

THE CRIMINAL JUSTICE ACT 2003

PROSECUTION APPEALS

“The vast majority of practitioners and commentators who have studied this area are firmly of the opinion that a prosecution appeal against the judge’s terminating, or de facto terminating, ruling is just, equitable and long overdue. It is a matter of serious concern that defendants have had a right of appeal against their conviction for almost a century while the prosecution has had no right to challenge a judge ordered acquittal, no matter how manifestly unjust such a ruling may be on rare occasions. These provisions will significantly increase public confidence in the administration of justice. I am proud to have had the privilege of taking them through the House.”

(Lord Goldsmith, Hansard 17th November 2003, col 1782, House of Lords)

PROSECUTION APPEALS

The New Law

Criminal Justice Act 2003, Part 9, sections 57 to 74.
Criminal Procedure Rules Part 66 ("CrPR Part 66")

Introduction

Part 9 of the CJA 2003 creates interlocutory prosecution rights of appeal to the Court of Appeal in respect of certain rulings ("termination rulings") made by a judge during a trial on indictment and rulings in respect of evidence.

The Act creates two procedural regimes. As at 4th April 2005 only those provisions relating to termination rulings have been brought into force (SI 2005/950). It is not known when/if the provisions relating to evidentiary rulings will be brought into force. The provisions apply only to those cases tried on indictment which have been committed, transferred or sent to the Crown Court on or after 4th April 2005.

GENERAL RIGHT OF APPEAL (SECTIONS 57 TO 61).

Section 58 creates a prosecution right to appeal rulings by a judge which have the effect of terminating or stopping the case (for eg, submission of no case to answer or application to stay the indictment as an abuse). The provisions apply to rulings made pre-trial or during the trial providing the ruling was made prior to the judge summing up (s58(13)) and appeal lies to the Court of Appeal.

The provisions do not apply (s58(8)) to any decision to

- a) discharge a jury; or
- b) a ruling from which an appeal lies to the Court of Appeal by virtue of any other enactment.

nor do they provide an appeal

- c) against a judge misdirecting the jury during the summing up; or
- d) against a jury acquittal resulting from an erroneous summing up.

The intention of these provisions is to restrict the right of appeal to terminating

rulings such as those which either terminates the case formally or which is so fatal to the prosecution case that it would lead to a decision to offer no evidence or no further evidence. This is because s58(8) of the Act requires the prosecution, as a condition of informing the Court that it intends to appeal a ruling, to inform the Court of its agreement that the Defendant should be acquitted of the offence which is the subject of the ruling appealed if leave to appeal is not obtained or the appeal is abandoned before it is determined by the Court of Appeal.

PROCEDURE

Following a ruling the prosecution must either inform the Court that it intends to appeal the ruling or request an adjournment to consider whether to appeal (s58(4)). Part 66.1 of the CrPR provides that the prosecution must decide immediately to appeal or to request an adjournment.

The trial judge should grant an adjournment to allow the prosecution time to consider their position unless it is in the interests of justice not to do so. (CrPR 66.2(3)). The adjournment will be to the next "business day" (CrPR 66.2(4)).

Leave to appeal is required

An appeal pursuant to s58 may be brought only with the leave of the trial judge or the Court of Appeal (s57(4)).

From the trial judge

Immediately following the ruling or adjournment, the prosecution must inform the judge that it intends to appeal and at the same time may apply orally for leave to appeal (CrPR 66.3(1)) and make representations as to whether the appeal should be expedited or not. The judge may hear representations from the Defendant but not an interested party (CrPR 66.4(2)). On the same day the judge must decide whether leave should be given or not (CrPR 66.3(3)). This time limit can be extended only if it is in the interests of justice to do so.

If leave to appeal is granted the judge must decide if the appeal should be

expedited (s59(1)). The judge must give his reasons in writing to the prosecution, Defendant and any other interested party (CrPR 66.4(4)).

From the Court of Appeal

If leave to appeal a ruling is refused by the trial judge or the prosecution does not apply to the trial judge for leave to appeal, the prosecutor may apply to the Court of Appeal. In that case, the prosecutor must serve written notice to the Court of Appeal before 5.00pm on the day that the prosecution informs the judge that it intends to appeal unless impracticable. Leave to appeal may be granted by the single judge (CrPR 66.11(1)(a)) and if refused the prosecution may seek to renew the application before the full Court by serving a notice of renewal (CrPR 66.13(1)).

