



# Criminal Procedure (Scotland) Act 1995

## 1995 CHAPTER 46

### PART VIII

#### APPEALS FROM SOLEMN PROCEEDINGS

##### 103 Appeal sittings.

- (1) The High Court shall hold both during session and during vacation such sittings as are necessary for the disposal of appeals and other proceedings under this Part of this Act.
- (2) Subject to subsection (3) below, for the purpose of hearing and determining any appeal or other proceeding under this Part of this Act three of the Lords Commissioners of Justiciary shall be a quorum of the High Court, and the determination of any question under this Part of this Act by the court shall be according to the votes of the majority of the members of the court sitting, including the presiding judge, and each judge so sitting shall be entitled to pronounce a separate opinion.
- (3) For the purpose of hearing and determining any appeal under section 106(1)(b) to (e) of this Act, or any proceeding connected therewith, two of the Lords Commissioners of Justiciary shall be a quorum of the High Court, and each judge shall be entitled to pronounce a separate opinion; but where the two Lords Commissioners of Justiciary are unable to reach agreement on the disposal of the appeal, or where they consider it appropriate, the appeal shall be heard and determined in accordance with [<sup>F1</sup>subsection (2)] above.
- (4) Subsections (1) [<sup>F2</sup>to (3)] above shall apply to cases certified to the High Court by a single judge of the said court and to appeals by way of advocacy in like manner as they apply to appeals under this Part of this Act.
- (5) The powers of the High Court under this Part of this Act—
  - (a) to extend the time within which intimation of intention to appeal and note of appeal may be given;
  - (b) to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave; and
  - (c) to admit an appellant to bail,

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may be exercised by any judge of the High Court, sitting and acting wherever convenient, in the same manner as they may be exercised by the High Court, and subject to the same provisions.

- (6) Where a judge acting under subsection (5) above refuses an application by an appellant to exercise under that subsection any power in his favour, the appellant shall be entitled to have the application determined by the High Court.
- (7) Subject to subsection (5) [<sup>F3</sup>and (6)] above and without prejudice to it, preliminary and interlocutory proceedings incidental to any appeal or application may be disposed of by a single judge.
- (8) In all proceedings before a judge under section (5) above, and in all preliminary and interlocutory proceedings and applications except such as are heard before the full court, the parties may be represented and appear by a solicitor alone.

#### Textual Amendments

- F1** Words in s. 103(3) substituted (1.8.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(13)(a)**; S.I. 1997/1712, art. 3, **Sch.** (subject to arts. 4, 5)
- F2** Words in s. 103(4) substituted (1.8.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(13)(b)**; S.I. 1997/1712, art. 3, **Sch.** (subject to arts. 4, 5)
- F3** Words in s. 103(7) inserted (1.8.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(13)(c)**; S.I. 1997/1712, art. 3, **Sch.** (subject to arts. 4, 5)

## 104 Power of High Court in appeals.

- (1) Without prejudice to any existing power of the High Court, it may for the purposes of an appeal under section 106(1) or 108 of this Act—
  - (a) order the production of any document or other thing connected with the proceedings;
  - (b) hear any <sup>F4</sup>... evidence relevant to any alleged miscarriage of justice or order such evidence to be heard by a judge of the High Court or by such other person as it may appoint for that purpose;
  - (c) take account of any circumstances relevant to the case which were not before the trial judge;
  - (d) remit to any fit person to enquire and report in regard to any matter or circumstance affecting the appeal;
  - (e) appoint a person with expert knowledge to act as assessor to the High Court in any case where it appears to the court that such expert knowledge is required for the proper determination of the case.
- (2) The evidence of any witnesses ordered to be examined before the High Court or before any judge of the High Court or other person appointed by the High Court shall be taken in accordance with the existing law and practice as to the taking of evidence in criminal trials in Scotland.
- (3) The appellant or applicant and the respondent or counsel on their behalf shall be entitled to be present at and take part in any examination of any witness to which this section relates.

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### Textual Amendments

- F4** Word in s. 104(1)(b) repealed (1.8.1997) by 1997 c. 48 , s. 62(1)(2) , Sch. 1 para. 21(14) , Sch. 3 ; S.I. 1997/1712 , art. 3 , Sch. (subject to arts. 4 , 5 )

## 105 Appeal against refusal of application.

- (1) When an application or applications have been dealt with by a judge of the High Court, under section 103(5) of this Act, the Clerk of Justiciary shall—
  - (a) notify to the applicant the decision in the form prescribed by Act of Adjournal or as nearly as may be in such form; and
  - (b) where all or any of such applications have been refused, forward to the applicant the prescribed form for completion and return forthwith if he desires to have the application or applications determined by the High Court as fully constituted for the hearing of appeals under this Part of this Act.
- (2) Where the applicant does not desire a determination as mentioned in subsection (1)(b) above, or does not return within five days to the Clerk the form duly completed by him, the refusal of his application or applications by the judge shall be final.
- (3) Where an applicant who desires a determination by the High Court as mentioned in subsection (1)(b) above—
  - (a) is not legally represented, he may be present at the hearing and determination by the High Court of the application;
  - (b) is legally represented, he shall not be entitled to be present without leave of the court.
- (4) When an applicant duly completes and returns to the Clerk of Justiciary within the prescribed time the form expressing a desire to be present at the hearing and determination by the court of the applications mentioned in this section, the form shall be deemed to be an application by the applicant for leave to be so present, and the Clerk of Justiciary, on receiving the form, shall take the necessary steps for placing the application before the court.
- (5) If the application to be present is refused by the court, the Clerk of Justiciary shall notify the applicant; and if the application is granted, he shall notify the applicant and the Governor of the prison where the applicant is in custody and the Secretary of State.
- (6) For the purpose of constituting a Court of Appeal, the judge who has refused any application may sit as a member of the court, and take part in determining the application.

VALID FROM 27/06/2003

### **[<sup>F5</sup>105A Appeal against granting of application**

- (1) Where the prosecutor desires a determination by the High Court as mentioned in subsection (6A) of section 103 of this Act, he shall apply to the judge immediately after the power in subsection (5)(c) of that section is exercised in favour of the appellant.

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- (2) Where a judge acting under section 103(5)(c) of this Act has exercised that power in favour of the appellant but the prosecutor has made an application under subsection (1) above—
- (a) the appellant shall not be liberated until the determination by the High Court; and
  - (b) that application by the prosecutor shall be heard not more than seven days after the making of the application,
- and the Clerk of the Justiciary shall forward to the appellant the prescribed form for completion and return forthwith if he desires to be present at the hearing.
- (3) At a hearing and determination as mentioned in subsection (2) above, if the appellant—
- (a) is not legally represented, he may be present;
  - (b) is legally represented, he shall not be entitled to be present without leave of the court.
- (4) If the appellant completes and returns the form mentioned in subsection (2) above indicating a desire to be present at the hearing, the form shall be deemed to be an application by the appellant for leave to be so present, and the Clerk of Justiciary, on receiving the form, shall take the necessary steps for placing the application before the court.
- (5) If the application to be present is refused by the court, the Clerk of Justiciary shall notify the appellant; and if the application is granted, he shall notify the appellant and the Governor of the prison where the applicant is in custody and the Scottish Ministers.
- (6) For the purposes of constituting a Court of Appeal, the judge who exercised the power in section 103(5)(c) of this Act in favour of the appellant may sit as a member of the court, and take part in determining the application of the prosecutor.]

#### Textual Amendments

- F5** S. 105A inserted (27.6.2003) by [Criminal Justice \(Scotland\) Act 2003 \(asp 7\)](#) , **ss. 66(4)** , 89 ; S.S.I. 2003/288 , **art. 2** , Sch.

