

Act No. 16, 1912.

CRIMINAL APPEAL. An Act to establish a court of criminal appeal; to amend the law relating to appeals in criminal cases; to provide for better consideration of petitions of convicted persons; to amend the Crimes Act of 1900; to amend the Supreme Court Act of 1900; and for other purposes consequent thereon or incidental thereto. [16th April, 1912.]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of New South Wales in Parliament assembled, and by the authority of the same, as follows:—

PART I.

PRELIMINARY.

Short title and definitions.

1. This Act may be cited as the "Criminal Appeal Act of 1912," and is divided into Parts as follows:—

PART I.—PRELIMINARY—*ss.* 1-2.

PART II.—COURT OF CRIMINAL APPEAL—*ss.* 3-4.

PART III.—RIGHT OF APPEAL AND DETERMINATION OF APPEALS—*ss.* 5-9.

PART IV.—PROCEDURE—*ss.* 10-23.

PART V.—APPEALS FROM THE DECISIONS OF THE COURT—*ss.* 24-25.

PART VI.—PETITIONS FOR LENIENCY—*ss.* 26-28.

Interpretation.

2. In this Act, unless the context or subject-matter otherwise requires or indicates,—

"Court" means the court of criminal appeal established by this Act:

"Court of trial" means any court from whose finding, sentence, or other determination, a person is by this Act entitled to appeal or to apply for leave to appeal.

"Indictment"

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- “Indictment” includes any information presented or filed as provided by law for the prosecution of offenders.
- “Justice” means a justice of the peace.
- “Prescribed” means prescribed by rules of court made under the authority of this Act.
- “Registrar” means the registrar of the court.
- “Sentence” includes any order made by the court of trial on conviction with reference to the person convicted, or his property, and any recommendation or order for deportation in the case of a person convicted; and the power of the Court of Criminal Appeal to pass any sentence includes a power to make any such order or recommendation.
- “The appellant” includes a person who has been convicted and desires to appeal under this Act.

PART II.

COURT OF CRIMINAL APPEAL.

3. The Supreme Court shall for the purposes of this Act be the Court of Criminal Appeal, and the court shall be constituted by such three or more judges of the Supreme Court as the Chief Justice may direct.

Constitution of court.

4. The Governor shall appoint a registrar and such officers as may be required for carrying out this Act.

Registrar of the court.

The Prothonotary of the Supreme Court shall be the first registrar.

PART III.

RIGHT OF APPEAL AND DETERMINATION OF APPEALS.

5. (1) A person convicted on indictment may appeal under this Act to the court—

Right of appeal in criminal cases.

- (a) against his conviction on any ground which involves a question of law alone; and
- (b) with the leave of the court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the court to be a sufficient ground of appeal; and
- (c) with the leave of the court against the sentence passed on his conviction.

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(2) For the purposes of this Act a person acquitted on the ground of insanity, where such insanity was not set up as a defence by him, shall be deemed to be a person convicted, and any order to keep him in custody shall be deemed to be a sentence.

Determination of
appeals in ordinary
cases.

6. (1) The court on any such appeal against conviction, shall allow the appeal if it is of opinion that the verdict of the jury should be set aside on the ground that it is unreasonable, or cannot be supported, having regard to the evidence, or that the judgment of the court of trial should be set aside on the ground of the wrong decision of any question of law, or that on any other ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal: Provided that the court may, notwithstanding that it is of opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this Act, the court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the court, if it is of opinion that some other sentence, whether more or less severe is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefor, and in any other case shall dismiss the appeal.

Powers of court in
special cases.

7. (1) If it appears to the court that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the court may either affirm the sentence passed at the trial, or pass such sentence whether more or less severe in substitution therefor as it thinks proper, and as may be warranted in law by the conviction on the count or part of the indictment on which it considers the appellant has been properly convicted.

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

(3) Where, on the conviction of the appellant the jury have found a special verdict, and the court considers that a wrong conclusion has been arrived at by the court of trial on the effect of that verdict, the court may, instead of allowing the appeal, order
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such conclusion to be recorded as appears to the court to be in law required by the verdict, and pass such sentence whether more or less severe, in substitution for the sentence passed, as may be warranted in law.