The notice of renewal must be served within 7 business days of the day on which the single judge's decision was served on the party (CPR Part 66.13(2)). The Court of Appeal may extend this time either before it expires or after (CPR Part 66.13(3)).

If the notice of renewal is not served within the period or such extended period as granted by the Court of Appeal, the application shall be treated as refused by the court (CPR Part 66.13(5)).

Defendant's Response

The Defendant may serve a response to the notice of appeal or application for leave (CPR 66.6). After receiving a notice of appeal or application for leave, the Defendant if he wishes to oppose the appeal or application must serve his response. The defendant's response must be served on the next business day after the day on which the appeal or application is served on the Defendant, where the judge has decided that the appeal should be expedited and that decision has not been reversed. In any other case it must be served within 7 days. The Court of Appeal may extend the period of service either before or after it has expired.

The defendant's response must be served on the registrar, the Crown Court, the prosecutor and any interested party.

Expedited Appeals

If leave to appeal is granted for an expedited appeal the judge must issue a certificate and send it to the registrar of criminal appeals by 5.00pm on the day that the judge was informed of the prosecution's intention to appeal (CrPR 66.3(5)). If the prosecution can demonstrate that it is not practical to serve the application by 5.00pm, then it must be served by 5.00pm the next business day.

The judge or the Court of Appeal may subsequently reverse the decision to expedite the appeal (s59(4)). The prosecution or Defendant but not an interested party may invite the Court of Appeal to reverse the judge's decision to expedite the appeal. The application must be made after the notice of appeal or leave to appeal has been served on the registrar. The application must be in writing and served on all parties (CrPR 66.4(5)).

Non-expedited Appeals

In the case of a non-expedited appeal, the notice of appeal or application for leave to appeal must be served within 7 business days of the prosecution informing the judge that it intends to appeal the ruling (CrPR 66.5(2)(b)).

The Court of Appeal may extend the time limit for service before or after it expires, on application by the Prosecution (CrPR 66.5(3)).

What must the Application Contain?

- grounds of the appeal summarising any arguments to be put before the Court of Appeal and specifying any authorities relied upon;
- transcripts of the ruling;
- any skeleton arguments provided to the judge by the parties in respect of the issue which gave rise to the ruling;
- if the application is expedited, a copy of the reasons provided by the judge must be sent with the notice of appeal or application for leave (CrPR 66.5(4)).

Transcripts

As soon as reasonably practicable after the prosecution has informed the judge that it intends to appeal a ruling the Crown Court shall provide a transcript of the ruling which is the subject of the proposed appeal to the prosecution, defendant and any interested party (CrPR 66.2(5)).

Powers of the single judge

- the single judge may exercise in the same manner as the Court of Appeal the following powers (CPR Part 66.11(1)):
- to give leave to appeal;
- to reverse a decision of the judge that the appeal is expedited;
- to extend time for service of the notice of appeal or an application for leave;
- to extend time for service of the defendant's response;
- to direct that the defendant in custody be present at the hearing or the appeal or the application;
- to order the acquittal of the defendant, and where appropriate, his release from custody and order of payment of costs where the prosecution has served a notice of abandonment.

If the single judge exercises any power, the registrar must serve notice of that decision on all parties (CPR Part 66.11(3)).

Determination of the appeal by the Court of Appeal

The Court of Appeal has the power to confirm, reverse or vary any ruling to which the appeal relates.

The Court of Appeal can reverse a ruling only where it satisfied that the ruling was wrong in law, involved an error of law or principle or was not reasonable (s67).

Although the Act gives no guidance as to "not reasonable" the CPS have given guidance to prosecutors that this means "Wednesbury unreasonable" (see "CPS

Prosecution Rights of Appeal, www.cps.gov.uk/legal).

If the Court of Appeal reverses or varies the ruling the court must decide between three options:

- i) to order resumption of the Crown Court proceedings;
- ii) to order a fresh trial; or
- iii) to order the acquittal of the defendant for the offence(s) the subject of the appeal (s61(4)).

The Court of Appeal may only order a resumption of proceedings or a fresh trial if it is necessary in the interests of justice to do so (s61(5)).

