"Appeals in the Criminal Courts"

"An introduction to dealing with Appeals from the Magistrate's Court and the High Court to the Court of Appeal and from the Court of Appeal to the Privy Council"

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1. Making the Decision to Appeal

- Information Gathering Process
  - Taking instructions from Client
  - Speaking to Trial Attorney -Get Instructions / Waiver
  - Consider whether you within time limits to give notice of appeal
  - Consider whether you have documents from the court (to be obtained and studied)
  - Costs Involved (legal fees, cost for obtaining copies of documents etc)
  - Explain all potential risks involved

- Do you have enough information at this stage to make a decision to appeal?

- Can you appeal a guilty plea? Depends whether appealing Sentence or Conviction.

  - **R v Forde 1923 2 KB 40** an appeal against conviction will only be entertained if applicant did not appreciate the nature of the offence or did not intend to plead guilty or on the admitted facts he could not in law be convicted on.

  - see **Richard Noel v PC Rawlins Mag Appeal 63 of 2015** where undefended person seeking to appeal conviction where a guilty plea has been entered.

- When do you have to make the decision to Appeal, can you withdraw later on?

2. Filing the Appeal and things to be done before the date of Appeal

- Are you within the time limit for filing?

  - Magistrate Court /High Court-

- S.130 (3) of the **Summary Courts Act Chap 4:20** states that notice of appeal shall be given in every case before the expiration of fourteen (14) days after the day on which the Court has made the order or given the refusal appealed against.

- S.130A (1) of the **Summary Courts Act Chap 4:20** allows the court to extend the time prescribed upon the application for an extension of time on any terms or conditions as it considers just.

- S.58(1) of the **Supreme Court Act Chap 4:01** – Written Notice of Appeal to be given within fourteen (14) days of the date of conviction to the Court of Appeal.

- S.58(2) of the **Supreme Court Act Chap 4:01**– the time within which notice of appeal or an application for leave to appeal maybe given maybe extended at any time by the Court of Appeal in the case involving sentence of death.

  - Application can be made for an extension of time –
    - **Sahadath Ali v R 1969 15 WIR 399**

- What do you need in order to prepare for Appeal?

  - Magistrate Court – Reasons

    - S.130B (1) of the Summary Courts Act states that where Notice of Appeal has been given in accordance with s.130, the Magistrate or Justice shall within sixty (60) days of giving of such notice draw up and sign a statement of the reasons for his decision.

  - High Court –Summing Up / Notes / Transcript from Trial

    - S.58(1) of the Supreme Court Act- ….. on any appeal or application for leave to appeal a transcript of the records or any part thereof shall be made if the Registrar so directs, and furnished to the Registrar for the use of the Court of Appeal or any Judge thereof.

    - S.58(2) of the Supreme Court Act states that a transcript of the records taken under subsection (1) shall be furnished to any party interested upon the payment of such charges as may be fixed by Rules of Court.

  - Magistrate Court – Notes come as of Right

  - High Court- practice is that Applicant entitled to Notes of Evidence in Capital but not Non Capital Matters.

- In Non Capital matters Applicant can make an Application to Court of Appeal to have notes provided but Court will expect you to justify why Notes are needed.

3. Bail - Can you get bail on Appeal?

Magisterial Matters:

- Automatic Bail **Under Section 133A(1) of the Summary Courts Act Chap. 4:20 –** where the appellant, who is sentenced to imprisonment for a term less than three (3) months, has given notice of appeal then, if he is in custody, the Magistrate or Justice whose decision is being appealed against, or if that Magistrate or Justice is not available some other Magistrate or Justice shall grant him bail.

- **S.133 A (4) of the Summary Courts Act Chap. 4:20** permits the appellant to apply to a Judge of the High Court to review any decision of a Magistrate or Justice granting bail under this section and on any such application the Judge may, in his discretion, confirm or modify such decision and thereupon the appellant is not entitled to make a fresh application to any other Judge of the High Court to review the decision of the Magistrate or Justice.

- **S.134(1) of the Summary Courts Act Chap. 4:20** where the appellant, who is sentenced to imprisonment for three (3) months or more, has given notice of appeal then, if he is in custody, the Magistrate or Justice whose decision is being appealed against, or if that Magistrate or Justice is not available some other Magistrate or Justice may in his discretion grant him bail.

