Western Australia

Criminal Appeals Act 2004

Compare between:

[01 Jan 2023, 02-f0-00] and [13 Apr 2023, 02-g0-01]

Western Australia

Criminal Appeals Act 2004

An Act about appeals in criminal cases and about related matters.

Part 1 — Preliminary

1. Short title

This Act may be cited as the *Criminal Appeals Act 2004* [1].

2. Commencement

This Act comes into operation on a day fixed by proclamation [1].

3. This Act to be read with *Criminal Procedure Act 2004*

This Act is to be read with the *Criminal Procedure Act 2004*.

4A. *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* Part 2 applies

The *Courts and Tribunals (Electronic Processes Facilitation) Act 2013* Part 2 applies to this Act.

[Section 4A inserted: No. 20 of 2013 s. 41.]

4. Terms used

(1) If not defined in this Act, words and expressions in this Act have the same definitions as in the *Criminal Procedure Act 2004* unless the contrary intention appears.

(2) In this Act, unless the contrary intention appears —

appeal means an appeal under this Act or an application for leave to appeal under this Act;

appellant includes an applicant for leave to appeal or for an extension of time within which to appeal or apply for leave to appeal;

concluded, in relation to an appeal, means decided, dismissed or discontinued;

Court of Appeal Registrar has the meaning given by the *Supreme Court Act 1935*;

court of summary jurisdiction means a court, or a person, that is acting in circumstances in which it is a court of summary jurisdiction by virtue of another written law;

rules of court means rules of court made by the Supreme Court;

superior court means the Supreme Court or the District Court but not the Court of Appeal;

Supreme Court does not include the Court of Appeal.

5. Appeal against sentence of superior court after conviction by lower court, commencement of

(1) This section applies if an accused is sentenced for an offence by a superior court having been convicted of the offence by a court of summary jurisdiction and committed to the superior court to be sentenced for the offence.

(2) Any appeal against both the conviction by the court of summary jurisdiction and the sentence imposed by the superior court must be commenced and conducted under Part 3, despite Part 2.

(3) If in one or more appeals there are appeals against both a conviction of an offence by a court of summary jurisdiction and the sentence imposed by a superior court for the offence, the appeals are to be dealt with together by the Court of Appeal under Part 3, despite Part 2.

Part 2 — Appeals from courts of summary jurisdiction

Division 1 — Preliminary

6. Terms used

In this Part, unless the contrary intention appears —

decision, of a court of summary jurisdiction, means any of the following —

(a) a judgment entered under the *Criminal Procedure Act 2004* section 128(2) or (3);

(b) a decision ordering a permanent stay of a prosecution;

(c) a decision to convict an accused of a charge, whether after a plea of guilty or after a trial;

(d) a decision to acquit an accused of a charge;

(e) a decision to acquit an accused of a charge on account of unsoundness of mind;

(f) a sentence imposed, or order made, as a result of a conviction or acquittal;

(g) a refusal to make an order that might be made as a result of a conviction or acquittal;

(h) a decision as to costs;

(i) a decision made under the *Criminal Investigation Act 2006* section 151;

Supreme Court means the Supreme Court constituted by a single judge sitting in its General Division.

[Section 6 amended: No. 59 of 2006 s. 73.]

Division 2 — Appeals to a single judge

7. Right of appeal

(1) A person who is aggrieved by a decision of a court of summary jurisdiction may appeal to the Supreme Court against the decision.

(2) The Attorney General may appeal to the Supreme Court against a decision of a court of summary jurisdiction.

(3) The following decisions of a court of summary jurisdiction cannot be the subject of an appeal under this Part —

(a) a decision that is declared by an Act to be final or not appealable;

(b) a decision to commit or not to commit an accused for trial or sentence;

(c) a decision as to bail.

(4) Except as provided by this section, no appeal lies against a decision of a court of summary jurisdiction.

(5) Subsections (1), (2) and (4) are subject to any other written law and in particular to the *Children's Court of Western Australia Act 1988* Part 5.

(6) This section does not affect the operation of the *Bail Act 1982*.

8. Grounds for appealing

(1) An appeal may be made under this Division on one or more of these grounds —

(a) that the court of summary jurisdiction —

(i) made an error of law or fact, or of both law and fact;

(ii) acted without or in excess of jurisdiction;

(iii) imposed a sentence that was inadequate or excessive;

(b) that there has been a miscarriage of justice.

(2) An appeal may be made under this Division against a decision even if the decision was made after a plea of guilty or an admission of the truth of any matter.

(3) Despite subsections (1) and (2), no decision of, or proceedings before, a court of summary jurisdiction, nor any document in such proceedings, shall be held to be bad for want of form.

(4) Without limiting subsection (3), a person cannot appeal against a decision —

(a) on the ground that the person had not received a prosecution notice; or

(b) on a ground that relates to any amendment of a prosecution notice,

if the person was present at the hearing at which the decision was made and did not then object on that ground.

9. Leave to appeal required in all cases

(1) The leave of the Supreme Court is required for each ground of appeal in an appeal under this Division.

(2) After an appeal is commenced, the Supreme Court must not give leave to appeal on a ground of appeal unless it is satisfied the ground has a reasonable prospect of succeeding.

(3) Unless the Supreme Court gives leave to appeal on at least one ground of appeal in an appeal, the appeal is to be taken to have been dismissed.

(4) The Supreme Court may decide whether or not to give leave to appeal —

(a) with or without written or oral submissions from the parties to the appeal;

(b) before or at the hearing of, or when giving judgment on, the appeal.

(5) As soon as practicable after the Supreme Court gives leave to appeal against a decision, it must notify the court of summary jurisdiction that made the decision.

10. Commencing an appeal

(1) An appeal under this Division must be commenced and conducted in accordance with this Division and rules of court.

(2) An appeal under this Division must be commenced by lodging with the Supreme Court an application for leave to appeal that sets out the grounds of the appeal.

(3) An appeal against a decision cannot be commenced later than 28 days after the date of the decision unless the Supreme Court orders otherwise.

(4) If the date on which a person is sentenced for an offence is not the date on which the person is convicted of the offence, the time in subsection (3) for an appeal against either the conviction or the sentence or both runs from the date of sentencing.

(5) On commencing an appeal, the appellant must serve a copy of the application for leave to appeal on —

[(a) deleted]

(b) the other party or other parties to the proceedings before the court of summary jurisdiction.

(6) The Supreme Court may at any time order the appellant to serve a copy of the application for leave to appeal on any other person the court thinks fit.

(7) As soon as practicable after it is served under subsection (5), a court of summary jurisdiction must give the exhibits in the case to the Supreme Court.

[Section 10 amended: No. 5 of 2008 s. 26.]

11. Sentences etc., effect of appeal on

(1) This section applies when the Supreme Court gives leave to appeal against a decision unless and to the extent that an order made under section 12 provides otherwise.

(2) After leave to appeal against a decision is given and until the appeal is concluded, no warrant or order to enforce the decision shall be issued, and no action to enforce the decision shall be taken, except to enforce a sentence or order referred to in subsection (6).

(3) Any disqualification from holding or obtaining a licence to drive a vehicle under a road law as defined in the *Road Traffic (Administration) Act 2008* section 4, or under the *Sentencing Act 1995* Part 15, in respect of a conviction that is the subject of an appeal is suspended until the appeal is concluded.

(4) Any period during which the disqualification is so suspended must not be taken into account in calculating the period of the disqualification.

(5) Subject to subsection (6) and the *Fines, Penalties and Infringement Notices Enforcement Act 1994* section 101B, any sentence imposed, or any other order made, under the *Sentencing Act 1995*, the *Young Offenders Act 1994*, or any other written law, is suspended until the appeal is concluded.

(6) Subsection (5) does not apply to —

(a) a sentence of imprisonment, whether or not it is suspended under the *Sentencing Act 1995* Part 11 or is indefinite imprisonment imposed under Part 14 of that Act; and

(b) a sentence of detention under the *Young Offenders Act 1994*; and

(c) an order of forfeiture.

[Section 11 amended: No. 8 of 2012 s. 75.]

12. Sentences etc., Supreme Court may suspend etc.

(1) At any time after an appeal under this Division is commenced against a decision of a court of summary jurisdiction, the Supreme Court may make any order it thinks fit that suspends or continues in effect until the appeal is concluded —

(a) the decision;

(b) any sentence imposed, or order made, by the court of summary jurisdiction as a result of the decision;

(c) any statutory consequence of the decision.

(2) The Supreme Court may amend or cancel an order made under this section at any time.

(3) An order may be made under this section before or after the Supreme Court decides whether or not to give leave to appeal.

(4) If the Supreme Court makes, amends or cancels any such order, it must give a copy of the order —

(a) to the court of summary jurisdiction concerned; and

(b) if the order relates to the statutory consequence of the decision being appealed, to any person who under a written law is required to register the statutory consequence.

