

CHAPTER 12

APPEALS

INTRODUCTION

Purposes and principles of a good appellate system

- 1 Lord Woolf wrote, in his Report, *Access to Justice*,¹ that there are two main purposes of appeals. The first is the private one of doing justice in individual cases by correcting wrong decisions. The second is the public one of engendering public confidence in the administration of justice by making those corrections and in clarifying and developing the law.
- 2 With those two purposes in mind it seems to me that the main criteria of a good criminal appellate system are that:
 - it should do justice to individual defendants and to the public as represented principally by the prosecution;
 - it should bring finality to the criminal process, subject to the need to safeguard either side from clear and serious injustice and such as would damage the integrity of the criminal justice system;
 - it should be readily accessible, consistently with a proper balance of the interest of individual defendants and that of the public;
 - it should be clear and simple in its structure and procedures;
 - it should be efficient and effective in its use of judges and other resources in righting injustice and in declaring and applying the law; and
 - it should be speedy.
- 3 In this chapter I have attempted to apply those various criteria to all levels and main forms of criminal appeal below the Appellate Committee of the House

¹ *Access to Justice* Final Report, p 153

of Lords. The practices and procedures of the Appellate Committee have not been at the centre of my Review and I have received few submissions about them. I have not, in any event, thought it appropriate for me to enquire closely into the Committee's composition or workings or make recommendations for its possible reform.

- 4 The system is notable for its mixed and overlapping appellate routes and remedies and lack of clarity in jurisdiction and procedure. There are also procedural impediments to its ability both to do justice in individual cases and adequately to protect the public interest. In what follows I summarise briefly the present appellate structures and jurisdictions, indicate how well or badly they meet the above criteria and recommend improvements. In formulating my recommendations, my main aims have been to improve justice and efficiency by:
- establishing, so far as practicable, broadly similar grounds of appeal at each jurisdictional level;
 - replacing the several and overlapping appellate procedures and jurisdictions with a single procedural strand from the lowest to the highest level; and
 - better matching of the appellate tribunal to the seriousness and complexity of the case.

Most of the recommendations that I make would benefit the present structure of the courts as well as the three tiered unified court structure that I propose. However, to make clear what I have in mind, I express them in terms of my recommended structure relating it in parentheses to present courts.

THE APPELLATE TESTS

- 5 The test that I have in mind for defendants' challenges of conviction at all levels is broadly based on the statutory jurisdiction of and restriction on the Court of Appeal (Criminal Division) to allow appeals against conviction only where it thinks they are 'unsafe'. The interpretation of that word is, so far, to be found wholly in the jurisprudence of the Court. There is judicial and academic disagreement about it, to which I shall return.
- 6 The Court of Criminal Appeal, on its establishment in 1907, was empowered to quash a verdict where it was wrong in law or unreasonable, or could not be supported having regard to the evidence or, on any ground, that there was a miscarriage of justice.² Its successor, the Court of Appeal (Criminal Division), shortly after its establishment in 1996, was given very much the same criteria, though expressed differently, namely whether the conviction

² Criminal Appeal Act 1907, s 4

was wrong in law, “unsafe or unsatisfactory” or there was “a material irregularity” in the course of the trial, but all subject to an express proviso that, even if the appellant established any of those complaints, the Court could still dismiss his appeal if it considered that “no miscarriage of justice” had occurred.³ Given that proviso, the unsafety of the conviction was in practice the paramount consideration, and the Court rarely had to spend long considering what it should do if it was of the view that there had been something unsatisfactory about the proceedings in the form of a material irregularity or otherwise, but that the conviction was nevertheless safe on the evidence. It applied the proviso and dismissed the appeal.

- 7 Clearly, the Court could not apply the proviso if it was of the view that the conviction was ‘unsafe’, because that would have been a miscarriage of justice. But that did not necessarily follow if it was, in some way not giving rise to unsafety, ‘unsatisfactory’ or followed a material irregularity in the course of the trial. Because the existence and use of the proviso effectively cancelled the two criteria of an unsatisfactory conviction and a material irregularity in the absence of unsafety, Parliament, by amendment of the 1968 Act in 1995,⁴ simplified the formula by confining the Court’s power and duty to quash a conviction by reference to the single criterion of its ‘unsafety’. The intention was clearly to make no substantial change in the law.
- 8 Unhappily, there is some dispute as to the effect of the old law that remained unchanged. Some, while agreeing that there has been no change, take the restrictive view that the Court has, and always has had, a power to quash a conviction only where it was unsafe in the sense of a doubt as to its ‘correctness’ – that is, as to the proof of its commission by admissible evidence - and that the words ‘unsafe’ and ‘unsatisfactory’ in the old test had been used interchangeably.⁵ Despite the exiguous use by the Court before the 1995 amendment of the criterion of ‘unsatisfactoriness’ as distinct from ‘unsafety’,⁶ many others maintain that there was a difference between the two which has been preserved in their replacement with the single word ‘unsafe’. They argue, on that basis alone, that it is open to the Court to take the view that, however ‘correct’ the conviction may be in terms of the cogency of the evidence supporting it, it might yet be considered unsafe because of some unsatisfactory feature before or at the trial giving rise to it. Such reasoning has gathered strength from the greater use by courts over recent years of their long-standing power to stay prosecutions for abuse of process, regardless of the effect of the abuse on the safety of the conviction in pure evidential terms. This development has gone hand in hand with an increasing

³ Criminal Appeal Act 1968, s 2(1)

⁴ Criminal Appeal Act 1995, s 2(1)

⁵ see: *R v Graham and ors* [1997] 1 Cr App R 302, Lord Bingham CJ at 308A-309E; and *R v Chalkley and Jeffries* [1998] QB 848, CA, at 867H-868H, citing, as an example of interchangeable use of the terms, *R v McIlkenny* [1991] 93 Cr App R, 287

⁶ there are only one or two reported instances of it; see eg *R v Llewellyn* [1978] 67 Cr App R 149, and *R v Heston Francois* [1984] QB 278

acknowledgement of the importance of due process in the criminal justice system, encouraged and now firmly ushered into our law in its Human Rights form.⁷

- 9 The logic of such a development where there has been abuse of process in bringing a defendant to trial is unassailable. As Lord Justice Rose has recently put it, “for a conviction to be safe, it must be lawful; and if it results from a trial which should never have taken place, it can hardly be regarded as safe”.⁸ But the position is not quite so clear where the abuse or lack of due process has occurred in the trial process. The European Court of Human Rights has ruled that the test of safety of a conviction is not the same as the question whether a defendant has had a fair trial.⁹ However, the Court of Appeal, while acknowledging the separateness of the two tests, has in practice, where they have both been in play as to the conduct of a trial, so elided them as to suggest that unfairness is only an operative consideration on appeal where it may have affected the safety of the conviction.¹⁰ That entirely logical, though not precisely formulated approach, may not satisfy many who believe that serious failures of due process, whatever their effect on the safety of a conviction, should be punished by an acquittal.
- 10 There is thus much uncertainty as to the relationship of the notions of a fair trial and a safe conviction, in particular as to whether unfairness not affecting the safety, in the sense of ‘correctness’, of a conviction, requires the Court of Appeal to quash it. The point has yet to be directly considered by the House of Lords,¹¹ but would it not be better to clarify in statutory form the Court of Appeal’s power and duty in this respect? In my view, consideration should be given to amendment of the present statutory test to make clear whether and to what extent it is to apply to convictions that would be regarded as safe in the ordinary sense of that word but follow want of due process before or during trial.

⁷ see *Condron v United Kingdom* (2000) 31 EHRR 1; [2000] Crim LR 679, ECHR

⁸ see eg *R v Mullen* [2000] QB 520, CA, at 540D-E; see also *R v Smith* [1999] 2 Cr App R 238, CA

⁹ see footnote 7

¹⁰ see eg *R v Davis* [2001] Cr App R 115, CA, per Mantell LJ at 134-135, paras 64 and 65 ; *R v Francom* [2001] Cr App R 237, CA, per Woolf LCJ at pp 250-25, paras 49-51; and *R v Togher* [2001] Cr App R 457. CA, per Woolf LJ at .467-468, paras 29 and 30; and see Lord Bingham’s discussion of the word ‘unsafe’ in *R v Criminal Cases Review Commission, ex p. Pearson* [2000] Cr App R 141, at 146F-147A

¹¹ it was considered only peripherally in *R v Martin* [1968] 1 Cr App R 347, HL

Appeals against sentence

- 11 The test that I have in mind for appeals against sentence at all levels is again broadly based on that developed by the Court of Appeal. It is whether the sentence is legally permissible, or imposed on a wrong factual basis, or on irrelevant matters or without regard to relevant matters, or wrong in principle either because it is the wrong sort of disposal in the circumstances or, depending on whether the defendant or the prosecutor is the appellant, whether it is far too severe ('manifestly excessive') or far too lenient ('unduly lenient').

I recommend that:

- **there should be the same tests for appeal against conviction and sentence respectively at all levels of appeal below the Appellate Committee of the House of Lords, namely those applicable to the Court of Appeal; and**
 - **consideration should be given to amendment of the statutory test of unsafety as the ground for quashing a conviction so as to clarify whether and to what extent it is to apply to convictions that would be regarded as safe in the ordinary sense, but that follow want of due process before or during trial.**
- 12 The test for prosecution appeals against acquittal, I leave for later detailed discussion, but its core element should be a well founded belief, by whatever level of appellate court is concerned, that a guilty man has probably been wrongly acquitted and that the public interest requires the matter to be re-opened. In addition, in certain circumstances, the Attorney General should be entitled, in the public interest and for the guidance of the courts, to seek a ruling of law arising out of a criminal proceeding without it affecting the final decision in that proceeding.
- 13 With the above principles and core criteria for appeal in mind, I now give an outline of the present appeal structures and respective criteria for appeal or challenge in order to identify and illustrate the need for change.

APPEALS FROM MAGISTRATES' COURTS

- 14 There are two routes of appeal from magistrates' courts. The first is to the Crown Court by way of rehearing and thence to the Divisional Court of the Queen's Bench Division on matters of law or jurisdiction on appeal by way of case stated or judicial review. The second is direct to the Divisional Court by one or other of those procedures. Whichever route is chosen, either side may then, with leave, take the matter direct from the Divisional Court to the House of Lords. The main issues raised in the Review on appeals from magistrates' courts were: first, whether appeal to the Crown Court or its successor should continue to be by way of rehearing; second, if not, what criteria should govern the success or failure of appeal, for example, should it be the same as those in the Court of Appeal; third, if so, should there be a requirement of leave; fourth, what court or courts should hear appeals from magistrates' courts and what judges should sit in them; and fifth, should appeals by way of case stated and challenge by judicial review continue in criminal matters or should they be subsumed in appeals to the Crown Court and/or to the Court of Appeal? Before looking at these questions, I should say that there was strong support in the contributions in the Review for removal of the right of appeal to the Crown Court by way of rehearing, for the introduction at that level of the same or similar grounds of appeal to those for the Court of Appeal and for merging the present remedies of appeal by way of case stated and judicial review into a single form of criminal appeal to the Court of Appeal. There was little support for conferring an appellate jurisdiction in crime on a District Judge, sitting with or without lay magistrates, in a new District Division, or on a High Court Judge sitting singly as such.

Appeals to the Crown Court

- 15 A person found guilty in the magistrates' courts may appeal as of right against conviction or against sentence to the Crown Court composed of a Circuit Judge or Recorder sitting with at least two lay magistrates not involved in the case below.¹² The prosecution has no corresponding right of appeal to the Crown Court against acquittal or sentence. The procedure is the same as that for a summary trial and the parties are not limited to, or bound to call all, the evidence called before the magistrates' court. An appeal against sentence also follows the same format as that before the magistrates' court. The Crown Court may reverse, affirm or amend the magistrates' decision, or may remit

¹² Magistrates' Courts Act 1980, s 108

the matter back to them giving its opinion for its disposal.¹³ Thus, the Crown Court may consider points of law as well as decide matters of fact and may impose its own sentence, though not one greater than the magistrates could have passed. In the main, appeals to the Crown Court are on matters of fact.

