CHAPTER 20

APPEALS

Appeal options

20.1 The primary mechanism for challenging a verdict or sentence is through an appeal. Both the accused and the prosecution have extensive although not unlimited rights of appeal: see **20.12**-**20.14**. For some appeals, the rights are qualified by a requirement for the appeal court to grant leave to appeal following a preliminary examination of the grounds of appeal: see **20.14**-**20.15**. Short time-limits apply to appeals, although extensions can be granted see **20.8**-**20.9**.

20.2 There is generally only one opportunity at each level of appeal. A court which has heard and dismissed an appeal cannot hear another appeal in the same case: *Grierson v R* (1938) 60 CLR 431; *Anisimai v State* [2012] FJSC 3. As explained in *Amisimai* at [28]:

> The reason is that there are compelling reasons in any civil society for permitting disputes in law to be fully and fairly litigated with the proviso that it is against the interest of the users of any legal system and against the public interest for there to be any open door to endless rehearings criminal or civil. That is why finality in litigation is almost a universal norm.

The principle of finality applies even if the application to appeal is based on fresh evidence: *Anisimai* at [68]-[69].

20.3 Even though rights of appeal through the courts have been exhausted, a convicted person may still apply to the Head of State for a pardon or a respite or reduction of sentence (or, as it is sometimes expressed, the exercise of 'the prerogative of mercy'): see below, **20.43**-**20.45**.

Jurisdiction of appeal courts

20.4 Separate schemes of appellate jurisdiction apply to decisions of Magistrates' Courts and of the High Court.

20.5 The Criminal Procedure Codes include two routes of appeal from decisions of Magistrates' Courts. See CPC SI ss 283-309; Ki/Tus ss 270-296.

- Appeal of a verdict, sentence or other order by a party to the High Court, where

the appeal can be heard by one or more judges.

- Appeal of a judgment on a point of law or jurisdiction by way of a case stated on application of a party by a Magistrates' Court for the High Court. This route may be attractive in a case where the Magistrate's view of the law was not made clear in the judgment.

These are alternative routes and an appeal cannot be pursued via both: SI s 306; Ki/Tu s 293.

20.6 Whichever route of appeal is pursued, a further appeal can sometimes be taken to the Court of Appeal: Court of Appeal Act SI s 22(1); Court of Appeal Act Ki; s 21(1); Constitution of Tuvalu s 135(1)(c); Superior Courts Act Tu s 9(1). In Solomon Islands and Kiribati, however, no further appeal is permitted when the High Court has confirmed a verdict of acquittal in a Magistrates' Court. Moreover, in Solomon Islands, an appeal must be on 'a question of law only'. Kiribati had the same limitation until 2010 when the word 'only' was removed. In *Mataio v Republic* [2019] KICA 10 at [4], it was noted: 'Removal of the word "only" has opened the way for consideration of appeals that raise issues of mixed fact and law.'

20.7 The Court of Appeal is the appeal court for decisions of the High Court: Constitutions SI s 85; Ki s 90; Tu s 135. It ordinarily comprises at least three judges: Court of Appeal Acts SI s 6; Ki s 5; Superior Courts Act Tu s 7. In addition, without prejudice to any rights of appeal of the parties, a judge of the Solomon Islands or Kiribati High Court may reserve a question of law for the opinion of the Court of Appeal and give judgment subject to this opinion: Court of Appeal Acts SI s 14; Ki s 13. In Tuvalu, in exceptional cases with leave of the Court of Appeal, final appeals can be taken to the Privy Council of the United Kingdom: Constitution s 136.

20.8 Judges of the Court of Appeal can be drawn from the High Court. However, in some Pacific jurisdictions including Solomon Islands, Kiribati and Tuvalu, expatriate judges are included in the Court of Appeal. These are often retired English, Australian or New Zealand judges but also sometimes judges from other Pacific jurisdictions.

