

APPEALS AGAINST ACQUITTALS AND SENTENCES

Memorandum by the Commonwealth Secretariat

There is a wide variety of practice in the Commonwealth relating to appeals to higher courts by the Crown or the State against acquittals and sentences. The purpose of this paper is shortly to review the position in a representative number of Commonwealth countries.

2. In most jurisdictions the Attorney-General or the Public Prosecutor may challenge a decision of a lower court resulting in an acquittal, in a higher court. In some, the complainant is given this right, often only after receiving the sanction of the Attorney-General. This may be a direct appeal, an application for review or revision, or by means of a case stated procedure. Sometimes such an appeal is restricted to a matter of law, but more usually the right is at large.

3. In a majority of jurisdictions, too, the Attorney-General or the Public Prosecutor may apply, in one form or another, to a higher court for a review of a sentence or order imposed or made by a subordinate court.

4. However, as regards appeals against acquittals and sentences after trials on indictment or information, far fewer jurisdictions permit an appeal by the Crown or the State. Where a not guilty verdict by a jury is involved, traditionally a jury's verdict could not be impugned or tainted.

5. Even in those jurisdictions in which the jury's not guilty verdict is sacrosanct, as it affects the accused, some allow the Attorney-General to refer a point of law following an acquittal on indictment, to the Court of Appeal. This practice, in various forms, is to be found, for example, in England and Wales, Hong Kong, New South Wales, Queensland and Western Australia. In all these jurisdictions it is expressly provided that the appeal has no effect on the earlier acquittal.

6. Canada, Hong Kong, New South Wales, Queensland, Western Australia, Singapore and Sri Lanka are all examples of jurisdictions which permit the Crown or the State to appeal to the appellate court against a sentence imposed after a trial on indictment, sometimes only with the leave of that court.

7. There are a number of jurisdictions, of which the following are examples, where there is a right of appeal by the Crown or the State following an acquittal on indictment or information: Tasmania, Singapore, Sri Lanka. The Criminal Procedure Code of India (and the Codes derived from it) also allows appeals against acquittals. In Tasmania the appeal must be on a point of law alone; in Singapore, on a question of fact or of law, or on a question of mixed law and fact; in Sri Lanka, on a question of law alone, except that the appeal may be on a question of

fact alone, or on a question of mixed law and fact, with the leave of the Court of Appeal, after a trial without a jury. In Tasmania, too, leave to appeal is required.

8. Ever since the 1930's, the Canadian Criminal Code has allowed the Attorney-General to appeal to the Court of Appeal against an acquittal on indictment, on a point of law. Until the enactment of the Criminal Law Amendment Act 1975, the appellate court had power to substitute its own verdict for that of a jury. This power was termed "a major departure from common law principles" by Pigeon J. in *Morgentaler v. The Queen*, (1976) 1 S.C.R. 616, but the learned judge, with four of his brothers, upheld the right of the Québec Court of Appeal to substitute a conviction in the place of the jury's acquittal, under the law as it stood before the 1975 amendment.

9. Chief Justice Bora Laskin was one of the three dissenting judges in the *Morgentaler case*, and he had this to say on the power of an appellate court to substitute a conviction in a case resulting in an acquittal—

"Formally, the powers of a provincial appellate Court under s.613(4)(b) of the Criminal Code are broad enough to authorize it to do what it did. However, I have been unable to find any reported Canadian case where an appellate Court, in setting aside a jury's verdict of acquittal, has entered a conviction on the very offence charged and of which the accused has been acquitted by a jury, and has not been content to order a new trial with accompanying directions. Counsel for the respective parties were unable to produce any such case, and I am not particularly surprised that they could not. Where a case is left to the jury on evidence that may be found to support a defence to the offence charged, and the accused is acquitted, the fact that the trial Judge may have erred in charging the jury on the law would ordinarily result in a direction for a new trial. If it be the case at the trial that there is, in the opinion of the trial Judge, no evidence to go to the jury to support a required defence the trial Judge would so charge, but would leave it to the jury to bring in a verdict of guilty. Correlatively, if the trial Judge is of the opinion that there is no evidence to go to the jury in support of the charge, it would be for the jury to bring in a directed verdict of acquittal. It must be an unusual case, indeed, in which an appellate Court, which has not seen the witnesses, has not observed their demeanour and has not heard their evidence adduced before a jury, should essay to pass on its sufficiency, either as to a defence or in support of a charge, and thereupon to substitute its opinion for that of the jury and to enter a conviction (rather than ordering a new trial) where the jury has acquitted. Where the jury has convicted, appellate Courts have, from time to time, substituted their opinion that an acquittal should be directed, and this has been done even by this Court."

10. The effect of the Criminal Law Amendment Act 1975 was to maintain the right of the Attorney-

General to appeal against an acquittal, but to remove from an appellate court the power to enter a verdict of guilty, where the verdict appealed against was that of a court composed of a judge and jury. Power to order a new trial in all cases is maintained, as is jurisdiction to enter a verdict of guilty in respect of non-jury trials.

11. It is not surprising that where some 70 jurisdictions are involved, differences in approach to the

constitutional and public interest issues involved are to be found. However, Ministers may wish to discuss the merits and demerits of provisions which allow or prohibit appeals against acquittals or sentences following trials on indictment or information, in the light of the practical working of such provisions in their own jurisdictions.

12. The Government of Jamaica has suggested that this subject should be considered for inclusion in the Agenda.