- 16 Few of those convicted and sentenced in the magistrates' courts take the matter to appeal, even by way of rehearing as of right in the Crown Court. In 2000, there were nearly 14,000 appeals against conviction and/or sentence to the Crown Court, 125 appeals by way of case stated to the Divisional Court and 336 claims of judicial review in criminal cases to the Divisional Court. Expressed in percentage terms, less than 1% of magistrates' courts' decisions are appealed. By any standards, those are very low levels of appeal.
- 17 The right of appeal from magistrates' courts by way of rehearing must have its origin in a general lack of confidence in the impartiality and competence of the old 'police courts', mostly manned by local worthies with little knowledge of the law, little or no training and not obliged, unless required to state a case, to explain their decisions. Quite apart from the greater number of District Judges now sharing magistrates' jurisdiction, their standing and function today bear little comparison with those of the old police courts. I have referred in Chapter 4 to their increasingly thorough training, the advice and support that they receive from their full-time legal advisers, the valuable national guidance provided by the Magistrates' Association and, not least, their recent move to give reasons for their decisions. I have also made a number of recommendations, which, if implemented, should further improve their performance. In those circumstances, it is hard to see what is left of the original justification for permitting another tribunal, even one presided over by a judge, to re-hear the case.

Appeals by way of case stated

- 18 Both sides also have a right of appeal from a final decision of a magistrates' court,¹⁴ or from the Crown Court on appeal from the magistrates' court,¹⁵ direct to the Divisional Court of the Queen's Bench Division on points of law by way of case stated. Under this procedure, one or other party or both may challenge a decision or other proceeding of the magistrates on the ground that it is wrong in law or in excess of jurisdiction. Application is made to the magistrates to state a case for the opinion of the High Court. As in the case of a notice of appeal to the Crown Court, the application must be made within 21 days of the order of which complaint is made. Despite this appellate route

¹³ Supreme Court Act 1981, s 48

¹⁴ except where there is a separate statutory right of appeal to the High Court or where an enactment makes the magistrates' decision final

¹⁵ Supreme Court Act 1981, s 28

being confined to points of law, there is potential for some overlap between law and fact in the ability to challenge a finding of fact on the basis that there was no evidence to support it or, put another way, one which no reasonable bench of magistrates could have made. Similarly, this procedure may be used to challenge a sentence that is so harsh or oppressive, or so far outside the normal discretionary sentencing limits, as to be regarded as an error of law. A defendant who applies to appeal straight from a magistrates' court to the Divisional Court by way of case stated loses his right of appeal to the Crown Court. But, as I have said, if he goes first to the Crown Court he can then challenge the Crown Court's decision by way of case stated.

- 19 It is important to note that this avenue of appeal is only available where the magistrates have exercised their jurisdiction, reached a final decision and have agreed to state a case. So, for example, where magistrates dismiss a charge for want of jurisdiction or where a defendant is given no opportunity of meeting a charge so that there is a breach of natural justice, the remedy is by way of judicial review. Magistrates may refuse to state a case, (save for an application by the Attorney General) where they are opinion that it is 'frivolous', that is, futile, misconceived, hopeless or academic. If an applicant seeks to challenge that refusal, he can do so by judicial review.

- 20 The procedure is rooted in the days when magistrates' decisions, like those of a jury, were oracular. They were not required, as they are now, publicly to give reasons for their decisions when they announced them. Thus, the content of a case stated should include the facts found (but not the evidence upon which the findings were based), the question or questions of law on which the opinion of the High Court is sought, the contentions of the parties and the opinion or decision of the magistrates.¹⁶ When the matter reaches the High Court, it is heard by a single judge or a Divisional Court comprising a Lord Justice and a Queen's Bench Division Judge. The magistrates are not normally parties to the appeal unless joined as a party or accused of misconduct. But the court may consider any affidavits filed by them or on their behalf and may, if it considers it necessary, ask the Attorney General to appoint an amicus. Otherwise, no new evidence is called. However, new points of law can be raised. As in the case of an appeal to the Crown Court, the High Court may reverse, affirm or amend the magistrates' decision, or may remit the matter to them to take action in accordance with its opinion. This may include substituting an acquittal or a conviction or a more lenient sentence for a 'harsh and oppressive' one. It may also order a re-trial and direct, for example, that certain matters should be ruled admissible or non-admissible on the re-trial.

¹⁶ see Practice Direction [1972] 1 W.L.R. 4, and also Magistrates' Courts Rules, 1981 rr 76-81

Judicial Review¹⁷

- 21 Both prosecution and defence may also challenge magistrates' courts' decisions, or decisions of the Crown Court on appeal from the magistrates, in the Divisional Court by way of the discretionary remedy of a claim for judicial review.¹⁸ Judicial review is concerned with failure to exercise or excess of jurisdiction, regularity of the decision-making process and, through it, the legality, including the rationality, of the decision itself. Where there is an overlap between the case stated jurisdiction and this, a party should normally proceed by way of case stated. The court may decline to consider an application for judicial review if he has not done so. Judicial review takes three main forms, derived from the old prerogative writs: certiorari, enabling the court to quash a summary conviction and, exceptionally, an acquittal; mandamus, requiring magistrates to carry out their duty, for example to try an information or to state a case for the Divisional Court; and prohibition, to require them to not to do something, for example, not to act in excess of their jurisdiction.
- 22 A claim for judicial review can only be made with permission. A request for permission must be made to a single judge of the High Court promptly and in any event within three months of the decision complained of (thus, capable, depending on the circumstances, of being a more generous time limit than the 21 days allowed for appeal to the Crown Court or by way of case stated). It is made in a written claim form, served on the defendant, and normally determined in writing. If permission is refused the request may be renewed within seven days before a Divisional Court. If permission is granted the claim is heard, on notice to all persons directly affected, by the same court that hears appeals by way of case stated, a Divisional Court of the Queen's Bench Division. Evidence may be received in these proceedings, usually on affidavit. The court may remit the matter to the lower court for decision in accordance with its judgment or take the decision itself.
- 23 Although judicial review lies in circumstances where appeal by way of case stated is not possible, there is a considerable overlap between the two jurisdictions, including the extent to which the court may exercise discretion in the grant of relief. It is generally more appropriate to go to the Crown Court if the question is essentially one of fact and, by way of case stated to the High Court, when magistrates have acted within their jurisdiction but have made a mistake in law.

¹⁷ see Supreme Court Act 1981, ss 29 – 31 and Civil Procedure Rules, Part 52

¹⁸ *ibid*, s 29(3)

Unsatisfactory features of the system

- 24 There are a number of unsatisfactory features of the present system. First, there are the three partially overlapping routes of appeal. Depending on the matter challenged, a defendant can take his point of law to the Crown Court by way of rehearing or by one of two different procedures to the same tribunal in the High Court. Depending on the selection made, a convicted defendant may make his way on a point of law to the High Court via a rehearing in the Crown Court or lose his right to such a rehearing if he proceeds straight to the High Court. Choosing the most appropriate route and form of relief in the High Court is not always straightforward.
- 25 Second, it is anomalous that there should be an appeal as of right capable of turning on points of law from a magistrates' court to the Crown Court when the two other forms of challenges on points of law going to the High Court require some form of judicial filter.
- 26 Third, it is equally anomalous that there should be a right of appeal on issues of fact, by way of rehearing from a magistrates' court to the Crown Court. As I have said, District Judges and increasingly well trained magistrates now give reasons for their decision which require them to justify why and on what evidence they decided the matter and, where there was a conflict of evidence, why they preferred one version to the other. Where magistrates have taken the decision, the appeal is heard by a similarly constituted tribunal, save only that one of its fact finders is a judge. Where the appeal is from a District Judge, it is equally anomalous that a defendant should then be able to repeat the process before a mixed tribunal of professional and lay judges. It is also an unsatisfactory feature of a normal appeal process, particularly one exercisable by a defendant as of right, that witnesses should have to attend court twice to give evidence.
- 27 Fourth, there seems little point in retaining two distinct and partially overlapping procedures for challenging magistrates' courts' jurisdictional and other legal errors in the same tribunal in the High Court.
- 28 Fifth, depending on the form of challenge chosen, different time limits apply either to the start of the process or the stages by which it reaches hearing.

Proposed changes

- 29 All this is very confusing and makes for duplicity of proceedings, much unnecessary jurisprudence on the extent of and differences between the respective jurisdictions, both as to which should be used and in what order. In

my view, there should be one avenue and form of appeal for each court, including the new middle tier that I have proposed.

- 30 In my view, the only avenue of direct appeal from the Magistrates' Division (magistrates' courts) should be to the Crown Division (Crown Court), and should be subject to permission from a judge of the Crown Division (Crown Court). The corollary of such a restriction would be a removal of the present direct access from a decision of magistrates to the supervisory jurisdiction of the High Court by appeal by way of case stated and judicial review. However, as I recommend below, that supervisory jurisdiction should in substance be exercisable in criminal matters by the Court of Appeal on appeal from the Crown Division (Crown Court). The effect would be, not to deny access to the High Court Bench for this purpose, but to limit it to a second stage of appeal to High Court Judges and above sitting in a different court. And, of course, there would still be scope in appropriate cases for direct access to a High Court Judge presiding as a judge of the Crown Division (Crown Court) on appeal from the Magistrates' Division (magistrates' courts).
- 31 I have considered and rejected the possibility of an appeal from the Magistrates' Division to the new District Division that I have proposed. It would be wrong, divisive and lack authority to subject District Judges' and magistrates' first instance decisions to the scrutiny of their peers on appeal who, when sitting in the Magistrates' Division, would exercise exactly the same jurisdiction and would mostly come from the same or neighbouring courts and benches. So, under my proposals for a three tier court structure, the District Division would have no appellate function.
- 32 Applications for permission to appeal from the Magistrates' Division (magistrates' courts) to the Crown Division (Crown Court) would be in writing, as would the judge's decision, unless for any reason of urgency, including bail, the application should be made orally. In the event of refusal, the applicant would have an opportunity to renew his application orally. The appeal would be heard by a judge sitting alone who, depending on the nature and importance of the case, could be a High Court Judge, Circuit Judge or Recorder. It would no longer be by way of rehearing, either on conviction or on sentence, but of law and on other grounds that now make a conviction 'unsafe' or a sentence unlawful, wrong in principle or manifestly excessive in the Court of Appeal.
- 33 I should record that I considered recommending, in the case of appeals against sentence, retention of the present form of rehearing before a judge sitting, as now, with magistrates. I had in mind the experience of magistrates in sentencing at summary level and the mutual benefit to the judge and them in exercising this appellate function together. However, it makes no more sense to re-run an essentially factual exercise as to sentence of a District Judge *or*

magistrates before a tribunal constituted by a judge *and* magistrates than it does to re-run the issue of guilt. The critical question should be, as it is in the case of Crown Court sentences, whether they are permitted by law or are wrong in principle because they are the wrong sort or far too severe. Those are questions that a judge is well able to determine on his own. Circuit Judges already have considerable experience of summary sentencing levels in their appellate capacity and through statutory provisions permitting them to deal with summary offences associated with indictable offences before them.¹⁹ They would have even more in the event of adoption of my recommendation (in Chapter 7) that courts at every level should have jurisdiction to try and sentence all cases brought before them, say as part of a group of matters heard together, some of which would normally have been determined by a lower court.

- 34 If, as I recommend, appeals against conviction were confined to a judge alone, it would, in any event, be impracticable for magistrates to sit on many sentence appeals. In combined appeals, against conviction and sentence, they would have to spend much time waiting around, presumably as little more than passive observers of the conviction proceedings, before becoming part of the constitution of the court for the purpose of sentence. In my view, magistrates would have a far greater contribution to make as first instance judges in the important District Division that I have recommended.
- 35 In conviction appeals the Crown Division (Crown Court), sitting in this appellate capacity, should be in better position than the Court of Appeal on appeals from it under the present system of jury trial, because it would have a reasoned decision from the magistrates on the law and the facts. The Court of Appeal presently has to do the best it can with the judge's direction and the jury's unreasoned verdict (though that distinction would disappear if my recommendation for a reasoned jury verdict were to find favour).

Accordingly, I recommend that:

- **a defendant's right of appeal against conviction and/or sentence in the magistrates' court to the Crown Court by way of re-hearing should be abolished;**
- **it should be replaced by a right of appeal to the Crown Division (Crown Court), with leave from that court, on the same grounds that would support appeal from the Crown Division (Crown Court), sitting in its original capacity, to the Court of Appeal;**
- **the constitution of the Crown Division (Crown Court) for this purpose should be a judge sitting alone who,**

¹⁹ eg under the Criminal Justice Act 1988, ss 40 and 41

depending on the nature and importance of the appeal, could be a High Court Judge, Circuit Judge or Recorder; and

- there should be no right of appeal from the Magistrates' Division (magistrates' courts) to the High Court by an appeal by way of case stated or by a claim for judicial review.