(5) Despite subsections (1) and (2), if an appellant or respondent is serving a sentence of imprisonment —

(a) the sentence must not be suspended unless he or she is granted bail under the *Bail Act 1982*; and

(b) he or she must not be released from custody until he or she becomes entitled to be released under that Act.

(6) If an appeal is commenced against a decision involving or giving rise to the imposition of a fine (as defined in the *Fines, Penalties and Infringement Notices Enforcement Act 1994* section 28(1)), an order cannot be made under this section.

(7) An order made under this section has effect despite section 11.

13. Supreme Court may refer appeal to Court of Appeal

(1) An appeal under this Division must be dealt with by the Supreme Court constituted by a single judge sitting in its General Division, unless an order is made under subsection (2).

(2) At any time before an appeal is concluded, the Supreme Court, on its own initiative or on the application of a party may order that the appeal be dealt with by the Court of Appeal.

(3) If an order is made under subsection (2), this Division, with any necessary changes, applies as if —

(a) the appeal had been made to the Court of Appeal; and

(b) unless the context requires otherwise, references to the Supreme Court were to the Court of Appeal.

14. Supreme Court's powers on an appeal

(1) In deciding an appeal, the Supreme Court may do one or more of the following —

(a) dismiss the appeal;

(b) allow the appeal;

(c) set aside or vary the decision of the court of summary jurisdiction and sentence imposed, order made or thing done as a result of the decision;

(d) substitute a decision that should have been made by the court of summary jurisdiction;

(e) order the case to be dealt with again by the court of summary jurisdiction, with or without orders to that court —

(i) as to how or by whom it is to be constituted;

(ii) as to how it must deal with the case;

(f) make any order under the *Magistrates Court Act 2004* section 36(6);

(g) if the appeal is against a decision to acquit an accused of a charge on account of unsoundness of mind or to make or refuse to make an order under the *Criminal Law (Mentally Impaired Accused) Act 1996*, exercise any power that the Court of Appeal may exercise under section 32;

(h) make an order as to the costs of the appeal and the costs of the proceedings in the court of summary jurisdiction;

(i) make any other order it thinks fit.

(2) Despite subsection (1)(b), even if a ground of appeal might be decided in favour of the appellant, the Supreme Court may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(3) The Supreme Court is not required to set aside or vary a decision of a court of summary jurisdiction because the court omitted to make any necessary finding of fact if the facts or evidence —

(a) in substance support the decision; or

(b) justify the finding,

and the Supreme Court, under subsection (1), may instead either vary the decision or substitute another decision for it.

(4) On an appeal against a conviction, the Supreme Court may vary a decision of a court of summary jurisdiction or substitute another decision for it if there is some excess which may, consistently with the merits of the case, be corrected.

(5) On an appeal against a sentence, the Supreme Court may have regard to any relevant matter that has occurred between when the offender was convicted and when the appeal was heard.

15. Conclusion of appeal, consequences

(1) The decision of the Supreme Court, or the decision of the court of summary jurisdiction as varied by the Supreme Court, other

than a decision under section 13(2) or 14(1)(e) or (f), has effect as if it were the decision of the court of summary jurisdiction, and may be enforced accordingly.

(2) The court of summary jurisdiction may take any steps that are necessary to give effect to any decision of the Supreme Court of a kind mentioned in section 14(1)(e).

(3) When an appeal is concluded, any warrant or other process that was suspended, and any thing the doing or operation of which was suspended under section 11, or under an order made under section 12, again has effect, subject to any order of the Supreme Court.

(4) Subsection (3) does not limit the operation of section 41(8).

Division 3 — Appeals from a single judge to the Court of Appeal

16. Right of appeal to Court of Appeal

(1) A person whose application to extend the time to commence an appeal under Division 2 is refused by a single judge of the Supreme Court sitting in its General Division may appeal to the Court of Appeal against the decision.

(2) A party to an appeal under Division 2 who is aggrieved by a decision made in the appeal by a single judge of the Supreme Court sitting in its General Division that —

(a) refuses leave to appeal; or

(b) dismisses or decides an appeal,

may appeal to the Court of Appeal against the decision.

(3) The Attorney General may appeal to the Court of Appeal against a decision referred to in subsection (1) or (2).

17. Commencing an appeal

(1) An appeal under this Division must be commenced and conducted in accordance with this Division and rules of court.

(2) An appeal under this Division must be commenced by lodging with the Court of Appeal an application for leave to appeal that sets out the grounds of the appeal.

(3) An appeal under this Division against a decision of a single judge cannot be commenced later than 21 days after the date of the decision unless the Court of Appeal orders otherwise.

18. Provisions applicable to appeals to Court of Appeal

Subject to this Division, Division 2 (other than sections 7, 8, 10 and 13), with any necessary changes, applies to and in respect of an appeal under this Division as if —

(a) the appeal were an appeal under Division 2; and

(b) unless the context requires otherwise, references in Division 2 —

(i) to a court of summary jurisdiction were to the Supreme Court sitting in its General Division; and

(ii) to the Supreme Court were to the Court of Appeal.

19. Court of Appeal's additional powers on an appeal

(1) This section does not limit the operation of section 18.

(2) In deciding an appeal under this Division, the Court of Appeal may, in addition to exercising any of the powers in section 14, do one or more of the following —

(a) order the case to be dealt with again by the court of summary jurisdiction, with or without orders to that court —

(i) as to how or by whom it is to be constituted;

(ii) as to how it must deal with the case;

(b) make an order as to the costs of the appeal and the costs of the proceedings in the court of summary jurisdiction.

Division 4 — Costs

20. Costs against Attorney General, JPs or police officers

(1) If the Attorney General is an appellant in proceedings under this Part, the Supreme Court must not order the Attorney General to pay the costs of any of the respondents, but the Supreme Court may order that a respondent be paid costs, and in such a case —

(a) a registrar of the Supreme Court must give that respondent a certificate sealed with the seal of the Supreme Court showing the amount of the costs; and

(b) the person may recover that amount in a court of competent jurisdiction as a debt due by the State.

(2) If a JP or a police officer, acting in an official capacity, is a party to proceedings under this Part, the Supreme Court must not order that the JP or officer is to pay any costs.

(3) Despite subsection (2), if a police officer is an appellant in an appeal under this Part and the decision appealed against —

(a) is confirmed; or

(b) if not confirmed, has in the opinion of the Supreme Court involved a point of law of exceptional public importance,

the Supreme Court may order that a respondent be paid costs, and in such a case —

(c) the Supreme Court must give that respondent a certificate sealed with the seal of the Supreme Court showing the amount of the costs; and

(d) the person may recover that amount in a court of competent jurisdiction as a debt due by the State.

21. Costs orders, enforcement of

(1) This section applies if under this Part the Supreme Court orders a person to pay any costs.

(2) If the money is not paid within 28 days after the date of the order, the person to whom the money is to be paid may enforce the order by lodging a certified copy of it, and an affidavit stating to what extent it has not been complied with, with a court of competent jurisdiction.

(3) When lodged, the order is to be taken to be a judgment of the court and may be enforced accordingly.

(4) This section does not prevent the recovery of the money by means expressly provided by a written law.

Part 3 — Appeals from superior courts

Division 1 — Preliminary

22. Terms used

In this Part —

offender means a person who has been convicted of an offence;

trial court, in relation to an appeal under this Part, means the superior court that dealt with the case that is the subject of the appeal.

Division 2 — Rights of appeal

23. Rights of appeal of offender

(1) An offender convicted of an offence on indictment may appeal to the Court of Appeal against any or all of the following decisions —

(a) the conviction;

(b) the sentence imposed on the offender or any order made as a result of the conviction;

(c) a refusal to make an order that might be made as a result of the conviction.

(2) An offender convicted by a court of summary jurisdiction and sentenced by a superior court may appeal to the Court of Appeal against any or all of the following decisions —

(a) the conviction;

(b) the sentence imposed on the person or any order made as a result of the conviction;

(c) a refusal to make an order that might be made as a result of the conviction.

24. Rights of appeal of prosecutor

(1) The prosecutor may appeal to the Court of Appeal against any one or more of the following decisions by a judge of a superior court in relation to a charge of an indictable offence —

(a) the sentence imposed on a person convicted of the charge or any order made as a result of the conviction;

(b) the sentence imposed on a person convicted by a court of summary jurisdiction of the charge and committed for sentence or any order made as a result of the conviction;

(c) a refusal to make an order that might be made as a result of a conviction.

