Appeals by the Prosecution Against Sentences and Acquittals:

A Survey of the Situation in some Commonwealth Countries

Commonwealth Secretariat

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Preface

At their Meeting in Barbados in 1980 Commonwealth Law Ministers agreed that the question of appeals by the prosecution against acquittals and sentences be included in the Agenda for their deliberations. However, in the event, there was insufficient time to discuss the item, so that Ministers agreed instead that the Secretariat be invited to collate Commonwealth experience on the topic and expand the short paper it had prepared for the Meeting.

This survey is the result and would not have proved possible without the generous support and co-operation of Law Ministers and Attorneys-General, which is gratefully acknowledged. It was prepared for the Commonwealth Secretariat by Dr. A. Paliwala and Ms Jill Cottrell of the University of Warwick to whom, too, the Secretariat is indebted.

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APPEALS BY THE PROSECUTION AGAINST SENTENCES AND ACQUITTALS: A SURVEY OF THE SITUATION IN SOME COMMONWEALTH COUNTRIES

Dr. A. Paliwala and Ms Jill Cottrell

This survey has been prepared from memoranda and materials supplied by a number of Commonwealth governments in response to a request from the Commonwealth Secretariat. Where available, additional sources have also been used. The survey was prepared for the Commonwealth Secretariat by Dr. A. Paliwala of the University of Warwick, with the assistane of Ms Jill Cottrell of the same University.

The development of the law in Commonwealth countries as well as in the United States has been strongly influenced by the principle of law developed by the English judges by the 17th Century that the prosecution had no right of appeal from either an acquittal or a sentence. What is interesting about the development of English law in this area is that while the judges did sometimes rationalise their decisions in terms of the double jeopardy rule (for example per Kelynge J. in The King v. Fenwicke and Holt (1663) 1 Keb. 546, cited in note to 1 Lev.9 - "The fame of the defendant shall not be often drawn in question for the same thing, no more than his life"), the reasoning in the old cases is very spare. The rule was upheld in some strong cases in which the accused had apparently tampered with witnesses (imprisonment in Fenwicke and Holt). The real reason for the rule is a policy preference for the finality of the trial. Seen in this light the appeals system for criminal trials developed as exceptional procedures particularly for the protection of the accused. On the other hand, the rule in relation to prosecution appeals was that there was no justification for disturbing the finality of the trial verdict:

> "Whenever and by whatever means, there is an acquittal in a criminal prosecution, the scene is closed and the curtain drops." (Statement by the Attorney-General in the Duchess of Kingston's Case (1776) 20 How. St. Tr. 355)

The double jeopardy rule was probably the most important reason preventing the extension of the exception to prosecution appeals.

The source of the English principle has recently been examined by the Full Court of the Federal Court of Australia. Deane J. stated that:

> "The principle is ordinarily stated in abstract terms without specific reference to the underlying common law right which it embodies ... the right of a person who has been acquitted by a court of competent jurisdiction after a trial on the merits of a criminal charge to be spared the renewed jeopardy of an appeal against acquittal." (Thompson v. Mastertouch TV Service Pty Ltd. (1978) TPRS 306, 115 at p. 306. 119-120: 19 ALR 547).

The influence of these principles on the jurisdiction in Commonwealth countries as well as in the United States has been very strong, but their sway is not absolute. In most jurisdictions including England and Wales, appeals by the prosecution or complainant have been permitted in summary cases (including those decided by customary tribunals), though often in more restricted circumstances than appeals by the accused.

From the second half of the 19th Century, legislation in a few jurisdictions has permitted appeals by the prosecution even in relation to indictable offences in the higher courts. Thus, while India adopted the common law principle in the Criminal Procedure Code of 1861, this was modified in the Code of 1872. Canada (apart from a brief period in the 1920's), New Zealand and Tasmania have permitted appeals or reviews. Sri Lanka which provided appeals for non-jury trials has recently extended appeals to jury trials. Botswana, Western Australia and the Nigerian States have recently made provision for prosecution appeals. On the other hand, proposals in South Australia (Criminal Law and Penal Methods Reform Committee of South Australia 3rd Report 1975) and a Northern Territory

(Australia) law making provision for prosecution appeals are unlikely to be implemented. In relation to federal offences in Australia, the Full Court of the Australian Federal Court has interpreted legislation restrictively thus denying the prosecution a right of appeal. Even in those jurisdictions allowing appeals, the following restrictions are often apparent:

(1) Appeals are often on restricted grounds compared with the right of the accused to appeal. (A particular restriction in some jurisdictions is that an appeal may be made on points of law only).

(2) There are frequently procedural limitations such as restrictions as to the court appealed to, the rank of the prosecutor, the need to obtain leave of the court, and the time within which notice to appeal must be given.

(3) There has been a fairly uniform tendency in the courts (Nigeria is an exception) to interpret the provisions enabling appeals in a very restrictive manner.

In some jurisdictions, for example in England, after some enthusiasm for prosecution appeals in the mid-19th Century (Eighth Report of the Commissioners on Criminal Law 1845, Report of the Commissioners on Criminal Law 1879), more recent reports have recommended against such appeals (Report of the Judges to the Lord Chancellor 1892 (1894 Sess. Papers Vol. 71, 173); Departmental Committee on New Trials in Criminal Cases 1954 Cmd.9150 para 29 p. 13; Report by JUSTICE, Criminal Appeals 1964 p. 18).

New South Wales adopted the device of allowing the prosecution to make 'moot' appeals in 1951. These are appeals in which the prosecution's sole interest is in obtaining a reversal on a point of law - the right of the accused to go free as a consequence of the original acquittal is not in issue. The United Kingdom followed suit in the Criminal Justice Act 1972; several other jurisdictions have since enacted similar measures.

A slightly larger number of jurisdictions permit appeals against sentences, even in the higher courts. However, even here, there is a general tendency to restrict revision of the sentences by trial courts to exceptional grounds. The situation is a little different as far as further appeals to higher appellate courts from an appellate decision are concerned. Here, the general tendency is to permit such appeals but on restricted grounds. In some jurisdictions further appeals are not permitted.

This survey is divided into three sections:

Section I - deals with the situation in the lower courts. This section distinguishes between the lower and the higher courts because in general, differences in provision for appeals are based on the level of the court. Differences based on classification of offences (indictable or serious and summary) or mode of trial (with or without jury) are very relevant, but the situation in different jurisdictions varies so much that such classifications would not produce meaningful results. Even in relation to levels of court, the jurisdiction and composition of courts vary greatly in the different jurisdictions studied. All these differences contribute to great variations in the provision for appeals.

Section II - deals with the situation in the higher courts. Here also, we note the significant differences in the jurisdiction of the courts and the important difference between trial by jury and without a jury. The main distinction between the jurisdictions is between those which prohibit appeals which put the fate of the accused in jeopardy and those which permit such appeals. In the former type of jurisdictions there is often provision for 'moot' appeals. In the latter type of jurisdictions, the main difference is between those which permit appeals on points of law only and those which provide appeals on facts as well. Separate treatment is given to appeals against sentences and appeals from appeals. In the latter case, a larger number of jurisdictions appear to permit such appeals.

In Section III some of the policy issues involved in this area are canvassed and the suggestion is made that a proper assessment cannot be undertaken either of the differences between the jurisdiction or of policy questions without examining the operation in practice of the appellate provisions in the context of the general operation of the criminal justice system. There is examination of some of the considerations involved in making such assessment. Some of the opinions of government law officers on this topic are considered and it is suggested that these raise wider issues than merely questions of justice in the individual case. The conclusion suggests the further research needed to obtain a better perspective of the issues involved.