- The approach of the Court in determining bail pending appeal is significantly different from a standard bail application under the Bail Act where section 6 considerations apply.

    - **Dexter Roberts v The State** Decision of Archie J., dated July 31, 2001.

Indictable Matters:

- **Under Section 48(2) of the Supreme Court of Judicature Act Chap. 4:01 -** The Court of Appeal may, if it seems fit, on the application of an appellant, grant him bail pending the determination of his appeal.

    - **Mandata Singh v The State. Sharma J.A. [1989.02.24] C.A.CRIM.66/1988**, the Court will consider inter alia the following: -

        - The complexity of the case;

- The gravity of the offence;
- The intervening period between conviction and the hearing of the appeal and the cause for such delay;
- The possibility that the sentence will have been served before the appeal is heard;
- The real possibility of success of the appeal.

4. Grounds of Appeal – what should I argue before the court?

- The following are examples of the circumstances in which the Judicial Committee is likely to intervene[i] in criminal appeals.[ii] (It should be noted that the degree to which these matters affected the final verdict will be the ultimate deciding factor[iii]):

a. where the petitioner had been denied basic rights at trial.[iv] These include understanding the proceedings,[v] the opportunity of properly considering whether to give evidence or a statement from the dock,[vi] or of knowing the charges he had to meet;[vii] or where Counsel was not allowed to address court on a point in the defence,[viii] or where there has been a failure to observe the rules of natural justice[ix];where there was material non-disclosure[x] or where the prosecution failed to produce a witness statement as requested by the defence[xi];where a substantial procedural provision was not complied with[xii];

b. where the trial judge had made erroneous decision during the course of the trial. This can include a judge's failure to exclude inadmissible hearsay[xiii] or other inadmissible evidence[xiv] or the exclusion of admissible evidence[xv] and improper judicial comment[xvi]where the trial judge failed to direct the jury with regard to visual evidence of identification in accordance with the established guidelines[xvii];

c. where the trial judge failed to leave defence issues to the jury,[xviii]; including the defendant's good character[xix]

d. where the trial judge misdirected the jury on central issues[xx];

e. where there were irregularities in relation to the jury[xxi];

f. where the local court is shown to have no jurisdiction to try the appellant,[xxii] or where a local court made an order which it had no jurisdiction to make[xxiii];

g. where there is no evidence (or no admissible evidence) to support his conviction,[xxiv] or no corroboration of the evidence of any accessory[xxv];

h. where there are differences of opinion amongst local courts[xxvi];

i. where a civil wrong has been treated as a crime.[xxvii]

5. <u>Fresh Evidence – Approach by Appellate Courts</u>

- Section 47 of the Supreme Court of Judicature Act of Trinidad and Tobago gives the Court of Appeal power in a criminal appeal to receive fresh evidence "if it thinks it necessary or expedient in the interest of justice".

- It was made clear by de la Bastide CJ in ***<u>Solomon v The State</u>*** **<u>(1999) 57 WIR 432</u>** that the breadth and generality of this power do not remove the long accepted requirements of the law that fresh evidence should appear to be capable of belief and that a reasonable explanation be furnished for the failure to adduce it at trial.

- Fresh evidence has proven to be quite popular in cases where medical evidence becomes available after the trial relative to the Applicant's mental health, where there was material non disclosure at the trial or where issues arise in relation to trial counsel's conduct.

- These factors are not, however, conclusive of the issue of admission of fresh evidence, and an appellate court has the overriding statutory power to admit it if it is in the interest of justice

  - **<u>Basdeo Baldeo v State 111/1990</u>**
  - **<u>Benedetto v The Queen [2003] UKPC 27</u>**
  - **<u>Pitman &Hernandez v State 2017 UKPC</u>**

- **Cadogan v R 2007 69 WIR 249 (CCJ Decision)**

6. Options open to the Appellate Court- Dismissal / Application of Proviso / Re Trial

- Where there is a successful appeal against **conviction**, power is given to the Court of Appeal under s. 44(2) of the *Supreme Court of Judicature Act*:

> "The conviction can be quashed and direct a judgment and verdict of acquittal to be entered; or Order a retrial."

