

CRIMINAL JUSTICE ACT 2003

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 9: Prosecution Appeals

Section 57: Introduction

273. This section sets out certain basic criteria for a prosecution appeal under this Part of the Act. The right of appeal arises only in trials on indictment and lies to the Court of Appeal.
274. *Subsection (2)* sets out two further limitations on appeals under this Part. It prohibits the prosecution from appealing rulings on discharge of the jury and those rulings that may be appealed by the prosecution under other legislation, for example, appeals from preparatory hearings against rulings on admissibility of evidence and other points of law.
275. *Subsection (4)* provides that the prosecution must obtain leave to appeal, either from the judge or the Court of Appeal.

Section 58: General right of appeal

276. This section sets out the procedure that must be followed when the prosecution wishes to appeal against a terminating ruling. The section covers both rulings that are formally terminating and those that are de facto terminating in the sense that they are so fatal to the prosecution case that, in the absence of a right of appeal, the prosecution would offer no or no further evidence. It applies to rulings made at an applicable time during a trial (which is defined in *subsection (13)* as any time before the start of the judge's summing up to the jury).
277. By virtue of *subsection (4)*, following the ruling, the prosecution must either inform the court that it intends to appeal or request an adjournment to consider whether to appeal (*subsection (4)(a)*). If such an adjournment is requested, the judge has the discretion to grant it (*subsection (5)*) but that discretion will be exercised in accordance with rules of court or other guidance. It is likewise envisaged that the period of any adjournment will be specified in rules of court. Following such an adjournment the prosecution must advise the court whether or not it intends to appeal (*subsection (4)(b)*). Under *subsection (6)*, a ruling which affects more than one offence need not be appealed against insofar as it affects all the offences. It can be appealed against, if the prosecutor wishes, only insofar as it affects one or more of the offences.
278. *Subsections (3), (10) and (11)* provide that the judge's ruling has no effect while the prosecution follows the procedure in *subsection (4)* in order to consider whether to appeal or is pursuing an appeal.
279. It is only possible for the prosecutor to appeal under this section against a single ruling. However, under *subsection (7)*, where the ruling that is the subject of the appeal is a ruling of no case to answer the prosecutor may nominate other rulings that relate to the

offence that is the subject of the appeal, for the Court of Appeal to consider at the same time. These rulings will also be regarded as the subject of the appeal.

280. Where the prosecution fails to obtain leave to appeal or abandons the appeal, the prosecution must agree that an acquittal follow by virtue of subsections (8) and (9).

Section 59: Expedited and non-expedited appeals

281. This section provides two alternative appeal routes, an expedited (fast) route and a non-expedited (slower) route. The judge must determine which route the appeal will follow (subsection (1)). In the case of an expedited appeal the trial may be adjourned (subsection (2)). If the judge decides that the appeal should follow the non-expedited route he may either adjourn the proceedings or discharge the jury, if one has been sworn (subsection (3)). Subsection (4) gives both the judge and the Court of Appeal power to reverse a decision to expedite an appeal, thus transferring the case to the slower non-expedited route. If a decision is reversed under this subsection, the jury may be discharged.

Section 60: Continuation of proceedings for offences not affected by ruling

282. This provision deals with cases where the trial involves more than one offence but the appeal does not apply to all of those offences. Subsection (2) enables proceedings to continue in relation to any offence to which the appeal does not apply. A ruling may affect several offences and several defendants, but the prosecutor may only wish to appeal against the ruling insofar as it affects one or more of those offences or defendants. This section enables proceedings to continue, at the discretion of the trial judge, against any offences affected by the ruling but not by the appeal.

Section 61: Determination of appeal by Court of Appeal

283. This section sets out the powers of the Court of Appeal when determining a prosecution appeal. This needs to be read in conjunction with section 67.
284. Subsection (1) authorises the Court of Appeal to confirm, reverse or vary a ruling appealed against. The section is drafted to ensure that, after the Court of Appeal has ordered one or other of these disposals, it must then always make it clear what is to happen next in the case.
285. When the Court of Appeal confirms a ruling, subsection (3) and (7) provide that it must then order the acquittal of the defendant(s) for the offence(s) which are the subject of the appeal.
286. When the Court of Appeal reverses or varies a ruling, subsections (4) and (8) provide that it must *either* order a resumption of the Crown Court proceedings or a fresh trial, *or* order the acquittal of the defendant(s) for the offence(s) under appeal. By virtue of subsections (5) and (8), the Court of Appeal will only order the resumption of the Crown Court proceedings or a fresh trial where it considers it necessary in the interests of justice to do so.

Section 62: Right of appeal in respect of evidentiary rulings

287. This section provides that the prosecution may appeal either a single or two or more qualifying evidentiary rulings. Like the right of appeal in section 58 this right of appeal will only be available to the prosecution.
288. Subsection (2) defines a qualifying evidentiary ruling as one made by a judge in relation to a trial on indictment at any time before the opening of the case of the defence (defined in subsection (8)).

289. *Subsections (3) and (4)* limit the right of appeal to a qualifying ruling or rulings that relate to qualifying offences, regardless of whether the ruling also relates to other (non-qualifying) offences.
290. *Subsections (5), (6) and (7)* set out the procedure that must be followed when the prosecution is seeking to appeal against a single or two or more qualifying evidentiary rulings.
291. Before the opening of the case for the defence, the prosecution must inform the court that it intends to appeal and give details of the ruling or rulings and the offences, including the qualifying offences to which the appeal relates.
292. *Subsection (9)* makes clear that the term “evidentiary ruling” includes rulings that relate both to the admissibility and the exclusion of any prosecution evidence. It also defines a qualifying offence as one listed in Schedule 4.