SECTION I - APPEALS BY PROSECUTOR AGAINST DECISIONS OF LOWER COURTS IN THE COMMONWEALTH

It is standard for an appeal to be available to the prosecutor of the State against decisions of inferior criminal courts of Commonwealth countries. Almost every word of that apparently straight-forward statement, however, conceals a wide variety of situations. The differences begin with the inferior courts themselves - in their composition, powers and jurisdiction. The destination of the appeal is less variable - in most instances it is to a 'High Court' or 'Supreme Court' meaning the superior Court of first instance. The appeal may be available against acquittal only, or against sentence as well. It may be on grounds of law only, or on fact as well. The safeguards of leave of a court or law officer, and of time limits, are not uniform, nor is the nature of the procedure or the powers of the appellate court. Finally, there is in many countries, supplementary to some sort of appeal, a procedure for review of lower court procedures, by either the judiciary or the law officers.

The lower courts themselves

The most common type of lower criminal court (some of which exercise civil jurisdiction too, of course) is the paid, legally qualified magistrate. There are, however, in a number

of countries, lay magistrates exercising criminal jurisdiction - for example the lay magistrates of England and Wales (it is the paid, stipendiary magistrates who are the exception). In some countries, mainly in Africa and the Pacific, there are courts broadly termed 'customary courts', the benches of which are usually occupied by people knowledgeable in customary law and possibly with some degree of training. There have been instances of customary courts presided over by legal practitioners (notably the Grade A and some Grade B customary courts of the former Western Nigeria). In some countries such courts may still administer customary criminal law - for example, the central and local courts of Lesotho - whereas in others the law has been superseded by written codes based largely upon English law (though possibly incorporating variations taking account of local customary law or Islamic law) - for example, in Nigeria the area and customary courts administer either a Penal Code or a Criminal Code.

In some countries there is only one type of lower criminal court - this is for example, the case in Cyprus and Australia - but in others there may be a number of grades of lower court with differing jurisdictions. The two countries with the most complex systems are perhaps India and Nigeria. In India there are, in addition to the High Court, Courts of Session(which has two grades of judges) and three grades of judicial magistrates (the last grade being honorary). There are also executive magistrates, who formerly used to combine judicial and executive roles but who now have only an executive role. Finally, there are the Nyaya Panchayats which are village elders' courts. The Courts of Session are more akin to the higher courts in that they have in general primary jurisdictions in all serious offences. In Nigeria there are several classes of magistrates,and in parts of the country there are also various grades of customary court.

Lower courts may have very limited powers, be able to hear only petty cases and empowered to impose very restricted sentences. On the other hand, some are able to hear all but the most serious of offences, and empowered to impose a full

range of penalties (except, perhaps, death and very long terms of imprisonment). The latter's jurisdiction may be mutually exclusive with that of the superior courts, or there may be an element of overlap with certain offences triable in either court - at the election of the prosecution and/or of the accused. Throughout the Commonwealth lower courts, of various types, dispose of the overwhelming majority of criminal cases. They also, in many countries, have the function of holding preliminary inquiries and committing for trial in the superior courts.

The table below gives an indication of the wide range of institutions embraced by the term 'lower courts'.

TABLE I

Inferior Criminal Courts in Selected Countries

Country	Court	Jurisdiction	Powers
India	Sessions Court	All cases	Death sentence or long prison sentence to be confirmed by High Court.
	Assistant Sessions Judge.	All cases	May not sentence to death or long prison sentence (10 years +).
	Chief Judicial Magistrate.	Specified in Schedule to CCP	Not death or imprisonment over 7 years.
	Judicial Magistrate 1st class.	"	Up to 3 years or Rs 5000 or both.
	Judicial Magistrate 2nd class.	"	Up to 1 year or Rs 1000 or both.
	Nyaya Panchayat	State Statute	Short sentences Rs 15 - Rs 250 fine or both.
Cyprus	District Court Judge.	Punishable up to 3 years (or 7 with consent A-G) or fine up to £500.	Up to 3 years or £500 fine or both.
England	Magistrates: Stipendiary and Lay panel.	Summary offences + some indictable offences triable summarily + preliminary hearing for indictable offences.	6 months imprisonment £1,000 fine or both.

	Single Lay Justice	Summary and preliminary hearing.	14 days imprisonment or £1 fine or both.
Nigeria Lagos	Chief Magistrate	Summary offences and specific law providing for indictable and preliminary hearing.	5 years imprisonment or ₦ 1,000 fine or both.
	Senior Magistrate		3 years imprisonment or ₦ 600 fine or both.
	Magistrate Grade I		2 years imprisonment or ₦ 400 fine or both.
	Magistrate Grade II		1 year imprisonment or ₦ 200 fine or both.
	Magistrate Grade III		3 months imprisonment or ₦ 50 fine or both.
	Customary Court		1 month imprisonment or ₦ 20 fine or both.

Court appealed to

All the countries of the Commonwealth have a court (or in the case of federations one for each constituent part) known variously as the High Court or Supreme Court with the following characteristics: it has no territorial limit i.e. it can hear cases throughout the country or State/Province; it has no general upper limit to its original jurisdictions (though certain types of cases may be given to some special court or tribunal) and it is staffed by qualified practitioners of a considerable number of years' standing. It also has a supervisory role in relation to the lower courts. In most instances it is to this court that appeals from lower courts are taken; in some instances it may be specially constituted for appellate purposes - for example the Full Court in Guyana, the three judges sitting on appeal in some Nigerian States, and the Divisional Court of the Queen's Bench Division in England. In some countries, however, there are appeals within the lower court structure - from a lower to a higher grade of magistrate as in India, or a lower to a higher grade of customary court, for example in Northern Nigeria.

If an appeal against an acquittal is successfully taken to a higher court, the accused usually has the right of appeal to the next higher court in the hierarchy. In St. Lucia, however, it is provided that the decision of the Supreme Court on appeal

from the District Court is final. In some countries the prosecution may not appeal further against the upholding of an acquittal.

Decision appealed against

Three types of decision in favour of the accused may be possible in different courts - though by no means all inferior courts may make all three. Firstly, a court trying a case may find the accused 'not guilty' - the decision normally known as 'acquittal' and upon which a plea of autrefois acquit may be founded. Secondly, the trial court may be empowered to discharge the accused if satisfied that there is no case made out against him on the basis of the prosecution evidence, but leaving it open for a further prosecution if new evidence comes to light. Such a procedure is possible under the Indian Code of Criminal Procedure 1973 - and its descendants such as the Northern Nigeria Criminal Procedure Code. Finally, a court holding a preliminary inquiry may decline to commit the accused for trial to a higher court.

In addition to these decisions which will, if not reversed on appeal, reault in the accused going free, in some jurisdicitons there may be an appeal against the decision as to sentence.

All jurisdictions which permit any prosecution appeal at all embrace at least the first category of decision: the full acquittal. In all the countries about which information is available, an appeal against acquittal is in some circumstances possible.

In the Northern States of Nigeria an appeal is provided for from the Magistrates' Courts against either an acquittal or a discharge. In India the Code mentions expressly an 'acquittal'; however, a number of types of discharge falling short of a final acquittal have been held to be an order of acquittal sufficient to ground an appeal. In effect, discharges for want of adequate evidence amount to acquittals for this purpose.

In some jurisdictions no appeal against a refusal to commit for trial is possible. In the Northern States of Nigeria, however, this would be a 'discharge' against which an appeal could be brought. In Guyana there is no appeal, the DDP may review the decision and direct a committal. In England the voluntary bill of indictment procedure may be used to avoid a refusal to commit by magistrates. In a number of jurisdictions the preliminary inquiry is unknown, or has been abolished. In several, although an appeal of some sort against acquittal is possible, there is none by the prosecution against sentence; this is true of, for example, the Australian Capital Territory, England, and St. Lucia. In Lagos State, Nigeria, the High Court has power to review sentences in its supervisory jurisdiction, but the prosecution does not have a direct right of appeal.

