

LAWS OF PITCAIRN, HENDERSON, DUCIE
AND OENO ISLANDS

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CHAPTER IV

**JUDICATURE (APPEALS IN CRIMINAL CASES)
ORDINANCE**

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**An ordinance to provide for appeals in criminal cases
from the judgments and orders of the Magistrate’s
Court and the Supreme Court**

No. 4 of 1999
No. 5 of 2000
No. 14 of 2000
No. 13 of 2002
No. 17 of 2002
No. 2 of 2003
No. 10 of 2003
No. 5 of 2004
No. 4 of 2010
No. 1 of 2016.

[15 June 2000]

PART I—PRELIMINARY

1. This ordinance may be cited as the *Judicature (Appeals in Criminal Cases) Ordinance*.

Citation.

2. In this ordinance, unless the context otherwise requires—

Interpretation.

“Court of Appeal” means the Pitcairn Court of Appeal [as constituted by section 49 of the Constitution of Pitcairn];

“Magistrate’s Court” means the Magistrate’s Court of Pitcairn, Henderson, Ducie and Oeno Islands established by section 10 of the *Judicature (Courts) Ordinance*;

cap. 2

“Supreme Court” means the Supreme Court of Pitcairn [as constituted by section 45 of the Constitution of Pitcairn].

(Amended by Ordinance No. 4 of 2010)

**PART II—APPEALS FROM THE
MAGISTRATE’S COURT**

3.—(1) Save as hereinafter provided, any person convicted on a trial held by the Magistrate’s Court may appeal to the Supreme Court against conviction or sentence or both.

Appeal to the Supreme Court.

(2) An appeal to the Supreme Court may be on a question of fact as well as on a question of law.

4. No appeal shall be allowed in the case of any accused person who has pleaded guilty and has been convicted on such plea by the Magistrate’s Court, except as to the extent or legality of the sentence.

No appeal on plea of guilty.

5.—(1) Every appeal shall be brought by notice in writing which shall be lodged with the Magistrate’s Court within 14 days after the date of the order or sentence appealed against.

Procedure on appeal.

(2) Such notice shall be signed or marked by the appellant or, if the appellant is represented by counsel, the notice may be signed by such counsel.

(3) Within 14 days of the filing of such notice of appeal, the appellant shall lodge with the Magistrate’s Court a memorandum of appeal.

(4) Every memorandum of appeal shall be signed or marked

by the appellant or signed by his or her counsel and shall contain particulars of the matters of law or of fact in regard to which the Magistrate's Court appealed from is alleged to have erred, and, except by leave of the Supreme Court, the appellant shall not be permitted on the hearing of the appeal, to rely on any ground of appeal other than those set forth in the memorandum:

Provided that nothing in this subsection shall restrict the power of the Supreme Court to make such order as the justice of the case may require.

(5) If a memorandum is not lodged within the time prescribed by subsection (3), the appeal shall be deemed to have been withdrawn but nothing in this subsection shall be deemed to limit or restrict the power of the Supreme Court to extend time.

(6) The Supreme Court shall have power to extend any time herein provided for the taking of any necessary step on appeal, as it may deem fit.

Appellant in prison.

6.—(1) If the appellant is in prison, he or she shall be deemed to have complied with the requirements of section 5 on giving to the officer in charge of the prison notice of intention to appeal and the particulars required to be included in the memorandum of appeal within the times prescribed by such section.

(2) Such officer shall forthwith record the date of receipt of such notice or memorandum and shall forward the same to the Registrar.

Documents to be sent to Registrar.

7. The Magistrate's Court shall transmit the notice and memorandum of appeal and the record of the case to the Registrar of the Supreme Court as soon as possible.

Summary rejection of appeal.

8.—(1) When a memorandum of appeal has been lodged, the Chief Justice shall peruse the same together with the record of the case and if he or she considers that there is not sufficient ground for interfering, may, notwithstanding the provisions of section 11, reject the appeal summarily:

Provided that no appeal shall be rejected summarily except in the case mentioned in subsection (2), unless the appellant or his or her counsel has had the opportunity of being heard in support of the same.

(2) Where an appeal is brought on the ground that the conviction is against the weight of evidence, or that the sentence is excessive, and it appears to the Chief Justice that the evidence is sufficient to support the conviction and that there is no material in the circumstances of the case which could raise a reasonable doubt whether the conviction was

right or lead to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing, be summarily rejected by an order of the Chief Justice certifying that he or she has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint.

(3) Whenever an appeal is summarily rejected notice of such rejection shall forthwith be given to the Public Prosecutor and to the appellant or his or her counsel.

