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 **20.9-20.11**. Short time-limits apply to appeals, although extensions can be granted see **20.6-20.8**.

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 President 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, **20.34-20.40**.

Jurisdiction of appeal courts

20.4 Separate schemes of appellate jurisdiction apply to different levels of trial court.

- Verdicts or sentences of Island Courts can be appealed to the Magistrates' Court: Island Courts Act s 22.
- Verdicts or sentences of Magistrates' Courts can be appealed to the Supreme Court: Criminal Procedure Code s 200(1), (3).
- Verdicts or sentences of the Supreme Court can be appealed to the Court of Appeal: Criminal Procedure Code s 200(2), (4).

An appeal from a trial court to an appeal court is final: Code s 212. There is no provision

for a further appeal.

20.5 The Court of Appeal is constituted by two or more judges of the Supreme Court sitting together: Constitution s 50. The Chief Justice determines the composition of the Court in consultation with the other judges: Judicial Services and Courts Act s 48(2). The trial judge in a case is excluded from sitting on an appeal: Judicial Services and Courts Act s 45(3). In practice, all Supreme Court judges who were not previously involved in the case will usually sit on an appeal. In addition, expatriate judges, often retired Australian or New Zealand judges, are appointed as Supreme Court judges for the purpose of participating in appeals and two will usually be included for each sitting of the Court of Appeal.

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

- Appeals from decisions of Island Courts must be appealed within 30 days unless an extension is granted: Island Courts Act s 22(1).
- Notice of appeal from decisions of Magistrates' Courts or the Supreme Court must ordinarily be lodged within 14 days: Criminal Procedure Code as s 201(1). Within 14 days after filing the notice, a memorandum of appeal containing particular of the grounds of appeal must be lodged: s 201(3)-(4).

The appeal court can extend these time limits: Island Courts Act s 22(5); Criminal Procedure Code s 291(6).

20.7 The statutes do not specify a test for extending the time within which to appeal. The Fiji Supreme Court has identified certain factors, which also apply in Vanuatu, as guides to the exercise of an appeal court's discretion:

> (i) The reason for the failure to file within time;
> (ii) The length of the delay;
> (iii) Whether there is a ground of merit justifying the appellate court's consideration.
> (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
> (v) If time is enlarged, will the respondent be unfairly prejudiced?

See *Kamlesh Kumar v. State; Mesake Sinu v State* [2012] FJSC 17; *Tuwai v State* [2016] FJSC 35

20.8 In *Popoe v R* [2015] SBCA 1 at [7], the Solomon Islands Court of Appeal denied an application for an extension 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

20.9 Appeal rights in Vanuatu are extensive.

- Either party may appeal a decision of an Island Court on any ground, either of fact or law: Island Courts Act s 22.
- A person convicted in either the Magistrates' Court or the Supreme Court may appeal on any ground, either of fact or of law, against the conviction or the sentence: Criminal Procedure Code s 200(1)-(2). However, there are restrictions on appeals against sentence by a person who has pleaded guilty:
    - There can only be an appeal only against the legality of the sentence: s 200)(1)(a), (2)(b)). Nevertheless, this would permit an appeal on the ground that a sentence was manifestly excessive: see 20.xx.
    - There cannot be an appeal against a sentence from the Magistrates' Court of a fine not exceeding VT2,000 (s 200(1)(b)) or from the Supreme Court of imprisonment not exceeding 6 months: s 200(2)(a).
- The Public Prosecutor may appeal on a point of law, but not on any other ground, against a decision of either the Magistrates' Court or the Supreme Court: s 200(3)-(4). In *Naisua v State* [2013] FJSC 14 at {14], it was said about the scope of questions of law alone:

> > 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.

> An appeal against a sentence on the ground that it involved an error of principle or reasoning will also be an appeal on a point of law: see **20.16**, **21.18-21.20**.

20.10 All appeals in Vanuatu are as of right. Unlike many jurisdictions, there are no categories of appeal where a grant of leave to appeal is required before there is a full

hearing in the appeal court.

20.11 Nevertheless, an appeal court can reject the appeal summarily if a perusal of the memorandum of appeal and the record of the case shows that 'there is not sufficient ground for interfering': s 204(1). For some categories of appeal, the appellant or their advocate are at least entitled to be heard. However, there is no such right for appeals on the ground that a conviction is against the weight of the evidence or that a sentence is excessive.

Powers of an appeal court

20.12 An appeal court can make a wide range of orders: for example, allowing or dismissing an appeal, reversing the finding at trial, quashing a conviction, acquitting the accused, ordering a re-trial, or reducing or increasing a sentence or altering its nature: Criminal Procedure Code s 207. The court cannot, however, enter a conviction on a successful appeal by the Public Prosecutor: it can only order a re-trial.