(4) If on any appeal it appears to the court that, although the appellant committed the act or made the omission charged against him, he was insane at the time the act was done or omission made, so as not to be responsible therefor according to law, the court may quash the sentence passed at the trial, and order the appellant to be kept in custody as a lunatic under the Lunacy Act, 1898, in the same manner as if a jury had found specially under that Act that he was insane at the time of the commission of the offence charged.

8. (1) On an appeal against a conviction on indictment, the court may, either of its own motion, or on the application of the appellant, order a new trial in such manner as it thinks fit, if the court considers that a miscarriage of justice has occurred, and that, having regard to all the circumstances, such miscarriage of justice can be more adequately remedied by an order for a new trial than by any other order which the court is empowered to make. Power of court to grant new trial.

(2) Provision shall be made by rules of court for detaining the appellant until the fresh trial has terminated, or for ordering him into any former custody, or for liberating him upon such conditions as to bail or recognizances as the court, or any judge thereof appointed for that purpose by the Chief Justice, shall deem fit.

9. (1) The operation of any order for the restitution of any property, or for the payment of compensation to an aggrieved person, made by the court of trial shall (unless such court directs to the contrary in any case in which in its opinion the title to the property is not in dispute) be suspended— Re-vesting and restitution of property on conviction.

(a) until the expiration of the time provided for appealing to the court; and

(b) where notice of appeal or of application for leave to appeal is given within the time provided, until the determination of the appeal or refusal of the application;

and in cases where the operation of any such order is suspended until the determination of the appeal, the order shall not take effect as to the property in question if the conviction is quashed on appeal, except by the special order of the court.

(2) The court may annul or vary any such order although the conviction is not quashed.

(3) The court or a judge thereof may give such directions as it or he thinks fit for the custody of any such property pending the suspension of any such order.

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PART IV.

PROCEDURE.

Time for appealing.

10. (1) Any person convicted desiring to appeal to the court, or to obtain the leave of the court to appeal from any conviction or sentence, shall give notice of appeal or notice of application for leave to appeal, in such manner as may be prescribed, within ten days of the date of such conviction or sentence.

(2) In the case of a conviction involving sentence of death or corporal punishment—

- (a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given; and
- (b) if notice be so given, the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or in cases where an application for leave to appeal is finally refused, of the application.

(3) Except in the case of conviction involving sentence of death, the time within which notice of appeal, or notice of an application for leave to appeal, may be given, may be extended at any time by the court.

Judge's notes and report to be furnished on appeal.

11. The judge of the court of trial shall, in case of any appeal or application for leave to appeal, furnish to the registrar his notes of the trial, and also a report, giving his opinion upon the case, or upon any point arising in the case:

Provided that where shorthand notes have been taken in accordance with this Act, a transcript of such notes may be furnished in lieu of such judge's notes.

Supplemental powers of the court.

12. The court may, if it thinks it necessary or expedient in the interests of justice,—

- (a) order the production of any document, exhibit, or other thing connected with the proceedings; and
 - (b) order any persons who would have been compellable witnesses at the trial to attend and be examined before the court, whether they were or were not called at the trial, or order any such persons to be examined before any judge of the court or before any officer of the court, or justice, or other person appointed by the court for the purpose, and admit any deposition so taken as evidence; and
 - (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent, but not a compellable witness; and
- (d)

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- (d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot, in the opinion of the court, be conveniently conducted before the court, the court or any judge thereof may refer the question for inquiry and report to a commissioner appointed by the court, and act upon the report of any such commissioner so far as the court thinks fit; and
- (e) appoint any person with special expert knowledge to act as assessor to the court in any case in which it appears to the court that such special knowledge is required for the determination of the case;

and exercise in relation to the proceedings of the court any other powers which may for the time being be exercised by the Supreme Court on appeals or applications in civil matters, and issue any warrant or other process necessary for enforcing the orders or sentences of the court: Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

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

14. (1) An appellant, notwithstanding that he is in custody, shall be entitled to be present if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone. On an appeal on such ground, and on an application for leave to appeal, and on any proceedings preliminary or incidental to an appeal, the appellant shall not be entitled to be present, except by leave of the court. Right of appellant to be present.