(2) The prosecutor may also appeal to the Court of Appeal against any one or more of the following decisions by a judge of a superior court in relation to a charge of an indictable offence —

(a) a decision refusing to consent to the discontinuance of the prosecution of the charge;

(b) a judgment entered under the *Criminal Procedure Act 2004* section 128(2) or (3);

(c) a decision ordering a permanent stay of proceedings on the charge;

(d) a decision ordering an adjournment of proceedings on the charge;

(da) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) entered after a jury's verdict of not guilty of a charge the statutory penalty for which is or includes imprisonment for 14 years or more or life, but only on the grounds that before or during the trial the judge made an error of fact or law in relation to the charge;

(e) a judgment of acquittal (other than a judgment of acquittal on account of unsoundness of mind) —

(i) entered after a decision by the judge that the accused has no case to answer on the charge; or

(ii) entered in a trial by the judge alone;

(f) any judgment entered as a result of any of the above decisions;

(g) any order made as a result of any of the above decisions or judgments.

[Section 24 amended: No. 2 of 2008 s. 32.]

25. Rights of appeal if acquittal on account of unsoundness of mind

(1) This section applies if an accused is acquitted of a charge in an indictment on account of unsoundness of mind.

(2) The accused may appeal to the Court of Appeal against any or all of the following decisions —

(a) the acquittal;

(b) any order made under the *Criminal Law (Mentally Impaired Accused) Act 1996* as a result of the acquittal.

(3) The prosecutor may appeal to the Court of Appeal against any or all of the following decisions —

(a) the acquittal if it was entered after a finding made by a judge under the *Criminal Procedure Act 2004* section 93 or in a trial by judge alone;

(aa) the acquittal if it was entered after a jury's special verdict returned under the *Criminal Procedure Act 2004* section 113(1) on a charge the statutory penalty for which is or includes imprisonment for 14 years or more or life, but only on the grounds that before or during the trial the judge made an error of fact or law in relation to the charge;

(b) any order made under the *Criminal Law (Mentally Impaired Accused) Act 1996* as a result of the acquittal;

(c) any refusal to make an order under the *Criminal Law (Mentally Impaired Accused) Act 1996* as a result of the acquittal.

[Section 25 amended: No. 2 of 2008 s. 33.]

26. Separate trial decision, preliminary appeal against

(1) If an accused is charged in one indictment with 2 or more offences —

(a) the prosecutor may appeal to the Court of Appeal against any order made by a judge of a superior court that there be a separate trial of any of the charges; and

(b) the accused may appeal to the Court of Appeal against a refusal by a judge of a superior court to order that there be a separate trial of any of the charges.

(2) If an accused is tried at one trial with 2 or more offences charged in one indictment and is convicted of any of those offences, an appeal by the accused under this Part against that conviction on any ground that relates to the joinder of the charges in the indictment cannot be allowed on that ground if the accused has already appealed under subsection (1)(b), except on the basis of any relevant matter that emerged at any time after the decision that was the subject of that appeal.

(3) If 2 or more accused are charged on indictment with an offence —

(a) the prosecutor may appeal to the Court of Appeal against any order made by a judge of a superior court that there be a separate trial of any of the accused; and

(b) any accused may appeal to the Court of Appeal against a refusal by a judge of a superior court to order that there be a separate trial of any of the accused.

(4) If an accused is tried with one or more other accused in one trial and is convicted of any offence, an appeal by the accused under this Part against that conviction on any ground that relates to the joinder of the accused in the indictment cannot be allowed on that ground if the accused has already appealed under subsection (3)(b), except on the basis of any relevant matter that

emerged at any time after the decision that was the subject of that appeal.

(5) An appeal under this section against a decision must be commenced within 7 days after the date of the decision and before the day on which the accused's trial is listed to start.

(6) If an appeal under this section is commenced on or after the day on which the accused's trial is listed to start, the appeal must be dismissed.

(7) On an appeal under this section against an order or a refusal to make an order, the Court of Appeal may confirm the order or refusal, or set it aside and make any order that could have been made on the application for a separate trial.

[Section 26 amended: No. 2 of 2008 s. 34.]

Division 3 — Commencing and deciding appeals

27. Leave to appeal required in all cases

(1) The leave of the Court of Appeal is required for each ground of appeal in an appeal under this Part.

(2) After an appeal is commenced, the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied the ground has a reasonable prospect of succeeding.

(3) Unless the Court of Appeal gives leave to appeal on at least one ground of appeal in an appeal, the appeal is to be taken to have been dismissed.

(4) The Court of Appeal may decide whether or not to give leave to appeal —

(a) with or without written or oral submissions from the parties to the appeal;

(b) before or at the hearing of, or when giving judgment on, the appeal.

28. Commencing an appeal

(1) An appeal under this Part must be commenced and conducted in accordance with this Part and rules of court.

(2) An appeal under this Part must be commenced by lodging with the Court of Appeal an application for leave to appeal.

(3) An appeal under this Part against a decision or judgment cannot be commenced later than 21 days after the date of the decision or judgment unless the Court of Appeal orders otherwise.

(4) If the date on which a person is sentenced for an offence is not the date on which the person is convicted of the offence, the time in subsection (3) for an appeal against either the conviction or the sentence or both runs from the date of sentencing.

(5) On commencing an appeal, the appellant must serve a copy of the application for leave to appeal on —

[(a) deleted]

(b) the other party or other parties to the proceedings before the trial court.

(6) The Court of Appeal may at any time order the appellant to serve a copy of the application for leave to appeal on any other person the court thinks fit.

(7) As soon as practicable after it is served under subsection (5), the District Court must give the exhibits in the case to the Court of Appeal.

[Section 28 amended: No. 5 of 2008 s. 27.]

29. Sentences etc., Court of Appeal may stay etc.

At any time after an appeal is commenced under this Part and before it is concluded, the Court of Appeal may —

(a) make any order that a superior court can make under the *Criminal Procedure Act 2004* section 121; or

(b) amend or cancel any such order that has been made, whether by a superior court or the Court of Appeal.

30. Appeal against conviction, decision on

(1) This section applies in the case of an appeal against a conviction by an offender.

(2) Unless under subsection (3) the Court of Appeal allows the appeal, it must dismiss the appeal.

(3) The Court of Appeal must allow the appeal if in its opinion —

(a) the verdict of guilty on which the conviction is based should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or

(b) the conviction should be set aside because of a wrong decision on a question of law by the judge; or

(c) there was a miscarriage of justice.

(4) Despite subsection (3), even if a ground of appeal might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(5) If the Court of Appeal allows the appeal, it must set aside the conviction of the offence (***offence A***) and must —

(a) order a trial or a new trial; or

(b) enter a judgment of acquittal of offence A; or

(c) if —

(i) the offender could have been found guilty of some other offence (***offence B***) instead of offence A; and

(ii) the court is satisfied that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender was guilty of offence B,

enter a judgment of conviction for offence B and impose a sentence for offence B that is no more severe than the sentence that was imposed for offence A; or

(d) if the court is satisfied that the offender should have been found not guilty of offence A on account of unsoundness of mind — enter a judgment of acquittal of offence A on account of unsoundness of mind and deal with the offender under the *Criminal Law (Mentally Impaired Accused) Act 1996*; or

(e) if the offender could have been found guilty of some other offence (***offence B***) instead of offence A and the court is satisfied —

(i) that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender did the acts or made the omissions that constitute offence B; and

(ii) that the offender should have been found not guilty of offence B on account of unsoundness of mind,

enter a judgment of acquittal of offence B on account of unsoundness of mind and deal with the offender under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

(6) If the Court of Appeal enters a judgment of acquittal of offence A or enters a judgment of conviction of offence B, it may vary any sentence —

(a) that was imposed for an offence other than offence A at or after the time when the offender was sentenced for offence A; and

(b) that took into account the sentence for offence A.

31. Appeal against sentence etc., decision on

(1) This section applies in the case of an appeal commenced by an offender under section 23, or by a prosecutor under section 24(1), against —

(a) the sentence imposed or any order made as a result of —

(i) a conviction on indictment; or

(ii) a conviction by a court of summary jurisdiction in respect of which the offender was committed for sentence;

(b) a refusal by a superior court to make an order that might be made as a result of such a conviction.

[(2) deleted]

(3) Unless under subsection (4) the Court of Appeal allows the appeal, it must dismiss the appeal.

(4) The Court of Appeal may allow the appeal if, in its opinion —

(a) in the case of an appeal referred to in subsection (1)(a), a different sentence should have been imposed; or

(b) in the case of an appeal referred to in subsection (1)(b), an order should have been made.

(5) If the Court of Appeal allows an appeal referred to in subsection (1)(a), it must set aside the sentence and —

(a) may instead impose a new sentence that is either more or less severe; or

(b) may send the charge back to the court that imposed the sentence to be dealt with further.

(6) If the Court of Appeal allows an appeal referred to in subsection (1)(b), it —

(a) may make any order that should have been made; or

(b) may send the charge back to the court that refused to make the order to be dealt with further.

[Section 31 amended: No. 2 of 2008 s. 35.]

