Crime and Punishment (Scotland) Act 1997

1997 CHAPTER 48

PART II S

CRIMINAL PROCEDURE

Appeals

17 Right of appeal. S

(1) In section 106 of the 1995 Act (right of appeal in solemn proceedings), for subsection (3) there shall be substituted the following subsections—

"(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—

Changes to legislation: *There are currently no known outstanding effects for the Crime and Punishment (Scotland) Act 1997, Cross Heading: Appeals. (See end of Document for details)*

(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.".

(2) In section 175 of the 1995 Act (right of appeal in summary proceedings), for subsection (5) there shall be substituted the following subsections—

"(5) By an appeal under subsection (2) above, an appellant may bring under review of the High Court any alleged miscarriage of justice which may include such a miscarriage based, subject to subsections (5A) to (5D) below, on the existence and significance of evidence which was not heard at the original proceedings.

(5A) Evidence which was not heard at the original proceedings may found an appeal only where there is a reasonable explanation of why it was not so heard.

(5B) Where the explanation referred to in subsection (5A) above or, as the case may be, (5C) 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.

(5C) Without prejudice to subsection (5A) above, where evidence such as is mentioned in paragraph (a) of subsection (5) 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.

(5D) For the purposes of subsection (5C) 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 (5C) above; and

(c) is accepted by the court as being credible and reliable.

(5E) By an appeal against acquittal under subsection (3) above a prosecutor may bring under review of the High Court any alleged miscarriage of justice.".

18 Automatic sentences: jurisdiction and appeals. S

(1) In section 106(1) of the 1995 Act (right of appeal), after paragraph (b) there shall be inserted the following paragraph—

"(bb) against any decision not to exercise the power conferred by section 205A(3), 205B(3) or 209(1A) of this Act;".

(2) After section 108 of the 1995 Act, there shall be inserted the following section—

"**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 205A(3), 205B(3) or 209(1A) of this Act, the Lord Advocate may appeal against that decision."

(3) In section 112(1) of the 1995 Act (bail for appellants), in paragraph (b) after the words "section 108" there shall be inserted the words " or 108A ".

(4) In section 116(2) of the 1995 Act (abandonment of part of appeal)—

(a) after the word "against", in the second place where it occurs, there shall be inserted the words " both conviction and a decision such as is mentioned in section 106(1)(bb) or "; and

(b) for the words "or disposal" there shall be substituted the words " or, as the case may be, decision, disposal ".

(5) In section 118 of the 1995 Act (disposal of appeals)—

(a) in subsection (4), for the words "section 106(1)(c)" there shall be substituted the words " section 106(1)(bb) "; and

(b) after subsection (4) there shall be inserted the following subsection—

"(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

(iii) subsection (1A) of section 209 of this Act, by making a supervised release order as required by paragraph (a) of subsection (1) of that section.”.

(6) In section 121 of the 1995 Act (suspension of disqualification)—

(a) in paragraph (b) of subsection (1), for the words “or 108” there shall be substituted the words “ , 108 or 108A ”;

(b) in paragraph (b) of subsection (2), for the words “or 108” there shall be substituted the words “ , 108 or 108A ”;

(c) in subsection (4), for the words “or 108” there shall be substituted the words “ , 108 or 108A ”.

(7) In section 125 of the 1995 Act (reckoning of time spent pending appeal)—

(a) in paragraph (b) of subsection (1), after the words “section 108” there shall be inserted the words “ or 108A ”; and

(b) in subsection (2), after the words “section 108” there shall be inserted the words “ or 108A ”.

(8) In section 126 of the 1995 Act (extract convictions), in paragraph (b) for the words “or 108” there shall be substituted the words “ , 108 or 108A ”.

Commencement Information

I1 S. 18 partly in force; s. 18 not in force at Royal Assent see s. 65(2); s. 18 in force for certain purposes at 20.10.1997 by S.I. 1997/2323, art. 3, **Sch. 1**

19 Appeal against automatic sentence where earlier conviction quashed. S

(1) After section 106 of the 1995 Act (appeals), there shall be inserted the following section—

“106A Appeal against automatic sentences where earlier conviction quashed.

(1) This subsection applies where—

(a) a person has been sentenced under section 205A(2) of this Act;

(b) 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

(c) after he has been so sentenced, the conviction mentioned in paragraph (b) above has been quashed.

(2) This subsection applies where—

(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.".

(2) In section 110(1) of the 1995 Act (notes of appeal), in paragraph (a), for the words from "passing" to "sentence)" there shall be substituted the words " 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) ".

Commencement Information

I2 S. 19 partly in force; s. 19 not in force at Royal Assent see s. 65(2); s. 19 in force for certain purposes at 20.10.1997 by S.I. 1997/2323, art. 3, **Sch. 1**

[F1]20 Transfer of rights of appeal of deceased person. S

After section 303 of the 1995 Act there shall be inserted—

" Transfer of rights of appeal of deceased person

303A Transfer of rights of appeal of deceased person.

