

Hon. Mr. Mason

## CRIMINAL APPEAL

### ANALYSIS

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### A BILL INTITULED

AN ACT to amend the Law relating to Appeals in Title.  
Criminal Cases.

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:—

1. This Act may be cited as the Criminal Appeal Act, 1945, and shall be read together with and deemed part of the Crimes Act, 1908 (hereinafter referred to as the principal Act).

Short Title.

See Reprint of Statutes, Vol. II, p. 132

Interpretation.  
Cf. 7 Edw. VII,  
c. 23, s. 21  
(Imp.); see  
Halsbury's  
Statutes of  
England,  
Vol. IV, p. 725  
See Reprint  
of Statutes,  
Vol. II, p. 78

Ibid., p. 96

Ibid., p. 401

Right of appeal  
against  
conviction or  
sentence.  
Cf. 7 Edw. VII,  
c. 23, s. 3 (Imp.)

Determination  
of appeals in  
ordinary cases.  
Ibid., s. 4  
(Imp.)

2. (1) In this Act, unless the context otherwise requires,—

“ Appellant ” includes a person who has been convicted and desires to appeal under this Act: 5

“ Court of Appeal ” means the Court of Appeal of New Zealand constituted under Part II of the Judicature Act, 1908:

“ Rules of Court ” means rules made under section three hundred and fifty-four of the principal Act, as affected by the Judicature Amendment Act, 1930: 10

“ Sentence ” includes any order of the Court made on conviction with reference to the person convicted or his wife or children; and the power of the Court of Appeal to pass a sentence includes a power to make any such order of the Court. 15

(2) For the purposes of this Act a committal to the Supreme Court for sentence under section one hundred and eighty-one of the Justices of the Peace Act, 1927, shall be deemed to be a conviction on indictment. 20

#### *Right of Appeal and Determination of Appeals*

3. Any person convicted on indictment of a crime may appeal under this Act to the Court of Appeal— 25

(a) Against his conviction on any ground of appeal which involves a question of law alone; and

(b) With the leave of the Court of Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal, against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court of Appeal to be a sufficient ground of appeal; and 30

(c) With the leave of the Court of Appeal, against the sentence passed on his conviction, unless the sentence is one fixed by law. 35

4. (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the 40

judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law, or that on any ground there was a miscarriage of justice, and in any other  
5 case shall dismiss the appeal:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial  
10 miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the Court of Appeal shall, if it allows an appeal against conviction, quash the conviction and in its discretion either direct a judgment and verdict of acquittal to be  
15 entered or direct a new trial.

(3) On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed and pass such other sentence warranted in law (whether more or  
20 less severe) in substitution therefor as the Court thinks ought to have been passed, and in any other case shall dismiss the appeal.

5. (1) If it appears to the Court of Appeal that an appellant, though not properly convicted on some count  
25 or part of the indictment, has been properly convicted on some other count or part of the indictment, the Court may either affirm the sentence passed on the appellant or pass such sentence in substitution therefor as it thinks proper and as may be warranted in law by the  
30 verdict on the count or part of the indictment on which the Court considers that the appellant has been properly convicted.

Powers of Court of Appeal in special cases.  
*Cf.* 7 Edw. VII, c. 23, s. 5 (Imp.)

(2) Where an appellant has been convicted of an offence and the jury could on the indictment have found  
35 him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the  
40 verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed as may be warranted in law for that other offence, not being a sentence of greater severity.

(3) Where on the conviction of the appellant the jury has found a special verdict, and the Court of Appeal considers that a wrong conclusion has been arrived at by the Court before which the appellant has been convicted on the effect of that verdict, the Court of Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court to be in law required by the verdict, and pass such sentence in substitution for the sentence passed as may be warranted in law. 5 10

(4) If on any appeal it appears to the Court of Appeal that the appellant was insane at the time of the commission of the offence and should have been acquitted on account of his insanity under section thirty-one of the Mental Defectives Act, 1911, the Court may quash the sentence passed and order the appellant to be kept in strict custody in such institution, prison, or place of confinement as to the Court seems fit, until the pleasure of the Minister of Justice is known, in the same manner as if he had been so acquitted. 15 20

See Reprint  
of Statutes,  
Vol. V, p. 756

Revesting and  
restitution of  
property on  
conviction.

*Cf.* 7 Edw. VII,  
c. 23, s. 6 (Imp.)

See Reprint  
of Statutes,  
Vol. VIII,  
p. 112

6. (1) The operation of any order for the restitution of any property to any person made on a conviction on indictment, and the operation, in case of any such conviction, of the provisions of subsection one of section twenty-six of the Sale of Goods Act, 1908, as to the revesting of the property in stolen goods on conviction shall (unless the Court before which the conviction takes place directs to the contrary in any case in which, in its opinion, the title to the property is not in dispute) be suspended— 25 30

(a) In any case until the expiration of *ten* days after the date of the conviction; and

(b) In cases where notice of appeal or leave to appeal is given within *ten* days after the date of conviction, until the determination of the appeal,— 35

and in cases where the operation of any such order or the operation of the said provisions is suspended until the determination of the appeal the order or provisions, as the case may be, shall not take effect as to the property in question if the conviction is quashed on appeal. Provision may be made by rules of Court for 40

securing the safe custody of any property, pending the suspension of the operation of any such order or of the said provisions.