9.—(1) If the Supreme Court does not dismiss the appeal summarily, the appeal shall be set down for hearing by the Registrar on a date to be fixed by the Registrar.

Fixing of appeal and presence of appellant.

(2) The appellant has no right to be present at the hearing of an appeal to the Supreme Court outside the Islands.

10. The order of the Registrar fixing the date of the appeal, together with a copy of the notice and memorandum of appeal, shall be served upon the Public Prosecutor, at the expense of the appellant not later than twenty-one clear days before the day fixed for the hearing.

Order of Registrar to be served on respondent.

11.—(1) After hearing the appellant or his or her counsel, if appearing, and the Public Prosecutor, if appearing, the Supreme Court may, if it considers that there is not sufficient ground for interfering, dismiss the appeal, or may —

Powers of Supreme Court.

- (a) in an appeal from a conviction —
 - (i) reverse the finding and sentence and acquit or discharge the accused, or order the accused to be retried on the same charge by a Court of competent jurisdiction, or commit the accused for trial on any other charge which appears to be disclosed by the evidence; or
 - (ii) alter the finding, maintaining the sentence or, with or without altering the finding, reduce or increase the sentence to any sentence which could have been imposed by the Magistrate's Court; or
 - (iii) with or without such reduction or increase and with or without altering the finding, alter the nature of the sentence;
- (b) in an appeal from any other order, alter or reverse such order and, in either case, make any amendment or any consequential or incidental order as to costs or otherwise that may appear just and proper.

(2) On any appeal the Supreme Court may exercise the same powers in relation to suspended sentences as are conferred on the Court of Appeal by section 41 of this ordinance.

Order of Supreme Court to be certified.

12.—(1) When a case is decided on appeal by the Supreme Court, it shall certify its judgment or order to the court by which the conviction, sentence or order appealed against was recorded or passed.

(2) The Court to which the Supreme Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the Supreme Court and, if necessary, the record shall be amended in accordance therewith.

Admission to bail or suspension of sentence pending appeal.

13.—(1) After the entering of an appeal by a person entitled to appeal, the Supreme Court or the Magistrate’s Court which convicted or sentenced such person, may order that he or she be released on bail with or without sureties or, if such person is not released on bail, shall, at the request of such person order that the execution of the sentence or order appealed against shall be suspended pending the hearing of the appeal. Section 16(2) of this ordinance shall apply to bonds taken under this subsection.

(2) An application for bail under this section may be heard in Chambers. In the Supreme Court such application shall be by motion served on the Public Prosecutor. In the Magistrate’s Court such application may be made without formal process on sufficient notice to the person who conducted the prosecution.

(3) Either party to a decision of the Magistrate’s Court under this section may appeal to the Supreme Court.

(4) If the appeal is ultimately dismissed and the original sentence confirmed or some other sentence of imprisonment [or sentence of home detention] substituted therefor, the time during which the appellant has been released on bail or during which the sentence has been suspended shall be excluded in computing the term of imprisonment [or term of home detention] to which he or she is finally sentenced.

(Amended by Ordinance No. 1 of 2016)

Further evidence.

14.—(1) In dealing with an appeal from the Magistrate’s Court, the Supreme Court, if it thinks additional evidence is necessary, shall record its reasons and may either take such evidence itself or direct it to be taken by the Magistrate’s Court.

(2) When the additional evidence is taken by the Magistrate’s Court, such court shall certify such evidence to the Supreme Court which shall thereupon proceed to dispose of the appeal.

(3) Unless the Supreme Court otherwise directs, the accused or his counsel shall be present when the additional evidence is taken.

(4) Evidence taken in pursuance of this section shall be taken as if it were taken at a trial before the Magistrate’s Court.

Reservation or points of law.

15. It shall be lawful for the Magistrate irrespective of

any appeal or whether a case is appealable or not to reserve for the consideration of the Supreme Court any point of law arising during any proceeding in the court or on which the said Magistrate may entertain a doubt as to the correctness of the decision. The question of law so reserved shall be stated in the form of a case prepared and signed by the Magistrate and such case shall be transmitted to the Registrar:

Provided that nothing herein contained shall exempt the Magistrate from giving his or her own judgment on such questions.

16.—(1) Whenever a case shall have been so reserved and stated by the Magistrate, the execution of the judgment shall be stayed until the decision of the Supreme Court has been delivered. Any person under detention shall be released on sufficient bail to be furnished before the Magistrate pending the consideration by the Supreme Court of any point reserved.

Cases reserved how dealt with.

(2) A bond taken under this section may contain such conditions, whether as to surrender of passport or otherwise, as may be expedient to ensure that the person released appears before the Magistrate's Court if so required.