20.9 There are short time-limits for appeal applications, although extensions can be granted:

- Appeals from decisions of Magistrates' Courts must be in form of a petition in writing ordinarily presented within 28 days of the decision appealed against: CPC SI s 285(1); Ki/Tu s 272(1). Similarly, application for a case stated must be made to a Magistrates' Court in writing within one month of the case being determined: CPC SI s 298; Ki/Tu s 285.

- Appeals from decisions of the High Court must ordinarily be presented within 30 days of the decision: Court of Appeal Acts SI s 26/Ki s 25; Court of Appeal Rules Tu s 34.

Similar short time-limits apply in other jurisdictions, although extensions for reason are commonly granted.

20.10 The Criminal Procedure Codes SI s 285; Ki/Tu s 272 detail the circumstances which may justify extending the period of limitation for presenting an appeal from a decision of a Magistrates' Court. There must be 'good cause': s SI s 285(1); Ki/Tu s 272(1). Without prejudice to the generality of this test, SI s 285(2); Ki/Tu s 272(2) provide that 'good cause' includes:

> (a) a case where the advocate engaged by the appellant was not present at the hearing before the magistrate's court and for that reason required further time for the preparation of the petition;
> (b) any case in which a question of law of unusual difficulty is involved;
> (c) a case in which the sanction of the Director of Public Prosecutions /Attorney-General is required…

The viability of the appeal application is presumably also a relevant consideration.

20.11 The statutes relating to Courts of Appeal do not specify a test for extending the time within which to appeal from a decision of the High Court. Presumably similar factors as those mentioned above will taken into account. In *Biribo v Republic* [2011] KICA 16 at [8], it was said:

> Authority in this Court and in many Commonwealth jurisdictions makes it clear that leave to appeal out of time will not be granted unless there is some reasonable excuse for the delay. The greater the delay, the higher the threshold. Moreover, the Court will look at the merits of the appeal.

20.12 In *Popoe v R* [2015] SBCA 1 at [7], a leave application was denied on these grounds:

> The excuse the Counsel for the Appellant advance is work commitment. I think everyone who is employed has work to do and of course are busy. Whether the office is under staffed or not there is always work to be done. One has to prioritise work according to the order of urgency. In this case there were two Counsels involved in the Appellant's case in the court below. With those considerations it appears the Counsels had failed their client the Appellant. The excuse given by the Counsel is unacceptable.

Entitlement to appeal

20.13 Appeal rights against decisions of Magistrates' Courts are extensive. Any party may appeal any 'judgment, sentence or order' to the High Court: CPC SI s 283(1); Ki/Tu s 270(1). It is specifically provided that an appeal may be on a matter of fact as well as a matter of Law: CPC SI s 283(3); Ki/Tu s 270(3). Although either party may appeal, there is a substantial restriction on prosecution appeals. A prosecution appeal against an acquittal requires the written sanction of the DPP (SI) or AG (Ki/Tu).

20.14 In Tuvalu, there is a similar broad entitlement to appeal decisions of the High Court to the Court of Appeal. Decisions of the High Court can be appealed by either party as of right: Superior Courts Act s 9(1)(b).

20.15 In Solomon Islands and Kiribati, however, rights of appeal to the Court of Appeal are more restrictive, particularly with respect to appeals by the prosecution.

- Under the Court of Appeal Acts SI s 20; Ki s 19, a convicted person may appeal:
    - against the conviction as of right on a question of law alone;
    - against the conviction with leave of the Court of Appeal or the trial judge on a question of fact or of mixed law and fact or on any other ground which appears sufficient to the Court; and
    - against the sentence with leave of the Court.
- Under the Court of Appeal Acts SI s 21; Ki s 19A, the prosecution (DDP in Solomon Islands; AG in Kiribati) may appeal:
    - against an acquittal on a question of law alone as of right in Solomon Islands and with leave of the Court of Appeal in Kiribati;
    - against a sentence as of right; and
    - in Kiribati against a stay of proceedings or a discharge as of right.

In the Court of Appeal, an application for leave will often be heard by a single judge.