## 106 Right of appeal.

- (1) Any person convicted on indictment may, with leave granted in accordance with section 107 of this Act, appeal in accordance with this Part of this Act, to the High Court—
- (a) against such conviction;
  - (b) subject to subsection (2) below, against the sentence passed on such conviction;
  - [<sup>F6</sup>(bb) against any decision not to exercise the power conferred by section 205A(3), [<sup>F7</sup>or 205B(3)] of this Act;]
  - (c) against his absolute discharge or admonition;
  - (d) against any probation order [<sup>F8</sup>, drug treatment and testing order] or any community service order;
  - [<sup>F9</sup>(da) against any decision to remit made under section 49(1)(a) of this Act;]

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- (e) against any order deferring sentence; or
  - (f) against both such conviction and, subject to subsection (2) below, such sentence or disposal or order.
- (2) There shall be no appeal against any sentence fixed by law.
- [<sup>F10</sup>(3) By an appeal under subsection (1) above a person may bring under review of the High Court any alleged miscarriage of justice, which may include such a miscarriage based on—
- (a) subject to subsections (3A) to (3D) below, the existence and significance of evidence which was not heard at the original proceedings; and
  - (b) the jury’s having returned a verdict which no reasonable jury, properly directed, could have returned.
- (3A) Evidence such as is mentioned in subsection (3)(a) above may found an appeal only where there is a reasonable explanation of why it was not so heard.
- (3B) Where the explanation referred to in subsection (3A) above or, as the case may be, (3C) below is that the evidence was not admissible at the time of the original proceedings, but is admissible at the time of the appeal, the court may admit that evidence if it appears to the court that it would be in the interests of justice to do so.
- (3C) Without prejudice to subsection (3A) above, where evidence such as is mentioned in paragraph (a) of subsection (3) above is evidence—
- (a) which is—
    - (i) from a person; or
    - (ii) of a statement (within the meaning of section 259(1) of this Act) by a person,  
who gave evidence at the original proceedings; and
  - (b) which is different from, or additional to, the evidence so given,  
it may not found an appeal unless there is a reasonable explanation as to why the evidence now sought to be adduced was not given by that person at those proceedings, which explanation is itself supported by independent evidence.
- (3D) For the purposes of subsection (3C) above, “independent evidence” means evidence which—
- (a) was not heard at the original proceedings;
  - (b) is from a source independent of the person referred to in subsection (3C) above; and
  - (c) is accepted by the court as being credible and reliable.]
- (4) Any document, production or other thing lodged in connection with the proceedings on the trial of any person who, if convicted, is entitled or may be authorised to appeal under this Part of this Act, shall, in accordance with subsections (5) to (9) below, be kept in the custody of the court in which the conviction took place.
- (5) All documents and other productions produced at the trial of a convicted person shall be kept in the custody of the court of trial in such manner as it may direct until any period allowed under or by virtue of this Part of this Act for lodging intimation of intention to appeal has elapsed.
- (6) Where no direction is given as mentioned in subsection (5) above, such custody shall be in the hands of the sheriff clerk of the district of the court of the second diet to

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whom the clerk of court shall hand them over at the close of the trial, unless otherwise ordered by the High Court on an intimation of intention to appeal being lodged, and if within such period there has been such lodgement under this Part of this Act, they shall be so kept until the appeal, if it is proceeded with, is determined.

- (7) Notwithstanding subsections (5) and (6) above, the judge of the court in which the conviction took place may, on cause shown, grant an order authorising any of such documents or productions to be released on such conditions as to custody and return as he may deem it proper to prescribe.
- (8) All such documents or other productions so retained in custody or released and returned shall, under supervision of the custodian thereof, be made available for inspection and for the purpose of making copies of documents or productions to a person who has lodged an intimation of intention to appeal or as the case may be, to the convicted person's counsel or agent, and to the Crown Agent and the procurator fiscal or his deputes.
- (9) Where no intimation of intention to appeal is lodged within the period mentioned in subsection (6) above, all such documents and productions shall be dealt with as they are dealt with according to the existing law and practice at the conclusion of a trial; and they shall be so dealt with if, there having been such intimation, the appeal is not proceeded with.

#### Textual Amendments

- F6** S. 106(1)(bb) inserted (20.10.1997) by 1997 c. 48, s. 18(1); S.I. 1997/2323, art. 3, Sch. 1
- F7** Words in s. 106(1)(bb) substituted (30.9.1998) by 1998 c. 37, s. 119, Sch. 8 para. 119; S.I. 1998/2327, art. 2(1)(y)(2)(kk)
- F8** Words in s. 106(1)(d) inserted (30.9.1998) by 1998 c. 37, s. 94(2), Sch. 6 Pt. II para. 5; S.I. 1998/2327, art. 2(1)(s)
- F9** S. 106(1)(da) inserted (1.8.1997) by 1997 c. 48, s. 23(b); S.I. 1997/1712, art. 3, Sch. (subject to arts. 4, 5)
- F10** S. 106(3)-(3D) substituted (1.8.1997) for s. 106(3) by 1997 c. 48, s. 17(1); S.I. 1997/1712, art. 3, Sch. (subject to arts. 4, 5)

#### Modifications etc. (not altering text)

- C1** S. 106 amended (1.4.1996) by 1995 c. 43, ss. 10(5), 50(2)  
S. 106 amended (24.3.2003) by Proceeds of Crime Act 2002 (c. 29), ss. 100(7), 458; S.S.I. 2003/210, art. 2 (with arts. 3-7)
- C2** S. 106 extended (19.2.2001) by 2000 c. 11, ss. 7(4)(b), 8(1)(c)(ii); S.I. 2001/421, art. 2  
S. 106 extended (11.3.2005) by Prevention of Terrorism Act 2005 (c. 2), s. 12(5)(c)

### [<sup>F11</sup>106A Appeal against automatic sentences where earlier conviction quashed.

- (1) This subsection applies where—
- a person has been sentenced under section 205A(2) of this Act;
  - he had, at the time at which the offence for which he was so sentenced was committed, only one previous conviction for a qualifying offence or a relevant offence within the meaning of that section; and
  - after he has been so sentenced, the conviction mentioned in paragraph (b) above has been quashed.
- (2) This subsection applies where—

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- (a) a person has been sentenced under section 205B(2) of this Act;
  - (b) he had, at the time at which the offence for which he was so sentenced was committed, only two previous convictions for class A drug trafficking offences within the meaning of that section; and
  - (c) after he has been so sentenced, one of the convictions mentioned in paragraph (b) above has been quashed.
- (3) Where subsection (1) or (2) above applies, the person may appeal under section 106(1)(b) of this Act against the sentence imposed on him under section 205A(2) or, as the case may be, 205B(2) of this Act.
- (4) An appeal under section 106(1)(b) of this Act by virtue of subsection (3) above—
- (a) may be made notwithstanding that the person has previously appealed under that section; and
  - (b) shall be lodged within two weeks of the quashing of the conviction as mentioned in subsection (1)(c) or, as the case may be, (2)(c) above.
- (5) Where an appeal is made under section 106(1)(b) by virtue of this section, the following provisions of this Act shall not apply in relation to such an appeal, namely—
- (a) section 121; and
  - (b) section 126.]

#### Textual Amendments

**F11** S. 106A inserted (20.10.1997 for specified purposes and otherwise prosp.) by 1997 c. 48 , **ss. 19(1)** , **65(2)** ; S.I. 1997/2323 , **art. 3** , **Sch. 1**

### 107 Leave to appeal.

- (1) The decision whether to grant leave to appeal for the purposes of section 106(1) of this Act shall be made by a judge of the High Court who shall—
- (a) if he considers that the documents mentioned in subsection (2) below disclose arguable grounds of appeal, grant leave to appeal and make such comments in writing as he considers appropriate; and
  - (b) in any other case—
    - (i) refuse leave to appeal and give reasons in writing for the refusal; and
    - (ii) where the appellant is on bail and the sentence imposed on his conviction is one of imprisonment, grant a warrant to apprehend and imprison him.
- (2) The documents referred to in subsection (1) above are—
- (a) the note of appeal lodged under section 110(1)(a) of this Act;
  - (b) in the case of an appeal against conviction or sentence in a sheriff court, the certified copy or, as the case may be, the record of the proceedings at the trial;
  - (c) where the judge who presided at the trial furnishes a report under section 113 of this Act, that report; and
  - (d) where, by virtue of section 94(1) of this Act, a transcript of the charge to the jury of the judge who presided at the trial is delivered to the Clerk of Justiciary, that transcript.

