

Chapter 11 (Appeal to the Court of Appeal): Update

A new edition of the official *Guide to commencing proceedings in the Court of Appeal Criminal Division* was published in May 2017:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/644192/A_guide_to_commencing_proceedings_in_the_Court_of_Appeal_Criminal_Division_2017.pdf

Key points include:

A2-2: “Grounds must be settled with sufficient particularity to enable, the Registrar, and subsequently the Court, to identify clearly the matters relied upon”.

A2-3: The notice of appeal must “identify each ground of appeal on which the appellant relies, numbering them consecutively (if there is more than one) and concisely outlining each argument in support” and must “identify any relevant authorities”.

A2-4: “The grounds of appeal should set out the relevant facts and nature of the proceedings concisely in one all-encompassing document, not separate grounds of appeal and advice ... The intended readership of this document is the Court and not the lay or professional client. Its purpose is to enable the single Judge to grasp quickly the facts and issues in the case.

A2-6: “Advocates should not settle or sign grounds unless they consider that they are properly arguable”.

11.2 Appeal against conviction

11.2.3 Procedure for obtaining leave to appeal

The rules governing the procedure for appealing to the Court of Appeal are unaltered but may now be found in Part 39 of the Criminal Procedure Rules.

R v Cook [2017] EWCA Crim 353, the Court of Appeal emphasised the importance of not waiting for sentence to be passed before lodging an application to appeal against conviction. Fulford LJ said (at [3]):

It is said that the justification for the delay as regards the application for leave to appeal against conviction is to be found in a decision ... to delay the application for leave to appeal until after the applicant had been sentenced so as not to prejudice her at the sentencing hearing, because the judge might have discovered that there was an extant appeal. We indicate immediately that that explanation for the delay in filing grounds of appeal against conviction is entirely devoid of merit. A defendant will never be prejudiced at his or her sentencing hearing because he or she had filed an application for leave to appeal against conviction. The applicant's submission involves the starkly disrespectful suggestion that the judge may sentence the defendant less favourably because he or she was seeking to challenge the safety of the conviction. It is to be regretted that the applicant's representatives have chosen to advance such a fallacious argument. In these circumstances the court would have been fully entitled to have refused the application for leave to appeal against conviction without considering the merits of the proposed appeal, but out of an abundance of caution we have considered whether or not this appeal is arguable.

11.2.3.4 Granting of leave to appeal

In *R v Matthews* [2014] EWCA Crim 2757, the Court of Appeal considered the power of the trial judge to certify that a case is 'fit for appeal', thus obviating the need for an application to the Court of Appeal for leave to appeal and also empowering the Crown Court to grant bail pending appeal. Lord Thomas CJ (at [2]-[3]) said:

... Crown Court Judges should certify cases only in exceptional circumstances ... [A] judge should not grant a certificate with regard to sentence merely in the light of the mitigation to which he has, in his opinion, given due weight. A judge should also bear in mind that applications may always be made to this court for leave to appeal and for bail, or, if bail is not granted, expedition of the hearing of the appeal. If a short sentence is imposed, every effort is made by the Court of Appeal to bring the case on very quickly. Difficulties arise for an appellant if he is granted bail and the court hearing the appeal concludes that there was no basis for the appeal.

[I]t is essential that if a judge is to consider exercising the power to grant a certificate and to grant bail, he should set out his reasons for taking such a course. His reasons should explain why the exceptional procedure is being used.

11.2.4 The hearing of the appeal against conviction

Criminal Practice Direction X, paragraph 68F, provides that, in the case of an appeal against conviction, the advocates must serve a skeleton argument when the appeal notice does not sufficiently outline the grounds of the appeal, particularly in cases where a complex or novel point of law has been raised. In an appeal against sentence it may be helpful for an advocate to serve a skeleton argument when a complex issue is raised.

11.3 Grounds of appeal against conviction

11.3.2 Fresh evidence in the Court of Appeal

In *R v George* [2014] EWCA Crim 2507, Sir Brian Leveson P (at [51]) said that the essential question, where the Court of Appeal has to consider the impact of fresh evidence, is whether, in the light of that fresh evidence, the conviction is unsafe. His Lordship also referred to the test articulated by Lord Kerr in *Lundy v The Queen* [2013] UKPC 28 (at [150]):

[T]he proper test to be applied by an appellate court in deciding whether a verdict is unsafe or a miscarriage of justice has occurred, where new evidence has been presented, is whether that evidence might reasonably have led to an acquittal.