- In determining whether to Order a Retrial see the case of **Reid v R (1978) 27 WIR 254** the question whether a Court of Appeal should direct a retrial were set out by Lord Diplock as follows:-

> i. The seriousness and prevalence of the offence;
> ii. The expense and the length of time for which the court and jury would be involved in a fresh hearing;
> iii. Whether the interests of justice require that the accused undergo the ordeal of a second trial;
> iv. The length of time that has elapsed between the offence and the new trial if one be ordered; and
> v. The strength of the case presented by the prosecution at the previous trial.
>
> These principles recited do not constitute an exhaustive list:
>
> "The weight to be attached to each of them in any individual case will depend not only upon its own particular facts but also upon the social environment in which criminal justice … falls to be administered day to-day. As their Lordships have already said, this makes the task of balancing the various factors one that is more fitly confided to appellate judges residing in the island."

- Where there is a successful appeal against **sentence**, power is given to the Court of Appeal under s. 44(3) the *Supreme Court of Judicature Act*:

> "The sentence passed at trial can be quashed and substitute such other sentence warranted in law by the verdict (**whether more or less severe**)"

- Where there is an unsuccessful appeal, the court can either dismiss the appeal in accordance with s. 44(1) of the *Supreme Court of Judicature Act,* **OR** it can apply the proviso of the same section where it is of the belief that even though a point raised in

appeal might be decided in favour of the appellant, the appeal can still be dismissed as there would be no substantial miscarriage of justice.

- **Marlon Gregory John v The State Cr. App. No. 39 of 2007**,
- **Julia Esmeralda Sellier Ramdeen a/c J-LO and David Abraham v The State Cr. App. No. 42 & 43 of 2008**).

- Section 45(2) of the Supreme Court of Judicature Act provides for the special power of the court to substitute a verdict more appropriate in the circumstances to an appellant convicted of an offence.
  - **Albert Edwards v The State Cr. App. No. 58/1992**,
  - **Gerard Wilson v The State Cr. App. No. 31 of 2006**)

7. Appealing to the Privy Council in Capital and Non-Capital Matters

- In a Criminal Matter an application for special leave will need to be made directly to the Judicial Committee. This will occur in almost all criminal cases and an application can be made by either the defence or prosecution.[xxviii]
- Special leave will not be given as a matter of course,[xxix] but where the nature of the application for leave is seen fit to be the subject of an appeal, special leave will be granted.[xxx]
- Special leave can be confined to one or more specific issues of those raised in the proceedings below. In *Nirmal v. The Queen*,[xxxi] for example, the appellant's conviction had been quashed and a re-trial ordered.
- The grant or refusal of such leave is a matter of discretion for the Judicial Committee.[xxxii] There is no appeal from a refusal to grant leave, although it may be possible to lodge a further petition at a later date.[xxxiii]

Circumstances in which leave is likely to be refused:

- The JCPC will not sit as a second Court of Appeal. Leave is generally not granted where the Board would have reached a different conclusion to that of the jury or difference in opinion;

- Reluctant to interfere with a discretion of the Courts below unless there has been an obvious misuse of said discretion;
- Being asked to resolve academic questions;
- Delay;
- Unspecific grounds of appeal;
- General allegations of injustice;
- New points not raised in Courts below (except in capital cases)

For a detailed guide on how to Appeal to the Supreme Court /JCPC see Taylor on Appeals – Chapter 17 which deals with Criminal Appeals to the Privy Council.

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[i] These examples include cases where leave was granted or the full appeal allowed. This is extracted from Chapter 17 of the Taylor on Appeals.

[ii] In some cases, the matter was remitted to the local court of appeal for consideration of a re-trial or re-sentencing under an alternative verdict imposed by the Judicial Committee.

[iii] *Chan Kau v The Queen* [1955] A.C. 206 See para. 18-098 on the proviso.

[iv] See also Chapter 15 Taylor on Appeals

[v] *Kunnath v. Mauritius* (1994) 98 Cr.App.R. 455.