(1) Where a person convicted of an offence has died, any person may, subject to the provisions of this section, apply to the High Court for an order authorising him to institute or continue any appeal which could have been or has been instituted by the deceased.

(2) An application for an order under this section may be lodged with the Clerk of Justiciary within three months of the deceased's death or at such later time as the Court may, on cause shown, allow.

(3) Where the Commission makes a reference to the High Court under section 194B of this Act in respect of a person who is deceased, any application under this section must be made within one month of the reference.

(4) Where an application is made for an order under this section and the applicant—

(a) is an executor of the deceased; or

(b) otherwise appears to the Court to have a legitimate interest,

the Court shall make an order authorising the applicant to institute or continue any appeal which could have been instituted or continued by the deceased; and, subject to the provisions of this section, any such order may include such ancillary or supplementary provision as the Court thinks fit.

(5) The person in whose favour an order under this section is made shall from the date of the order be afforded the same rights to carry on the appeal as the deceased enjoyed at the time of his death and, in particular, where any time limit had begun to run against the deceased the person in whose favour an order has been made shall have the benefit of only that portion of the time limit which remained unexpired at the time of the death.

(6) In this section "appeal" includes any sort of application, whether at common law or under statute, for the review of any conviction, penalty or other order made in respect of the deceased in any criminal proceedings whatsoever.".

Textual Amendments

F1 S. 20 wholly in force at 1.4.1999; s. 20 not in force at Royal Assent see s. 65(2); s. 20 in force for certain purposes at 1.8.1997 by S.I. 1997/1712, art. 3, **Sch.** (with arts. 4, 5); s. 20 in force insofar as not already in force at 1.4.1999 by S.I. 1999/652, art. 2, **Sch.** (with art. 3)

21 Increased rights of appeal of prosecutor. S

(1) For section 108 of the 1995 Act there shall be substituted the following section—

"**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;

(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) or (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.”.

(2) For subsection (4) of section 175 of the 1995 Act there shall be substituted the following subsections—

“(4) The prosecutor in summary proceedings, in any class of case specified by order made by the Secretary of State, may, in accordance with subsection (4A) below, appeal to the High Court 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;

(e) a community service order;

(f) a decision to remit to the Principal Reporter made under section 49(1)(a) or (7)(b) of this Act;

(g) an order deferring sentence;

(h) an admonition; or

(i) an absolute discharge.

(4A) An appeal under subsection (4) 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) or (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.”.

22 Appeal by prosecutor against hospital orders etc. S

After section 60 of the 1995 Act there shall be inserted the following section—

"60A Appeal by prosecutor against hospital orders etc.

(1) This section applies where the court, in respect of a person charged or brought before it, has made—

(a) an order under any of paragraphs (a) to (d) of subsection (2) of section 57 of this Act or such a decision as is mentioned in paragraph (e) of that subsection; or

(b) a hospital order, guardianship order, restriction order or a hospital direction.

(2) Where this section applies, the prosecutor may appeal against any such order, decision or direction as is mentioned in subsection (1) above—

(a) if it appears to him that the order, decision or direction was inappropriate; or

(b) on a point of law,

and an appeal under this section shall be treated in the same manner as an appeal against sentence under section 108 of this Act.".

23 Appeals against orders under section 49 of the 1995 Act. S

It shall be competent for a convicted person or a prosecutor to appeal against a decision made under section 49 of the 1995 Act (reference or remit to children's hearing) to remit a case to the Principal Reporter and, accordingly—

(a) in section 49(4) of that Act, at the beginning there shall be inserted the words " Subject to any appeal against any decision to remit made under subsection (1)(a) above or (7)(b) below, ";

(b) in section 106(1) of that Act (right of appeal in solemn proceedings), after paragraph (d) there shall be inserted the following paragraph—

"(da) against any decision to remit made under section 49(1)(a) of this Act;"; and

(c) in subsection (2) of section 175 of that Act (right of appeal in summary proceedings), after paragraph (c) there shall be inserted the following paragraph—

"(ca) against any decision to remit made under section 49(1)(a) or (7)(b) of this Act;".

24 Suspension of certain sentences pending determination of appeal. S

(1) After section 121 of the 1995 Act, there shall be inserted the following section—

"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.".

(2) After section 193 of the 1995 Act, there shall be inserted the following section—

"**193A Suspension of certain sentences pending determination of appeal.**

(1) Where a convicted person or the prosecutor appeals to the High Court under section 175 of this Act, 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.".

Commencement Information

I3 S. 24 wholly in force at 1.7.1998; s. 24 not in force at Royal Assent see s. 65(2); s. 24 in force for certain purpose at 1.8.1997 by S.I. 1997/1712, art. 3, **Sch.** (with arts. 4, 5); s. 24 in force insofar as not already in force at 1.7.1998 by S.I. 1997/2323, **art. 5(1)**

Changes to legislation:
There are currently no known outstanding effects for the Crime and Punishment (Scotland) Act 1997, Cross Heading: Appeals.