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- (3) A warrant granted under subsection (1)(b)(ii) above shall not take effect until the expiry of the period of 14 days mentioned in subsection (4) below without an application to the High Court for leave to appeal having been lodged by the appellant under that subsection.
- (4) Where leave to appeal is refused under subsection (1) above the appellant may, within 14 days of intimation under [<sup>F12</sup>subsection (10)] below, apply to the High Court for leave to appeal.
- (5) In deciding an application under subsection (4) above the High Court shall—
  - (a) if, after considering the documents mentioned in subsection (2) above and the reasons for the refusal, the court is of the opinion that there are arguable grounds of appeal, grant leave to appeal and make such comments in writing as the court considers appropriate; and
  - (b) in any other case—
    - (i) refuse leave to appeal and give reasons in writing for the refusal; and
    - (ii) where the appellant is on bail and the sentence imposed on his conviction is one of imprisonment, grant a warrant to apprehend and imprison him.
- (6) Consideration whether to grant leave to appeal under subsection (1) or (5) above shall take place in chambers without the parties being present.
- (7) Comments in writing made under subsection (1)(a) or (5)(a) above may, without prejudice to the generality of that provision, specify the arguable grounds of appeal (whether or not they are contained in the note of appeal) on the basis of which leave to appeal is granted.
- (8) Where the arguable grounds of appeal are specified by virtue of subsection (7) above it shall not, except by leave of the High Court on cause shown, be competent for the appellant to found any aspect of his appeal on any ground of appeal contained in the note of appeal but not so specified.
- (9) Any application by the appellant for the leave of the High Court under subsection (8) above—
  - (a) shall be made not less than seven days before the date fixed for the hearing of the appeal; and
  - (b) shall, not less than seven days before that date, be intimated by the appellant to the Crown Agent.
- (10) The Clerk of Justiciary shall forthwith intimate—
  - (a) a decision under subsection (1) or (5) above; and
  - (b) in the case of a refusal of leave to appeal, the reasons for the decision, to the appellant or his solicitor and to the Crown Agent.

#### **Textual Amendments**

**F12** Words in s. 107(4) substituted (1.8.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(15)**; S.I. 1997/1712, art. 3, **Sch.** (subject to arts. 4, 5)



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**Modifications etc. (not altering text)**

- C3** S. 107 applied (with modifications) (26.8.2002) by [Act of Adjournal \(Criminal Procedure Rules\) 1996 \(S.I. 1996/513\)](#), [rule 15.15\(4\)](#) (as inserted (26.8.2002) by [Act of Adjournal \(Criminal Appeals\) 2002 \(S.I. 2002/387\)](#), [para. 3\(4\)](#))

VALID FROM 28/03/2011

**[<sup>F13</sup>107A] Prosecutor's right of appeal: decisions on section 97 and 97A submissions**

- (1) The prosecutor may appeal to the High Court against—
  - (a) an acquittal under section 97 or 97B(2)(a), or
  - (b) a direction under section 97B(2)(b) or 97C(2).
- (2) If, immediately after an acquittal under section 97 or 97B(2)(a), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the acquittal under subsection (1), the court of first instance must grant the motion unless the court considers that there are no arguable grounds of appeal.
- (3) If, immediately after the giving of a direction under section 97B(2)(b) or 97C(2), the prosecutor moves for the trial diet to be adjourned for no more than 2 days in order to consider whether to appeal against the direction under subsection (1), the court of first instance must grant the motion unless the court considers that it would not be in the interests of justice to do so.
- (4) In considering whether it would be in the interests of justice to grant a motion for adjournment under subsection (3), the court must have regard, amongst other things, to—
  - (a) whether, if an appeal were to be made and to be successful, continuing with the diet would have any impact on any subsequent or continued prosecution,
  - (b) whether there are any arguable grounds of appeal.
- (5) An appeal may not be brought under subsection (1) unless the prosecutor intimates intention to appeal—
  - (a) immediately after the acquittal or, as the case may be, the giving of the direction,
  - (b) if a motion to adjourn the trial diet under subsection (2) or (3) is granted, immediately upon resumption of the diet, or
  - (c) if such a motion is refused, immediately after the refusal.
- (6) Subsection (7) applies if—
  - (a) the prosecutor intimates an intention to appeal under subsection (1)(a), or
  - (b) the trial diet is adjourned under subsection (2).
- (7) Where this subsection applies, the court of first instance must suspend the effect of the acquittal and may—
  - (a) make an order under section 4(2) of the Contempt of Court Act 1981 (c.49) (which gives a court power, in some circumstances, to order that publication of certain reports be postponed) as if proceedings for the offence of which the person was acquitted were pending or imminent,

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- (b) after giving the parties an opportunity of being heard, order the detention of the person in custody or admit him to bail.
- (8) The court may, under subsection (7)(b), order the detention of the person in custody only if the court considers that there are arguable grounds of appeal.

#### Textual Amendments

**F13** Ss. 107A-107F inserted (prosp.) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 74, 206(1)

VALID FROM 28/03/2011

#### 107B Prosecutor's right of appeal: decisions on admissibility of evidence

- (1) The prosecutor may appeal to the High Court against a finding, made after the jury is empanelled and before the close of the evidence for the prosecution, that evidence that the prosecution seeks to lead is inadmissible.
- (2) The appeal may be made only with the leave of the court of first instance, granted—
  - (a) on the motion of the prosecutor, or
  - (b) on that court's initiative.
- (3) Any motion for leave to appeal must be made before the close of the case for the prosecution.
- (4) In determining whether to grant leave to appeal the court must consider—
  - (a) whether there are arguable grounds of appeal, and
  - (b) what effect the finding has on the strength of the prosecutor's case.

#### Textual Amendments

**F13** Ss. 107A-107F inserted (prosp.) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), ss. 74, 206(1)

VALID FROM 28/03/2011

#### 107C Appeals under section 107A and 107B: general provisions

- (1) In an appeal brought under section 107A or 107B the High Court may review not only the acquittal, direction or finding appealed against but also any direction, finding, decision, determination or ruling in the proceedings at first instance if it has a bearing on the acquittal, direction or finding appealed against.
- (2) The test to be applied by the High Court in reviewing the acquittal, direction or finding appealed against is whether it was wrong in law.

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### Textual Amendments

**F13** Ss. 107A-107F inserted (prosp.) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss. 74, 206(1)

VALID FROM 28/03/2011

### 107D Expedited appeals

- (1) Subsection (2) applies where—
  - (a) the prosecutor intimates intention to appeal under section 107A or leave to appeal is granted by the court under section 107B, and
  - (b) the court is able to obtain confirmation from the Keeper of the Rolls that it would be practicable for the appeal to be heard and determined during an adjournment of the trial diet.
- (2) The court must inform both parties of that fact and, after hearing them, must decide whether or not the appeal is to be heard and determined during such an adjournment.
- (3) An appeal brought under section 107A or 107B which is heard and determined during such an adjournment is referred to in this Act as an “expedited appeal”.
- (4) If the court decides that the appeal is to be an expedited appeal the court must, pending the outcome of the appeal—
  - (a) adjourn the trial diet, and
  - (b) where the appeal is against an acquittal, suspend the effect of the acquittal.
- (5) Where the court cannot obtain from the Keeper of the Rolls confirmation of the kind mentioned in subsection (1)(b), the court must inform the parties of that fact.
- (6) Where the High Court in an expedited appeal determines that an acquittal of an offence libelled in the indictment was wrong in law it must quash the acquittal and direct that the trial is to proceed in respect of the offence.

### Textual Amendments

**F13** Ss. 107A-107F inserted (prosp.) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss. 74, 206(1)

VALID FROM 28/03/2011

### 107E Other appeals under section 107A: appeal against acquittal

- (1) This section applies where—
  - (a) an appeal brought under section 107A is not an expedited appeal,
  - (b) the appeal is against an acquittal, and
  - (c) the High Court determines that the acquittal was wrong in law.
- (2) The court must quash the acquittal.

**Status:** Point in time view as at 06/05/1999. This version of this part contains provisions that are not valid for this point in time.

**Changes to legislation:** *Criminal Procedure (Scotland) Act 1995, PART VIII is up to date with all changes known to be in force on or before 15 April 2024. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)*

- (3) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.
- (4) If—
- (a) no motion is made under subsection (3), or
  - (b) the High Court does not grant a motion made under that subsection,
- the High Court must in disposing of the appeal acquit the accused of the offence libelled in the indictment.