APPEALS FROM THE CROWN COURT

36 This section concerns appeals from the Crown Court as an appellate court and as a court of first instance.

In its appellate capacity

37 As to appeal from a decision of the Crown Court in its appellate capacity, I can see no more justification for maintaining the present two overlapping forms of recourse on law and jurisdiction to the High Court by an appeal by way of case stated and judicial review than in the case of challenges to magistrates' decisions. In my view, there should be a single form of appeal and procedure combining the best of both jurisdictions. The only question is to what court should it go? For reasons that are reinforced below when considering appeals from the Crown Court as a court of first instance,²⁰ my view is that it should go to the Court of Appeal suitably constituted for the purpose. The Court should be invested as far as necessary for this purpose with the High Court's present powers on appeal by way of case stated or judicial review. It is not as if there is any difference in judicial personnel between the two Courts to justify the present complicated and overlapping procedures and separate courts for essentially the same exercise. Both are constituted, as necessary, by Lords Justices and Queen's Bench Judges. Thus, from the Crown Division (Crown Court), sitting as an appeal court from the Magistrates' Division (magistrates' courts), an appeal would lie to the Court of Appeal, but only with the permission of that Court and in special circumstances. I have in mind a similar principle in criminal appeals to that formulated by the Bowman Committee for civil appeals, and already applicable to appeals from the Crown Court sitting as a court of first instance, namely that only one level of appeal should be the norm. Thus, criteria for a second appeal in Magistrates' Division (magistrates' courts') decisions to the Court of Appeal could be similar to those for civil appeals from the High Court sitting on appeal from the county court, namely that the appeal would have to raise an important point of principle or practice or that there is some

²⁰ see paras 38-44 below

other compelling reason for the Court of Appeal to hear it.²¹ The second criterion of some other compelling reason would be a vital safety valve in the interest of justice, including the liberty of the subject in each individual case. For that reason, and also in recognition that the first level of appeal in crime would be to the Crown Division (Crown Court) – save that an appeal could be listed before a High Court Judge sitting as a judge of the Crown Division (Crown Court) - it should fall to be interpreted more widely than its counterpart in the civil sphere. It could include, for example, where the single judge of the Court of Appeal considers that an appeal would have a high prospect of success and/or that there is a risk of the ‘lurking doubt’²² variety that a serious injustice has been done.

Accordingly, I recommend that where it is sought to challenge the decision of the Crown Division (Crown Court) sitting in its appellate capacity:

- **there should be no right of challenge to the High Court by appeal by way of case stated or by claim for judicial review;**
- **instead, appeal should lie to the Court of Appeal under its general appellate jurisdiction enlarged, if and as necessary, to cover matters presently provided by the remedies of appeal by way of case stated or claim for judicial review – and for which the Court should be suitably constituted; and**
- **all such appeals should be subject to the permission of the Court of Appeal, which it should only give in a case involving an important point of principle or practice or where there is some other compelling reason for the Court to hear it.**

As a court of first instance

38 The main avenue of appeal from the Crown Court as a court of first instance is to the Court of Appeal. Between April 2000 and March 2001, there were 2029 applications for leave to appeal against conviction, of which 430 were granted leave, and 5545 applications for leave to appeal against sentence, of which 1426 went to appeal. The percentage rates of success on appeal were 30% for conviction appeals and nearly 68% for sentence appeals.

²¹ Access to Justice Act, s 55(1) and Civil Procedure Rules Part 52.13

²² see *R v Cooper* [1969] 1 QB 267, CA

- 39 The main issues raised by contributors to the Review on the question of appeal at this level were: first, whether challenges by way of case stated or judicial review to the Crown Court's decisions, when acting as a court of first instance, should be subsumed in a general right of appeal to the Court of Appeal; second, as to the composition of the Court of Appeal, in particular, whether it should be composed differently according to the seriousness and difficulty of appeals; third, whether a single judge of the Court of Appeal, who normally deals with applications for leave to appeal, should be given greater powers of 'case management'; and fourth, whether there should be changes in the Court's working practices and procedures.
- 40 Appeals from the Crown Court "in matters relating to trial on indictment" lie to the Court of Appeal (Criminal Division), either on the certificate of the trial judge that the case is "fit for appeal" or, more usually, with the leave of a single judge of the appellate court. On the hearing of the appeal, the 'Full Court' normally consists of a Lord Justice, who presides, and two High Court Judges of the Queen's Bench Division or a Lord Justice, a High Court Judge and Circuit Judge acting as a Judge of the Court.²³ From time to time when the list consists entirely of short sentence appeals the Court may be constituted by two High Court Judges or one High Court Judge and one Circuit Judge appointed to act as a Judge of the Court.
- 41 Challenges to Crown Court decisions in matters not "relating to trial on indictment" cannot presently be made to the Court of Appeal, but go the High Court on appeal by way of case stated or judicial review. As I have indicated, those are also the present procedures for challenging decisions of the Crown Court in its appellate capacity.²⁴ However, when the Crown Court sits as a court of first instance, there are sometimes difficulties in drawing the line between matters that do and do not relate to a trial on indictment. In *Re Smalley* in 1985²⁵ Lord Bridge of Harwich stated that matters that relate to a trial on indictment extend beyond decisions taken during the actual course of a trial on indictment and cover all decisions "affecting the conduct of the trial", including those taken at a pre-trial stage.
- 42 The intention seems to have been that the course of trials on indictment should not be interrupted or delayed by recourse to the High Court in respect of decisions relating to them, but should await determination by the Court of Appeal on appeal against conviction or sentence.²⁶ However, a large body of case law has built up as to what and what does not satisfy the test, engaging the House of Lords in a number of cases. For example, a decision not to

²³ under the Supreme Court Act 1981, s 9

²⁴ Supreme Court Act 1981, ss 28 and 31

²⁵ *Re Smalley*, [1985] A.C. 622

²⁶ *R. v Manchester Crown Court and others, ex p DPP* (1994) 98 Cr App R 461, per Lord Browne-Wilkinson at pp 463-467

prosecute, a forfeiture of a surety's recognisance for bail, binding over an acquitted person to keep the peace or discharging a restriction on publication of material that might lead to the identification of a juvenile do not satisfy it because they have no bearing on the conduct of trial and are, therefore, amenable to challenge by judicial review. On the other hand, an order that an indictment should lie on the file or direction as to the order of trials do satisfy the test and are challengeable only by appeal to the Court of Appeal. The law on this matter is needlessly imprecise and the Divisional Court has recently called for its reconsideration by Parliament.²⁷

- 43 In my view, appeals from the Crown Division (Crown Court) in all criminal matters, whether relating to trial on indictment or not, should go where they properly belong, to the Court of Appeal. The same should apply to appeals from the District Division. As I have recommended, the Court of Appeal for this purpose, should be invested, so far as is necessary, with the High Court's powers on appeals by way of case stated or judicial review. Under my proposals, therefore, appeals would lie to the Court of Appeal from the new District and Crown Divisions, on their certification or with leave from the Court under broadly the same regime as it now hears appeals from the Crown Court.
- 44 I should add that, just as I considered and rejected the possibility of an appeal from the Magistrates' Division to the District Division, so also have I considered and rejected the notion of an appeal from the District Division to the Crown Division. That is because they would both have a first instance jurisdiction in indictable cases. And, under the flexible use of judges in the new three tier system of jurisdiction I propose, they could in certain cases be presided over by the same level of judge. Thus, according to the seriousness of the case, including grave offences by young offenders, the presiding judge in a District Division court could be a High Court Judge, Circuit Judge, Recorder or District Judge. With such contiguity of jurisdiction and judicial overlap, it is clear that appeal from the District Division should lie only to the Court of Appeal.

Accordingly, I recommend that where it is sought to challenge the decision of the Crown Division (Crown Court) as a court of first instance or of the District Division:

- **there should be no right of challenge to the High Court by appeal by way of case stated or claim for judicial review; and**
- **instead, appeal should lie only to the Court of Appeal under its general appellate jurisdiction enlarged, if**

²⁷ *R. v Manchester Crown Court, ex pH and D* [2000] Cr App R 262, DC

and as necessary, to cover matters presently provided by the remedies of appeal by way of case stated or of claim for judicial review - and for which the Court should be suitably constituted.

Defendants' appeals

- 45 The vast majority of appeals are defendants' appeals against conviction or sentence. As I have said, the sole ground on which the Court can and must allow an appeal against conviction is if they think it is "unsafe". If not, they must dismiss it.²⁸ If the Court allows an appeal by quashing a conviction they may order a retrial where the interests of justice require it.²⁹
- 46 On an appeal against sentence the Court, "if they consider that the appellant should be sentenced differently" from below, may quash the sentence and substitute for it such sentence or order "as they think appropriate for the case". This power is subject to two qualifications, the substituted sentence or order must be one that the court below would have had power to impose and, "taking the case as a whole" must not be more severe than the sentence or order appealed against. As I have said, the Court may allow an appeal against sentence in four circumstances: where it was wrong in law; where it was passed on a wrong factual basis; where the court below improperly took certain matters into account or did not take into account matters then before it, or which have subsequently emerged; or when it was wrong in principle or "manifestly excessive". The last is the most common complaint.

Prosecution rights of appeal

- 47 There is no general prosecution right of appeal against acquittals, rulings staying prosecution as an abuse of process or, as they occur, rulings of law or of inadmissibility of evidence likely to result in an acquittal. The only three current instances of the prosecution's right to appeal decisions adverse to it are: with leave, rulings of law or as to the admissibility of evidence in preparatory hearings in serious fraud cases or other long or complicated cases,³⁰ against 'tainted' acquittals, that is, where a person is convicted of interference with or intimidation of a juror or witness in the trial leading to the acquittal,³¹ and, by Attorney General's reference, against unduly lenient

²⁸ Criminal Appeal Act 1968, s 2(1)

²⁹ *ibid*, s 7

³⁰ Criminal Justice Act 1987, s 9(11) and Criminal Procedure and Investigations Act 1996, s 35(1)

³¹ Criminal Procedure and Investigations Act 1996, ss 54–57; a provision which, since its introduction on 15 April 1997 has remained un-used

sentences.³² The Attorney General may also refer an acquittal or removal of a case from the jury to the Court of Appeal for its opinion, or for reference to the House of Lords, on a point of law.³³

48 The Runciman Royal Commission, rejected, rather cursorily, the notion of any general right of appeal against acquittals.³⁴ Sir William Macpherson of Cluny in his Report on the Stephen Lawrence Inquiry, recommended that consideration be given to empowering the Court of Appeal to permit prosecution appeals after acquittal where “fresh and viable” evidence is presented.³⁵ The Home Affairs Committee of the House of Commons, in its Third Report of the 1999-2000 session, expressed the view that there was a strong case for relaxation of the double jeopardy rule in two circumstances: first, where there is new evidence that makes the previous acquittal unsafe; and second, where the offence is sufficiently serious for a life penalty to be available on conviction and where the Attorney General considers it in the public interest to apply for the acquittal to be quashed.³⁶

49 The Law Commission, in its recent report, *Double Jeopardy and Prosecution Appeals*,³⁷ has proposed statutory reform, as part of a codification exercise, to give the Court of Appeal power to set aside an acquittal, but for murder only,³⁸ in cases where there is apparently reliable and compelling new evidence of guilt and it is in the interests of justice to do so. It also recommended that the prosecution, in the more serious types of case,³⁹ should be able to appeal rulings before trial, during the hearing of the prosecution case and of no case to answer under the first limb of the rule in *R v Galbraith*,⁴⁰ which have resulted in termination of the trial (‘terminating rulings’). It recommended the preservation of, and certain extensions to, the existing rights of appeal enjoyed by both sides in preparatory hearings in serious fraud and other long or complex cases, whether or not they are terminating rulings, and some changes to the tainted acquittal procedure. The Law Commission expressly excluded from its recommendations a prosecutor’s right of appeal against judicial misdirections that may result in acquittal by a jury. The Government, in its February 2001 policy paper, *The Way Ahead*, published a few days before the Law Commission’s Report, expressed interest in prosecution rights of appeal against acquittal and

³² see paras 69-72 below

³³ see para 68 below

³⁴ *Royal Commission on Criminal Justice*, Chapter 10, paras 75 and 76

³⁵ *Report on the Stephen Lawrence Inquiry*, recommendation 38

³⁶ see its *Third Report for the 1999-2000 Session*, (The Stationery Office), paras 39-41 and 21-24

³⁷ March 2001, Law Com No 267, recommendation 1, p 122

³⁸ also genocide consisting in the killing of a person, and (if and when the Law Commission’s recommendations on involuntary manslaughter are implemented) reckless manslaughter

³⁹ ie all indictable-only cases and such other offences as are or may be prescribed by order for the purpose an unduly lenient sentence reference; see paras 7.79-7.85

⁴⁰ (1981) 73 Cr App R 124, CA; namely that the prosecution has called no evidence of one or more elements of the offence

terminating rulings and an enhanced prosecution role in sentencing procedures, including appeals.⁴¹

- 50 The Law Commission's proposals, if implemented, would make inroads on our hallowed common law doctrine of *autrefois acquit* or, as it is more commonly called, the rule against double jeopardy, under which no-one may be put in peril of conviction twice for the same offence. Like many of our principles of criminal law, it has its origin in harsher times when trials were crude affairs affording accused persons little effective means of defending themselves or of appeal, and when the consequence of conviction was often death. Thus, in Hawkins' *Pleas of the Crown*⁴² it is said that it is founded on the maxim "that a man shall not be brought into danger of his life for one and the same offence more than once".
- 51 The doctrine, in its application to an acquittal, is not absolute and, as a matter of common sense, should not be so. As I have said in Chapter 1, adopting Professor Ashworth's analysis, the general justifying aim of the administration of criminal justice is to control crime by detecting, convicting and duly sentencing the guilty. It is not part of that aim, simply a necessary incident of it, that the system should acquit those not proved to be guilty. If there is compelling evidence, say in the form of DNA or other scientific analysis or of an unguarded admission, that an acquitted person is after all guilty of a serious offence, then, subject to stringent safeguards of the sort proposed by the Law Commission, what basis in logic or justice can there be for preventing proof of that criminality?⁴³ And what of the public confidence in a system that allows it to happen?
- 52 To permit reopening of an acquittal in such a circumstance is not inconsistent with the International Covenant on Civil and Political Rights 1966⁴⁴ or with the European Convention of Human Rights.⁴⁵ Both provide that no-one shall be tried a second time for an offence of which he has been 'finally' convicted or acquitted "in accordance with the law and penal procedure" of each state. And both accommodate the reopening of criminal proceedings in exceptional circumstances. Indeed, the ECHR expressly provides for the reopening of cases in accordance with provisions of domestic law where there is evidence of newly discovered facts or if there was a fundamental defect in the proceedings, which could affect the outcome of the case.