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

15. An appellant shall be entitled to present his case and his argument to the court in writing if he so desires. Appeals permitted in writing.

16. Notice of all appeals and applications for leave to appeal shall be given by the registrar to the Attorney-General in the prescribed manner. Notice of appeals.

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

(2) The expenses of any solicitor or counsel assigned, and of any assessor appointed, and of any witnesses attending on the order

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order of the court or examined, and of and incidental to any examination or reference under this Act, and of the appearance of an appellant on the hearing of his appeal or on any proceedings preliminary or incidental to his appeal, shall be defrayed out of the Consolidated Revenue up to an amount allowed by the registrar, but subject to any regulations as to rates of payment made by the Minister of Justice the decision of the registrar may be reviewed by the court or a judge thereof.

Admission of appellant to bail and custody when attending court.

18. (1) An appellant who is not admitted to bail shall, pending the determination of his appeal, be treated in such manner as may be directed by regulations made under the Acts relating to prisons.

(2) The court may, if it thinks fit, on the application of the appellant, admit the appellant to bail, with or without sureties, pending the determination of the appeal.

(3) The time during which an appellant, pending the determination of his appeal, is liberated on bail or recognisances, and (subject to any directions which the court may give to the contrary on any appeal), the time during which an appellant, if in custody, is specially treated as an appellant under this section, shall not count as part of any term of imprisonment or penal servitude under his sentence. Any imprisonment or penal servitude under such sentence, whether it is the sentence passed by the court of trial or the sentence passed by the court shall, subject to any directions which the court may give as aforesaid, be deemed to be resumed or to begin to run, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and if he is not in custody as from the day on which he is received into prison, under the sentence.

(4) Provision shall be made by rules or regulations under the Acts relating to prisons for the manner in which an appellant, when in custody, is to be brought to any place where he is entitled to be present, or ordered to be taken, for the purposes of this Act, and for the manner in which he is to be kept in custody whilst absent from prison for the purpose; and an appellant whilst in custody in accordance with those rules and regulations shall be deemed to be in legal custody.

Duties of registrar with respect to notices of appeal.

19. (1) The registrar shall take all necessary steps for obtaining a hearing under this Act of any appeals or applications, notice of which is given to him under this Act, and shall obtain and lay before the court in proper form, all documents, exhibits, and other things relating to the proceedings in the court of trial which appear necessary for the proper determination of the appeal or application.

(2) If it appears to the registrar that any notice of appeal against a conviction does not show any substantial ground of appeal, he may refer the appeal to the court for summary determination, and the

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the court may thereupon, if it considers that the appeal is frivolous or vexatious, dismiss the appeal summarily, without calling upon any person to attend the hearing.

(3) The registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this Act to any person who demands the same, and to officers of courts, governors of prisons, and to such other officers or persons as he thinks fit, and the governor of a prison shall cause such forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this Act, and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the registrar.

(4) The registrar shall report to the Attorney-General any case in which it appears to him that, although no application has been made for the purpose, legal assistance ought to be provided to an appellant under the powers given to the Attorney-General.

20. Any documents, exhibits, or other things connected with any proceedings before a court of trial in respect of which any person is entitled, or may be authorised, to appeal under this Act, shall be kept in the custody of the court of trial for such time as may be prescribed, subject to such power as may be prescribed for the conditional release of any such documents, exhibits, or other things from that custody. Documents, exhibits, &c.

21. Shorthand notes shall if practicable be taken of the proceedings at every trial of any person on indictment; and on any notice of appeal or application for leave to appeal, a transcript of the notes, or any part thereof, shall be made if the registrar so directs, and furnished to the registrar for the use of the court, or a judge thereof; and a transcript shall be furnished to any party interested upon the payment of such charges as may be prescribed by the Governor in Council. Shorthand notes of trial.

22. The powers of the court under this Act to give leave to appeal, to extend the time in 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 is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the court in the same manner as they may be exercised by the court, and subject to the same provisions; but if the judge refuses an application on the part of the appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the court. Powers which may be exercised by a judge of the court.