32. Appeal under s. 25, decision on

(1) This section applies in the case of an appeal commenced under section 25 in relation to a charge of which an accused has been acquitted on account of unsoundness of mind under *The Criminal Code* section 27.

(2) An appeal against an acquittal of an offence (***offence A***) on account of unsoundness of mind is to be dealt with as if the appeal were against —

(a) a finding that the accused did the acts or made the omissions that constitute the offence (the ***factual finding***); or

(b) a finding that the accused was not criminally responsible for those acts or omissions on account of unsoundness of mind (the ***section 27 finding***); or

(c) both the factual finding and the section 27 finding,

as the case requires.

(3) Unless under subsection (4) the Court of Appeal allows an appeal referred to in subsection (2), it must dismiss the appeal.

(4) In an appeal referred to in subsection (2), the Court of Appeal may allow the appeal against the factual finding or against the section 27 finding if in its opinion —

(a) the finding should be set aside because, having regard to the evidence, it is unreasonable or cannot be supported; or

(b) the finding should be set aside because of a wrong decision on a question of law by the judge; or

(c) there was a miscarriage of justice.

(5) Despite subsection (4), even if a ground of appeal might be decided in favour of the appellant, the Court of Appeal may

dismiss an appeal if it considers that no substantial miscarriage of justice has occurred.

(6) If both the appeal against the factual finding and the appeal against the section 27 finding are allowed, the Court of Appeal must set aside the acquittal of offence A on account of unsoundness of mind and must —

(a) order a trial or a new trial; or

(b) enter a judgment of acquittal (other than on account of unsoundness of mind) of offence A; or

(c) if —

(i) the offender could have been found guilty of some other offence (***offence B***) instead of offence A; and

(ii) the court is satisfied that the jury must have been satisfied or, in a trial by a judge alone, that the judge must have been satisfied of facts that prove the offender was guilty of offence B,

enter a judgment of conviction for offence B and deal with the accused accordingly.

(7) If the appeal against the factual finding is allowed and the appeal against the section 27 finding is dismissed, the Court of Appeal must set aside the acquittal of offence A on account of unsoundness of mind and must —

(a) order a trial or a new trial; or

(b) enter a judgment of acquittal (other than on account of unsoundness of mind) of offence A; or

(c) if —

(i) the offender could have been found guilty of some other offence (***offence B***) instead of offence A; and

(ii) the court is satisfied that the jury must have been satisfied or, in a trial by a judge alone, that the

judge must have been satisfied of facts that prove the offender was guilty of offence B,

enter a judgment of acquittal of offence B on account of unsoundness of mind and deal with the offender under the *Criminal Law (Mentally Impaired Accused) Act 1996*.

(8) If the appeal against the factual finding is dismissed and the appeal against the section 27 finding is allowed, the Court of Appeal must set aside the acquittal of offence A on account of unsoundness of mind and must —

(a) if it is satisfied that, but for the section 27 finding, the accused would have been found guilty of —

(i) offence A; or

(ii) some other offence of which the accused might have been convicted instead of offence A,

enter a judgment of conviction for the offence concerned and deal with the accused accordingly; or

(b) otherwise, order a trial or a new trial.

(9) In an appeal against an order made, or a refusal to make an order, under the *Criminal Law (Mentally Impaired Accused) Act 1996* as a result of an acquittal on account of unsoundness of mind, section 31, with any necessary changes, applies as if the order were a sentence or the refusal were a refusal to make an order that might be made as a result of a conviction, as the case requires.

33. Other appeals by prosecutor, decision on

(1) This section applies in the case of an appeal by a prosecutor against any decision referred to in section 24(2) in relation to an indictable charge.

(2) On the appeal the Court of Appeal —

(a) may affirm, vary or set aside the decision and any judgment entered or order made as a result of the decision; and

(b) may enter any judgment, make any order, exercise any power (including a power to amend the charge), and direct any step to be taken, which should have been given, made, exercised or taken in the first instance; and

(c) if it sets aside a decision, may order a trial or a new trial, as the case requires.

(2a) Even if a ground of appeal might be decided in favour of the prosecutor, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(3) If the Court of Appeal sets aside a judgment entered under the *Criminal Procedure Act 2004* section 128(2) after the accused was found guilty of an offence but before the accused was convicted of it, the court must —

(a) enter a judgment of conviction of the offence against the accused; and

(b) order the accused to appear to receive judgment and be dealt with according to law by the Court of Appeal or the trial court, as the Court of Appeal decides.

(4) If an order is made under subsection (3), the Court of Appeal Registrar may issue a warrant to have the accused arrested and brought before the Court of Appeal or the trial court, as the case requires, as soon as practicable.

[Section 33 amended: No. 2 of 2008 s. 36.]

34. New trial etc., procedure if ordered

(1) If as a result of a decision by the Court of Appeal —

(a) a trial or a new trial is required; or

(b) a person is to be required to plead to a charge; or

(c) an issue needs to be tried,

in the trial court, the Court of Appeal may fix the time and place for the parties to appear in the trial court and give any directions about it that are necessary.

(2) For the purposes of any such appearance, the Court of Appeal Registrar may issue a warrant to have the person who is to be tried or required to plead arrested and brought before the trial court as soon as practicable.

[Section 34 amended: No. 2 of 2008 s. 37.]

Division 4 — Miscellaneous

35. No fees or costs

(1) A party to an appeal under this Part must not be charged a fee by a court for or in respect of any act or proceeding that relates to the appeal or its commencement.

(2) The Court of Appeal cannot order a party to an appeal under this Part to pay another party's costs of or relating to the appeal.

35A. Accused's costs in some appeals to be paid by State

In an appeal commenced by a prosecutor under section 24(2)(da) or 25(3)(aa), the accused's reasonable costs of being legally represented in the Court of Appeal are to be paid by the State.

[Section 35A inserted: No. 2 of 2008 s. 38.]

Part 3A — Further appeals against conviction

[Heading inserted: No. 18 of 2022 s. 4.]

Division 1 — Preliminary

[Heading inserted: No. 18 of 2022 s. 4.]

35B. Application of this Part

This Part applies to an offender whether the offender was convicted of the offence to which an appeal under this Part relates before or after the *Criminal Appeals Amendment Act 2022* came into operation.

[Section 35B inserted: No. 18 of 2022 s. 4.]

35C. Term used: offender

In this Part —

offender has the meaning given in section 22.

[Section 35C inserted: No. 18 of 2022 s. 4.]

35D. Fresh, new and compelling evidence

(1) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is ***fresh*** —

(a) if, despite the exercise of reasonable diligence, the evidence was not and could not have been tendered at the trial of the offence or any previous appeal; or

(b) if —

(i) the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal; and

(ii) the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.

(2) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is ***new*** if the evidence was not tendered at the trial of the offence or any previous appeal but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or any previous appeal.

(3) Despite subsection (2), evidence is not new evidence if it is fresh evidence under subsection (1)(b).

(4) For the purposes of this Part, evidence relating to an offence of which an offender was convicted is ***compelling*** if it is highly probative in the context of the issues in dispute at the trial of the offence.

[Section 35D inserted: No. 18 of 2022 s. 4.]

Division 2 — Rights of appeal

[Heading inserted: No. 18 of 2022 s. 4.]

35E. Second or subsequent appeal against conviction

(1) Subject to this Part, an offender convicted of an offence on indictment may bring a 2nd or subsequent appeal to the Court of Appeal against conviction if —

(a) there is fresh and compelling evidence relating to the offence; or

(b) there is new and compelling evidence relating to the offence.

(2) Evidence is not precluded from being admissible on an appeal brought under this Part just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

[Section 35E inserted: No. 18 of 2022 s. 4.]

Division 3 — Commencing and deciding appeals

[Heading inserted: No. 18 of 2022 s. 4.]

35F. Leave to appeal required in all cases

(1) Leave of the Court of Appeal is required for each ground of appeal in an appeal brought under this Part.

(2) Except as provided in subsection (3), the Court of Appeal must decide whether to give leave to appeal on a ground of the appeal before the hearing of the appeal.

(3) If the Court of Appeal considers it necessary or desirable, it may give leave to appeal at the hearing of, or when giving judgment on, the appeal.

(4) After an appeal has commenced, the Court of Appeal must not give leave to appeal on a ground of appeal unless it is satisfied —

(a) the ground identifies fresh and compelling evidence or new and compelling evidence that should, in the interests of justice, be considered on an appeal; and

(b) the ground has a reasonable prospect of succeeding.

(5) Unless the Court of Appeal gives leave to appeal on at least 1 ground of appeal, the appeal is taken to have been dismissed.

[Section 35F inserted: No. 18 of 2022 s. 4.]

35G. Commencing appeal

(1) An appeal under this Part must be commenced and conducted in accordance with this Part and rules of court.

(2) An appeal under this Part must be commenced by lodging with the Court of Appeal an application for leave to appeal that sets out the grounds for appeal.