⁴¹ *The Way Ahead*, paras 3.53-3.56

⁴² 7th ed, Vol IV, p 311

⁴³ for a powerful expression of the thought behind this question, see Professor Ian Dennis, *Rethinking Double Jeopardy: Justice and Finality in the Criminal Process* [2000] Crim L R 933, at 945

⁴⁴ Article 14(7)

⁴⁵ Protocol 7, Article 4; the Government has not yet ratified Protocol 7, but has expressed its intention to do so

- 53 There are also a number of Commonwealth statutory precedents for prosecution appeals from trials on a point of law and against decisions to stay proceedings or to quash indictments.⁴⁶ And, as I have mentioned, in this country there are already some inroads on the principle, if not always in the formal expression of the rule. There may be a re-trial in a magistrates' court following a successful prosecution appeal to the Divisional Court by way of case stated or, exceptionally, by way of judicial review. Where the defendant initially sets the appeal process in motion, the House of Lords may restore a conviction or order a re-trial following a conviction that it has set aside and annulled.⁴⁷ And the prosecution may appeal a 'tainted' acquittal where a person is convicted of interference with or intimidation of a juror or witness in the trial leading to the acquittal.
- 54 I support the general thrust of the Law Commission's proposals for statutory reform and codification of the law of double jeopardy. They seem to me to give proper weight to justice in individual cases whilst, in the criterion of exceptionality, to take account of and reasonably limit their impact on the principle of 'finality' of decisions and the anxiety and insecurity to defendants and others involved in the process. Indeed, in the last respect, they seem to me to involve no greater burden than is already a feature of retrial after jury disagreement or when ordered on appeal against conviction. I also support the Law Commission's view that the decision whether fresh evidence justifies reopening the prosecution should be for the Court of Appeal, as it is in appeals against conviction based on fresh evidence received under section 23 of the Criminal Appeal Act 1968.
- 55 Some have expressed concern that such a relaxation of the general rule might encourage laxity of police investigation because investigators would rely on the prospect of a second trial if the first went badly. I doubt whether investigating police officers would regard the possibility of a second trial as a reason for not trying hard enough the first time. In any event, as Professor Ian Dennis has written, whilst that may be part of the rationale for the general rule, it is no reason for not considering a tightly drawn exception to it.⁴⁸ And, as the Law Commission observed, want of due diligence in investigation is one of the factors that the Court can take into account in deciding whether to grant leave to appeal.⁴⁹
- 56 Concern has also been expressed that a re-trial following an acquittal could be unfair, given that jurors or some of them might know that the Court of Appeal had only directed it because it considered that new evidence against the

⁴⁶ see Rosemary Pattenden, *Prosecution Appeals Against Judges' Rulings*, [2000] Crim L R. 971, at 972 and 973, referring to M. Friedland, *Double Jeopardy*, Oxford, (1969), p 979

⁴⁷ Criminal Appeal Act 1968, s.33; and see Rosemary Pattenden, *ibid*, p 293

⁴⁸ *Rethinking Double Jeopardy*, at 951

⁴⁹ *Double Jeopardy and Prosecution Appeals*, para 4.83

defendant was apparently reliable and compelling⁵⁰ or, as the Law Commission put it, because it made it “highly probable that the defendant was guilty”.⁵¹ The Home Affairs Committee suggested that a better way to deal with this problem would be to concentrate on the unsafety of the previous acquittal, rather than appear to prejudge the outcome of any new trial by making it conditional on the appearance of probability of a conviction.⁵² However, this seems to me largely a matter of semantics or presentation, for only prima facie compelling new evidence should be enough to unseat an acquittal.

57 This is a familiar enough problem. It could be mitigated by enabling the Court of Appeal to impose reporting restrictions on its decision to quash an acquittal, as the Law Commission has recommended.⁵³ Re-trials take place today without juries being told that they are re-trials. They also take place where, because of great national publicity given to the first trial and related appeal, it cannot be kept from jurors that a previous jury have disagreed or have convicted and their verdict has been set aside. Courts and juries, in the public interest as well as the interests of defendants in individual cases, are expected to cope with it. They do - and juries often acquit despite what has gone before, as the Director of Public Prosecutions noted in his evidence to the Home Affairs Committee.⁵⁴ As in many other circumstances where the jury are exposed to potentially prejudicial and inadmissible material, the retrial judge could suitably direct them. In the end, it would be for the jury to determine how compelling the new evidence is, along with all the other evidence in the retrial. I wonder to what extent they would, at the end of the day, be influenced in that exercise by drawing some inference as to why they were there so engaged. It should be remembered too that the retrial judge would also have the power to stay the prosecution if he was of the view that, despite all those considerations, there had been such publicity as would make a fair trial in the particular case impossible.

58 I have, however, two reservations of substance on this part of the Law Commission's proposals. The first is its concept of the public interest, leading it to limit a prosecution right of appeal to cases of murder. It considered public interest both in relation to a right of appeal against an acquittal and against rulings. This is what it said in the latter context in its final Report,⁵⁵ referring to its consultation paper, *Prosecution Appeals Against Judges' Rulings*:

⁵⁰ Professor Ian Dennis in *Rethinking Double Jeopardy*, at 939, has effectively despatched other suggestions of possible unfairness

⁵¹ *Double Jeopardy and Prosecution Appeals*, para 4.69

⁵² *Third Report for the 1999-2000 Session*, para 41

⁵³ *Double Jeopardy and Prosecution Appeals*, para 4.103

⁵⁴ *Third Report for the 1999-2000 Session*, para 43; for a recent example of this in Scotland, see the convictions following the decision of the Privy Council in *Montgomery & Coulter v HM Advocate*, *The Times*, December 6, 2000, PC

⁵⁵ *Double Jeopardy and Prosecution Appeals*, para 7.12

“... we tried to identify the main principles and aims which have a bearing on the question whether it would be fair to extend the prosecution’s existing rights of appeal. We distinguished two aims of the criminal justice system. One such aim, which we called *accuracy of outcome*, is to ensure, as far as possible, that those who are guilty are convicted and those who are not guilty are acquitted. On the other hand, we pointed out, there is also a *process aim* in ensuring that the system shows respect for the fundamental rights and freedoms of the individual. Accuracy of outcome can benefit either the prosecution or the defendant, depending on whether the defendant is guilty or innocent. **By contrast, process aims by their nature work only in favour of the defendant. They arise out of the relationship between the citizen and the state, and regulate what the state can properly do to the citizen. They reflect society’s valuation of the citizen’s autonomy and entitlement to be treated with dignity and respect.”** [my emphasis]⁵⁶

59 The Law Commission clung to that approach in its final Report, whilst acknowledging the prosecution role and that of others, such as complainants, in representing the public interest. It also asserted a need to balance competing interests so as to secure a fair trial, seemingly by balancing the interests of justice with what would achieve a fair trial for the defendant.⁵⁷ I am not quite sure what to make of that analysis. But I feel bound to express concern at the Law Commission’s seeming confinement of the public interest in its definition of *process aims* to the protection of defendants.⁵⁸ The public too have an interest in seeing that the criminal justice system - which is also there to protect them – works, and that it is not all just a procedural game. I believe that the Law Commission’s approach in this respect led it to be unduly cautious in ultimately limiting its main proposal to cases of murder.

60 In its consultation paper, the Law Commission had provisionally suggested that the proposal should apply to all cases in which the sentence would be likely to be at least three years’ imprisonment. However, it finally confined it to murder for two main reasons. First, it was concerned about the lack of finality and consequent uncertainty and distress that its provisional proposal, if implemented, could have caused to a large number of acquitted defendants. Second, it was uneasy about making too big an inroad on a principle so fundamental to the public’s confidence in the criminal justice system as a whole.⁵⁹ However, as I have indicated, it appears to have considered that the

⁵⁶ Law Commission CP 158, Part III

⁵⁷ *Double Jeopardy and Prosecution Appeals*, paras 7.18 and 7.19

⁵⁸ drawing in part on an eloquent passage in an article by Paul Roberts, *Acquitted Misconduct Evidence and Double Jeopardy Principles, From Sambasivam to Z* [2000] Crim L R pp 952-970, at 954

⁵⁹ *Double Jeopardy and Prosecution Appeals*, paras 4.11- 4.22

only or primary interest in this connection is that of defendants. In my view, the Law Commission's retreat, for these reasons, to murder as the sole exception where there is new and apparently reliable and compelling evidence of guilt is hard to justify. What principled distinction, for individual justice or having regard to the integrity of the system as a whole, is there between murder and other serious offences capable of attracting sentences that may in practice be as severe as the mandatory life sentence? Why should an alleged violent rapist or robber, who leaves his victim near dead, or a large scale importer of hard drugs, dealing in death, against whom new compelling evidence of guilt emerges, not be answerable to the law in the same way as an alleged murderer?

61 I can see why the likely three years custody sentence criterion could, in its uncertainty, have been difficult to apply and that, in any event, it was almost certainly too low. As the Home Affairs Committee observed,⁶⁰ in theory a relaxation of the double jeopardy rule could apply to all cases, but in practice the public interest in securing conviction of the guilty depends on the seriousness of the offence. My inclination is the same as that of the Committee and the majority of the respondents to the Law Commission's first consultation paper, namely to fix on some objective and clear criterion of seriousness for this purpose, for example, by reference to the type of offence or the maximum sentence available for it. A suitable level of seriousness of offence and clarity of application might be to include in the exception all offences punishable with life imprisonment, as suggested by the Home Affairs Committee,⁶¹ and/or to sentences up to a specified maximum. Professor Ian Dennis has pointed out that the list would then include, in addition to murder, such offences as rape, arson, robbery and wounding with intent to do grievous bodily harm, just the sort of offences "from which victims may justifiably demand the greatest degree of protection, and which figure most often in discussion about the merits of a new exception".⁶² It would be for Parliament to decide and specify the offences to which it would apply. I sympathise with the Law Commission's unease about identifying the line between those offences that do and those that do not qualify, but such an exercise is commonplace in the criminal law and is capable of a broadly principled approach.

62 For the reasons I have given, I regret to say that I do not understand the Law Commission's reliance on the public interest test, as it has defined it, for confining to murder its proposed exception to the *autrefois acquit* rule. Nor do I see any logic in distinguishing, for this purpose, murder from all other offences, simply because of a "widespread perception" that it is "not just more serious than other offences but qualitatively different".⁶³ There may be all

⁶⁰ *Third Report for the 1999-2000 Session*, para 21

⁶¹ *ibid*, para 24

⁶² [2000] Crim L R at 948; see also the editorial in [1999] Crim L R at 927

⁶³ *Double Jeopardy and Prosecution Appeals*, para 4.30; and see further paras 4.31 – 4.36

sorts or reasons for giving - and legal contexts in which murder should be given special treatment. But that is not a reason for excluding other serious offences from a procedure capable of removing grave injustice in their cases too.

