> and expense involved. There must be an end to the controversy as far as the appellate process at the CFI is concerned. The perfection rule is directed at that purpose.
>
> Further, the appellate process to the CFI from a conviction by a magistrate envisages a single process where all matters in controversy are put in issue and resolved. The process does not contemplate an opportunity to have a second bite at the cherry. The perfection rule provides 'the sharpest spur' to judges, lawyers and litigants to get things right the first time. *Burrell v R* at para.16."

Whilst the Chief Justice was referring to appeals from the Magistrates' Court to the CFI, these principles will apply to all courts in Hong Kong.

In the earlier decision of *HKSAR v Hung Chan Wa*,[128] Li CJ, referring to time limits in appeals, stated:

> "These provisions lay down time limits for appeals and confer on courts the discretion to extend time. (In this judgment the term 'appeal' is used to include leave to appeal). This arrangement is an important feature of any criminal justice system. It is in the interests of society for there to be finality in the criminal process. But the time limits for the purpose of achieving finality are not absolute. The courts have the discretion to relax the time limit where this is considered to be justified in the circumstances of the individual case."

The ultimate recognition of finality would be a criminal law system that did not recognise any form of appeal, but such a system would be inconsistent with the rule of law and unacceptable in liberal democratic societies.[129] Statutory provisions that prohibit appeals from decisions can also be declared unconstitutional.[130]

The requirement of "access to justice" must therefore be *balanced* with the principle of finality.

Finality is recognised in the general principle that multiple appeals by the same appellant to the same appellate court are not permitted.[131] Where a person has exhausted all his or her statutory appeal rights and fresh or new evidence subsequently emerges casting doubt on their original conviction, the question of "post-appeal" review rights becomes important and how these rights are balanced with the need for finality.[132] If an offender unsuccessfully

128 (2006) 9 HKCFAR 614, [21].

129 In *Ras Behari Lal v The King-Emperor* (1933) 50 TLR 1 (PC), Lord Atkin stated: "Finality is a good thing, but justice is a better."

130 *Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570.

131 *HKSAR v Tin's Label Factory Ltd* (2008) 11 HKCFAR 637, [27]–[28]; *HKSAR v Rawe Waikama Magarya* [2015] 5 HKC 438 and *McMaster v R* [2016] NZCA 612, [66]. However, an appeal court has an inherent power to recall or reopen an earlier judgment in exceptional circumstances, in order to correct a serious error that has occurred in the appellate process, though no fault of the appellant or the appeal court: *R v Smith* [2003] 3 NZLR 617, [36]; *McMaster v R* [2016] NZCA 612, [58] and *Wong v R* [2011] NZCA 563, [13]. The exceptional circumstances include where the original judgment was a nullity, where presumptive bias can be demonstrated and where the judgment was the result of a fraud: *Taylor v Lawrence* [2003] QB 528, [54]. An application to reopen (or recall) an earlier judgment is not the same as a "second appeal": *R v Wickliffe* [1986] 1 NZLR 4, 11. A recall application is based on some fundamental defect in the proceedings, whereas an appeal is generally based on an error inherent in the judgment.

132 In England, Wales and Scotland, a Criminal Cases Review Commission (CCRC) has been established to review "post-appeal" possible miscarriages of justice. A similar body was proposed for New Zealand: see Thomas Thorp, *Miscarriages of Justice* (Auckland: Legal Research Foundation, 2005). A compelling case for the establishment of such a body in New Zealand is provided by Malcolm Birdling in Malcolm Birdling, "Correcting Miscarriages of Justice" [2013] 11 *NZLJ* 413. In New Zealand, the Criminal Cases Review Commission Bill 2018 proposed the creation of a CCRC. The role of the CCRC will be to review convictions and sentences (usually after all appeals have been exhausted) and to refer a "suspect" conviction or sentence to the appropriate appeal court. The CCRC will replace the current system whereby the Governor-General can refer a conviction or sentence, on an application for the prerogative of mercy, to the appropriate appeal court. However, decisions of the CCRC will not be appealable. This reflects the requirements of finality.

appealed his or her conviction to the CA and new evidence of innocence subsequently emerged, he or she could not directly appeal again to the CA.[133] By comparison, such a second appeal is recognised in some jurisdictions.[134]

Finality is recognised in the principles that govern an application by a defendant who wishes to reverse their plea of guilty to a plea of not guilty, assuming that the plea of guilty was "unequivocal." In these circumstances, the court has an unfettered discretion to permit a reversal of the plea, but this discretion should be exercised cautiously and sparingly because of the policy of certainty and finality.[135]

New and compelling evidence can also arise that casts doubt on the accuracy of a person's acquittal. This raises the question of whether the prosecution should be able to retry an acquitted person and, if so, in what circumstances?[136]

The requirement of finality must however always be balanced against the superior requirement of "justice" in all circumstances.[137]

In *The Ampthill Peerage* [1977] AC 547, 569, Lord Wilberforce stated:

> "For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals; so the law, exceptionally, allows appeals out of time; so the law still more exceptionally allows judgments to be attacked on the ground of fraud: so limitation periods may, exceptionally be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved."

