Chapter 6
Appeals and Cases Stated

Chapter 6 – Appeals and Cases Stated

Chapter Overview

This Chapter is divided into parts which are identified by the court that is being appealed from and to:

Part 6.1 – Appeal from Magistrates' Court to County Court

Part 6.2 – Appeal from Magistrates' Court to Supreme Court on a question of law

Part 6.3 – Appeal and Case Stated from County and Supreme Court to Court of Appeal.

Legislative History

This Chapter is based on a mix of previous legislation, primarily on Part VI of the *Crimes Act 1958* and on Division 4 of Part 4 and Schedule 6 to the *Magistrates' Court Act 1989.*

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This Chapter contains all appeals related provisions. The most significant changes from previous procedures are found in Part 6.3 which concerns appeals to the Court of Appeal. This includes a significant restructure of the sections dealing with each type of appeal, a substantive change to the grounds of appeal against conviction and a new interlocutory appeals regime.

In relation to appeals to the County Court (*de novo* appeals from the Magistrates' Court), there are fewer substantive changes but the provisions have been restructured for clarity and brought into a single set of sections. Previously, these were split between the body of the *Magistrates' Court Act 1989* and Schedule 6 to that Act.

As is the case in many parts of the Act, this Chapter adopts consistent language and processes regardless of jurisdiction, unless there is a good reason for a difference.

Previously, the structure of the appeals provisions in the County Court and the Court of Appeal was very different.

For appeals to the County Court, the general approach was that the appeal must be filed and personally served within 30 days of the date of sentence.

For appeals to the Court of Appeal, the general approach was that the accused must give notice of application for leave to appeal in accordance with the rules of the court, within 30 days of the date of sentence, without further mention of service. However, there were also time limits of 14 days for some appeals. Time limits have been standardised in the Act at 28 days for filing and 7 further days for service.

A more explicit approach which separates out filing and service is introduced across all of the appeal provisions. Filing will commence the appeal and service will occur shortly after filing. The application of this filing/service approach is discussed, along with other relevant issues, in relation to each type of appeal throughout this guide.

A consistent structure has been adopted for the sections relating to each type of appeal. Broadly:

- right of appeal: sets out, in very simple terms, the nature of the appeal
- how appeal is commenced: provides for when the appeal must be filed and served
- determination of appeal: describes the test for the appeal and the process
- orders etc on successful appeal: explains the orders the court can make and the process that follows.

In relation to the County Court, the Act consistently follows the first three parts as noted above. The absence of the fourth (orders etc on successful appeal) reflects the *de novo* nature of the proceedings in which appeals are not strictly allowed. There are additional provisions in relation to some appeal rights and the reasons for those differences are explained for each.

It is also important to note that Chapter 8 of the Act includes a number of provisions which apply across all criminal proceedings, and therefore to appeals. These include:

- the general power of adjournment (section 331)
- a broad error correction power (section 412)
- service provisions (Part 8.3).

In addition, Schedule 4 to the Act contains transitional provisions which apply to appeals. The relevant point for the application of most appeals is when the sentence is imposed. This applies to appeals from the Magistrates' Court to the County Court under Part 6.1. The relevant trigger for appeals from the Magistrates' Court to the Supreme Court is when the final order is made. The day when the sentence is imposed or the final order is made is also the relevant day for the purposes of time limits for such appeals.

In relation to an interlocutory appeal, the relevant point for the application of the provisions is when the decision which is the subject of the appeal is made. In relation to cases stated, the relevant point for the application of the provisions is when the question of law arises. If the decision is made or the question arises on or after the commencement day (1 January 2010), Chapter 6 will apply. This means that interlocutory appeals and case stated procedures may be used almost as soon as the Act commences.

As discussed throughout this guide, there are a number of changes to time periods in the Act. They have been adjusted so that days are ordinarily in blocks of seven and time periods more than 42 days are referred to in months. In this Chapter, the main effect is that 30 day periods have been replaced with 28 day periods. An increased period for service of seven days beyond the 28 day filing period has been included in most provisions.

Part 6.1 – Appeal from Magistrates' Court to County Court

Part Overview

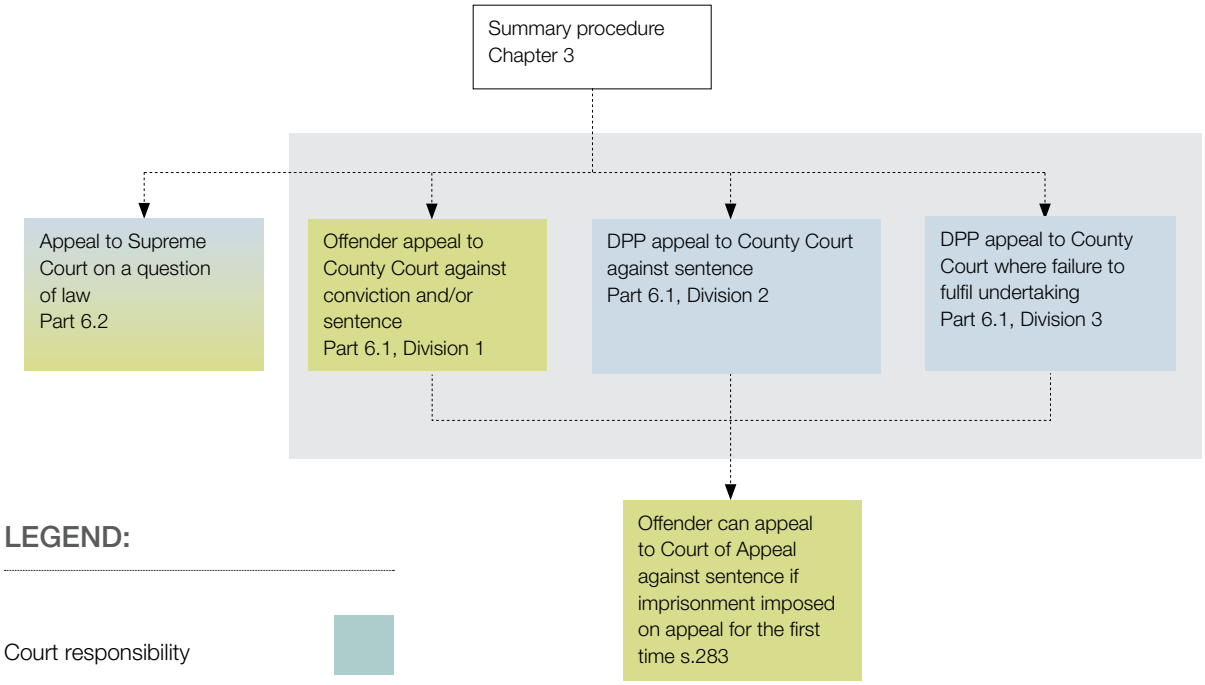
This Part provides for appeals from the Magistrates' Court to the County Court, including:

- appeal by offender (sections 274–277)
- appeal by DPP against sentence (sections 278–286)
- appeal by DPP against sentence; failure to fulfil undertaking (sections 260–262).

Procedural provisions relating to all of the above types of appeal are contained in Division 4.

The following flowchart sets out an overview of the appeal processes from the Magistrates' Court. In addition to the processes covered in this Part, it also identifies the related process in Part 6.2 (appeal on a question of law to the Supreme Court) and section 283 (appeal to the Court of Appeal when a sentence of imprisonment is imposed on appeal to the County Court for the first time).

Appeal from Magistrates' Court



Legislative History

This Part is based on provisions from Division 4 of Part 4 and Schedule 6 to the *Magistrates' Court Act 1989*. However, those provisions have been brought together into one scheme and restructured to follow a consistent procedural pattern.

Relevant Rules/Regulations/Forms

For application of this Part, see rule 3.01 of the County Court Criminal Procedure Rules 2009.

Discussion

The Act repeals Schedule 6 to the *Magistrates' Court Act 1989* and brings together all of the provisions dealing with County Court appeals into one Act making them easier to locate. The provisions have been restructured and reorganised so that a consistent approach is taken to the way that similar appeal processes are dealt with in each jurisdiction. See the Chapter 6 overview for more detailed discussion about the restructure.

However, there has been no change to the fundamental nature of these appeals as *de novo* hearings. This means that on appeal the plea is disregarded, the evidence heard afresh in the County Court and a new verdict delivered and sentence (if needed) imposed.

In summary, each appeal right in this Division follows three steps:

- right of appeal: sets out, in very simple terms, the nature of the appeal
- how appeal is commenced: provides for when the appeal must be filed and served
- determination of appeal: describes the test for the appeal and the process.

Time limits have been changed to use a standard period of 28 days (4 weeks) for filing appeals and a further period for serving them (either 7 or 14 days depending on the nature of the appeal).

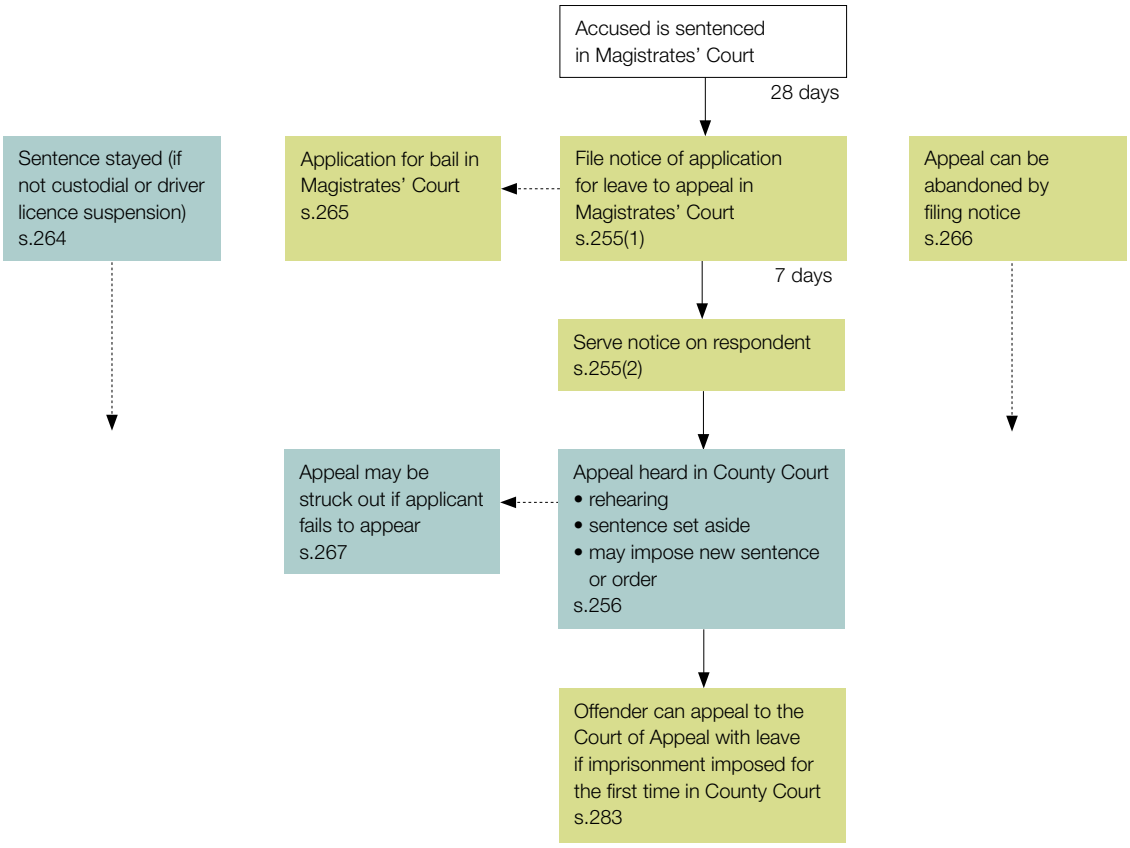
The Act also makes some limited policy changes to implement recommendations made by the Victorian Parliament Law Reform Committee in its 2006 report, *De Novo Appeals to the County Court*. These are discussed in relation to the specific provisions to which they relate.

Division 1 – Appeal by offender

Division Overview

The following flowchart summarises the process for these types of appeals.

Appeal to County Court Against Conviction and/or Sentence by Person Convicted



LEGEND:

Court responsibility

Accused responsibility

Optional process

254 Right of appeal

Overview

This section sets out the right of a person convicted of a criminal offence in the Magistrates' Court to appeal to the County Court either against the ***conviction*** and ***sentence*** imposed by the court, or against sentence alone.

Legislative History

This section is based on section 83(1) of the *Magistrates' Court Act 1989*, although it now draws an important distinction between an appeal against conviction and sentence and an appeal against sentence alone.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 83(1) of the *Magistrates' Court Act 1989* did not distinguish between appeals against conviction and appeals against sentence. It simply provided that a person may appeal to the County Court "against any sentencing order made against that person by the Magistrates' Court".

Although this provision only referred to an appeal against a sentencing order, in effect, it also operated as an appeal against conviction because section 85 provided that the appeal must be conducted as a rehearing. In other words, at the start of the appeal the court sets aside the sentencing order and hears the whole matter again. The evidence is led afresh and the appeal court does not have regard to any transcript of the evidence that was led in the original court or that court's decision.

This means that a person who has been found guilty by the Magistrates' Court and who wishes to appeal against the finding of guilt does so by appealing against the sentencing order, even if he or she does not consider that the sentencing order itself was excessive.

Conversely, it also means that a person who originally pleaded guilty and who does not contest the finding of guilt but simply considers that the sentence imposed was excessive still had to appeal against the finding of guilt and the sentence.

In practice, it was possible to indicate the general grounds of appeal on the prescribed notice of appeal (Form 2-2A in the County Court Miscellaneous Rules 2009). That is, whether the appellant was not guilty, the sentence was excessive, or both. Fox (*Victorian Criminal Procedure,* 2005, paragraph 10.4.5) also notes that where the merit of the conviction is not in dispute, but only the sentence, the County Court may rely upon an outline of facts accepted by the appellant.

A distinction of this kind is sensible for case management reasons and better reflects practice. It is achieved in this section by dividing the appeal right into an appeal against:

- ***conviction*** and ***sentence***
- ***sentence*** alone.

Section 266(2) allows an appellant to abandon the conviction aspect of the appeal and only pursue the sentence aspect. If the appellant does so, they must give written notice of that abandonment as it will result in less court time being required to hear the appeal. It should also be noted that the word "sentence" (defined in section 3) is used instead of "sentencing order".

255 How appeal is commenced

Overview

This section sets out the practical requirements for starting an appeal against ***conviction*** and/or ***sentence***. An appeal is commenced by filing a notice of appeal at any venue of the Magistrates' Court within 28 days of sentencing. A copy of the notice of appeal must be served on the respondent within 7 days of filing.

The notice of appeal must comply with any rules of the County Court and state whether the appeal is against:

- conviction and sentence
- sentence alone.

The appellant must also give an undertaking to proceed with the appeal and must acknowledge that they are aware that a more severe sentence could be imposed on the appeal.

Legislative History

This section is based on clauses 1 and 2 of Schedule 6 to the *Magistrates' Court Act 1989*. However, it has been significantly restructured and simplified.

Relevant Rules/Regulations/Forms

For notice to appeal and undertaking to proceed, see rule 3.02(1) and Form 3A, and for the notice given under section 255(6)(a), see rule 3.02(2) and Form 3B of the County Court Criminal Procedure Rules 2009.

Discussion

There are important changes to time limits in that:

- a notice of appeal must now be filed within 28 days of sentencing
- the notice of appeal must be served on the respondent within 7 days after filing.

Service on the respondent (i.e. the informant in the Magistrates' Court) is to be done in accordance with section 392 which sets out a number of different service methods, including electronic methods.

Clause 1(4) of Schedule 6 to the *Magistrates' Court Act 1989* previously provided that the notice of appeal must state "the general grounds of appeal". As discussed above, an appeal from the Magistrates' Court to the County Court is conducted as a rehearing. Given the nature of a rehearing, it is not clear what purpose was served by requiring the appellant to state his or her grounds of appeal.

Paragraph 3C of the earlier prescribed notice of appeal (Form 2-2A in the County Court Miscellaneous Rules 1999) enabled the appellant to indicate either or both of the following two general grounds of appeal:

- the appellant is not guilty
- the punishment is excessive.

These appear to simply perform the function of indicating whether the appellant is appealing against ***conviction*** and ***sentence*** or ***sentence*** alone. As section 254 now expressly distinguishes between such appeals, there does not appear to be any purpose in requiring the appellant to state the general grounds of appeal in the notice of appeal. The section simply requires that the notice distinguish between an appeal against conviction and sentence and an appeal against sentence alone.

Filing a notice of appeal stays all sentences other than a custodial sentence until the appeal is finally resolved (see section 264) and appeal bail can be granted by the Magistrates' Court (see section 265). Section 266 sets out how an appeal is abandoned (which no longer requires leave).

256 Determination of appeal

Overview

This section sets out the powers and obligations of the County Court when hearing an appeal against conviction and sentence or sentence alone by a person convicted in the Magistrate's Court. In particular, an appeal must be conducted as a rehearing and the appellant is not bound by the plea entered in the Magistrates' Court.

The County Court must set aside the sentence of the Magistrates' Court and may impose any sentence which the Magistrates' Court could have imposed and may exercise any power which the Magistrates' Court could have exercised. It can also backdate the sentence.

Legislative History

This section is based on sections 85 and 86(1)–(2) of the *Magistrates' Court Act 1989*. It has been restructured and the court is now required to warn the appellant of the possibility of a more severe sentence being imposed.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The Victorian Parliament Law Reform Committee (VPLRC) in its 2006 report, *De Novo Appeals to the County Court*, recommended that the County Court be required to provide a warning, as early as possible during the hearing, if the court was considering imposing a more severe sentence than the one originally imposed by the Magistrates' Court. It also recommended that the warning be provided as early as possible during the hearing in order to give the appellant an opportunity to abandon the appeal. This recommendation has been implemented in section 256(3) of the Act.

Section 256(2)(a) provides that on hearing an appeal under section 254, the County Court must set aside the sentence of the Magistrates' Court. For clarity, the note inserted at the foot of section 256 indicates that the definition of ***sentence*** in section 3 of the Act includes the recording of a conviction.

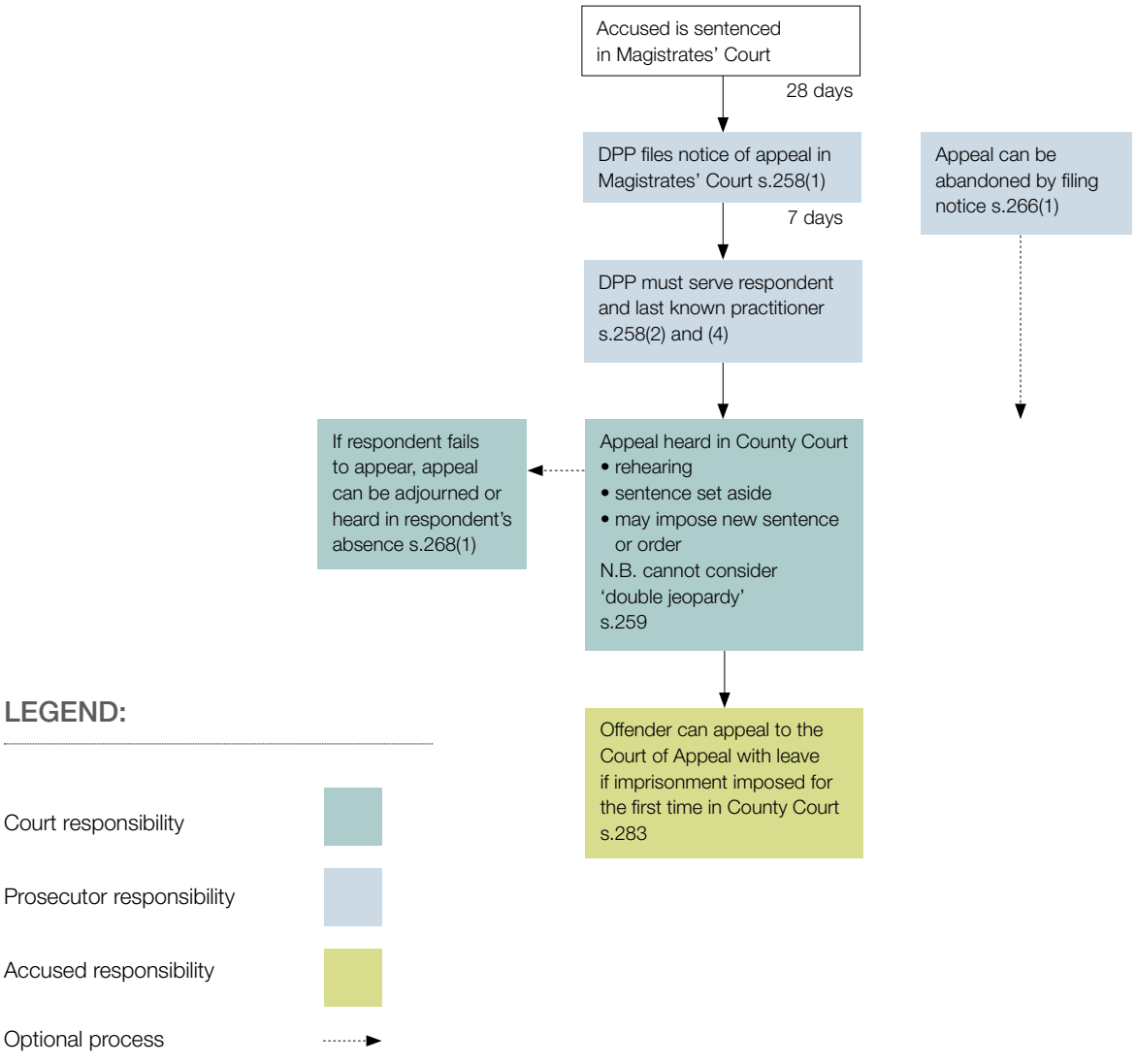
Section 256(5) notes that the sentence imposed by the court after hearing an appeal under section 254 is a sentence of the County Court and it will be enforced by that Court.

Division 2 – Appeal by DPP against sentence

Division Overview

Division 2 reflects the substance of the previous law. However, the existing provisions have been reorganised and reworked so that all of the provisions relevant to an appeal by the ***DPP*** are set out together in the one Division. The following flowchart sets out this process.

DPP Appeal to County Court Against Sentence



257 DPP's right of appeal against sentence

Overview

This section sets out the right of the ***DPP*** to appeal to the County Court against a ***sentence*** imposed in the Magistrates' Court, if the DPP considers that an appeal is in the public interest.

Legislative History

This section is based on section 84 of the *Magistrates' Court Act 1989*. Consistent with the rest of the Act, section 257 uses the term 'sentence' instead of 'sentencing order'.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

DPP appeals against sentence where the accused has failed to fulfil an undertaking are dealt with separately under Division 3. See also section 268 which sets out what happens when a respondent to a DPP appeal fails to appear.

258 How appeal is commenced

Overview

This section sets out how an appeal by the DPP is commenced, namely by filing a notice of appeal in the Magistrates' Court within 28 days of sentencing. A copy of the notice of appeal must be served personally on the respondent within 7 days after the day the notice is filed. The DPP must also provide a copy of the notice of appeal to the legal practitioner who last represented the respondent if they can reasonably be identified.

Legislative History

This section is based on clauses 1(1), (4) and (5) of Schedule 6 to the *Magistrates' Court Act 1989*. However, it has been significantly restructured and simplified and the time limits have been changed.

Relevant Rules/Regulations/Forms

For notice of appeal by the DPP, see rule 3.03 and Form 3C of the County Court Criminal Procedure Rules 2009.

For procedure on appeal from the Magistrates' Court to the County Court, see rule 70 of the Magistrates' Court Criminal Procedure Rules 2009.

Discussion

The most significant change is to the time frames for the DPP to commence an ***appeal*** against ***sentence*** (i.e. the notice of appeal must be filed 28 days after sentence and served on the respondent within 7 days after filing). A copy of the notice of appeal must also be sent to the legal practitioner who last represented the accused, if known.

Importantly, personal service is required because an appeal against sentence brought by the DPP is a significant new step in a proceeding and the accused may have thought that the matter was finalised. The ways in which personal service can be effected are set out in section 391, as part of a new service regime that applies across the Act.

259 Determination of DPP's appeal

Overview

This section sets out powers and obligations of the County Court in determining a ***DPP*** appeal, including that it is to be conducted as a rehearing and that the respondent is not bound by the plea entered in the Magistrates' Court. The County Court must set aside the sentence of the Magistrates' Court and impose any appropriate sentence which the Magistrates' Court could have imposed.

On sentencing, the County Court must not take into account the element of 'double jeopardy' involved in the respondent being sentenced again and impose a less severe sentence than the court would otherwise consider appropriate.

A sentence may be backdated to the date of the original sentence of the Magistrates' Court. The new sentence is technically a sentence of the County Court.

Legislative History

This section is based on sections 85 and 86(1)–(2) of the *Magistrates' Court Act 1989*. It has been restructured and the section expressly prevents the court from considering 'sentencing double jeopardy' when resentencing the offender.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Although this type of appeal is formally only against sentence, it is to be conducted as a rehearing (see section 259(1)) and the original plea is set aside. This means that it is technically open to the County Court to acquit the respondent as part of this process.

The only significant change to existing practice is the exclusion of 'double jeopardy' as a factor to reduce what would otherwise be an appropriate sentence. This exclusion now applies to all relevant DPP appeals. Its primary operation is in relation to DPP appeals against sentence to the Court of Appeal which is discussed in detail in relation to sections 289 and 290 in this guide.