- 63 The Law Commission has usefully recommended that the personal consent of the Director of Public Prosecutions should be obtained before applying to the Court of Appeal for an acquittal to be quashed on the grounds of new evidence.⁶⁴ A number of contributors to the Home Affairs Committee's proceedings, to the Law Commission's consultation exercise and to the Review, have expressed concern about any inroad on the double jeopardy rule enabling police authorities, disappointed with acquittals, to harass those acquitted with further investigations. The fact that they might come to nothing, or not produce fresh evidence that would prompt the Director of Public Prosecutions to challenge an acquittal or the Court to quash it, would not detract from the anxiety and uncertainty that abortive fresh investigations could cause. There is force in those concerns. Adopting with slight variation a suggestion of the Law Society to the Home Affairs Committee, I believe they could and should be dealt with by requiring the consent of the Director of Public Prosecution to the reopening of an investigation and, if he so recommends, by a different police force.

Accordingly, whilst I also support the general thrust of the Law Commission's recommendation for the introduction of statutory exceptions to the double jeopardy rule, I recommend that:

- **the exceptions should not be limited to murder and allied offences, but should extend to other grave offences punishable with life and/or long terms of imprisonment as Parliament might specify; and**
- **there should be no reopening of an investigation of a case following an acquittal without the Director of Public Prosecution's prior, personal consent and recommendation as to which police force should conduct it.**

- 64 Subject to my recommendations in Chapter 10 for rationalisation of the various present forms of pre-trial procedures, I also support the Law Commission's arguments for extension of the preparatory hearing regime to include appealable rulings on potentially terminating matters such as severance, joinder and applications to quash or stay proceeding as an abuse of

⁶⁴ *ibid*, paras 4.98 and 4.99

process.⁶⁵ Equally, I support its proposals for a prosecution right to appeal before the close of the prosecution case against terminating rulings and to extending it in this instance to all indictable-only cases and to such other offences as are or may be prescribed by order for the purpose of an unduly lenient sentence reference. There is no good reason that I can see why a defendant should be able to take advantage of a judge's error of law that can be quickly corrected on appeal. If the error is left to go uncorrected and the defendant is convicted and successfully appeals, he and others involved in the case face the possibility and ordeal of an unnecessary re-trial. And if the error is left to go uncorrected and, as a result, he is acquitted, justice is not done. Also, as Professor Rosemary Pattenden has observed,⁶⁶ judges at first instance are at present unaccountable to the Court of Appeal for errors that they may make in directing acquittals and other rulings that wrongly abort trials. This can engender a laxity of approach on their part that is damaging for the public interest in that it can encourage them to err on the side of safety against later challenge by defendants of their rulings.

65 Some have expressed concern about the potential for delay of trials if there were widespread use of such an extended right of appeal against judges' pre-trial and trial directions. But if these measures are justified, the fact that they may be well used is an argument in support of meeting a need rather than an argument against doing so.⁶⁷ They should all, in any event, be subject to the filter of leave by the Court of Appeal. Appeals against rulings in preparatory hearings do not appear to have caused undue delays in serious fraud cases. The important matter is to ensure that procedures are devised and that the Court of Appeal and its staff are staffed, organised and equipped to deal quickly with challenges to pre-trial and trial rulings and directions so as not unduly to delay or interrupt trials.

Accordingly, I also support the general thrust of the Law Commission's recommendations for:

- **extending the present preparatory bearing regime to include appealable rulings on potentially terminating matters such as severance, joinder, quashing the indictment or staying the prosecution as an abuse of process;**
- **giving the prosecution a right of appeal against an acquittal in certain cases arising from a terminating**

⁶⁵ for a recent example of problems arising from the present restrictive nature of the power, see *R v G & Ors* The Times, March 30 2001, CA

⁶⁶ *Prosecution Appeals Against Judges' Rulings*, at 985

⁶⁷ research conducted for the Runciman Royal Commission in the early 1990s showed that acquittals of over half of arraigned defendants who have pleaded not guilty result from an order or direction of the judge; see Rosemary Pattenden, *ibid*, citing 1993 research reported in [1993] Crim L R 95

ruling during the trial up to the close of the prosecution case; and

- **giving the prosecution a right of appeal against an acquittal arising from a ruling of no case to answer under the first limb of the rule in R v Galbraith.**

Appeals against perverse verdicts

66 In Chapter 11 I have recommended that, in appropriate cases in the Crown Division (Crown Court), judges should be entitled to require juries to return a special verdict, that is, to answer publicly a number of questions fashioned by the judge to the issues in the case. If that recommendation is accepted, the reasoning of the jury would be exposed to judicial and public scrutiny in a way that it is not now. For reasons that I have given, I believe that that would be good for justice and would lead to a system in which the public could have greater confidence. One consequence would be that the open reasoning of juries in their special verdicts could, on occasion, reveal what is mostly undiscoverable now, namely perverse verdicts. These could be verdicts of guilty or not guilty.

67 In those circumstances, it would be vital in the interests of individual justice and public confidence in the system that the defence or the prosecution, as the case may be, should be able to challenge the verdict on the ground of perversity on its terms. This could include, not only internal inconsistencies in the jury's individual answers to the judge's questions, but also inconsistency with the issues or agreed facts in the case. In my view, in such cases, which I would expect to be limited, both the defence and prosecution should have a right of appeal, subject to the usual filter of leave, to the Court of Appeal. There is no great novelty about this in our system. Perverse decisions of magistrates have always been open to scrutiny on appeal, either of the defence or the prosecution, by way of case stated to the Divisional Court. And, now that magistrates are required to give reasons for their decisions, their vulnerability to such scrutiny will increase, whatever the procedural nature of the appeal. Why should juries' verdicts be treated differently?

Accordingly, I recommend that where any special verdict of a jury reveals on its terms that it is perverse:

- **if the verdict is guilty, the defence should have a right of appeal to the Court of Appeal, subject to the usual leave procedure, on the ground that the perversity renders the conviction unsafe; and**

- **if the verdict is not guilty, the prosecution should have a right of appeal to the Court of Appeal, also subject to leave, on the ground that the perversity indicates that the verdict is probably untrue or unfair and such as to merit a re-trial.**

Attorney General's reference on a point of law

68 The Attorney General, following an acquittal or where the trial judge has removed the case from the jury, may refer a case to the Court of Appeal for its opinion, or for reference by it to the House of Lords, on a point of law.⁶⁸ However, whatever the outcome of the reference, it does not affect the acquittal. The purpose of the procedure is to clarify the law for future cases. It is limited to cases tried on indictment and has been sparingly used.⁶⁹ Its limitation to indictable cases is no doubt in part a recognition of the prosecutor's ability to appeal a summary acquittal by way of case stated to the Divisional Court and, thence, if necessary, direct to the House of Lords. Under the revised appellate structure that I have recommended, the prosecutor would retain this ability. If the separate forms of appeal to the High Court by way of case stated and judicial review and to the Court of Appeal were to remain as they are, I would see no reason for removal of the limitation in section 36. However, if, as I have recommended, the three forms of appeal are rationalised and channelled to the Court of Appeal suitably constituted for the purpose, the limitation should be removed so as to preserve and concentrate such prosecution rights of challenge in that procedure.

Attorney General's reference of an unduly lenient sentence

69 The Attorney General may also, with leave of the Court of Appeal, refer to it a sentence of the Crown Court that appears to have been 'unduly lenient', including one not authorised or required by law.⁷⁰ This procedure applies to offences triable only on indictment, or to triable 'either-way' offences specified by the Home Secretary.⁷¹ The Court may quash the sentence and substitute a sentence which it considers 'appropriate' and which the court below had power to impose.⁷² The Attorney General has made considerable use of this power to refer, and the Court more often than not substitutes a higher sentence.

⁶⁸ Criminal Justice Act 1972, s 36

⁶⁹ see the Law Commission's Report, *Double Jeopardy And Prosecution Appeals*

⁷⁰ Criminal Justice Act 1988, s 36

⁷¹ the latter include offences of indecent assault, threats to kill, cruelty to a person under 16 and serious fraud

⁷² Criminal Justice Act 1988, s 36

- 70 On the whole, this procedure appears to be working well, though a significant number of Court of Appeal judges consider that the Attorney General should make more sparing use of the power, reserving it for points of principle of real public interest. In appropriate cases it is a flexible and sensitive way of monitoring undue leniency and giving general guidance to sentencing judges - far preferable to the alternative of introducing highly prescriptive statutory constraints in the form of statutory minima, however qualified.
- 71 There have been suggestions for extension of the power to *all* offences triable 'either-way' and those triable summarily-only.⁷³ That suggestion should be considered against the Court's criterion for intervention, namely that there should be some error of principle in the sentence such that public confidence would be damaged if it were not altered. Regard should also be had to the significant discount that the Court allows in any sentence that it substitutes, for the ordeal to the defendant of being brought back before a court a second time. Given both those considerations, I doubt whether there would be much scope for the exercise of such power in lesser offences, given the narrower range of custodial sentencing options available. It might have some application to fines but, as they are always bounded by the defendant's ability to pay, the individual circumstances of the offender would often intrude on any exercise of comparing the fine imposed with some notional 'right' level of fine.
- 72 It seems to me that the better course is to look to the general levels of sentencing in such cases established or approved by the Court of Appeal, to the Judicial Studies Board in its training of judges and magistrates and to the Magistrates' Association in their sentencing guidelines to influence on a general basis any obvious under-sentencing in lesser offences. I advise strongly against any attempt to deal with the question by further statutory prescription, setting tariffs of minimum sentences and the like. Accordingly, I do not recommend extension of the Attorney General's power to refer to the Court of Appeal sentences that he considers are unduly lenient to *all* offences triable 'either-way' and/or those triable summarily-only.

⁷³ Penny Darbyshire, *An Essay on the Importance and Neglect of the Magistracy* [1997] Crim L R 627, at 634

PROCEDURE ON APPEALS TO THE COURT OF APPEAL⁷⁴

Obtaining leave and preparing for appeal

- 73 Leave must be sought for appeals to the Court of Appeal, initially to a single judge of the Queen's Bench and usually in writing. If the single judge refuses leave the applicant may renew his application orally, or in writing if unrepresented, to the Full Court who, if they grant leave, may continue with the hearing as the determination of the appeal. The test for the grant of leave to appeal against conviction or sentence is whether the single judge, or the Full Court as may be, consider that the appeal is 'reasonably arguable'. In the case of an appeal against conviction this is sometimes put as whether the Court feels there is a need to hear the prosecution on the merits. A notice of appeal or of application for leave to appeal must be given within 28 days of the determination appealed against, a period that the Court or the Registrar may extend before or after its expiry.⁷⁵
- 74 Each Queen's Bench Judge who sits in the Court of Appeal has a regular allotment of paper applications for leave to appeal - normally about 14 a month. This is an essential and invaluable filter to the work of the Full Court. The applications may vary considerably in complexity. Some may take a half an hour or so to read and to write a short determination; others, in particular, appeals against conviction in long and complex trials, could take up to a day or more. With the advent of human rights as a backcloth to many appeals, this filtering process is likely to become more demanding and important. The judges are required to do this work out of normal court sitting hours and in addition to their preparatory work for each day's sitting. Sometimes there is time to do them in the cracks of the day when a case 'goes short', but the norm is that they do them in the evenings, sometimes over the weekend and during vacation periods. In my view, they should be allowed time to deal with them in chambers as part of their regular sitting plan.

I recommend that single judges of the Court of Appeal should be allowed time to consider and determine written applications for leave to appeal against conviction or sentence in chambers as part of their regular sitting plan.

⁷⁴ see generally the Criminal Appeal Office's *Guide To Proceedings In The Court Of Appeal (Criminal Division)* February 1997

⁷⁵ Criminal Appeal Act 1968, ss 18 and 31A, as amended by Criminal Appeal Act 1995, s 6

75 In addition to the grant of leave, each single judge has a number of other, but limited, powers to give directions connected with the appeal, including extension of time for service of notice of appeal or of application for leave to appeal, to allow an appellant to be present at any proceedings, to order a witness to attend for examination, to grant, vary or revoke bail pending appeal and for removal of the anonymity of a complainant in a sexual offence.⁷⁶ There is a strong case for reviewing and extending the powers exercisable by the single judge; too many matters of a procedural nature are left unnecessarily to the Full Court. These include a power to give directions to enable proper consideration of the application, for example, in a potential appeal concerning the conduct of or towards jurors outside their deliberations, or for the hearing of the appeal. However, even under such extended powers, there should be a right of renewal to the Full Court.

I recommend that a judge of the Court of Appeal should be empowered, when considering applications for leave to appeal, to give procedural directions for the hearing of the application or of the appeal that need not trouble the Full Court, subject to a right on the part of the applicant or the prosecution, as the case may be, to renew the application to the Full Court.