Grounds of appeal

It is the issue of upon what grounds an appeal may be brought that perhaps the most significant divergence of approaches to this issue is apparent. The major question is, of course, whether an appeal is possible only upon a point of law or upon issues of fact as well (which would then include issues of mixed fact and law). In a number of countries appeal by the prosecution is restricted to grounds of law: e.g. parts of Australia, Botswana, England and Lesotho. It has been suggested that a perverse decision may amount to an error of law - if this were so it would whittle away the fact/law distinction. (Rabiu v. Kano State unreported (1980) 8-11 SC (Nigeria)).

Where an appeal against sentence is possible there are a few jurisdictions in which the only ground permitted is that the lower court failed to impose a sentence required by law (Lesotho, Lagos State (Nigeria), Trinidad and Tobago). In some jurisdictions, such as Lagos State, however, adequacy of sentence may be examined in a review. (It seems that in some countries such a failure by the lower court cannot be challenged).

Elsewhere the ground of appeal is that the sentence imposed was inadequate.

Who may appeal - and with leave of whom

Another very significant factor in assessing the importance of the right of appeal by the prosecution is constituted by the two questions: who may take the initiative to appeal and is the permission of someone else (the Attorney-General, the DPP, a court) required? In some jurisdictions "any person aggrieved" or "any dissatisfied person" may appeal; these expressions may be wider than just the parties to the original trial. Most notably they may include the complainant. Naturally they will not embrace any irritated member of the public but only someone who can show himself or herself to be adversely affected by the decision. In some jurisdictions the complainant, even if himself not the prosecution, is expressly given the right to appeal. In others a very limited right is given to the government in some manifestation only. Leave required may be that of the Attorney-General or of a court. The position is summarised in Table II.

Court appealed to

In general an appeal against acquittal is taken to the same court as would be appropriate if a defendant were appealing against conviction. In India, however, only the High Court may deal with such an appeal, even if the appropriate forum for an appeal against conviction would be the court of Session.

Powers of appeal court

In principle the possibilities open to an appellate court upon an appeal against acquittal might include one or more of the following:

(a) a power only to declare that the decision of the lower court was wrong but without affecting the outcome for the particular accused (moot appeal);

(b) to convict the accused of the offence charged in the lower court;

(c) to convict the accused of another offence supported by the evidence (this power might be restricted to offences in some way designated less serious);

(d) to order retrial.

The first possibility - the moot appeal - has been adopted in some countries for appeals from higher courts but less often where the appeal is from a lower court - although it is the procedure in the Northern Territory of Australia.

In Fiji, while the appeal court may confirm, reverse or vary the decision of the court below, it may not order a new trial. In a number of countries - including India, Nigeria, and Trinidad and Tobago, the court has a very wide range of powers. In India, the appeal court may direct a further inquiry, or a retrial (or committal for trial if that is the decision considered appropriate) or find him guilty of any offence of which he might have been convicted in the court below (not necessarily one with which he was charged),

Time Limits

In most countries the time limit specified is fairly short - 14 to 21 days - and the same limit applies to prosecution as to accuseds' appeals. In India the limit is 60 days, extended to 6 months when the charge is by a public servant.

Further appeals

Is the appellate court the end of the road, or is a further appeal possible? Would such an appeal be only at the instance of a person convicted by the first appeal court, or is the prosecution allowed yet another chance to secure a conviction? Is such an appeal, by either side, to be on law alone, or on both fact and law? Here again there is a wide range of provisions. In St. Lucia there is no further appeal in any circumstances. In India an appeal may be taken by the accused only, and only if he is sentenced to death or imprisonment for ten years or more; in such cases the appeal is as of right - if

the sentence is less, there is still an appeal by leave of the High Court. In Fiji, the accused alone may appeal (as of right) to the Court of Appeal on a point of law only, and either side may appeal further to the Judicial Committee of the Privy Council, with leave of the Judicial Committee. In the Eastern States of Nigeria, there is an appeal on law or fact to the Court of Appeal, with leave of the High Court or of the Court of Appeal.

Review

An appeal in the narrow sense leaves the initiative usually to the original parties to the litigation. A review is undertaken at the initiative of the court or some public official. The power to review generally arises as a consequence of the supervisory role of the higher courts over the lower courts. A review of a court order may be only one of many different forms of supervision. In many jurisdictions, the form of review of a decision has effectively been converted to an appellate process. This is the case with many of the review provisions in the Australian States. On the other hand, in India there is a power to review at the instance of a sessions judge or the High Court any finding, sentence or order, which operates separately from the appeal provision. However, there is no power to upset a verdict of acquittal in such a case. Similar review powers also exist in the States of Nigeria, and may be the most effective forms of obtaining reconsideration of lower court sentences. Apart from specific review provisions, most superior courts in their supervisory jurisdiction over the lower courts permit applications for prerogative writs. This constitutes an alternative remedy against improper practices.

SECTION II - THE SITUATION IN THE HIGHER COURTS

Note has already been made that there are marked differences in the structure and jurisdiction of the courts in different countries. In general the higher courts are those which normally try only the more serious cases - in particular the indictable offences where such a category exists. However,

this definition is problematic because in many jurisdictions lower courts have jurisdiction to try almost all offences. For the purposes of this dicussion the authors have taken the dividing line to be the exercise of jurisdiction in practice over serious offences only. These courts are often termed the High Court, or the Supreme Court, but there are situations for example in India and England and Wales where it is the Sessions Court or the Crown Court respectively which has primary jurisdiction over serious offences and the superior courts only exercise supervisory or appellate jurisdiction. In India, the judiciary of the sessions court is separate from that of the High Court. On the other hand in England the Crown Court is constituted by High Court judges, circuit judges and recorders. The mode of trial in different jurisdictions also varies between those jurisdictions in which there is trial by jury (e.g. England and Wales) and those where there is no jury (e.g. Nigerian Sates generally). In many jurisdictions (for example, Sri Lanka, Canada and England and Wales) both modes of trial are available. In some jurisdictions (such as the Nigerian Sates and Lesotho) the court may sit with assessors who assist the court in relation to matters of fact. However, the important difference between the higher and lower courts is that the former are constituted by lawyers of considerable experience.

The two main types of appeal dealt with in relation to the higher courts are appeals against acquittals and against sentence. Other appeals also considered are appeals on appeals, including where an original appeal against a conviction has been upheld by a higher court. There are strong similarities between the attitudes in a jurisdiction to appeals against acquittals and appeals against sentence. However, jurisdictions which prohibit appeals against acquittals or sentence frequently permit appeals on appeals. Each type of appeal is considered in turn.

Appeals against Acquittal

The main division here is between those jurisdictions which follow the old English rule under which there was no appeal against an acquittal, and those which provide such rights of appeal. Within this main divide further differences in approach

are observable. Thus, an increasing number of jurisdictions which prohibit appeals which put the acquitted person in jeopardy, nevertheless allow 'moot' appeals. Similarly,there are great differences in jurisdictions permitting appeals as to the restrictions on such appeals with respect to both the grounds and other restrictions such as requirements on leave.

Jurisdictions which do not permit appeals which put the acquitted person in jeopardy

As appears from Table 3, the majority of the jurisdictions studied do not permit appeals from acquittals which would put the acquitted person in jeopardy.

There has been a movement away from this position in some jurisdictions during the nineteenth and twentieth centuries. At the same time, in some jurisdictions (such as the Commonwealth of Australia and Cyprus) legislation has been interpreted restrictively to deny a right of appeal to the prosecution. In each jurisdiction, the court based its decision on the necessity for clear statutory language to deviate from the established common law principle. Thus, in Thompson v. Mastertouch (1978) TPRS 306. 19 ALR 547 it was stated by Deane J that:

> "The right of the subject .. to be spared the jeopardy of an appeal against acquittal .. is not, upon proper principles of statutory interpretation to be swept aside by the general terms of a statute .." (at p. 306. In relation to Cyprus see A.G. v. Pouris and Others 1979 2 CLR 15)

This contrasts with the situation in Nigeria where it has been decided that the Constitution of 1979 permits wide powers of appeal against acquittal inspite of the absence of the word 'acquittal' in the definition of decisions which may be appealed from (Rabiu v. Kano State unreported (1980) 8-11 S.C.).