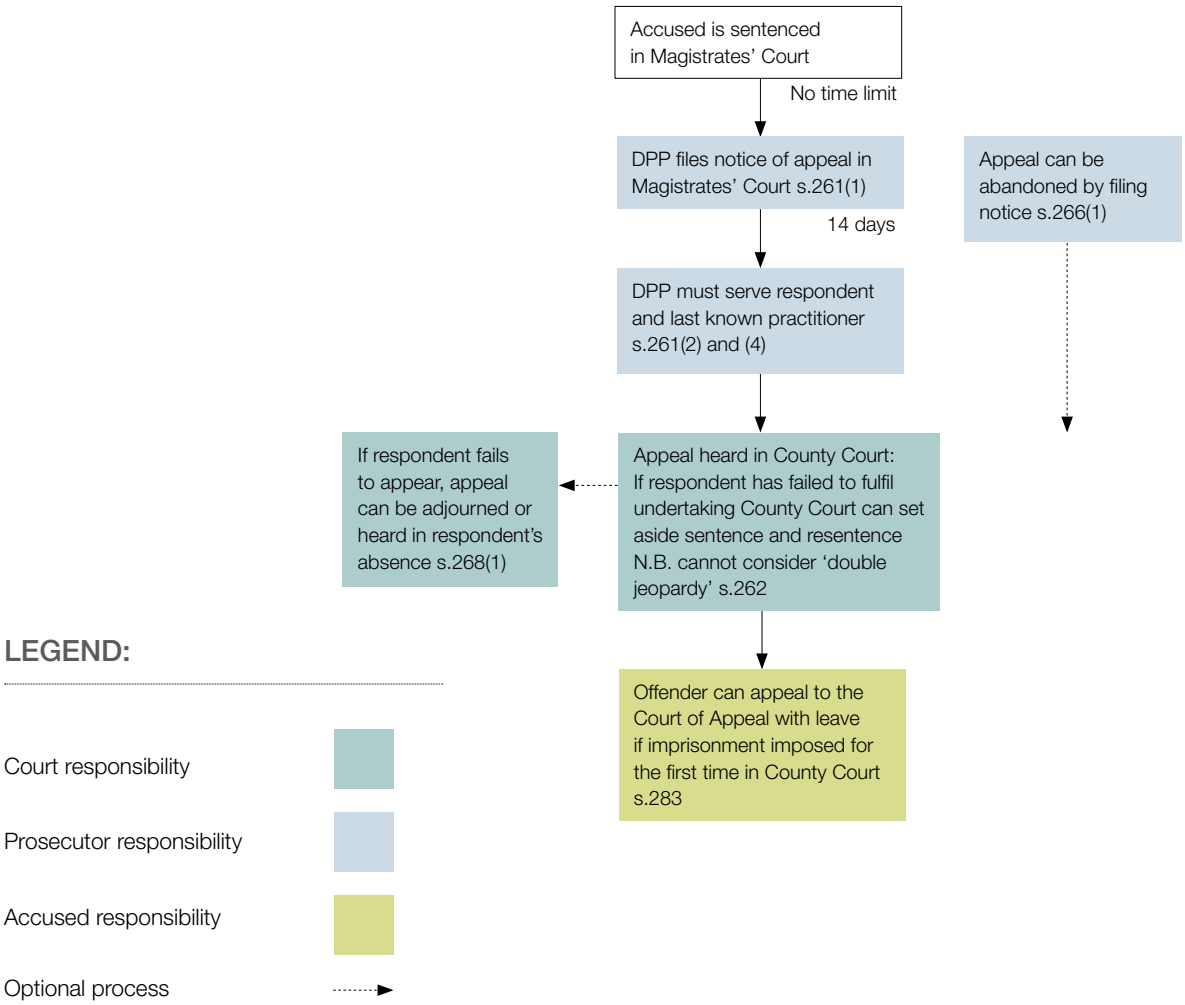
It should be noted that a further right of appeal exists for a respondent who receives a custodial sentence on a DPP appeal under this section, having received a non-custodial sentence in the Magistrates' Court. This appeal right is found in sections 283 to 286.

Division 3 – Appeal by DPP – Failure to fulfil undertaking

Division Overview

This Division represents a significant change in that these appeals were previously only able to be heard in the Court of Appeal, but these sections have now been moved to the County Court. The sections follow the same structure as for other appeals to the County Court, with some modifications (discussed below). The following flowchart sets out the process created by the Division.

DPP Appeal to County Court Against Sentence – Failure to Fulfil Undertaking



260 DPP's right of appeal – failure to fulfil undertaking

Overview

Section 260 allows the ***DPP*** to appeal against sentence where a less severe sentence was imposed in the County Court because the offender agreed to co-operate with authorities but the offender failed to fulfil their undertaking to assist.

Legislative History

This section has some connection to section 567A(1A)-(1B) of the *Crimes Act 1958*. However, that section required all such appeals to go to the Court of Appeal whereas this section allows appeals out of the summary jurisdiction to be heard in the County Court.

Relevant Rules/Regulations/Forms

For notice of appeal by the DPP, see rule 3.03 and Form 3C of the County Court Criminal Procedure Rules 2009.

For procedure on appeal from the Magistrates' Court to the County Court, see rule 70 of the Magistrates' Court Criminal Procedure Rules 2009.

Discussion

This section does not contain a time limit within which the DPP must commence an appeal as the failure to fulfil an undertaking will often not become apparent until a long time after the respondent was originally sentenced.

261 How appeal is commenced

Overview

Section 261 provides that a ***DPP*** appeal against sentence under section 260 (for failure to fulfil an undertaking) is commenced by filing a notice of appeal, signed by the DPP personally, in the Magistrates' Court.

The notice of appeal must then be served personally on the respondent within 14 days after filing. In addition, the DPP must provide a copy of the notice to the legal practitioner who last represented the respondent, if they can reasonably be identified.

Legislative History

This section has some connection to section 567A(2) of the *Crimes Act 1958*, but is new in that it provides for how to commence this type of appeal in the County Court rather than the Court of Appeal.

Relevant Rules/Regulations/Forms

For filing of a notice of appeal, see rule 3.03 and Form 3C of the County Court Criminal Procedure Rules 2009.

The rules for commencing an appeal under this section are similar to other appeals (filing followed by service) except that there is no time limit for filing a notice of appeal. This is because the failure to fulfil an undertaking may not be apparent for some time.

An extra 7 days (14 days in total) is allowed for a copy of the notice of appeal to be served on the respondent as the underlying proceedings may not be recent and therefore the respondent may be more difficult to locate. A copy of the notice must also be provided to the last known legal practitioner acting for the respondent. The word 'provide' rather than 'serve' has been used here, indicating that the formal requirements of service are not required. This is a case management tool, designed to ensure that the respondent is made aware of the appeal, rather than a formal step in proceedings.

By contrast, service on the respondent themself is a formal step in proceedings. Service on the respondent must be personal because it is a significant new step in a proceeding and they may have thought that the matter was concluded. The ways in which ***personal service*** can be effected are set out in section 391, which is part of a service regime that applies across the Act.

262 Determination of DPP's appeal – failure to fulfil undertaking

Overview

Section 262 sets out the test to be applied by the County Court in hearing an ***appeal*** of this kind. If the court considers that the respondent failed to fulfil an undertaking then it may set the ***sentence*** aside and resentence the respondent. In doing so, it cannot consider the element of 'double jeopardy' involved in resentencing the offender.

Legislative History

This section has some connection to section 567A(4A) of the *Crimes Act 1958* but is new in that it provides for the hearing of this type of appeal in the County Court rather than the Court of Appeal.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The major difference between this and other County Court appeals is that it is not by way of rehearing. The respondent's plea is not set aside and there will ordinarily be no evidence called, beyond that needed to satisfy the court of the respondent's failure to fulfil the undertaking.

If there is a failure (whether a full or partial failure), then the court has jurisdiction to resentence in a way which removes the windfall that the respondent gained at the original sentencing for their anticipated assistance to the authorities.

Section 262(3) excludes 'double jeopardy' as a factor to reduce what would otherwise be an appropriate sentence. This exclusion has been applied to all DPP sentence appeals. Its primary operation is in relation to DPP appeals against sentence to the Court of Appeal which is discussed in detail in relation to sections 289 and 290. This exclusion may have limited impact on these types of appeals as the reason the accused falls to be resentenced is because of their default, rather than an error by the sentencing court or the prosecution.

Division 4 – Procedure

Division Overview

This Division gathers together procedural issues that apply to some or all of the three types of ***appeal*** that can be taken to the County Court. The key issues covered are:

- late filing of a notice of appeal (section 263)
- stay of ***sentence*** and bail pending appeal (sections 264 and 265)
- abandoning an appeal (section 266)
- failure to ***appear*** at an appeal (sections 267 and 268).

The major change to procedure is that leave is no longer required to abandon an appeal which can now be done by filing written notice.

263 Late notice of appeal deemed to be application for leave to appeal

Overview

Section 263 deems a late notice of appeal to be an application for leave to appeal out of time. The test for granting such an application is that the failure to file on time was due to exceptional circumstances and there would be no material prejudice to the respondent's case.

Legislative History

This section is based on clause 1(2) and (3) of Schedule 6 to the *Magistrates' Court Act 1989*, without change.

Relevant Rules/Regulations/Forms

For a notice of appeal, see rule 3.03 of the County Court Criminal Procedure Rules 2009.

For an application for leave following late filing of appeal to the County Court, see rule 72 of the Magistrates' Court Criminal Procedure Rules 2009.

Discussion

As a matter of practice, these applications are heard at the same time as the substantive ***appeal***.

264 Stay of sentence

Overview

This section means that an ***appeal*** automatically stays the operation of all ***sentences*** imposed unless the appellant is in custody. If they are in custody then the sentences are not stayed unless and until bail is granted under section 265. The only kind of non-custodial sentence not automatically stayed is a driving suspension under section 29 of the *Road Safety Act 1986*.

Legislative History

This section is based on clause 3 of Schedule 6 to the *Magistrates' Court Act 1989*, without change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

It is important to note that the definition of ***appeal*** in section 3 includes an application for leave to appeal. Under section 263, a late notice of appeal is deemed to be an application for leave to appeal. As a result, whenever a notice of appeal is filed it will operate to stay all sentences (other than custodial sentences and driving suspensions).

Section 264(2) confirms that this section does not operate to stay a conviction pending the hearing of the appeal. This is required because the definition of ***sentence*** in section 3 includes the recording of a conviction. If this provision had not been included then appeal notices could be filed to stay the recording of a conviction which could be used to give the appellant a sentencing advantage on unrelated matters. This section ensures that if an appeal on charge A is successful, and in the meantime the accused has been sentenced on charge B taking into account the conviction on charge A, it will be open to the accused to appeal the sentence on charge B on that basis. This avoids any unfairness to the accused.

At the beginning of the appeal hearing itself, the sentence of the Magistrates' Court (whether stayed or not) is set aside under section 256(2) (including the recording of the conviction) and the matter is heard afresh (i.e. *de novo*). Any new sentence imposed will be a sentence of the County Court (section 256(5)) and enforced as such.

It should be noted that when an appeal is struck out (because of a failure to appear or abandonment) the sentence of the Magistrates' Court is reinstated and may be enforced (see sections 266(5)(a) and 267(2)(a)) as if an appeal had not been made.

265 Bail pending appeal

Overview

Section 265 provides that an appellant may apply to the Magistrates' Court for bail pending an appeal. The appellant must give notice of any such application to the respondent and the application is decided as if a ***conviction*** had not been entered and the charges were pending.

Legislative History

This section is based on clause 4 of Schedule 6 to the *Magistrates' Court Act 1989*, without change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section allows bail to be granted. Under section 264(2)(b), a custodial ***sentence*** is stayed only if bail is granted under this section.

266 Abandonment of appeal

Overview

This section creates a process for abandoning an appeal before it is heard. In summary:

- An appeal can be abandoned in writing by filing a notice of abandonment in the form prescribed by County Court rules.

- If the appellant was originally sentenced to a custodial ***sentence*** and is in custody when the appeal is abandoned then the County Court will strike out the appeal on the filing of the notice.
- If the appellant was originally sentenced to a custodial sentence and *is not in custody* when the appeal is abandoned then the County Court will strike out the appeal when the appellant surrenders to the registrar of the County Court and files a notice of abandonment. The registrar may then issue a warrant to imprison the person.
- If the appellant was not sentenced to a custodial sentence then the County Court will strike out the appeal on the filing of the notice.

On striking out the ***appeal***, the Magistrates' Court sentence is reinstated and may be enforced as if an appeal had not been made. However, for the purposes of the enforcement of any penalty, time is deemed not to run during the stay period.

Section 266(2) provides a process for the appellant to abandon an appeal against conviction and just proceed with the sentence appeal, in which case written notice must be given to the court and the ***DPP***.

Legislative History

This section is based on clause 6 of Schedule 6 to the *Magistrates' Court Act 1989* and parts of section 86 of that Act. However, there are significant changes stemming from the fact that leave is no longer required to abandon an appeal and a notice will now suffice.

Relevant Rules/Regulations/Forms

For written notice of abandonment of an appeal:

- on all grounds (section 266(1)), see rule 3.05 and Form 3D
- against conviction only where the appeal against sentence is still being pursued (section 266(2)), see rule 3.06 and Form 3E of the County Court Criminal Procedure Rules 2009.

Discussion

This section provides a simple notice-based method to abandon an appeal. Leave based on exceptional circumstances is no longer required. The system is modified where a person received a custodial sentence and was then granted bail under section 265. As well as filing the notice of abandonment, people in that category must also surrender themselves to the registrar of the County Court who is empowered to issue a warrant to imprison the person. An amendment has also been made to section 57 of the *Magistrates' Court Act 1989* (new subsection (7A)) to link this power into other general warrant powers.

This is the most practical way for the warrant to imprison to be issued even though once the appeal is struck out, it is the sentence of the Magistrate's Court that is reinstated and to which the warrant relates.

Section 266(2) allows an appellant to abandon an appeal against conviction and maintain the appeal against sentence. This is part of a greater distinction drawn between those two types of appeals in the Act, recognising that an appeal against sentence alone should be much quicker than a full conviction appeal. See further the discussion in relation to section 254 in this guide.

Subsection (5) provides that if an appeal is struck out because the appellant has abandoned their appeal, the sentence of the Magistrates' Court is automatically reinstated.

In *Helfenbaum v Sattler* [1999] VSC 548 at [23], Justice Beach held that in the absence of a reinstatement clause such as this one, if an appeal is abandoned and struck out after the appeal hearing commences (and the sentence has therefore been 'set aside'), the sentence to be enforced is technically a sentence of the County Court.

Subsection (5) makes clear that the sentence to be enforced is the original Magistrates' Court sentence.

267 Appellant's failure to appear

Overview

This section only applies to offender appeals under section 254. It does not apply to the ***DPP*** in sentence appeals. In summary, if an appellant fails to ***appear*** at the hearing of the appeal the court can either adjourn the case or strike out the appeal. If it strikes out the appeal then the Magistrates' Court sentence is reinstated and enforced.

The appellant can apply to set aside the striking out of the appeal if the failure to appear was not their fault. If the County Court reinstates the appeal, the appeal operates as a stay of the sentence when (if required) the appellant signs an undertaking and, if the appellant is in custody because of the sentence appealed against and bail is granted under section 265, the appellant enters bail.

Legislative History

This section is based on sections 86(3A), 86(4) and 89 and clause 6(3) and (4) of Schedule 6 to the *Magistrates' Court Act 1989*. However, there are significant changes in that the court can no longer hear an appeal in the appellant's absence and must instead either strike it out or adjourn it.

Relevant Rules/Regulations/Forms

For an application to set aside an order striking out an appeal for failure to appear, see rule 3.07 and Form 3F of the County Court Criminal Procedure Rules 2009.

For recording that an application to set aside has been granted, see rule 73 of the Magistrates' Court Criminal Procedure Rules 2009.

Discussion

Previously, the court was permitted to conduct an appeal in the absence of an accused who failed to ***appear***. Section 267 (this section) removes this option as it is considered that court resources should not be wasted rehearing evidence against an accused who chooses not to appear for the hearing. However, if the appellant is genuinely not at fault for failing to appear, the section allows the appellant to apply to have the order striking out the appeal set aside and the appeal reinstated.

It is important to note that an application for reinstatement does not necessarily have the effect of staying the sentence that is the subject of the appeal. This is due to the operation of section 264 and the definition of ***appeal*** (in section 3). The stay will only operate if the appeal is reinstated under section 267(6)(a). In those circumstances where the County Court does reinstate the appeal, the appeal operates as a stay of the sentence when (if required) the appellant signs an undertaking and, if the appellant is in custody because of the sentence appealed against and bail is granted under section 265, the appellant enters bail.

This follows the same model as section 265 in that a custodial sentence will not be stayed until appeal bail is granted. Further, section 267(8) provides that a driving suspension under section 29 of the *Road Safety Act 1986* is not automatically stayed by section 267(7).

268 Respondent's failure to appear on appeal by DPP

Overview

This section gives the court power to deal with a ***DPP*** appeal if the respondent (i.e. the accused in the original case) does not appear at the hearing of the appeal. The court can either adjourn the appeal or hear it in the absence of the respondent. A warrant to arrest can be issued for non-appearance.

This provision applies to DPP appeals against sentence and appeals on the ground of a failure to fulfil an undertaking.

Legislative History

This section is new and has no relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section is new and allows the court to either adjourn a DPP appeal where the respondent does not ***attend*** or to hear it in the respondent's absence. There is a protection in that the court must be satisfied that the respondent had been given proper notice of the ***appeal***.

As noted in the section, the court cannot impose a sentence that requires the respondent's consent (such as a community based order) in the respondent's absence. However, all other sentencing options will be available.

Section 268(2) provides that where the court adjourns an appeal, it may issue a warrant. This avoids the need to go through the process of issuing a warrant under section 330 in this particular situation which would otherwise require a direction for the respondent to attend and a failure to comply with that direction. This subsection provides a short cut by allowing a warrant to be issued directly for non-appearance. The Act's approach to when a person is required to either ***attend*** or ***appear*** is discussed in detail in relation to section 329 in this guide.

269 One notice of appeal for 2 or more sentences

Overview

This section confirms that only one appeal needs to be lodged in relation to multiple charges and sentences if they were heard together in the Magistrates' Court.

Legislative History

This section is based on clause 8 of Schedule 6 to the *Magistrates' Court Act 1989*, without change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

270 Appeal against aggregate sentence

Overview

To avoid doubt, this section confirms that when the County Court is sentencing on an appeal, and the sentence in issue is an aggregate one, the court can rely on an agreed statement of facts about the original charge.

Legislative History

This section is based on clause 9 of Schedule 6 to the *Magistrates' Court Act 1989*, with minor drafting changes.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

271 Appeal to County Court authorised by other Acts

Overview

This section applies the procedural provisions of this Act to any other ***appeal*** from the Magistrates' Court to the County Court, subject to the provisions of the other Act which authorises the appeal.

Legislative History

This section is based on section 90 of the *Magistrates' Court Act 1989*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

Part 6.2 – Appeal from Magistrates' Court to Supreme Court on a Question of Law

Part Overview

This Part provides for appeals on questions of law to the Supreme Court from the Magistrates' Court. As section 273 makes clear, if an ***appeal*** is taken under this Part then an ordinary appeal to the County Court cannot also be taken.

272 Appeal to Supreme Court on a question of law

Overview

Section 272 applies to both the informant and the accused. It provides:

- for a right of appeal on a question of law from a final order of the Magistrates' Court
- that an appeal is commenced by filing a notice of appeal in the Supreme Court within 28 days of the final order. The notice must then be served personally on the respondent within 7 days
- that filing a notice of appeal does not stay an order made in the Magistrates' Court but the Supreme Court can stay the order or grant bail
- that the Supreme Court may make any order, including an order to remit the case for rehearing
- that a late notice of appeal is to be treated as an application for leave to appeal out of time.

Legislative History

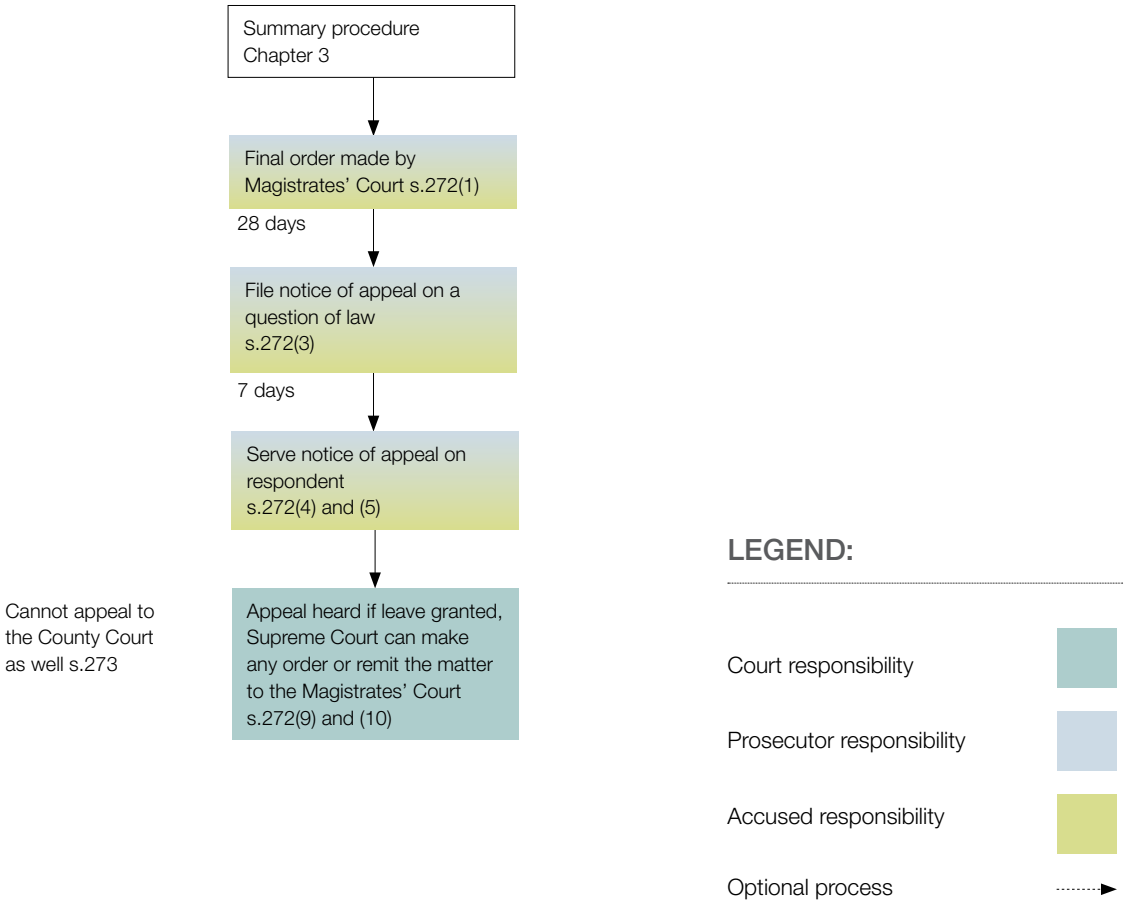
This section is based on section 92 of the *Magistrates' Court Act 1989*. It has been reworked to follow the basic structure of all other appeal processes in the Act. In addition, the time limits have changed to 28 days for filing and 7 days for service following filing.

Relevant Rules/Regulations/Forms

For an appeal on a question of law, see Order 3A of the Supreme Court (Criminal Procedure) Rules 2008. In particular, for a notice of appeal under section 272(1) of the Act, see rule 3A.03, and for a stay of the order, see rule 3A.07. Rule 3A.03(2) also contains additional requirements for providing a copy of the notice of appeal to other people.

For filing of an appeal from the Magistrates' Court to the Supreme Court on a question of law, see rules 74, 75 and 76 of the Magistrates' Court Criminal Procedure Rules 2009.

Appeal to Supreme Court on a Question of law



Discussion

This ***appeal*** right on pure questions of law fills a gap that would otherwise be left by the *de novo* nature of ordinary appeals from the Magistrates' Court to the County Court (under section 254). *De novo* appeals cannot be used specifically to correct an error of law made in the Magistrates' Court (although the legal issue may be considered afresh by the County Court), as they involve a complete rehearing of the case. Instead, this section allows a pure issue of law to be taken to the Supreme Court, which also strengthens its precedent value.

The flowchart above sets out the process to be followed for these types of appeals.

273 Appeal on question of law precludes appeal to County Court

Overview

Section 273 prevents the appellant from appealing to the County Court where an appeal to the Supreme Court under this Division is taken in relation to the proceeding.

Legislative History

This section is based on section 83(2) of the *Magistrates' Court Act 1989*, without substantive change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

Part 6.3 – Appeal and Case Stated from County Court or Trial Division of Supreme Court to Court of Appeal

Part Overview

This Part deals with all criminal appeals from trial courts (County Court or the Trial Division of the Supreme Court) to the Court of Appeal. In particular:

- offender appeals against conviction (sections 274–277)
- offender appeals against sentence (sections 278–286)
- Crown appeals against sentence (sections 287–294)
- interlocutory appeals (sections 295–301)
- reserved questions of law or cases stated (sections 302–308).

Division 6 deals with the status of sentences and other orders during the appeal period. Remaining procedural provisions relating to all of the above types of appeals are contained in Division 7.

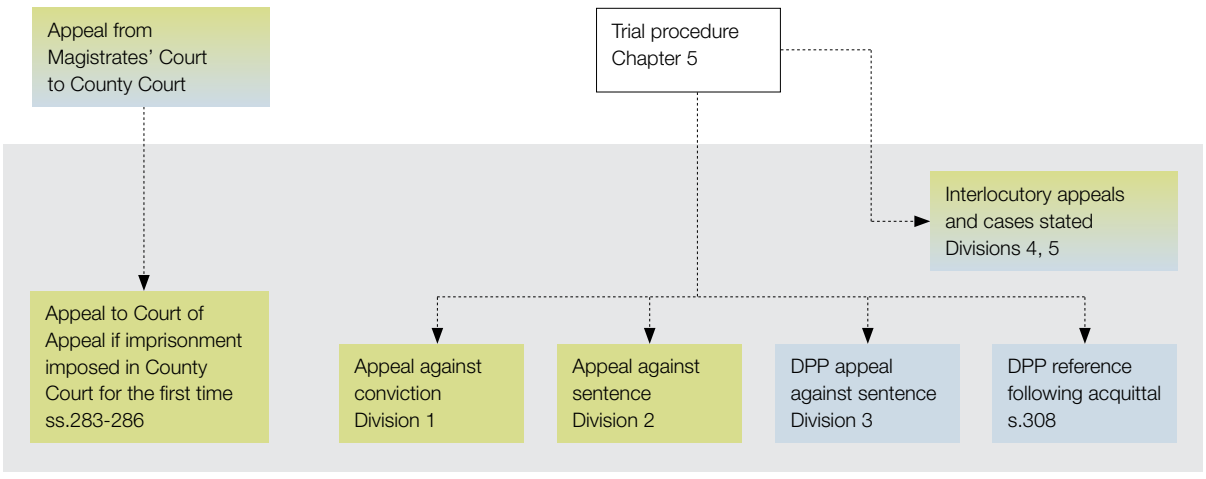
Appeals against findings of unfitness to stand trial and verdicts of not guilty by reason of mental impairment are now located in the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. Those appeal provisions have also been redrafted and are discussed in detail in relation to sections 423 and 424.

