



# Criminal Procedure (Scotland) Act 1995

## 1995 CHAPTER 46

### PART X

#### APPEALS FROM SUMMARY PROCEEDINGS

##### *Disposal of appeals*

#### **188 Setting aside conviction or sentence: prosecutor's consent or application.**

- (1) Without prejudice to section 175(3) or (4) of this Act, where—
  - (a) an appeal has been taken under section 175(2) of this Act or by suspension or otherwise and the prosecutor is not prepared to maintain the judgment appealed against he may, by a relevant minute, consent to the conviction or sentence or, as the case may be, conviction and sentence (“sentence” being construed in this section as including disposal or order) being set aside either in whole or in part; or
  - (b) no such appeal has been taken but the prosecutor is, at any time, not prepared to maintain the judgment on which a conviction is founded or the sentence imposed following such conviction he may, by a relevant minute, apply for the conviction or sentence or, as the case may be, conviction and sentence to be set aside.
- (2) For the purposes of subsection (1) above, a “relevant minute” is a minute, signed by the prosecutor—
  - (a) setting forth the grounds on which he is of the opinion that the judgment cannot be maintained; and
  - (b) written on the complaint or lodged with the clerk of court.
- (3) A copy of any minute under subsection (1) above shall be sent by the prosecutor to the convicted person or his solicitor and the clerk of court shall—
  - (a) thereupon ascertain and note on the record, whether that person or solicitor desires to be heard by the High Court before the appeal, or as the case may be application, is disposed of; and

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- (b) thereafter transmit the complaint and relative proceedings to the Clerk of Justiciary.
- (4) The Clerk of Justiciary, on receipt of a complaint and relative proceedings transmitted under subsection (3) above, shall lay them before any judge of the High Court either in court or in chambers who, after hearing parties if they desire to be heard, may—
  - (a) set aside the conviction or the sentence, or both, either in whole or in part and—
    - (i) award such expenses to the convicted person, both in the High Court and in the inferior court, as the judge may think fit;
    - (ii) where the conviction is set aside in part, pass another (but not more severe) sentence in substitution for the sentence imposed in respect of that conviction; and
    - (iii) where the sentence is set aside, pass another (but not more severe) sentence; or
  - (b) refuse to set aside the conviction or sentence or, as the case may be, conviction and sentence, in which case the complaint and proceedings shall be returned to the clerk of the inferior court.
- (5) Where an appeal has been taken and the complaint and proceedings in respect of that appeal returned under subsection (4)(b) above, the appellant shall be entitled to proceed with the appeal as if it had been marked on the date of their being received by the clerk of the inferior court on such return.
- (6) Where an appeal has been taken and a copy minute in respect of that appeal sent under subsection (3) above, the preparation of the draft stated case shall be delayed pending the decision of the High Court.
- (7) The period from an application being made under subsection (1)(b) above until its disposal under subsection (4) above (including the day of application and the day of disposal) shall, in relation to the conviction to which the application relates, be disregarded in any computation of time specified in any provision of this Part of this Act.

## **189 Disposal of appeal against sentence.**

- (1) An appeal against sentence by note of appeal shall be heard by the High Court on such date as it may fix, and the High Court may, subject to section 190(1) of this Act, dispose of such appeal by—
    - (a) affirming the sentence; or
    - (b) if the Court thinks that, having regard to all the circumstances, including any <sup>F1</sup> . . . evidence such as is mentioned in section 175(5) of this Act, a different sentence should have been passed, quashing the sentence and, subject to subsection (2) below, passing another sentence, whether more or less severe, in substitution therefor.
  - (2) In passing another sentence under subsection (1)(b) above, the Court shall not in any case increase the sentence beyond the maximum sentence which could have been passed by the inferior court.
- [F2(2A) The High Court may dispose of an appeal against a reference proposed under subsection (1) of section 10 of the Protection of Children (Scotland) Act 2003 (asp 5) by—