17. The Supreme Court shall have power, if it thinks fit, to return the case for amendment and thereupon the same shall be amended accordingly and judgment shall be delivered after it shall have been so amended.

Cases may be sent back for amendment.

18. After the decision of the Supreme Court, the Magistrate shall cause the judgment of the Supreme Court to be enforced as if it were a judgment of the Magistrate's Court and as if the same had not been appealed against.

Judgment of appellate court how enforced.

19. When the Supreme Court has allowed costs of appeal, such costs, when taxed by the Registrar, shall be recovered by execution in the Magistrate's Court.

Costs of appeal how recovered.

20. Every appeal from the Magistrate's Court (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Abatement of appeals.

21.—(1) Any party to an appeal from the Magistrate's Court may appeal against the decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal on a matter of law (not including severity of sentence) but not on a matter of fact or mixed fact and law.

Appeals to Court of Appeal.

For the purposes of this section the expression "decision of the Supreme Court in its appellate jurisdiction" shall include a decision of that Court made in revision or on a case stated.

(2) On any such appeal, the Court of Appeal may, if it thinks that the judgment of the Magistrate's Court or of the

first appellate Court should be set aside or varied on the ground of a wrong decision on any question of law, make any order which the Magistrate's Court or the first appellate court could have made; or may remit the case, together with its judgment or order thereon, to the first appellate court or the Magistrate's Court for determination, whether or not by way of re-hearing, with such directions as the Court of Appeal may think necessary:

Provided that in the case of an appeal against conviction, if the Court of Appeal dismisses the appeal and confirms the conviction appealed against, it shall not (save as in subsection (3) provided) increase, reduce or alter the nature of the sentence imposed in respect of that conviction, whether by the Magistrate's Court or by the first appellate court, unless the Court of Appeal thinks that such sentence was an unlawful one or was passed in consequence of an error of law, in which case it may impose such sentence in substitution therefor as it thinks proper and as could have been imposed by the court of trial for the offence of which the appellant has been convicted.

(3) If it appears to the Court of Appeal that a party to an appeal, though not properly convicted on some count of the information, has been properly convicted on some other count of the information, the Court may, in respect of the count of the information on which the Court considers that the appellant has been properly convicted, either affirm the sentence passed by the Magistrate's Court or by the first appellate court, or pass such other sentence (whether more or less severe) in substitution therefor as it thinks proper and as could have been passed by the court of trial.

(4) Where a party to an appeal has been convicted of an offence and the Magistrate's Court or the first appellate court could on the information have found that person guilty of some other offence and, on the finding of the Magistrate's Court or of the first appellate court, it appears to the Court of Appeal that the court must have been satisfied of facts which proved that person guilty of that other offence, the Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the conviction entered by the Magistrate's Court or by the first appellate court a conviction of guilty of that other offence, and pass such sentence in substitution for the sentence passed by the Magistrate's Court or the first appellate court as could have been passed by the court of trial for that other offence, not being a sentence of greater severity.

(5) On any appeal brought under this section, the Court of Appeal may, notwithstanding that it may be 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 miscarriage of justice has occurred.

22. The [Supreme Court] may, in any case in which an appeal from a decision of the Supreme Court in its appellate jurisdiction to the Court of Appeal is filed, grant bail pending the hearing of such appeal. Section 16(2) of this ordinance shall apply to bonds taken under this section.

Admission to bail pending appeal.

(Amended by Ordinance No. 1 of 2016)

23. The Supreme Court may call for and examine the record of any criminal proceedings before the Magistrate's Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceedings of the Magistrate's Court.

Power of Supreme Court to call for records.

24.—(1) Where any ordinance authorises the revision by the Supreme Court of any proceedings in the Magistrate's Court, the Supreme Court may—

Powers of Supreme Court on revision.

- (a) in the case of an order of acquittal, reverse such order and direct that further inquiry be made or direct that the accused be retried;
- (b) in the case of a conviction, exercise any of the powers conferred on it as a court of appeal by sections 11, 13, and 14 of this ordinance and may enhance sentence;
- (c) in the case of any other order, alter or reverse such order.

(2) No order under this section shall be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by counsel.

(3) Where the sentence dealt with under this section has been passed by the Magistrate's Court, the Supreme Court shall not inflict a greater punishment for the offence which, in the opinion of the Supreme Court, the accused has committed than might have been inflicted by the court that imposed the sentence.

(4) Nothing in this section shall be deemed to authorise the Supreme Court to convert a finding of acquittal into one of conviction.

(5) Where an appeal lies from any finding, sentence or order and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed.

25. No party has any right to be heard either personally or by counsel before the Supreme Court when exercising its powers of revision:

Discretion of Court as to hearing parties.

