



Western Australia

## **Criminal Appeals Act 2004**

Compare between:

[02 May 2005, 00-a0-02] and [16 Nov 2006, 00-b0-02]



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*.

**2. Commencement**

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

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

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

**4. Interpretation**

(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. Interpretation**

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;

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

### **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.

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- (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) the court of summary jurisdiction; and
  - (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.

**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

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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 the *Road Traffic Act 1974*, 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;
  - (b) a sentence of detention under the *Young Offenders Act 1994*; and
  - (c) an order of forfeiture.

**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. Interpretation**

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;
  - (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.

**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;
  - (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.

**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 trial of the accused starts.
- (6) If an appeal under this section is commenced after the trial of the accused concerned has started, it 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.

**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 that sets out the grounds of the 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) the District Court if it made the decision that is the subject of the appeal; and
  - (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.

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

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- (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;
  - (b) enter a judgment of acquittal of offence A;
  - (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;
  - (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) In deciding the appeal, the Court of Appeal may have regard to any relevant matter that has occurred between when the offender was convicted and when the appeal was heard.

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- (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.

**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**”);

- (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;
  - (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;
  - (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

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**Part 3** Appeals from superior courts

**Division 3** Commencing and deciding appeals

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- (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;
- (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;
  - (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.
- (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.

**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;
  - (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.

**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.

## Part 4 — Provisions applicable to any appeal

### 36. Interpretation

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.

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- (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.

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- (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) In exercising a power under this Act to vary a sentence an appeal court may consider any matter relevant to the sentence that has occurred between when the sentence was imposed and when the appeal was heard.
- (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;
  - (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.

**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 —

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**“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 with orders to ensure the exhibits are kept by it until the last to happen of the events referred to in subsection (2).
- (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.

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- (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, subject to any order made under subsection (1) —
- (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.

## 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;

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- (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.

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## Notes

<sup>1</sup> This is a compilation of the *Criminal Appeals Act 2004*. The following table contains information about that Act<sup>1a</sup>.

### Compilation table

| Short title                      | Number and year | Assent      | Commencement  |
|----------------------------------|-----------------|-------------|---|
| <i>Criminal Appeals Act 2004</i> | 60 of 2004      | 23 Nov 2004 | 2 May 2005 (see s. 2 and Gazette 31 Dec 2004 p. 7129) |

<sup>1a</sup> [On the date as at which this compilation was prepared, provisions referred to in the following table had not come into operation and were therefore not included in this compilation. For the text of the provisions see the endnotes referred to in the table.](#)

### Provisions that have not come into operation

| <u>Short title</u>   | <u>Number and Year</u>     | <u>Assent</u>               | <u>Commencement</u>                         |
|--|----------------------------|-----------------------------|---|
| <a href="#">Criminal Investigation (Consequential Provisions) Act 2006 s. 73<sup>2</sup></a> | <a href="#">59 of 2006</a> | <a href="#">16 Nov 2006</a> | <a href="#">To be proclaimed (see s. 2)</a> |

<sup>2</sup> [On the date as at which this compilation was prepared, the \*Criminal Investigation \(Consequential Provisions\) Act 2006 s. 73\* which gives effect to Sch. 1 it. 2 had not come into operation. They read as follows:](#)

“

**73. Various Acts amended (Sch. 1)**

[Each Act listed in Schedule 1 is amended as set out in that Schedule immediately below the short title of the Act.](#)

”

[Schedule 1 item 2 reads as follows:](#)

“

**Schedule 1 — Various Acts amended**

[s. 73]

**2. Criminal Appeals Act 2004**

|             |   |
|-------------|---|
| <u>s. 6</u> | In the definition of “decision”, insert after paragraph (h) —<br><br>“<br>—<br><br>(i) a decision made under the <i>Criminal Investigation Act 2006</i> section 151;<br><br>” |
|-------------|---|

”  
—