The following flowchart sets out an overview of the appeal processes from the Supreme and County Courts, which are covered in this Part.

Legislative History

This Part is based on provisions from Part VI of the *Crimes Act 1958*. However, those provisions were very old and at times difficult to follow. They have been modernised and substantially restructured to follow a consistent procedural pattern.

Appeal from County Court and Supreme Court to Court of Appeal



LEGEND:

Prosecutor responsibility

Accused responsibility

Optional process

Relevant Rules/Regulations/Forms

For rules concerning criminal appeals, see Order 2 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

Each appeal right in this Part has been restructured and reorganised so that a consistent approach is taken to how similar appeal processes are dealt with in each jurisdiction. See the overview to this Chapter for more detailed discussion about the restructure.

In summary, each appeal right in this Part follows four steps:

- right of appeal: which sets out the nature of the appeal in very simple terms
- how appeal is commenced: which provides for when the appeal must be filed and served
- determination of appeal: which describes the test for the appeal and the process
- orders etc on successful appeal: which describes the orders and processes to be followed if an appeal succeeds.

There are additional sections in relation to some appeal rights, but each appeal right has, at a minimum, all of the above features.

Time limits have been changed to use a standard period of 28 days (4 weeks) for filing appeals and a further period for serving them (either 7 or 14 days depending on the nature of the appeal).

The Part also adopts a consistent approach in describing the court from which the parties can appeal in order to ensure that the rights of appeal are carefully delineated. Sections 274, 278, 287 and 291 all confer rights of appeal against conviction and sentence. They refer to an ***originating court*** which is defined in section 3 to mean the Supreme or County Courts in their original jurisdiction. ***Original jurisdiction*** is defined to include proceedings for an indictable offence, related and unrelated summary offences, contempt, and breaches of sentencing orders heard at first instance in the trial court (e.g. under section 47(1) of the *Sentencing Act 1991)*. Where an appeal right is not intended to be so broad, it is described differently. For example, section 295 (interlocutory appeals) and section 302 (cases stated) are limited to the County Court or the Supreme Court in a proceeding for an indictable offence.

Division 1 – Appeal against conviction

274 Right of appeal against conviction

Overview

This section provides a right of ***appeal*** against ***conviction*** on any ground with leave of the Court of Appeal.

The following flowchart sets out the process for these types of appeals under the Act.

Legislative History

This section has some relationship to section 567(a) to (c) of the *Crimes Act 1958.* However, leave is now required for all grounds of appeal and the provisions have been redrafted and simplified.

Relevant Rules/Regulations/Forms

For rules concerning appeals against conviction, see Part 2 of Order 2 of the Supreme Court (Criminal Procedure) Rules 2008, in particular rule 2.05 and Form 6-2A.

Discussion

What sorts of convictions can be appealed from?

An appeal can be taken against any conviction entered in an ***originating court***. What this covers is discussed in more detail under section 254. However, on a general level, it includes convictions at trial, convictions for related and unrelated summary offences in the Supreme Court or County Court and other first instance convictions in those courts. It should be noted that the definition of ***conviction*** includes a finding of guilt where a formal conviction is not recorded.

Grounds of appeal

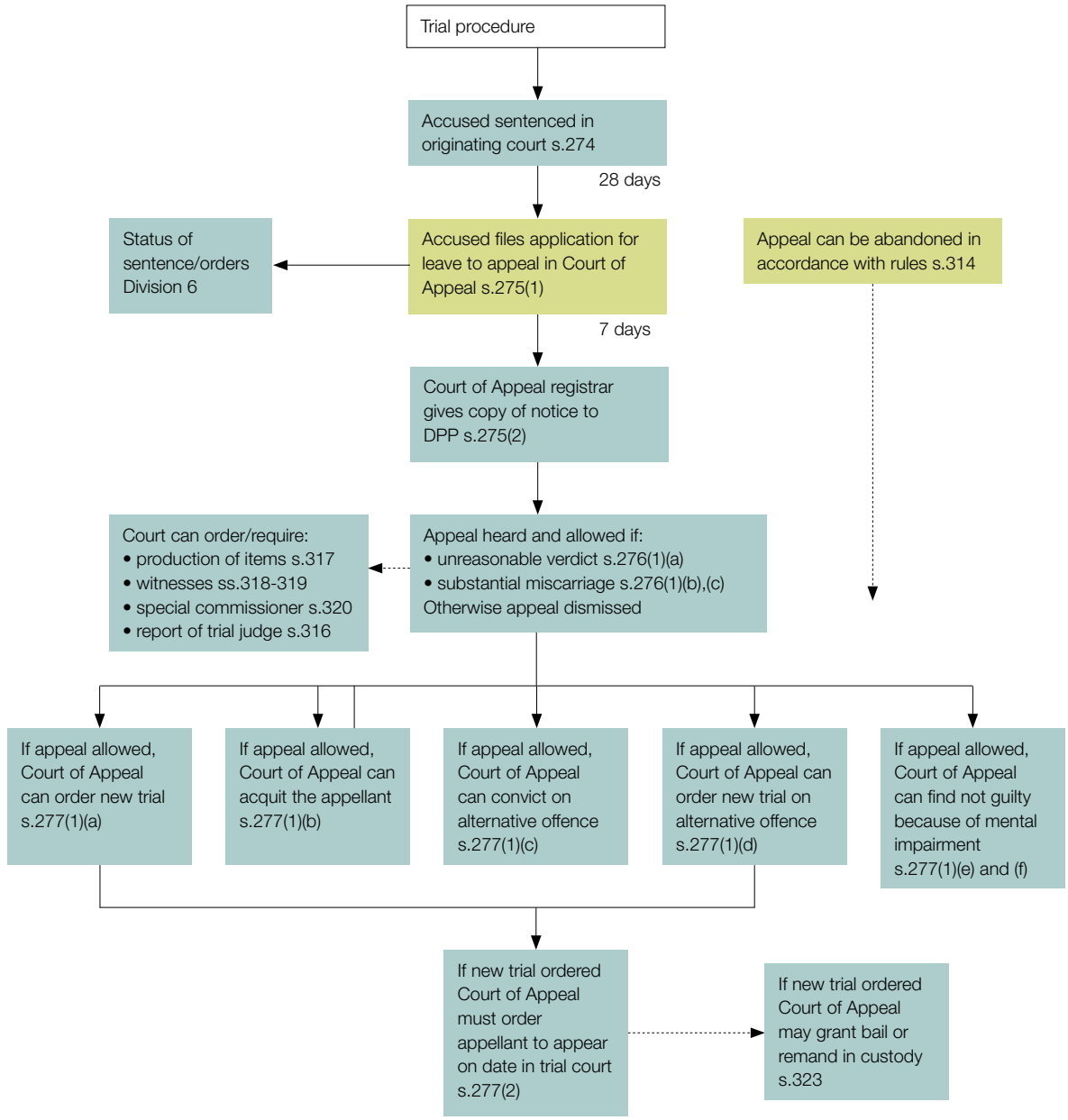
An appeal can be taken "on any ground of appeal". There is now no need to distinguish between types of grounds as was previously the case under section 567 of the *Crimes Act 1958* (e.g. question of law, certification by the trial judge) because leave is now required regardless of the ground of appeal, as discussed below. However, to be a ground of appeal a submission must be capable of leading to one of the conclusions in section 276(1)(a), (b) or (c) that the Court of Appeal is required to reach before an appeal is allowed.

Leave to appeal required in all cases

This section changes the law so that all appeals will be by leave. This contrasts with section 567 of the *Crimes Act 1958,* which previously provided for:

- appeals as of right (i.e. without leave) on questions of law
- appeals as of right on questions of fact or mixed questions of fact or law if the trial judge certifies the case as appropriate

Offender Appeal Against Conviction



LEGEND:

Court responsibility

Accused responsibility

Optional process

- appeals with the leave of the Court of Appeal on any other ground of appeal.

The distinction between questions of fact, questions of law and mixed questions of fact and law is no longer necessary to delineate different types of appeal due to the reform of the grounds of appeal and proviso, discussed below under section 276.

Further, in practice, almost every appeal is taken under section 567(c) (i.e. by an application for leave to appeal) and the processes in section 567(a) and (b) have fallen into disuse. For example, in *R v Gallagher* [1998] 2 VR 621 Callaway JA referred to an applicant for leave to appeal, "or the unheard of appellant who takes advantage of section 567(a) or (b)". There may be various reasons why it is unheard of for applicants to rely on section 567(a) or (b). One may be the notorious difficulty of distinguishing between questions of law and questions of fact. In addition, many appeals involve various grounds, some of which involve matters that could be characterised as questions of law and others which could be characterised as questions of fact. Further, the grounds of appeal may be amended prior to, or during, the hearing.

The effect of this is that appeals as of right are not brought, even when they appear to clearly fall within section 567(a). An example is *R v Tait* [1996] 1 VR 662. In that case, the accused had pleaded guilty to a sexual offence (which has since been repealed). The offence was subject to a twelve month limit on prosecutions. Initially the case was simply an application for leave to appeal against the sentence. Just before the hearing commenced, counsel for the applicant realised that the prosecution had been commenced outside the 12 month limit and that the accused could not lawfully be prosecuted for the offence. The Court of Appeal allowed the appellant to bring an application for leave to appeal against conviction. The matter was dealt with as an application for leave, rather than an appeal as of right, even though it seems clearly to have been considered to involve a question of law (i.e. whether legally the accused could plead guilty to an offence where the prosecution had been brought out of time).

It is current practice for applications for leave to appeal to be heard at the same time as the substantive appeal. That is, there is no separate leave process. However, the Act would not prevent the Court of Appeal from hearing applications for leave separately as a filtering mechanism if required (as is routinely done for appeals against sentence). A single judge of appeal is entitled to grant or refuse leave under section 315(1)(a), subject to an absolute right of election to the Court of Appeal itself if leave is refused (see section 315(2)). It would also be open for leave to be granted on one or more grounds of appeal and refused on others and section 315 would apply in the same way.

The ability to grant leave on some grounds and not others does not require an express power as is found in relation to appeals against sentence in section 280.

This is because of the different ways in which the right to appeal against conviction and sentence are expressed. The right to appeal against sentence is described in section 278 without reference to grounds, providing "a person may appeal ... against the sentence imposed if the Court of Appeal gives leave." In contrast, the right of appeal against conviction in section 274 (this section) provides that "a person convicted ... may appeal against the conviction on any ground of appeal if the Court of Appeal gives the person leave to appeal." Section 315(1)(a) also anticipates leave being given on some grounds and not others.

275 How appeal is commenced

Overview

Section 275 requires an application for leave to appeal against conviction to be filed within 28 days of sentencing. The registrar must provide a copy of the application to the respondent within 7 days of filing.

Legislative History

Previously, section 572 of the *Crimes Act 1958* provided for the "time and manner for appealing" which applied to all appeals. In this Act, each appeal right has a separate filing and service section. Substantively, the major change is an increase in the time for filing to 28 days (which is consistent across all appeal processes).

Relevant Rules/Regulations/Forms

For commencement of appeals against conviction, see rule 2.05(1) and (3) and Form 6-2A of the Supreme Court (Criminal Procedure) Rules 2008.

Rules 2.10–2.14 set out the requirements to (amongst other things) serve a full statement of the grounds on which the appellant relies, outline of submissions (from both the appellant and the respondent) and the time limits for such matters including the consequences of failing to meet those timelines.

Discussion

This section provides for filing within 28 days of sentencing.

The appeal provisions in this Act generally require the appellant to serve relevant documents on the respondent. For offender appeals to the Court of Appeal this is replaced by a requirement for the registrar to provide a copy of the application to the respondent. This is possible because the respondent will always be the ***DPP*** or the Commonwealth Director of Public Prosecutions. This practical approach has been taking place for some time and has been reflected in the Act.

It should be noted that time limits under this Part can be extended under section 313.

276 Determination of appeal against conviction

Overview

This section sets out the basis on which the Court of Appeal must allow or refuse an appeal against conviction.

Legislative History

This issue was previously found in section 568(1) of the *Crimes Act 1958*. However, the grounds have been substantially changed and the proviso to section 568(1) was not re-enacted.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section has been substantially changed. The new approach is based on discussions with the Specialist Appeals Advisory Group formed by the Department of Justice to discuss this issue and interlocutory appeals.

Background

Section 568(1) was drafted as a single subsection, but for ease of discussion, it can be separated out into these components:

> *The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks—*
>
> **[First limb]** *that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or*
>
> **[Second limb]** *that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision on a question of law; or*
>
> **[Third limb]** *that on any ground there was a miscarriage of justice and—*
>
> *in any other case shall dismiss the appeal:*
>
> **['the proviso']** *Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

At first glance the provision looks simple. However, it has caused considerable confusion. For example, in 1998 Brooking JA commented that ever since he had encountered the provision he had wondered what it means and that it was "extraordinary that, 90 years after the legislation providing for appeals in criminal cases was first enacted, doubt should exist about its effect".

The provision was originally enacted in the *Criminal Appeals Act 1914*, modelled on the *Criminal Appeal Act 1907* (UK). Every other Australian jurisdiction, New Zealand and Canada adopted the same provision, and most still have it in largely the same form. The model was substantially changed in the UK in 1995 to a single ground that the verdict was 'unsafe', although that approach has since been criticised as being too simplistic.

Before the provision was originally enacted, appeal courts were very reluctant to look behind a jury verdict and to impinge on the jury's role of weighing the evidence in the case. In particular, it was not possible to appeal on a question of fact. This meant that a convicted person could not challenge the conviction by arguing that the jury's verdict was simply unreasonable or was not supported by the evidence in the trial.

However, if there had been a legal mistake or irregularity in the trial, the law was very strict. The accused was entitled to a retrial, even if the error or irregularity was merely technical in nature. Two key features of the provision were that:

- it enabled appeals on questions of fact (see the first limb of the provision)
- by operation of the proviso, it took a more pragmatic approach to errors and irregularities in the trial.

Both of these reforms required the appellate courts to look at the substantive merits of the case.

First limb (Verdict unreasonable or not supported by the evidence)

Under this limb, the appellant needed to persuade the appeal court that the verdict was unreasonable or was not supported by the evidence at the trial.

This required the appeal court to itself assess the evidence given at the trial to decide whether, on the whole of that evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty.

The way that the subsection was drafted suggests that it was intended that the proviso could apply to the first limb. However, the proviso makes little sense in relation to that limb and the courts firmly concluded that the proviso did not apply to it.

Second limb (Error of law)

Under this limb, the appellant needed to persuade the appeal court that there was a wrong decision on a question of law. The meaning of this limb is relatively clear, although there can be some uncertainty about precisely what constitutes a question of law (as distinct from a question of fact, or a question of mixed law and fact).

The purpose of the proviso was much clearer in relation to this limb than in relation to the first limb. Even if the appellant persuaded the court that there was (or may have been) an error of law, the appeal court could dismiss the appeal if the DPP persuaded the court that no substantial miscarriage of justice actually occurred.

Two tests were developed to help in making that assessment. The tests were not mutually exclusive.

The lost chance of acquittal test. Under this test, the DPP had to persuade the court that the error of law did not deprive the accused of a 'real chance' of acquittal or a chance of an acquittal that was 'fairly open' to the accused. The test involved considering the likely effect that the error of law had on the jury in the trial (or on a hypothetical reasonable jury). This test was replaced by the test in *Weiss v R* [2005] HCA 81; (2005) 224 CLR 300 (*Weiss*), which is discussed below.

The fundamental error test. Under this test, the DPP had to persuade the court that the error was not a fundamental error, in the sense that it did not constitute 'a serious breach of the presuppositions of a trial'. This involved focusing on the character of the error itself. Under this test, it is irrelevant whether the accused is actually guilty or not. This test treated due process as an important end in its own right.

Third limb (Miscarriage of justice)

Under this limb, the burden was on the appellant to persuade the appeal court that 'on any ground there was a miscarriage of justice'. The breadth of this ground led to debate about the relationship between it and the other two limbs. While it appears to overlap with both of those limbs, it also covers situations that do not fall within either of those limbs (e.g. where fresh evidence arises after the trial and throws doubt on the conviction).

The relationship between this limb and the proviso was also unclear. Some judges have taken the view that there is no difference between a 'miscarriage of justice' and a 'substantial miscarriage of justice', so that the proviso does not apply to this limb. On this view, the appellant had to persuade the appeal court not just that there was an irregularity, but also that it really mattered. Under this approach, the same two tests apply as under the second limb, except that the burden of persuasion is wholly on the appellant. The appellant had to persuade the court:

- that the error or irregularity meant that he or she lost a real chance of acquittal
- that the error or irregularity was 'fundamental'.

Other judges took the view that there was a difference between the two phrases. On this view, the burden was on the appellant to show that there was a miscarriage of justice, in the narrow sense of an error or irregularity. The burden then shifted to the DPP to establish that it was not a substantial miscarriage of justice.

The approach taken to the proviso was altered by the High Court in *Weiss*. In that case the trial judge made a ruling allowing the prosecutor to ask a witness certain questions (the answers to which were irrelevant and prejudicial to the accused). The accused was convicted. He appealed on the ground that the judge should not have permitted the questions.

There was some uncertainty about whether the appeal was under the second limb or the third limb. The Victorian Court of Appeal and the High Court took the approach that the appellant had overcome the threshold posed by the second or third limbs, and that the burden had shifted to the DPP to persuade the court to apply the proviso.

The High Court criticised the use of the lost chance of acquittal test in relation to the proviso, and instead focused on the statutory words 'substantial miscarriage of justice'. The High Court held that it was impossible to completely define what a substantial miscarriage of justice is. However, the court reasoned that (subject to the 'fundamental error' test) there could not have been a substantial miscarriage of justice if the convicted person is in fact guilty. Therefore, the DPP will satisfy the proviso if it persuades the court that the appellant is guilty.

In this sense, the appeal itself could be considered as taking the place of a retrial. The High Court indicated that an appellate court should order a retrial only if it is not possible for the appellate court to decide whether the accused was guilty (e.g. if the case depends on an assessment of the demeanour of a witness in order to assess his or her credibility). The High Court's decision has been subjected to some strong criticism, including concerns about the extent to which it is appropriate for appellate courts to be able to take over the jury's role of weighing the evidence.

In many cases, it does not matter which party has the formal burden of persuasion because, for example, the error or irregularity was clearly insignificant in the context of the trial. However, the burden is significant in cases where it is not clear how important the error or other miscarriage was and the accused did not raise any concerns about the issue at the trial.

Since *Weiss*, the High Court delivered its decision in *Gassy v The Queen* [2008] HCA 18. In that case, a more flexible case by case approach appeared to be taken to what constituted a 'substantial miscarriage of justice' and how that might be demonstrated, indicating that the test (of considering whether the person is in fact guilty) should not be treated as an exhaustive explanation of the statutory test.

Approach taken

Against that background, this section simplifies the appeal grounds while retaining the phrase 'substantial miscarriage of justice'.

In particular, the current provision has been refined in a way which recognises that many of the problems that have plagued the appeal grounds and the proviso have resulted from different understandings of the phrase 'miscarriage of justice'. This phrase was originally intended to refer to any departure, however insignificant, from the rules of trial. It is now commonly understood by lawyers and judges to refer to cases where something very significant has gone wrong in a trial. To a lay audience it tends to mean that an innocent person has been convicted.

Specifically, the revised grounds of appeal take into account the following conclusions:

- There is no need for a two-stage proviso structure if the grounds of appeal themselves are appropriately worded. A single tiered test removes much of the complexity of the current provision.
- The current first ground (verdict is unreasonable or cannot be supported having regard to the evidence) is fundamentally sound.
- There is duplication (and linguistic difficulty) in requiring initial consideration of whether there has been a miscarriage and then separate consideration of whether there has been a substantial miscarriage.
- The phrase 'substantial miscarriage of justice' should remain the ultimate test for determining whether an appeal should be allowed or dismissed.
- There should be a presumption that, until the contrary is shown, a trial before judge and jury was fair and in accordance with law. It follows that the onus to persuade the court of the matters required for a successful appeal should be on the appellant.
- Errors or irregularities in the trial should result in appeals being allowed:
  - if the problem could have reasonably made a difference to the trial outcome
  - if the error or irregularity was of a fundamental kind depriving the appellant of a fair trial or amounting to an abuse of process (regardless of whether it could have made a difference to the trial outcome.

Accordingly, this section now provides that the Court of Appeal must allow an appeal against conviction if the appellant satisfies the court that:

- the verdict of the jury was unreasonable or cannot be supported having regard to the evidence
- as the result of an error or an irregularity in, or in relation to, the trial there has been a substantial miscarriage of justice
- for any other reason, there has been a substantial miscarriage of justice.

The Court will now need to be positively satisfied that there has been a substantial miscarriage of justice before an appeal is allowed. While the first limb of the test is not expressed as a substantial miscarriage of justice test, satisfaction of that test could also be reasonably described as evidence of a substantial miscarriage of justice.

This change of focus as to when a court considers whether there has been a substantial miscarriage of justice (as the test rather than as the second limb of a test) does not alter the fundamental meaning of the words, but does impact on the appropriateness of the *Weiss* approach. When applying the *Weiss* approach, a court could conclude that there could not have been a substantial miscarriage of justice if the convicted person is in fact guilty. However, the *Weiss* test approaches the issue on appeal from a different perspective than that provided in section 276:

- The *Weiss* test concerns the ability of the prosecution to persuade the court that there was no substantial miscarriage of justice.
- Section 276 requires the appellant to persuade the court that there was in fact a substantial miscarriage of justice.

In applying the second and third limbs of the new test, it is important to approach this task in the light of other statements made by the High Court in the context of the common form appeal provision. The test to be applied is the test described in the statute – other tests should not be used as a substitute for the ultimate test, namely in relation to the second and third limbs, whether there was a substantial miscarriage of justice.

Consideration of other tests such as whether the accused lost a real chance of acquittal or that something fundamental went wrong with the trial may assist in determining the ultimate issue, but must not replace consideration of the ultimate issue.

277 Orders etc. on successful appeal

Overview

Section 277 sets out what happens if an ***appeal*** against ***conviction*** is successful. In summary, the court must set aside the conviction and then can do any of the following:

- order a new trial (subsection (1)(a))
- acquit the appellant (subsection (1)(b))
- convict the appellant of an alternative offence (subsection (1)(c))
- order a retrial for an alternative offence (subsection (1)(d))
- enter a judgment of not guilty by reason of mental impairment for the primary offence (subsection (1)(e)) or an alternative offence (subsection (1)(f)).

In relation to sentencing, the court can resentence for any offences of which the appellant remains convicted.

If a new trial is ordered, the court must order the appellant to ***attend*** at a specific date and time in the trial court.

Legislative History

This section is based on sections 568(2) and 569 of the *Crimes Act 1958*. These provisions have been significantly restructured and simplified.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 277(1)(c) deals with alternative offences. It provides that where the appellant could have been found guilty of some other offence (offence B) instead of offence A and the court considers that the jury must have been satisfied that the appellant was guilty of offence B, the court must convict the appellant of offence B. However, if the court does not consider that the jury must have been so satisfied, then the court can order a new trial for offence B under section 277(1)(d). This subclause is designed to allow the Court of Appeal to order a retrial in the circumstances covered in *AJS v The Queen* [2007] HCA 27, that is, to enter a judgment of acquittal for offence A and order a retrial on an alternative offence.

Section 277(2) requires the Court of Appeal, when it orders a new trial, to order that the appellant ***attend*** on a specified date before the trial court. This requirement is new. This ensures that the accused is promptly brought back before the trial court. In addition, for the intervening period, the Court of Appeal may also remand the appellant in custody or grant bail pending the new trial under section 323.

Previously, there was no clear way to ensure that this happened. This provision is designed to assist trial courts to comply with the new time limits for holding retrials set out in sections 211(c) and 212(c). The trial court can then hold any necessary directions hearings and list the case for trial.

Division 2 – Appeal by offender against sentence

Division Overview

This Division provides for appeals against sentence by an offender. It includes a general sentence appeal right (sections 278–283) and a specific appeal right where a term of imprisonment was imposed on a County Court appeal (sections 283–286).

Both appeal rights follow the structure discussed in the chapter overview, separating out the appeal right, how the appeal is commenced, how it is decided and what happens if it is successful.

The key changes are:

- time frames for filing and service of an appeal are now 28 days and 7 days after filing respectively (see section 279)
- a new test for deciding applications for leave to appeal against sentence has been provided (see section 280)
- the test for appeals against sentence has been modified to reflect settled case law (see section 281).

Divisions 6 and 7 include important procedural rules which apply to all appeals and include provisions in relation to stays of sentencing orders pending appeal, extensions of time and bail.

The following flowchart sets out the process for appeals under this Division, including references to relevant sections in other parts of the Act.

278 Right of appeal against sentence imposed by originating court

Overview

Section 278 gives a right of appeal against ***sentence*** with leave of the Court of Appeal.