Impact upon the trial of any application to appeal

If the appeal is to be expedited the judge may adjourn the trial (s59(2)).

If the appeal is not to be expedited the judge may adjourn the trial or discharge the jury if one has been sworn (s59(3)).

Proceedings may continue in respect of any offence which is not the subject of an appeal (s60(2)).

Where two or more defendants are charged jointly with the same offence, they are to be treated for the purposes of this Part of the Act as charged with separate offences (s74 (5)). Thus an appeal will be possible against a ruling so far as it relates to only one of the defendants.

How many times can the prosecutor appeal?

It appears that the effect of s58 is that the prosecution can make only one appeal against a ruling.

If a prosecutor has previously informed the Court of his intention to appeal a ruling (and regardless of whether the appeal was proceeded with), no further appeal can

lie against the same ruling (s74(3)).

Further, s58 (7) provides that where the ruling to be appealed is a ruling that there is no case to answer, the prosecution may at the same time that it informs the court that it intends to appeal that ruling, nominate one or more other rulings which have been made by the judge in relation to the trial on indictment and which relate to the offence or offences which are the subject of the appeal and that other ruling, or those other rulings, are also to be treated as the subject of the appeal.

Abandonment of the Appeal

An appeal or application for leave to appeal may be abandoned before it is heard by the Court of Appeal by serving notice on the registrar (CrPR Part 66.10).

Further Appeal by the Prosecution

With leave of the court, an appeal lies to the House of Lords from a decision by the Court of Appeal on a prosecution appeal against a ruling made under Part 9 of the 2003 Act. The procedure and time limits are set out at CrPR 66.17.

If leave to appeal is refused or the appeal is abandoned?

s58(8) of the Act requires the prosecution, as a condition of informing the Court that it intends to appeal a ruling, to inform the Court of its agreement that the Defendant should be acquitted of the offence which is the subject of the ruling appealed if leave to appeal is not obtained or the appeal is abandoned before it is determined by the Court of Appeal. Thus in the event of leave being refused or the appeal being abandoned, the trial judge, the single judge or the Court of Appeal should direct the Defendant be acquitted.

Custody Time Limits

Custody time limits do not apply where proceedings for an offence are adjourned pending the determination of an appeal (s70(2)). However, custody time limits resume after the appeal has been determined. We must ensure that all dates relating

to the appeal process are recorded accurately so that any custody time limit failures can be acted upon immediately.

Public Interest Immunity Rulings

If the prosecution is seeking leave or appealing against a ruling by the trial judge in relation to PII material, the material that is the subject of a public interest ruling in the notice of appeal or application for leave to appeal need not be described (CrPR 66.8(2)). The prosecution need not describe the category of material if it would have the effect of disclosing material which the prosecutor considers should not be disclosed (CrPR 66.8(3)). The prosecution need not serve notice of appeal or application for leave to appeal on the defendant or interested party if the fact that a public interest ruling has been made would have the effect of disclosing material which the prosecutor considers should not be disclosed (CrPR 66.8(4)).

Where the prosecution withholds the notice of appeal or application for leave and the public interest material from the defence and interested party, then such notice served on the registrar must be accompanied by a confidential annex indicating the reasons for the prosecution's decision (CrPR 66.8(5)). Where the prosecution does not serve a notice of appeal or application for leave to appeal to keep secret from the defence or interested party the fact that a public interest ruling was made, the defendant is not entitled to be present at the hearing unless otherwise directed by the Court of Appeal (CrPR 66.8(6)).

EVIDENTIARY RULINGS

The prosecution rights to appeal a trial judge's evidentiary rulings are provided by sections 62 to 66 of the CJA 2003. These provisions have not yet been brought into force and it is not known when they will be.

Which rulings can be appealed?

Section 62 provides that the prosecution may appeal against one or more "qualifying evidentiary rulings".

A ruling is a "qualifying ruling" if it is made by a judge in relation to a trial on indictment at any time (whether before or after the commencement of the trial) before the opening of the defence case (s62(2)). Clearly, pre-trial rulings could be "qualifying rulings".

Section 62(9) defines an "evidentiary ruling" as a ruling which relates to the admissibility or exclusion of any prosecution evidence.

