> (a) in any case until the expiration of thirty days after the date of the conviction; and
>
> (b) in cases where notice of appeal or leave to appeal is given within thirty days after the date of conviction, until the determination of the appeal, and in cases where the

operation of any such order or provisions is suspended until the determination of the appeal, the order or provisions shall not take effect as to the property in question if the conviction is quashed on appeal.

(2) The Court of Appeal may by order annual or vary an order made in the trial for the payment of compensation or of any of the expenses of the prosecution or for the restitution of any property to any person, although the conviction is not quashed and the order, if annulled, shall not take effect and, if varied, shall take effect as so varied.

Time Limit

Section 26 provides thirty days for the lodgement of an appeal unless leave is granted. The law in respect of an extension of time to lodge an appeal is considered earlier in this chapter. Section 26 states:

Time for appealing

26. Where a person convicted desires to appeal under this Part of this Act to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by the rules of Court within thirty days of the date of conviction.

Judges Notes to be Provided

Section 27 requires the judge who convicted and/or sentenced the appellant to provide his or her notes, taken at trial, to the Registrar. This requirement was introduced when trials were not recorded and transcribed. It is still relevant where the appeal arises from a magistrate's decision, where proceedings are not recorded or transcribed, or where there has been a break in recording. Section 27 states:

Judges notes and report to be furnished on appeal

27. The judge before whom a person is convicted, shall in the case of an appeal under this Part of this Act against the conviction or against the sentence, or in the case of an application for leave to appeal under this Part of this Act, furnish to the Registrar, in accordance with the rules of Court, his notes of the trial; and shall furnish to the Registrar in accordance with rules of Court a report giving his opinion upon the case or upon any point arising in the case.

Supplemental Powers of the Court of Appeal

Section 28 gives the Court of Appeal power to: order the production of documents; order witnesses to attend and give evidence; receive evidence from a witness who is competent but not compellable; have a special commissioner report on documents, accounts, or any scientific or local investigation; and appoint a person with special expert knowledge as an assessor. Section 28 states:

Supplemental powers of Court

28. In the exercise of their jurisdiction under this Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice-

(a) order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to them necessary for the determination of the case; and

(b) order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court, or in the absence of rules of Court making provision in that behalf, as they may direct, before any judge of the Court or before any officer of the Court or Magistrate or other person appointed by the Court for the purpose, and allow the admission of any depositions so taken as evidence before the Court; and

(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such application; and

(d) where any question arising in the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in the manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner as far as they think fit to adopt it; and

(e) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case, and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters and issue any warrants necessary for enforcing the orders of sentences of the Court:

Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

Director of Public Prosecutions as a Party

Section 29 is in the same terms as section 283 of the *Criminal Procedure Code*. Section 29 states:

Director of public prosecutions to be party

29. For the purposes of this Act, the Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor.

Legal Assistance

Section 30 allows the Court of Appeal to assign counsel to an appellant where the appellant does not have sufficient means to do so. It states:

Legal assistance to appellant

30. The Court of Appeal may at any time assign counsel to an appellant in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

Appellant's Limited Right to be Present

Sections 31 allows an appellant who is in custody to be present at his or her appeal where it involves more than a question of law alone and or only involves a preliminary matter. It states:

Right of appellant to be present

31. (1) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it and is not prevented by sickness or other cause, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal shall not be entitled to be present, except where rules of Court provide that he shall have the right to be present or where the Court of Appeal gives him leave to be present.

(2) The power of the Court of Appeal to pass any sentence under this Act may be exercised notwithstanding that the appellant is for any reason not present.

Costs of Appeal

Section 32 provides for the Consolidated Fund to defray necessary costs. It states:

Costs of appeal

32. (1) On the hearing and determination of an appeal under this Part of this Act no costs shall be allowed to either side.

(2) The expenses of counsel assigned to an appellant under this Part of this Act and the expenses of any witness attending on the order of the Court of Appeal or examined in any proceedings

incidental to the appeal, and of the appearance of an appellant when in custody on the hearing of his appeal or on any proceedings preliminary or incidental to an appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the Court for the purpose, or any reference of a question to a special commissioner appointed by the Court, shall be defrayed out of the Consolidated Fund up to an amount allowed by the Court but subject to any provision as to rates and scales of payment made by rules of Court.