A question which is of relevance to the appeals provisions in many jurisdictions is the double jeopardy rule contained in Constitutions such as those of Nigeria and India. Whereas in the United States it has been held that this rule

prohibits appeals against acquittals (Kepner v. U.S. (1904) 195 U.S. 100), it has been held in India ((1971) 2 GLR 1041) and in Nigeria (Rabiu v. Kano State) that double jeopardy provisions do not apply to such appeals.

Moot appeals

Commencing with New South Wales in 1951, a significant number of jurisdictions now permit 'moot' appeals in which the acquitted person is not in jeopardy. The sole rationale for the moot appeal is the proper and orderly development of the criminal law.

There is a substantial similarity in the provisions for moot appeals in the different jurisdictions. In practice, they are not appeals but references on a point of law by a State law officer, normally the Attorney-General. However, generally the point of law must be in reference to a particular case. In the case of Botswana, however, the provision is for a reference which does not have to be related to a particular case. Sri Lanka appears to be the only jurisdiction which permits a pure declaratory reference.

Safeguards for the acquitted person generally include the following:

(i) The identity of the acquitted person is kept secret. In New South Wales, Queensland and Western Australia the primary legislation provides for this, whereas in England and Wales, Trinidad and Tobago, Guyana and Lesotho, this is provided in the Rules of Court. The English rules provide that a person's name may be revealed with his or her consent. However, it was widely believed by members of the United Kingdom Parliament that it would be very difficult to keep the identity of the acquitted person entirely secret.

(House of Commons, Minutes of Standing Committee G.22 Feb. 1972 Col. 657-676)

(ii) The right to Representation.

There is a difference in approach between the jurisdictions on this question. For example, in Western Australia there is no specific right to representation for the acquitted person. Instead, a duty is placed on the Attorney-General to "instruct sufficient counsel to ensure that the point of law is properly argued". The English provisions give the acquitted person a right to legal representation. However, he may only argue his case in person with the leave of the court - a substantial departure from existing practice on appeals. In New South Wales, on the other hand, there is a general right of the acquitted person to be heard. Only if he is not represented must the Attorney-General instruct counsel.

(iii) Entitlement to costs involved in representation.

In the Western Australian type provision, the State pays for all counsel instructed by the Attorney-General. In the English type provision there is an entitlement to costs but subject to taxation and of counsel only, an obvious disincentive for the acquitted person to appear in person. Whether it is because of the inadequacy of the provision as to costs or the obvious disincentive for the acquitted person to argue in a hypothetical appeal, there does not in practive appear to have been any representation on the part of the acquitted person in England. The court has had to instruct amicus curiae in the English references to argue the point of view of the acquitted person.

The material surveyed does not deal with the question in relation to other jurisdictions, but the English evidence suggests firstly that the Attorney-General acts as a substantial sifting device in relation to the references. The number of references is fairly low. Of 71 applications to the Attorney-General between 1973 and 1980, only 18 references were in fact made. This cautious approach of the Attorney-General is in accordance with the opinion expressed by the government during the passage of the legislation, but contrary to the hopes of Lord Widgery,the former Chief Justice,that the procedure would be used extensively for short but important points. [A.G's Reference (No. 1. 1975) [1975] 2 All E.R. 684 at p. 685]

Jurisdictions permitting appeals against acquittals

The main distinction in jurisdictions which permit appeals is between those which permit them on matters of law only and those which permit them on both fact and law. However, there is also the question of both the approach of the prosecution and the attitude of the courts to appeals. These latter issues may often affect the interests of the acquitted person more than any technical question of the availability of grounds.

Grounds of Appeal

Of the jurisdictions studied, Tasmania and Western Australia, Botswana, Canada, New Zealand and Sri Lanka (in respect of jury trials only) permit appeals against acquittals on points of law only. Jurisdictions which permit appeals on questions of law and fact include Sri Lanka (in trials by judges alone) India, and, after the decision of the Supreme Court in Rabiu v. Kano State (1980) 8-11 SC. the States of Nigeria.

In India, as has been noted already, no appeals are possible in 'petty cases' (involving a maximum fine of Rs.1,000 and imprisonment of less than three months) whether by prosecution or defence. In Nigeria, the situation in respect of prosecution appeals was unclear until the Supreme Court decision in the Rabiu case. In this case, it had been decided that the Federal

Court of Appeal has jurisdiction to hear appeals against acquittals or sentence from decisions of a State High Court where the law of a State, in this instance, Kano State, provides for such an appeal. While the particular case turned on the issue of an appeal as of right (that is, without leave of the court) on a point of law only, it was stated by the court that appeals may lie on questions of fact or mixed fact and law (as provided by the laws of most States) with leave of the court. Alternatively appeals may lie as of right under Section 220(1)(a) of the constitution by the Attorney-General or the appropriate authority to conduct appeals prescribed for the purposes of the section.

Another aspect of the Nigerian decision is the adoption by the court of the test in Regina v. Governor of Brixton Prison ex parte Armah [1968] AC 192 that where an inference of fact drawn by the court below is absolutely unsupported by the evidence, or (that) the decision is so manifestly unreasonable that no reasonable tribunal would have come to the conclusion on the evidence, then an appeal based on such inference raises an issue of law.

Restrictions on Appeal

Two types of restrictions apply to the right of the prosecution to appeal. On the one hand, there are procedural restrictions which provide for time limits in relation to the appeal, for appeals to be made by or with the consent of the highest legal officers and for the leave of court. The other level of restriction is the approach of the courts in relation to such appeals. On the whole these are not based on specific legislative provisions but on the principles developed by the courts themselves in the light of the historical development of provisions on prosecution appeals.

Time Limits

Some jurisdictions provide special time limits for prosecution appeals, but in others no difference is made between prosecution and defence appeals. Jurisdictions with special time limits include Sri Lanka where a 28 day limit is provided and

India where a 60 day period is specified for applications for leave to appeal, except where the complainant is a public servant when the limitation period is extended to six months.

Who May Appeal

The major restriction on appeal relates to the status of the appellant. In Canada, Sri Lanka, Botswana and Tasmania, only the Attorney-General may make the appeal. In India, the appeal may only be lodged by the public prosecutor who may be one or more persons specially appointed for the purpose of conducting appeals. The situation in the States of Nigeria is more complex. The State laws generally only provide for appeals to be lodged by the prosecutor (e.g. s.284(2) and (3), Criminal Procedure Code (Northern Nigeria)). The Constitution(s.222)provides for appeals by prescribed authorities and persons as of right as to both fact and law, but no such prescription has been made. However, it was stated in the Rabiu case that the Attorney-General had this unrestricted right of appeal.

On the whole, what evidence there is suggests that the requirement of appeals by or with the leave of a high government official operates as a practical sifting process limiting appeals only to cases where important issues of law are involved. This would appear to be the case both in Australia and New Zealand where appeals by the prosecution in indictable cases are said to be very rare.

Leave of Court

Perhaps the most important restrictions relate to the provisions as to leave of court. Thus the leave of the court is required in New Zealand, Botswana, Tasmania and India where such a restriction was introduced under the reformed Code of 1973. No such leave appears to be required in Western Australia or Canada. In Sri Lanka and the States of Nigeria a difference is made as to whether appeal is on a matter of law alone or involves questions of fact. In the former situation appeal is as of right but in the later leave of the court is required. However, in Nigeria, it seems that the Attorney-General or the appropriate

persons or authorities prescribed for the purposes of s.220(1)(a) of the Constitution may appeal as of right whether on law or fact.