(3) On commencing an appeal, the appellant must serve a copy of the application for leave to appeal on the other party or parties to the proceedings before the trial court.

(4) The Court of Appeal may at any time order the appellant to serve a copy of the application for leave to appeal on any other person that the court thinks fit.

[Section 35G inserted: No. 18 of 2022 s. 4.]

35H. Decision on appeal

(1) Unless, under subsection (2) or (4), the Court of Appeal allows an appeal, it must dismiss the appeal.

(2) The Court of Appeal must allow an appeal based on fresh and compelling evidence if it is satisfied there was a miscarriage of justice.

(3) Despite subsection (2), even if 1 or more grounds might be decided in favour of the offender, the Court of Appeal may dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

(4) The Court of Appeal must allow an appeal based on new and compelling evidence if it is satisfied on the balance of probabilities that, in light of all the evidence, the evidence establishes that the offender is innocent.

(5) If the Court of Appeal allows the appeal, it must set aside the conviction of the offence and must —

(a) order a new trial; or

(b) enter a judgment, and deal with the offender in a manner, referred to in section 30(5)(b) to (e).

(6) If the Court of Appeal orders a new trial under subsection (5)(a), section 34 applies, with any necessary modifications, as if the appeal had been brought under Part 3.

(7) If the Court of Appeal enters a judgment under subsection (5)(b), section 30(6) applies, with any necessary modifications, as if the appeal had been brought under Part 3.

[Section 35H inserted: No. 18 of 2022 s. 4.]

Division 4 — Fees and costs

[Heading inserted: No. 18 of 2022 s. 4.]

35I. No fees

A party to an appeal under this Part must not be charged a fee by a court for, or in respect of, any act or proceeding that relates to the appeal or its commencement.

[Section 35I inserted: No. 18 of 2022 s. 4.]

35J. Costs against appellant

(1) This section applies if an application for leave to appeal under this Part is dismissed under section 35F(5).

(2) The Court of Appeal may order the appellant to pay another party's costs of, or relating to, the appeal.

(3) If the Court of Appeal orders the appellant to pay any costs under subsection (2), section 21 applies, with any necessary modifications, as if the order were made under Part 2.

[Section 35J inserted: No. 18 of 2022 s. 4.]

Part 4 — Provisions applicable to any appeal

36. Terms used

In this Part, unless the contrary intention appears —

appeal court, in relation to an appeal, means the division of the Supreme Court that has jurisdiction to hear the appeal;

lower court, in relation to an appeal, means the court that made the decision that is the subject of the appeal.

37. Application of this Part

This Part applies to any appeal under this Act.

38. Multiple appeals, consolidation etc.

(1) An appellant may appeal against 2 or more decisions made at the same hearing and in such a case the appeals must be heard and decided together unless and to the extent that the appeal court orders otherwise.

(2) If more than one appeal against a decision is made, the appeal court may hear and decide 2 or more of them at the same time.

(3) An appeal court may hear and decide 2 or more appeals, each of which is against a different decision, at the same time if it is in the interests of justice to do so.

39. Material to be considered on appeal

(1) An appeal court must decide an appeal on the evidence and material that were before the lower court.

(2) An appeal court may ascertain what evidence and material was before the lower court in any way it considers sufficient.

(3) Subsection (1) does not affect the power of an appeal court in section 40 to admit evidence.

(4) Subsection (1) does not prevent an appeal court from considering any evidence that the lower court refused to admit.

40. General powers to deal with appeals

(1) For the purposes of dealing with an appeal, an appeal court may do any or all of the following —

(a) order the production of any record or thing, whether or not an exhibit, that is or may be relevant to the appeal;

(b) order a witness who would have been compellable at the trial in the lower court, whether or not called at the trial, to attend and be examined before the appeal court;

(c) if a person was a compellable witness, or would have been a compellable witness if called, at the trial in the lower court —

(i) order the person to attend and be examined in accordance with rules of court or the directions of the appeal court before a person appointed by it under subsection (2); and

(ii) order the evidence of the person to be recorded and the recording to be admitted as evidence in the court;

(d) subject to the *Evidence Act 1906* section 9, admit the evidence of a witness, including a convicted appellant, who is a competent but not compellable witness;

(e) admit any other evidence;

(f) if a question in the appeal involves a lengthy examination of records, or a scientific or local investigation, that the court considers cannot be done conveniently before the court —

(i) appoint a special commissioner to inquire into and report on the question; and

(ii) act on the report so far as the court thinks fit;

(g) appoint a person with special expert knowledge to act as an assessor to the court if it considers that the knowledge is required to properly decide the appeal;

(h) require the person or persons who constituted the lower court to supply a report about the decision or the case in which it was made or any aspect of either;

(i) order a party to give particulars to support a ground of appeal;

(j) if there are inadequate particulars to support a ground of appeal, strike it out without deciding it;

(k) amend or add a ground of appeal;

(l) exercise any power that the Supreme Court may exercise in a civil case;

(m) issue any warrant or document, and make any order, that is necessary to give effect to its decision on the appeal or that may be necessary as a result of the discontinuance or dismissal of the appeal;

(n) issue any warrant or other document for the purpose of enforcing an order or sentence of the court.

(2) For the purposes of subsection (1)(c)(i) —

(a) in an appeal under Part 2 a single judge may appoint a magistrate, JP or some other officer or person to conduct the examination;

(b) in an appeal under Part 3 the Court of Appeal may appoint a judge of appeal, Supreme Court judge, District Court judge, magistrate, JP or some other officer or person to conduct the examination.

(3) If a person is appointed as a special commissioner or assessor, the reasonable fees of and expenses incurred by the person in performing his or her functions are to be fixed by a registrar of the Supreme Court and paid by the State.

(4) The *Criminal Procedure Act 2004* sections 31 and 32, with any necessary changes, apply respectively to and in respect of any warrant or summons issued by a court dealing with an appeal.

41. Sentencing or re-sentencing on appeal

(1) If under this Act an appeal court decides to impose a sentence, it may do one or more of the following —

(a) order that the sentence is to be taken to have taken effect on a date before the date of the order;

(b) order that the sentence is to take effect on a date on or after the date of the order.

(2) If under this Act an appeal court varies or sets aside a sentence (***sentence A***), it may vary any other sentence —

(a) that was imposed at or after the time when sentence A was imposed; and

(b) that took into account sentence A.

(3) If under this Act an appeal court decides to vary a sentence, it may do one or more of the following —

(a) vary the sentence as imposed;

(b) impose a different sentence involving a different sentencing option;

(c) order that the sentence is to be taken to have taken effect on a date before the date of the order;

(d) order that the sentence is to take effect on a date on or after the date of the order.

(4) The appeal court deciding an appeal that does or may require it to impose a sentence, or to vary a sentence imposed, on a person for an offence (whether the appeal was commenced by the person or by the prosecutor) —

(a) may take into account any matter, including any material change to the person's circumstances, relevant to the

sentence that has occurred between when the lower court dealt with the person and when the appeal is heard; but

(b) despite paragraph (a), must not take into account the fact that the court's decision may mean that the person is again sentenced for the offence.

(5) If an appeal court decides to impose a sentence, or vary a sentence already imposed, on a party, it may do so in the absence of the party, despite the *Sentencing Act 1995* section 14.

(6) If an appeal court, in deciding an appeal in relation to a person sentenced to imprisonment —

(a) sets aside the sentence; or

(b) varies the sentence, or amends the conviction in respect of which the sentence was imposed; or

(c) confirms the sentence,

the court must send a memorandum setting out the result of the appeal to the chief executive officer (as defined in the *Prisons Act 1981*).

(7) If subsection (6)(a) applies and the court does not impose another sentence of imprisonment on the person, the person must be released as soon as practicable after the memorandum is received by the chief executive officer, unless the person is required to be in custody for some other matter.

(8) If subsection (6)(b) applies, the warrant for the imprisonment of the person previously issued and in force has effect as if it were amended in accordance with the memorandum.

(9) The memorandum is to be put in the records of the department (as defined in the *Prisons Act 1981*) and is evidence of the matters stated in it.

(10) This section is in addition to and does not affect the operation of the *Sentencing Act 1995* except as expressly stated.

[Section 41 amended: No. 2 of 2008 s. 39.]

42. Result of appeal to be given to other court

(1) When an appeal is concluded, the appeal court must send a memorandum setting out the result of the appeal to the lower court.

(2) The memorandum is to be put in the records of the lower court and is evidence of the matters stated in it.

43. Party in custody, entitlement to be present at appeal

(1) In this section —

video link means facilities, including closed circuit television, that enable, at the same time, a court at one place to see and hear a person at another place and vice versa.

(2) A party to an appeal who is in custody and who is self-represented is entitled to be present at any proceedings relating to the appeal.