The principle of finality can also work in favour of accused persons in terms of a ceiling on the number of times a person can be retried for the same offence. The general principle is that a second trial is not an abuse of process. Although there was early authority that a third retrial would ordinarily be substantial and grave injustice,[138] this view has altered. A third

133 The only option would be to apply to the CFA for leave to appeal and if this failed to apply to the Chief Executive for a pardon.

134 Under the Criminal Procedure Act 1921 (SA) s.158, the Full Court of the Supreme Court of South Australia, as an example, can hear a second or subsequent appeal against conviction if the Court is satisfied that there is fresh and compelling evidence (of innocence). The requirement of fresh and compelling evidence (of guilt) also applies in the converse situation in Hong Kong (and in Victoria) where the Solicitor-General can apply to the CA for retrial of a person acquitted: discussed in Chapter 7.

135 *HKSAR v Chan Chi Ho Lincoln* (2018) 21 HKCFAR 588, [41], referring to *R v Croydon Youth Court* [1997] 2 Cr App R 411, 417. Reversal of plea is discussed in Chapter 7.

136 In a number of common law jurisdictions, the prosecution has been given a right to apply to the CA for the retrial of an acquitted person.

137 The requirement of finality is also recognised in the general principle that an appellate court will not lightly interfere with the verdict of a jury and in the principle that an appellant needs to establish not simply that an error occurred in the trial but also that the error led to a miscarriage of justice.

138 See *R v Wong Chung Ling* [1995] 2 HKCLR 179; *Hau King Yeung v HKSAR* (FAMC 1/2007, [2007] HKEC 594) and *Mok Kin Kau v HKSAR* (2008) 11 HKCFAR 1. In *Mok Kin Kau*, the Court stated: "In the absence of a special and compelling reason for doing so, putting a person on trial for a third time after two concluded trials and appeals and after he has already served the whole of his sentence would be a departure from accepted norms to his disadvantage so serious as to constitute a substantial and grave injustice."

retrial would be unusual but not unprecedented. There are certainly circumstances where a third retrial is appropriate.[139]

1.14.2 Prosecution appeal rights

Apart from the principle of finality, another competing consideration with any system of appeals and reviews (from the perspective of convicted persons) is the public interest in enabling the prosecution to also appeal and review various decisions and judgments.[140] The community, the State, the courts and the victim also have interests in criminal appeals, but these (public) interests may not be consistent with those of the convicted person. Examples include the right of the prosecution to appeal an acquittal (judge-alone) or a sentence and the right of the prosecution to appeal the discharge of the accused or the quashing of the indictment. It will be seen in subsequent chapters of this book that prosecution appeal rights serve different interests to those of the accused.

1.14.3 Avoidance of fragmentation

A third competing consideration is the need to avoid fragmentation of criminal proceedings. For this reason, only limited forms of appeal are available with respect to pre-trial and other interlocutory decisions. Most appeals can only be from a "final" order.

1.14.4 Limited court resources

A fourth competing interest is the limitations on court resources such as the number of available appeal judges, appeal courts and required staff. As a consequence of this consideration, on an appeal against sentence by an offender under ss.83G and 83H of the CPO, only two appeal judges of the CA are required to sit, hear and determine the appeal.[141] Further, only one appeal judge of the CA is required to decide an application for leave to appeal.[142] Applications for leave that are totally devoid of merit waste the valuable and limited resources of appeal courts.

1.14.5 Jury confidentiality rule

One of the oldest common rules is the confidentiality rule with regard to juries. The rule is (in summary) that a court (first instance or appellate) will not investigate or receive into evidence, anything said in the course of the deliberations of the jury.[143] This means that if, after the jury has delivered its verdict, it comes to light that there might have been an irregularity in the deliberations of the jury, to the disadvantage of the convicted person, the trial judge cannot do anything about it as the judge is *functus officio*.[144] There are very

139 See, eg, *HKSAR v Tam Ho Nam (No 2)* (2017) 20 HKCFAR 414; *Nguyen Anh Nga v HKSAR* (2017) 20 HKCFAR 149, [65] and *HKSAR v Lo Chun Siu* (CACC 90/2013, [2014] HKEC 936), [191] compared to *Mok Kin Kau v HKSAR* (2008) 11 HKCFAR 1, [12]. Also see *Dennis Reid v R* [1980] AC 343 and *R v Chau Mei Ling* [1981] HKC 542.

140 It is not entirely accurate to describe prosecution appeal rights as "competing" with appeal rights of offenders. Both sets of rights can coexist in harmony.