Provided that such court may, if it thinks fit, when exercising such powers, hear any party either personally or by counsel, and that nothing in this section shall be deemed to affect section 24(2) of this ordinance.

Order on revision to be certified to lower court.

26. When a case is revised by the Supreme Court it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed and the court to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified and, if necessary, the record shall be amended in accordance therewith.

Case stated by the Magistrate's Court.

27. After hearing and determination by the Magistrate's Court of any summons, charge, information or complaint, either party to the proceedings before the Magistrate's Court may, if dissatisfied with the determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within thirty days after the determination to the Magistrate's Court to state and sign a case setting forth the facts and the grounds of such determination for the opinion thereon of the Supreme Court and such party (hereinafter called the "appellant") shall—

- (a) within fourteen days after receiving the case transmit the same to the Supreme Court; and
- (b) within thirty days after receiving the case serve a copy of the case so stated and signed on the other party to the proceedings in which the determination was given (hereinafter called "the respondent"):

Provided always that no application shall be made under this section by a prosecutor other than the Public Prosecutor without the previous consent in writing of the Public Prosecutor.

Recognizance to be taken.

28.—(1) The appellant, at the time of making such application and before the case shall be stated and delivered to the appellant by the Magistrate's Court, shall in every instance enter into a recognizance before the Magistrate's Court with or without surety or sureties and in such sum not exceeding \$500.00 as to the Magistrate's Court shall seem just, conditioned to prosecute without delay such appeal, and to submit to the judgment of the Supreme Court and to pay such costs as may be awarded by it; and before the appellant shall be entitled to have the case delivered, he or she shall pay to the Registrar of the Magistrate's Court the fees for and in respect of the case and recognizances and any other prescribed fees to which the Registrar shall be entitled.

(2) If the appellant is then in custody, the Court may liberate

the appellant upon the recognizance being further conditioned for his or her appearance before the Court within fourteen days after the judgment of the Supreme Court shall have been given to abide by such judgment unless the determination appealed against be reversed.

(3) If the appellant is ultimately sentenced to imprisonment, the time during which he or she is so released shall be excluded in computing the term of the sentence.

(4) Nothing in this section shall apply to an application for a case stated by or under the direction of the Public Prosecutor.

(5) Section 16(2) of this ordinance shall apply to bonds taken under this section

29. If the Magistrate's Court is of opinion that the application is merely frivolous or vexatious, it may refuse to state a case and shall, on the request of the appellant, sign and deliver to him a certificate of such refusal:

Refusal of frivolous application.

Provided that the Magistrate's Court shall not refuse to state a case when the application for that purpose is made by or under the direction of the Public Prosecutor who may require a case to be stated with reference to proceedings to which the Public Prosecutor was not a party.

30. When the Magistrate's Court has refused to state a case as aforesaid, it shall be lawful for the appellant to apply to the Supreme Court within two months of such refusal, upon an affidavit of the facts, for a *rule nisi* calling upon the Magistrate's Court and also upon the respondent to show cause why such case should not be stated and the Supreme Court may make the same *absolute* or discharge it with or without payment of costs as to the Court shall seem fit and the Magistrate's Court, upon being served with such *rule absolute* shall state a case accordingly, upon the appellant entering into such recognizance as is hereinbefore provided.

Procedure on refusal of Court to state case.

31. The Supreme Court shall (subject to the provisions of section 32 of this ordinance) hear and determine the question or questions of law arising on the case stated and shall thereupon reverse, affirm or amend the determination in respect of which the case has been stated or remit the matter to the Magistrate's Court with the opinion of the Supreme Court thereon or may make such order as to costs as to the Court may seem fit and all such orders shall be final and conclusive on all parties:

Hearing and determination by the Supreme Court.

Provided always that no Magistrate who shall state and deliver a case in pursuance of this Part or *bona fide* refuse to state one shall be liable to any costs in respect or by reason of such appeal against his determination or refusal.

Case may be sent back for amendment or rehearing.

- 32.** The Supreme Court shall have power, if it thinks fit—
- (a) to cause the case to be sent back for amendment or restatement and thereupon the same shall be amended or restated accordingly and judgment shall be delivered after it has been so amended or restated;
 - (b) to remit the case to the Magistrate’s Court for rehearing and determination with such directions as it may deem necessary.

Appellant may not proceed both by case stated and by appeal.

33. No person who has appealed under section 3 of this ordinance shall be entitled to have a case stated and no person who has applied to have a case stated shall be entitled to appeal.

Contents of case stated.