Test Applied by the Court in Considering the Appeal

On the whole, the attitude of the courts in relation to prosecution appeals has been fairly restrictive. This is clearly signified in the decisions of the Full Court of the Federal Court of Australia and the Supreme Court of Cyprus which have each interpreted legislation in a way that denies the prosecution the right of appeal against acquittal.

Where appeals are permitted, some difference of opinion exists as to the applicable tests. Thus, the restrictive attitude is apparent in Australia where in Vallance v. The Queen (1961) 35 ALJR 182 at p. 185, Dixon C.J. indicated the test as whether the error was "on the whole case a probable explanation for the verdict of the jury?" In India, there has been a considerable amount of discussion on the applicable test. In the case of Sheo Swarup v. The King Emperor([1934]PC 227, 36 Cr. L.J. 5786) the Privy Council decided that it was not necessary for the prosecution to prove an 'obstinate blunder - incompetence, stupidity or perversity' on the part of the trial judge. However, proper weight had to be given to such matters as the views of the trial judge on the credibility of witnesses, the presumption of innocence, the right of the accused to the benefit of any doubt and to the slowness of an appellate court in disturbing a finding of fact arrived at by a lower court judge. This decision establishes a clear distinction between prosecution and defence appeals and has been subsequently followed in India. If anything, the recent tendency of the Supreme Court has been more restrictive and it has been held that if the acquittal is logically possible on the evidence, the court should not interfere with it. The jurisdiction is intended for cases where the acquittal is perverse or clearly erroneous and results in a gross miscarriage of justice. [Bhagirath Singh v. State of Bihar AIR 1976, SC 424; State of Uttar Pradesh v. Poosu AIR 1976 SC 1750].

In Canada on the other hand, a somewhat milder test has been employed as enunciated by Kerwin J. in White v. The King [1947] 5 CR 268 at p. 276:

"In the present case it must be concluded that the magistrate would not necessarily have acquitted the appellant if he had given himself the proper direction."

The applicable test in Nigeria is not clear, in that it was not specifically discussed in the Rabiu Case. However, Idigbe, JSC stated the test as being one of "a decision to which no reasonable jury applying their minds to proper considerations and giving themselves proper directions .. can come" (p.222). He also considered that the decision had in fact been 'perverse '. However, it is likely that the test of the perverse nature of the decision is not applicable to a situation in which an appeal is based on law alone or fact alone but only to a situation as in the Rabiu case where the appeal court holds that the inference of fact was so perverse as to constitute an error in law. An Indian type general test of perverseness would make the distinction between fact and law meaningless in the Nigerian context.

Orders which a court may make on Appeal

The main difference between the jurisdictions relates to whether the court can substitute its own verdict on upholding an appeal or whether it is obliged to order a retrial. The issue is whether an appeal court with its limited knowledge of the full implications of a criminal trial is an appropriate institution for determining the verdict and the sentence. The laws of most jurisdictions which allow appeals permit the court a wide range of powers in relation to both verdict and sentence, and also allow a retrial in appropriate cases. In Canada, partly as a consequence of the strong criticism by Bora Laskin CJ in Morgenthaler v. The Queen (1976) 1 SCR 616 the power of the court in appeals against acquittals from jury trials is limited to a power to order a retrial.

Appeals against Sentence

English law has regarded prosecution appeals against sentence as strictly as appeals against acquittal. However, until the passage of the Criminal Appeal Act 1966, it was possible

for the court to increase the sentence on an appeal by the accused. In 1892 a Report by the Judges to the Lord Chancellor recommended the setting up of a court to revise sentences either way. However, both the Report by JUSTICE on Criminal Appeals in 1964 and that by the Donovan Committee on Criminal Appeals in 1965 (Cmnd.2755) recommended that the appeal courts' powers should in fact be further restricted by not permitting an increase of sentence on an appeal by the accused.

This attitude is in marked contrast to the position taken by the Criminal Law and Penal Methods Reform Committee of South Australia in their first Report in 1973. The Committee proposed an active involvement of the prosecution in the sentencing process, a marked departure from the present situation in which sentencing is left to the judge. Permitting appeals by the prosecution against sentence so imposed is seen as a mere logical extension of such active involvement. The Committee's proposals have proved controversial and, unlike the very different English proposals, have not found place in the Statute book.

On the whole, a slightly wider number of jurisdictions have permitted appeals against sentence than against acquittals. Thus all the States and Territories of Australia except for South Australia permit appeals by the procesution against sentence. In addition, there is a right of appeal against sentence in all jurisdictions which provide for appeals against acquittal.

Restrictions

In general, the restrictions as to time, the person who may appeal and leave of court are similar to those applying in a particular jurisdiction to appeals against acquittals. In the Australian States including those which do not provide for appeals against acquittals, only the Attorney-General may appeal. In Victoria it is specified that the Attorney-General may only appeal if satisfied that it would be "in the public interest" to do so (Crimes Act s.576A).

The test to be applied is also fairly restrictive and on the whole courts are reluctant to increase the sentence on appeal. In principle the tests do not appear to be different whether the

appeal is by the prosecution or the accused. However, in practice the courts will be more reluctant to vary a sentence upward than downward. The tests on sentence are variously described as that of "manifest inadequacy" or "wrong in principle". That is, the sentence must not be varied merely because the members of the Court themselves would have passed a different sentence. The issues which have most affected courts in considering upward variation of sentence have been the issues of "public interest" and "general deterrence". Thus in the Sri Lanka case of A.G. v. HN de Silva (1955) 57 New Law Reports 121 on an appeal against the imposition of a good behaviour bond on a charge of forgery, Basnayke ACJ.considered that the judge should "consider the matter of sentence both from the point of view of the public and offender". The judge had to consider the effect of deterrence, and reformation of the criminal was subordinate to other principles in sentencing.

Similarly, the Victorian Full Court varied upward a deferred sentence for indecent assault on a young girl. The sentence was based on the recommendation of a psychiatrist that psychiatric treatment and a suspended sentence would help cure the accused's problem. The full Court held that inadequate weight had been given to "general deterrence". (Reg v. Dole (1975) VR 754).

Appeal on Appeal

Even those jurisdictions which do not permit appeals against acquittal permit further appeals where an appeal by the accused has been upheld by the first appellate court. However, the provisions for such further appeals are often subject to restrictions. Thus in England the prosecution may appeal to the House of Lords from the Court of Appeal in relation to any decision (including a sentence) of the Court, if the court certifies that a matter of law of general public importance is involved and either grants leave or leave is granted by the House of Lords. In some jurisdictions, such as Fiji, similar provisions apply but the appeal is to the Privy Council. In jurisdictions such as those in India and Nigeria which permit appeals by the prosecution against acquittal or inadequacy of sentence, the

further appeal may often be by the accused. A difference may thus be made between a further appeal by the prosecution and the accused. Thus, in India, the accused can appeal as of right to the Supreme Court if the High Court has imposed a sentence of death, imprisonment for life or for not less than ten years (Constitution,Art.134) or in other cases with leave of the Supreme Court (Art.136). The prosecution only has a right of further appeal with leave of the supreme Court. On the other hand, in Nigeria no distinction appears to be made between the prosecution and the accused in relation to further appeals to the Supreme Court.

The main purpose of the right to further appeals appears to be the general administration and development of the criminal law. Thus, an improper ruling by an appeal court may have the effect of being a binding precedent whereas that of a trial judge will not have such an effect. This overall consideration has occasionally in England led to assurance given to the accused as in DPP v. Smith [1961] AC 290 that he would not be punished even if the decision of the Appeal Court is reversed by the House of Lords. However, a subsidiary purpose of ensuring the due administration of justice in the individual case has also been an important consideration (Per Sir John Coleridge in Bertrand (1867) LR 1 PC 520 at P.530).