In *R v Singh* [2017] EWCA Crim 466, the Court of Appeal noted (at [45]) that:

As is well-known by counsel and should be known by those who stand in the dock in the Crown Court, the time for calling evidence is at trial. It is not permissible to await conviction and then appeal on the basis of evidence that was available at trial but was 'not actively pursued'.

In *R v Garland* [2016] EWCA Crim 1743, the appeal was based on non-disclosure by the prosecution. The Court of Appeal noted that the statutory test in England and Wales requires the Court of Appeal to allow an appeal against conviction only if they think that the conviction is unsafe. The court went on to hold that the law as set out in *R v Pendleton* [2001] UKHL 66; [2002] 1 WLR 72 (which concerned fresh evidence) applies equally to non-disclosure. The court did not consider there was any material difference when determining the test to be

applied. The ultimate question was whether the withheld material caused doubt about the safety of the conviction.

11.4.2.3 Unmeritorious appeals: directions for loss of time

In *R v Gray* [2014] EWCA Crim 2372, Hallett LJ said (at [2]):

Unmeritorious renewal applications take up a wholly disproportionate amount of staff and judicial resources in preparation and hearing time. They also waste significant sums of public money, for example in obtaining transcripts, especially in applications for leave to appeal against conviction. The figures for September 2013 to August 2014 show that the total number of applications to the Court of Appeal Criminal Division is now running at nearly 6,500 per year; of those, 1,424 were applications for leave to appeal against conviction. Leave was granted or the application referred to the Full Court in just 245 cases. In the same period 416 applications were renewed and 454 applications refused. The apparent discrepancy in the mathematics is because the figures do not represent the same cases. Nevertheless, a clear picture of a pattern of unjustified renewals of applications for leave to appeal against conviction emerges. The result is that waiting times for conviction cases remain at approximately 12 months. The more time the Court of Appeal Office and the judges spend on unmeritorious cases, the longer the waiting times are likely to be.

Her ladyship went on (at [3]) to observe that the 'only means the court has of discouraging unmeritorious applications which waste precious time and resources is by using the powers given to us by Parliament in the Criminal Appeal Act 1968 and the Prosecution of Offences Act 1985'. She added, at ([7]):

The power to award costs is used infrequently and the single judge's power to make an order for loss of time has not been exercised since October 2007. Single judges today faced with what they consider to be a totally unmeritorious application generally prefer to initial a box on the form to indicate that if the application is renewed, the Full Court will consider the making of a loss of time order. However, the fact that the single judge has not initialled the box does not deprive the Full Court of the power to make a loss of time order. The court gave an express warning of this in *R v Hart* [2007] 1 Cr App R 31; [2007] 2 Cr App R 34. It also advised that applicants should not consider themselves protected by the advice of counsel. The Vice President at that time suggested that both advocates and applicants should "heed the fact that this court is prepared to exercise its power ... The mere fact that counsel has advised there are grounds of appeal will not always be a sufficient answer to the question as to whether or not an application has indeed been brought which was totally without merit".

She concluded (at [10])

In our view, therefore, in every case where the court is presented with an unmeritorious application, consideration should be given to exercising these powers. The single judge should consider whether to initial the box, and if the application is renewed, the Full Court (be it a two or three judge court) should consider whether or not to make a loss of time order or costs order. If it decides to exercise the power, a statement to this effect would suffice:

"Despite being warned of the court's power to make a loss of time order, the applicant chose to pursue a totally unmeritorious application which has wasted the time of the court. Such applications hamper the court's ability to process meritorious applications in a timely fashion".

11.6 Appeals by the prosecution

11.6.2 Attorney General's reference: unduly lenient sentence

In *Attorney-General's Reference Nos 4, 5, 6, 7 and 8 of 2014 (R v Deacon and others)* [2014] EWCA Crim 651, the Court of Appeal considered a submission that the sentence substituted by the Court of Appeal should take account of the fact that the offender was being sentenced for the second time. Davis LJ (at [43]) said:

We should add that some mention was made before us of what counsel described as “double jeopardy”. Indeed, one counsel before us rather hopefully sought to invoke what was, he said, considered to be a notional deduction for double jeopardy of the order of 20% to 30% which had some currency some time ago. We do not think that such considerations of double jeopardy in cases of this particular kind, where significant custodial sentences, on any view, were imposed and had to be imposed should feature to any great extent in the appropriate sentence now to be imposed by this court.