[vi] *Sankar v. Trinidad and Tobago* [1995] 1 W.L.R. 194

[vii] *Atta Mohammed v. King Emperor* (1929) 57 I.A. 71; see also *Appuhamy v. The Queen* [1963] A.C. 474; *Chang Hang Kiu v. Piggott* [1909] A.C. 312.

[viii] *Mahadeo v. The King* [1936 W.N. 203.

[ix] *e.g. Mahlikilili Dhalamini v. The King* [1942] A.C. 583, where some evidence was given privately to the judge; an appeal was allowed where a new trial was ordered for appellant's co-accused but not the appellant: *Baksh v. The Queen* [1958] A.C. 167.

[x] *Berry (Linton) v. The Queen* [1992] 2 A.C. 364 (non-disclosure of unused witness statements led to a conviction being quashed and the case being remitted to the local court of appeal). The Board applied the test set out in *Davies v The King* (1937) 57 C.L.R. 170 at 180, cited with approval by the Jamaican Court of Appeal in *Grant & Hewitt* 1971 J.L.R. 585, 591; *Solomon (Winston) v. The Queen* (unreported) Privy Council Appeal No. 45 of 1997 (medical evidence) Sangster v R 2002 61WIR 383 (Non disclosure video recordings)

[xi] *Mahadeo v. The King* [1936] W.N. 203.

[xii] *Hemapala v. R.* [1963] A.C. 859 where failure to comply with directions in the Criminal Procedure Code resulted in the conviction being quashed. *Cf. Dinizulu v. Att.-Gen of Zululand* (1889) 61 L.T. (N.S.) 740 (leave will not be granted because of a failure to observe a technicality, such as the form of indictment). *Lawrence v. The King* [1933] A.C. 699 at 705 (they will not necessarily intervene if charges have been properly joined)

[xiii] *Hopson (Delroy) v. The Queen* (unreported) Privy Council Appeal No. 35 of 1992, May 16, 1994; *Coote* (1873) L.R. 4 P.C. 509 (appeal allowed from order of local appellate court for a new trial on the basis that the depositions of the accused were improperly admitted); *Scott and Barnes v. The Queen* (1989) 89 Cr. App.R. 153; *Cf. Prasad v The Queen* [1981] 1 W.L.R. 469..

[xiv] *Kuruma v The Queen* [1955] A.C. 197; *Sutton v. The King* [1933] A.C. 348 *(See Karamat v. The Queen* [1956] A.C. 256; appeal dismissed where judge allowed view of *locus* with jury and witnesses gave demonstrations, accused was absent by choice: *Lobban v. The Queen* [1995] 1 W.L.R. 877(prosecuting counsel was permitted to cross-examine a defendant on a statement which was inadmissible in the case against him). Arthurton v R 2005 1 LRC 200

[xv] *Lui Mei Lin v. The Queen* (1989) 88 Cr.App.R. 296

[xvi] *Mears v. The Queen* (1993) 97 Cr.App.R. 239; *Re Dillet* (1887) l.R. 12 App.Cas. 459

[xvii] *Reid (Junior) v. The Queen* [1990] 1 A.C. 363; *Beckford* (1993) 97 Cr.App.R. 409; see also *Evans (Kenneth) v. The Queen* (unreported) Privy Council Appeal No. 43 of 1990, August 8, 1991): *Dailey* (1994) 98 Cr.App.R. 447; *Farquharson* (1994) 98 Cr.App.R. 398.Pipersburgh & Robateau v R PC Appeal 96 of 2006 (Delivered 21st February 2008)

[xviii] . *Karaolides v. The Queen* [1956] Crim L.R. 488, PC. Where a plea of "lawful excuse" ought to have been left to the assessors by the judge and, if that had been done, the appellant might have been acquitted, the appeal was allowed; *Wong Pooh Yin v. Public Prosecutor* [1955] A.C. 93; *Chan Kai v. The Queen* [1955] A.C. 206; See also *Ballard v. The Queen* [1957] A.C. 635. *Cf. Lee Chun-Chun v. The Queen* [1963] A.C. 220, or where a judge sitting alone failed to consider the alternatives to murder, and manslaughter: *Knowles* [1930] A.C. 366; see also *Mahadeo v. The King* [1936] W.N. 203.