#### Textual Amendments

**F13** Ss. 107A-107F inserted (prosp.) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss. 74, 206(1)

VALID FROM 28/03/2011

#### **107F Other appeals under section 107A or 107B: appeal against directions etc.**

- (1) This section applies where—
- (a) an appeal brought under section 107A or 107B is not an expedited appeal, and
  - (b) the appeal is not against an acquittal.
- (2) The court of first instance must desert the diet *pro loco et tempore* in relation to any offence to which the appeal relates.
- (3) The trial is to proceed only if another offence of which the accused has not been acquitted and to which the appeal does not relate is libelled in the indictment.
- (4) However, if the prosecutor moves for the diet to be deserted *pro loco et tempore* in relation to such other offence, the court must grant the motion.
- (5) If the prosecutor seeks leave to bring a new prosecution charging the accused with the same offence as that libelled in the indictment, or a similar offence arising out of the same facts as the offence libelled in the indictment, the High Court must grant the prosecutor authority to do so in accordance with section 119, unless the court considers that it would be contrary to the interests of justice to do so.]

#### Textual Amendments

**F13** Ss. 107A-107F inserted (prosp.) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss. 74, 206(1)

*Status: Point in time view as at 06/05/1999. This version of this part contains provisions that are not valid for this point in time.*

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## [<sup>F14</sup>108 Lord Advocate’s right of appeal against disposal.

- (1) Where a person has been convicted on indictment, the Lord Advocate may, in accordance with subsection (2) below, appeal against any of the following disposals, namely—
- (a) a sentence passed on conviction;
  - (b) a decision under section 209(1)(b) of this Act not to make a supervised release order;
  - (c) a decision under section 234A(2) of this Act not to make a non-harassment order;
  - (d) a probation order;
  - [ a drug treatment and testing order;]
  - <sup>F15</sup>(dd) (e) a community service order;
  - (f) a decision to remit to the Principal Reporter made under section 49(1)(a) of this Act;
  - (g) an order deferring sentence;
  - (h) an admonition; or
  - (i) an absolute discharge.
- (2) An appeal under subsection (1) above may be made—
- (a) on a point of law;
  - (b) where it appears to the Lord Advocate, in relation to an appeal under—
    - (i) paragraph (a), (h) or (i) of that subsection, that the disposal was unduly lenient;
    - (ii) paragraph (b) or (c) of that subsection, that the decision not to make the order in question was inappropriate;
    - (iii) paragraph (d) [<sup>F16</sup>to] (e) of that subsection, that the making of the order concerned was unduly lenient or was on unduly lenient terms;
    - (iv) under paragraph (f) of that subsection, that the decision to remit was inappropriate;
    - (v) under paragraph (g) of that subsection, that the deferment of sentence was inappropriate or was on unduly lenient conditions.]

### Textual Amendments

**F14** S. 108 substituted (1.8.1997) by 1997 c. 48, s. 21(1); S.I. 1997/1712, art. 3, Sch. (subject to arts. 4, 5)

**F15** S. 108(1)(dd) inserted (30.9.1998) by 1998 c. 37, s. 94(2), Sch. 6 Pt. II para. 6(2); S.I. 1998/2327, art. 2(1)(s)

**F16** Word in s. 108(2)(b)(iii) substituted (30.9.1998) by 1998 c. 37, s. 94(2), Sch. 6 Pt. II para. 6(3); S.I. 1998/2327, art. 2(1)(s)

## [<sup>F17</sup>108A Lord Advocate’s appeal against decision not to impose automatic sentence in certain cases.

Where the court has exercised the power conferred by section or [<sup>F18</sup>or 205B(3)] of this Act, the Lord Advocate may appeal against that decision.]

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#### Textual Amendments

- F17** S. 108A inserted (20.10.1997 for specified purposes and otherwise prosp.) by 1997 c. 48 , s. 18(2) ; S.I. 1997/2323 , art. 3 , Sch. 1
- F18** Words in s. 108A substituted (30.9.1998) by 1998 c. 37 , s. 119 , Sch. 8 para. 120 ; S.I. 1998/2327 , art. 2(1)(y)(2)(kk)

### 109 Intimation of intention to appeal.

- (1) Subject to section 111(2) of this Act and to section 10 of the <sup>M1</sup>Proceeds of Crime (Scotland) Act 1995 (postponed confiscation orders), where a person desires to appeal under section 106(1)(a) or (f) of this Act, he shall within two weeks of the final determination of the proceedings, lodge with the Clerk of Justiciary written intimation of intention to appeal which shall identify the proceedings and be in as nearly as may be the form prescribed by Act of Adjournal.
- (2) A copy of intimation given under subsection (1) above shall be sent to the Crown Agent.
- (3) On intimation under subsection (1) above being lodged by a person in custody, the Clerk of Justiciary shall give notice of the intimation to the Secretary of State.
- (4) Subject to subsection (5) below, for the purposes of subsection (1) above and section 106(5) to (7) of this Act, proceedings shall be deemed finally determined on the day on which sentence is passed in open court.
- (5) Where in relation to an appeal under section 106(1)(a) of this Act sentence is deferred under section 202 of this Act, the proceedings shall be deemed finally determined on the day on which sentence is first so deferred in open court.
- (6) Without prejudice to section 10 of the said Act of 1995, the reference in subsection (4) above to “the day on which sentence is passed in open court” shall, in relation to any case in which, under subsection (1) of that section, a decision has been postponed for a period, be construed as a reference to the day on which that decision is made, whether or not a confiscation order is then made or any other sentence is then passed.

#### Modifications etc. (not altering text)

- C4** S. 109(1) restricted (1.4.1996) by 1995 c. 43 , ss. 10(4) , 50(2)

#### Marginal Citations

- M1** 1995 c.43.

### 110 Note of appeal.

- (1) Subject to section 111(2) of this Act—
  - (a) within six weeks of lodging intimation of intention to appeal or, in the case of an appeal under section 106(1)(b) to (e) of this Act, within two weeks of the [<sup>F19</sup>appropriate date (being, as the case may be, the date on which sentence was passed, the order disposing of the case was made, sentence was deferred or the previous conviction was quashed as mentioned in section 106A(1)(c) or (2)(c) of this Act)] in open court, the convicted person may lodge a written

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- note of appeal with the Clerk of Justiciary who shall send a copy to the judge who presided at the trial and to the Crown Agent; or, as the case may be,
- (b) within four weeks of the passing of the sentence in open court, the Lord Advocate may lodge such a note with the Clerk of Justiciary, who shall send a copy to the said judge and to the convicted person or that person's solicitor.
- (2) The period of six weeks mentioned in paragraph (a) of subsection (1) above may be extended, before it expires, by the Clerk of Justiciary.
- (3) A note of appeal shall—
- (a) identify the proceedings;
- (b) contain a full statement of all the grounds of appeal; and
- (c) be in as nearly as may be the form prescribed by Act of Adjournal.
- (4) Except by leave of the High Court on cause shown, it shall not be competent for an appellant to found any aspect of his appeal on a ground not contained in the note of appeal.
- (5) Subsection (4) above shall not apply as respects any ground of appeal specified as an arguable ground of appeal by virtue of subsection (7) of section 107 of this Act.
- (6) On a note of appeal under section 106(1)(b) to (e) of this Act being lodged by an appellant in custody the Clerk of Justiciary shall give notice of that fact to the Secretary of State.

#### **Textual Amendments**

**F19** Words in s. 110(1) substituted (20.10.1997) by 1997 c. 48 , s. 19(2) ; S.I. 1997/2323 , art. 3 , Sch. 1

### **111 Provisions supplementary to sections 109 and 110.**

- (1) Where the last day of any period mentioned in sections 109(1) and 110(1) of this Act falls on a day on which the office of the Clerk of Justiciary is closed, such period shall extend to and include the next day on which such office is open.
- (2) Any period mentioned in section 109(1) or 110(1)(a) of this Act may be extended at any time by the High Court in respect of any convicted person; and an application for such extension may be made under this subsection and shall be in as nearly as may be the form prescribed by Act of Adjournal.