(3) A party to an appeal who is in custody and who is represented by a lawyer —

(a) is entitled to be present at the actual hearing of the appeal; but

(b) is not entitled to appear at any other proceedings on the appeal,

unless the appeal court orders otherwise.

(4) If a party to an appeal who is in custody is entitled and wants to be present at proceedings on the appeal, the appeal court must make any necessary orders to ensure the party appears before the court in person or by means of a video link.

(5) If a party to an appeal conducts himself or herself in a manner that makes it impracticable to continue proceedings in his or her presence, the appeal court may order the party to be removed and the proceedings to proceed in the accused's absence or by means of a video link.

44. Appellant in custody, treatment of

If a convicted appellant —

(a) is in custody pending the conclusion of an appeal commenced by him or her; and

(b) requests the chief executive officer (within the meaning of the *Prisons Act 1981*) to be treated as if he or she was a prisoner on remand,

he or she is to be treated as such, even if he or she is also in custody serving a sentence in relation to a conviction neither of which is the subject of an appeal.

45. Exhibits

(1) If an appeal court orders a lower court to deal with a case again, the appeal court must return each exhibit received from the lower court to it.

(2) Unless subsection (1) applies, an appeal court must retain each exhibit received from another court in relation to an appeal until —

(a) the time for appealing against a decision made on the appeal has elapsed; or

(b) any appeal against a decision made on the appeal has concluded,

whichever happens last, and then return it to the lower court.

(3) Despite subsection (2), an appeal court —

(a) may dispose of an exhibit that it considers is dangerous to retain; or

(b) may release an exhibit to a person who is entitled to custody of it if the court considers that —

(i) it is dangerous, impracticable or inconvenient for it to be retained under this section; or

(ii) it is necessary for that person to have the use of the exhibit.

(4) An appeal court that under subsection (3)(b) releases an exhibit to a person may require the person, as a condition of being given the exhibit, to give a written undertaking to the court as to the care, maintenance and custody of the exhibit and its re-delivery to the court.

(5) A person who, without a reasonable excuse, fails to carry out such an undertaking commits an offence.

Penalty: A fine of $12 000 or imprisonment for 12 months.

(6) If under subsection (1) or (2) an exhibit is returned to a lower court, then —

(a) the *Criminal Procedure Act 2004* section 170 applies to the exhibit, if further proceedings in the lower court are required as a result of the appeal; or

(b) if no such further proceedings are required, the lower court may release the exhibit to a person who in the court's opinion is entitled to custody of it or may require the party who tendered it in evidence to collect it.

[Section 45 amended: No. 5 of 2008 s. 28.]

Part 5A — Prosecuting acquitted accused

[Heading inserted: No. 9 of 2012 s. 4.]

46A. Terms used

(1) In this Part, unless the contrary intention appears —

acquitted accused has the meaning given in section 46B(1);

AOJ offence means —

(a) an administration of justice offence listed in subsection (2); or

(b) an offence under the law of a place outside this State that is substantially similar to an administration of justice offence listed in subsection (2);

authorised officer means —

(a) the Attorney General; or

(b) the Solicitor-General; or

(c) the State Solicitor; or

(d) the DPP; or

(e) the Director of Public Prosecutions appointed under the *Director of Public Prosecutions Act 1983* (Commonwealth);

charge A, in relation to an acquitted accused, has the meaning given in section 46B(1);

leave application means an application for leave made under section 46E;

new charge, in relation to an acquitted accused, has the meaning given in section 46E(1);

offence A, in relation to an acquitted accused, has the meaning given in section 46B(1);

serious offence means an indictable offence the statutory penalty for which is —

(a) life imprisonment; or

(b) imprisonment for 14 years or more;

trial A, in relation to an acquitted accused, has the meaning given in section 46B(1).

(2) For the purposes of this Part, an offence under a section of *The Criminal Code* listed in the Table is an administration of justice offence.

Table

Section	**Description of offence**
s. 82	Bribery of public officer
s. 121	Judicial corruption
s. 122	Official corruption not judicial but relating to offences
s. 123	Corrupting or threatening jurors
s. 124	Perjury
s. 129	Fabricating evidence
s. 130	Corruption of witnesses
s. 131	Deceiving witnesses
s. 132	Destroying evidence
s. 133	Preventing witnesses from attending
s. 135	Conspiring to defeat justice
s. 136	Compounding or concealing offences
s. 143	Attempting to pervert course of justice

[Section 46A inserted: No. 9 of 2012 s. 4.]

46B. Term used: acquitted accused

(1) For the purposes of this Part a person is an ***acquitted accused*** if the person, in this State or elsewhere —

(a) is tried on a charge (***charge A***) of a serious offence (***offence A***); and

(b) at the trial (***trial A***), or on appeal from a conviction in trial A, is acquitted, other than on account of unsoundness of mind, of —

(i) charge A; and

(ii) any other offence of which, on charge A, the acquitted accused might have been convicted instead of offence A.

(2) For the purposes of subsection (1) it does not matter if the acquittal occurred before or after the commencement of this Part.

[Section 46B inserted: No. 9 of 2012 s. 4.]

46C. Criminal investigations of acquitted accused that need authorised officer's authority

(1) In this section —

investigate, an offence, includes to exercise any power under the common law, a written law or a law of the Commonwealth for the purposes of obtaining evidence as to the commission of the offence;

law enforcement officer means —

(a) a police officer; or

(b) a person, other than a police officer, appointed under a written law to an office on which the common law, a written law or a law of the Commonwealth confers powers to investigate offences;

relevant offence means a serious offence, or an AOJ offence, a charge of which may be subject to —

(a) a defence under *The Criminal Code* section 17 on the ground that the accused has been acquitted as described in that section, other than on account of unsoundness of mind; or

(b) a requirement at law to permanently stay it because it would be an abuse of process.

(2) A law enforcement officer, whether with or without an acquitted accused's consent, must not investigate or authorise another person to investigate whether the acquitted accused may have committed a relevant offence unless —

(a) under subsection (4), an authorised officer, in writing, has authorised the investigation; or

(b) the law enforcement officer believes on reasonable grounds —

(i) the investigation needs to be done urgently in order to prevent it from being substantially and irrevocably prejudiced; and

(ii) it is not reasonably practicable in the circumstances to obtain an authorised officer's authorisation before doing the investigation.

(3) If a law enforcement officer acts under subsection (2)(b) —

(a) the officer, as soon as it is practicable to do so, must inform an authorised officer of —

(i) the grounds for acting under that provision; and

(ii) the action taken;

and

(b) the investigation of the relevant offence must not continue unless, under subsection (4), an authorised officer, in writing, has authorised the investigation.

(4) An authorised officer must not authorise the investigation of a relevant offence unless —

(a) the officer is satisfied a charge of the offence would not be subject to —

(i) a defence under *The Criminal Code* section 17 on the ground that the accused has been acquitted as described in that section, other than on account of unsoundness of mind; or

(ii) a requirement at law to permanently stay it because it would be an abuse of process;

or

(b) the officer is satisfied —

(i) there is, or the investigation is likely to obtain, evidence to justify making an application under this Part for leave to charge the acquitted accused with the relevant offence; and

(ii) it is in the public interest to investigate the relevant offence.

[Section 46C inserted: No. 9 of 2012 s. 4.]

46D. Charges against acquitted accused that need leave

A person cannot charge an acquitted accused with any of these charges without the leave of the Court of Appeal given under this Part —

(a) a charge of a serious offence the details of which are the same or substantially the same as those in charge A;

(b) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A;

(c) a charge of an AOJ offence allegedly committed in or in connection with trial A.

[Section 46D inserted: No. 9 of 2012 s. 4.]

46E. Applying for leave for new charge

(1) An authorised officer may apply to the Court of Appeal for leave to charge an acquitted accused with a new charge (the ***new charge***) being one of these —

(a) a charge of a serious offence the details of which are the same or substantially the same as those in charge A;

(b) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A;

(c) a charge of an AOJ offence allegedly committed in or in connection with trial A.

(2) An application cannot be made under subsection (1) if —

(a) the acquittal in trial A (as described in section 46B(1)(b)) of the acquitted accused occurred on a charge for which leave had been given under this Part; and

(b) that leave was given because, under section 46H(2)(c)(i), the Court of Appeal was satisfied that fresh and compelling evidence (within the meaning given by section 46I) existed against the acquitted accused in relation to the charge.

(3) An application made under subsection (1) may relate to 2 or more new charges.

(4) An application permitted by subsection (1) must be made in accordance with this Part and rules of court.

(5) An application made under subsection (1) may be made without giving notice of it to the acquitted accused.

[Section 46E inserted: No. 9 of 2012 s. 4.]

46F. Procedure on leave applications

(1) As soon as practicable after a leave application is made, the Court of Appeal, unless it is satisfied the application is an abuse of process, must —

(a) issue a summons that requires the acquitted accused to appear before the court; or

(b) issue an arrest warrant to have the acquitted accused brought before the court.