- 34.** A case stated by the Magistrate’s Court shall set out—
- (a) the charge, summons, information or complaint;
 - (b) the facts found by the Magistrate’s Court to be admitted or proved;
 - (c) any submission of law made by or on behalf of the complainant during the trial or inquiry;
 - (d) any submission of law made by or on behalf of the accused during the trial or inquiry;
 - (e) the finding and, in case of conviction, the sentence of the Magistrate’s Court;
 - (f) any question or questions of law which the Magistrate’s Court or any of the parties may desire to be submitted for the opinion of the Supreme Court;
 - (g) any question or questions of law which the Public Prosecutor may require to be submitted for the opinion of the Supreme Court.

Supreme Court may enlarge time.

35. The Supreme Court may, if it deems fit, enlarge any period of time prescribed by sections 27, 28 or 30 of this ordinance.

**[PART IIA
GENERAL PROVISIONS AS TO APPEALS TO THE
COURT OF APPEAL**

Decisions about mode of hearing

- 35A.**—(1) An appeal or application for leave to appeal must be dealt with by way of a hearing involving oral submissions unless the Judge or Court making the decision on the mode of hearing determines, on the basis of the information contained in the notice of appeal, notice of application or other written material provided by the parties that the appeal or application—
- (a) can be fairly dealt with on the papers; and
 - (b) either has no realistic prospect of success or clearly should be allowed;
- (2) In determining whether an appeal or application can

be fairly dealt with on the papers, the Judge or Court may consider any matters relevant to the decision on the mode of hearing, including such matters as—

- (a) whether the appellant has been assisted by counsel in preparing the appeal or application;
- (b) whether the appellant has been provided with copies of the relevant trial documentation;
- (c) the gravity of the offence;
- (d) the nature and complexity of the issues raised by the appeal or application;
- (e) whether evidence should be called;
- (f) any relevant cultural or personal factors.

(3) A Judge of the Court of Appeal, acting alone, may make a decision about the mode of hearing a particular appeal or application but no Judge acting alone may reverse a decision on mode that has been made by the Court.

(4) The Court of Appeal may, at any time, either on its own initiative or on the application of any party, change the mode of hearing a particular appeal or application to an oral hearing, having regard to any written submissions made by the parties concerning the mode of hearing.

(5) The Court or Judge making the decision on the mode of hearing must apply section 35B (2) to (5) (with all necessary modifications) in the same way as the Court would apply them in determining an appeal or application for leave to appeal.

(6) Every decision about the mode of hearing an appeal or application must be in writing, be accompanied by reasons (unless the decision is that the hearing will be an oral hearing) and be provided by the Registrar to the parties.

35B.—(1) This section applies to appeals and applications for leave to appeal which are disposed of by the Court of Appeal by way of a hearing on the papers.

Hearings on the papers

(2) The parties to the appeal or application may make written but not oral submissions to the Court and may include in their submissions—

- (a) additional relevant written material; and
- (b) responses to any submissions made by the other party.

(3) Neither the parties nor their representatives may appear before the Court.

(4) The appeal or application must be determined by the Court on the basis of the written material before it.

(5) Consideration of the written material may be undertaken in whatever manner the Court thinks fit.

35C. The powers of the Court of Appeal to give leave

Certain powers exercisable by Judge of Court of Appeal

to appeal against conviction or sentence, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without leave, to issue a warrant for the detention of the accused pending a new trial and to grant bail to an appellant 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 or her favour, the appellant shall be entitled to have the application determined by the Court of Appeal.

Evidence for Court of Appeal

35D.—(1) On any appeal or application for leave to appeal under this ordinance, 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.

(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.]

(Inserted by Ordinance No. 17 of 2002)

PART III APPEALS FROM THE SUPREME COURT

[Applications for stay of proceedings]

Right of appeal against decision on application for stay

35DD.—(1) At any time before or during the course of any trial either the prosecutor or the accused person, with the leave of the Court of Appeal, may appeal to that Court against the decision of a Judge of the Supreme Court

- (a) to make or to refuse to make an order staying the proceedings on the ground of abuse of process or any other ground; or
- (b) to give or refuse to give any other interlocutory judgment having the effect of bringing the proceedings to an end.

(2) On any appeal under this section, the Court of Appeal may confirm the decision of the Judge or vary it or set it aside and make such other order as the Court of Appeal thinks ought to have been made by the Judge.

(3) For the purposes of an appeal under this section, the person seeking leave to appeal shall give notice of such application in such manner as may be directed by rules of Court (or, if there are none, in a form approved by the

Registrar) within 28 days after the decision of the Judge, irrespective of whether reasons for that decision have been given at that time and whether any formal steps to perfect the judgment have been taken.]