20.13 If a conviction is quashed, a verdict of acquittal may be entered by the appeal court if that is justified. 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

20.14 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 error had been avoided. In that eventuality, the appeal court can order a new trial.

20.15 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'. This proviso is express in many statutes. It is not included in the Vanuatu Criminal Procedure Code. However, the terms of the Code are sufficiently loose to allow for the recognition of the proviso. It 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 in the case 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 proceedings. Some case authorities have indicated that a procedural error may be so bad that the accused did not receive 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.

20.16 There are no statutory criteria for appeals against sentences. 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 **21.15-21.20**.

Grounds for quashing convictions

20.17 Three precise grounds for quashing a conviction by the Court of Appeal have been recognized at common law and in the legislation of many jurisdictions. 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. The formula can be expected to be applied in Vanuatu.

20.18 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.

20.19 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.

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

> 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.

20.21 In *Morrison v Public Prosecutor* [2020] VUCA 29, the Court of Appeal set out the general approach to be taken by an appeal court:

> [19]…For our purposes, we are content to rely on the approach set out in *Dovan v Public Prosecutor* [1988] VUCA 7, quoted in *Ben v Public Prosecutor* [1990] VUCA 7 and other cases, and most recently relied on in *Pakoa v Public Prosecutor* [2019] VUCA 51:
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> > We cannot accept that, in deciding if a verdict is unsafe or unsatisfactory, in asking ourselves if we have a lurking doubt, we can or should hear a virtual repeat of the type of arguments usually presented in Counsel's closing speech. The appeal court is not to be regarded simply as an opportunity to have a second bite at the same cherry.... Thus, before it will intervene in such a case, this Court must have some ground for considering the verdict unsafe or unsatisfactory that goes beyond the simple question of whether we feel we might have come to a different conclusion if we had been the trial judge on the appearance of the written record.
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> [20] Thus it is important to approach this appeal appreciating that this is not just a matter of this Court substituting its own opinion for that of the Supreme Court judge. This Court must analyse the evidence, but in the end rather than apply its own opinion it must ask the question whether it was open to the Supreme Court judge to reach the decision that he did. Before we allow the appeal we must have reached the position that any reasonable decision maker *must* have entertained a doubt about Mr Morrison's guilt.

20.22 An extremely deferential stance to trial verdicts might be suggested by posing the question as: 'Was it open to the judge to reach the decision that he did'? Presumably 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.

20.23 It could therefore be advantageous to the appellant if it is simply asked 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].

20.24 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.

20.25 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.

22.26 Errors by defence counsel can sometimes create miscarriages of justice and lead to convictions being quashed. The principles to be applied were explained by the Court of Appeal in *Kalosil v Public Prosecutor* [2015] VUCA 43:

> [83] The approach to allegations of counsel incompetence was considered by the Solomon Islands Court of Appeal in *Malaketa v R* [2007] SBCA 5, where the Court adopted the decision of Gleeson CJ in *R v Birks* (1990) 19 NSWLR 677. Any allegation of counsel incompetence is examined from the point of view of the fairness of the Court process and outcome, rather than the characterisation of counsel's conduct. As was observed by the New Zealand Supreme Court in *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 (SC) and the Court of Appeal in *R v Scurrah* CA159/06, 12 September 2006 at [13]–[15], an appellate Court will not second-guess tactical decisions made by counsel in the course of a trial. Inevitably there is often no demonstrably right or wrong answer to many of the decisions made in the course of a trial, and appeals cannot be turned into a hindsight-driven review of those decisions.
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> [84] For that reason a person is generally bound by the way in which the trial is conducted by counsel. As Gleeson CJ said in *R v Birks* at 685:
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> > However, there may arise 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 recognised 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'.

20.27 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.

20.28 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.

20.29 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. Under some circumstances, failure to provide positive advice to testify can also require a conviction to be quashed: *R v Clinton* [1993] 2 All ER 998. In *Kalosil v Public Prosecutor* [2015] VUCA 45, the Vanuatu Court of Appeal said:

> It is the duty of counsel to give advice on the issue of whether an accused should give evidence. The decision in the end must be that of the accused.

New arguments

20.30 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 diminish responsibility for the accused: see **10.26**-**10.28**. Even if the alternative of provocation was never raised by defence

counsel at trial, counsel on appeal might be permitted to argue for it. 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 intentional homicide, 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.

New evidence

20.31 New evidence may be heard by an appeal court: Criminal Procedure Code s 210; Judicial Services and Courts Act s 22(3).