76 Before or once leave has been granted, the advocate for the appellant may, if necessary, ‘perfect’ the grounds of appeal by reference to the transcript of the relevant proceedings in the court below. The Criminal Appeal Office prepares a case summary for the use of the Court, the factual contents of which are copied to the parties. In appeals against conviction a Practice Direction requires the appellant’s advocate to lodge a skeleton argument with the Registrar of Criminal Appeals and to serve it on the prosecuting authority within 14 days of receipt of notification of leave to appeal. And the prosecuting authority is required to respond within 14 days after receipt of the appellant’s skeleton. In both cases, the Registrar or the Court may direct a longer period.⁷⁷ As I mention below, this Direction is honoured more in its breach than its observance.

77 The effect of all these requirements is to produce much repetition of material for the Full Court on the hearing of the appeal. Included in each judge’s case papers filed on behalf of the appellant, there are or should be: his advocate’s positive advice on appeal; initial or draft grounds of appeal; in most cases also ‘perfected’ grounds of appeal; a skeleton argument; sometimes a supplemental or amended skeleton argument; and the Registry’s case summary incorporating in outline some of that material. In large and

⁷⁶ *ibid* s 31; and see s 31A which empowers the Registrar of Criminal Appeals to direct extensions of time, order a witness to attend for examination and, where the respondent does not object, vary conditions of bail

⁷⁷ Lord Chief Justice’s Practice Direction on 15th December 1998 [1999] 1 All ER 669

complicated cases those documents, with their overlapping and varying forms of presentation and accounts of the appellant's case, are time consuming to read and potentially confusing to follow when his advocate refers variously to them in the course of his oral submissions. I believe that it would simplify both the Court's and advocates' task of preparation and conduct of appeals if some of this repetitious and sometimes inconsistent documentation could be reduced to one master appellant's 'brief' for the Court, coupled with an amalgamation of the time limits for service of notice of appeal and skeleton arguments. I have in mind a document that could combine the grounds of appeal and skeleton argument, along the lines now provided for in the Civil Division of the Court of Appeal.⁷⁸ Under those provisions a notice of appeal must be accompanied by, or include, a skeleton argument or the skeleton argument must be served within 14 days of filing the notice. But, ideally, the skeleton argument should stand as the grounds of appeal.

I recommend that consideration should be given to combining, or more closely associating in content and time, appellants' grounds of appeal and skeleton arguments, and to making appropriate adjustments to time limits for their filing and service.

Composition and working methods of the Court

78 The Lord Chief Justice is the President of the Court of Appeal (Criminal Division). In addition, there are a Vice-President, 19 Lords Justices and about 46 High Court Judges mostly drawn from the Queen's Bench Division who regularly sit in the Court. There are also about 26 experienced Circuit Judges who are requested to act as judges of the Court, usually for a three week period once a year.⁷⁹ As I have said, the normal constitution of the Court is three, the Lord Chief Justice or the Vice-President or a Lord Justice presiding and sitting either with two High Court Judges or with one High Court Judge and one Circuit Judge. Sometimes the Court sits as a two judge court for short sentence appeals, usually consisting of two High Court Judges. None of the judges of the Court has any dedicated legal assistance for the purpose of research, analysis of legal and factual issues or in the preparation of judgments. In this respect, they lack the legal support of judges of most appellate courts of corresponding jurisdiction in the United States or major Commonwealth countries – usually in the form of law graduates of high academic standing acting as their 'law clerks' for a period of one or two years at a time. In the last year or so, some judges have had assistance on a temporary or ad hoc basis from one of a few judicial assistants seconded from the Bar or solicitors firms for short periods, but that is all.

⁷⁸ see Civil Procedure Rules, 52 PD-016 and 017

⁷⁹ under the Supreme Court Act 1981, s 9

- 79 The Court sits mostly in the Royal Courts of Justice in London. But in recent years it has increasingly sat for short periods around the country in the major cities on circuit. In London the Court sits continuously throughout the year, drawing on judges in rotation in up to six constitutions of three judges at a time. Save for Circuit Judge members of the Court, each of its judges normally sits three times a year for about four weeks at a time. Each constitution normally sits on average about four days a week. The fifth day is intended to give them time to read the papers and prepare judgments for the other four days work in court. It is not enough for those purposes. The average daily list for each constitution is two to three appeals against conviction (depending on their length and complexity), four to six appeals against sentence and a number of renewed applications for leave to appeal against conviction and/or sentence. If the day's list consists entirely of appeals against sentence, between twelve and sixteen are listed. For each judge, to prepare for each day involves much preparatory work, since the norm is for one or other of them, according to an allocation made by the Registry with the agreement of the Presiding Lord Justice, to give an extempore judgement of the Court. Five or six hours preparation a day in addition to normal sitting hours, sometimes longer, and much of the weekend is not unusual.
- 80 Thanks to the encouragement of Lords Chief Justices of the day and the hard work of the judges and the Registrar and staff of the Court, there has been a fall in waiting times for criminal appeals over the last decade. In the early 1990s, a 22 months' wait for hearing of an appeal against conviction was not uncommon. And appeals against sentence frequently waited for 15 months, sometimes being heard after the appellant had been released from custody. The average waiting time for conviction appeals is now between eight and nine months, including miscarriage of justice cases referred to the Court by the Criminal Cases Review Commission, and for sentence appeals, about five months or a shorter period if the sentence is very short. To many unfamiliar with the system and, even more so with appellate systems of other countries, these averages may still seem too long – and so they are for the wrongly convicted or sentenced appellant.
- 81 A further significant increase in the number of Lords Justices or High Court Judges and supporting staff to increase the capacity of the Court of Appeal – even if it were feasible to find enough sufficiently qualified and experienced for the task – is not the answer.⁸⁰ Nor, as I hope I have shown, would it be possible to speed the Court's work by sitting for longer hours. In my view, rationalisation of the work and working patterns of the judges manning the Court so as better to match their skills and experience to the work in hand is

⁸⁰ in the last ten years, the numbers of Lords Justices and Queen's Bench Division Judges have risen respectively from 27 and 54 to 35 and 73

what is required. Some of the recommendations that I have made in Chapter 6 for more flexible deployment of Queen's Bench Judges trying crime on circuit should enable many of them to spend longer in London and to give more time to the Court of Appeal. The proposals that I make below for reorganisation of the constitutions and working practices of the Court should, if adopted, make more appropriate use of judicial resources and, over-all, speed its work. In some respects, they may slow it, but with potentially long-term benefits of reducing the number of unnecessary appeals.

- 82 Before I turn to proposals for change, I should say a little more about the practices of the Court as it is now organised. The judges of each constitution of the Court usually receive their hearing papers from the Criminal Appeal Office Registry about a week before the appeals are listed for hearing. They are expected to read and digest them thoroughly before sitting on the appeals. It is no secret that the judge allotted the task of giving the judgment of the Court in each case will often need to prepare in advance some provisional notes of the relevant facts, issues and law as a reference for his judgment. The volume and speed of the work is such that the judges could not cope if they did not do that. In this task they are helped by the Registry's case summary, which, as I have mentioned, summarises the essential facts of the case, its procedural history, the matters of which complaint is made, the grounds of appeal, any arguments that timely skeleton arguments may have disclosed and brief references to any relevant law. The quality of the summaries is generally very good, but it is not unusual for the judges to have to prepare provisional notes of their own to match the issues as they see them and as developed in skeleton arguments, many of which are served on the Court after the case summary has been prepared.
- 83 The appeal papers are often incomplete, largely because the parties do not file their papers on time. They may contain differently numbered or composed bundles of case documents, mostly because the parties have not co-operated to provide a single paginated bundle. Late papers and late skeleton arguments or supplemental skeleton arguments, are common, often delivered to the judges shortly before they go into court on the day listed for the appeal. There is rarely any advance notification that a ground or grounds of appeal will be abandoned, though the judges may have spent a considerable time considering it or them as part of their preparation for the hearing.
- 84 Despite all this, I believe that the judges of the Court manage well in the circumstances, exhibiting a familiarity with the facts and the points of law in issue and despatching the appeals with speed, courtesy and, in general, sound judgments on the law as applied to the cases in hand. However, there are obvious disadvantages in the system that I have described. The first is that working at such speed gives the judges of the Court little time to focus on anything but the application of the law to the particular facts before them. They usually meet for the first time to discuss each day's list for about a

quarter of an hour before going into court to hear and deal with it. It is thus difficult for them to apply and develop the law in a principled and consistent manner. Despite the Registrar's introduction of machinery to alert one constitution of the Court to similar points that have arisen or are about to arise in another constitution, inconsistencies arise or anomalies develop because of the piecemeal and focused way in which the judges have to work. The system is capable, because of these inconsistencies and anomalies, of engendering wrong decisions at first instance and otherwise unnecessary appeals. This is a serious shortcoming in the main judicial institution in this country responsible for declaring and developing the criminal law as well as for applying it. In all but a small minority of cases, the Court is effectively the final appellate criminal court; in the last three years the number of criminal appeals to the House of Lords has averaged only about three a year. I say that without disrespect to the contribution of the House of Lords to criminal jurisprudence, but its coverage of the criminal law, though of great principle and impact where matters reach it, is necessarily patchy.

- 85 Second, the performance of the judges of the Court of Appeal, in their obvious familiarity with the facts and issues of law in the cases before them, and in the speed with which they despatch them, often suggests to those in court that they have made up their minds before hearing argument in the matter. I believe that, despite the rush, the judges are anxious to allow advocates to make their points and, if the points are good, are prepared to reconsider whatever provisional views they may have formed. But it does not always sound or feel like that to an unsuccessful advocate who has not been given an opportunity to develop his argument or to his client who may feel that his case has not received a full hearing.
- 86 Third, the Court, as it is presently constituted and in the volume of its work, is plainly overloaded. Even though its judges can cope – just – I do not see why they or those appearing in front of them or their respective clients should have to put up with it.

Reorganisation and reconstitution of the Court of Appeal

- 87 For all those reasons, I consider that the Court should be reorganised and reconstituted to enable it: first, to concentrate on cases of general significance in which it can declare and develop the criminal law in a principled and more reflective way, so as to provide useful guidance to the courts below; and, second, to apply well established principles or rules of law in a more consistent manner to correct errors and to ensure justice in individual cases.

- 88 To meet the various criticisms I have levelled at the manner of working of the Court, I consider that it needs reorganising and reconstituting in the following manner. First, the present ‘standard’ constitution of the Lord Chief Justice or the Vice-President or a Lord Justice and two High Court Judges should be reserved for cases where there is a point of law of general public importance or of particular complexity or public interest. Such cases would also include sentencing appeals calling for guidelines or involving some other point of general principle or very long custodial sentences, over which the Lord Chief Justice or the Vice-President would normally preside. In particularly important and high profile cases, the rare practice of convening a court presided over by the Lord Chief Justice or the Vice-President and two or more Lords Justices and/or High Court Judges should continue to be an option.⁸¹
- 89 In addition, I believe that in cases of exceptional legal importance and complexity, the contribution of the Court to criminal jurisprudence could on occasion be strengthened by the involvement in its process of a distinguished legal academic with specialist knowledge and expertise in the subject matter of the appeal. This could be done in one of two ways as appropriate in any particular case: either by appointing an academic to sit ad hoc as a judge of the Court under a suitably amended section 9 of the Supreme Court Act 1981; or by inviting him to submit a written brief to the Court on the point(s) in issue with copies to the parties. In the latter role, his function might be similar to that of an academic lawyer retained by the Law Commission to prepare a consultation paper for its consultative process, or to that of an advocate general in the Court of Justice of the European Court, Luxembourg.
- 90 For ‘straightforward’ appeals against conviction or in respect of short sentences, where the law, procedures and principles are clear and the only issue is whether the trial judge has correctly followed them, or where the issue turns on his treatment of the facts, I believe that the Court should be differently and less ‘heavily’ constituted, in particular, without a Lord Justice. There would be nothing new about that. The present Court’s predecessor, the Court of Criminal Appeal, frequently sat as a constitution of three High Court Judges, and the present Court is often composed of High Court Judges in straightforward sentence appeals. Many of the appeals from the Crown Division (Crown Court) and the District Division would be likely to come within this category, as would many cases presently the subject of recourse to the Divisional Court on appeal by way of case stated or claim for judicial review.
- 91 Some have suggested for this purpose a three judge court consisting of three High Court Judges, or two High Court Judges and one Circuit Judge or one

⁸¹ the most recent example of such a constitution was in 1988; *R v Watson & Ors* 87 Cr App R 1, CA (on the ‘give and take’ direction to a jury)

High Court Judge and two Circuit Judges. Whichever of those combinations might be considered, they would be at least as well qualified by their current trial experience, to deal with matters of practice and procedure as the present Full Court. But, in my view, there would still be an over-provision of judicial talent for the types of appeal that I have in mind. Both High Court Judges and experienced Circuit Judges are a valuable and scarce judicial resource, upon whom many other important calls are made. The former, in addition to trying heavy criminal work on circuit, have other equally demanding responsibilities in their civil jurisdiction and in specialist courts, including the Administrative or Commercial Courts. As to the latter, the 26 Circuit Judges who presently sit in the Court are the most experienced Circuit Judges in the country. All of them are authorised to try murder and rape and many of them are Senior Circuit Judges and Resident Judges. For all those reasons, they are much needed in their own courts and could not reasonably be asked to give more time to the Court of Appeal than they do.