- (2) The Court of Appeal may by order annul or vary any order made on a trial for the restitution of any property to any person, although the conviction is not quashed; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

### Procedure

- 10 7. (1) Where a person convicted desires to appeal under this Act to the Court of Appeal, or to obtain the leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by rules of Court  
15 within *ten* days of the date of conviction. The rules shall enable any convicted person to present his case and his argument in writing instead of by oral argument if he so desires. Any case or argument so presented shall be considered by the Court.

Time for appealing.  
Cf. 7 Edw. VII, c. 23, s. 7 (Imp.)

- 20 (2) The time within which notice of appeal or notice of an application for leave to appeal may be given may be extended at any time by the Court of Appeal.

- 25 8. (1) On any appeal or application for leave to appeal under this Act the Court before which the appellant was convicted shall, if it thinks necessary or if the Court of Appeal so desires, send to the Court of Appeal a copy of the whole or of such part as is material of the notes taken by the Judge presiding at the trial.

Judge's notes to be furnished on appeal.  
Cf. 7 Edw. VII, c. 23, s. 8 (Imp.);  
Cf. 1908, No. 32, s. 444 (N.Z.); see Reprint of Statutes, Vol. II, p. 326

- 30 (2) The Court of Appeal may, if it considers the notes defective, refer to such other evidence of what took place at the trial as it thinks fit.

- 35 9. For the purposes of this Act the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice,—

Supplemental powers of Court of Appeal.  
Cf. 7 Edw. VII, c. 23, s. 9 (Imp.)

- 40 (a) Order the production of any document, exhibit, or other thing connected with the proceedings the production of which appears to the Court to be necessary for the determination of the case:

- (b) If it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any Judge of the Court or before any officer of the Court or Magistrate or other person appointed by the Court of Appeal for the purpose, and allow the admission of any depositions so taken as evidence before the Court: 5
- (c) If it thinks fit, receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such an application: 15 20
- (d) Where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in manner provided by rules of Court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner so far as the Court thinks fit to adopt it: 25 30
- (e) Appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case,— 35

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court: 40

Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

10. The Court of Appeal may at any time assign to an appellant a solicitor and counsel, or counsel only, in any appeal or proceedings preliminary or incidental to an appeal in which, in the opinion of the Court, it appears desirable in the interests of justice that the appellant should have legal aid, and that he has not sufficient means to enable him to obtain that aid.

Legal assistance to appellant. Cf. 7 Edw. VII, c. 23, s. 10 (Imp.)

11. (1) An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of Court provide that he shall have the right to be present, or where the Court of Appeal gives him leave to be present.

Right of appellant to be present. Ibid., s. 11 (Imp.)

(2) The power of the Court of Appeal to pass any sentence under this Act may be exercised, notwithstanding that the appellant is for any reason not present.

12. It shall be the duty of the Solicitor-General to appear for the Crown on every appeal under this Act, except so far as any other counsel employed or engaged by the Crown, or a private prosecutor in the case of a private prosecution, undertakes the defence of the appeal, and provision shall be made by rules of Court for the transmission to the Solicitor-General of all such documents, exhibits, and other things connected with the proceedings as he may require for the purpose of his duties under this section.

Duty of Solicitor-General. Ibid., s. 12 (Imp.)

13. (1) On the hearing and determination of an appeal or any proceedings preliminary or incidental thereto under this Act no costs shall be allowed on either side.

Costs of appeal. Ibid., s. 13 (Imp.)

(2) The expenses of any solicitor or counsel assigned to an appellant under this Act, and the expenses of any witnesses attending on the order of the Court of Appeal or examined in any proceedings incidental to the appeal, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by

any person appointed by the Court for the purpose, or any reference of a question to a special commissioner appointed by the Court, or of any person appointed as assessor to the Court shall be defrayed, up to an amount allowed by the Court, but subject to any regulations as to rates and scales of payment, in the same manner as the expenses of a trial of a criminal case in the Supreme Court. 5

Admission of appellant to bail, and custody when attending trial.  
*Cf. 7 Edw. VII, c. 23, s. 14 (Imp.)*  
 See Reprint of Statutes, Vol. VI, p. 966

14. (1) An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by regulations under the Prisons Act, 1908. 10

(2) The Court of Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal. 15

(3) The time during which an appellant, pending the determination of his appeal, is admitted to bail and, subject to any directions which the Court of Appeal may give to the contrary on any appeal, the time during which the appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it is the sentence passed by the Supreme Court or the sentence passed by the Court of Appeal, shall, subject to any directions which may be given by the Court of Appeal as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence. 20 25 30

(4) Where a case is stated under section four hundred and forty-two or section four hundred and forty-three of the principal Act, this section shall apply to any person in relation to whose conviction the case is stated as it applies to an appellant. 35

(5) Provision shall be made by regulations under the Prisons Act, 1908, for the manner in which an appellant, when in custody, is to be brought to any place at which he is entitled to be present for the purposes of this Act, or to any place to which the Court of 40



Appeal or any Judge thereof may order him to be taken for the purpose of any proceedings of that Court, and for the manner in which he is to be kept in custody while absent from prison for the purpose; and an  
 5 appellant while in custody in accordance with those regulations shall be deemed to be in legal custody.