### **112 Admission of appellant to bail.**

- (1) Subject to subsection (2) below, the High Court may, if it thinks fit, on the application of a convicted person, admit him to bail pending the determination of—
- (a) his appeal; or
- (b) any relevant appeal by the Lord Advocate under section 108 [F20 or 108A] of this Act.
- (2) The High Court shall not admit a convicted person to bail under subsection (1) above unless—
- (a) where he is the appellant and has not lodged a note of appeal in accordance with section 110(1)(a) of this Act, the application for bail states reasons why it should be granted and sets out the proposed grounds of appeal; or

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- (b) where the Lord Advocate is the appellant, the application for bail states reasons why it should be granted, and, in either case, the High Court considers there to be exceptional circumstances justifying admitting the convicted person to bail.
- (3) A person who is admitted to bail under subsection (1) above shall, unless the High Court otherwise directs, appear personally in court on the day or days fixed for the hearing of the appeal.
- (4) Where an appellant fails to appear personally in court as mentioned in subsection (3) above, the court may—
- (a) if he is the appellant—
    - (i) decline to consider the appeal; and
    - (ii) dismiss it summarily; or
  - (b) whether or not he is the appellant—
    - (i) consider and determine the appeal; or
    - (ii) without prejudice to section 27 of this Act, make such other order as the court thinks fit.
- (5) For the purposes of subsections (1), (3) and (4) above, “appellant” includes not only a person who has lodged a note of appeal but also one who has lodged an intimation of intention to appeal.
- [<sup>F21</sup>(6) Subject to subsection (7) below, the High Court may, if it thinks fit, on the application of a convicted person, admit him to bail pending the determination of any appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998 and the disposal of the proceedings by the High Court thereafter.
- (7) The High Court shall not admit a convicted person to bail under subsection (6) above unless the application for bail states reasons why it should be granted and the High Court considers there to be exceptional circumstances justifying admitting the convicted person to bail.
- (8) A person who is admitted to bail under subsection (6) above shall, unless the High Court otherwise directs, appear personally in the High Court at any subsequent hearing in the High Court in relation to the proceedings; and if he fails to do so the court may, without prejudice to section 27 of this Act, make such order as it thinks fit.]

#### Textual Amendments

- F20** Words in s. 112(1) inserted (20.10.1997) by 1997 c. 48 , s. 18(3) ; S.I. 1997/2323 , art. 3 , Sch. 1
- F21** S. 112(6)-(8) inserted (6.5.1999) by S.I. 1999/1042 , arts. 1(2)(a) , 3 , Sch. 1 Pt. I para. 13(2)

### 113 Judge’s report.

- (1) As soon as is reasonably practicable after receiving the copy note of appeal sent to him under section 110(1) of this Act, the judge who presided at the trial shall furnish the Clerk of Justiciary with a written report giving the judge’s opinion on the case generally and on the grounds contained in the note of appeal.
- (2) The Clerk of Justiciary shall send a copy of the judge’s report—
- (a) to the convicted person or his solicitor;



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- (b) to the Crown Agent; and
  - (c) in a case referred under [<sup>F22</sup>Part XA of this Act, to the Commission].
- (3) Where the judge's report is not furnished as mentioned in subsection (1) above, the High Court may call for the report to be furnished within such period as it may specify or, if it thinks fit, hear and determine the appeal without the report.
- (4) Subject to subsection (2) above, the report of the judge shall be available only to the High Court, the parties and, on such conditions as may be prescribed by Act of Adjournal, such other persons or classes of persons as may be so prescribed.

#### Textual Amendments

**F22** Words in s. 113(2)(c) substituted (1.4.1999) by 1997 c. 48 , s. 62(1) , **Sch. 1 para. 21(16)** ; S.I. 1999/652 , art. 2 , **Sch.** (subject to savings and transitional provisions in art. 3 )

#### Modifications etc. (not altering text)

**C5** S. 113(2)-(4) applied (26.8.2002) by Act of Adjournal (Criminal Procedure Rules) 1996 (S.I. 1996/513) , rule 15 .15(3) (as inserted (26.8.2002) by Act of Adjournal (Criminal Appeals) 2002 (S.S.I. 2002/387) , **para. 3(4)** )

VALID FROM 28/03/2011

#### [<sup>F23</sup>113A Judge's observations in expedited appeal

- (1) On receiving a note of appeal given under section 110(1)(e), the judge who presided at the trial may give the Clerk of Justiciary any written observations that the judge thinks fit on—
- (a) the case generally,
  - (b) the grounds contained in the note of appeal.
- (2) The High Court may hear and determine the appeal without any such written observations.
- (3) If written observations are given under subsection (1), the Clerk of Justiciary must give a copy of them to—
- (a) the accused or the accused's solicitor, and
  - (b) the prosecutor.
- (4) The written observations of the judge are available only to—
- (a) the High Court,
  - (b) the parties, and
  - (c) any other person or classes of person prescribed by Act of Adjournal, in accordance with any conditions prescribed by Act of Adjournal.]

#### Textual Amendments

**F23** S. 113A inserted (prosp.) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), **ss. 76(3)**, 206(1)

*Status: Point in time view as at 06/05/1999. This version of this part contains provisions that are not valid for this point in time.*

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#### **114 Applications made orally or in writing.**

Subject to any provision of this Part of this Act to the contrary, any application to the High Court may be made by the appellant or respondent as the case may be or by counsel on his behalf, orally or in writing.

#### **115 Presentation of appeal in writing.**

- (1) If an appellant, other than the Lord Advocate, desires to present his case and his argument in writing instead of orally he shall, at least four days before the diet fixed for the hearing of the appeal—
  - (a) intimate this desire to the Clerk of Justiciary;
  - (b) lodge with the Clerk of Justiciary three copies of his case and argument; and
  - (c) send a copy of the intimation, case and argument to the Crown Agent.
- (2) Any case or argument presented as mentioned in subsection (1) above shall be considered by the High Court.
- (3) Unless the High Court otherwise directs, the respondent shall not make a written reply to a case and argument presented as mentioned in subsection (1) above, but shall reply orally at the diet fixed for the hearing of the appeal.
- (4) Unless the High Court otherwise allows, an appellant who has presented his case and argument in writing shall not be entitled to submit in addition an oral argument to the court in support of the appeal.

#### **116 Abandonment of appeal.**

- (1) An appellant may abandon his appeal by lodging with the Clerk of Justiciary a notice of abandonment in as nearly as may be the form prescribed by Act of Adjournal; and on such notice being lodged the appeal shall be deemed to have been dismissed by the court.
- (2) A person who has appealed against both conviction and sentence (or, as the case may be, against [<sup>F24</sup>both conviction and a decision such as is mentioned in section 106(1)(bb) or] both conviction and disposal or order) may abandon the appeal in so far as it is against conviction and may proceed with it against sentence ([<sup>F25</sup>or, as the case may be, decision, disposal] or order) alone.

#### **Textual Amendments**

**F24** Words in s. 116(2) inserted (20.10.1997) by 1997 c. 48, s. 18(4)(a); S.I. 1997/2323, art. 3, Sch. 1

**F25** Words in s. 116(2) substituted (20.10.1997) by 1997 c. 48, s. 18(4)(b); S.I. 1997/2323, art. 3, Sch. 1

#### **117 Presence of appellant or applicant at hearing.**

- (1) Where an appellant or applicant is in custody the Clerk of Justiciary shall notify—
  - (a) the appellant or applicant;
  - (b) the Governor of the prison in which the appellant or applicant then is; and
  - (c) the Secretary of State,
 of the probable day on which the appeal or application will be heard.

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- (2) The Secretary of State shall take steps to transfer the appellant or applicant to a prison convenient for his appearance before the High Court at such reasonable time before the hearing as shall enable him to consult his legal adviser, if any.
- (3) A convicted appellant, notwithstanding that he is in custody, shall be entitled to be present if he desires it, at the hearing of his appeal.
- (4) When an appellant or applicant is to be present at any diet—
  - (a) before the High Court or any judge of that court; or
  - (b) for the taking of additional evidence before a person appointed for that purpose under section 104(1)(b) of this Act, or
  - (c) for an examination or investigation by a special commissioner in terms of section 104(1)(d) of this Act,the Clerk of Justiciary shall give timeous notice to the Secretary of State, in the form prescribed by Act of Adjournal or as nearly as may be in such form.
- (5) A notice under subsection (4) above shall be sufficient warrant to the Secretary of State for transmitting the appellant or applicant in custody from prison to the place where the diet mentioned in that subsection or any subsequent diet is to be held and for reconveying him to prison at the conclusion of such diet.
- (6) The appellant or applicant shall appear at any diet mentioned in subsection (4) above in ordinary civilian clothes.
- (7) Where the Lord Advocate is the appellant, subsections (1) to (6) above shall apply in respect of the convicted person, if in custody, as they apply to an appellant or applicant in custody.
- (8) The Secretary of State shall, on notice under subsection (4) above from the Clerk of Justiciary, ensure that sufficient male and female prison officers attend each sitting of the court, having regard to the list of appeals for the sitting.
- (9) When the High Court fixes the date for the hearing of an appeal, or of an application under section 111(2) of this Act, the Clerk of Justiciary shall give notice to the Crown Agent and to the solicitor of the convicted person, or to the convicted person himself if he has no known solicitor.