- 92 Others have suggested there should be a two judge court consisting of two High Court Judges or one High Court Judge and a Circuit Judge requested to act as a judge of the Court. In my view, this would be a more appropriate match of judges for relatively straightforward appeals from Circuit Judges sitting in the Crown Division (Crown Court) and from the District Division.⁸² And they could convene on circuit more readily than is now possible, thus reducing the cost and time to the parties of bringing many appeals to London.
- 93 There are three possible obstacles to the option of a two judge court, but none of them is insurmountable. The first is that the law does not permit two judge courts in conviction appeals,⁸³ but if the proposal is otherwise acceptable, that is curable by legislation. Second, some have suggested that there could on occasion be listing difficulties where the Court consists of a High Court Judge and a Circuit Judge and the appeal is from a High Court Judge. By statute a Circuit Judge may not sit on an appeal from a conviction before or a sentence imposed by a High Court Judge.⁸⁴ Whilst it might be acceptable to amend the law to enable a Circuit Judge to sit in a three judge court on appeal from a High Court Judge, it would be less so in a two judge court. But I believe that in practice this would not be much of a listing problem. Most two judge court appeals, by their very nature, would come from a District Judge and two magistrates sitting in the District Division, or from a Circuit Judge, rather than a High Court Judge, sitting in the Crown Division (Crown Court). Third, there is the possibility of judges disagreeing,

⁸² cf the similar suggestion in the *Bowman Report of the Review of the Court of Appeal (Civil Division)*, pp 57-58

⁸³ Supreme Court Act 1981, s 55(4)(a)(i)

⁸⁴ Supreme Court Act 1981, s 56A, as inserted by the Criminal Justice and Public Order Act 1994, s 52

but in that event, the Court could be given statutory power to re-list the matter before a three judge court.⁸⁵

- 94 The section 31 Judge should be responsible for allocation of cases to the Full Court as variously constituted under these proposals. I do not consider that his decision should be amenable to a formal process of appeal, but the Full Court, if it considers it necessary, should be able to review the allocation before or during the hearing of the appeal.

I recommend that:

- **the Court of Appeal should be variously constituted according to the nature, legal importance and complexity of its work:**
 - **in cases where there is a point of law of general public importance or of particular complexity or public interest, including sentencing cases calling for guidelines or involving some other point of general principle or very long custodial sentences, the Court should consist of the Lord Chief Justice or the Vice-President or a Lord Justice and two High Court Judges;**
 - **in straightforward appeals against conviction, or in respect of short sentences where the law and procedures are clear and the only issue is whether the trial judge has correctly followed them, or where the issue turns on his treatment of the facts, the Court should consist of two High Court Judges or one High Court Judge and one Circuit Judge; and**
 - **consideration should be given to introducing a system under which, in cases of exceptional legal importance and complexity, a distinguished academic could either be appointed ad hoc to act as a judge of the Court or be invited to submit a written brief to the Court on the point(s) in issue.**
- **a single judge of the Court should be responsible for allocation of appeals to the Full Court as variously constituted under these recommendations, subject to review by the Full Court before or during the hearing of the appeal.**

⁸⁵ as the Court attempted, unsuccessfully, to do in *R v Shama* (1990) 91 Cr App R 138, CA

Practice and procedure

- 95 For the reasons I have given in paragraphs 78 - 86 above, I consider that the Court, however it is constituted, should 'slow down'. More preparation and judgment writing time should be allowed to the judges as part of their sitting plan. More time should be allowed to advocates to deploy their arguments and to the judges to consider the issues *together* in an unhurried way before and after argument. And, as part of that more orderly approach to the work of the Court, tighter and more rigorously enforced practice requirements should be made of appellants and respondents in their preparation of appeal papers. The Criminal Appeal Rules 1968 and the Registry's valuable *Guide to Proceedings in the Court of Appeal (Criminal Division)* issued in 1997 provide a clear and detailed indication of the procedural steps from notice to hearing.⁸⁶ But they say little about court bundles, pre-trial directions and final advance notification to the Court of the 'live' issues in the appeal.
- 96 In my view, what is needed, initially in the form of a Practice Direction but ultimately in a Code of Criminal Procedure, is a clear statement of what the Court requires in the structure, content and pagination etc. of bundles and the provision of common bundles to the extent possible. I have in mind something like the Practice Directions on court bundles in the civil and family jurisdictions.⁸⁷ In appeals of any complexity, there should be provision for pre-appeal hearings for directions before the single judge who granted leave or the Registrar as may be appropriate. And, in all cases the appellant's advocate should be required, not less than, say, ten days before the hearing, to provide the Court with a certificate indicating whether there are any last minute changes that may affect the content or duration of the appeal, for example, whether any grounds of appeal are to be abandoned or additional authorities are to be relied upon. This is all more work for advocates and those instructing them, but it is a discipline to which their counterparts in the civil and family jurisdictions are well used, and no less should be expected of criminal practitioners. They should be properly paid for the additional work; this is another area in which additional cost of preparatory work could produce enormous efficiency savings in court time.
- 97 Whilst a slowing down of the pace of court work may ease the present heavy workload of the Registrar and his staff, it may also increase it in the greater sophistication in listing and support arrangements that would be necessary for the Court variously constituted according to the nature of its work. In general the Registry has coped remarkably well with the increasing demands made on it in recent years, but from time to time the strain has shown and administrative problems have hindered the work of the Court. It is vital that

⁸⁶ the Registry proposes to issue a revised edition in early 2002

⁸⁷ Civil Procedure Rules, Part 39.5.3 and Practice Direction 52 on *Appeals* (February 2001); and the President of the Family Division's Practice Direction on *Court Bundles* of 10th March 2000

close attention is paid to the staffing needs of the Registry in its work of supporting the Court whatever changes lie ahead, especially having regard to the, as yet, uncertain effect of the Human Rights Act 1998 on its work load.

98 I repeat what I have said in other contexts in this Report: in conviction appeals the Court should support trial judges' robust case management and control of the trial, so long as it has not prejudiced the fairness of the trial over-all and thereby put the safety of the conviction at risk.

99 In appeals against sentence that do not involve any points of law or significant mistakes of fact or as to relevance of facts, the Court, however constituted, should draw back from its present tendency to 'tinker' with sentences passed below. I say this notwithstanding the present well known criteria for intervention, that a sentence should be 'wrong in principle' or 'manifestly excessive'. Part of the problem is that when the case has passed the leave threshold and is before the Court, it is too easy for it to slip into an exercise of attempting to determine the 'right' sentence, rather than of concentrating on whether the sentence below is seriously wrong. The high percentage of successful sentence appeals of nearly 70% that I mentioned in paragraph 38 above may be illustrative of this tendency. There is also an over-reporting of sentence appeals, which tends to encourage advocates – and the Court if it is not careful - to rely on fine factual distinctions from other reported cases. And there is the manner in which the present Government, and its recent predecessors, have sought consistency – sometimes confused with uniformity – of sentences. I believe that sentencing is not apt for fine prescription, imposing rigid and potentially unjust sentencing brackets for cases with, often, very different circumstances. And that is so, whether the prescription comes from Parliament or is attempted by the Court of Appeal itself. I believe too that more credit should be given than is sometimes done at present to the experience and judgment of first instance judges and magistrates, and also to the greater time and thoroughness they give to their sentencing decisions than is often possible in the Court of Appeal. With those thoughts in mind, I take the opportunity of citing the following passage from the Halliday Sentencing Review Report.

“Consistency can be recognised through like cases resulting in like outcomes. The variety of circumstance in criminal cases, however, makes this an incomplete definition, and one which can result in undesirable priority being given to apparently uniform outcomes, regardless of circumstances. A better approach is to seek consistent application of explicit principles and standards, recognising that these may result in justifiably disparate outcomes. The goal is consistency of

approach not uniformity of outcomes. This makes consistency difficult to monitor but not impossible.”⁸⁸

100 There have been a number of suggestions for change. One is for a different formulation of the test for intervention by the Court, for example, that it should only do so where the sentence “is well outside the permissible bracket or general sentencing level for the particular offence”. But that is essentially the test that the Court presently applies, or should apply, and has the same elasticity. Another is that the Court should only intervene when it considers that the sentence is at least, say, 25% or 33.3% higher than it should have been. But a rule that the Court should not intervene unless a sentence is at least X% higher than it should have been, would hardly engender public confidence in the system and, depending on the length or severity of the sentence, could operate disproportionately against some offenders. To stop tinkering is probably more a matter of judicial appellate culture that needs firm general guidance and regular reminder from the Lord Chief Justice and/or the Vice-President. In short, the Court should be vigilant not to ‘tinker’ with the sentence of the court below, but only to intervene where it is wrong in principle, that is of the wrong sort or far too long.

101 A frequent problem for the Court of Appeal on sentence is when an issue of fact arises as to the circumstances of the offence or as to what happened in the court below or since sentence. The prosecution is not normally represented on sentence appeals, and the Court is often hampered by its uncertainty as to the accuracy of matters put to it by the appellant’s advocate on his lay client’s instructions. In my view, the Crown Prosecution Service should consider on a case by case basis whether to appear on the hearing of an appeal against sentence so as to be able to assist the Court, if required, on matters of fact, including the effect on any victim, or of law.

I recommend that:

- **the Court, however it is constituted, should ‘slow down’ - its judges should be allowed more time for preparation and judgment writing as part of their sitting plan, and appeal hearings should be less rushed so as to allow advocates adequate time to deploy their arguments and judges to consider them;**
- **the Lord Chief Justice should consider issuing a Practice Direction for the better conduct by the parties of their preparation for hearing, including provision for pre-appeal directions hearings in complex cases, the form and contents of appeal**

⁸⁸ *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales*, (Home Office, July 2001) para 2.21

bundles and advance notification to the Court of last minute changes likely to affect the content or duration of the appeal;

- **criminal practitioners should provide a standard of service to the Court of the same level as is presently required of their counterparts in the Court of Appeal (Civil Division) and they should be paid properly for it;**
- **in conviction appeals the Court should support trial judges' robust case management and control of the trial, so long as it has not prejudiced the fairness of the trial over-all and thereby put the safety of the conviction at risk;**
- **in sentence appeals the Court should be vigilant not to 'tinker' with the sentence of the court below, but only to intervene where it is wrong in principle, that is, of the wrong sort or far too long in the circumstances; and**
- **the Crown Prosecution Service should consider on a case by case basis whether to appear on the hearing of an appeal against sentence so as to be able to assist the Court, if required, on matters of fact, including the effect on any victim, or of law.**

CRIMINAL CASES REVIEW COMMISSION

102 The Commission, a non-departmental public body, was established in 1997 to review alleged miscarriages of justice in England, Wales and Northern Ireland.⁸⁹ It has assumed the former responsibilities in this respect of the Home Office and the Northern Ireland Office. It is concerned with miscarriages of justice in summary cases as well as those triable on indictment, and refers them to the appropriate court of appeal where it considers that there is a 'real possibility' that a conviction would not be upheld on account of some argument or evidence or, in the case of sentence, some information not raised in the proceedings giving rise to it. It investigates and reports to the Court of Appeal on any matter in an appeal referred to it by the Court. And it considers and advises the Secretary of State on any matter referred to it as to the exercise of the Queen's prerogative of mercy.