(Inserted by Ordinance No. 10 of 2003)

(Subsection (4) repealed by Ordinance No. 5 of 2004)

[Appeal on Matters Arising Before Trial

35E.—(1) At any time before the trial either the prosecutor or the accused person, with the leave of the Court of Appeal, may appeal to that Court—

Right of appeal in
certain cases

- (a) against the decision of a Judge of the Supreme Court to make or to refuse to make, an order changing the venue of the trial under section 15B of the Judicature (Courts) Ordinance;
 - (b) against the making of an order or the refusal to make an order concerning the admissibility of evidence under section 70AA of the Justice Ordinance;
 - (c) against the making of an order under subsection (5) (concerning the amendment or division of any count in an information) or under subsection (7) (concerning the trial of the accused upon one or more counts separately) of section 70 of the Justice Ordinance or against a refusal to make any such order;
 - (d) against the making of an order under subsection (2) of section 8 or section 10 of the Victims of Offences Ordinance 2002 or the refusal to make any such order;
 - (e) against the quashing or amendment of an information under subsection (8) of section 70 of the Justice Ordinance, or against a refusal to quash or amend the information under that subsection;
 - (f) against the making of an order directing separate trials of persons jointly charged or against a refusal to make such an order;
 - (g) against the granting of leave under subsection (2) of section 70E of the Justice Ordinance restricting the cross-examination of the complainant in a case of a sexual nature or the granting of leave under section 70F of the Justice Ordinance in relation to the address and occupation of a complainant in a case of a sexual nature or against the refusal to grant leave in either case.
- (2) At any time before the trial, the accused person, with the leave of the Court of Appeal, may appeal to that Court—
- (a) against the imposition by a Judge of any condition on an order for change of venue under subsection (1)

of section 15B of the Judicature (Courts) Ordinance made under subsection (3) of that section;

- (b) against a refusal by the Court to order that further particulars of any information or of any count in any information be furnished in writing by the prosecutor.

(3) On any appeal under this section, the Court of Appeal may confirm the decision of the Court or Judge, as the case may be, or vary it or set it aside and make such other order as the Court of Appeal thinks ought to have been made in the first place.

(4) Where a person desires to obtain the leave of the Court of Appeal to appeal to that Court under this section, he or she shall give notice of application for leave to appeal in such manner as may be directed by rules of Court (or if there are no such rules in a form approved by the Registrar) within [28] days after the decision of the Court or Judge is given, irrespective of whether reasons for the decision are given at a later date and irrespective of whether any formal steps to sign, enter or otherwise perfect the decision are necessary or are afterwards taken.

(Amended by Ordinance No. 2 of 2003)

(5) The time within which notice of an application for leave to appeal under this section may be given may be extended at any time by the Court of Appeal.

(6) Notwithstanding that an application for leave to appeal under subsection (1)(b) has been made, the Court may, if it is satisfied that it is in the interests of justice to do so, proceed with the trial without awaiting the determination of the application.]

(Inserted and amended by Ordinance No. 13 and No. 17 of 2002)

36.—(1) Any person convicted on a trial held by the Supreme Court may appeal to the Court of Appeal—

- (a) against conviction—
 - (i) on any ground of appeal whenever the penalty awarded shall exceed six months' imprisonment or a fine of \$1,000.00;
 - (ii) on any ground of appeal which involves a question of law alone;
 - (iii) with the leave of the Court of Appeal or upon a certificate of the Chief Justice that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or on any other ground which appears to the Court to

Appeals from
Supreme Court to the
Court of Appeal.

be a sufficient ground of appeal;

- (b) against sentence with the leave of the Court of Appeal unless the sentence is one fixed by law.

[(1A) The Public Prosecutor, with the leave of the Court of Appeal, may appeal to the Court of Appeal against the sentence passed on the conviction of any person on information in the Supreme Court, unless the sentence is one fixed by law. For the purpose of this subsection, the term “sentence” includes any method of disposing of a case following conviction.]

(Inserted by Ordinance No. 13 of 2002)

(2) Any person who has been dealt with by the Supreme Court under section 34(2) of the Justice Ordinance may appeal to the Court of Appeal as set out in subsection (1)(a) and (b) of this section as if he or she had been both convicted and sentenced by the Supreme Court.

(3) Notwithstanding a right of appeal, the Chief Justice may reserve for the consideration of the Court of Appeal any question of law decided by him or her in the course of any trial. The question or questions so reserved shall be stated in the form of a case prepared and signed by the Chief Justice; and such case shall be transmitted by him or her at the earliest opportunity to the Court of Appeal.

(4) The [Supreme Court or Court of Appeal] may, in any case in which an appeal to the Court of Appeal is filed or in any case in which a question of law has been reserved for the decision of the Court of Appeal, grant bail pending the hearing of the appeal or the decision upon the case reserved.