## **118 Disposal of appeals.**

- (1) The High Court may, subject to subsection (4) below, dispose of an appeal against conviction by—
  - (a) affirming the verdict of the trial court;
  - (b) setting aside the verdict of the trial court and either quashing the conviction or, subject to subsection (2) below, substituting therefor an amended verdict of guilty; or
  - (c) setting aside the verdict of the trial court and quashing the conviction and granting authority to bring a new prosecution in accordance with section 119 of this Act.
- (2) An amended verdict of guilty substituted under subsection (1) above must be one which could have been returned on the indictment before the trial court.

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- (3) In setting aside, under subsection (1) above, a verdict the High Court may quash any sentence imposed on the appellant (or, as the case may be, any disposal or order made) as respects the indictment, and—
- (a) in a case where it substitutes an amended verdict of guilty, whether or not the sentence (or disposal or order) related to the verdict set aside; or
  - (b) in any other case, where the sentence (or disposal or order) did not so relate, may pass another (but not more severe) sentence or make another (but not more severe) disposal or order in substitution for the sentence, disposal or order so quashed.

- (4) The High Court may, subject to subsection (5) below, dispose of an appeal against sentence by—

- (a) affirming such sentence; or
- (b) if the Court thinks that, having regard to all the circumstances, including any <sup>F26</sup> . . . evidence such as is mentioned in section 106(3) of this Act, a different sentence should have been passed, quashing the sentence and passing another sentence whether more or less severe in substitution therefor,

and, in this subsection, “appeal against sentence” shall, without prejudice to the generality of the expression, be construed as including an appeal under [<sup>F27</sup>section 106(1)(bb)] to (e), and any appeal under section 108, of this Act; and other references to sentence shall be construed accordingly.

- [<sup>F28</sup>(4A) On an appeal under section 108A of this Act, the High Court may dispose of the appeal—

- (a) by affirming the decision and any sentence or order passed;
- (b) where it is of the opinion mentioned in section 205A(3) or, as the case may be, 205B(3) of this Act but it considers that a different sentence or order should have been passed, by affirming the decision but quashing any sentence or order passed and passing another sentence or order whether more or less severe in substitution therefor; or
- (c) in any other case, by setting aside the decision appealed against and any sentence or order passed by the trial court and where the decision appealed against was taken under—
  - (i) subsection (3) of section 205A of this Act, by passing the sentence mentioned in subsection (2) of that section;
  - (ii) subsection (3) of section 205B of this Act, by passing a sentence of imprisonment of at least the length mentioned in subsection (2) of that section; or

<sup>F29</sup>(iii) . . . . .]

- (5) In relation to any appeal under section 106(1) of this Act, the High Court shall, where it appears to it that the appellant committed the act charged against him but that he was insane when he did so, dispose of the appeal by—

- (a) setting aside the verdict of the trial court and substituting therefor a verdict of acquittal on the ground of insanity; and
- (b) quashing any sentence imposed on the appellant (or disposal or order made) as respects the indictment and—
  - (i) making, in respect of the appellant, any order mentioned in section 57(2)(a) to (d) of this Act; or
  - (ii) making no order.

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- (6) Subsections (3) and (4) of section 57 of this Act shall apply to an order made under subsection (5)(b)(i) above as they apply to an order made under subsection (2) of that section.
- (7) In disposing of an appeal under section 106(1)(b) to (f) or 108 of this Act the High Court may, without prejudice to any other power in that regard, pronounce an opinion on the sentence or other disposal or order which is appropriate in any similar case.
- (8) No conviction, sentence, judgment, order of court or other proceeding whatsoever in or for the purposes of solemn proceedings under this Act—
- (a) shall be quashed for want of form; or
  - (b) where the accused had legal assistance in his defence, shall be suspended or set aside in respect of any objections to—
    - (i) the relevancy of the indictment, or the want of specification therein; or
    - (ii) the competency or admission or rejection of evidence at the trial in the inferior court,unless such objections were timeously stated.
- [<sup>F30</sup>(9) The High Court may give its reasons for the disposal of any appeal in writing without giving those reasons orally.]

#### Textual Amendments

- F26** S. 118(4)(b) repealed (1.8.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(17)(a)**; S.I. 1997/1712, art. 3, **Sch.** (subject to arts. 4, 5)
- F27** Words in s. 118(4) substituted (20.10.1997) by 1997 c. 48, s. 18(5)(a); S.I. 1997/2323, art. 3, **Sch. 1**
- F28** S. 118(4A) inserted (20.10.1997 for specified purposes and otherwise prosp.) by 1997 c. 48, s. 18(5)(b); S.I. 1997/2323, art. 3, **Sch. 1**
- F29** S. 118(4A)(c)(iii) repealed (30.9.1998) by 1998 c. 37, ss. 119, 120(2), Sch. 8 para. 121, **Sch. 10**; S.I. 1998/2327, art. 2(1)(y)(2)(kk)(3)(w)
- F30** S. 118(9) inserted (1.8.1997) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(17)(b)**; S.I. 1997/1712, art. 3, **Sch.** (subject to arts. 4, 5)

#### 119 Provision where High Court authorises new prosecution.

- (1) Subject to subsection (2) below, where authority is granted under section 118(1)(c) of this Act, a new prosecution may be brought charging the accused with the same or any similar offence arising out of the same facts; and the proceedings out of which the appeal arose shall not be a bar to such new prosecution.
- (2) In a new prosecution under this section the accused shall not be charged with an offence more serious than that of which he was convicted in the earlier proceedings.
- (3) No sentence may be passed on conviction under the new prosecution which could not have been passed on conviction under the earlier proceedings.
- (4) A new prosecution may be brought under this section, notwithstanding that any time limit, other than the time limit mentioned in subsection (5) below, for the commencement of such proceedings has elapsed.
- (5) Proceedings in a prosecution under this section shall be commenced within two months of the date on which authority to bring the prosecution was granted.

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- (6) In proceedings in a new prosecution under this section it shall, subject to subsection (7) below, be competent for either party to lead any evidence which it was competent for him to lead in the earlier proceedings.
- (7) The indictment in a new prosecution under this section shall identify any matters as respects which the prosecutor intends to lead evidence by virtue of subsection (6) above which would not have been competent but for that subsection.
- (8) For the purposes of subsection (5) above, proceedings shall be deemed to be commenced—
  - (a) in a case where a warrant to apprehend or to cite the accused is executed without unreasonable delay, on the date on which the warrant is granted; and
  - (b) in any other case, on the date on which the warrant is executed.
- (9) Where the two months mentioned in subsection (5) above elapse and no new prosecution has been brought under this section, the order under section 118(1)(c) of this Act setting aside the verdict shall have the effect, for all purposes, of an acquittal.
- (10) On granting authority under section 118(1)(c) of this Act to bring a new prosecution, the High Court shall, after giving the parties an opportunity of being heard, order the detention of the accused person in custody or admit him to bail.
- (11) Subsections (4)(b) and (7) to (9) of section 65 of this Act (prevention of delay in trials) shall apply to an accused person who is detained under subsection (10) above as they apply to an accused person detained by virtue of being committed until liberated in due course of law.