⁸⁹ established by the Criminal Appeal Act 1995, s 8

- 103 Four main points about the Commission's work have been raised in the Review: first, the inability of the Court of Appeal to direct the Commission to investigate and report to it on any matter in an application for leave to appeal, as distinct from an appeal itself; second, delays in its handling of the many applications made to it after its establishment, and in the Court of Appeal in hearing and determining references; third, its power to refer old cases; and fourth, its power to refer comparatively trivial cases.
- 104 Section 23A of the Criminal Appeal Act 1968 empowers the Court of Appeal on an appeal against conviction, but not on an application for leave to appeal against conviction, to direct the Commission to investigate and report to the Court on any matter relevant to the determination of the case and likely to assist in resolving it. There may be instances where the Court might require such assistance at the application stage, and without it, may be obliged to deny leave. In my view, this is a gap in the provision of justice that should be filled by extending the ambit of section 23A to applications for leave to appeal against conviction.
- 105 As to the question of delay, one has only to read the Annual Report of the Commission for 1999-2000, to see what it has been up against - an enormous number of applications following its establishment and insufficient staff to cope with them. Under the vigorous leadership of its Chairman, Sir Frederick Crawford, it has reduced its initial considerable backlog of work, partly through acquiring more staff, partly through setting appropriate priorities and systems and partly, in the last year or so, as a result of a decrease in the number of applications for a reference. The general tenor of comment in the Review has been that the Commission has been a success. So far, it has referred 128 cases to the Court of Appeal, over 65 of which the Court has considered and, in 47 cases, quashed the conviction or reduced the sentence. However, the Court is barely keeping up with the cases that the Commission refers to it. As I have mentioned earlier in this Chapter, the average period between referral and judgment is similar to that for ordinary conviction appeals, nine months, which is far too long, especially for cases that have come to the Court by such a route. If my recommendations for reorganisation of the Court are adopted, it should be better equipped to reduce this lengthy waiting time.
- 106 As to the age of some of the cases that the Commission has referred, the Court of Appeal has recently called for urgent consideration of the ambit of the Commission's power to refer a conviction whenever it had taken place.⁹⁰ Once a reference has been made to the Court it has no option, however old the case, but to declare the conviction unsafe if it results from a change in the common law since trial deemed on judgment to be retrospective, as distinct in

⁹⁰ *R v Kansal*, The Times, 11th June 2001

the ordinary way from statutory changes or of a breach of convention rights before the Human Rights Act 1998 came into force.⁹¹ The problem for the Court of Appeal is that its established law and practice until now has been not to reopen convictions because of a change in the law since trial. The answer may be, as some contributors to the Review have suggested, to amend the 1995 Act to introduce a time limit or simply to require application of the law in force at the time of conviction. The latter seems to me the more logical course.

107 As to the ability of the Commission to refer cases however trivial, there have been one or two examples of that recently, and some concern has been expressed whether it is an appropriate use of the Commission's or appellate courts' stretched resources given the Commission's own declared priorities in favour of those in custody, those who are old or in ill-health where there is a possibility of deterioration of evidence and cases believed to be of particular significance for the criminal justice system.⁹² However, the Commission has a wide statutory discretion to refer convictions of offences tried on indictment and summarily⁹³ and is better placed than I am to assess priorities over that range and in individual cases. I do not think it appropriate for me even to attempt to form a view on this issue.

I recommend that:

- **section 23A of the Criminal Appeal Act 1968 should be amended to extend the Court of Appeal's power to direct the Criminal Cases Review Commission to investigate and report on a matter on appeal, to a matter in an application for leave to appeal; and**
- **on any reference by the Commission to the Court of Appeal or the Crown Court of a conviction or sentence, those courts should apply the law in force at the time of conviction or sentence as the case may be.**

SENTENCING ADVISORY PANEL

108 The Panel was established under sections 80 and 81 of the Crime and Disorder Act 1998 and began work in July 1999. It is an independent, advisory and consultative non-departmental public body sponsored by the Home Office and the Lord Chancellor's Department. Its Chairman is Professor Martin Wasik and there are about 12 other members drawn from

⁹¹ *R v Lambert* [2001] UKHL, 5th July 2001, not following *R v DPP, ex p Kebilene* [2000] 2 AC 326

⁹² *Criminal Cases Review Commission Annual Report 1999-2000*, p 22

⁹³ Criminal Appeal Act 1995, ss 9 and 11

academe and various disciplines serving the criminal justice system. The Act empowers the Panel to make proposals to the Court of Appeal of its own choice as well as in response to a reference from the Court or a direction from the Home Secretary, but only in relation to “a particular category of offence”. The Act requires the Court, when framing or revising sentencing guidelines, to have regard, *inter alia*, to the Panel’s views and to frame and include any resultant guidelines in a judgment of the Court in a case under appeal.

109 As the Panel has itself observed,⁹⁴ one of the reasons for its establishment was to provide a broader input into sentencing guidelines through the experience and expertise of its members and also through its own consultative process. The Panel has made a good start, albeit that the majority of its proposals to date have been on its own initiative since, with or without the provisions of the 1998 Act, the Court of Appeal can only issue sentencing guidelines through the medium of a judgment in an appropriate case on appeal before it. The Panel has made proposals on the following categories of offences: environmental offences (on which the Court of Appeal has decided not to issue a guideline); offences involving offensive weapons (not yet the subject of guideline); importation and possession of opium (now part of a Court of Appeal guideline judgment); racially aggravated offences (adopted in a Court of Appeal guideline judgment); and handling stolen goods (adopted in a Court of Appeal guideline judgment). And it is now in the course of preparing final proposals for domestic burglary.

110 Despite this good start, my view is that the remit of the Panel, limited as it is to proposing guidelines for particular categories of offences, is too narrow and fails to make full use of its talents and consultative machinery. I consider that it should have a wider responsibility, enabling it to consider and advise on general principles of sentencing, in particular as to the courts’ use of the various sentencing options available to them regardless of the category of offence. I also consider that the Court of Appeal would be able to work more closely with and respond more speedily to the Panel’s advice if it were empowered to issue guidelines without having to tie them to a specific appeal before it. In Chapter 1, I have proposed that we should build on the Law Commission’s recent initiative in consolidating sentencing legislation by general codification of our sentencing law and practice, and have suggested that a standing body should be responsible for undertaking this work, under the oversight of the Criminal Justice Council. I believe that we should make a start by amending the law to allow the Panel and the Court a freer rein in devising, as part of the codification exercise, some general principles and guidelines for categories of cases and sentencing options across the full range of offences.⁹⁵

⁹⁴ *Annual Report for 1 April 2000 – 31 March 2001*, p 7

⁹⁵ this is a personal view, first expressed in a paper given at the 19th Annual Conference of the Statute Law Society, 17th October 1999, *Do We Need A Sentencing Code?*

111 It follows that I strongly support the recommendation in the Halliday Sentencing Review⁹⁶ for a statutory framework in the form of a Penal Code, the incorporation into it of sentencing guidelines, the establishment of a new body for the purpose and widening the remit of the Sentencing Advisory Panel to provide more general advice on sentencing issues, including draft guidelines.

Accordingly, I recommend that:

- **the law should be amended to widen the remit of the Sentencing Advisory Panel to include general principles of sentencing, in particular as to the courts' use of the various sentencing options available to them regardless of the category of offence; and**
- **the law should be amended, to enable the Court of Appeal to work more closely with and respond more speedily to the Panel's advice, by empowering it to issue guidelines without having to tie them to a specific appeal before it.**

APPEALS TO THE HOUSE OF LORDS

112 As I have said, the composition and the workings of the Appellate Committee of the House of Lords have not been at the centre of the Review, and I have not felt it appropriate for me to look closely at them in the context of only part of its jurisdiction – and a small part at that. In the years 1998 to 2000 it dealt with only ten criminal appeals against 183 civil appeals. The Judicial Committee of the Privy Council has dealt with many more criminal cases from the Commonwealth. As the authors of a study in 2000 have observed, the combination of recent legislation in the form of the Human Rights and 'Devolution' Acts are likely to increase the case load for the common membership of the Appellate and Judicial Committees, and reform of either will necessarily affect the other.⁹⁷ Consideration of such fundamental constitutional reform is for others.⁹⁸ There are, however, a few matters of practicality that have arisen in the Review that it may be helpful for me to record and, on some of which, to make recommendations.

⁹⁶ *Making Punishments Work* paras 0.22-0.23 and recommendations 41 - 43

⁹⁷ *What Do the Top Courts Do?*, Andrew Le Sueur and Richard Cornes, School of Public Policy, University College London, (June 2000)

⁹⁸ a start is being made by the above authors, funded by the Economic and Social Research Council and the British Academy with a view to developing a detailed and costed outline for a new structure for the United Kingdom's 'top courts'

- 113 First, a basic summary of the Appellate Committee’s criminal jurisdiction. An appeal lies from the Court of Appeal, (Criminal Division) to the House of Lords at the instance of a defendant or a prosecutor where the Court has certified a point of law of general public importance and where either the Court or the House grants leave.⁹⁹ Similar provision is made for an appeal from the Divisional Court in a criminal cause or matter direct to the House of Lords. The Committee hears no criminal appeals from Scotland, where the Inner House is the final court of appeal.

Academic assistance to the Appellate Committee

- 114 As in the case of the Court of Appeal, I believe consideration should be given to introducing a system under which, in cases of exceptional legal importance and complexity, a distinguished academic in the field of criminal law in question could be invited to assist an Appellate Committee, say, by the submission of a written brief with copies to the parties. But for the present requirement that membership of this ‘top court’ should be combined with membership of the House of Lords, I would also recommend, as I have done for the Court of Appeal, legislation to enable an academic to sit as an ad hoc member of it where appropriate. If the Court of Appeal is to have such assistance then so should the ultimate appellate tribunal if it requires it.

The ratio of House of Lords judgments

- 115 A number of contributors to the Review have expressed concern about the difficulty of determining the ratio of the Appellate Committee’s decisions. This is because of the modern tendency for them to be contained in a number of speeches which, even when unanimous or in a majority, may use different or differently nuanced routes to the same end. It would clearly assist the clarity of the criminal law and its application in the courts if there were to be a single speech, if not on behalf of the whole Committee then at least for the majority. The dissentients, if any, should, of course, continue to express their own views. As Lord Justice Rose has noted, in a copy letter provided in the Review, the need for such clarity has given rise to the long-standing practice for the Court of Appeal (Criminal Division) to give only one judgment. Until recently, the Judicial Committee of the Privy Council did the same. And, in the House of Lords, until the last decade or so, most of the 20th century landmark decisions were contained in one or, at most, two speeches. I respectfully record and adopt Lord Justice Rose’s concern, and Lord Bingham’s view expressed in the Review, that rules made at this level “should be as clear and short and simple as possible” and that “[t]his will be more

⁹⁹ Criminal Appeal Act 1968, s 33

readily achieved if the majority speak with one voice (or if more than one voice) to the same effect”.

‘Leap-frog’ applications for leave

- 116 On points of law of general public importance where there are conflicting decisions of the Court of Appeal, or where the law on them is otherwise in such an unsatisfactory state that only the House of Lords can resolve it, there may be a case for introducing some form of ‘fast-track’ appeal to it from the Crown Division (Crown Court). I have in mind a procedure similar to the ‘leap-frog’ provisions for civil appeals direct from the High Court to the House of Lords provided by Part II of the Administration of Justice Act 1969. Under such procedure a High Court Judge may, if he considers it an appropriate case and all the parties consent, certify the case fit for an application to the House for leave to appeal. Any of the parties may then apply direct to the House of Lords for leave, and the House determines the application in writing. In criminal cases, to ensure a rigorous filter, the task of certification could be restricted to the trial judge, where he is a High Court Judge, or otherwise to a single judge of the Court of Appeal. I shall not explore the procedural minutiae of this possibility any further, but commend it in principle for further consideration.

Time limits

- 117 There is a disparity between a defendant and a prosecutor as to operation of the time limits within which each may petition the House of Lords for leave to appeal where the Court of Appeal, having certified a point of law of general public importance, has refused it. Both have 14 days from the decision of the Court of Appeal to apply to it for leave and, if leave is refused by the Court, a further 14 days from the date of refusal.¹⁰⁰ Whilst the House or the Court have power at any time to extend a defendant’s time for application for leave, neither has power to do so if the prosecutor wishes leave but fails to apply within time.¹⁰¹ I do not understand why there should be such disparity and consider that the law should be changed to permit the same flexibility to prosecutors.

I recommend that:

¹⁰¹ Criminal Appeal Act s 34(2); and see *R v Weir*, *The Independent*, 14th February 2001, in which Lord Bingham expressed puzzlement at the disparity

- **consideration should be given to introducing a system under which, in cases of exceptional legal importance and complexity, a distinguished academic could be invited to assist an Appellate Committee, say, by the submission of a written brief, with copies to the parties, on the point(s) at issue;**
- **on points of law of general public importance, where there are conflicting decisions of the Court of Appeal or the law on them is otherwise in such an unsatisfactory state that only the House of Lords can resolve it, consideration should be given to introducing a form of ‘leap-frog’ appeal from the Crown Division (Crown Court) to the House of Lords, similar to that provided for civil appeals by Part II of the Administration of Justice Act 1969; and**
- **section 34(2) of the Criminal Appeal Act 1968 should be amended to empower the House of Lords and Court of Appeal, as the case may be, to extend the time within which a prosecutor may apply for leave to appeal, as it does in the case of a defendant.**