20.32 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. This restriction is adopted in Vanuatu.

20.33 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.

Pardons

20.34 When rights of appeal through the courts are unavailable or have been exhausted, application can be made to the President of Vanuatu for a pardon. Pardons have a long history at common law. A pardon is usually granted to 'forgive' an offender. However, a pardon can also be used to correct a miscarriage of justice in a case where no remedy is available through the courts. The grant of a pardon was historically called the exercise of 'the prerogative of mercy'.

20.35 The process is now governed in Vanuatu by the Constitution s 38:

> The President of the Republic may pardon, commute or reduce a sentence imposed on a person convicted of an offence. Parliament may provide for a committee to advise the President in the exercise of this function.

An advisory committee has not yet been established. The function is therefore performed on the President's own volition or on the advice of the executive government. The failure to establish an advisory committee has been the subject of strong criticism by the judiciary: see *Public Prosecutor v Atis Willie* [2004] VUCA 4.

20.36 The Court of Appeal in *Atis Willie* was also highly critical of the arbitrary ways in ways the pardoning power had been exercised in Vanuatu. The Court insisted that the power 'must always be used in a principled, transparent and consistent way' and that an exercise of the power could be subject to judicial review for its legality:

> Within any country which is committed to the rule of law, notwithstanding the general terms of the Article, this is not a power which can be exercised except in a way which is consistent with the entire constitutional framework. It is not a power which is beyond the purview of the Court to review and assess its exercise for legality.

An example of an unlawful attempt to grant pardons can be found in *Vohor v President of the Republic of Vanuatu* [2015] VUCA 40. In that case, an Acting President had purported to pardon himself and others for offences of bribery and corruption. His actions were held to violate all of the leadership duties specified in the Constitution s 66(1). The pardons were quashed.

20.37 The Constitution does not define a pardon. At common law, a pardon has generally been understood as a measure relieving a convicted person of any punishment or other consequences of the conviction, such as a civil disqualification, although not formally quashing the conviction itself. In *Sope Maautamate v Speaker of Parliament* [2003] VUCA, the Court of Appeal endorsed the following statement of the effect of a pardon from *8 Halsbury, Laws of England,* 4th Ed. at para. 952:

> The effect of a pardon under the Great Seal is to clear the person from all infamy, and from all consequences of the offence for which it is granted, and from all statutory or other disqualifications following upon conviction. It makes him, as it were, a new man so as to enable him to maintain an action against any person afterwards defaming him in respect of the offence to which he was convicted.

In Vanuatu, the consequences of a conviction followed by a sentence of imprisonment can include bars on running for political office and on the practice of the legal profession. A pardon should be effective to remove these bars.

20.38 It was said in *Sope Maautamate* that a pardon 'is not the equivalent of an acquittal'. Nevertheless, the Constitution s 5(2)(h) treats a pardon as equivalent to a verdict of acquittal for the purposes of the rule against double jeopardy: see **19.9**.

20.39 There is a problem with the drafting of s 38. Section 38 lumps 'pardon' together with 'commute or reduce' as a process affecting a sentence that has been imposed. Yet this would make the reference to 'commute' redundant: to commute a sentence is to relieve a convicted person of punishment. In order to make sense of s 38, and to align it with the historical meaning of a pardon, an additional comma needs to be inserted so that the provision reads in this way: 'The President of the Republic may pardon, or commute or reduce a sentence imposed on, a person convicted of an offence.' This is effectively the way the provision was interpreted in *Sope v Republic of Vanuatu* [2004] VUCA 20:

> In our judgment, Article 38 provides a power in two ways for the President. First he may pardon a person convicted of an offence. Secondly, he can commute or reduce a sentence imposed on the person convicted of an offence.
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> We heard an argument that the power in Article 38 is restricted solely to dealing with the sentence in some way. Such a reading would mean that the word "pardon" before the comma is redundant. "Pardon" would add nothing to the other words of the Article. There is a fundamental rule of interpretation that every word in a Constitution, a statute or a contract is to be given a meaning.
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> We have no doubt that there is the power to "pardon" a person convicted of an offence which is separate and distinct from the power to "commute or reduce a sentence imposed".

20.40 The major role of pardons in Vanuatu has been to forgive offenders rather than to correct miscarriages of justices. In modern times, some other jurisdictions have facilitated and regulated the role of pardons in correcting miscarriages by providing that an application can be referred to the appellate court for a judgment: see, for example, *Mallard v R* (2005) 224 CLR 125, [205] HCA 68. Effectively, this creates a new avenue of appeal. However, the development has not yet occurred in Vanuatu.