20.16 Leave to appeal is not required for questions of law alone, except for prosecution appeals in Kiribati. In *Naisua v State* [2013] FJSC 14 at {14], the scope of questions of law alone was summarised in this way:

> A summary of these cases show that questions that have been accepted as a point of law alone include causational issues in homicide cases, jurisdiction to try an offence, existence of a particular defence, mens rea for a particular offence, construction of a statute and defective charge. The list, however, is not exhaustive.

Appeals on matters of fact or of mixed law and fact are restricted to appeals against conviction and require leave to appeal. Examples of questions of mixed law and fact are questions of legal status (for example, 'was the driver licensed?') or legal characterisation (for example, 'was the publication obscene?').

20.17 The role of the leave process was analysed by the Fiji Supreme Court in *Naisua v State* [2013] FJSC 14 at [31]:

> As was put by a single judge in *Chand v State* [2008] FJCA 53; AAU0035.2007 at [15]-[16]:
>
> > The right of appeal as prescribed by Parliament must be a meaningful right. A meaningful right of appeal is achieved by a procedure that avoids clogging appeal rolls with frivolous and unmeritorious appeals. This is particularly so in our jurisdiction, where majority of appeals are filed by prisoners without any legal assistance. I am not suggesting that all appeals filed by the prisoners are frivolous, but experience has shown that some appeals are frivolous and unmeritorious, thus, clogging appeal rolls and denying resources to appeals that are meritorious.

20.18 Fijian courts have said that the issue on a leave application will be whether the applicant has 'a reasonable prospect of success': see, for example, *Naduva v State* [2021] FJCA 98 at [5]. This means that there must be arguable grounds of appeal but not that the appeal must be likely to succeed. In *Chaudhry v State* [2014] FJCA 106 at [36], it was said:

> [I]n any application for leave to appeal against conviction and/or sentence, a single judge deciding the application…, is not deciding the appeal nor in any way assessing the merit of any particular ground. So long as the ground of appeal raises an arguable point, leave will be granted. It does not matter that a ground may be weak with little chance of success. That is a matter for the Court of Appeal to determine.

Powers of an appeal court

20.19 On an appeal from a decision of a Magistrates' Court, the High Court may make a wide range of orders: CPC SI 283; Ki/Tu s 270. The relevant legislation does not specify any particular grounds on which the appeal court may act. The Tuvalu Superior Courts Act includes similar provisions for both the High Court on an appeal from a

Magistrates' Court and the Court of Appeal on an appeal from the High Court: ss 5(3), 11. However, the powers of the Solomon Islands and Kiribati Courts of Appeal are specified in more detail. These specific powers of the Court of Appeal may be presumed to be available to other courts hearing appeals.

20.20 In Solomon Islands and Kiribati, three precise grounds are set out for quashing a conviction by the Court of Appeal: Court of Appeal Acts SI s 23(1); Ki s 22(1). These are:

- that the verdict 'is unreasonable or cannot be supported having regard to the evidence';
- that the trial judge made 'a wrong decision on any question of law'; or
- that 'on any ground there was a miscarriage of justice'.

This is a standard formula which is found in many jurisdictions. It has generated an extensive body of case-law, some which is explored below at **20.25-20.36**.

20.21 If a conviction is quashed, a verdict of acquittal may be entered by the appeal court if that is justified: Court of Appeal Acts SI s 23(2); Ki s 22(2). However, even though a conviction has been quashed, the appellant may be guilty of a lesser offence. In that eventuality, the appeal court can enter a conviction of the lesser offence: SI s 24(2); Ki s 23(2).

20.22 It is also possible that quashing a conviction may leave no clear answer as to the disposition of the case. The trial may have miscarried but perhaps the accused would have been convicted even if an error had been avoided. In that eventuality, the appeal court can order a new trial: Court of Appeal Acts SI s 23(2); Ki s 22(2); Superior Courts Act Tu s 5(3)(b)(iv).