15 **15.** (1) The Registrar of the Court of Appeal shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications notice of which  
 20 is given to him under this Act, and shall obtain and lay before the Court in proper form all documents, exhibits, and other things connected with the proceedings in the Supreme Court which appear necessary for the proper  
 25 determination of the appeal or application.

30 (2) If it appears to the Registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the Registrar may refer the appeal to the Court of Appeal  
 35 for summary determination, and, where the case is so referred, the Court may, if it considers that the appeal is frivolous or vexatious and can be determined without adjourning it for a full hearing, dismiss the appeal summarily, without calling on any persons to attend the  
 40 hearing or to appear for the Crown thereon.

45 (3) Any documents, exhibits, or other things connected with the proceedings on the trial of any person on indictment who, if convicted, is entitled or may be authorized to appeal under this Act, shall be kept in  
 50 the custody of the Supreme Court in accordance with rules of Court made for the purpose, for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that  
 55 custody.

60 (4) The Registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Act to any person who demands them, and to officers of Courts, Gaolers, and  
 65 such other officers or persons as he thinks fit, and the Gaoler of every prison shall cause those forms and instructions to be placed at the disposal of prisoners

Duties of Registrar with respect to notices of appeal, &c.  
*Cf.* 7 Edw. VII. c. 23, s. 15 (Imp.)

desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the Registrar.

(5) The Registrar shall report to the Court of Appeal or some Judge thereof any case in which it appears to him that, although no application has been made for the purpose, a solicitor and counsel, or counsel only, ought to be assigned to an appellant under the powers given to the Court by this Act. 5 10

Powers which may be exercised by a Judge.  
Cf. 7 Edw. VII, c. 23, s. 17 (Imp.)

16. The powers of the Court of Appeal under this Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to assign legal aid to an appellant, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail may be exercised by any Judge of the Court of Appeal in the same manner as they may be exercised by the Court, and subject to the same provisions; but if the Judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court of Appeal as duly constituted for the hearing and determining of appeals under this Act. 15 20 25

*Miscellaneous*

Prerogative of mercy.  
Ibid., s. 19 (Imp.)

17. Nothing in this Act shall affect the prerogative of mercy or the provisions of section four hundred and forty-seven of the principal Act, but the Attorney-General, on the consideration of any application for the exercise of the mercy of the Crown having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either— 30 35

(a) Refer the whole case to the Court of Appeal, and the case shall then be heard and determined by the Court of Appeal as in the case of an appeal by a person convicted; or

5 (b) If he desires the assistance of the Court of Appeal on any point arising in the case with a view to the determination of the application, refer that point to the Court of Appeal for its opinion thereon, and the Court shall consider the point so referred and furnish the Attorney-General with its opinion thereon accordingly.

10 18. The judgment of the Court of Appeal on any appeal under this Act, or on any motion under section four hundred and forty-three of the principal Act, and the opinion of the Court of Appeal on any point referred to it under this Act, or on any question of law reserved under section four hundred and forty-two of the principal Act, shall be pronounced by the presiding Judge or such other member of the Court hearing the case as the presiding Judge directs, and no judgment with respect to the determination of any question shall be separately pronounced by any other member of the Court.

Judgment of Court of Appeal.  
*Cf.* 7 Edw. VII, c. 23, s. 1 (5) (Imp.)

20 19. (1) Section four hundred and forty-six of the principal Act and sections two and five of the Crimes Amendment Act, 1920, are hereby repealed.

Repeals and savings.  
See Reprint of Statutes, Vol. II, pp. 327, 343, 344

25 (2) All applications, motions, appeals, hearings, and generally all acts of authority that originated under any of the sections hereby repealed, and are subsisting or in force on the commencement of this Act, shall enure for the purposes of this Act as if they had originated under this Act, and accordingly shall, where necessary, be deemed to have so originated.

30 (3) All matters and proceedings that are pending or in progress under any of the sections hereby repealed on the commencement of this Act may be continued and completed under this Act.

35 (4) For the purposes of this section any application for a new trial under section four hundred and forty-six of the principal Act shall be deemed to be an appeal under this Act, and any leave granted under that section shall be deemed to have been granted by the Court of Appeal under this Act.