SECTION III - RELEVANT FACTORS IN DETERMINING POLICY

The outline of principles and rules applying to prosecution appeals indicates a degree of variation in practice between Commonwealth jurisdictions. On the surface the differences might appear to be very marked, however, it is arguable that on the one hand the differences between those jurisdictions which do not permit appeals (other than moot appeals and appeal on appeal) against acquittals and sentences and the majority of those which do may not be so great in practice. A proper assessment of these differences requires an analysis of the real operation of the appeals system within the overall framework of the criminal justice system. It is also suggested however, that where there are real differences in practice these may be based on different views or emphases in relation to the

nature and purpose of the criminal process generally and the appellate process in particular.

An agenda is also suggested for research which may be necessary to make a proper assessment of the real situation in a particular country.

The Differences in Practice

There are substantial similarities as far as the situation in the lower courts is concerned. The main difference in principle appears to be between those jurisdictions which allow an appeal on a matter of law only and those which allow appeals both on law and fact. Again, there is a general tendency to allow a review of sentences. On the other hand, there appears to be a marked difference as far as the situation in the higher courts is concerned. A majority of jurisdictions do not permit any appeals except moot appeals. In the minority which permit appeals against acquittal - there appears to be a marked difference between those which permit them on a point of law alone and those which permit them on both fact and law. There may also be marked differences in the restrictions relating to such matters as leave requirements.

A real assessment of the similarities and differences requires analysis of several factors concerning which the information was not available. These include:

(i) Statistical Profile of the Operation of the Appeals System

One test of the use of the appellate provision would be to analyse the number of cases in which the prosecution felt dissatisfied with the verdict or sentence and compare them with the statistics for actual appeals permitted and allowed. There is some indication for example of the extensive sifting which takes place by the law officers of the Crown in such countries as Australia and New Zealand before appeals are made. There is also some evidence of the restrictive attitude of the courts in many jurisdictions.

An even more important consideration in relation to statistics is the conviction rate, including for those who plead guilty. It has been argued for example, that even in England and Wales the statistics indicate very high conviction rates both at the lower court and at the higher court level (McBarnet, Conviction: The Law, The State and the Construction of Justice, 1981; cf. N. Walker, Crimes, Courts and Figures 1971. Figures for other jurisdictions were not available to the authors but a high conviction rate would tend to reduce the need for prosecution appeals as it would indicate at the very least, that the existing system is operating effectively and efficiently. Statistics may be a controversial and unreliable guide for policy but they help to place the problem of appeals by the prosecution within the overall framework of the criminal justice system.

(ii) Efficiency of Court Process

In relation to the lower courts, the wide difference in the structure and composition of the lower courts has been noted. There do not appear to be great differences between the qualification for appointment to the higher court judiciary. However, there is a major difference between jury trials and non-jury trials. An important reason for the difference in situation between lower and higher courts in jurisdictions such as England and Wales is the existence of jury trials for indictable offences with the principle of the sanctity of jury verdicts. In some jurisdictions such as Sri Lanka and Canada which allow appeals in relation to the higher courts, a significant difference is also found between jury and non-jury trials.

However, apart from these structural differences, one needs to know more about the relative efficiency of the court process in practice. This involves rather more than issues of quality of the judiciary, in that the efficiency of the prosecution process (including pre-trial process) and of the defence are of vital importance. While there is a rule in some jurisdictions

that an appeal will not be permitted merely to patch up defects in a prosecution, an inefficient prosecution system may lead to a greater dissatisfaction with first decisions on the part of those responsible for prosecution.

Viewed from the perspective of the defendant, it has been suggested that the operation of the formal rules of criminal process in practice leave the majority of accused at a disadvantage (Bottoms and McLean, The Defendant in the Criminal Process, 1976; McBarnet, Conviction: The Law, the State and the Construction of Justice, 1981).

The respondent's interests may be affected by such matters as the availability of effective legal advice. This depends to some extent only on the availability of legal aid for appeal. The availability of legal aid on appeals by prosecution appears to vary a great deal from jurisdiction to jurisdiction. If effective legal advice is not available, this may make the task of the respondent much more difficult.

Time is another factor which affects the respondent. There is some indication as to the time period permitted for making applications to appeal by the prosecution. Yet, from the respondent's point of view, the real time involved may be the time it takes to obtain the decision on appeal. It is again relevant whether the acquitted person may be rearrested during this period. Too lenghthy a time period before the decision on appeal could be regarded as being oppressive. (See generally on delays and appeals by the accused Judith Osborne, Delay in the Administration of Criminal Justice: Commonwealth Developments and Experience, Commonwealth Secretariat 1980 pp.111-127).

(iii) Alternative Techniques for Improving the Administration of Justice.

The purpose of appeals provision is not merely doing justice in the individual case but also of checking on and improving the general machinery of justice. However, appeals are only one method of doing so. Thus, an

adequate study of prosecution appeals provision needs to take account of alternative methods of supervising the administration of justice. The issue in relation to moot appeals is whether the task of law reform would not be better carried out by the legislature. Similarly, in relation to sentencing, much can be done to improve sentencing practice by means other than decisions from case to case. Instructions from the highest judicial authority, as was done recently in England by Lord Lane CJ in relation to sentencing in rape cases is one example. The Australian Law Reform Commission has in relation to Federal offences proposed an Australian Sentencing Council to prepare detailed and publicly available guidelines on sentencing. (Australian Law Reform Commission, Sentencing of Federal Offenders, ALRC 15 1980.)

One issue which is obviously important in deciding on the question of appeals is that of costs to the system. Appeals by the prosecution increase costs to the State and obviously these have to be related to the costs of alternative methods of achieving policy objectives. That the factor of costs is an important consideration is shown by the low financial provision made by the United Kingdom Government in respect of moot appeals when they were first introduced in 1972. (See House of Commons Minutes of Standing Committee G 1972, Column 661.)

General Policy Considerations

It seems that a proper assessment of policy on prosecution appeals cannot be made without an exploration of at least some of the more practical issues discussed above. It also needs to be related to broader questions of the role of the criminal justice system.

On the whole the authors did not perceive a great deal of dissatisfaction with the existing systems in their jurisdictions in the opinions of the government law officers who provided material for the survey. Some of those jurisdictions which permit prosecution appeals from lower courts, but not from higher ones, rationalise this divided position on two grounds. Firstly, that while the quality of the higher judiciary is such

as to ensure a fair trial, a check was necessary for the lower magistracy. The other rationalisation for those jurisdictions with jury trials is that of the sanctity of the jury verdict. This includes both the aspect that the jury is the best judge of the case and that public confidence in the administration of justice will be undermined if the jury verdict is questioned by the State. This is the position in the majority of jurisdictions studied. In general, the modern rationalisation against prosecution appeals is that double jeopardy rule - in the substantive sense that questioning a trial verdict or sentence will be oppressive to the accused. However, other reasons include issues which go beyond the issues of justice in the individual case and raise questions related to the need for a proper, efficient and acceptable system of administration of justice. Thus it may be felt that too many prosecution appeals would increase uncertainty in the administration of justice and would lead to an undesirable prolongation of the trial process. Judges and juries aware of the possibility of appeals might be inclined to be less efficient. Appeals can also increase the costs of the system to the State. In relation to sentencing, appeals would change the traditional role of the prosecution as being impartial and concerned merely with proof of guilt . The questioning of trial decisions and, in particular, jury trials by the State itself would undermine public confidence in the administration of justice, an obviously important aspect of ruling by consent.

There is a general acceptance of many of these principles even in some of those States which provide limited appeals, with the emphasis in many of these jurisdictions being on restraint in the exercise of State power.

However, some argue for a wider exercise of the power of appeal. The main argument appears to centre on justice in the individual case. Thus it has been suggested that justice must not merely be done to the individual, it must also be done to the State and to the victim of the offence. It is further argued that double jeopardy is not contravened by letting the criminal justice process take its proper course in the same trial. Finally, if appeals are not permitted, people might be tempted to take the law into their own hands. It is also suggested that the English rule for jury trials may not suit the conditions

of some Commonwealth jurisdictions.