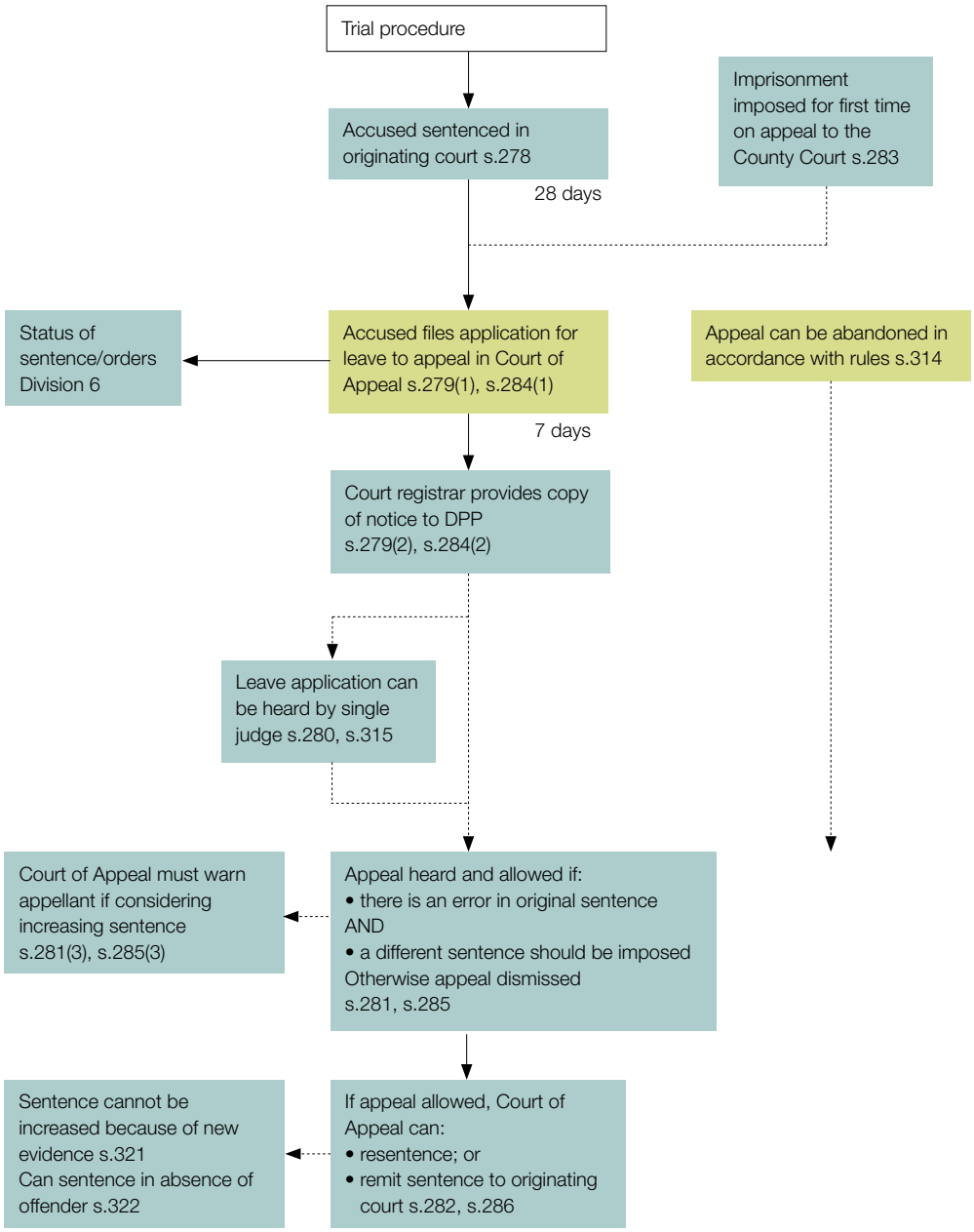
Legislative History

This section is based on section 567(d) of the *Crimes Act 1958*. The provision has been simplified and there are some minor changes in terminology.

Relevant Rules/Regulations/Forms

For commencement of an appeal under section 278, see rule 2.05(2) and (3) and Form 6-2B of the Supreme Court (Criminal Procedure) Rules 2008.

Offender Appeal Against Sentence



LEGEND:

Court responsibility

Accused responsibility

Optional process

Discussion

An appeal can be taken against any ***sentence*** entered in an ***originating court.*** What this covers is discussed in more detail under section 254. In summary, it includes sentences following convictions at trial, convictions for related and unrelated summary offences in the Supreme Court or County Court and other first instance convictions in those courts.

It should be noted that, unlike appeals against conviction, applications for leave to appeal against sentence are usually heard separately from the substantive appeal. Such applications are ordinarily heard by a single judge of appeal. A new test for such hearings is provided in section 280.

279 How appeal is commenced

Overview

This section requires an application for leave to appeal against sentence to be filed within 28 days of sentencing. The registrar must provide a copy of the application to the respondent within 7 days of filing.

Legislative History

Previously, section 572 of the *Crimes Act 1958* provided for the "time and manner for appealing", which applied to all appeals. In the Act, each appeal right has a separate filing and service section (such as this one). Substantively, the major change is an increase in the time for filing to 28 days (which is consistent across all appeal processes).

Relevant Rules/Regulations/Forms

For commencement of an appeal against sentence under section 278 of the Act, see rule 2.05(2) and (3) and Form 6-2B of the Supreme Court (Criminal Procedure) Rules 2008.

Rules 2.10–2.14 set out the requirements to (amongst other things) serve a full statement of the grounds on which the appellant relies, outline of submissions (from both the appellant and the respondent) and the time limits for such matters including the consequences for failing to meet those timelines.

Discussion

This section provides for filing within 28 days of sentencing. Many other appeal provisions require the appellant to serve the respondent. For offender appeals to the Court of Appeal this is replaced by a requirement for the registrar to provide the application to the respondent. This is possible because the respondent will always be the ***DPP*** or the Commonwealth Director of Public Prosecutions. In practice, this has been happening for some time and has been reflected in the legislation (see further, the discussion under section 275).

It should be noted that time limits under this Part can be extended in accordance with section 313.

280 Determination of application for leave to appeal under section 278

Overview

Section 280 regulates applications for leave to appeal against sentence (under section 278) which are heard by a single judge of appeal (under section 315) in two ways:

- It allows leave to be refused if there is no reasonable prospect of a lower sentence being imposed, even if there is otherwise a reasonably arguable ground of appeal.
- It allows leave to be given or refused in relation to any or all grounds of appeal.

Legislative History

This section is new and has no relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The test to be applied by a single judge on an application for leave to appeal was settled in *R v Raad* [2006] VSCA 67 (*Raad*). *Raad* was a decision of a bench of five that was split 3/2. The majority held that the sole test was whether the single judge considered that there was a reasonably arguable ground of appeal. The majority considered that the single judge should not refuse leave having found a reasonably arguable ground of appeal simply because the judge considered that there was no reasonable prospect of a lesser sentence being imposed. The principal justification for that position was that an appellant is, as a matter of principle, entitled to be sentenced correctly at least once.

The minority considered that it was appropriate for a single judge to refuse leave in cases where an arguable error could be shown in sentencing, but that there was no reasonable prospect of the sentence being reduced on appeal. They pointed out that, as is still the case, an appellant dissatisfied with such a decision has an unfettered right to have a three member court consider the case.

Section 280 (this section) effectively reverses the majority approach in *Raad*. As a result of three years experience since *Raad*, it is now considered that the minority view in *Raad* should prevail. If a single judge of appeal considers that there is no reasonable prospect of a sentence being reduced then leave should not be granted and the court's valuable resources can then be applied to cases where there is some prospect that a lower sentence will be substituted. The power will be available in cases where, for example, there was an error in process by the

sentencing judge, or a failure to give adequate weight to a guilty plea, but where the overall sentence was well within range. The important proviso is that no change be made to the absolute right to challenge the decision of the single judge by electing to have the case dealt with by a three member court under section 315(2) of the Act.

Accordingly, this section authorises the single judge to refuse leave if there is no reasonable prospect that the Court of Appeal would substitute a lesser sentence than that imposed by the sentencing judge. This approach deals only with when leave may be refused, but leaves the general basis upon which leave should be granted open. The language of "no reasonable prospect" is taken from the judgment of Buchanan JA in *Raad*. If leave is refused under this new test (because there is an error, but it would not make a difference to the sentence), it is open for the single judge to give reasons and highlight the existence of the error to give guidance in future cases.

Importantly, this section allows a single judge of the Court of Appeal to grant leave in relation to particular grounds of appeal and to refuse leave for others. This approach adds a further filter to the leave process which should enable the substantive appeal hearing to be more focused as a result of the issues being narrowed.

281 Determination of appeal

Overview

Section 281 sets out the test to be applied by the Court of Appeal on a sentence appeal under section 278. The court must allow the appeal if there is an error in the ***sentence*** first imposed and a different sentence should be imposed.

It must also warn the appellant if it is considering imposing a more severe sentence than was originally imposed.

Legislative History

The test on an appeal against sentence was contained in section 568(4) of the *Crimes Act 1958*. However, it has been significantly reworked to reflect long standing case law (see *House v The Queen* [1936] HCA 40; (1936) 55 CLR 499).

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Section 568(4) of the *Crimes Act 1958* required the Court of Appeal, on an offender appeal against sentence, to quash the sentence and substitute a different sentence if "it thinks that a different sentence should have been passed". Alternatively, if it thinks it "appropriate and in the interests of justice to do so" it may quash the sentence and remit the matter to the trial court for resentence.

Common form provisions of this kind were enacted throughout the Australian jurisdictions and in the United Kingdom, Canada and New Zealand in the early 20th century.

The discretion given to the Court of Appeal was, on the face of it, unfettered. It appeared to mandate unfettered appellate resentencing rather than appellate review for the purpose of error correction.

It is now firmly settled that the approach of the Court of Appeal on a sentence appeal is not to ask what the Court of Appeal itself thinks the appropriate sentence should have been and, if different to the sentence imposed, substitute it. Rather, it is to apply a two stage test:

- to assess whether the sentence imposed was attended by error and
- only if such error is established, to resentence the appellant (see, e.g. *House v The Queen* [1936] HCA 40; (1936) 55 CLR 499 at 505 (*House*)).

This approach is reflected in the language regularly employed by the Court of Appeal, for example, "…I am of the opinion that the sentencing judge fell into error. The question then becomes whether I consider a different sentence should have been passed" (*R v Eastham* [2008] VSCA 67 at [18]). This approach to establishing error is broadly consistent with the general approach to appellate review of judicial discretion.

Although this approach to appeals against sentence is longstanding, it was not apparent from the words of section 568(4) of the *Crimes Act 1958*. This detracted from the clarity and accessibility of the law.

Section 281 (this section) expressly includes both steps in the test on appeal. As a result, the Court of Appeal must now be satisfied that:

- there is an error in the sentence first imposed
- a different sentence should be imposed.

If the court is so satisfied then the appeal must be allowed and section 282 will operate to allow the court to resentence the appellant.

The Act therefore includes the concept of error expressly for the first time. The Explanatory Memorandum makes explicit reference to *House* and to the concept of error developed in that and other cases, in relation to this section. The Explanatory Memorandum particularly notes that error can be found other than on the face of the court record in two circumstances. These are:

- where manifest excess itself allows the Court of Appeal to presume error
- where an error as to the facts can be found on the basis of material not available to the sentencing judge if the interests of justice require such material to be considered.

The Explanatory Memorandum also noted there is a strong presumption in sentencing appeals in favour of correctness, affirming the broad nature of the discretion vested in a sentencing judge.

Section 281(3) is new and requires the Court of Appeal to warn the appellant if it is considering imposing a more severe sentence than was first imposed. Section 282 (and its predecessor - section 568(5) of the *Crimes Act 1958*) expressly allows the Court of Appeal to substitute a more severe sentence on an offender appeal against sentence. Notwithstanding this express power to increase a sentence, the Court of Appeal has said in *R v Boyle* (1996) 87 A Crim R 539 that:

> *…where a person has shown that the sentencing process was attended by error, he [sic] should, as a prima facie rule, not be required to run the risk of suffering a heavier sentence as a result of a successful appeal. The applicant is entitled to come to this Court and complain of sentencing error, and it is in the public interest that such error be identified and corrected.*

The policy underlying the above statement is consistent with the recommendation of the Victorian Parliamentary Law Reform Committee, in relation to *de novo* appeals to the County Court. In particular, a statutory warning should be given if the court is considering increasing a ***sentence*** on appeal, presumably to give the appellant the opportunity to abandon the appeal (see section 256(3)). Section 281(3) creates a similar obligation to warn in the Court of Appeal, although only if the court is actually considering a more severe sentence. Given that leave to appeal against sentence is determined by a single judge in advance of the substantive appeal hearing, in practice it is unlikely that this warning will often be needed in the substantive hearing and only likely where the appellant has persisted with an appeal (using the process in section 315) even after leave is refused by a single judge.

282 Orders etc. on successful appeal

Overview

This section operates if the Court of Appeal allows an offender appeal against sentence under section 278, in which case it must set the sentence aside and either resentence the offender or remit the case back to the originating court for resentencing.

Legislative History

This section is based on section 568(4)-(6) of the *Crimes Act 1958*, although has been restructured and simplified.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the discussion under section 281 in relation to the Court of Appeal's power (in section 282(1)(a)) to impose a more severe sentence on the appellant.

283 Right of appeal against sentence of imprisonment imposed by County Court on appeal from Magistrates' Court

Overview

Section 283 provides a limited appeal right where:

- a person is sentenced to a non-custodial sentence in the Magistrates' Court; and
- the ***DPP*** successfully appeals that sentence to the County Court; and
- the County Court imposes a term of imprisonment on that appeal.

In these circumstances, the person sentenced to imprisonment may, with leave, appeal to the Court of Appeal against the sentence imposed by the County Court.

Legislative History

This section is based on section 91(1)-(2) of the *Magistrates' Court Act 1989,* which has been slightly reworked.

Relevant Rules/Regulations/Forms

For commencement and procedure of appeals against sentence under section 283 of the Act, see rules 2.06, 2.07 of the Supreme Court (Criminal Procedure) Rules 2008 (see also Part 8.1 of the Act).

For the obligation of prison officers in relation to appeals under this section, see rule 2.54 and Forms 6-2C And 6-2R of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

See the overview above.

284 How appeal is commenced

Overview

Section 284 requires an application for leave to appeal against ***sentence*** to be filed within 28 days of sentencing by the County Court. The registrar must provide a copy of the application to the respondent within 7 days of filing.

Legislative History

This section is based on section 91(4) of the *Magistrates' Court Act 1989*. However, the section has been restructured and the time limits changed for consistency with the structure of appeals in this Chapter and the time limits throughout the Act.

Relevant Rules/Regulations/Forms

For commencement of appeals against sentence under section 283 of the Act, see rules 2.06 and Form 6-2C of the Supreme Court (Criminal Procedure) Rules 2008.

Rules 2.10–2.14 set out the requirements to (amongst other things) serve a full statement of the grounds on which the appellant relies, outline of submissions (from both the appellant and the respondent) and the time limits for such matters including the consequences of failing to meet those timelines.

Discussion

This section provides for filing within 28 days of sentencing. Many other appeal provisions require the appellant to serve the respondent. For offender appeals to the Court of Appeal this is replaced by a requirement for the registrar to provide the application to the respondent. This is possible because the respondent will always be the ***DPP*** or the Commonwealth Director of Public Prosecutions. In practice, this has been happening for some time, is pragmatic and has been reflected in the Act (see further, the discussion under section 275).

It should be noted that time limits under this Part can be extended in accordance with section 313.

284A Determination of application for leave to appeal under section 283

Overview

This section sets out how an application for leave to appeal under section 283 which is heard by a single judge is to be determined. This section regulates applications for leave to appeal (against a sentence of imprisonment imposed by the County Court on appeal from the Magistrate's Court) which are heard by a single judge of appeal under section 315 in two ways:

- It allows leave to be refused if there is no reasonable prospect of a lower sentence being imposed, even if there is otherwise a reasonably arguable ground of appeal.
- It allows leave to be given or refused in relation to any or all grounds of appeal in addition to giving or refusing leave in relation to all grounds in an application.

Legislative History

This section is new and has no relationship to any earlier provision.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Appeals under section 283 require leave, and although rare, leave applications can be heard by a single judge. If a single judge of appeal considers that there is no reasonable prospect of a less severe sentence being imposed, then leave will not be granted even where there is a reasonably arguable ground of appeal. Importantly, this section allows a single judge of the Court of Appeal to grant leave in relation to particular grounds of appeal and to refuse leave for others. This approach adds a further filter to the leave process which should enable the substantive appeal hearing to be more focused as a result of the issues being narrowed.

The important proviso that the absolute right to challenge this decision of the single judge by electing to have the case dealt with by a three member court under section 315(2) of the Act remains.

For consistency, this section takes the same approach to the determination of such applications as is taken to the determination of applications for leave to appeal under section 278, as set out in section 280.

See the discussion of section 280.

285 Determination of appeal

Overview

This section sets out the test to be applied by the Court of Appeal on a ***sentence*** appeal under section 283. It must allow the appeal if:

- there is an error in the sentence first imposed and
- a different sentence should be imposed.

It must also warn the appellant if it is considering imposing a more severe sentence than was originally imposed.

Legislative History

Previously, the test for these appeals was located in section 91(5) of the *Magistrates' Court Act 1989*. That test has been significantly reworked in the new section, consistent with long standing case law on appeals against sentence.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section requires the Court of Appeal to find error and to consider that a different sentence should be imposed before it allows an appeal. This approach has been adopted for consistency with the new test for general sentence appeals to the Court of Appeal in section 281.

Section 285(3) requires the Court of Appeal to warn the appellant if a more severe ***sentence*** is being considered. This also mirrors section 281(3) and is discussed in detail in the discussion of that section.

286 Orders etc. on successful appeal

Overview

This section operates if the Court of Appeal allows an offender appeal against sentence under section 283, in which case it must set the sentence aside and either resentence the offender or remit the case back to the County Court for resentencing.

Legislative History

This section has its origins in section 91(5) of the *Magistrates' Court Act 1989*. However, a power to remit has been added so that the section now mirrors section 282.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the discussion under section 281 in relation to the Court of Appeal's power (in section 281(1)(a)) to impose a more severe sentence on the appellant.

Division 3 – Crown appeal against sentence

Division Overview

This Division provides for appeals against ***sentence*** by the ***DPP***. It includes a general sentence appeal right (sections 287–290) and a specific appeal right where the offender has failed to fulfil an undertaking to assist the authorities (sections 291–294).

Both appeal rights follow (with some additions) the structure discussed in the overview of Chapter 6; separating out the appeal right, how the appeal is commenced, how it is decided and what happens if it is successful.

The key changes are:

- time frames for filing and service of an appeal against sentence by the DPP are now 28 days and 7 days after filing respectively (see sections 288 and 292)
- the test for appeals against sentence has been modified to reflect settled case law (see section 289)
- the Court of Appeal is now precluded from relying on 'sentencing double jeopardy' in DPP appeals against sentence (see sections 289(2) and 290(3)).

Divisions 6 and 7 include important procedural rules that apply to all appeals including those in relation to stays of sentencing orders pending appeal, extensions of time and bail.

This Division creates two distinct appeal processes and flowcharts in relation to each process are included in the discussion under each of section 287 (DPP sentence appeal - general) and section 291 (DPP sentence appeal - failure to fulfil undertaking).

287 Right of appeal – inadequate sentence

Overview

This section provides a right of appeal against sentence to the DPP. Leave is not required but the DPP must be satisfied that there is an error in the sentence, that a different sentence should be imposed and that the appeal is in the public interest.

Legislative History

This section is based on section 567A(1) of the *Crimes Act 1958*. It has been simplified and the matters that the DPP has to be satisfied of now include the fact that there was an error in the sentence imposed. This reflects the new test for determining sentence appeals in section 289(1).

Relevant Rules/Regulations/Forms

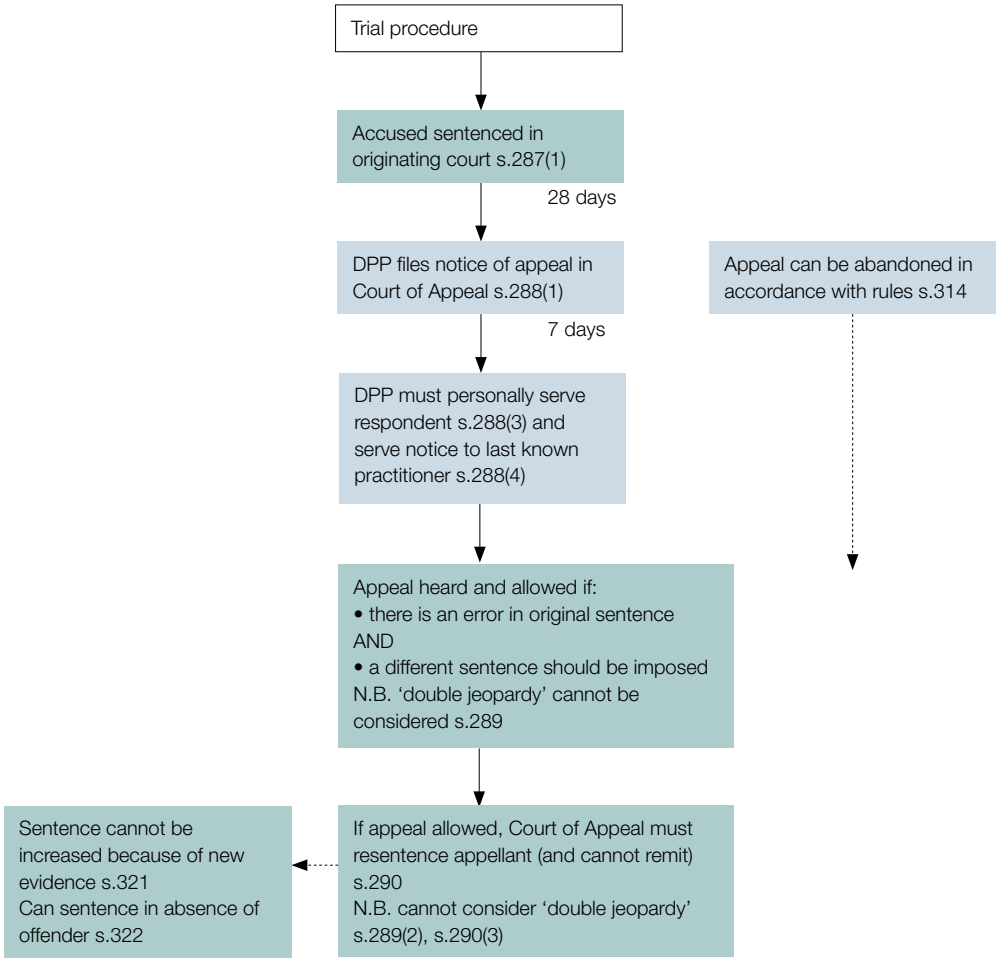
For DPP (or prosecution) appeals, see rule 2.15 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

An appeal can be taken against any sentence entered in an ***originating court***. What this covers is discussed in more detail under section 254. In summary, it includes sentences following; convictions at trial, convictions for related and unrelated summary offences in the Supreme Court or County Court and other first instance convictions in those courts.

The following flowchart sets out the process for appeals under this Division, including references to relevant sections in other parts of the Act.

DPP Appeal Against Sentence - General Appeal



LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

Optional process

288 How appeal is commenced

Overview

This section sets out how an appeal by the ***DPP*** is commenced, namely by filing a notice of appeal within 28 days of sentencing. A copy of the notice of appeal must be served personally on the respondent within 7 days after the day the notice is filed. The DPP must also provide a copy of the notice of appeal to the legal practitioner who last represented the respondent, if they can reasonably be identified.

Legislative History

Previously, section 572 of the *Crimes Act 1958* provided for the time and manner for appealing which applied to all appeals and section 567A(2) and (3) provided for DPP appeals against sentence in particular. In the Act, each appeal right has a separate filing and service section (such as this one). Substantively, the major change is that the time for filing is now 28 days (consistent across all appeal processes) and an extra 7 days for service after filing.

Relevant Rules/Regulations/Forms

For DPP appeals, see rules 2.15 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

The significant change to commencing these appeals is the time frames (28 days for filing and 7 further days for service). A copy must also be sent to the legal practitioner who last acted for the accused, if known.

Importantly, the respondent must be personally served because it is a significant new step in a proceeding and they may have thought that the matter was concluded. The ways in which ***personal service*** can be effected are set out in section 391, which is part of a service regime that applies across the Act.

It should be noted that time limits under this Part can be extended in accordance with section 313.

289 Determination of Crown appeal

Overview

This section sets out the test to be applied by the Court of Appeal on a DPP sentence appeal. It must allow the appeal if:

- there is an error in the ***sentence*** first imposed and
- a different sentence should be imposed.

The Court cannot consider the principle of 'sentencing double jeopardy' on these appeals.

Legislative History

This section is based on section 567A(4) of the *Crimes Act 1958*. However, it has been substantially reworked and restructured. The test for sentence appeals has been set out in greater detail and the court is now prevented from considering 'sentencing double jeopardy'.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Change to test on appeal

As with offender sentence appeals, the test to be applied to ***DPP*** sentence appeals has been changed to reflect long standing case law. In summary, the new test requires the Court of Appeal to be satisfied that:

- there is an error in the sentence first imposed; *and*
- a different sentence should be imposed.

It is important to note that there are some differences between the way in which the error test applies in DPP appeals as compared to offender appeals. In particular:

- as stated in the Explanatory Memorandum, "[i]n the same way that a manifestly excessive sentence can allow the court to presume error on an offender appeal, a manifestly inadequate sentence can, in accordance with established principles on DPP appeals against sentence, allow the court to presume error"
- while new evidence can form the basis of an error in an offender appeal, it cannot in a DPP appeal unless it falls into the narrow exception in section 321(3).

Beyond those issues, it is to be expected that existing principles in relation to DPP appeals should continue to apply, subject to the removal of 'sentencing double jeopardy' discussed below. In particular, those principles are discussed in cases such as *R v Clarke* [1996] 2 VR 520.

Sentencing Double Jeopardy

This section and section 290 have been drafted to remove 'sentencing double jeopardy' as a factor in DPP appeals against sentence.

The Court of Appeal in Victoria has regularly declined to increase sentences on a DPP appeal even if the court held that the sentence is manifestly inadequate. The basis for that non-interference was what is described as the 'double jeopardy' that the offender faced as a result of having to be sentenced twice. The principle was either used to leave a manifestly inadequate sentence alone or, if the sentence was increased, to only increase it by a relatively small amount. However, this is not 'double jeopardy' in a strict legal sense (which applies to an acquittal). Instead, it reflects the anticipated trauma and inconvenience of being sentenced twice.