Section 63: Condition that evidentiary ruling significantly weakens prosecution case

293. This section provides that leave to appeal a qualifying evidentiary ruling may not be given unless the judge or the Court of Appeal is satisfied that the relevant condition is met. This relevant condition is that a single ruling (or two or more rulings taken together) significantly weakens the prosecution case in relation to the offence or offences that are the subject of the appeal.

Section 64: Expedited and non-expedited appeals

294. As in the case of appeals against terminating rulings this section provides two alternative appeal routes for appeals against evidentiary rulings, an expedited (fast) route and a non-expedited (slower) route.

Section 65: Continuation of proceedings for offences not affected by ruling

295. This provision deals with cases where the trial involves more than one offence but the appeal does not apply to all of them. Subsection (2) enables proceedings to continue in relation to any offence to which the appeal does not apply.

Section 66: Determination of appeal by Court of Appeal

296. This section sets out the powers of the Court of Appeal when determining a prosecution appeal against an evidentiary ruling. This needs to be read in conjunction with section 67.
297. *Subsection (1)* authorises the Court of Appeal to confirm, reverse or vary a ruling appealed against. The section is drafted to ensure that, after the Court of Appeal has ordered one or other of these disposals, it must then always make it clear what is to happen next in the case.
298. When the Court of Appeal confirms, reverses or varies a ruling, *subsection (2)* provides that it must order a resumption of the Crown Court proceedings or a fresh trial, or order the acquittal of the defendant(s) for the offence(s) under appeal. By virtue of *subsection (3)*, the Court of Appeal may only order an acquittal if the prosecution has indicated that it does not intend to continue with the prosecution of that offence. This is intended to cater for the situation where the prosecution considers that effect of the ruling or rulings on the prosecution case is so damaging that they do not wish to proceed with the prosecution.

Section 67: Reversal of rulings

299. This section sets out the criteria that have to be satisfied before the Court of Appeal can overturn a judge's ruling. This applies to both the general right of appeal and appeals against evidentiary rulings.

Section 68: Appeals to the House of Lords

300. *Subsection (1)* amends section 33(1) of the Criminal Appeal Act 1968 to give both the prosecution and defence a right of appeal to the House of Lords from a decision by the Court of Appeal on a prosecution appeal against a ruling made under this Part of the Act.
301. *Subsection (2)* amends section 36 of the Criminal Appeal Act 1968 to prevent the Court of Appeal from granting bail to a defendant who is appealing, or is applying for leave to appeal, to the House of Lords from a Court of Appeal decision made under this Part of the Act. Bail will continue to be a matter for the trial court.

Section 69: Costs

302. *Subsections (2) and (3)* amend sections 16(4A) and 18 of the Prosecution of Offences Act 1985 to give the Court of Appeal power, on an appeal under this Part, to award costs to and against the defendant.

Section 70: Effect on time limits in relation to preliminary stages

303. Section 22 of the Prosecution of Offences Act 1985 enables overall and custody time limits to be set which apply during the preliminary stages of criminal proceedings, although not to the trial itself. If the prosecution were to appeal against a ruling made prior to the commencement of the trial, the time limits set under section 22 of the 1985 Act would continue to run pending the outcome of the appeal. *Section 70* addresses this problem by inserting a new subsection (6B) into section 22 of the 1985 Act. Subsection (6B) disapplies the overall time limit and the custody time limit for the period during which proceedings are adjourned pending a prosecution appeal under this Part of the Act.

Section 71: Restrictions on reporting

304. *Subsection (1)* contains a general prohibition on the reporting of appeals arising under this Part of the Act. This general prohibition is qualified by *subsections (7) and (8)* which provide that the restriction ends at the conclusion of the trial and does not apply to various matters including details of the court, the defendants, witnesses, legal representatives and the offences at issue.
305. *Subsections (2), (3) and (4)* give the judge, the Court of Appeal and the House of Lords respectively, power, by order, to lift the reporting restriction under *subsection (1)* either completely or to a specified extent. If the defendant(s) object to the making of such an order, such an order may only be made if it would be in the interests of justice to do so (*subsections (5) and (6)*).
306. *Subsection (10)* ensures that any other restrictions on the reporting of court proceedings are preserved.

Section 72: Offences in connection with reporting

307. *Section 72* sets out the summary offences created by the new reporting restrictions under *section 71* and the penalties which may be imposed on conviction. Prosecutions under this section may only be brought in England and Wales by or with the consent of the Attorney General or, where instituted in Northern Ireland, by or with the consent of the Attorney General for Northern Ireland or, after the Justice (Northern Ireland) Act 2002 comes into force, the Director of Public Prosecutions for Northern Ireland.

Section 73 Rules of court

308. This section makes clear that rules of court may be made governing the procedure to be followed. It is envisaged that these rules will address the time limits that will apply, and the powers of a single judge of the Court of Appeal, in respect of appeals under Part 9.

Section 74: Interpretation of Part 9

309. *Subsection (3)* prevents the same ruling from being appealed against more than once. *Subsection (4)* provides that where a ruling relates to more than one offence any appeal does not affect the ruling in relation to an offence that is not the subject of the appeal. *Subsection (5)* provides that two defendants charged jointly with the same offence are to be treated as charged with separate offences. This, when read in conjunction with, say, *section 58 (6)*, will mean that an appeal will be possible against a ruling so far as it relates to only one of the defendants.