20.23 An appeal against conviction can be dismissed, even though its point(s) might be decided in favour of the appellant, if the conviction involved 'no substantial miscarriage of justice': CPC SI s 293; Ki s 280, second paragraph; Court of Appeal Acts SI s 23(1), Ki s 22(1), second paragraph. This proviso is found in most jurisdictions. It is inapplicable to cases where a verdict has been quashed on the ground that it was unreasonable, because such a finding necessarily involves a conclusion that there has been a substantial miscarriage of justice: *Filippou v R* (2015) ALR 33, [2015] HCA 29 at [15]. However, the proviso might be applied, for example, if the trial judge made an error of law about the elements of an offence or defence but the evidence would have dictated the same result even if the error had not been made. There might also have been a procedural error in the conduct of the trial. Some case authorities have indicated that a procedural error may be so bad that the accused never received a fair trial, in which case the verdict must be quashed regardless of the strength of the evidence: *Wilde v R* (1988) 164 CLR 365, [1988] HCA 6; *Baiada Poultry Pty Ltd v R*

(2012) 246 CLR 92, [2012] HCA 14 at [21]-[29]. However, for lesser errors the proviso might be applied to preserve a verdict where there was overwhelming evidence of guilt.

20.24 There are no statutory criteria for appeals against sentences. In *R v Su'umania* [2005] SBCA 3 at [12], the Solomon Islands Court of Appeal expressed principles that have been accepted throughout common law jurisdictions:

> It is well settled that this court will not interfere with the sentence imposed by the trial judge in the exercise of his discretion unless it is shown to be manifestly excessive or manifestly inadequate either because the judge has acted on wrong principle or has clearly overlooked or understated or overstated or misunderstood some salient feature of the evidence.

The courts have stressed that a sentencing judge has wide discretion and that appellate courts should interfere with the exercise of that discretion only where there has been an error of principle or reasoning. Such an error might be indicated in the judge's stated reasons. Alternatively, it might be inferred because the sentence was 'manifestly inadequate' or 'manifestly excessive'. See the discussion at **21.14-21.15**.

Grounds for quashing convictions

20.25 The three grounds for quashing convictions are stated in the Court of Appeal Acts of Solomon Islands and Kiribati; see above at **20.20**.

20.26 The first ground for quashing a conviction is that the verdict 'is unreasonable or cannot be supported having regard to the evidence'. The test has sometimes been conveyed through the expression that the verdict is 'unsafe or unsatisfactory'. The concern is with questions of fact rather than law, that is, with the strength of the evidence.

20.27 What is at issue is the verdict at trial and not the prosecution's case as to how the crime was committed. An appeal court can, therefore, conclude that the crime could not have been committed in the way the prosecution claimed at trial, and yet uphold a verdict of guilty. See, for example, *R v Stafford* [1997] QCA 333; leave for further appeal refused, *Stafford* B57/1997.

20.28 The key issue in relation to unreasonable or unsupportable verdicts is how much deference should be given to the conclusions reached in the trial process. In *Kamaniera v Republic* [2006] KICA 2 at [12], it was said:

> The true test is clearly set out in section 22(1) of the Court of Appeal Act. It is whether the verdict is unreasonable or cannot be supported having regard to the evidence. That is quite a stringent test. It recognises that decisions on questions of fact and credibility are the proper province of the trial court, and that it is only in exceptional circumstances that an appellate court will be entitled to interfere with the trial court's findings on such questions.

The difficulty for an appeal court is that it will usually not hear the witnesses and see the evidence. It will merely be reviewing the record of what occurred at trial and the judge's notes. An appeal court may be reluctant to substitute its opinion — for example, about the credibility of a witness — for that of the trial judge. In *Terara v Republic* [2005] KICA 4 at [16], the Kiribati Court of Appeal endorsed the following passage from the New Zealand case of *Hutton v Palmer* [1990] 2 NZLR 260 at 268:

> The principles are not in doubt. An appeal such as the present is by way of rehearing and the Court has an obligation to come to its own conclusion. Running across that principle is another, namely, that an appellate Court is under the disadvantage that it has not seen or heard the witnesses. In a case which depends on an opinion as to conflicting testimony an appellate Court will not interfere unless it can be shown that the trial Judge has failed to use or has palpably misused his advantage; it ought not to reverse the conclusions at which he has arrived merely from its own comparison and criticisms of the witnesses and its own view of the probabilities of the case.