## **120 Appeals: supplementary provisions.**

- (1) Where—
  - (a) intimation of the diet appointed for the hearing of the appeal has been made to the appellant;
  - (b) no appearance is made by or on behalf of an appellant at the diet; and
  - (c) no case or argument in writing has been timeously lodged,
 the High Court shall dispose of the appeal as if it had been abandoned.
- (2) The power of the High Court to pass any sentence under this Part of this Act may be exercised notwithstanding that the appellant (or, where the Lord Advocate is the appellant, the convicted person) is for any reason not present.
- (3) When the High Court has heard and dealt with any application under this Part of this Act, the Clerk of Justiciary shall (unless it appears to him unnecessary so to do) give to the applicant if he is in custody and has not been present at the hearing of such application notice of the decision of the court in relation to the said application.
- (4) On the final determination of any appeal under this Part of this Act or of any matter under section 103(5) of this Act, the Clerk of Justiciary shall give notice of such determination—
  - (a) to the appellant or applicant if he is in custody and has not been present at such final determination;
  - (b) to the clerk of the court in which the conviction took place; and
  - (c) to the Secretary of State.

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## 121 Suspension of disqualification, forfeiture, etc.

- (1) Any disqualification, forfeiture or disability which attaches to a person by reason of a conviction shall not attach—
    - (a) for the period of four weeks from the date of the verdict against him; or
    - (b) where an intimation of intention to appeal or, in the case of an appeal under section 106(1)(b) to (e) [<sup>F31</sup>, 108 or 108A] of this Act, a note of appeal is lodged, until the appeal, if it is proceeded with, is determined.
  - (2) The destruction or forfeiture or any order for the destruction or forfeiture of any property, matter or thing which is the subject of or connected with any prosecution following upon a conviction shall be suspended—
    - (a) for the period of four weeks after the date of the verdict in the trial; or
    - (b) where an intimation of intention to appeal or, in the case of an appeal under section 106(1)(b) to (e) [<sup>F32</sup>, 108 or 108A] of this Act, a note of appeal is lodged, until the appeal, if it is proceeded with, is determined.
  - (3) This section does not apply in the case of any disqualification, destruction or forfeiture or order for destruction or forfeiture under or by virtue of any enactment which makes express provision for the suspension of the disqualification, destruction or forfeiture or order for destruction or forfeiture pending the determination of an appeal against conviction or sentence.
  - (4) Where, upon conviction, a fine has been imposed on a person or a compensation order has been made against him under section 249 of this Act, then, for a period of four weeks from the date of the verdict against such person or, in the event of an intimation of intention to appeal (or in the case of an appeal under section 106(1)(b) to (e) [<sup>F33</sup>, 108 or 108A] of this Act a note of appeal) being lodged under this Part of this Act, until such appeal, if it is proceeded with, is determined—
    - (a) the fine or compensation order shall not be enforced against that person and he shall not be liable to make any payment in respect of the fine or compensation order; and
    - (b) any money paid by that person under the compensation order shall not be paid by the clerk of court to the person entitled to it under subsection (9) of the said section 249.
- [<sup>F34</sup>(5) In this section—
- (a) “appeal” includes an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998; and
  - (b) in relation to such an appeal, references to an appeal being determined are to be read as references to the disposal of the proceedings by the High Court following determination of the appeal.]

### Textual Amendments

- F31** Words in s. 121(1)(b) substituted (20.10.1997) by 1997 c. 48, s. 18(6)(a); S.I. 1997/2323, art. 3, Sch. 1
- F32** Words in s. 121(2)(b) substituted (20.10.1997) by 1997 c. 48, s. 18(6)(b); S.I. 1997/2323, art. 3, Sch. 1
- F33** Words in s. 121(4) substituted (20.10.1997) by 1997 c. 48, s. 18(6)(c); S.I. 1997/2323, art. 3, Sch. 1
- F34** S. 121(5) inserted (6.5.1999) by S.I. 1999/1042, arts. 1(2)(a), 3, Sch. 1 Pt. I para. 13(3)

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### [<sup>F35</sup>121A Suspension of certain sentences pending determination of appeal.

- (1) Where an intimation of intention to appeal or, in the case of an appeal under section 106(1)(b) to (e), 108 or 108A of this Act, a note of appeal is lodged, the court may on the application of the appellant direct that the whole, or any remaining part, of a relevant sentence shall be suspended until the appeal, if it is proceeded with, is determined.
- (2) Where the court has directed the suspension of the whole or any remaining part of a person's relevant sentence, the person shall, unless the High Court otherwise directs, appear personally in court on the day or days fixed for the hearing of the appeal.
- (3) Where a person fails to appear personally in court as mentioned in subsection (2) above, the court may—
  - (a) if he is the appellant—
    - (i) decline to consider the appeal; and
    - (ii) dismiss it summarily; or
  - (b) whether or not he is the appellant—
    - (i) consider and determine the appeal; or
    - (ii) make such other order as the court thinks fit.
- (4) In this section “relevant sentence” means any one or more of the following—
  - (a) a probation order;
  - (b) a supervised attendance order made under section 236(6) of this Act;
  - (c) a community service order;
  - (d) a restriction of liberty order.]
- [<sup>F36</sup>(5) Subsections (1), (2) and (4) above apply to an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998 and, in relation to such an appeal—
  - (a) references to an appeal being determined are to be read as references to the disposal of the proceedings by the High Court following determination of the appeal; and
  - (b) the reference in subsection (2) to the hearing of the appeal is to be read as a reference to any subsequent hearing in the High Court in relation to the proceedings.
- (6) Where a person fails to appear personally in court as mentioned in subsection (2) as read with subsection (5) above, the court may make such order as it thinks fit.]

#### Textual Amendments

- F35** S. 121A inserted (1.8.1997 for specified purposes otherwise and 1.7.1998) by 1997 c. 48, s. 24(1); S.I. 1997/1712, art. 3, Sch. (subject to arts. 4, 5); S.I. 1997/2323, art. 5(1)
- F36** S. 121A(5)(6) inserted (6.5.1999) by S.I. 1999/1042, arts. 1(2)(a), 3, Sch. 1 Pt. 1 para. 13(4)

### 122 Fines and caution.

- (1) Where a person has on conviction been sentenced to payment of a fine and in default of payment to imprisonment, the person lawfully authorised to receive the fine shall, on receiving it, retain it until the determination of any appeal in relation to the conviction or sentence.



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- (2) If a person sentenced to payment of a fine remains in custody in default of payment of the fine he shall be deemed, for the purposes of this Part of this Act, to be a person sentenced to imprisonment.
- (3) An appellant who has been sentenced to the payment of a fine, and has paid it in accordance with the sentence, shall, in the event of his appeal being successful, be entitled, subject to any order of the High Court, to the return of the sum paid or any part of it.
- (4) A convicted person who has been sentenced to the payment of a fine and has duly paid it shall, if an appeal against sentence by the Lord Advocate [<sup>F37</sup> or any appeal by the Lord Advocate or the Advocate General for Scotland under paragraph 13(a) of Schedule 6 to the Scotland Act 1998] results in the sentence being quashed and no fine, or a lesser fine than that paid, being imposed, be entitled, subject to any order of the High Court, to the return of the sum paid or as the case may be to the return of the amount by which that sum exceeds the amount of the lesser fine.
- [<sup>F38</sup>(5) In subsections (1) and (3) above, “appeal” includes an appeal under paragraph 13(a) of Schedule 6 to the Scotland Act 1998.]

#### Textual Amendments

- F37** Words in s. 122(4) inserted (6.5.1999) by S.I. 1999/1042 , arts. 1(2)(a) , 3 , Sch. 1 Pt. I para. 13(5)(a)  
**F38** S. 122(5) inserted (6.5.1999) by S.I. 1999/1042 , arts. 1(2)(a) , 3 , Sch. 1 Pt. I para. 13(5)(b)

### 123 Lord Advocate’s reference.

- (1) Where a person tried on indictment is acquitted or convicted of a charge, the Lord Advocate may refer a point of law which has arisen in relation to that charge to the High Court for their opinion; and the Clerk of Justiciary shall send to the person and to any solicitor who acted for the person at the trial, a copy of the reference and intimation of the date fixed by the Court for a hearing.
- (2) The person may, not later than seven days before the date so fixed, intimate in writing to the Clerk of Justiciary and to the Lord Advocate either—
  - (a) that he elects to appear personally at the hearing; or
  - (b) that he elects to be represented thereat by counsel,but, except by leave of the Court on cause shown, and without prejudice to his right to attend, he shall not appear or be represented at the hearing other than by and in conformity with an election under this subsection.
- (3) Where there is no intimation under subsection (2)(b) above, the High Court shall appoint counsel to act at the hearing as *amicus curiae*.
- (4) The costs of representation elected under subsection (2)(b) above or of an appointment under subsection (3) above shall, after being taxed by the Auditor of the Court of Session, be paid by the Lord Advocate.
- (5) The opinion on the point referred under subsection (1) above shall not affect the acquittal or, as the case may be, conviction in the trial.