[xix] . *Burrow v. The Queen* [1998] A.C. 846; *Thompson (Eversley) v. The Queen* [1998] A.C. 811 Teeluck & John v State 66 WIR 319

[xx] *Wong Pooh Yin v Public Prosecutor* [1955] A.C. 93, PC. (where at his trial for rape an appellant had been deprived of the protection of the rule as to the desirability of corroboration and there had been a miscarriage of justice, the appeal was allowed); *Chiu Nang Hong v. Public Prosecution* [1946] 1 W.L.R. 1279, PC. (Where the committee found that there was misdirection by the trial judge on provocation but that this could not have caused a miscarriage of justice the appeal was dismissed); *Lee Chun Chuen v. The Queen* [1963] A.C. 220, PC. See also *Bharat v The Queen* [1959] A.C. 533; *Laurence v. The King* [1933] A.C. 699 (burden and standard of proof), *Broadhurst. V The Queen* [1964] A.C. 441 (misdirection on fact and with reference to the credibility to evidence); *Mears v. The Queen* (1933) 97 Cr. App.R. 239 (improper

judicial comments on the defence case). *Cf. Ibrahim v. The King* [1914] A.C. 599; *Dal Singh v King Emperor* (1917) L.R. 4 Ind. App. 137, PC; *Lawrence v. The King* (failure by judge to explain to jury that they need no convict on all or any of the charges does not necessarily call for intervention); *Attygalle v. The King* [1936] A.C. 338; *Chun Kau v. The Queen* [1955] A.C. 206 (an appeal will not be allowed where there was an incorrect direction but it would have made no difference to outcome)

[xxi] .E.g. *Ras Behari Lal v. The King Emperor* (1933) L.R. 60 Ind. App. 390 (member of jury who convicts was no later found to have insufficient knowledge of English); *Crosdale* [1995] 1 W.L.R. 864; *Lobban v. The Queen* [1995] 2 Cr.App.R. 573 (a submission of no case was made in front of the jury *Mitchell* [1998] 2 Cr.App.R. 35 (judge informed jury of his ruling on a *voire dire); Lincoln De fu v. The State* [1999] W.L.R. 1731, PC

[xxii] *Dinizulu v. Att.-Gen. of Zealand* (1889) 61 L.T (N.S.) 740; see also *Chief Kwame Asante v Ch Kwarne Tawia* [1949] W.N. 40

[xxiii]. *Kishan Singh v. The King* (1928) L.R. 55 Ind. App. 390 (the appellant had been found guilty culpable homicide and sentenced. The Crown applied for a revision of the sentence on the basis that he should have been found guilty of murder. The High Court convicted him of murder a sentenced him for that offence. Conviction and sentence were quashed. The High Court had no jurisdiction to conduct such a review).

[xxiv] . *Nelson v. The King* [1902] A.C. 250; *Akerele v. The King* [1943] A.C. 255; *Cf. Ballard v. The Queen* [1957] A.C. 636; *Sparks v. The Queen* [1964] A.C. 964

[xxv] *Mahadeo v. The King* [1936] W.N. 203.

[xxvi] . *Nazir Ahmad v. The King* [1936] W.N. 27; Att.-Gen for *Ceylon v Perera* [1953] A.C. 200

[xxvii] . *Toronto Rly v. The King* [1917] A.C. 630. PC

[xxviii] *Att. –Gen of Ceylon v Perera* [1953] A.C. 200; *Att.-Gen of Hong Kong v Tse Hang-Lit* [1986] A.C. 876; *Att-Gen of Hong Kong v. Sham Chuen* [1986] A.C. 887: *Att-Gen of Hong Kong v. Wong Mak Pmg* [1987] A.C. 501

[xxix] *Quinlan v. Quinlan* [1901] A.C. 615.

[xxx] *Ponnamma v. Arumogam* [1962] A.C. 561. See para. 13-095 below for the nature of the Judicial Committee' approach to the grant of leave.

[xxxi] [1972] Crim. L.R.226.

[xxxii] *Notes,* p. 4.

[xxxiii] See para. 18-053 below.