(2) If the acquitted accused does not obey a summons issued under subsection (1), the court must issue an arrest warrant to have the accused brought before the court.

(3) On being served with the summons or arrested (as the case may be), the acquitted accused must be given a copy of the leave application.

(4) When the acquitted accused appears or is brought before the Court of Appeal, the court —

(a) may make any order necessary in relation to hearing the leave application; and

(b) subject to the *Bail Act 1982*, may order that the accused be kept in custody until the hearing.

[Section 46F inserted: No. 9 of 2012 s. 4.]

46G. Hearing leave applications

(1) The acquitted accused is entitled to be heard at the hearing of a leave application.

(2) For the purpose of dealing with a leave application —

(a) the Court of Appeal may exercise any power in section 40 as if the application were an appeal; and

(b) if the acquitted accused is in custody, section 43 applies, with any necessary changes, as if the application were an appeal.

(3) The Court of Appeal may deal with 2 or more leave applications at one hearing if the new charges for which leave is sought will or may be tried together.

(4) If the Court of Appeal is satisfied the acquitted accused has received adequate notice of the hearing, the court may hear a leave application in the absence of the acquitted accused.

[Section 46G inserted: No. 9 of 2012 s. 4.]

46H. Deciding leave applications

(1) On a leave application, the Court of Appeal may give or refuse to give the applicant leave to charge the acquitted accused with the new charge.

(2) If the new charge to which a leave application relates is —

(a) a charge of a serious offence the details of which are the same or substantially the same as those in charge A; or

(b) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A,

but not a charge of an AOJ offence allegedly committed in or in connection with trial A, the Court of Appeal must not give leave unless —

(c) the Court of Appeal is satisfied on the balance of probabilities —

(i) there is fresh and compelling evidence (within the meaning given by section 46I) against the acquitted accused in relation to the new charge; or

(ii) the acquittal in trial A is a tainted acquittal (within the meaning given by section 46J);

and

(d) the Court of Appeal is satisfied on the balance of probabilities that charging the acquitted accused with the

new charge is in the interests of justice having regard to section 46K.

(3) If the new charge to which a leave application relates is a charge of an AOJ offence allegedly committed in or in connection with trial A, the Court of Appeal must not give leave unless it is satisfied on the balance of probabilities that charging the acquitted accused with the AOJ offence is in the interests of justice having regard to section 46K.

(4) If the acquitted accused is an acquitted accused for the purposes of this Part because, in a place outside this State, he or she was charged with and acquitted of an offence under the law of that place —

(a) leave cannot be given under subsection (2) if the law of that place does not permit the person to be tried —

(i) on another charge of offence A the details of which are the same or substantially the same as those in charge A; or

(ii) on a charge of some other offence of which, on charge A, the acquitted accused might have been convicted instead of offence A;

and

(b) leave cannot be given under subsection (3) if the law of that place does not permit the person to be tried on a charge of an AOJ offence allegedly committed in or in connection with trial A; and

(c) leave cannot be given under subsection (2) or (3) if the application of this Part to the person is inconsistent with the *Constitution* (Commonwealth) or the law of the Commonwealth.

(5) If the Court of Appeal refuses to give leave to charge the acquitted accused with a new charge, it must discharge the acquitted accused.

(6) If the Court of Appeal gives leave to charge the acquitted accused with a new charge, then, subject to the *Bail Act 1982*, it may order that the acquitted accused be kept in custody until —

(a) his or her first appearance in the court in which the prosecution of the new charge is commenced; or

(b) the time for commencing the prosecution of the new charge expires,

whichever occurs first.

[Section 46H inserted: No. 9 of 2012 s. 4.]

46I. Meaning of fresh and compelling evidence

(1) For the purposes of section 46H, evidence is fresh in relation to the new charge if —

(a) despite the exercise of reasonable diligence by those who investigated offence A, it was not and could not have been made available to the prosecutor in trial A; or

(b) it was available to the prosecutor in trial A but was not and could not have been adduced in it.

(2) For the purposes of section 46H, evidence is compelling in relation to the new charge if, in the context of the issues in dispute in trial A, it is highly probative of the new charge.

(3) For the purposes of this section, it is irrelevant whether the evidence being considered by the Court of Appeal would have been admissible in trial A against the acquitted accused.

[Section 46I inserted: No. 9 of 2012 s. 4.]

46J. Meaning of tainted acquittal

For the purposes of section 46H, the acquittal in trial A is tainted if —

(a) the acquitted accused or another person has been convicted in this State or elsewhere of an AOJ offence committed in or in connection with trial A; and

(b) but for the commission of that AOJ offence, it is more likely than not that the acquitted accused would have been found guilty of, or would have been acquitted on account of unsoundness of mind of —

(i) offence A; or

(ii) some other offence of which, on charge A, the acquitted accused might have been convicted instead of offence A.

[Section 46J inserted: No. 9 of 2012 s. 4.]

46K. Interests of justice, matters to be considered

(1) This section applies for the purposes of section 46H.

(2) Charging the acquitted accused with the new charge is not in the interests of justice if the Court of Appeal is satisfied a fair trial of the new charge is unlikely having regard to —

(a) the length of time since offence A was allegedly committed or since trial A; and

(b) all other existing circumstances.

(3) The Court of Appeal is to have regard in particular to the following —

(a) whether any police officer or prosecutor has failed to act with reasonable diligence or expedition in connection with applying for leave to charge the acquitted accused with the new charge;

(b) the objective seriousness of the facts of the new charge.

[Section 46K inserted: No. 9 of 2012 s. 4.]

46L. Restrictions on publicity

(1) This section does not affect any prohibition in any other written law of the publication of any information.

(2) A person must not publish any information that conveys or has the effect of conveying that a person whom the information identifies directly or indirectly is the subject of any of these —

(a) an application made under section 46C;

(b) an investigation authorised under section 46C;

(c) a leave application;

(d) leave given under section 46H;

(e) a new charge laid pursuant to leave given under section 46H.

(3) The prohibition on publication in subsection (2) does not apply —

(a) if and to the extent an order made under subsection (4) authorises publication; or

(b) if subsection (2) has ceased to operate under subsection (9).

(4) The Court of Appeal or the court in which the acquitted accused is being tried on the new charge may make an order that authorises the publication of some or all of the information to which subsection (2) applies.

(5) An order made under subsection (4) may be in any terms, and include any conditions, the court thinks just.

(6) A court must not make an order under subsection (4) unless satisfied it is in the interests of justice to do so.

(7) Before making an order under subsection (4) a court must give the acquitted accused a reasonable opportunity to be heard on the application for the order.

(8) A court that has made an order under subsection (4) may amend or cancel it at any time.

(9) Subject to any order made under subsection (4), the prohibition in subsection (2) ceases to have effect —

(a) when there is no longer any step that could be taken in order to charge and try the acquitted accused with a new charge under this Part; or

(b) when the trial (if any) of the acquitted accused on a new charge concludes,

whichever occurs first.

(10) A person who contravenes subsection (2) commits a contempt of the Supreme Court.

[Section 46L inserted: No. 9 of 2012 s. 4.]

46M. Leave for new charge, effect of

(1) If under this Part the Court of Appeal gives leave to charge an acquitted accused with a new charge, only the person given leave, or another authorised officer, may commence a prosecution of the new charge.

(2) A prosecution of a new charge cannot be commenced after —

(a) 2 months after the date on which leave is given; or

(b) any longer period that the Court of Appeal may allow on an application made before the 2 months elapse.

(3) The Court of Appeal must not allow a longer period under subsection (2)(b) unless it is satisfied —

(a) the person given leave has taken and is taking reasonable steps to commence the prosecution as quickly as possible; and

(b) there is a good reason why a longer period should be allowed.

(4) In a prosecution of the new charge —

(a) a court dealing with the new charge cannot stay it because it is an abuse of process unless it is an abuse of process for reasons unrelated to it being —

(i) a charge of a serious offence the details of which are the same or substantially the same as those in charge A; or

(ii) a charge of some other serious offence of which, at trial A, the acquitted accused might have been convicted instead of offence A; or

(iii) a charge of an AOJ offence allegedly committed in or in connection with trial A;

and

(b) the acquitted accused is not entitled —

(i) on the grounds of the acquittal in trial A, to plead a defence under *The Criminal Code* section 17; or

(ii) to prove or refer to the acquittal in trial A;

and

(c) the defence under *The Criminal Code* section 17 to the new charge that, but for this section, would exist by virtue of the acquittal in trial A does not apply to the new charge; and

(d) the prosecutor is not entitled to refer to the fact that the Court of Appeal has given leave to charge the acquitted accused with the new charge or to any findings of the Court of Appeal in doing so.