The Attorney-General, in his Second Reading Speech, outlined the reasons for removing 'sentencing double jeopardy':

> *This existing common law consideration [sentencing double jeopardy] can distort sentencing practices because the sentence imposed by the Court of Appeal will not reflect the sentence that it considers should have been imposed in the first place. This can reduce the guidance provided by Court of Appeal sentences to other courts and the effectiveness of DPP appeals against sentence.*
>
> *Further, this approach does not take into account other relevant and counter-balancing policy considerations, such as the interests of the community and the victim, in the courts sentencing offenders to appropriate sentences.*

The use of the principle is well described in the often cited case of *R v Clarke* [1996] 2 VR 520 (*Clarke*). It has two effects as set out in the following paragraphs from that decision:

> *When, in response to a Crown appeal, the court decides to resentence an offender, it ordinarily gives recognition to the element of double jeopardy involved (in twice standing for sentence) by imposing a sentence that is somewhat less than the sentence it considers should have been imposed at first instance.*
>
> *An appellate court has an over-riding discretion which may lead it to decline to intervene, even if it concludes that error has been shown in the original sentencing process. In this connection, the conduct of the Crown at the original sentencing proceedings may be a matter of significance.*

The effect of the changes in the Act is to:

- remove the consideration in the first paragraph (namely twice standing for sentence) and
- limit the discretion in the second paragraph only to the extent that the discretion may be exercised on the basis of the 'double jeopardy' principle.

Therefore, the conduct of the DPP at the original sentencing proceedings will continue to be relevant.

Similar reform has recently occurred in Western Australia. Section 41 of the *Criminal Appeals Act 2004* (WA) prevents the court from taking 'sentencing double jeopardy' into account, in the following way:

> (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.

The only case to consider the operation of the provision is *State of Western Australia v Wallam* [2008] WASCA 117 (*Wallan*). In that case, the court was divided 2/1. The majority held that the section had the effect of removing the court's ability to apply 'double jeopardy' principles with the result that prosecution appeals were to be dealt with in the same way as offender appeals.

The minority view was that the section had little if any real effect, essentially because the fact of resentencing was only one of a number of reasons for the conservative approach to prosecution appeals.

In order to avoid the potential difficulties with both the majority and minority views in *Wallam*, the Act has used the more explicit phrase "the element of double jeopardy involved in the fact that the respondent is being sentenced again". This is a modification of the wording used to describe the relevant principle in *Clarke* (set out above) and is intended to ensure that the object of the provision is clear.

Section 289 also reflects the new structure for sentence appeals in the Act, that is, the two-stage test separating out a finding of error from resentencing. The Act's approach is designed to prevent recourse to the 'double jeopardy' principle both at the error stage and at the resentencing stage.

Accordingly, sections 289(2) and 290(3) now provide that the element of 'double jeopardy' associated with the accused being sentenced again cannot be taken into account when the Court of Appeal is determining whether an appeal should be allowed. This broad language is designed to encompass the Court of Appeal's consideration of both:

- whether there is an error in the sentence imposed and
- whether a different sentence should be imposed.

For consistency with other prosecution appeal provisions, ***DPP*** appeals to the County Court (sections 259 and 262) have been similarly amended, as has the DPP's appeal to the Court of Appeal against sentence where there has been a failure to fulfil an undertaking (section 294(2)).

Other factors particular to DPP sentence appeals remain relevant and may act to reduce an otherwise appropriate sentence, despite the removal of 'sentencing double jeopardy' as a consideration. These factors were noted in *Clarke* (discussed above) and include: the conduct of the prosecution at the original sentencing, a significant change in personal circumstances of the offender, and

the fact that the offender has served part or all of a different kind of original sentence. For example, where an offender has already served much of a community based order, a sentence of imprisonment substituted on appeal may need to be reduced to reflect the sentence already served.

290 Orders etc. on successful appeal

Overview

This section operates if the Court of Appeal allows an offender appeal against sentence, in which case it must set the sentence aside and resentence the offender. The Court may also make any other order it considers appropriate.

Legislative History

This section is based on part of section 567A(4) of the *Crimes Act 1958* without significant change, except that it prevents the Court of Appeal from considering 'sentencing double jeopardy' when resentencing the offender.

Relevant Rules/Regulations/Forms

Not applicable.

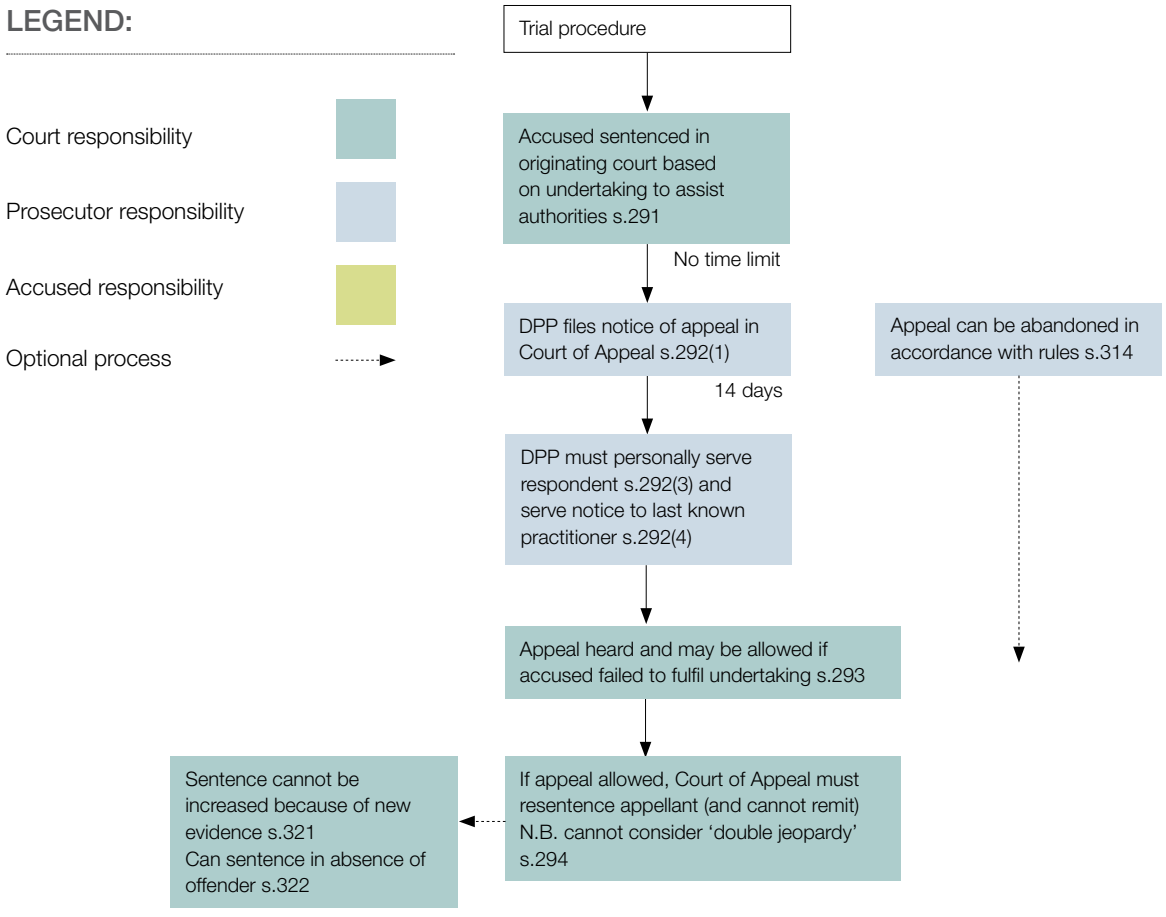
Discussion

Unlike most other types of appeal in this Part, the Court of Appeal does not have the option of remitting the case to the sentencing court for resentencing upon a successful appeal. The Court of Appeal must conduct the resentencing. This reflects the fact that ***DPP*** appeals are designed to provide guidance and the actual sentence imposed may be important for that reason.

The other significant feature is section 290(3) which prevents the court from considering 'sentencing double jeopardy' as a factor when resentencing. This is discussed in detail under section 289.

The following flowchart sets out the process for appeals under this Division, including references to relevant sections in other parts of the Act.

DPP Appeal Against Sentence – Failure to Fulfil Undertaking



291 Right of appeal – failure to fulfil undertaking

Overview

This section allows the ***DPP*** to appeal against sentence where the ***originating court*** imposed a less severe sentence because the offender agreed to co-operate with authorities, but the offender failed to fulfil their undertaking to assist.

Legislative History

This section is based on section 567A(1A) of the *Crimes Act 1958*. However, that section required all such appeals to go to the Court of Appeal. The Act now requires appeals of this type from sentences imposed in the Magistrates' Court to be taken in the County Court (see section 260).

Relevant Rules/Regulations/Forms

For DPP appeals see rule 2.15 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

An appeal can be taken against any ***sentence*** entered in an ***originating court***. What this covers is discussed in more detail under section 254. In summary, it includes sentences following convictions at trial, convictions for related and unrelated summary offences in the Supreme Court and County Court and other first instance convictions in those courts.

It is important to note that there are no time limits within which an appeal must be brought in these circumstances. That is because the failure to fulfil an undertaking may not become apparent until a long time after the respondent was originally sentenced.

292 How appeal is commenced

Overview

Section 292 provides that this kind of appeal is commenced by filing a notice of appeal signed by the ***DPP*** personally, in the Court of Appeal.

The notice of appeal must then be served personally on the respondent within 14 days after filing. Further, the DPP has to provide a copy of the notice to the legal practitioner who last represented the respondent, if they can reasonably be identified.

Legislative History

Section 567A(1B) and (2) of the *Crimes Act 1958* allowed an appeal to be taken "at any time regardless of whether or not the sentence has been served" and set out the manner of service on the respondent. Section 292 (this section) restructures that approach and provides for a clear distinction between filing and service.

Relevant Rules/Regulations/Forms

For DPP appeals, see rule 2.15 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

The process for commencing an appeal under this section is similar to other appeals (filing followed by service) except that there is no time limit for filing a notice of appeal. This is because the failure to fulfil an undertaking may not be apparent for some time.

A copy of the notice of appeal must be served on the respondent within 14 days of filing (compared to 7 days for most other types of appeal). This is because the underlying proceedings may not be recent and therefore the respondent may be more difficult to locate. A copy of the notice must also be provided to the last known practitioner acting for the respondent. The word "provided" has been used here, indicating that the formal requirements of service do not apply. This is because it is not a formal step, rather it is a case management tool designed to ensure that the respondent is aware of the appeal.

Importantly, the respondent must be personally served because it is a significant new step in a proceeding and they may have thought that the matter was concluded. The ways in which personal service can be effected are set out in section 391, which is part of a service regime that applies across the Act.

It should be noted that time limits under this Part can be extended in accordance with section 313.

293 Determination of Crown appeal – failure to fulfil undertaking

Overview

Section 293 provides that the Court of Appeal must find that the respondent has failed to fulfil their undertaking to assist authorities – in whole or in part - before it may allow a Crown appeal against sentence on that ground.

Legislative History

This section is based on the first part of section 567A(4A) of the *Crimes Act 1958* without significant change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

It should be noted that the Court of Appeal *may* rather than *must* allow an appeal if it finds a failure to fulfil an undertaking. Section 294 sets out the process that follows if the appeal is allowed.

Evidence will ordinarily be needed in order to establish the failure to fulfil an undertaking, unless the respondent formally admits the failure. As a result, this type of an appeal is exempt from the prohibition on increasing a sentence on appeal based on new evidence (see section 321).

294 Powers of Court of Appeal on successful appeal

Overview

Section 294 sets out the court's powers where it allows an appeal under section 293. It may set aside the original sentence and resentence the respondent. In doing so, it cannot consider the element of 'double jeopardy' involved in resentencing the respondent to reduce the final sentence.

Legislative History

This section is based on the second part of section 567A(4A) of the *Crimes Act 1958* without significant change other than the prohibition on considering 'sentencing double jeopardy'.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

If an appeal is allowed, the court has jurisdiction to resentence the respondent in a way which removes the windfall that they gained at the original sentencing for their anticipated assistance to authorities.

Section 294(2) expressly excludes 'double jeopardy' as a factor to reduce what would otherwise be an appropriate sentence. This exclusion now applies to all ***DPP*** sentence appeals although its primary operation is in relation to general DPP appeals against sentence to the Court of Appeal which is discussed in detail in relation to sections 289 and 290. However, this prohibition on considering 'double jeopardy' may have limited impact in an appeal for failure to fulfil an undertaking as the respondent falls to be resentenced because of their default, rather than an error by the sentencing court or the prosecution.

This section operates in conjunction with section 321(2) which clarifies that the general prohibition upon increasing a sentence by reason of new evidence does not apply where that evidence is of the failure to fulfil an undertaking. Section 321(2) expressly provides that on an appeal under section 294 the Court of Appeal may increase a sentence by reason of evidence of a failure to fulfil an undertaking.

Division 4 – Interlocutory appeal

Division Overview

Introduction

Interlocutory appeals allow a party to a criminal trial to appeal against decisions made by the judge before, or in exceptional circumstances during, the trial. This is the first time that there have been interlocutory appeals in Victoria. The model chosen has some similarities to that used in New South Wales. However there are also significant differences.

This Division sets out the machinery for interlocutory appeals and issues relating to each section in the Division are discussed in detail at the relevant points in this guide. However, in order to put the new system into context, what follows is a practical overview of the system, including a flowchart and then a detailed discussion of the background and policy underlying the system.

It should be noted that the Act also makes changes to the case stated regime whereby trial courts can reserve a question of law for determination by the Court of Appeal. These two processes (interlocutory appeals and cases stated) both provide for pre-verdict review of decisions made by a court. The modifications to the case stated regime are designed to complement the new interlocutory appeals system and are discussed in relation to Division 5.

Practical Overview

Interlocutory appeals function in the following way:

Interlocutory appeals only apply to trial proceedings, that is, cases in the Supreme Court or County Court for indictable offences (see section 295(1)).

An interlocutory appeal can be taken against any ***interlocutory decision***, which is defined in section 3 as "a decision made by a judge". This is an intentionally broad description (see section 295(2)).

There is an express limitation on the type of decision that can be appealed concerning the admissibility of evidence. Only an evidential ruling that relates to key prosecution evidence, that is, evidence which, if excluded, would "eliminate or substantially weaken the prosecution case" can be appealed (see section 295(3)(a)).

Different rules apply in relation to appealing decisions made before trial and those made during trial. The differences are designed to make it significantly harder to take an interlocutory appeal during trial than before it. Similarly, the longer before trial a decision is made, the easier it will be to appeal. Even with fewer statutory restrictions on appealing once a trial has started, New South Wales only has on average 30-35 interlocutory appeals each year, of which leave is only given to a handful during trial.

Both kinds of appeal (before and during trial) have two

hurdles, namely certification by the judge and leave from the Court of Appeal.

For a decision made *before trial:*

Step 1 - Certification by the judge who made the decision

- If the decision concerns the admissibility of evidence, the judge must certify that the absence of the evidence would "eliminate or substantially weaken the prosecution the prosecution case" (see section 295(3)(a)).
- For all other decisions (i.e. non evidential decisions) the judge must certify that the decision is of sufficient importance to the trial to justify it going to the Court of Appeal (see section 295(3)(b)).
- The judge must determine a request for certification as soon as practicable after it is made (see section 295(4)). If certification is granted then the party can apply for leave to appeal (see checklist below).
- If the judge refuses to certify on either ground then the requesting party can apply to the Court of Appeal to review the refusal (see section 296(1)). The application for review must be filed within 10 days of the refusal but, at the latest, within 2 days after the trial starts (see section 296(2)(a) and (b)) (e.g. if the trial starts before the 8th day after the decision is made, then the time to appeal is reduced to 2 days from the commencement of the trial).
- A review of refusal to certify can be decided by a single judge of appeal (see section 315(1)(b)).
- The result of a successful review will be the immediate granting of leave to appeal rather than the issue being remitted (see section 296(4)(b)).

Step 2 - Leave from the Court of Appeal

- An interlocutory appeal can only be taken with leave from the Court of Appeal (see section 295(2)). An application for leave cannot be made unless the appeal has been certified by the judge who made the decision (see section 295(3) and the list of steps above).
- The application for leave must be filed within 10 days of the interlocutory decision but, at the latest, within two days after the trial starts (see section 298(1)(a) and (b)). It must be served within the period specified for filing the notice (see section 298(2)).
- The leave application can be heard by a single judge of appeal (see section 315(1)(a)) or by the Court of Appeal itself.
- Leave can only be given in the interests of justice and taking into account the level of disruption to the trial process and the extent to which hearing the appeal will reduce subsequent court time needed (e.g. by dispensing with the need for trial or reducing the likelihood of a successful post-conviction appeal) (see section 297(1)).
- When it hears the appeal (either at the same time as granting leave or separately), the Court of Appeal can either affirm or set aside the original decision (see section 300(2)(a)).
- If it sets aside the decision, the Court of Appeal can either remit the matter with directions or make a new decision (see section 300(2)(b)).

For a decision made *during trial*:

Step 1 - Certification by the judge who made the decision

- In addition to the issues which require certification by the judge for a pre-trial appeal (see checklist above and section 295(3)(a) and (b)), the judge must also certify that the issue could not have reasonably been identified before trial ***or,*** if it could have been identified before trial, that the party wanting to appeal was not at fault in failing to identify it.
- The judge must determine a request for certification as soon as practicable after it is made (see section 295(4)). Once certified, the party can apply for leave to appeal (see checklist below).
- If the judge refuses to certify either matter then the requesting party can apply to the Court of Appeal to review the refusal (see section 296(1)). The application for review must be filed and served within 2 days of the refusal (see section 296(2)(c)).
- A review of refusal to certify can be decided by a single judge of appeal (see section 315(1)(b)).
- The result of a successful review will be the immediate granting of leave to appeal rather than the issue being remitted (see section 296(4)(b)).

Step 2 - Leave from the Court of Appeal

- An interlocutory appeal can only be taken with leave from the Court of Appeal (see section 295(2)). An application for leave cannot be made unless the appeal has been certified by the judge who made the decision (see section 295(3) and the checklist above).
- The application for leave must be filed within 2 days of the interlocutory decision (see section 298(1)(a) and (b)). It must be served within the period specified for filing the notice (see section 298(2)).
- The leave application can be heard by a single judge of appeal (see section 298(1)(a)) or by the Court of Appeal itself.
- Leave can only be given in the interests of justice and taking into account the level of disruption to the trial process and the extent to which hearing the appeal will reduce subsequent court time needed (e.g. by dispensing with the need for trial or reducing the likelihood of a successful post-conviction appeal) (see section 297(1)).

- For an appeal during trial, leave *must not* be granted unless the reasons for doing so outweigh the disruption to the trial process. If leave is granted then the trial must be adjourned pending the outcome (see section 299).
- When it hears the appeal (either at the same time as granting leave or separately), the Court of Appeal can either affirm or set aside the original decision (see section 300(2)(a)).
- If it sets aside the decision, the Court of Appeal can either remit the matter with directions or make a new decision (see section 300(2)(b)).

The following flowchart sets out the process for appeals under this Division, including references to relevant sections in other parts of the Act. There is a more detailed flowchart in relation to the certification process in the discussion following section 295.

Background and Discussion

Interlocutory appeals provide a mechanism for a judge's rulings to be tested on appeal before a trial starts or, in limited circumstances, during trial. An interlocutory appeal essentially brings forward an issue that may otherwise become part of a post-conviction appeal. Typically, it deals with only one issue, unlike an appeal against conviction which may involve many issues.

The key advantage of interlocutory appeals is that they allow issues that might otherwise result in a successful post-conviction appeal to be dealt with early and thus avoid the need for lengthy and costly retrials.

Interlocutory appeals can also be used by the prosecution to appeal against a decision which severely limits the prosecution's case (e.g. if key evidence is ruled inadmissible).

Interlocutory decisions are made both before and during trial proceedings. However, because appealing after empanelment will inevitably interrupt the trial, stronger reasons are required to justify an interlocutory appeal being heard during trial. This ties in with the new pre-trial processes for identifying and deciding important issues before trial found in Part 5.5. The link between interlocutory appeals and the new pre-trial processes is discussed under section 199.

The Attorney-General emphasised this distinction between appeals before trial and those taken during trial in the Second Reading Speech:

> *An interlocutory appeal may be brought if the judge who made the decision provides the necessary certification and the Court of Appeal provides leave to hear the appeal. The tests for certification and leave encourage the resolution of issues before a trial commences. Good preparation by the parties and case management by the court will identify most interlocutory appeal issues before a trial commences.*

Interlocutory Appeals

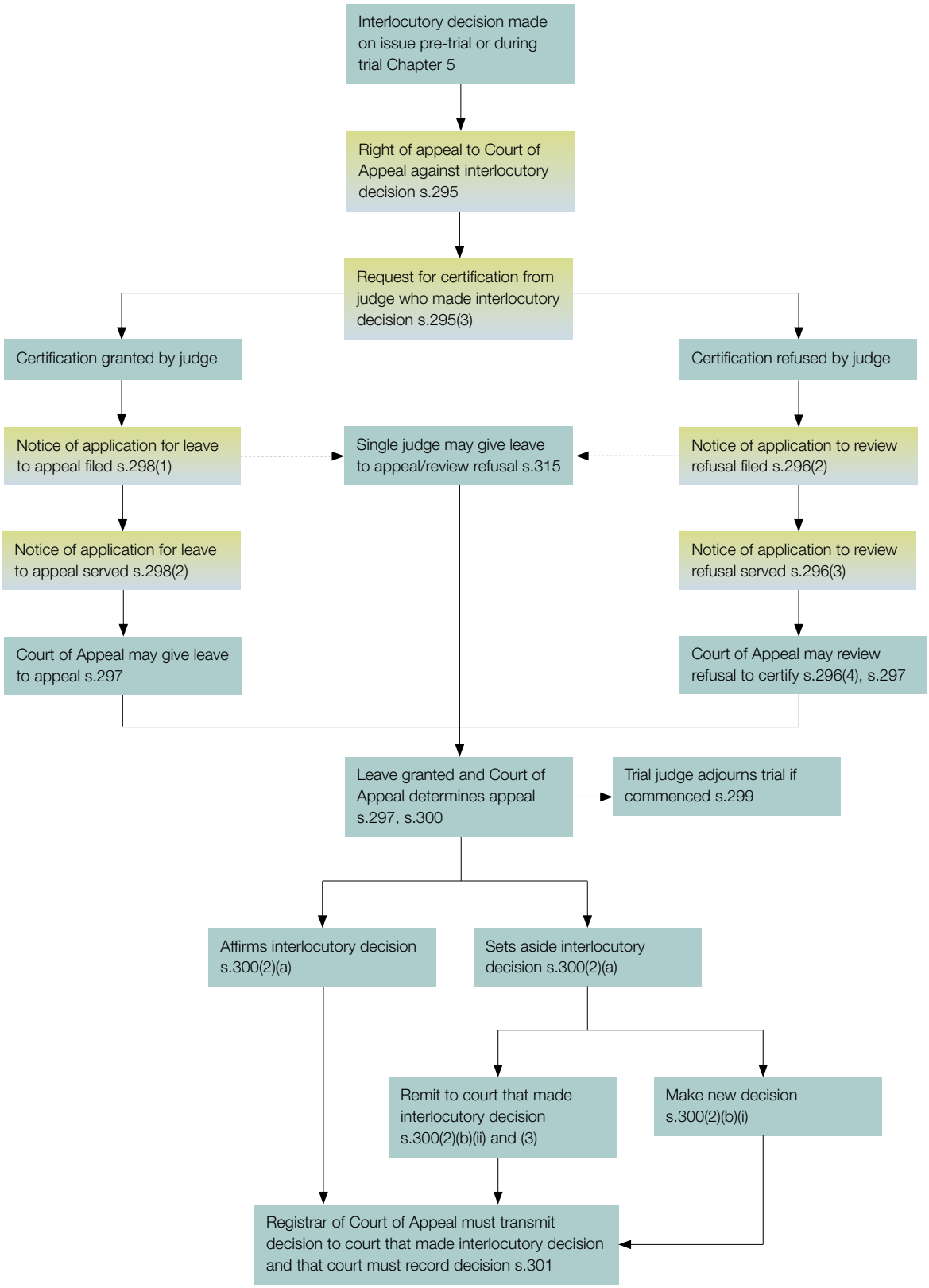
LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

Optional process


Interlocutory decision made on issue pre-trial or during trial Chapter 5
Right of appeal to Court of Appeal against interlocutory decision s.295
Request for certification from judge who made interlocutory decision s.295(3)
Certification granted by judge
Certification refused by judge
Notice of application for leave to appeal filed s.298(1)
Single judge may give leave to appeal/review refusal s.315
Notice of application to review refusal filed s.296(2)
Notice of application for leave to appeal served s.298(2)
Notice of application to review refusal served s.296(3)
Court of Appeal may give leave to appeal s.297
Court of Appeal may review refusal to certify s.296(4), s.297
Leave granted and Court of Appeal determines appeal s.297, s.300
Trial judge adjourns trial if commenced s.299
Affirms interlocutory decision s.300(2)(a)
Sets aside interlocutory decision s.300(2)(a)
Remit to court that made interlocutory decision s.300(2)(b)(ii) and (3)
Make new decision s.300(2)(b)(i)
Registrar of Court of Appeal must transmit decision to court that made interlocutory decision and that court must record decision s.301

However, there may be occasions when an issue arises during trial and there are very strong reasons for conducting an interlocutory appeal at that stage of the proceeding.

An interlocutory appeal process can be of particular benefit where a judge:

- admits or excludes important evidence in particularly lengthy, serious or complex cases
- grants, or refuses to grant, an application:
  - to discharge a jury
  - to sever charges
  - to amend an indictment
  - to conduct separate trials
  - to change the trial venue
  - to accept or reject a submission that the accused has no case to answer
  - to permanently stay proceedings.