141 HCO s.34(2A).

142 CPO s.83Y(2)(a).

143 *R v Mirza* [2004] 1 AC 1118; *R v Smith* [2005] 1 WLR 704, 712D–713B and *HKSAR v Mohammed Saleem* [2009] 1 HKLRD 369, 376–378. All these cases are discussed in *HKSAR v Chan Huandai* [2016] 2 HKLRD 384.

144 *HKSAR v Chan Huandai* [2016] 2 HKLRD 384, [3].

strong public policy reasons for this rule.[145] The only avenue open to the convicted person is to apply for leave to appeal on the ground that the verdict is unsafe or unsatisfactory. However, as discussed in Chapter 7 (at 7.4.11.11), an appeal court can only investigate jury deliberations in very narrow circumstances.[146] An appeal court will approach such an appeal with "extreme caution."[147]

Although there exist a number of competing considerations, criminal appeals in Hong Kong have developed into an important component of the contemporary criminal justice system, reflecting a greater emphasis on human rights and procedural fairness. In Hong Kong and other jurisdictions, over the last two decades, there has been a discernible shift within the law regarding criminal appeals. Whereas once an appeal against sentence or conviction was seen by many practitioners as a peripheral matter, the right to appeal is now regarded as a fundamental human right.

1.15 CORRECTING MISTAKES: REOPENING APPEAL JUDGMENTS

Whilst the principle of finality is of central importance, there can be circumstances where an appeal court may wish to correct a mistake in one of its judgments. This raises the question of when, if ever, can an appeal court reopen a judgment in order to correct a mistake?

1.15.1 The perfection rule

> "For a court of record, it is a well-established rule that until the point in time when its order is finally recorded, it has the power to recall and vary a decision it had earlier made. That moment marks the cut-off point after which the power to change an earlier decision ceases. The final entry of the order in the record is known as the perfection of the order and it will be convenient to refer to that rule as the perfection rule. Such a power is implicit in the court's power to determine the matter in controversy. To identify the point of demarcation represented by the final recording of the order, it is necessary to examine the statutory provisions establishing the court and governing its operation and, where required, any relevant court practice."[148]

The perfection rule applies in criminal appeals.[149] For appeals to the CFI from the Magistrates' Court, the judgment of the CFI (deciding the appeal) is perfected when the judgment is

145 First, confidentiality promotes candour in the jury room. Second, there is the need for finality of the jury verdict, and third, confidentiality protects the privacy of jurors: *HKSAR v Chan Huandai* [2016] 2 HKLRD 384, [25]–[27].

146 The first exception is if there is evidence that the jury has completely repudiated its oath to try cases according to the evidence presented at trial, as distinct from using an Ouija board or drawing lots to determine the verdict. The second exception is where extraneous material has been introduced into the jury deliberations. Examples include telephone calls into or out of the jury room, accessing information on the Internet and papers left in the jury room: *R v Thompson* [2011] 1 WLR 200, [4]–[5], discussed in *HKSAR v Chan Huandai* [2016] 2 HKLRD 384, [22].

147 *HKSAR v Chan Huandai* [2016] 2 HKLRD 384, [21].

148 *HKSAR v Tin's Label Factory Ltd* (2008) 11 HKCFAR 637, [16].

149 *Ibid.*, [17] and *R v Cross* [1973] QB 937. The perfection rule has also been followed in many Australian decisions: see, eg, *Burrell v The Queen* (2008) 238 CLR 218. The perfection rule is also followed in New Zealand: see *R v Nakhla (No 2)* [1974] 1 NZLR 453.

recorded in the records of the Magistrates' Court.[150] For appeals to the CA, the judgment of the CA will be perfected when it is finally recorded in the records of the trial court.[151]

Until the order or decision of the court is finally recorded, the court has the power to vary the decision in question. Indeed, this has occurred in quite a number of criminal cases in Hong Kong, including the CA.[152]

In *HKSAR v Tin's Label Factory Ltd*,[153] the CFA stated that even when an intermediate appeal court has jurisdiction to reopen an order under the perfection rule, there are three points that should be emphasised. First, where the question of alteration in the decision arises, all parties must be given an opportunity to be heard on the subject.[154] Second, the occasions when a court will reconvene to consider, altering a decision will be exceptional.[155] Third, the judge must exercise great caution before altering his initial decision.[156]

1.15.2 The slip rule

Courts have a power in criminal cases to amend the (perfected) court record under the slip rule:[157]

> "This power is distinct from the power to alter an order before its perfection and should not be regarded as an exception to the perfection rule. In amending an order under the slip rule, the court is not changing its order. What is being done is to ensure that the order accurately reflects what the court had originally intended when making it. See *Burrell v The Queen* at para.21."[158]