Packer in an often cited work describes two models of criminal justice (H. Packer, The Limits of Criminal Sanction, 1969). These are the 'crime control' model and the 'due process' model. The crime control model emphasises the importance of the repression of criminal conduct; it requires that primary attention is paid to the efficiency of the system, the aim being to produce a series of routinised operations which ascertain the truth in every case. This contrasts with the 'due process model' in which:

> "Each of its successive stages is designed to present formidable impediments to carrying the accused any further along in the process. [It] resembles a factory that has to devote a substantial part of its input to quality control. This necessarily cuts down on quantitative output". (pp.163, 165).

While the arguments of the minority of strong proponents of prosecution appeals fits the 'crime control' model, that of the majority of jurisdictions with appeals in relation to the lower courts only does not quite fit the 'due process model', in that the rationale is in terms of efficiency of the system and its acceptability and not in terms of seeing due process as an 'obstacle course', and perhaps fits better a third 'liberal bureaucratic' model of Bottoms and McClean which mediates due process with the requirement of efficiency. (Bottoms and McClean, Defendants in the Criminal Process 1976. McBarnet would go further in suggesting that the practical working of the rules of evidence, practice and procedure ultimately work to the disadvantage of the accused (D. McBarnet, Conviction: The Law, the State and the Construction of Justice, 1981).

Questions of exercise of power with restraint and of the public acceptance of the trial process suggest purposes of the criminal justice system which are both wider and more complex than either considerations of justice in the individual case or bureaucratic efficiency. None of the opinions raised the question of the appropriateness of the adversary system in this context. However, the very flexible appeals procedures provided for the Provincial Offences Court in Ontario appear to be based on a notion of the amelioration of the normal adversary procedures.

Thus there are differences in perspective on what public interest means. Within a wide spectrum, there is the notion of justice in the individual case being properly achieved through the full implementation of our adversary system. On the other hand, there is the notion of restraint enunciated by Alderson B. in giving evidence before the Select Committee of the House of Lords considering the establishment of the Court of Crown Cases Reserved:

> "the prisoner is the weaker of the two contending parties... There would be great complaints of oppression if the poor man, after being acquitted were put on trial a second time". (Cd.523 (Br. Sess. Pap. Vol. 16, p.423) p.11 Q53).

A proper assessment of the situation generally and in individual countries can only be made after a consideration of the practical operation of the criminal justice system and the operation of prosecution appeals. Such further research might include:

1. A statistical profile of the operation of the appeals system in the context of the overall framework of the criminal justice system.

2. The way in which the criminal justice system operates in practice from the perspective of both the prosecution and the accused. Particular areas which need exploration relate to costs, time and availability of effective legal advice.

3. Existing and other possible alternatives to a system of appeals.

TABLE 2: PROSECUTION APPEALS AGAINST ACQUITTAL AND SENTENCE: The Situation in the Lower Courts

Jurisdiction/court Procedure	Appeal Procedure	Type of Decision	Court: Appealed to	Grounds	Who May Appeal	Leave Required
AUSTRALIA						
(i) NSW Justice Summary Trial	Case Stated	Acquittal or Sentence	Supreme Court	Law	Any Party	Leave of Court
(ii) Victoria Magistrate Summary Trial	Order to Review	Acquittal or Sentence	Supreme Court	Fact, jurisn. and law	"person aggrieved" incl. informant	Leave of Court
	Appeal	Sentence	County Court	Adequacy	A.G.	No Leave
(iii) W. Australia Magistrate Summary Trial	Order to Review	Acquittal or Sentence	Supreme Court	Fact, jurisn. and law	person aggrieved or A.G.	Leave of Court
(iv) Queensland Magistrate Summary Trial	Order to Review	Acquittal or Sentence	Supreme Court	Fact, jurisn. and law	person aggrieved or A.G.	Leave of Court

Jurisdiction/court Procedure	Appeal Procedure	Type of Decision	Court: Appealed to	Grounds	Who May Appeal	Leave Required
	Appeal	Acquittal or Sentence	Supreme Court	Law	Any Party	No Leave
	Hearing de novo	dismissed private complaint				
(v) S. Australia Magistrates Summary Trial	Case Stated	Acquittal or Sentence	Supreme Court	Law	Any Party	Leave of Court
	Appeal	Acquittal or Sentence	Supreme Court	Fact, jurisn. and law	Any Party	No Leave
(vi) Tasmania Magistrates Summary Trial	Motion to Review	Acquittal or Sentence	Supreme Court	Fact and Law	Person Aggrieved	Leave of Court
(vii) Australian Capital Territories Magistrates Summary Trial	Motion to Review	Acquittal only	Supreme Court	Fact, jurisn and law	Person Aggrieved	Leave of Court

Jurisdiction/Court Procedure	Appeal Procedure	Type of Decision	Court: Appealed to	Grounds	Who May Appeal	Leave Required
(viii) N. Territory Magistrates Summary Trial	Case Stated	Acquittal or Sentence	Supreme Court	Law	Any Party	Leave of Court
	Moot Appeal	Dismissed complaint	Supreme Court	Law	Crown	Leave of Crown Solicitors
Botswana Magistrates Summary Trial	Appeal	Findings or Acquittal	High Court	Law	A.G.	No Leave
CANADA Ontario Provincial Offences Court Summary Trial	Appeal	Acquittal or Sentence	Provincial Court (Criminal Division)	Fact, jurisdiction or Law	Any Party	No Leave
CYPRUS District Court Summary Trial	Appeal	Acquittal or Sentence	High Court	No evidence, evidence wrongly admitted/excluded irregular procedure sentence insufficient	Prosecutor/ A.G.	Leave of A.G.

Jurisdiction/Court Procedure	Appeal Procedure	Type of Decision	Court: Appealed to	Grounds	Who May Appeal	Leave Required
ENGLAND & WALES Magistrates Summary Trial	Case Stated	Acquittal	Divisional Court	Law	Any Party	Leave of Court except where by A.G.
FIJI Magistrates Summary Trial	Appeal	Acquittal or Sentence	Supreme Court	Fact/Law	Prosecutor	Leave of DPP
GUYANA Magistrates Summary Trial & Summary Trial of indictable offences	Appeal	Acquittal or Sentence	Full Court of Supreme Court for Summary Off. Ct. of App. for indictable off. summary trial	Law, Fact Unreasonable decision improper practice	Anyone dissatisfied	No leave
	Review	Dismissal	Full Court	Requirement of justice	DPP	Leave of Court
	Case Stated	Acquittal or Sentence	Full Court	Law	Prosecutor	Leave of Court

Jurisdiction/Court Procedure	Appeal Procedure	Type of Decision	Court: Appealed to	Grounds	Who May Appeal	Leave Required
INDIA						
Magistrates of various Grades Summary Trial	Appeal	Acquittal or Sentence	High Court	Fact/Law	Complainant or Public Prosecutor	Leave of High Court
	Review	Any decision Order or Sentence	Session Ct. or High Ct.	Fact/Law	Court on Application	Leave of Court
LESOTHO						
Customary Courts (Local)	Appeal	Acquittal or Sentence	Central Ct. (customary)	Fact or law	Any person Aggrieved	No Leave
Magistrates Summary Trial	Case Stated	Acquittal	High Court	Law	DPP	Leave of Court
	Appeal	Dismissal	High Court	Law	DPP	No Leave
	Review	Sentence	High Court	Mandatory Sentence not imposed	DPP	Leave of Court
NIGERIA						
(i) North Area Cts grades 1 - 3	Appeal	Acquittal or Sentence	Upper Area Ct.	Fact/Law - inadequate sentence	Person Aggrieved incl. Prosecutor	No Leave