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**124 Finality of proceedings and Secretary of State’s reference.**

- (1) Nothing in this Part [F39 or Part XA] of this Act shall affect the prerogative of mercy.
- (2) Subject to [F40 Part XA of this Act][F41 and paragraph 13(a) of Schedule 6 to the Scotland Act 1998], every interlocutor and sentence pronounced by the High Court under this Part of this Act shall be final and conclusive and not subject to review by any court whatsoever and [F42, except for the purposes of an appeal under paragraph 13(a) of that Schedule,] it shall be incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part of this Act.

F43(3) .....

F43(4) .....

F43(5) .....

**Textual Amendments**

- F39** Words in s. 124(1) inserted (1.4.1999) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(18)(a)**; S.I. 1999/652, art. 2, **Sch.** (subject to savings and transitional provisions in art. 3)
- F40** Words in s. 124(2) substituted (1.4.1999) by 1997 c. 48, s. 62(1), **Sch. 1 para. 21(18)(b)**; S.I. 1999/652, art. 2, **Sch.** (subject to savings and transitional provisions in art. 3)
- F41** S. 124(2): By S.I. 1999/1042, arts. 1(2)(a), 3, **Sch. 1 Pt. I para. 13(6)(a)** it is provided (6.5.1999) that after “subsection (3) below” there is inserted “and paragraph 13(a) of Schedule 6 to the Scotland Act 1998”
- F42** Words in s. 124(2) inserted (6.5.1999) by S.I. 1999/1042, arts. 1(2)(a), 3, **Sch. 1 Pt. I para. 13(6)(b)**
- F43** S. 124(3)-(5) repealed (1.4.1999) by 1997 c. 48, s. 62(1)(2), **Sch. 1 para. 21(18)(c)**, **Sch. 3**; S.I. 1999/652, art. 2, **Sch.** Table (subject to savings and transitional provisions in art. 3)

**125 Reckoning of time spent pending appeal.**

- (1) Subject to subsection (2) below, where a convicted person is admitted to bail under section 112 of this Act, the period beginning with the date of his admission to bail and ending on the date of his readmission to prison in consequence of the determination or abandonment of—
  - (a) his appeal; or, as the case may be,
  - (b) any relevant appeal by the Lord Advocate under section 108 [F44 or 108A] of this Act,
 shall not be reckoned as part of any term of imprisonment under his sentence.
- (2) The time, including any period consequent on the recall of bail, during which an appellant is in custody pending the determination of his appeal or, as the case may be, of any relevant appeal by the Lord Advocate under section 108 [F45 or 108A] of this Act shall, subject to any direction which the High Court may give to the contrary, be reckoned as part of any term of imprisonment under his sentence.
- (3) Subject to any direction which the High Court may give to the contrary, imprisonment of an appellant or, where the appellant is the Lord Advocate, of a convicted person—
  - (a) who is in custody in consequence of the conviction or sentence appealed against, shall be deemed to run as from the date on which the sentence was passed;

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- (b) who is in custody other than in consequence of such conviction or sentence, shall be deemed to run or to be resumed as from the date on which his appeal was determined or abandoned;
  - (c) who is not in custody, shall be deemed to run or to be resumed as from the date on which he is received into prison under the sentence.
- (4) In this section references to a prison and imprisonment shall include respectively references to a young offenders institution or place of safety or, as respects a child sentenced to be detained under section 208 of this Act, the place directed by the Secretary of State and to detention in such institution, centre or place of safety, or, as respects such a child, place directed by the Secretary of State and any reference to a sentence shall be construed as a reference to a sentence passed by the court imposing sentence or by the High Court on appeal as the case may require.

#### Textual Amendments

**F44** Words in s. 125(1)(b) inserted (20.10.1997) by 1997 c. 48 , s. 18(7)(a) ; S.I. 1997/2323 , art. 3 , Sch. 1

**F45** Words in s. 125(2) inserted (20.10.1997) by 1997 c. 48 , s. 18(7)(b) ; S.I. 1997/2323 , art. 3 , Sch. 1

## 126 Extract convictions.

No extract conviction shall be issued—

- (a) during the period of four weeks after the day on which the conviction took place, except in so far as it is required as a warrant for the detention of the person convicted under any sentence which has been pronounced against him; nor
- (b) where an intimation of intention to appeal or, in the case of an appeal under section 106(1)(b) to (e) [<sup>F46</sup>, 108 or 108A]of this Act, a note of appeal is lodged, until the appeal, if it is proceeded with, is determined.

#### Textual Amendments

**F46** Words in s. 126(b) substituted (20.10.1997) by 1997 c. 48 , s. 18(8) ; S.I. 1997/2323 , art. 3 , Sch. 1

## 127 Forms in relation to appeals.

- (1) The Clerk of Justiciary shall furnish the necessary forms and instructions in relation to intimations of intention to appeal, notes of appeal or notices of application under this Part of this Act to—
  - (a) any person who demands them; and
  - (b) to officers of courts, governors of prisons, and such other officers or persons as he thinks fit.
- (2) The governor of a prison shall cause the forms and instructions mentioned in subsection (1) above to be placed at the disposal of prisoners desiring to appeal or to make any application under this Part of this Act.
- (3) The governor of a prison shall, if requested to do so by a prisoner, forwarded on the prisoner's behalf to the Clerk of Justiciary any intimation, note or notice mentioned in subsection (1) above given by the prisoner.

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## **128 Fees and expenses.**

Except as otherwise provided in this Part of this Act, no court fees, or other fees or expenses shall be exigible from or awarded against an appellant or applicant in respect of an appeal or application under this Part of this Act.

## **129 Non-compliance with certain provisions may be waived.**

(1) Non-compliance with—

- (a) the provisions of this Act set out in subsection (3) below; or
- (b) any rule of practice for the time being in force under this Part of this Act relating to appeals,

shall not prevent the further prosecution of an appeal if the High Court or a judge thereof considers it just and proper that the non-compliance is waived or, in the manner directed by the High Court or judge, remedied by amendment or otherwise.

(2) Where the High Court or a judge thereof directs that the non-compliance is to be remedied, and the remedy is carried out, the appeal shall proceed.

(3) The provisions of this Act referred to in subsection (1) above are:—

- section 94
- section 103(1), (4), (6) and (7)
- section 104(2) and (3)
- section 105
- section 106(4)
- section 111
- section 114
- section 115
- section 116
- section 117
- section 120(1), (3) and (4)
- section 121
- section 122
- section 126
- section 128.

(4) This section does not apply to any rule of practice relating to appeals under section 60 of this Act.

## **130 Bill of suspension not competent.**

It shall not be competent to appeal to the High Court by bill of suspension against any conviction, sentence, judgement or order pronounced in any proceedings on indictment in the sheriff court.

## **131 Prosecution appeal by bill of advocacy.**

(1) Without prejudice to section 74 of this Act, the prosecutor's right to bring a decision under review of the High Court by way of bill of advocacy in accordance with existing law and practice shall extend to the review of a decision of any court of solemn jurisdiction.

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- (2) Where a decision to which a bill of advocation relates is reversed on the review of the decision the prosecutor may, whether or not there has already been a trial diet at which evidence has been led, proceed against the accused by serving him with an indictment containing, subject to subsection (3) below, the charge or charges which were affected by the decision.
- (3) The wording of the charge or charges referred to in subsection (2) above shall be as it was immediately before the decision appealed against.

### **132 Interpretation of Part VIII.**

In this Part of this Act, unless the context otherwise requires—

“appellant” includes a person who has been convicted and desires to appeal under this Part of the Act;

“sentence” includes any order of the High Court made on conviction with reference to the person convicted or his wife or children, and any recommendation of the High Court as to the making of a deportation order in the case of a person convicted and the power of the High Court to pass a sentence includes a power to make any such order of the court or recommendation, and a recommendation so made by the High Court shall have the same effect for the purposes of Articles 20 and 21 of the Aliens Order 1953 as the certificate and recommendation of the convicting court.

**Status:**

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**Changes to legislation:**

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