20.29 In Australian cases, the question that has often been posed is: 'was it open to the jury to be to be satisfied beyond reasonable doubt that the accused was guilty'? See, for example *M v R* (1994) 181 CLR 487 at 493; [1994] HCA 63 at [9]. Putting the question in this way might suggest an extremely deferential stance to trial verdicts: the conviction is to be upheld even if it was also reasonably open to the trial court *not* to be satisfied of guilt. In *Libke v R* (2007) 230 CLR 559; [2007] HCA 30, Hayne J said at [113]:

> It is clear that the evidence that was adduced at the trial did not all point to the appellant's guilt on this first count. But the question for an appellate court is whether it was open to the jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must, as distinct from might, have entertained a doubt about the appellant's guilt. It is not sufficient to show that there was material which might have been taken by the jury to be sufficient to preclude satisfaction of guilt to the requisite standard.

In *Hunt v State of Western Australia* [No 2] (2008) 37 WAR 530; [2008] WASCA 210, at [150]–[151], Murray J endorsed this passage from *Libke* and added:

> It will, I think, rarely be the case that the test expressed in that way may be satisfied before an appellate court, which must make its evaluation of the sufficiency of the evidence solely on the record, without having had the advantage of being present at the trial.

20.30 It could therefore be advantageous to the appellant to simply ask whether there is a significant possibility that an innocent person has been convicted. This formulation has been preferred in some other decisions of the High Court of Australia: see, for example, *Darkan v R* (2006) 227 CLR 373; [2006] HCA 34 at [84]; *Weiss v R* (2005) 224 CLR 300; [2005] HCA 81 at [41].

20.31 The second ground for quashing a conviction on appeal is that the trial judge made 'a wrong decision of any question of law'. For example, evidence might have been wrongly admitted, or the elements of an offence or defence might have been misdescribed. It is also a question of law whether or not the accused has discharged the evidential burden to put a defence in issue. There are higher chances of success when appealing questions of law than questions of fact, because there is no particular reason for the appeal court to defer to the opinion of the trial judge.

20.32 The third ground for quashing a conviction is that 'on any ground there was a miscarriage of justice'. Miscarriages of justice are necessarily involved in all three grounds for quashing convictions. The third ground is therefore a residual category to capture defects that do not fall within either of the other two categories; The residual category covers various defects in the trial process; for example, errors in permitting joinder of counts or of defendants and errors in summing up the evidence. See also *R v Szabo* [2001] 2 Qd R 214; [2000] QCA 194, where the defence counsel had failed to advise the accused of a personal relationship with the prosecutor.

22.33 Errors by defence counsel can sometimes create miscarriages of justice and lead to convictions being quashed. In *Malaketa v R* [2007] SBCA 5, the Solomon Islands Court of Appeal endorsed the following statement of the principles by Gleeson CJ in *R v Birks* (1990) 19 NSWLR 677 at 685:

> 2. As a general rule an accused person is bound by the way the trial is conducted by counsel, regardless of whether that was in accordance with the wishes of the client, and it is not a ground for setting aside a conviction that decisions made by counsel were made without, or contrary to instructions, or involve errors of judgment or even negligence.
> 3. However, there may arise cases where something has occurred in the running of the trial, perhaps as a result of 'flagrant incompetence' of counsel, or perhaps from some other cause, which will be recognized as involving, or causing, a miscarriage of justice. It is impossible and undesirable to attempt to

define such cases with precision. When they arise they will attract appellate intervention.

For example, in *R v Sheppard* [2005] QCA 235, counsel failed to challenge a prosecution witness through cross-examination and also failed to pursue a defence claimed by the accused. However, in *Malaketa*, a complaint about counsel's failure to seek instructions about some possible lines of defence was dismissed on the ground that 'there is no evidence as to the instructions the appellant would have given had he been asked about them'.