(5) If —

(a) a new charge against an acquitted accused is the same or substantially the same as charge A; and

(b) the acquitted accused was acquitted of charge A in trial A; and

(c) trial A occurred in this State; and

(d) the acquitted accused is convicted on the new charge,

the court dealing with the new charge must set aside the judgment of acquittal, entered in trial A, of charge A.

[Section 46M inserted: No. 9 of 2012 s. 4.]

Part 5 — Referrals of questions of law to the Court of Appeal

46. Referrals by superior courts

(1) A referral of a question of law to the Court of Appeal by a superior court under the *Criminal Procedure Act 2004* must be made —

(a) with a statement of the circumstances that gave rise to the question of law; and

(b) in accordance with rules of court.

(2) Each party to the prosecution in which the question arose is entitled to be heard by the Court of Appeal on the referred question.

(3) If it appears that a person referred to in subsection (2) will not be making submissions to the Court of Appeal, the Attorney General may instruct a lawyer to make submissions to the court on behalf of the person.

(4) The Court of Appeal must consider the referred question and give its judgment on it.

47. Referrals by Attorney General

(1) In this section —

superior court means the Supreme Court, or the District Court, or the Children's Court when constituted so as to consist of or include a judge, but not the Court of Appeal.

(2) The Attorney General may refer to the Court of Appeal any question of law that was decided by a superior court when dealing with a charge of an indictable offence.

(3) The referral must be made —

(a) within 60 days after the date of the superior court's final judgment on the charge; and

(b) with a statement of the circumstances that gave rise to the question of law; and

(c) in accordance with rules of court.

(4) A person who was charged with the offence or who is affected by the superior court's decision is entitled to be heard by the Court of Appeal on the question referred and the person's reasonable costs of being legally represented in the Court of Appeal are to be paid by the State.

(5) If it appears that a person referred to in subsection (4) will not be making submissions to the Court of Appeal, the Attorney General must instruct a lawyer to make submissions to the court on behalf of the person.

(6) When a referral is made to it under this section, the Court of Appeal —

(a) may require the Attorney General to provide any information it considers is necessary to decide the question of law; and

(b) must consider the question referred and give its judgment on it.

(7) The judgment of the Court of Appeal on a question of law referred to it under this section does not affect or invalidate any verdict or decision in the superior court on the charge.

48. Referrals, general provisions about

(1) This section applies if a question of law is referred to the Court of Appeal under the *Criminal Procedure Act 2004* or under section 47(2).

(2) For the purpose of considering and deciding the referred question, the Court of Appeal may exercise any power in section 40.

(3) A person must not publish —

(a) any report of such a referral; or

(b) any report of proceedings on the referral,

that discloses the name or identity of a person charged in the indictment or affected by the decision of the superior court.

(4) A person who contravenes subsection (3) commits an offence.

Penalty:

(a) for an individual, a fine of $12 000 or imprisonment for 12 months;

(b) for a corporation, a fine of $60 000.

Part 6 — Miscellaneous

49. Sentence may be varied etc. in specific cases

If —

(a) a sentence imposed on a person (***sentence A***) ceases to have effect other than as a result of —

(i) it being set aside in an appeal under this Act; or

(ii) the conviction for which it was imposed being set aside in an appeal under this Act;

and

(b) at the time when sentence A ceases to have effect the person is serving or has yet to serve another sentence (***sentence B***) imposed when or after sentence A was imposed,

the Court of Appeal, on the application of the Attorney General —

(c) may set aside sentence B and impose a new sentence instead; or

(d) may vary sentence B.

50. Rules of court

(1) This section is in addition to and does not affect the operation of the *Supreme Court Act 1935* section 167.

(2) The Supreme Court may make rules of court prescribing any matter that is required or permitted by this Act to be prescribed, or that is necessary or convenient to be prescribed for giving effect to the purposes of this Act.

(3) Without limiting subsection (2), rules of court may —

(a) regulate the commencement and conduct of proceedings under this Act;

(b) provide for extending or shortening, with or without conditions, the time allowed under this Act or the rules of court for doing any act;

(c) provide for a proceeding under this Act to be dismissed without a hearing of it if the person who commenced it does not conduct it in accordance with the rules of court or orders made by the court;

(d) provide for the re-instatement of a proceeding under this Act that has been dismissed without a hearing of it;

(e) allow or require a party to a proceeding under this Act to present the party's case in writing instead of or in addition to doing so orally;

(f) provide for the discontinuance of proceedings under this Act;

(g) provide for the taxation of costs ordered to be paid in appeals under Part 2;

(h) confer on a master or registrar of the Supreme Court, either generally or in particular cases, and under such circumstances and on such conditions as the rules specify, such of the jurisdiction of the court under this Act as the rules specify.

51. Certain amendments to be reviewed

(1) The Minister must carry out a review of the operation of the amendments made to this Act by the *Criminal Law and Evidence Amendment Act 2008* Part 4 as soon as practicable after the expiration of 5 years from the commencement of the amendments.

(2) The Minister must prepare a report based on the review and, as soon as practicable after the report is prepared, cause it to be laid before each House of Parliament.

[Section 51 inserted: No. 2 of 2008 s. 40.]

52. Double jeopardy amendments to be reviewed

(1) The Minister must carry out a review of the operation of the amendments made to this Act and *The Criminal Code* by the *Criminal Appeals Amendment (Double Jeopardy) Act 2012* as soon as practicable after the expiration of 5 years after the date on which the amendments come into operation.

(2) The Minister must prepare a report based on the review and, as soon as practicable after the report is prepared and in any event not more than 18 months after the expiry of the period referred to in subsection (1), cause it to be laid before each House of Parliament.

[Section 52 inserted: No. 9 of 2012 s. 5.]

53. Review of amendments made by *Criminal Appeals Amendment Act 2022*

(1) The Minister must review the operation and effectiveness of the amendments made to this Act by the *Criminal Appeals Amendment Act 2022*, and prepare a report based on the review, as soon as practicable after the 5th anniversary of the day on which the *Criminal Appeals Amendment Act 2022* section 4 comes into operation.

(2) The Minister must cause the report to be laid before each House of Parliament as soon as practicable after it is prepared, but not later than 12 months after the 5th anniversary.

[Section 53 inserted: No. 18 of 2022 s. 5.]

Notes

This is a compilation of the *Criminal Appeals Act 2004* and includes amendments made by other written laws. For provisions that have come into operation, and for information about any reprints, see the compilation table. For provisions that have not yet come into operation see the uncommenced provisions table.

Compilation table

Short title	Number and year	Assent	Commencement
Criminal Appeals Act 2004	60 of 2004	23 Nov 2004	s. 1 and 2: 23 Nov 2004; Act other than s. 1 and 2: 2 May 2005 (see s. 2 and Gazette 31 Dec 2004 p. 7129)
Criminal Investigation (Consequential Provisions) Act 2006 s. 73	59 of 2006	16 Nov 2006	1 Jul 2007 (see s. 2 and Gazette 22 Jun 2007 p. 2838)
Criminal Law and Evidence Amendment Act 2008 Pt. 4	2 of 2008	12 Mar 2008	27 Apr 2008 (see s. 2 and Gazette 24 Apr 2008 p. 1559)
Acts Amendment (Justice) Act 2008 Pt. 6	5 of 2008	31 Mar 2008	30 Sep 2008 (see s. 2(d) and Gazette 11 Jul 2008 p. 3253)
Reprint 1: The *Criminal Appeals Act 2004* as at 23 Jan 2009 (includes amendments listed above)			
Road Traffic Legislation Amendment Act 2012 Pt. 4 Div. 13	8 of 2012	21 May 2012	27 Apr 2015 (see s. 2(d) and *Gazette* 17 Apr 2015 p. 1371)
Criminal Appeals Amendment (Double Jeopardy) Act 2012 Pt. 2	9 of 2012	21 May 2012	26 Sep 2012 (see s. 2(b) and *Gazette* 25 Sep 2012 p. 4499)
Reprint 2: The *Criminal Appeals Act 2004* as at 12 Apr 2013 (includes amendments listed above except those in the *Road Traffic Legislation Amendment Act 2012* Pt. 4 Div. 13)			
Courts and Tribunals (Electronic Processes Facilitation) Act 2013 Pt. 3 Div. 5	20 of 2013	4 Nov 2013	25 Nov 2013 (see s. 2(b) and *Gazette* 22 Nov 2013 p. 5391)
Criminal Appeals Amendment Act 2022 Pt. 2	18 of 2022	24 Jun 2022	1 Jan 2023 (see s. 2(b) and SL 2022/212 cl. 2)

Uncommenced provisions table

To view the text of the uncommenced provisions see *Acts as passed* on the WA Legislation website.

Short title	Number and year	Assent	Commencement
Criminal Law (Mental Impairment) Act 2023 Pt. 15 Div. 6	10 of 2023	13 Apr 2023	1 Sep 2024 (see s. 2(b) and SL 2024/175 cl. 2)