A ruling must relate to a "qualifying offence". A "qualifying offence" is defined as an offence listed in Part 1 of Schedule 4 section 62(9).

Although there is no power to appeal against a "non-qualifying" offence, provided that the ruling relates to a "qualifying offence" an appeal can be made in relation to the "non-qualifying" offence at the same time as any appeal in relation to the "qualifying offence".

Where more than one ruling is appealed, each ruling must relate to at least one "qualifying offence".

When is the defence case "opened"?

The case for the defence opens when, after the conclusion of the prosecution

evidence, the earliest of the following events occurs-

- (a) evidence begins to be adduced by or on behalf of a defendant,
- (b) it is indicated to the court that no evidence will be adduced by or on behalf of a defendant,
- (c) a defendant's case is opened, as permitted by section 2 of the Criminal Procedure Act 1865 c. 18) (ie, an opening speech made on behalf of the Defendant).

Procedure

The prosecution must inform the Court that it intends to appeal against an evidentiary ruling before the Defence case is opened and must identify the ruling and the "qualifying offence(s)" (s62(5 - 7)). If it is the prosecution's intention to appeal against any evidentiary ruling(s) in relation to "non-qualifying offences", they must also be identified at the same time.

The precise procedure governing this type of appeal is not set down in the Act nor in the CrPR. It is anticipated that rules will be made if/when the provisions are brought into force.

Leave to appeal is required

Leave may be given by the trial judge or the Court of Appeal. Leave will only be granted if the judge or the Court of Appeal is satisfied that the ruling significantly weakens the prosecution case. Where there are two or more qualifying evidentiary rulings, then the rulings taken together must significantly weaken the prosecution case (s62(3)).

The Act does not define what "significantly weaken the prosecution case" means.

Impact upon trial of an appeal against an evidentiary ruling

When the prosecution properly indicates its intention to appeal an evidentiary ruling the judge must decide whether the appeal should be expedited or not.

The same principles apply to the judge in deciding whether or not to expedite an appeal in respect of an evidentiary ruling as they do under the general right of appeal. The court also has power to continue proceedings for an offence not affected by a ruling (s65).

The judge or the Court of Appeal can reverse a decision to expedite an appeal.

If the decision is that the appeal should not be expedited, the trial should be adjourned or the jury discharged if a jury has been sworn.

Determination by the Court of Appeal

The Court of Appeal may confirm, reverse or vary any ruling. As with the right general right of appeal, the Court of Appeal may not reverse a ruling unless:

- a) it was wrong in law; or
- b) the ruling involved an error of law or principle; or
- c) the ruling was a ruling that it was not reasonable for the judge to have made.

Unlike the general right of appeal, if leave to appeal is refused, or the appeal is abandoned, or the Court of Appeal confirms the ruling and the prosecution loses the appeal, the Court of Appeal must order the proceedings to continue or a fresh trial to take place. There is no interest of justice test to apply.

The Court of Appeal may only order the defendant to be acquitted if the prosecution has indicated that it does not intend to continue with the offence (s66(3)).

Impact on Other Charges

Charges which are not subject to an appeal can continue to be tried (s65(2)). In the event of the trial of other charges continuing (if any) consideration will have to be given to discharging the jury.

Impact upon Co-Defendants

As with the general right of appeal, where two or more defendants are charged jointly with the same offence, they are to be treated for the purposes of this Part of the Act as charged with separate offences (s74(5)). Thus an appeal will be possible against a ruling so far as it relates to only one of the defendants. However, where a ruling impacts upon one or more co-defendants the prosecution should ensure that they signify an intention to appeal as against each co-defendant affected by the ruling.

Reporting Restrictions

In relation to both the general right of appeal and appeals against evidentiary rulings, the Act (s71) imposes reporting restrictions. There are restrictions on reporting the proceedings associated with the appeal and the appeal itself, until after the conclusion of the trial, for obvious reasons. However, the judge, the Court of Appeal and the House of Lords have power, by order, to lift the reporting restriction either completely or to a specified extent. Any restrictions on reporting will cover reports in England and Wales, Scotland and Northern Ireland.

Contravention of any reporting restrictions will be a summary offence, which requires consent of the Attorney General, and carries a maximum penalty of a level 5 fine (s72).

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