The policy reasons behind introducing interlocutory appeals were also discussed in the Attorney-General's Second Reading Speech and include:

- reducing the number of retrials, thereby sparing the participants in trial proceedings a retrial (especially the complainant(s), witnesses and the accused), and removing the costs of such retrials
- avoiding trials because the resolution of a key issue (e.g. concerning the admissibility of certain evidence) may result in a plea or a withdrawal of charges
- preventing the fortuitous acquittal of an accused because of an error in the trial (particularly when the accused would probably have been convicted in a properly conducted trial)
- preventing the conviction of an accused because of an error in the trial (particularly when the accused would probably have been acquitted in a properly conducted trial). Although it is possible to remedy this situation in a post-conviction appeal, there are benefits in avoiding a wrong conviction at the earliest available stage
- promoting community confidence in trial processes by addressing problems in a trial before a verdict is given.

Despite the advantages of interlocutory appeals, they should only be used when strictly necessary or beneficial. The model chosen reflects the need to tightly control the number and type of interlocutory appeals taken to ensure that they do not:

- increase delay in completing trials (e.g. if the Court of Appeal is not able to hear a matter quickly where an appeal is commenced after a jury has been empanelled)
- fragment proceedings (e.g. once a trial has commenced it may be difficult for a jury to continue hearing a trial if there is a significant break while the appeal is heard).

On the basis of those considerations, the Act is designed to:

- focus on issues which might reduce trial time (either in the trial itself or by avoiding a retrial)
- encourage early (i.e. pre-trial) resolution of key legal, procedural and evidential issues
- avoid, where possible, interrupting trial proceedings (e.g. if a jury is already empanelled, very strong reasons are needed to interrupt those proceedings)
- prevent such appeals being used as a delaying tactic
- be able to be heard quickly, especially if a jury is already empanelled.

New South Wales (NSW)

Particular attention was paid to the NSW interlocutory appeals model which has been in place for some time. The approach taken in the Act builds on some of the lessons learnt from NSW, discussed in detail below.

NSW has had an interlocutory appeals process for criminal cases since 1987. It was introduced as a way of managing increasing numbers of applications for stays of proceedings based on an abuse of process. Those applications created significant delays. Interlocutory appeals appear to have been effective in reducing the rate of retrials. They may also have reduced overall delays in the administration of jury trials. Because of the range of factors that could influence such results, this is difficult to determine statistically.

A key feature of the NSW model is that it applies to "an interlocutory judgment or order". The definition of that phrase has been the subject of a great deal of judicial scrutiny and has resulted in some uncertainty concerning the issues that are properly the subject of interlocutory appeals.

Three important features of the NSW system are not included in this Act, namely:

- the restriction of appeals to judgments or orders
- the different treatment of the accused and the ***DPP*** on whether leave to appeal is required, and as to the ability to appeal against key evidential points
- the approach to judge certification.

The approach in this Act also provides stronger restrictions on the ability to appeal during trial and includes a list of mandatory factors for granting leave which have been, in part, derived from the approach developed in NSW cases.

The restriction of appeals to judgments or orders

The NSW provision restricts appeals to interlocutory judgments or orders. This wording has resulted in a substantial body of case law regarding which types of decisions fall into that category. The case law demonstrates that there is no definitive exposition or 'bright line test' of what an interlocutory judgment or order is for the purposes of section 5F of the *Criminal Appeal Act 1912* (NSW) (see *R v Bozatsis & Spanakakis* [1997] NSWSC 524; (1997) 97 A Crim R 296).

Following the early focus on what a judgment or order was, the NSW Court of Criminal Appeal shifted its focus towards whether and when an interlocutory appeal is going to be of practical benefit in relation to a particular trial (see *R v RAG* [2006] NSWCCA 343). For example, where a trial has been running for six months a decision to discharge the jury will be very important, but if the decision is taken on the second day of the trial it will be less so.

In order to avoid the sorts of technical arguments that have arisen in NSW as to whether an issue can be appealed, the Act adopts a very broad approach to the question of what can be appealed. This allows a leave decision to focus on whether it is genuinely in the interests of justice to allow the issue to be appealed, rather than on technical arguments as to whether a particular decision is a judgment or order. Accordingly, the word "decision" has been used. Changes to the terminology used in the pre-trial and trial divisions of the Act have been made to complement the use of the word decision.

To avoid doubt, the definition of an ***interlocutory decision*** in section 3 includes reference to a decision to permanently stay (or refuse to stay) a criminal proceeding. This approach reverses the effect of *Smith v R* [1994] HCA 60; (1994) 181 CLR 338. In that case, the High Court held that the Court of Appeal did not have power to overturn a permanent stay granted by Vincent J to five police officers charged with murder. That decision was based on section 17A of the *Supreme Court Act 1986* which was amended by the *Criminal Procedure Amendment (Consequential and Transitional Provisions) Act 2009* to expressly accommodate interlocutory appeals.

Treatment of the accused and the DPP

The NSW provisions require the accused to seek leave to appeal, but not the DPP. Similarly, the DPP is granted a right of appeal against significant evidential rulings but the accused is not.

Contrary to that approach, this Act gives the parties equal statutory access to appeals. In particular, leave is required in all cases to allow the Court of Appeal to control the use of interlocutory appeals on a consistent basis.

In relation to appeals against evidential rulings, the NSW provisions only allow the DPP to appeal and only when the admission or exclusion of evidence will substantially weaken or eliminate the DPP case. This Act takes a different approach. Although the only evidence that can be the subject of an interlocutory appeal remains evidence that will eliminate or substantially weaken the prosecution case, both parties can appeal against such rulings. So, for example, if a confessional record of interview is admitted (and it is central to the prosecution case) then the accused can also seek leave to appeal against that decision. The reason for this approach is that if the accused is successful, there may be no need for a trial at all.

Judge certification

In NSW, the judge may certify that a judgment or order is suitable for an interlocutory appeal. Such certification is neither necessary nor sufficient and thus adds an extra layer of proceedings for no discernible purpose.

Instead, the Act makes certification a necessary precondition to the grant of leave to appeal, but limits certification to specific threshold issues which the certifying judge is best placed to decide, namely:

- in relation to decisions made during trial, that the issue to which the proposed appeal relates was either not reasonably able to be identified pre-trial or, if it could have been identified, that the party wishing to seek leave to appeal was not at fault in failing to identify the issue
- in relation to evidential rulings, that the evidence to which the decision relates would, if ruled inadmissible, eliminate or substantially weaken the prosecution case
- in relation to all proposed appeals, that the issue is of sufficient importance in the context of the trial to warrant an appeal.

These considerations have been provided for in section 295(3) and do not involve the judge making any assessment about the merits of their decision, nor how the judge considers the Court of Appeal might decide the issue.

It should be noted that certification under the Act is a necessary but not sufficient pre-condition for an interlocutory appeal – leave must still be obtained in all cases.

Restrictions on leave to appeal

The test for leave to appeal in NSW is unconstrained. Although not intended to fetter the ability of the Court of Appeal to develop appropriate tests, a list of mandatory considerations is included in the Act at section 297(1) and (2). They are drawn from general principles, informed by NSW case law, and are designed to reflect the desired balance between hearing appeals that are genuinely likely to reduce overall delays and avoiding the fragmentation of individual trials without good reason. Accordingly, when determining whether an interlocutory appeal is in the interests of justice, the court must consider the extent of any disruption or delay to the trial process that may arise if leave to appeal is granted. It must also consider (along with any other relevant matters) whether determining the appeal could:

- render the trial unnecessary
- substantially reduce the time required for trial
- resolve an issue of law or procedure necessary for the proper conduct of the trial
- reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.

These factors make it clear that a grant of leave is to be based on practical considerations where, overall, trial time (particularly potential retrial time) can be reduced or removed.

Further restrictions during trial

Appeals during trial are subject to significant further hurdles in the Act. No such distinction is expressly drawn in NSW. However, the NSW Court of Criminal Appeal has made it clear that grants of leave during trial are to be limited to exceptional circumstances. For example, in *R v Natoli* [2005] NSWCCA 292 (*Natoli*), Justice Sully said:

> *It is trite that this court will not interfere with the orderly progress of a first instance trial in the absence of wholly exceptional circumstances... .Too freewheeling an interference by the Court of Criminal Appeal with a current trial at first instance … would promote a situation of curial and forensic chaos.*

In *Natoli*, the trial commenced on 2 August 2005, the jury was empanelled on 3 August 2005 and an application for leave to appeal was filed prior to the closing addresses. The application was heard by the Court of Criminal Appeal on 17 August 2005. Leave was refused that day and the trial resumed.

Appeals during trial carry a risk that, without careful management, an application for leave itself will result in an inevitable adjournment (perhaps for several days) while the application is determined by the Court of Appeal. The tactical use of this procedure could result in significant trial disruption, even on unmeritorious appeal grounds.

Further, restricting access to appeals during trial should encourage earlier resolution of important issues. There may be a forensic advantage to the accused in testing a ruling pre-trial. If the accused is successful on the point on an interlocutory appeal then that will work to their advantage in trial. However, success on the same point on a post-conviction appeal may not result in a retrial given that the error may not amount to a substantial miscarriage of justice.

That forensic advantage should encourage the use of interlocutory appeals generally. If such appeals are strictly limited during trial then that should in turn encourage the identification and resolution of issues pre-trial. Such early resolution is to be encouraged as better case preparation assists the courts in managing court lists and is consistent with the new approach to pre-trial issues in Part 5.5.

To achieve this, extra hurdles have been added to certification and leave when they are sought after the trial has commenced (for discussion of when a trial commences under the Act see section 210):

- Under section 295(3)(c), the judge must also certify that the issue to which the proposed appeal relates was either not reasonably able to be identified pre-trial or, if it could have been identified, that the party wishing to seek leave to appeal was not at fault in failing to identify the issue. This complements the new and extended obligation under section 200 to notify the other party and the court of issues pre-trial.
- Under section 297(2), the Court of Appeal must not grant leave to appeal after the trial has commenced unless the reasons for doing so clearly outweigh the disruption to the trial process.

For further discussion of interlocutory appeals see Philip Priest QC and Bruce Gardner, 'An Appealing Procedure' December 2009 (83) 12 *Law Institute Journal* 32.

295 Right of appeal against interlocutory decision

Overview

Section 295 does two main things:

- It declares that parties to a proceeding for an indictable offence can appeal an ***interlocutory decision*** pre-verdict, with leave of the Court of Appeal.
- It makes certification from the judge who made the decision a precondition to applying for leave.

Legislative History

This section is new and has no relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

For commencement of interlocutory appeals see rules 3.03 and 3.05(1) and (3) of the Supreme Court (Criminal Procedure) Rules 2008.

For interlocutory appeals see rule 2.12 and Form 2H of the County Court Criminal Procedure Rules 2009.

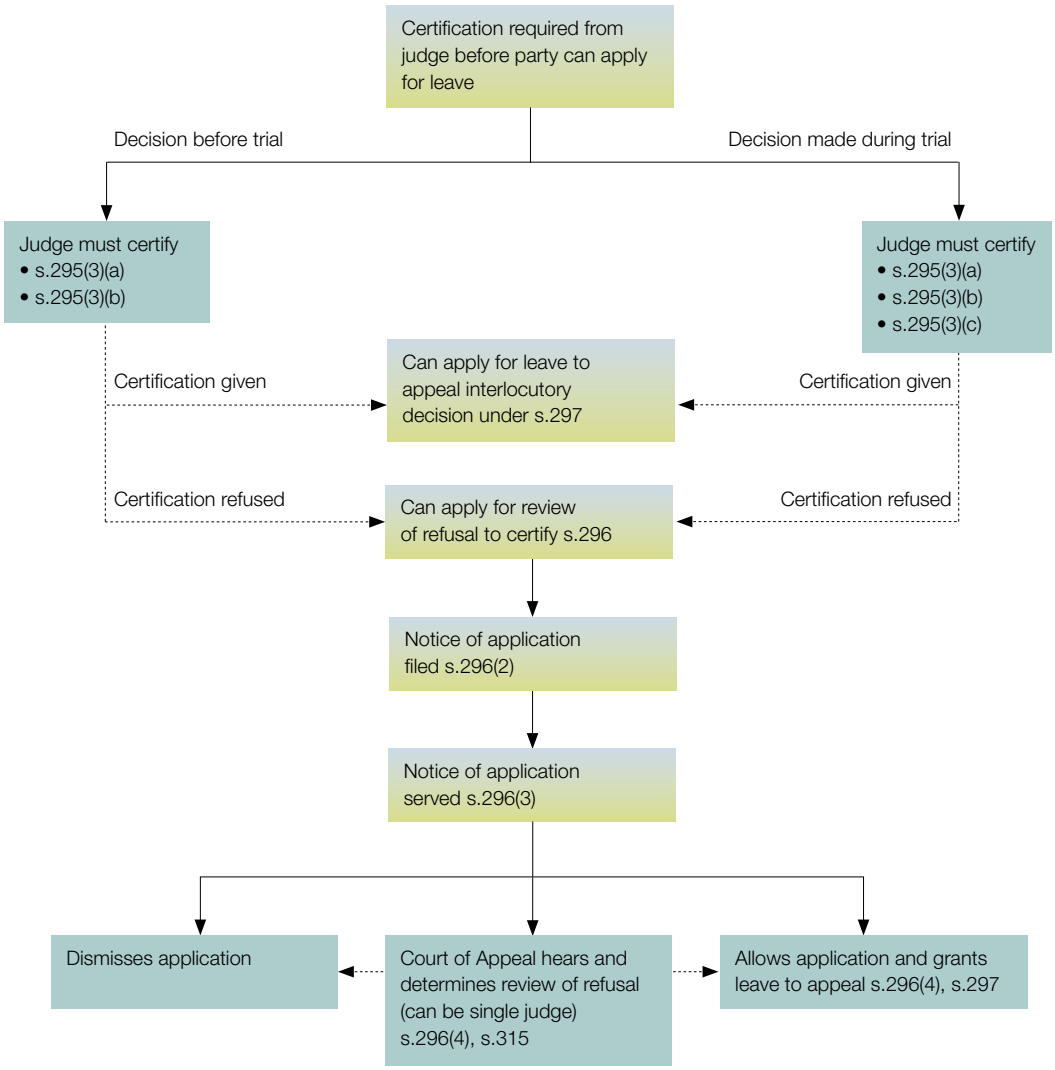
Discussion

For an overview of the interlocutory appeals regime see the discussion above under Division 4. Although it is difficult to predict how many interlocutory appeals will be taken under this appeal right, NSW has on average 30-35 interlocutory appeals each year. Of those, leave is only given to a handful during trial.

This section's primary purpose is to declare that interlocutory appeals can be taken by parties to a trial proceeding before or during trial. Key issues to note in relation to this right are outlined below.

An appeal is available against any ***interlocutory decision***. This is intended to be a broad and inclusive definition, as discussed in detail under Division 4. The breadth of the meaning of the word "decision" is reflected in the language used throughout Chapter 5 (Trial on Indictment) where all rulings, orders, judgments or directions are referred to as "decisions". A good example is in section 199 which is headed "Court may make orders and other decisions", making it clear that an order is a subset of a 'decision'. Similarly, the verb 'decide' has been used instead of 'determine' throughout the Act.

Certification Process for Interlocutory Appeals



LEGEND:

Court responsibility

Prosecutor responsibility

Accused responsibility

Optional process

This is designed to avoid technical arguments about what can be appealed (as occurred in NSW where appeals were limited to 'judgments and orders') and instead to focus on whether there are benefits to the trial process in granting leave to appeal (in this regard see the criteria for granting leave in section 297). To avoid doubt, the definition of ***interlocutory decision*** includes reference to a permanent stay of proceedings. However, that should not be taken as limiting the application of the phrase which is wide enough to capture any issue related to the trial on which a judge is required to make a decision. This recognises that any number of decisions might, in particular circumstances, be an appropriate candidate for an interlocutory appeal. These include, but are not limited to, whether:

- to admit or exclude key prosecution evidence
- to permanently stay, or refuse to stay, proceedings
- to sever, or refuse to sever, charges
- to conduct, or refuse to conduct, separate trials
- to change, or refuse to change, the trial venue
- to accept or reject a submission that an accused has no case to answer
- to discharge a jury
- to give a particular direction to the jury.

Unlike other appeal rights in this Part, an interlocutory appeal can only be taken in relation to proceedings on indictment in the County Court or the Trial Division of the Supreme Court. They are not available in other proceedings in those courts, including proceedings for related and unrelated summary offences.

The second purpose of this section is to require certification by the judge who made the decision before a party can apply for leave to appeal. Certification is a necessary precondition to applying for leave to appeal (although a refusal to certify can be reviewed by the Court of Appeal under section 296).

Section 295(3)(a) has the effect of limiting interlocutory appeals on decisions about the admissibility of evidence to those relating to key prosecution evidence. This limitation is the same as that in place in NSW and is designed to limit the number of applications for leave on evidential matters. However, both the accused and the ***DPP*** can appeal against such evidential rulings about key prosecution evidence. This is a significant departure from the NSW model and was discussed in the introduction to Division 4. As to what amounts to evidence the absence of which "substantially weakens" the prosecution case, the interpretation of the identical words in NSW section 5F(3A) may help. In *R v Shamouil* [2006] NSWCCA 112; (2006) 66 NSWLR 228 Chief Justice Spigelman held that the words "substantially weakens" mean that the effect of the evidence must be to weaken the DPP case more than nominally. The weakening effect of the exclusion of the evidence must be significant:

> *The Crown bears the onus of establishing that the exclusion of the evidence substantially weakens its case … . Even a case which is otherwise likely, even very likely, to succeed, may still be "substantially weakened", if evidence of cogency or force is withheld. (at 232-235)*

See also *R v SJRC* [2007] NSWCCA 142 on the same issue.

For all other types of decisions (i.e. non-evidential decisions) the judge must certify under section 295(3)(b) that the decision is of sufficient importance to justify it being taken as an interlocutory appeal. The judge who made the decision will be well placed to make this determination as they should have knowledge of the context in which the decision is made. Although there are no statutory criteria for deciding this issue, it may be that the factors for the Court of Appeal granting leave in section 297(1)(b) will provide some guidance.

Section 295(3)(c) requires extra certification if the decision sought to be appealed was made after the trial commences (see section 210 as to when a trial formally commences). This is the first extra hurdle for appeals during trial which are intended to be exceptional. Reflecting the way in which interlocutory appeals are designed to complement the new extended pre-trial powers and processes in Part 5.5, the trial judge must certify that the issue could not reasonably have been identified before trial, or that the party was not at fault in failing to do so. Section 200 requires a party to notify the court before trial of any evidential, legal or procedural issues that it intends to raise. A failure to comply with that obligation should ordinarily result in a failure to get this certification. In turn, a failure to obtain certification prevents the party from applying for leave to appeal.

Section 295(4) requires the judge to determine a request for certification "as soon as practicable" after it is made. What is "practicable" will depend on the stage of proceedings at which the request is made and is inevitably related to the time limits for filing applications for leave to appeal given that leave cannot be applied for until certification has been given. Those time limits are set out in section 298(1). They are short for appeals during trial (2 days after the decision to be appealed from) and slightly longer before trial (10 days after the decision to be appealed from but no later than 2 days after the trial starts). For those time limits to be effective, certification will need to be given or refused within those time frames. However, if that is not done then time to file an application for leave to appeal can be extended under section 313.

Other important sections to be aware of are:

- section 296, which allows a party to ask the Court of Appeal to review a refusal to certify
- section 297, which sets out the test for granting leave to appeal
- section 298 which sets out how to commence an interlocutory appeal.

Examples

Example 1

The accused gives notice under section 200 of an objection to a confessional record of interview. A judge makes a decision admitting the evidence under section 199. The accused can then ask the judge to certify that the record of interview, if it had been excluded, would eliminate or substantially weaken the prosecution case. If the judge certifies that to be the case, then the accused can apply to the Court of Appeal for leave to appeal.

Example 2

The accused applies for severance after the trial commences, submitting that propensity evidence given by one complainant is inadmissible in relation to another. The trial judge rules that the evidence is cross-admissible and refuses to sever the charges in the indictment.

The accused asks the judge for certification under section 295(3). The judge is prepared to certify that the issue is of sufficient importance under subsection (3)(b). However, because the accused could and should have identified the issue before trial under section 200, the judge does not certify under section 295(3)(c). The trial continues and the issue may be raised on a post-conviction appeal.

Example 3

At the end of the prosecution case, the trial judge decides to accept a submission that there is no case for the accused to answer.

The prosecution asks the trial judge not to discharge the accused before it seeks certification, which the trial judge gives considering that it is of sufficient importance to justify an appeal, and that it could not (as a matter of law) have been identified before trial. The trial is adjourned and the prosecution then applies for leave to appeal which is refused. The trial then proceeds and the accused is discharged.

Example 4

Just before closing addresses in a 6 month long trial, the accused asks the trial judge to discharge the jury because of a media report the night before that the accused says may taint the jury. The trial judge agrees and proposes to discharge the jury.

The prosecution asks the trial judge to certify the decision for an interlocutory appeal. The trial judge agrees because an appeal could avoid a very lengthy retrial and, for obvious reasons, it could not have been identified before trial. The trial is adjourned and the prosecution then applies for leave to appeal which is granted and the appeal allowed. The trial then proceeds.

The certification process under this Division is set out in the flowchart on page 277, including the process for reviewing a refusal to certify. A higher level flowchart on interlocutory appeals more generally can be found in the introduction to this Division.

296 Review of refusal to certify

Overview

Section 296 allows a party to apply to the Court of Appeal to review the refusal of a judge to certify an issue for an interlocutory appeal under section 295(3). On an application for review, the Court of Appeal can give leave to appeal without certification.

Legislative History

This section is new and has no relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

For commencement of application for review of refusal to certify, see rules 3.04, 3.05(2) and (3), and Form 6-3B of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

For an overview of the interlocutory appeals regime see the discussion above under Division 4. This power to review a refusal to certify is designed as an exceptional, fail-safe process to deal with situations in which a judge wrongly refuses to certify and an interlocutory appeal should plainly proceed (e.g. on an arguable decision to discharge the jury very late in a 6 month trial which will otherwise need to be started again).

It is important to note that the review of the refusal only needs to "consider the matters in section 295(3)" (i.e. the matters that must be certified). Further, the remedy is not to remit the matter back, or for the Court of Appeal to substitute a certification, but instead to simply grant leave. In combination, this approach will allow the Court of Appeal to decide such reviews on the basis that leave should in fact be granted on the basis of the criteria set out in section 297.

To ensure that these applications are dealt with promptly, section 315 allows them to be heard by a single judge of appeal. Leave to appeal can also be granted or refused by a single judge under that section.

The time for filing and service mirrors the time for filing applications for leave to appeal - more time where the certification is refused before trial (within 10 days of the refusal) and less when it is refused during trial (within 2 days of the refusal).

Service on the respondent is required within the same time period in which the application is required to be filed and must be in accordance with section 392 or 394 of the Act as the case requires. This should not be onerous given that, during trial, the parties will be in regular contact.

297 When leave to appeal may be given

Overview

Section 297 sets out the criteria for granting leave. Leave can only be given if it is in the interests of justice to do so. Mandatory factors to be considered in assessing the interests of justice are:

- the extent of disruption to the trial process if leave is granted
- whether the determination of the appeal will: render the trial unnecessary; substantially reduce the time for trial; resolve a necessary point of law, evidence or procedure; or reduce the likelihood of a successful post-conviction appeal.

If leave is sought during trial then it must not be granted unless the reasons for doing so 'clearly outweigh' any disruption to the trial.

Legislative History

This section is new and has no relationship to earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

For an overview of the interlocutory appeals regime see the discussion above in relation to Division 4.

These mandatory criteria make it clear that the reasons for the introduction of interlocutory appeals are primarily practical. Issues should be resolved by the Court of Appeal pre-verdict only where there is a real benefit in doing so, whether in relation to the current trial or a potential retrial.

A list of mandatory considerations for the Court of Appeal is included in section 297(1) and (2). This list does not fetter the Court of Appeal's ability to consider other factors. They are drawn from general principles, informed by NSW case law and are designed to reflect the desired balance between hearing appeals that are genuinely likely to reduce overall delays and avoid the fragmentation of individual trials without good reason. Accordingly, determining whether an interlocutory appeal is in the interests of justice, the court must consider the extent of any disruption or delay to the trial process that may arise if leave to appeal is granted. Specifically, it must also consider (along with any other relevant matters) whether determining the appeal could:

- render the trial unnecessary
- substantially reduce the time required for trial
- resolve an issue of law or procedure necessary for the proper conduct of the trial
- reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.

These factors make it clear that a grant of leave is to be based on practical considerations including whether trial time (particularly potential retrial time) can be reduced or removed. This approach reflects the way in which the NSW Court of Criminal Appeal has come to deal with leave by considering the substance and effect of the decision made by the trial judge in the practical context of the trial (see, e.g. *Director of Public Prosecutions (NSW) v PM* [2006] NSWCCA 297; 164 A Crim R 151, *R v Stone* [2005] NSWCCA 344 and *R v King* [2003] NSWCCA 399; (2003) 139 A Crim R 132).

When leave to appeal is sought after the trial has commenced (see section 210), section 297(2) raises the bar by preventing leave being granted unless the reasons for hearing the appeal 'clearly outweigh' the disruption to the trial process.

This reflects one of the primary concerns with interlocutory appeals during trial, namely that they inevitably disrupt the trial process (see the strong statements accompanying a refusal of leave to appeal during trial in *R v Natoli* [2005] NSWCCA 292).

In NSW, such a disruption will only be justified in exceptional cases, usually involving very long trials where deciding the issue could be the difference between requiring a lengthy retrial or not. This is reflected by the fact that leave is only given during trial in a handful of cases in NSW per year. Practical issues such as how long the trial has been running for and the impact of

a retrial have become more important in NSW and the criteria for leave in this section are designed to emphasise that focus.

Example

Petroulias v The Queen [2007] NSWCCA 134 related to an appeal under section 5F(3)(b) of the *Criminal Appeal Act 1912* (NSW), where the accused argued successfully that the jury empanelled in the trial (which was itself a retrial) should be discharged because one of the jurors was a disqualified driver and should never have been empanelled. The trial had been running for months with three appellate level decisions, one application to the High Court and one trial already discontinued. Leave to appeal was granted given the practical effect of discharging the jury against that procedural background.

Subsection (3) provides that if the court refuses leave, the accused is not prevented from arguing that issue in a post-conviction appeal. The Act does not indicate whether the accused can appeal following conviction in relation to an issue that was determined against the accused on an interlocutory appeal as such matters are classically for a court to determine.