Bail

Section 33 allows for bail. The provisions in respect of bail are considered in Chapter 2.

Registrar's Duties

Section 34 lists some of the duties of the Registrar in respect of appeals, it states:

Duties of Registrar with respect to notices of appeal, etc.

34. (1) The Registrar shall take all necessary steps for obtaining a hearing under this Part of this Act of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the Court of Appeal in proper form all documents, exhibits and other things relating to the proceedings in the court before which the appellant or applicant was tried which appear necessary for the proper determination of the appeal or application.

(2) If it appears to the Registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the Registrar may refer the appeal to the Court of Appeal for summary determination, and where the case is so referred, the Court may, if they consider that the appeal is frivolous or vexatious, and can be determined without adjourning the same for a full hearing, dismiss the appeal summarily, without calling on any person to attend the hearing or to appear for the Crown thereon.

(3) Any documents, exhibits or other things connected with the proceedings on the trial of any person before the High Court who, if convicted, is entitled or may be entitled to appeal under this Part of this Act, shall be kept in the custody of the court of trial in accordance with rules of Court made for the purpose for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits or things from that custody.

(4) The Registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Part of this Act to any person who demands the same, and to

officers of courts, the Superintendent of Prisons and such other officers or persons as he thinks fit and the Superintendent of Prisons shall cause these forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Part of this Act and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the Registrar.

(5) The Registrar shall report to the Court or some judge thereof any case in which it appears to him that although no application has been made for the purpose, counsel ought to be assigned to an appellant under the powers given to the Court by this Act.

Single Judge Exercise of Powers

Section 35 of the *Act* allows for a single judge to determine whether to extend time for an appeal, to give leave to appeal, to allow an appellant to be present at any proceedings, and to grant bail. However, where the judge refuses an application a further application can be made to the Court. Section 35 states:

Powers which may be exercised by a judge of the Court

35. The powers of the Court of Appeal under this Part of this Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court as duly constituted for the hearing and determining of appeals under this Act.

Judgments

Section 36 of the *Act* provides that the usual case will involve the handing down of a single judgment, but separate and dissenting judgments can be given. It states:

Judgment in criminal appeals

36. (1) In an appeal under this Part of this Act the Court shall ordinarily give only one judgment, which may be given by the senior member of the Court present at the hearing of the appeal as he may direct:

Provided that

(a) if any judge dissents from the judgment of the Court it shall not be obligatory on him to sign the same; and

(b) separate judgments shall be given if the Court is of the opinion that it is convenient that there should be separate judgments.

(2) The judgment of the Court or of any judge present at the hearing of the appeal shall be delivered in open Court either at the hearing of the appeal or at any subsequent time of which notice shall be given by the Registrar to the parties to the appeal.

(3) The judgement of the Court or of any judge present at the hearing of the appeal may be read in open Court by any judge, whether present at the hearing of that appeal or not, or by the Registrar.

The final section in the *Court of Appeal Act* notes that the prerogative of mercy is not affected by the Act. It states:

Prerogative of mercy

38. Nothing in this Act shall affect the prerogative of mercy as determined by section 45 of the Constitution.

Fresh Evidence

In most cases a court of appeal considers only the evidence that was before the trial court. The exception is where there is fresh evidence. The principles are summarised by Kirby J in *R v Abou-Chabake*.[39] He states:

> The authorities in respect of fresh evidence have recently been collected and analysed by Giles JA in R v Bikic [2002] NSWCCA 227, and Heydon JA in R v M [2002] NSWCCA 66 at paras 61-64; see also R v Sleiman [2003] NSWCCA 231 paras 101-105. The test was stated by Barwick CJ in Ratten v The Queen (1974) 131 CLR 510 at 518-520 (McTiernan, Stephen and Jacob JJ agreeing). It was reaffirmed in Lawless v The Queen (1979) 142 CLR 659 by Mason J at 674-5 (Barwick CJ and Aiken J agreeing). The principles may be summarised as follows:
>
> · First, a distinction is made between "new evidence" and "fresh evidence". Fresh evidence is evidence not available to the accused at the time of the trial, actually or constructively. Evidence is constructively available if it could have been discovered, or available at the trial by the exercise of due diligence.
>
> · Second, great latitude must be extended to an accused in determining what evidence, by reasonable diligence, could have been available at his trial (Ratten v The Queen (supra) per Barwick CJ at 512).
>
> · Third, the Court is ultimately concerned with whether there has been a miscarriage of justice. The rationale for setting aside a conviction on the basis of new evidence or fresh evidence is that the absence of that evidence from the trial was, in effect, a miscarriage of justice. That evidence must be examined in the context of the evidence given at the trial

