



# 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 [F<sup>1</sup>Sheriff Appeal 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 <sup>F2</sup>Clerk of the Sheriff Appeal Court].
- (4) The <sup>F3</sup>Clerk of the Sheriff Appeal Court], on receipt of a complaint and relative proceedings transmitted under subsection (3) above, shall lay them before any <sup>F4</sup>Appeal Sheriff] of the <sup>F5</sup>Sheriff Appeal 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 <sup>F5</sup>Sheriff Appeal Court] and in the inferior court, as the <sup>F4</sup>Appeal Sheriff] 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 <sup>F6</sup>Sheriff Appeal 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.

#### Textual Amendments

- F1** Words in s. 188(3)(a) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 17\(2\)](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F2** Words in s. 188(3)(b) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 17\(3\)](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F3** Words in s. 188(4) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 17\(3\)](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F4** Words in s. 188(4) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 17\(4\)](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F5** Words in s. 188(4) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 17\(2\)](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F6** Words in s. 188(6) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 17\(2\)](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)

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## 189 Disposal of appeal against sentence.

- (1) An appeal against sentence by note of appeal shall be heard by the [F7Sheriff Appeal Court] on such date as it may fix, and the [F7Sheriff Appeal 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 F8 . . . 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.

F9(2A) . . . . .

- (3) The [F10Sheriff Appeal Court] shall have power in an appeal by note of appeal to award such expenses both in the [F10Sheriff Appeal 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 [F11Sheriff Appeal 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) [F12or (cza)], 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 [F13Sheriff Appeal 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 [F14Sheriff Appeal Court] may, without prejudice to any other power in that regard, pronounce an opinion on
  - [F15(a)] the sentence or other disposal or order which is appropriate in any similar case; F16 ...

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<sup>F17</sup>(b) .....

#### Textual Amendments

- F7** Words in s. 189(1) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 18](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F8** 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)
- F9** S. 189(2A) repealed (28.2.2011) by [Protection of Vulnerable Groups \(Scotland\) Act 2007 \(asp 14\)](#), s. 101(2), [sch. 4 para. 25\(a\)](#) (with ss. 90, 99); S.S.I. 2011/157, art. 2(a) (with art. 5(1))
- F10** Words in s. 189(3) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 18](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F11** Words in s. 189(4) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 18](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F12** Words in s. 189(5) inserted (1.2.2011) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), ss. 14(2), 206(1), [Sch. 2 para. 15](#); S.S.I. 2010/413, art. 2, [Sch.](#) (with art. 3)
- F13** Words in s. 189(6) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 18](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F14** Words in s. 189(7) substituted (22.9.2015) by [Courts Reform \(Scotland\) Act 2014 \(asp 18\)](#), s. 138(2), [sch. 3 para. 18](#); S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F15** 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)
- F16** Words in s. 189(7)(a) repealed (28.2.2011) by [Protection of Vulnerable Groups \(Scotland\) Act 2007 \(asp 14\)](#), s. 101(2), [sch. 4 para. 25\(b\)\(i\)](#) (with ss. 90, 99); S.S.I. 2011/157, art. 2(a) (with art. 5(1))
- F17** S. 189(7)(b) repealed (28.2.2011) by [Protection of Vulnerable Groups \(Scotland\) Act 2007 \(asp 14\)](#), s. 101(2), [sch. 4 para. 25\(b\)\(ii\)](#) (with ss. 90, 99); S.S.I. 2011/157, art. 2(a) (with art. 5(1))

#### 190 Disposal of appeal where appellant [<sup>F18</sup>not criminally responsible].

- (1) In relation to any appeal under section 175(2) of this Act, the [<sup>F19</sup>Sheriff Appeal Court] shall, where it appears to it that the appellant committed the act charged against him but that he was [<sup>F20</sup>not, because of section 51A of this Act, criminally responsible for it], dispose of the appeal by—
- (a) setting aside the verdict of the inferior court and substituting therefor a verdict of acquittal [<sup>F21</sup>by reason of the special defence set out in section 51A of this Act]; 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>F22</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

- F18** Words in s. 190 heading substituted (with application in accordance with art. 3 of the commencing S.S.I.) by [Criminal Justice and Licensing \(Scotland\) Act 2010 \(asp 13\)](#), s. 206(1), [sch. 7 para. 57](#); S.S.I. 2012/160, art. 3, sch.

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- F19** Words in s. 190(1) substituted (22.9.2015) by Courts Reform (Scotland) Act 2014 (asp 18), s. 138(2), **sch. 3 para. 19**; S.S.I. 2015/247, art. 2, sch. (with art. 6)
- F20** Words in s. 190(1) substituted (with application in accordance with art. 3 of the commencing S.S.I.) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), s. 206(1), **sch. 7 para. 58(a)**; S.S.I. 2012/160, art. 3, sch.
- F21** Words in s. 190(1) substituted (with application in accordance with art. 3 of the commencing S.S.I.) by Criminal Justice and Licensing (Scotland) Act 2010 (asp 13), s. 206(1), **sch. 7 para. 58(b)**; S.S.I. 2012/160, art. 3, sch.
- F22** 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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