Jurisdiction/Court Procedure	Appeal Procedure	Type of Decision	Court: Appealed to	Grounds	Who May Appeal	Leave Required
Upper Area Court	Appeal	Acquittal or Sentence	High Court	Fact/Law - inadequate sentence	Person Aggrieved incl. Prosecutor	No Leave
Magistrates - various grades Summary Trial	Appeal	Acquittal/ dismissal	High Court	Law/jurisn.	Prosecutor	No Leave
	Review	Finding sentence or order	High Court	correctness legality or propriety	Court on Application	Leave of Court
(ii) West etc. Customary courts	N/A					
Magistrates Summary Trial	Appeal	Acquittal	High Court	Law/no jurisdiction	Prosecutor	No leave
	Review	Finding sentence or order	High Court	correctness or propriety	High Court on Application	Leave
(iii) Lagos State Magistrates Summary Trial	Appeal	Acquittal or Sentence	High Court	Law or Sentence mandatory and not imposed	Prosecutor	No Leave
	Review	Finding sentence or order	High Court	correctness legality or propriety	High Court on Application	Leave of Court

Jurisdiction/Court Procedure	Appeal Procedure	Type of Decision	Court: Appeal ed To	Ground	Who May Appeal Review	Leave Required
(iv) East Customary Courts	Appeal	Any decis-ion	Cust. C.A.	Law/Fact	Party Aggrieved	No Leave
Magistrates Summary Trial	Appeal	Acquittal or Sentence	High Court	Law or Sentence mandatory and not imposed	Prosecutor	No Leave
	Review	Finding sentence or order	High Court	correctness legality or propriety	High Court on Application	Leave of Court
St. LUCIA District Cts Summary Trial	Appeal	Acquittal or Sentence	S. Ct.	Law / Fact	Prosecutor	No Leave
	Review	Decisions order or proceedings	Supreme Ct.	"Material error"	Court on Application by or on behalf of crown attorney	Leave of Court.

Jurisdiction/Court Procedure	Appeal Procedure	Type of Decision	Court: Appealed to	Grounds	Who May Appeal	Leave Required
SRI LANKA						
Primary	Appeal	Any order Acquittal or sentence	Court of Appeal	Law/fact	Any Party	No leave
Magistrates' Court	Appeal	Order or Sentence	Court of Appeal	Law/fact	Any Party	Leave of A.G.
TRINIDAD AND TOBAGO	Appeal	Acquittal or Sentence	Court of Appeal	Law jurisdn. evidence fact or sentence unlawful	Complainant	No Leave

TABLE 3 - APPEALS AGAINST ACQUITTALS AND SENTENCE

The Situation in the Higher Courts

Jurisdiction & Court	Constitution of Court	Appeal Against Acquittal	Appeal Against Sentence	Moot Appeal	Powers of Court
AUSTRALIA					
New South Wales Supreme Court (and District Ct)	Judge and Jury	None	A.G. as of right to full court	A.G. may refer point of law in a case to Full Court	Variation of Sentence
Victoria Supreme Court (and County Court)	Judge and Jury	None	A.G. as of right to Full Court	None	Variation of Sentence
Western Australia Supreme Court (and District Court)	Judge and Jury	Prosecutor as of right to full court on point of law	as for Acquittal	A.G. may refer point of law in a case to full court	Wide powers (incl. variation and material)
Queensland Supreme Court (and district Court?)	Judge and Jury	None	A.G. as of right to Full Court	A.G. may refer point of law in a case to full court	Variation of Sentence.
S Australia Supreme Court (and District Criminal Court)	Judge and Jury	None	None	None	-

Jurisdiction & Court	Constitution of Court	Appeal Against Acquittal	Appeal Against Sentence	Moot Appeal	Powers of Court
Tasmania Supreme Court (and District Court?)	Judge and Jury	A.G. as of right on law	A.G. as of right on adequacy of sentence	None	Wide
Australian Capital Territory Federal Court	Judge and Jury	None	Probable appeal on adequacy	None	Variation of sentence
Northern Territory Supreme Court	Judge (and Jury?)	None	probable appeal on adequacy	None	Variation of sentence
Federal Jurisdiction Federal Court	Single Judge	None	probable appeal on adequacy	None	Variation of sentence
Botswana High Court	Judge (sometimes with assessors?)	A.G. on law with leave of the High Court	A.G. on question of law with leave of High Court?	A.G. right to refer to Court of Appeal any decision ruling or opinion	Wide powers
Canada (various Provincial Supreme Courts)	Judge alone	Prosecutor on question of law	Prosecutor on adequacy of sentence	None	Wide powers to vary court order or to order new trial

Jurisdiction & Court	Constitution of Court	Appeal Against Acquittal	Appeal Against Sentence	Moot Appeal	Powers of Court
	Judge and Jury	Prosecutor on question of law	Prosecutor on adequacy of sentence	None	May very sentence but can only order a new trial for acquittal appeal
Cyprus Assize Courts	3 judges	None	Prosecutor on adequacy of sentence	None	Variation of Sentence
England and Wales Crown Court	Judge and Jury(exceptions)	None	None	A.G. may refer point of law arising in a case to the Court of Appeal	Ruling on question of law only
Fiji Supreme Court	Judge with 3 assessors	None	None	None	None
Guyana High Court	Judge and Jury	None	None	DPP may refer point of law arising in a case to Court of Appeal	Leave of court except where by A.G.

Jurisdiction & Court	Constitution of Court	Appeal Against Acquittal	Appeal Against Sentence	Moot Appeal	Powers of Court
India Sessions Court	Judge and Jury	On question of fact or law. Appeal to High Ct. by Public Prosecutor on question of fact or law with leave of court	Prosecutor to High Court on ground of inadequacy	None	Wide Powers
Lesotho	Judge (assessors poss.)	None	None unless mandatory sentence not imposed	Prosecutors on point of law to Court of Appeal	Imposition of mandatory sentence
New Zealand High Court	Judge and Jury	Prosecutor to Ct. of App. on point of law with leave of the High Court or Ct. of App.	Solicitor Gen. with leave of Ct. of App. on adequacy of sentence & Prosecutor on point of law as for acquittal	None	Retrial only in relation to acquittal wide powers in relation to sentence
Nigeria (All States) High Court	Judge Only (rare jury)	(1) AG or prescribed authority without leave to Fed. Ct.ofApp. on question of fact or law	as for acquittal	None	Wide powers
		(2) as provided by State law	as for acquittal	None	Wide powers

Jurisdiction & Court	Constitution of Court	Appeal Against Acquittal	Appeal Against Sentence	Moot Appeal	Powers of Court
Lagos High Court	Judge only (rare jury)	(1) Prosecutor as of right on a point of law (2) Prosecutor with leave of court on question of fact or mixed law and fact	As for acquittal	None	Wide Powers
Eastern States High Court	Judge only	Prosecutor as of right on a question of law	As for acquittal	None	Wide Powers
Western & Mid-Western States High Court	Judge only	DPP or any Prosecutor as of right to State Court of Appeal on a question of law	As for acquittal	None	Wide Powers

Jurisdiction & Court	Constitution of Court	Appeal Against Acquittal	Appeal Against Sentence	Moot Appeal	Powers of Court
Northern Nigeria High Court	Judge only	(a) Prosecutor to Federal Ct. of App. as of right on a question of law (b) Prosecutor with leave of court on a question of fact or fact and law	As for acquittal	None	Wide Powers
Sri Lanka High Court	Judge & jury	A.G. as of right on question of law	A.G. on ground of manifest inadequacy	None	Wide Powers
	Judge Only	A.G. as of right on question of law A.G. with leave of court on question of fact or fact and law			
St Lucia Supreme Court	Judge and jury	No appeal	No appeal	None	

Jurisdiction & Court	Constitution of Court	Appeal Against Acquittal	Appeal Against Sentence	Moot Appeal	Power of Courts
Trinidad and Tobago Supreme Court	Judge and Jury	No Appeal	No Appeal	A.G. may refer a question of law in a case to the Court of Appeal	
Uganda High Court	Judge (and 2 assessors)	None	None	None	

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