Where the court grants leave and decides an issue against the accused it seems likely that the Court of Appeal will treat its earlier decision as binding and not allow the issue to be re-litigated on appeal. However, applying the approach in *RJE v Secretary to the Department of Justice* [2008] VSCA 265, exceptions to this may arise where:

- the challenge is to the earlier decision as a matter of law, only in exceptional circumstances
- assumed facts that were central to the interlocutory appeal decision have substantially changed (e.g. following evidence given at the trial).

Important other sections to be aware of are:

- section 295: which requires the judge who made the interlocutory decision to certify certain matters before leave can be sought
- section 298: which sets out how to commence an interlocutory appeal
- section 315: which allows leave to be granted or refused by a single judge of appeal.

298 How interlocutory appeal is commenced

Overview

Section 298 provides that this kind of appeal is commenced by filing a notice of application for leave to appeal in the Court of Appeal. The notice must also be served on the other party (or parties if there is more than one accused).

The time limits for filing and service are different depending on whether the ***interlocutory decision*** was made before or after the trial commences:

- Where the decision was made before trial the notice must be filed and served within 10 days of the decision but, at the latest, within 2 days of the trial starting.
- Where the decision is made during trial the notice must be filed and served within 2 days of the decision.

Legislative History

This section is new and has no relationship to earlier provisions.

Relevant Rules/Regulations/Forms

For commencement of interlocutory appeals, see rules 3.03 and 3.05, and Form 6-3A of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

This section takes the same approach as for all appeals by providing expressly for filing and service. The time limits are shorter due to the need to case manage interlocutory appeals more quickly than other appeals.

Reflecting the strong distinction drawn in this Division between pre-trial and during trial interlocutory appeals, pre-trial appeals must be filed and served more quickly (within 10 days of the decision and at the latest within 2 days of the trial staring) than a decision made during trial (within 2 days of the decision). Service must be in accordance with sections 392 or 394 of the Act as the case requires.

This should not be onerous given that during trial, the parties will be in regular contact. It reflects the need for intensive case management of such applications by the trial court and the Court of Appeal (for appeals during trial).

Under section 295(3), certification of certain matters is a pre-requisite to filing an application for leave to appeal. Section 295(4) requires judges to determine requests for certification as soon as practicable after they are made. What is practicable must depend on the stage of proceedings at which the request is made and the time limits for filing applications for leave to appeal under this section. If certification is not given before the time limits under this section expire then time can be extended under section 313.

299 Adjournment of trial if leave to appeal given

Overview

This section creates a presumption that, where the Court of Appeal gives a party leave to appeal during trial, the trial will be adjourned without discharging the jury as long as it is practicable to do so.

Legislative History

This section is new and has no relationship to earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

As discussed throughout this Division, appeals during trial are intended to be exceptional. They will tend to be taken where, for example, the decision in issue will bring the trial to an end and, if it turns out to have been incorrect, require a retrial (e.g. a decision to discharge the jury). In order for an interlocutory appeal to be of value in these circumstances the trial needs to be preserved in its present state. Accordingly, this section creates a presumption that the jury is to be retained so that the trial can continue once the appeal is finalised - if that is the consequence of the Court of Appeal's decision.

The proviso to the procedure in this section is that it must be practicable. This applies both to the adjournment of trial and to the discharge of the jury. It is recognised that some situations may, for practical reasons, require a different approach. For example:

- if leave is given on an interlocutory appeal in relation to a decision that will not end the trial either way (e.g. a decision on the admissibility of important prosecution evidence yet to be given), then it may be sensible to continue the trial by calling other evidence while the appeal process proceeds (depending on the availability of counsel)
- if leave is given in a short trial and the determination of the interlocutory appeal will take longer than the trial is otherwise scheduled for, then resources may be better used by discharging the jury.

Close communication between counsel, the trial judge and the Court of Appeal will be essential in deciding how to deal with an ongoing trial when leave is given.

300 Determination of appeal

Overview

Section 300 allows the Court of Appeal to either affirm or set aside an ***interlocutory decision***. If it sets the decision aside then it must either:

- make a new decision that it considers ought to have been made; or
- remit the issue back to the originating court with directions as to how the decision should be made.

New evidence cannot be given in the Court of Appeal unless the court gives leave to do so.

Legislative History

This section is new and has no relationship to earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section does not set any particular threshold for when an interlocutory appeal should be allowed or refused. This reflects the diversity of decisions which could be the subject of an interlocutory appeal. The approach taken by the Court of Appeal should continue to reflect long-standing principles of appellate review of judicial decisions. For example, appellate courts traditionally:

- give deference to first instance findings of fact or assessments of witnesses
- give limited deference to areas of discretion such as weighing the prejudicial effect of evidence against its probative value
- give no deference to questions of statutory interpretation or the admissibility of evidence as a matter of law.

The section presumes that appeals will be decided on the available record of evidence available. However, leave to call new evidence can be given. This is designed to give the Court of Appeal flexibility in case an issue does require additional evidence.

The powers that apply to all appeals in Division 7, also apply to interlocutory appeals. They include:

- section 314 – How to abandon an appeal
- section 316 – Obtaining a report from the trial judge
- section 317 – Producing documents, exhibits and other things
- sections 318 and 319 – Examining witnesses
- section 324 – Warrants to enforce orders
- section 325 – Power of the court to make ancillary orders.

New sections 15A and 15B of the Appeal Costs Act 1998

New sections have been added to the *Appeal Costs Act 1998* (by section 431 of this Act) in order to bring interlocutory appeals into that regime. The approach taken in this Act is to work by analogy to other types of appeals.

The *Appeal Costs Act 1998* already provides that if an accused appeals to the Court of Appeal post conviction and their conviction is quashed, the court may grant the accused an indemnity certificate for the costs of the appeal and costs arising if a new trial is necessary.

Appeals against conviction provide a useful analogy for interlocutory appeals. The sorts of issues that will be raised on an interlocutory appeal are a subset of the sorts of issues that are usually raised on an appeal following a conviction. Accordingly, under the new section 15A of the *Appeal Costs Act 1998*, the accused will only be able to claim costs if they are successful in their own interlocutory appeal. This is consistent with the underlying philosophy of the *Appeal Costs Act 1998* that the accused should not have to pay for mistakes in the process that led to them incurring additional costs.

An indemnity certificate will also be available for the costs of a new trial. This will only apply in the unusual situation where an interlocutory appeal is taken during trial and, as a result of the appeal being successful, the current trial has to be abandoned and a new trial is ordered. This is made clear in the Explanatory Memorandum in relation to section 431 of the Act.

If an interlocutory appeal is brought by the ***DPP***, it is similar to an appeal against sentence by the prosecution. It is an additional cost that would not normally arise in the proceedings, which the accused must bear. Accordingly, under the new section 15B of the *Appeal Costs Act 1998*, the accused will be able to claim costs of the appeal for all DPP initiated interlocutory appeals, regardless of the outcome.

As with accused appeals, an indemnity certificate will also be available for the costs of a new trial. This will only apply in the unusual situation where an interlocutory appeal is taken during trial and, as a result of the appeal, the current trial has to be abandoned and a new trial commenced. This is also made clear in the Explanatory Memorandum in relation to section 431 of the Act.

301 Determination of interlocutory appeal to be entered on record

Overview

Section 301 provides for the decision of the Court of Appeal to be sent to the trial court and entered on that court's record.

Legislative History

This section is new and has no relationship to earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

Division 5 – Case stated for Court of Appeal

Division Overview

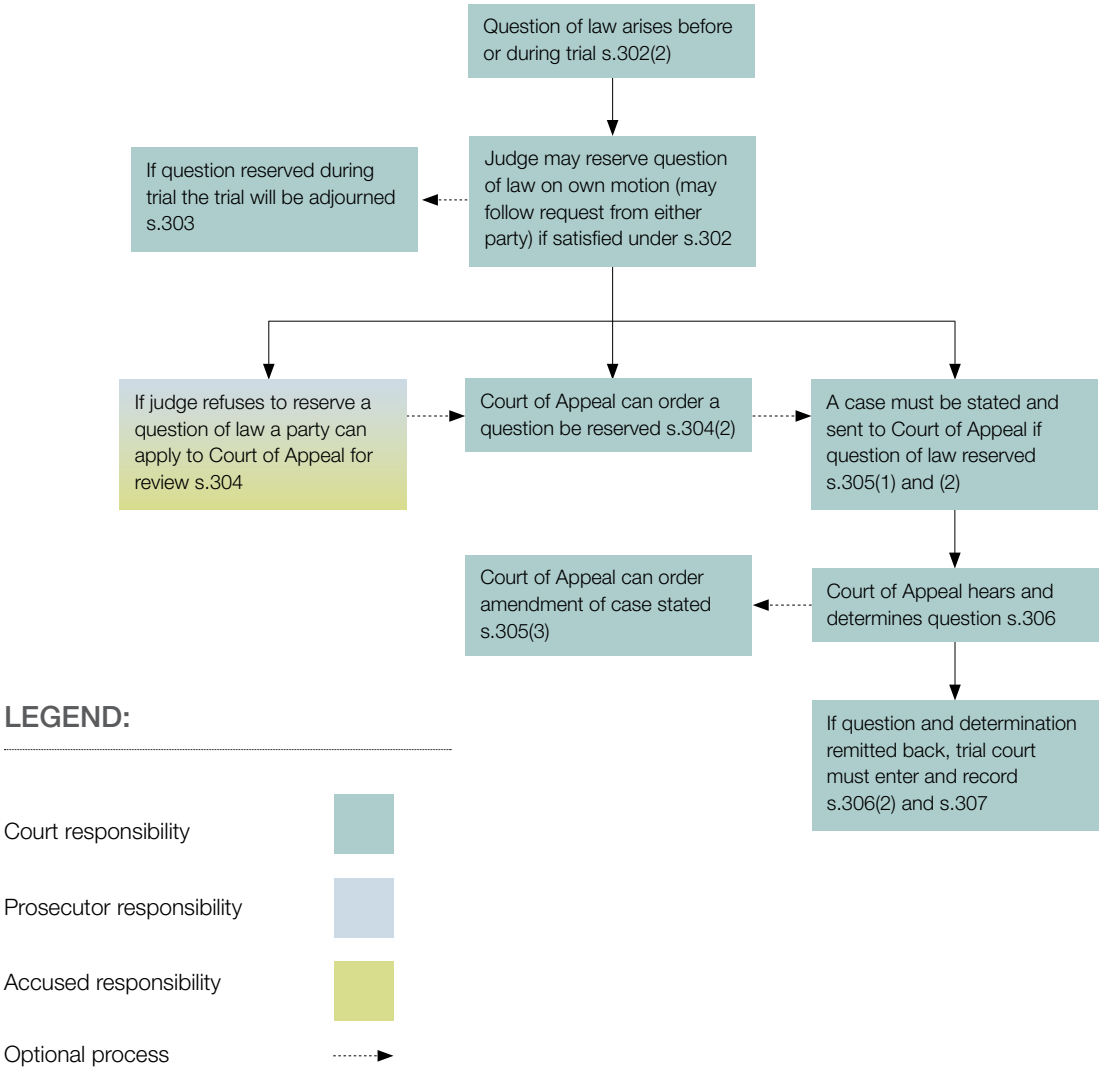
A 'case stated' is also referred to as a 'reserved question of law'. It is a process by which a first instance judge asks a question of the appeal court. Historically, the process derives from the informal English arrangement whereby the giving of judgment or execution of sentence in indictable matters was postponed while the trial judge sought the advice of his colleagues on a point of law. In England, this resulted in the creation during the late 19th Century of the English 'Court of Crown Cases Reserved'.

This Division provides for two different kinds of case stated:

- A general power of a trial judge to refer a question of law to the Court of Appeal before or during trial (sections 302 to 307).
- A power of the DPP to refer a question of law to the Court of Appeal following an acquittal. Although the decision on the question does not effect the acquittal, it can have value as a precedent for other cases (section 308).

The first of these has been significantly changed in this Act to complement the new interlocutory appeals regime discussed above at Division 4. The changes are discussed in detail below in relation to section 302. There are no substantive changes to the second category of cases stated. The following flowchart sets out the process for reserving questions of law under this Division, including references to relevant sections in other parts of the Act.

Cases Stated



302 Reservation of question of law

Overview

This section allows a trial court to reserve a question of law for the Court of Appeal to rule on, at any stage before or during trial and at the request of either party or of its own motion.

The court must consider a number of mandatory criteria before agreeing to reserve a question of law.

Legislative History

This section covers the same subject matter as section 446 of the *Crimes Act 1958* but with substantive changes.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

Sections 302 to 307 create the following process:

- A party can ask a judge of the trial court to reserve a question of law. The judge can also do this of his or her own motion (section 302).
- A question or questions of law can be reserved at any time before or during trial, but there are stronger restrictions on doing so during trial (section 302).
- If the court refuses to reserve the question(s), the aggrieved party can apply to the Court of Appeal to intervene and order a case to be stated (section 304).
- If a question of law is reserved then a case must be stated. It is this document (the 'case stated') which the Court of Appeal receives. It will contain the factual background and then the question(s) of law (section 305(1) and (2)).

- The Court of Appeal can send the case stated back for amendment (section 305(3)).
- If a case is stated during trial, then the trial should usually be adjourned but the jury kept in place (i.e. not discharged) until the question(s) are answered (section 303).
- The Court of Appeal hears the case stated and then answers the question(s) of law and returns the case to the trial court (sections 306 and 307).

Background and Discussion of Changes

Previously, questions of law could be 'reserved' or 'stated' for the court under section 446 of the *Crimes Act 1958*.

Section 446(1) applied where an accused person was convicted at trial. It allowed the trial court at its own discretion to reserve a question of law for the Court of Appeal and postpone judgment until the question of law was determined. This provision has effectively been rendered redundant by post-conviction appeal rights (now in section 274). As a result, this process has not been re-enacted.

The only remaining power to state a case was contained in section 446(2) of the *Crimes Act 1958* which provided:

> *If on the trial of an accused person in the Supreme or County Court, a question of difficulty in point of law arises before a jury is empanelled, the court may, on the application of the accused, determine that the question of law is such that its determination could render the conduct of the trial unnecessary and reserve the question of law for the consideration and determination of the Court of Appeal.*

The key features of section 446(2) were that a case could be stated only:

- on the application of the accused
- where the determination of the question could render the conduct of the trial unnecessary.

The key features of the new case stated process under the Act are that:

- a question can now be reserved before or during trial
- the court may reserve a question of law on its own motion or on the application of either party
- the court must have regard to the same factors as for granting leave in interlocutory appeals when deciding whether to state a case, and is not limited to when the question will render the trial unnecessary
- once a trial has started, the court must not reserve a question of law unless the reasons for doing so clearly outweigh the disruption to the trial process.

The structure of the new case stated process under the Act has been heavily influenced by the new interlocutory appeals power. Given that the interlocutory appeals regime will, in effect, allow an accused to seek leave to appeal a question of law pre-trial, the section 446(2) process became of very limited application.

However, a modified judge-initiated case stated procedure has been retained in order to capture those cases:

- that may fall outside the interlocutory appeals regime or
- where the parties do not wish to appeal but the trial judge considers that there is an important issue that the Court of Appeal should review.

Two Victorian Supreme Court cases highlight the argument in favour of a judge-initiated case stated procedure to complement an interlocutory appeals regime: *R v Pepper* [2007] VSC 234 (*Pepper*) per Whelan J and *DPP v McAllister* [2007] VSC 315 (*McAllister*) per Teague J. Both cases concerned whether the offence of attempted defensive homicide exists at law. A case could not be stated under section 446(2) because the determination of the question would not have rendered the conduct of the trial unnecessary. Further, the new interlocutory appeals process would not have helped because the parties were in agreement that there was no such offence; it was the trial judge in each case who thought that the offence may exist.

When a case can be stated

Previously, the section 446(2) process could only be used if the question of law arose between the commencement of the trial and before a jury was empanelled.

As discussed in relation to Division 4, interlocutory appeal procedures now apply both before and during trial. In the absence of a good reason why interlocutory appeals and case stated procedures should be available at different times, the case stated process has been extended to cover questions that arise before trial and during trial. This is also consistent with the Act's increased focus on resolving important issues before trial, discussed in detail in relation to section 199.

An 'own motion' power for judges and access for the DPP

Section 446(2) did not provide the trial judge with an 'own motion' power to use the case stated procedure pre-verdict. Although the judge states the case, that could only be done on an application by the accused.

Consistent with the approach taken to interlocutory appeals (i.e. that the prosecution has access to interlocutory appeal procedures) the previous restriction has been removed and both parties can now also ask the court to state a case.

As discussed above, there will be cases (albeit rare) in which there are good reasons for a case to be stated in the absence of a request by the parties. For instance, in *Pepper*, it was the trial judge who raised and considered in detail the issue concerning whether the offence of attempted defensive homicide existed. On such a novel question of law there would have been advantages in an authoritative determination of the issue pre-verdict by the Court of Appeal. Allowing trial judges to state a case of their own motion is also consistent with the historical basis of case stated procedures.

The 'own motion' power is made clear by the operation of section 337.

Safeguards to ensure limited interference in trial process

Section 446(2) of the *Crimes Act 1958* only applied to a point of law that could "render the conduct of the trial unnecessary". In both *Pepper* and *McAllister*, the case stated provision could not be used because the issue to be resolved concerned whether an offence of attempted defensive homicide existed and, if so, what directions should be given to the jury about the offence. No matter what decision was made on the question of law, a trial would still be necessary. Instead of such a restrictive approach, section 302 of the Act (this section) provides mandatory criteria for the judge to consider when deciding whether to state a case. For consistency, these are identical to the matters that the Court of Appeal must consider when granting leave on an interlocutory appeal (see the discussion in relation to section 297). Again consistently with the approach to leave on interlocutory appeals, section 302(3) sets a higher threshold for cases stated during trial, preventing leave being granted unless the reasons for hearing the appeal 'clearly outweigh' the disruption to the trial process.

New section 15C of the Appeal Costs Act 1998

The case stated procedure can only be utilised if the court approves its use. The types of issues that usually arise in case stated procedures often have benefits for other trials where similar issues arise. As the accused cannot win or lose a case stated procedure, there is no basis for attempting to identify whether the accused won or lost the question of law which was reserved for the consideration of the Court of Appeal.

Section 431 creates a new section 15C of the *Appeal Costs Act 1998* which provides that, irrespective of whether the accused or the prosecution is the applicant or the case is stated on the court's own motion, the Court of Appeal may grant the accused an indemnity certificate in respect of the costs of the appeal. This is consistent with the approach to interlocutory appeals and the *Appeal Costs Act 1998*.

An indemnity certificate will also be available for the costs of a new trial. This will only apply in the unusual situation where a case stated is taken during trial and, as a result of the appeal being successful, the current trial has to be abandoned and a new trial commenced. This is made clear in the Explanatory Memorandum in relation to section 431 of the Act.

What is a question of law?

The Act does not change the phrase "question of law" and earlier authorities will continue to govern this issue.

303 Adjournment if question of law reserved

Overview

Section 303 creates a presumption that, where a question of law is reserved during trial, the trial will be adjourned without discharging the jury as long as it is practicable to do so.

Legislative History

This section is based on section 446(3) of the *Crimes Act 1958* and incorporates substantive changes.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

As with interlocutory appeals, reserved questions of law *during trial* are intended to be exceptional. They will tend to be taken where, for example, resolution of the question of law in issue will almost certainly avoid a retrial if not finally determined. In order for the process to be of value in those circumstances the trial needs to be preserved in its current state. This section achieves that by creating a presumption that the jury is to be retained so that the trial can continue once the question is answered by the Court of Appeal.

The proviso to the procedure in this section is that it must be practicable. This applies both to the adjournment of trial and to the discharge of the jury. It recognises that, for practical reasons, some situations may require a different approach. For example:

- if a case is stated in relation to a decision that will not end the trial either way (e.g. because it relates to the directions to be given to the jury) then it may be sensible to continue the trial by calling other evidence while the appeal process proceeds (depending on the availability of counsel)
- if in a short trial a question is reserved and the appeal process will take longer than the trial is otherwise scheduled for, then resources may be better used by discharging the jury.

Close communication between counsel, the trial judge and the Court of Appeal is essential in deciding how to deal with an ongoing trial in these circumstances.

304 Refusal to reserve question of law

Overview

Section 304 allows a party to ask the Court of Appeal to review a refusal to reserve a question of law. The Court of Appeal can call on the trial court to show cause why the question should not be reserved and can order that the question be reserved.

Legislative History

This section is based on section 449 of the *Crimes Act 1958*. It has been redrafted and modernised.

Relevant Rules/Regulations/Forms

For refusal to reserve a question of law, see rules 2.16 and 2.17, and Form 6-2E of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

As with section 449 of the *Crimes Act 1958*, there are two aspects to the review of a refusal to reserve a question of law:

- The Court of Appeal can call on the trial court and the other party to 'show cause' why a case should not be stated.
- The Court of Appeal can order that a case be stated in which case the trial court must do so.

However, the criteria for deciding whether to state a case in section 302(2) and (3) have changed completely. Accordingly, it is likely that a review under this section will focus on the exercise of the discretion to refuse to state a case against those statutory criteria.

This change of criteria may mean that previous authorities on this issue may be of less value. Decisions on the test for leave in interlocutory appeals (given that the criteria are identical) will be relevant to the exercise of this power.

305 Case to be stated if question of law reserved

Overview

Section 305 provides that where a question of law is reserved, the court must then state a case. This document (the 'case stated') is transmitted to the Court of Appeal, and must include:

- the circumstances in which the question(s) of law arises and
- the question(s) of law.

The Court of Appeal can return a case stated for amendment if not satisfied with it.

Legislative History

Sections 305(1) and (2) are based on parts of section 447(1) of the *Crimes Act 1958*. Section 305(3) is based on section 448 of the *Crimes Act 1958*. However, the provisions have been substantially simplified.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The case stated should set out both the circumstances in which the question(s) of law arise and the question(s) themselves. The only change to the way in which this process is expressed in the Act is that section 447 previously required "special circumstances" to be set out. The Act only refers to "circumstances". This is not designed to change the content of a case stated, but to reflect the fact that special circumstances are not required for a question of law to be reserved.

Setting out the circumstances essentially requires a statement of the ultimate facts which have given rise to the question(s) of law. Importantly, it should not include evidence or contested facts. The idea is that the Court of Appeal should only be required to determine true issues of law and not issues of fact under this process. The requirement for what should be included was recently discussed by the Court of Appeal in *R v Garlick* [2006] VSCA 127:

> *A case stated must state the ultimate facts. It should not normally include a statement of the evidence. It should not contain argumentative passages. The purpose of a case stated is not to facilitate the offering of general advisory opinions on hypothetical facts but to determine the application of law to the ultimate facts of the particular case.*

306 General powers of Court of Appeal on case stated

Overview

This section confirms that the Court of Appeal can hear and determine a question of law. The question and the determination are then remitted back to the trial court.

Legislative History

This section is a simplified version of the first part of section 447(1) of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See section 307 for the obligation on the registrar to give practical effect to this process.

307 Judgment to be entered on record

Overview

This section provides the practical mechanism for transmitting the judgment of the Court of Appeal back to the trial court and requires the trial court to enter it on the record of that court.

Legislative History

This section is a simplified version of the last part of section 447(1) of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

308 DPP may refer point of law to Court of Appeal

Overview

Section 308 allows the ***DPP*** to refer a point of law to the Court of Appeal following an acquittal at trial or on appeal to the County Court. Although the opinion will have value as a precedent, the acquittal is not effected.

Legislative History

This section is based on section 450A of the *Crimes Act 1958*. The section has been modernised and reworked, but the substance of the process has not changed.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section simplified the drafting of the 'Director's reference' power in section 450A of the *Crimes Act 1958*. However, there are no substantive changes.

As a result, previous authorities dealing with the process will continue to be relevant on a number of issues, for example:

- the purpose of the process (see *DPP Reference (No 1 of 1984)* [1984] VR 727)
- what constitutes a 'point of law' (see *DPP (Cth) Reference (No 1 of 1996)* [1998] 3 VR 352)
- when a point law can be said to have 'arisen in the proceeding' (see *DPP Reference (No 2 of 1996)* [1998] 3 VR 241). This language differs from section 450A(1) which uses 'arisen in the case', however, the change was made for consistency throughout the Act rather than to change the law.

The section does not re-enact section 450A(2) which provided for rights of appearance on such appeals. The issue of who may ***appear*** on behalf of a party is dealt with in section 328. The accused's entitlement to appear does not need to be articulated in specific sections as it is a matter of natural justice and is also implied from the obligation to appear in section 329.

Division 6 – Status of sentences and orders during appeal period

Division Overview

This Division deals comprehensively with the status of sentences and associated orders during the ***appeal period***, namely the time between when the accused is convicted and any appeal is finally determined in the Court of Appeal.

The state of the law before the Act was, at best, confusing and incomplete. As a result, identifying the legal status of a particular ***sentence*** or order during the appeal period was difficult. The review of the law in this area, set out below, shows that the types of sentences available had overtaken the statutory provisions relating to stays and the status of certain types of orders pending appeal in the Court of Appeal.

The Act addresses this issue in the following way:

- Section 3 defines appeal period to mean the period during which an appeal can be filed and, if an appeal is filed, the period until the appeal is finally determined.
- Section 309(1) creates an express presumption that, unless this or any other Act provides to the contrary, sentences are not stayed during the appeal period. The inclusive definition of ***sentence*** in section 3 should also be referred to.
- Section 311 provides exceptions so that specific types of orders are automatically stayed, namely:
  - restitution orders under section 84 of the *Sentencing Act 1991*
  - compensation orders under sections 85B (pain and suffering) and 86 (property loss) of the *Sentencing Act 1991*.
- Section 309(2) gives a power to the trial court and/or the Court of Appeal to stay any other sentence in the interests of justice. The trial court has that power prior to an appeal being filed and the Court of Appeal has it after that point. Section 315 allows a single judge of the Court of Appeal to exercise this power
- Section 310 gives the Court of Appeal the power to grant bail to an appellant pending appeal. Section 315 allows a single judge of the Court of Appeal to exercise this power.