20.34 In *Nudd v R* (2006) 225 ALR 161; [2006] HCA 9, the members of the High Court of Australia were agreed that the issue to be addressed with respect to the performance of defence counsel is whether it has led to a miscarriage of justice rather than whether any particular degree of incompetence or negligence has been established. Some previous cases had espoused a test of 'flagrant incompetence' but this was rejected in *Nudd* as being the determinative issue.

20.35 Different views were expressed in *Nudd* as to what could amount to a miscarriage of justice in this context. Four of the judges (Gummow, Hayne, Callinan and Heydon JJ) appeared to take the position that a miscarriage of justice occurs when an error by counsel deprived the accused of a chance of an acquittal. On that approach, any error would become irrelevant if the evidence for the prosecution was sufficiently strong. Gleeson CJ and Kirby J, however, took a broader view of the concept of a miscarriage of justice. In their view, there would be a miscarriage if there was a departure from the essential elements of a fair trial, regardless of the strength of the evidence. In the result, however, the appeal in *Nudd* itself was denied by all members of the High Court.

20.36 One of the main sources of complaint about counsel is advice given to the accused about whether or not to give evidence at trial. Ordinarily such advice will be regarded as a matter of trial tactics lying beyond the scope for appellate review. In an exceptional case, however, a conviction might be quashed. In *R v ND* (2004) 2 Qd R 307; [2003] QCA 505, it was concluded that one of the grounds for the advice involved an error of law. In addition, the accused was not advised of advantages of testifying. On the failure of counsel to provide appropriate advice with respect to the significance of not testifying, see also *Sankar v State of Trinidad and Tobago* [1995] 1 All ER 236.

20.37 Nevertheless, the failure of defence counsel to provide appropriate advice to testify does not necessarily occasion a miscarriage of justice. Whether or not there was a miscarriage of justice will depend on the reasons why the defendant did not give evidence in the particular case. In *Craig v The Queen* (2018) 264 CLR 202; 353 ALR

177; [2018] HCA 13 at [26]-[27], the High Court of Australia said:

> It may be accepted that the choice to give evidence is ultimately for the accused to make and that in some circumstances counsel's failure to adequately advise the accused with respect to the exercise of the choice not to give evidence will occasion a miscarriage of justice. *Sankar* was such a case…*Sankar* is not authority for the proposition that any inadequacy or error in legal advice relating to the accused's right to give evidence, without more, occasions a miscarriage of justice. Certainly where it is not in issue that the accused was aware of the right to give evidence, the contention that any material error in legal advice bearing on the exercise of the right denies an essential condition of a fair trial must be rejected. At the least, demonstration that incorrect advice has occasioned a miscarriage of justice will require consideration of the relation between the advice and the decision not to give evidence.

The defendant in *Craig* had been advised of his right to give evidence but had been given incorrect advice on the degree of risk that giving evidence would lead to cross-examination on prior convictions. The court held that it had not been established that he would have given evidence if he had been correctly advised.

New arguments

20.38 New arguments can be made on appeal unless they were withheld at trial for reasons of forensic strategy. For example, if a homicide occurred in the course of a fight, the primary defence at trial might be self-defence. An alternative defence might be provocation, although that would only reduce murder to manslaughter. Even if the alternative defence of provocation was never raised by defence counsel at trial, counsel on appeal might be permitted to argue for a provocation defence. Suppose, however, that the defence at trial was 'alibi' (that is, 'it wasn't me — I was somewhere else'). If the accused is convicted of murder, the appeal court might not be interested in hearing arguments about self-defence or provocation that were never raised at trial. The accused would have chosen a line of defence and might have to live with the consequences of that choice.

20.39 The Fiji Supreme Court has indicated that it will take a strict approach in deciding whether new arguments can be allowed. In *Balekivuya v State* [2016] FJSC 37 at [114], Wati J said:

> Due to the volume of cases in which fresh grounds are sought to be argued in the

Supreme Court, it is now timely that the Court takes a strict approach in deciding whether new grounds should be permitted to be argued. It must not be a routine to allow every petitioner to argue new grounds. I feel that it is proper that those grounds should only be allowed if the petitioner can establish that:

(a) there are sufficient evidentiary record to resolve the issue;

(b) it is not an instance in which the petitioner for tactical reasons failed to raise the issue at trial and/or the appellate court below, and

(c) the significance of the new grounds on the special leave criteria is compelling making it a most exceptional case to grant leave.