(Amended by Ordinance No. 1 of 2016)

(5) Section 16(2) of this Ordinance shall apply to bonds taken under subsection (4).

(6) An application for bail under this section shall be by motion, supported by affidavit served on the Public Prosecutor and may be heard in Chambers.

[36A.—(1) Every appeal under section 36(1)(a)(i) or (ii) shall be brought by notice in writing lodged with the Court of Appeal in such manner as may be directed by rules of Court (or if there are no such rules in a form approved by the Registrar) within 28 days after the date of the conviction appealed against.

Time for appeal or application

(2) Every application by the Public Prosecutor for leave to appeal against sentence under section 36(1A) shall be brought by notice in writing lodged with the Court of Appeal in such manner as may be directed by rules of Court (or if there are no such rules in a form approved by the Registrar) within 28 days after the date of the sentence in respect of which leave to appeal is applied for.

(3) The time within which a notice of appeal or a notice

of application for leave to appeal under this section may be given may be extended at any time by the Court of Appeal.]

(Inserted by Ordinance No. 2 of 2003)

Grounds for allowing appeal under s. 36.

37.—(1) Except as provided by this ordinance, the Court of Appeal shall allow an appeal against conviction if it thinks—

- (a) that the decision of the court should be set aside on the ground that under all circumstances of the case it is unsafe or unsatisfactory; or
- (b) that such decision should be set aside on the ground of a wrong decision of any question of law; or
- (c) that there was material irregularity in the course of the trial,

and in any other case shall dismiss the appeal:

Provided that the Court may, notwithstanding that it is of the 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] miscarriage of justice has occurred.

(Inserted by Ordinance No. 13 of 2002)

(2) In the case of an appeal against conviction the Court shall, if it allows the appeal, quash the conviction.

(3) Where the Court of Appeal allows an appeal against conviction, it may order the appellant to be retried on the same charge by a court of competent jurisdiction.

(4) The Court of Appeal may, on ordering a retrial, make such orders as appear to it to be necessary or expedient—

- (a) for the custody or admission to bail of the person ordered to be retried pending the retrial;
- (b) for the retention pending the retrial of any property or money forfeited, restored or paid by virtue of the original conviction or any order made on that conviction.

Power to substitute conviction of alternative offence.

38.—(1) This section applies to an appeal against conviction where the appellant has been convicted of an offence and the court could on the information have found the appellant guilty of some other offence and it appears to the Court of Appeal that the court must have been satisfied of facts which proved him or her guilty of the other offence.

(2) The Court may, instead of allowing or dismissing the appeal, substitute for the finding of the court a finding of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorised by law for the other offence, not being a sentence of greater severity.

Sentence when appeal allowed on part of an information.

39.—(1) This section applies where, on an appeal against conviction, on an information containing two or more counts, the Court of Appeal allows the appeal in respect of part of the

information.

(2) Except as provided by subsection (3), the Court may, in respect of any count on which the appellant remains convicted, pass such sentence in substitution for any sentence passed thereon at the trial as it thinks proper.

(3) The Court shall not, under this section, pass any sentence such that the appellant's sentence on the information as a whole will, in consequence of the appeal, be of greater severity than the sentence (taken as a whole) which was passed at the trial.

40. Where, on an appeal against conviction, the Court of Appeal is of the opinion—

Substitution of finding of insanity or unfitness to plead.

- (a) that the proper decision would have been one of not guilty by reason of insanity; or
- (b) that the case is not one where there should have been an acquittal but that there should have been a finding that the accused was of unsound mind and thereby unfit to plead;

the Court shall enter a substituted verdict accordingly and order that the appellant be detained in appropriate care as a person of unsound mind pending the further directions of the Governor.

41.—(1) On an appeal against sentence, the Court of Appeal, if it considers that the sentence of the appellant should be altered, may—

Supplementary provisions as to appeals against sentence.

- (a) quash any sentence or order which is the subject of the appeal; and
- (b) in place of it pass such sentence or such order as it thinks appropriate for the case which the court appealed from had power to pass;

but the Court shall so exercise its powers under this subsection that, taking the case as a whole, the appellant is not more severely dealt with on appeal than he was dealt with by the court appealed from.

42. A person tried and adjudged by the Supreme Court to be not guilty by reason of insanity may appeal to the Court of Appeal against the decision—

Appeal against decision of not guilty by reason of insanity.

- (a) on any ground of appeal which involves a question of law alone; and
- (b) with the leave of the Court of Appeal, on any ground which involves a question of fact alone or a question of mixed law and fact or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal:

Provided that if the Chief Justice grants a certificate that the case is fit for appeal on a ground which involves a question of

fact, or a question of mixed law and fact, an appeal lies under this section without the leave of the Court of Appeal.