- Section 312 provides that, where any order is made under any Act for the forfeiture or destruction of an item, as a minimum protection, the item must not be destroyed until the ***appeal period*** expires, unless another law provides to the contrary.

The state of previous Victorian law is discussed in detail below, and it explains the basis of the model adopted in this Division. More detail is given in relation to each section in this guide.

General Position

There was no explicit rule providing for or against stays of sentencing orders on an offender appeal to the Court of Appeal. The provisions that relate to how an appeal affects sentencing orders are in both the *Crimes Act 1958* and the Supreme Court (Criminal Procedure) Rules 2008. They were complex and difficult to reconcile.

Imprisonment

Previously, an appeal to the Court of Appeal on a sentence of imprisonment where the appellant was in custody was dealt with as a bail issue under section 579(2) of the *Crimes Act 1958*. That section gave the Court of Appeal a discretion to grant an appellant 'prisoner' (as defined in the *Corrections Act 1986*) bail pending the hearing of the appeal. The Court of Appeal applied a presumption against bail pending appeal requiring exceptional circumstances for the grant of bail. Any period on appeal bail was removed from the calculation of prison time served under section 579(3) of the *Crimes Act 1958*. The Act takes basically the same approach.

Financial Penalties

The position in relation to financial penalties and sentences related to property was more complicated.

The only provision in the *Crimes Act 1958* dealing with the issue directly was section 570 which provided that "any order":

- for the restitution of any property to any person
- with reference to any property or the payment of money, made on or in connexion [the spelling shows just how old the provision is] with a conviction on indictment or a relevant summary offence
- is suspended until the relevant appeal period has expired or, if there is an appeal, until the appeal is determined.

Rule 2.23 of the Supreme Court (Criminal Procedure) Rules 2008 required the trial judge, on making an order under section 570 of the *Crimes Act 1958*, to give directions as to the custody of the convicted person's property, in the prosecution's possession, for the appeal period. However, rule 2.22 of that Act also gave the trial judge the power in special circumstances to make orders to ensure the security of the property pending the determination of the appeal. These rules raise the issue of whether the trial court, the Court of Appeal, or both, should have the power to make orders during the appeal period.

Rule 2.22 of the Supreme Court (Criminal Procedure) Rules 2008 anticipates that the trial judge has the power to order the suspension or non-suspension of an order for the restitution of property. In contrast, section 570 of the *Crimes Act 1958* is expressed in mandatory terms ("…is suspended").

Rule 2.25 of the Supreme Court (Criminal Procedure) Rules 2008 provides that any order for "destruction or forfeiture of any property connected with a prosecution" is suspended until the expiry of the appeal period. In relation to destruction, (at least) the rule appears designed to preserve the status quo (i.e. the existence of the item(s)) given that destruction cannot be reversed if an appeal is successful.

Section 570 originated in the *Criminal Appeal Act 1914* and pre-dates many of the different types of sentences that are now available, as well as other orders that can be made on or in connection with a conviction. Section 570 expressly suspended restitution orders, but it also suspended any order "…with reference to any property or the payment of money made on or in connexion with a conviction on indictment or a relevant summary offence".

Those words applied to any order that related to property or the payment of money connected to the conviction. Such orders could include:

- restitution orders under section 84 of the *Sentencing Act 1991*
- forfeiture orders under Part 3 of the *Confiscation Act 1997*
- compensation orders under section 85B (pain and suffering) and 86 (property loss) of the *Sentencing Act 1991*
- fines
- superannuation orders under Part 3A of the *Sentencing Act 1991*
- pecuniary penalty orders under Part 8 of the *Confiscation Act 1997*.

However, it was by no means clear that the section was intended to apply that broadly. For example, if section 570 applied to a fine (on the basis that it is an order with "reference to … the payment of money"), the fine would be suspended until the relevant appeal period had expired or the appeal had been determined. However, this interpretation conflicts with rules 2.14(1) and 2.15 of the Supreme Court (Criminal Procedure) Rules 2008.

Rule 2.14 of the Supreme Court (Criminal Procedure) Rules 2008 required the person authorised to receive the fine to retain it for the relevant period and, if the appeal was successful, to repay the fine to the offender. Rule 2.15 authorised the trial judge to allow an appellant to provide security or surety to avoid default imprisonment

for non-payment of the fine during the appeal period. Those rules assumed that the fine was not stayed and remained enforceable during the appeal period.

Although there are difficulties in application, the likely rationale for section 570 is that orders for the payment of money or the return of property to third parties (i.e. not the State) are particularly difficult to reverse. Adopting that rationale, the types of current orders that should be presumptively stayed are:

- restitution orders under section 84 of the *Sentencing Act 1991*
- compensation orders under sections 85B (pain and suffering) and 86 (property loss) of the *Sentencing Act 1991*.

Other Sentences

The law was previously silent on a range of other sentences that did not fall into the categories discussed above (financial/property based orders and sentences of imprisonment where the accused is in custody). This range of sentences includes, for example, combined custody and treatment orders, home detention, intensive correction orders and community based orders.

Given that the Court of Appeal's jurisdiction in relation to criminal appeals is purely statutory, the absence of a provision for these types of sentencing orders means that they were not stayed (see *Censori v Holland* [1993] 1 VR 509).

Approach to Stays in the Division

This review of the previous law helps to explain the approach taken in the Act. Specifically, the approach adopted takes the following considerations into account.

While there is difference in approach between appeals to the Court of Appeal and appeals to the County Court (where sentences are presumptively stayed – see section 264), the difference is justifiable because of the nature of appeals to the County Court (full rehearing) compared to the nature of appeals to the Court of Appeal (review on the record).

The absence of a clear declaration as to whether sentencing orders are presumptively stayed pending appeal detracts from the clarity of the regime.

There was a need to clarify which orders should be stayed pending appeal given the confused interplay between section 570 of the *Crimes Act 1958* and the Supreme Court (Criminal Procedure) Rules 2008, discussed earlier.

Previously, the types of orders that were stayed related to property or financial penalties. The most obvious types of orders of that kind that should be presumptively stayed are:

- where the effect of the order cannot subsequently be undone (e.g. a destruction order)
- where the reversal of an order in the event of a successful appeal would require the return of money or property from a party other than the state (e.g. restitution and compensation orders).

For clarity, provisions relating to which sentences and orders are stayed during an appeal period are all dealt with in primary legislation (i.e. the Act), rather than in court rules.

The Court of Appeal and/or the trial court need to have sufficient flexibility to do justice in individual cases.

309 Sentence not stayed during appeal period

Overview

Section 309 declares that a sentence is not stayed during the ***appeal period*** unless this or any other Act says that it is stayed; or the trial judge or the Court of Appeal orders it stayed.

Legislative History

This topic is dealt with to some extent in section 570 of the *Crimes Act 1958*, however, this section is very different in content.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section creates an express statutory presumption against sentences being stayed during the appeal period. A detailed explanation of the background to this section and its relationship to the rest of the Act can be found above in relation to Division 6 (this Division). However, the key points to note in relation to this section are:

- ***Sentence*** is defined in section 3 in an inclusive way and this section will therefore have broad application.
- A key change in this section is that the trial judge is given the power to stay a sentence before a notice of appeal is filed, and the Court of Appeal will have the power after the notice is filed. This is designed to ensure that, as much as is possible, one court has the conduct of a case at any one time. Applications for a stay of sentence can be heard by a single judge under section 315.
- Bail (section 310) and certain orders under the *Sentencing Act 1991* (section 311) are dealt with differently – as discussed in relation to those sections.
- The section does not apply where another Act provides for orders to be stayed. For example, superannuation orders under section 83G(1) of the *Sentencing Act 1991* are already deemed not to take effect until the final determination of any appeal.

310 Bail pending appeal

Overview

Section 310 provides for the Court of Appeal to grant bail pending an appeal.

Legislative History

This section is based on section 579(2) of the *Crimes Act 1958*. However, the issue of post appeal bail (pending a retrial) is now dealt with separately in section 323. Section 579(3) has not been re-enacted as the issue of calculating time served is dealt with in the *Sentencing Act 1991*. The Act also does not re-enact section 579(1) and (5) of the *Crimes Act 1958*, which referred to the treatment of appellants who are not admitted to bail, and the transfer of appellants to court, respectively. These provisions refer to rules and regulations made under the *Community Services Act 1970*, which are now outdated. In any event, they appear unnecessary, as section 579(1) would be covered by the general provisions of the *Corrections Act 1986* and section 579(5) is covered by section 332 (re-enacting the substance of section 361 of the *Crimes Act 1958*).

Relevant Rules/Regulations/Forms

For bail pending appeal, see rule 2.38(1) of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

This section confirms the Court of Appeal's power to grant bail pending appeal. The power can be exercised by a single judge of appeal under section 315.

Nothing in the section requires any change to the approach that the Court of Appeal has taken to bail pending appeal and it is expected that the same principles will continue to apply. The grant of bail in such circumstances must be the result of exceptional circumstances. As the High Court put it in *Chamberlain v R (No. 1)* [1983] HCA 13; (1983) 153 CLR 514, the grant of bail can "…whittle away the finality of the jury's finding and to treat the verdict merely as a step in the process of appeal".

The issue of whether there are exceptional circumstances will often turn on two issues:

- the likelihood of the appeal being allowed
- the portion of the sentence likely to have been served by the time the appeal is determined.

Often both of these will need to be in the appellant's favour for bail to be granted (see, e.g. *Re Crawley* (Court of Appeal – 5 August 1998 – BC9804530)).

Unless bail is granted under this section then the presumption that sentences are not stayed during the ***appeal period*** (in section 309) applies. See the discussion at Division 6 for a detailed background to this approach.

311 Stay of certain orders during appeal period

Overview

Section 311 automatically stays, during the ***appeal period***, the operation of:

- restitution orders under section 84 of the *Sentencing Act 1991*
- compensation orders under sections 85B (pain and suffering) and 86 (property loss) of the *Sentencing Act 1991*.

The trial court can decide that these orders should take immediate effect regardless of this section. However, the Court of Appeal can vary or set aside any such order.

Legislative History

This section is based on section 570 of the *Crimes Act 1958*. However, its application has been significantly limited to specific types of orders, that is, restitution orders and compensation orders.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This section provides exceptions to the primary approach taken in this Part (particularly in section 309) that all sentences are stayed during the appeal period.

As noted, this section is based on section 570 of the *Crimes Act 1958*. The problems with that section, and the reasons why this section has been limited in the way that it has, are discussed in detail in the overview to Division 6. For these purposes, it is sufficient to note that restitution orders and compensation orders need to be exempted from the general rule that sentences are not stayed during the appeal period because such orders will be very difficult to reverse in the event of a successful appeal.

As is noted in the section itself, superannuation orders under section 83G(1) of the *Sentencing Act 1991* are already deemed not to take effect until the final determination of any appeal. Provisions such as section 83G(1) are exempted from the operation of section 309.

Section 311(3) confirms that an order stayed for the duration of an appeal does not take effect if the conviction is set aside (even though that is technically the end of the appeal period) unless the court orders otherwise. This protection is included to avoid doubt given that the conviction is likely to have underpinned the making of the order.

312 Execution of order for forfeiture or destruction of property

Overview

Section 312 prohibits the destruction or forfeiture of any property during the ***appeal period*** unless it is expressly permitted in other legislation.

Legislative History

This section is based on rule 2.25 of the Supreme Court (Criminal Procedure) Rules 2008 with significant changes that act as a minimum protection for property ordered to be forfeited or destroyed.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

There are a number of consequential orders that can be made upon conviction, that are not specifically referred to in the definition of ***sentence*** in section 3 (although, arguably they could be held to be within the inclusive definition).

In particular, rule 2.25 of the Supreme Court (Criminal Procedure) Rules 2008 previously suspended any order for "destruction or forfeiture of any property connected with a prosecution" until the expiry of the appeal period. The rule is, on the face of it, directed at protecting property that may otherwise be disposed of or destroyed within the appeal period.

The language of the rule, particularly the use of the word "forfeiture", was problematic because of the formal forfeiture regime in the *Confiscation Act 1997*. That Act has its own appeals regime and provisions relating to stays (discussed below).

However, a number of provisions in various Acts do provide for orders to be made for forfeiture or destruction of items on conviction. To complicate the picture, some of those provisions provide for the protection of the property ordered to be forfeited or destroyed during the appeal period while others do not. Those that do provide for such protection take different approaches. For example:

- Section 30(3) of the *Drugs, Poisons and Controlled Substances Act 1981* provides for the forfeiture on conviction of drug distributing vending machines. There is no provision for a stay pending appeal.
- Section 91 of the *Crimes Act 1958* provides for the forfeiture and destruction of tools for house breaking. There is no provision for a stay pending appeal.
- Section 70AB of the *Crimes Act 1958* provides for the forfeiture and destruction of child pornography upon conviction. However, the items cannot be destroyed (as opposed to forfeited) until any appeal is determined.

To deal with such differences, this section sets minimum standards for the protection of items during the appeal period by requiring that no item ordered to be forfeited or destroyed consequent upon conviction should be forfeited or destroyed until the expiry of the appeal period.

The words "forfeiture" and "destruction" are also used for orders made under the *Confiscation Act 1997*. Section 312(2) expressly excludes forfeiture and pecuniary penalty orders under that Act as they have their own regime to protect the position during an appeal period.

Division 7 – Powers and procedure

Division Overview

This Division contains a mix of procedural rules that apply to some or all appeals under this Part. It deals with, for example:

- extensions of time (section 313)
- bail following appeal (section 323)
- trial judge reports (section 316)
- evidence and witnesses on appeal (sections 317–321)
- miscellaneous powers such as warrants and ancillary orders (sections 324 and 325).

It should be noted that the Act does not re-enact section 576(1) of the *Crimes Act 1958*. That provision limited the right of an appellant in custody to be present in court for the hearing of their appeal if the appeal concerned a point of law alone. The Act omits the provision because it is inconsistent with the intent of the *Charter of Human Rights and Responsibilities Act 2006*.

The Act also does not contain an equivalent to section 574(e) of the *Crimes Act 1958*. That provision enabled the Court of Appeal to appoint a person to act as an assessor if the court considers that special expert knowledge is required and the person has that special expert knowledge. Section 77 of the *Supreme Court Act 1986* gives the Supreme Court the power to appoint an assessor. This provision appears to apply to any proceedings and does not need to be duplicated. The power to appoint a special commissioner has been retained and is in section 320.

Similarly, the process for summary dismissal of appeals against conviction was in section 580(2) of the *Crimes Act 1958*. It allowed the registrar to refer an appeal to the court if the notice showed no substantial ground of appeal. The court could then summarily determine the matter if it considered that the appeal was vexatious and frivolous and could be determined without a hearing. This power has not been used in many years, is obsolete and has not been re-enacted.

313 Extension of time for filing or serving notice of appeal or notice of application for leave to appeal

Overview

Section 313 allows the Court of Appeal or the registrar to extend time for filing or serving a notice of appeal or notice of application for leave to appeal.

Legislative History

This section is a combination of extension powers previously found in paragraph 2 of section 572(1) and in section 582A of the *Crimes Act 1958*. The power has been increased to allow extensions of time for service, given that time limits for service are now set in relation to all appeals.

Relevant Rules/Regulations/Forms

For an application for an order (under section 313 of the Act) for an extension of time, see rules 2.23 and 2.24, and Forms 6-2I and 6-2J of the Supreme Court (Criminal Procedure) Rules 2008. For extension and abridgement of time, where it is fixed under the Supreme Court (Criminal Procedure) Rules 2008, see rule 1.08.

Discussion

The power to extend time under this section is, on its face, unfettered and will continue to be governed by principles developed by the Court of Appeal. These were recently stated by the court in *R v Croft* [2008] VSCA 61 as follows:

(a) the intention of the statutory time limit is to secure finality, and compliance is required in the ordinary case;

(b) extension of time by the court is an exercise of discretion and the applicant must put material and considerations before the court in order to persuade the exercise of discretion in favour of an extension;

(c) in general the court will require special and substantial reasons for extending time;

(d) the longer the time which elapses since the expiration of the statutory period the more exceptional will the circumstances have to be;

(e) the practice of the court is not to grant a considerable extension of time unless it is satisfied that there are such merits in the proposed appeal that it would probably succeed;

(f) a reasonably satisfactory explanation of the reasons for failure to comply with the statutory requirements needs to be forthcoming.

It should be noted that a refusal to extend time by the registrar can be referred to the Court of Appeal as of right.

314 Abandonment of appeal

Overview

Section 314 allows for appeals to be abandoned in accordance with court rules.

Legislative History

This section is new and has no relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

For abandonment of appeal, see rule 2.41 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

See the overview, above.

315 Powers which may be exercised by a single Judge of Appeal

Overview

Section 315(1) allows a single judge of appeal to do a number of things in place of the whole court. If a single judge refuses an application to exercise one of these powers, the applicant can refer the matter, as of right, to the whole court for determination under section 315(2). This is an important case management power.

Legislative History

This section is based on section 582 of the *Crimes Act 1958*. However, additional powers have been added in section 315(1)(b) and (1)(f).

Relevant Rules/Regulations/Forms

For notice requirements and an application under section 315(2) in relation to a refusal by a Judge of Appeal to exercise powers, see rule 2.25 and Forms 6-2D and 6-2K of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

The new powers in this section that can be exercised by a single judge are:

- a review of refusal to certify – this relates to the process under section 296 for reviewing a trial judge's refusal to certify certain matters in proposed interlocutory appeals
- a power to order a stay of a sentence – this relates to the Court of Appeal's express power to stay a sentence pending appeal in section 309(2)
- a review of a refusal to reserve a question of law – this relates to the case stated process under sections 302 and 304.

Section 315(1)(e) will apply both to bail pending appeal under section 310 and bail following appeal under section 323.

Section 315(2) refers to the power of a judge "in relation to any ground of appeal." This links in with the general powers to grant or refuse leave in relation to any ground of appeal (for example, in relation to a sentence appeal under section 280 or 284A of the Act).

316 Trial judge may be required to provide report on appeal

Overview

Section 316 allows the registrar to require a trial judge to give the court a report of the judge's opinion on any point in the case.

Legislative History

This section is based on section 573 of the *Crimes Act 1958*. However, the reference in that section to the "trial judge's notes" of the trial (and the process for obtaining them) has not been re-enacted as it is obsolete in light of modern evidence recording practices.

Relevant Rules/Regulations/Forms

For report from trial judge, see rule 2.42 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

The power to order a report has not changed in this re-enactment. The circumstances in which a report will be ordered, and the weight to be given to the report, will vary depending on the circumstances. Reports are usually ordered to shed light on an issue that is not apparent from the record of the trial. Authorities on this issue include *R v Ahmet* [1996] VSC 43 and *R v JMV* [2001] VSCA 219.

317 Production of documents, exhibits or other things

Overview

This section confirms that the Court of Appeal can order the production of any item or exhibit if the interests of justice require it.

Legislative History

This section is based on section 574(a) of the *Crimes Act 1958* without change.

Relevant Rules/Regulations/Forms

For production of documents, exhibits etc, see rule 2.43 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

This power has been retained to avoid doubt, although ordering production of items is almost certainly within the inherent power of the court to regulate its own proceedings.

It should be noted that section 324 allows the Court of Appeal to issue warrants to enforce any order, which would include an order under this section.

318 Order for examination of compellable witness

Overview

Section 318 confirms that the Court of Appeal can order any compellable witness to appear before it (or before a nominated person) and give evidence.

Legislative History

This section is based on section 574(b) of the *Crimes Act 1958* without change.

Relevant Rules/Regulations/Forms

For examination of witnesses, see rules 2.44 and 2.45 and Forms 6-2O and 6-2P of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

This power has been retained to avoid doubt, although ordering compellable witnesses to give evidence is almost certainly within the inherent power of the court to regulate its own proceedings.

It should be noted that section 324 allows the Court of Appeal to issue warrants to enforce any order, which would include an order under this section.

319 Evidence of competent but not compellable witness

Overview

Section 319 permits the Court of Appeal to receive evidence from a competent but not compellable witness.

Legislative History

This section is based on section 574(c) of the *Crimes Act 1958* without reference to the husband or wife of the accused.

Relevant Rules/Regulations/Forms

For examination of witnesses other than by the court under section 318(2) of the Act, see rule 2.45 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

This section reflects section 574(c) of the *Crimes Act 1958*, which provides that the court may receive the evidence of any witness who is a competent but not compellable witness. However, it omits a part of section 574(c) which provided that, if the appellant consented, the court could receive evidence of the husband or wife of the appellant in cases where the evidence of the husband or wife could not have been given at the trial except with such consent. The requirement that the appellant consent before the court can receive evidence from the appellant's husband or wife is outdated and has been removed.

320 Reference of question to special commissioner

Overview

This section allows the Court of Appeal to appoint a 'special commissioner' if an issue arises that requires scientific or local investigation or prolonged examination of documents or accounts. The Court of Appeal can then act on the report furnished by the special commissioner.

Legislative History

This section is based on section 574(d) of the *Crimes Act 1958* without change.

Relevant Rules/Regulations/Forms

For reference of question to special commissioner, see rule 2.46 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

See section 326 which provides for how a special commissioner is to be paid for their time.

321 New evidence – effect on sentence

Overview

This section prevents the Court of Appeal from increasing a sentence on appeal (whether by an offender or the ***DPP***) because of new evidence unless:

- it is an appeal by the ***DPP*** because of a failure to fulfil an undertaking
- the sentencing court was misled by the accused as to a material fact.

Legislative History

This section is based on the proviso to section 574 of the *Crimes Act 1958*. However, an important exception has been added to the prohibition. The Court of Appeal may now increase a sentence on the basis of new evidence where the sentencing court was misled as to a material fact and the court considers it necessary in the interests of justice.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The proviso to section 574 of the *Crimes Act 1958* provided that the Court of Appeal could not increase a sentence on appeal based on new evidence, i.e. evidence not given at trial. The purpose of the proviso was to preserve the finality of a sentence where the court in the first instance had heard and considered all of the evidence before it. It also promoted fairness to the accused by ensuring that full disclosure of the evidence occurred during trial and/or sentencing.

The proviso is re-enacted in this section (on a stand alone basis rather than as a proviso), but with two important changes based on issues raised with the previous wording, namely:

- the reference to 'trial' in the proviso was not sufficiently clear
- there was an identified need for flexibility in the proviso's application where exceptional circumstances arise.

The reference to trial in the proviso could technically only have applied to evidence not given before the jury and therefore not evidence given at the sentencing hearing. In order to avoid doubt the section is now expressed to apply to both a "trial and sentencing hearing".

The proviso previously contained one exception to increased sentences, namely an appeal against sentence where there has been a failure to fulfil an undertaking.

A further exception has been included in response to issues arising from the case law dealing with the proviso (mostly involving fraud or misleading conduct at sentencing).

The leading case is *DPP v Burgess* [2001] VSCA 135; (2001) 3 VR 363 (*Burgess*) in which the court considered whether new evidence provided by the prosecution on appeal fell within the proviso. The new evidence demonstrated that the material submitted by the offender in mitigation at sentencing was false (the falsity was not known to counsel).

The court held that the proviso did not prevent it from increasing the sentence as a result of the new evidence. However, it adopted a range of different and conflicting reasons to avoid applying the proviso.

The case exposed the lack of flexibility in the proviso to deal with exceptional cases, where fraud or deception has occurred. The differences in reasoning between the judges demonstrate the difficulties that the court found in identifying a statutory reason for not applying the proviso.

To address this, section 321 provides an exception and gives the court a discretion, based on *Burgess*, to consider new evidence where the sentencing court was misled and that it is necessary in the interests of justice to do so.

Section 321 also provides an exception in the case of an appeal brought under section 291 of the Act for failure to fulfil an undertaking.

322 Sentence in absence of offender

Overview

Section 322 confirms that the Court of Appeal can sentence an offender in their absence.

Legislative History

This section is based on section 576(2) of the *Crimes Act 1958*. The note to the section is new and confirms that this section does not override the requirement for the accused's consent in relation to some sentences (e.g. community based orders).

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

323 Bail following appeal

Overview

Section 323 gives the Court of Appeal the power to grant bail to an accused or remand them in custody if the court orders a new trial.

Legislative History

This section is based on a combination of sections 568(7) and 579(2) of the *Crimes Act 1958*, and has been simplified.

Relevant Rules/Regulations/Forms

For bail, see rule 2.38 of the Supreme Court (Criminal Procedure) Rules 2008.

Discussion

This section is permissive in that it does not require the Court of Appeal to grant bail or remand an accused in custody pending a new trial. This contrasts with section 277(2) which requires the Court of Appeal to order the accused to ***appear*** in the trial court on a specific date where a retrial is ordered.

This section does not re-enact section 579(3) of the *Crimes Act 1958* which provided that the time during which a person is admitted to bail under this section does not count as part of any term of imprisonment under the person's sentence. This declaration is unnecessary as the determination of time reckoned as a period of imprisonment served is dealt with in section 18(1) of the *Sentencing Act 1991*.

It should be noted that the power under this section can be exercised by a single judge of appeal under section 315.

324 Warrants

Overview

Section 324 allows the Court of Appeal to issue warrants to enforce orders of the court.

Legislative History

This section is based on section 574(g) of the *Crimes Act 1958*, without significant change.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

See the overview, above.

325 Ancillary orders of originating court

Overview

Section 325 confirms that, on appeal, the Court of Appeal can set aside or vary any order made by the originating court, even if that order is not the subject of the appeal.

Legislative History

This section is new and has no relationship to any earlier provisions.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

This is a new section giving the Court of Appeal a power to vary or set aside orders other than orders appealed from. This will avoid a difficulty that occasionally arises where the Court of Appeal sends a case back to the first instance court to deal with an ancillary order such as name suppression where an appeal has not technically been taken against that order.

326 Expenses of assessors and special commissioners

Overview

This section provides that from money provided by Parliament the Attorney-General must pay the expenses of a special commissioner or an assessor appointed in relation to an appeal.

Legislative History

This section is based on part of section 578(2) of the *Crimes Act 1958*.

Relevant Rules/Regulations/Forms

Not applicable.

Discussion

The power to appoint a special commissioner in an appeal is found in section 320. Under section 320(3), the Court of Appeal can determine the remuneration of the commissioner. That remuneration is then payable under this section.