New evidence

20.40 New evidence on matters of fact may be heard by the High Court when it considers an appeal from a decision of a Magistrates' Court: CPC SI s 294; Ki/Tu s 281.

20.41 New evidence can also sometimes be introduced in the Court of Appeal. Under common law principles, however, the evidence must ordinarily be 'fresh' rather than just 'new'. 'New' evidence would be any evidence that was not introduced at the trial. 'Fresh' evidence, however, is evidence that was not reasonably available for the trial. In *Ngoro v Regina* [2015] SBCA 13 at [13], it was said:

> The principles on which material not before the original trial court may be admitted are well established. The following principles have emerged over time:
>
> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
>
> (2) The evidence must be relevant in the sense that it bears potentially decisive issue in the trial,
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief.
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

20.42 In *Green v R* (1938) 61 CLR 167 at 174–5, the requirement for additional evidence to be fresh was described as a general principle rather than a hard and fast rule. In *Gallagher v R* (1986) 160 CLR 392; [1986] HCA 26, Gibbs CJ reaffirmed that evidence will not usually be considered if it could with 'reasonable diligence' have been produced at trial. Nevertheless, he then went on to say that 'this is not a universal and inflexible requirement': Gallagher, at CLR 395. There has been some acknowledgement, therefore, that exceptional circumstances may justify hearing new evidence even though it is not fresh. An example is *Re Knowles* [1984] VR 751, where certain evidence had not been produced at trial because defence counsel mistakenly believed it to be inadmissible.

The Prerogative of Mercy

20.43 When rights of appeal through the courts are unavailable or have been exhausted, application may be made to the Head of State for the exercise of 'the prerogative of mercy'. The prerogative is governed by terms of the Constitutions: SI s 45; Ki s 50; Tu s 80. The Solomon Islands version reads:

> **(**1) The Governor-General may, in the name and on behalf of the Head of State -
>
> *(a)* grant to any person convicted of any offence under the law of Solomon Islands a pardon, either free or subject to lawful conditions;
>
> *(b)* grant to any person a respite, either indefinite or for a specified period, of the execution of any punishment imposed on that person for such an offence;
>
> *(c)* substitute a less severe form of punishment for any punishment imposed on any person for such an offence; or
>
> *(d)* remit the whole or any part of any punishment imposed on any person for such an offence or any penalty or forfeiture otherwise due to the Crown on account of such an offence.

Kiribati and Tuvalu have similar provisions, allowing for the same options.

20.44 The prerogative of mercy covers both pardons and respite or reduction of sentences. The effect of a pardon is to relieve the convicted person of any punishment or other consequences of the conviction, such as civil disqualifications, but not to quash the conviction itself. The prerogative can be exercised for various reasons, including to 'forgive' an offender. It can also be used to correct a miscarriage of justice in a case where rights of appeal have been exhausted.

20.45 The prerogative must be exercised on the advice of a representative body. The Governor-General of Solomon Islands must act on the advice of a Committee of four persons – a Chair, a medical practitioner, a social worker, and a nominee of the government of the region of ordinary residence of the person under review: s 45(2)-(5).

> (2) There shall be a Committee on the Prerogative of Mercy (in this section referred to as "the Committee") which shall consist of the following members -
>
> *(a)* a Chairman and two other persons, one of whom shall be a qualified medical practitioner and the other of whom shall be a social worker, appointed by the Governor-General in his own deliberate judgment; and
> *(b)* one person nominated -
> (i) by the Honiara city council, if the person whose case is being reviewed ordinarily resides in Honiara city;
> (ii) by the provincial assembly of a province, if such a person ordinarily resides in that province.

The President of Kiribati and the Governor-General of Tuvalu must act on the advice of the Cabinet: Constitutions Ki s 50; Tu s 80(1)(a).