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- (a) dismissing the appeal and affirming such reference; or
  - (b) if it thinks—
    - (i) in a case to which subsection (3) of that section applies, that the court which is proposing to make the reference should not have been satisfied as to the condition mentioned in that subsection;
    - (ii) in a case to which subsection (4) of that section applies, that the court which is proposing to make the reference should have been satisfied as to the condition mentioned in that subsection,by directing the court not to make the reference.]
- (3) The High Court shall have power in an appeal by note of appeal to award such expenses both in the High Court and in the inferior court as it may think fit.
- (4) Where, following an appeal under section 175(2)(b) or (c), or by virtue of section 175(4), of this Act, the convicted person remains liable to imprisonment or detention under the sentence of the inferior court or is so liable under a sentence passed in the appeal proceedings, the High Court shall have power where at the time of disposal of the appeal the convicted person—
- (a) was at liberty on bail, to grant warrant to apprehend and imprison or detain the appellant for a term, to run from the date of such apprehension, not longer than that part of the term or terms of imprisonment or detention specified in the sentence brought under review which remained unexpired at the date of liberation; or
  - (b) is serving a term or terms of imprisonment or detention imposed in relation to a conviction subsequent to the conviction in respect of which the sentence appealed against was imposed, to exercise the like powers in regard to him as may be exercised, in relation to an appeal which has been abandoned, by a court of summary jurisdiction in pursuance of section 177(6) of this Act.
- (5) In subsection (1) above, “appeal against sentence” shall, without prejudice to the generality of the expression, be construed as including an appeal under section 175(2)(c), and any appeal by virtue of section 175(4), of this Act; and without prejudice to subsection (6) below, other references to sentence in that subsection and in subsection (4) above shall be construed accordingly.
- (6) In disposing of any appeal in a case where the accused has not been convicted, the High Court may proceed to convict him; and where it does, the reference in subsection (4) above to the conviction in respect of which the sentence appealed against was imposed shall be construed as a reference to the disposal or order appealed against.
- (7) In disposing of an appeal under section 175(2)(b) to (d), (3)(b) or (4) of this Act the High Court may, without prejudice to any other power in that regard, pronounce an opinion on
- [<sup>F3</sup>(a)] the sentence or other disposal or order which is appropriate in any similar case[<sup>F4</sup>; or, as the case may be,
  - (b) whether a reference is appropriate in any similar case.]

#### Textual Amendments

**F1** Word in s. 189(1)(b) repealed (1.8.1997) by 1997 c. 48, s. 62(1)(2), Sch. 1 para. 21(22), Sch. 3; S.I. 1997/1712, art. 3, Sch. (subject to arts. 4, 5)

**F2** S. 189(2A) inserted (10.1.2005) by Protection of Children (Scotland) Act 2003 (asp 5), ss. 16(10)(a), 22(2); S.S.I. 2004/522, art. 2 (as amended by S.S.I. 2004/556, art. 2)

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- F3** S. 189(7): words "become" para. (a) (10.1.2005) by virtue of [Protection of Children \(Scotland\) Act 2003 \(asp 5\)](#), **ss. 16(10)(b)**, 22(2); S.S.I. 2004/522, **art. 2** (as amended by S.S.I. 2004/556, art. 2)
- F4** S. 189(7)(b) and preceding words inserted (10.1.2005) by [Protection of Children \(Scotland\) Act 2003 \(asp 5\)](#), **ss. 16(10)(c)**, 22(2); S.S.I. 2004/522, **art. 2** (as amended by S.S.I. 2004/556, art. 2)

## **190 Disposal of appeal where appellant insane.**

- (1) In relation to any appeal under section 175(2) 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 inferior court and substituting therefor a verdict of acquittal on the ground of insanity; and
  - (b) quashing any sentence imposed on the appellant as respects the complaint 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.
- (2) [<sup>F5</sup>Subsections (3) to (6)] of section 57 of this Act shall apply to an order made under subsection (1)(b)(i) above as it applies to an order made under subsection (2) of that section.

### **Textual Amendments**

- F5** Words in s. 190(2) substituted (5.10.2005) by [Mental Health \(Care and Treatment\) \(Scotland\) Act 2003 \(asp 13\)](#), **ss. 331(1)**, 333(2)-(4), **Sch. 4 para. 8(12)**; S.S.I. 2005/161, **art. 3**

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