Disposal of appeal
under section 42.

43.—(1) Subject to the provisions of this section, the Court of Appeal shall allow an appeal under section 42 of this ordinance if it is of the opinion—

- (a) that the decision should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
- (b) that the decision should be set aside on the ground of a wrong decision on any question of law; or
- (c) that there was a material irregularity in the course of the trial and in any other case shall dismiss the appeal.

(2) The Court of Appeal may dismiss an appeal under section 42 of this ordinance if of the opinion that, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, no miscarriage of justice has occurred.

(3) Where, apart from this subsection—

- (a) an appeal under section 42 of this ordinance would fall to be allowed; and
- (b) none of the grounds for allowing it relates to the question of the insanity of the accused,

the Court of Appeal may dismiss the appeal if it is of the opinion that, but for the insanity of the accused, the proper decision would have been that he or she was guilty of an offence other than the offence charged.

(4) Where an appeal under section 42 of this ordinance is allowed, the following provisions apply:—

- (a) if the ground, or one of the grounds, for allowing the appeal is that the finding as to the insanity of the accused ought not to stand and the Court of Appeal is of the opinion that the proper finding would have been that the accused was guilty of an offence (whether the offence charged or any other offence of which the court could have found him guilty), the Court—
 - (i) shall substitute for the finding of not guilty by reason of insanity a finding of guilty of that offence; and
 - (ii) shall have the like powers of punishing or otherwise dealing with the appellant and such other powers as the court of trial would have had if it had come to the substituted finding; and
- (b) in any other case the Court of Appeal shall substitute

for the finding an acquittal.

(5) Where, on an appeal under section 42 of this ordinance, the Court of Appeal is of opinion that the case is not one where there should have been an acquittal but that there should have been a finding that the accused was unfit to plead, the Court shall remit the proceedings to the Supreme Court accordingly.

44.—(1) Where there has been a finding that an accused person is unfit to plead, the accused person may appeal to the Court of Appeal against the finding.

Right of appeal against finding of unfitness to plead.

(2) An appeal under this section may be—

- (a) on any ground of appeal which involves a question of law alone; and
- (b) with the leave of the Court of Appeal, on any ground which involves a question of fact alone, or a question of mixed law and fact or on any other ground which appears to the Court of Appeal to be a sufficient ground of appeal:

Provided that, if the Chief Justice grants a certificate that the case is fit for appeal on a ground which involves a question of fact or a question of mixed law and fact, an appeal lies under this section without the leave of the Court of Appeal.

45.—(1) The Court of Appeal shall allow an appeal under section 44 of this ordinance if it is of opinion—

Disposal of appeal under section 44.

- (a) that the finding should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or
- (b) that the finding should be set aside on the ground of a wrong decision on any question of law; or
- (c) that there was a material irregularity in the course of the determination of the question of fitness to be tried;

and in any other case (except one to which subsection (2) below applies) shall dismiss the appeal; but it may dismiss the appeal if of opinion that, notwithstanding that the point raised in the appeal might be decided in favour of the appellant, no miscarriage of justice has occurred.

(2) An appeal under section 44 of this ordinance may, in a case where the question of fitness to be tried was determined later than on arraignment, be allowed by the Court of Appeal (notwithstanding that the finding was properly come to) if the Court is of opinion that the case is one in which the accused should have been acquitted before the question of fitness to be tried was considered; and if an appeal is allowed under this subsection, the Court of Appeal shall, in addition to quashing the finding, direct an acquittal to be recorded, not being a finding of not guilty by reason of insanity.

Supplementary powers of Court of Appeal.

46. The Court of Appeal shall have the same powers *mutatis mutandis* as to the awarding of costs, the hearing of further evidence and admission to bail as the Supreme Court has on an appeal from the Magistrate's Court under sections 11, 14 and 22 of this ordinance.

References to the Court of Appeal by the Governor.

47.—(1) The Governor on an application made by a person convicted on a trial held by the Supreme Court or without such application may at any time either—

- (a) refer the whole case to the Court of Appeal and the case shall then be treated for all purposes as an appeal to that Court by the person convicted; or
- (b) if the Governor desires the assistance of the Court of Appeal on any point arising in the case, refer that point to the Court of Appeal for its opinion thereon and that Court shall consider the point so referred and furnish the Governor with its opinion accordingly.

(2) A reference to the Court of Appeal may be made under this section irrespective of any appeal or whether the case is appealable or not.

(3) Nothing in this section shall affect the prerogative of mercy.