[39] [2004] NSWCCA 356, [63].

(Mickelberg v The Queen (1989) 167 CLR 259, per Toohey and Gaudron JJ at 301).

· Fourth, the issue of whether there has been a miscarriage is to be approached on a number of levels, depending upon the order sought (whether a verdict of acquittal or a new trial), and the capacity of the new or fresh evidence to sustain the order sought.

· Fifth, where a verdict of acquittal is sought and the new evidence is of such cogency that innocence is shown to the Court's satisfaction, or the Court entertains a reasonable doubt as to guilt, the guilty verdict will be quashed and the appellant discharged. In such circumstances, it does not matter whether the evidence is fresh or simply new (Ratten v The Queen (supra) Barwick CJ at 518/519; cf Gibbs CJ in Gallagher v The Queen (1986) 160 CLR 392 at 398/399).

· Sixth, where the evidence does not have that quality, or where a new trial is sought, a number of issues arise. The verdict will be quashed and a new trial ordered only where the following questions are answered affirmatively:
· Is the evidence fresh?
· If it is, is it "credible" or at least capable of belief (Gallagher v The Queen (supra) per Gibbs CJ at 395), or "plausible" (Mickelberg v The Queen (supra) per Toohey and Gaudron JJ at 301)?
· If it is, would that evidence, in the context of the evidence given at the trial, have been likely to have caused the jury to have entertained a reasonable doubt about the guilt of the accused (Gallagher v The Queen (supra) per Brennan J at 410) or, if there is a practical difference, is there a significant possibility that the jury, acting reasonably, would have acquitted the accused (Gallagher v The Queen (supra) per Mason and Deane JJ at 402)? See Mickelberg v The Queen (supra) per Toohey & Gaudron JJ at 301-302.

· Seventh, the concept of a miscarriage of justice is not an abstract investigation of truth (cf an Inquiry under s474D Crimes Act 1900). It is an investigation in the context of the adversarial nature of a criminal trial. Where deliberate tactical decisions are made on the part of the accused as to the evidence that should or should not be called, and the issues that should or should not be pursued, there is nothing unfair, and there will be no miscarriage, in holding an accused to such decisions, even though it is conceivable that other decisions or something else may have worked rather better (Ratten v The Queen (supra) at 517). [40]

In summary fresh evidence is considered in the following way:

1. The fresh evidence must not have been available at the time of the trial after the exercise of due diligence by the defence.

2. Latitude is extended to an accused in determining what is reasonable diligence exercised by the defence.

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[40] [2004] NSWCCA 356, [63].

3. The absence of the fresh evidence at the trial must have resulted in a miscarriage of justice.

4. In determining whether the absence of the fresh evidence resulted in a miscarriage of justice, consideration is given to whether a new trial or a verdict of acquittal is sought.

5. If a verdict of acquittal is sought, the court needs to be satisfied that the evidence shows innocence, or that the prosecution has not proved its case beyond reasonable doubt.

6. Consideration needs to be given to whether the fresh evidence is credible or at least capable of belief.

7. Consideration needs to be given to whether the decision to keep the evidence away from the trial court was a tactical decision. In such a case, the evidence is generally not considered to be fresh evidence.

A ground of appeal relying on fresh evidence can be worded in the following way: *'A miscarriage of justice resulted from the absence at the trial of fresh evidence'*.

Practitioners should remember that where possible, appeals should be avoided. This is in the best interests of an accused as well as the State. Appeals can most often be avoided when best practise is followed at the trial and sentencing stages of the trial process.