23. (1) Writs of error, and the powers and practice now existing in the Supreme Court in respect of motions for new trials, and the granting thereof in criminal cases, save as aforesaid, are hereby abolished. Writs of error abolished.

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(2) Sections four hundred and twenty-eight, four hundred and seventy, four hundred and seventy-one, four hundred and seventy-two, four hundred and seventy-three, and four hundred and seventy-four of the Crimes Act, 1900, are repealed.

PART V.

APPEALS FROM THE DECISIONS OF THE COURT.

Postponing execution of order quashing conviction on Crown's application.

24. (1) Where an appeal to the court is upheld, and the appellant is entitled under this Act to have the conviction against him quashed by order of the court, the court may, upon application on behalf of the Crown, at any time before the release of such appellant, either by the same or by a separate order, direct that execution of the order quashing the appellant's conviction be stayed for such time (not exceeding four days) as the court thinks fit, and the court or judge thereof shall thereupon make such order for the detention of the appellant or his return to any former custody, or for liberating him on bail, or recognisance, as the court or judge thinks fit, for the time during which such stay has been directed.

(2) The court or a judge thereof may upon application made by the Attorney-General make such order for the detention of the appellant or for liberating him on bail or recognisance pending the hearing of an appeal to the High Court as the court or a judge may think fit, and may at any time vary or rescind such order.

Court may release on failure to prosecute appeal.

25. On the application of any appellant deeming himself wronged by any failure to diligently prosecute such appeal, the court or a judge thereof may order the immediate execution of the original order of the court quashing the conviction, and may order the appellant's immediate release, and the court may further, if it thinks fit, award him such compensation as appears just.

PART VI.

PETITIONS FOR LENIENCY.

Not to affect pardoning power.

26. Nothing in this Act shall affect the pardoning power of the Governor, but the Minister of Justice, on the consideration of any petition for the exercise of the pardoning power having reference to the conviction of any person or to any sentence other than the sentence of death passed on a convicted person, may—

- (a) refer the whole case to the court, and the case shall be heard and determined by the court as in the case of an appeal by a person convicted;
- (b)

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- (b) if he desires the assistance of the court on any point arising in the case with a view to the determination of the petition, refer that point to the court for their opinion thereon, and the court shall consider the point so referred and furnish the Minister with their opinion thereon accordingly.

27. The Governor, in granting any license under the provisions of section four hundred and sixty-three of the Crimes Act of 1900, may, upon the report of a judge of the court and the recommendation of the Minister of Justice, extend the sentence passed for such further period as may be recommended, and thereupon grant such license for the unexpired period of such extended sentence. Otherwise nothing in this Act shall affect the provisions of such section.

Section 463, Crimes Act, amended.

28. (1) Rules of court for the purposes of this Act shall be made by the Chief Justice and the judges of the court, or any three of such judges, and shall be subject, so far as such rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, to the approval of the Minister of Justice.

Rules of court.

(2) Such rules may be made with respect to all or any of the following matters :—

- (a) The regulation of the practice and procedure under this Act.
- (b) The sitting of the court if necessary during any vacation.
- (c) The powers and duties of the registrar and other officers of the court.
- (d) The admission to bail or detention of an appellant pending any appeal, or application for leave to appeal, or new trial.
- (e) The safe custody of any property with respect to which an order for restitution has been suspended.
- (f) The taking of shorthand notes and the making of transcripts thereof.
- (g) Applications for and furnishing of notes of trial and reports by judges of courts of trial.
- (h) Any matters which in the opinion of the court are necessary or expedient for giving effect to the purposes of this Act.

(3) All rules made under this Act shall as soon as practicable after the making thereof be laid before both Houses of Parliament: Provided that if either of the said Houses by any resolution passed within thirty days after such rules have been laid before it, resolves that any such rule, or any part thereof, ought to be annulled, then such rule or part shall immediately cease to be binding and to have the force of law, but without prejudice to the validity of anything previously done thereunder.

(4) Compliance with such rules may be enforced by order of the court or a judge thereof.