1.15.3 The residual discretion after perfection

It seems clear that an appeal court has a power to reopen one of its earlier judgments even where the judgment has been perfected. However, not surprisingly, it would only be in the most exceptional circumstances that an appeal court could lawfully reopen one of its earlier judgments. The precise circumstances where an appeal court in Hong Kong could reopen a judgment are not entirely clear, although there is authority from other common law jurisdictions that the jurisdiction can be enlivened when the previous judgment (of the

150 *HKSAR v Tin's Label Factory Ltd* (2008) 11 HKCFAR 637, [41].
151 *R v Cross* [1973] QB 937 and *HKSAR v Tin's Label Factory Ltd* (2008) 11 HKCFAR 637, [18].
152 *R v Au Pui Kuen* (CACC 1028/1976, 3 February 1977); *R v Wong Tak Sing* [1990] 1 HKC 155; *R v Wong Siu Chung* (CACC 571/1994, [1995] HKEC 385) and *Secretary for Justice v Mak Wai Hon* [2000] 1 HKC 498. The perfection rule has also been applied in the CFI: see *Lau Kwok Wah v R* [1980] HKLR 24 and *HKSAR v Yeh Tsann Tarng* (HCMA 1005/1998, [1999] HKEC 1). In *HKSAR v Tin's Label Factory Ltd* (2008) 11 HKCFAR 637, [23]–[24], the CFA stated that the earlier decisions in *Chan Wai Keung v R* [1965] HKLR 815 and *R v Man Lim Ping* [1985] 1 HKC 61 should not be followed in respect of the power of the CA to reopen a judgment.
153 (2008) 11 HKCFAR 637, [17].
154 *Ibid.*, [30].
155 *Ibid.*, [31].
156 *Ibid.*, [32]. The CFA stated that where the alteration favours the appellant who is appealing his conviction or sentence, the judge should be more ready to exercise the power [33]. In contrast, where the appeal judge has allowed the appeal and quashed a conviction, it would only be in the most "exceptional and rare" circumstances that the decision should be changed [34].
157 *Ibid.*, [35], referring to *R v Saville* [1981] QB 12.
158 *Ibid.*, [35]. The reference to *Burrell* is a reference to the decision of the Australian High Court in *Burrell v The Queen* (2008) 238 CLR 218.

appeal court) is a nullity[159] or the result of some type of fraud. To reopen a judgment, the appeal court would have to be satisfied that a serious miscarriage of justice would otherwise occur. In *R v Wong Tak Sing*,[160] the CA declined jurisdiction to reopen a sentence, but in *Secretary for Justice v Mak Wai Hon*,[161] the Court was prepared to reopen a sentence.

In *HKSAR v Tin's Label Factory Ltd*, the CFA stated that the approach taken in *Taylor v Lawrence:*

> "merits serious consideration for adoption in Hong Kong for an intermediate court of appeal dealing with civil or criminal cases as the appropriate solution for reconciling the tension between the two principal objectives referred to above of such a court."[162]

1.16 PROSPECTIVE AND RETROSPECTIVE EFFECT OF APPEAL COURT RULINGS

Occasionally, an appeal court will determine that a previous interpretation of a particular law is incorrect and lay down what is now the correct interpretation. The new, correct interpretation will apply to all subsequent trials and other criminal proceedings in Hong Kong. However, the change in the law could (in principle) also provide a ground for a person to challenge his or her conviction under the previous law on the ground that the conviction was based on an incorrect understanding of the law.

For example, in *HKSAR v Hung Chan Wa*,[163] the CA and the CFA held that s.47(1) and 47(2) of the DDO imposed only an evidential burden on the accused, not a legal or persuasive burden, as had been previously been thought. This was to be the new approach to be taken in Hong Kong after 25 June 2005 (the date of the CA judgment). The two appellants in this case and other applicants who had applied for leave to appeal but had not yet had their cases heard would thus benefit from the ruling. However, the CFA also had to consider the retrospective implications of the ruling in terms of whether persons convicted under the previous understanding of the law could now apply for leave to appeal their conviction out of time.

In dealing with the prosecution's concern about "floodgates" of applications for leave to appeal, Li CJ stated at [23]–[24]:

> "[23] Whatever be the level of court, in dealing with applications for extension of time to appeal against conviction on the ground that the previous view that the relevant provisions imposed legal or persuasive burdens has now been authoritatively held to be incorrect and that the relevant provisions only impose evidential burdens, the principle to apply is that this ground by itself would not justify an extension of time.

159 In *R v Daniel* [1977] 1 QB 364, 369F–370B, the CA stated that apart from a nullity, an order could be reopened where, because of a failure to follow the rules or the well-established practice, there was a likelihood that an injustice may have been done. Also see *R v Grantham* [1969] 2 QB 574 and *R v Cadman-Smith* [2000] EWCA Crim 75.
160 [1990] 1 HKC 155.
161 [2000] 1 HKC 498.
162 (2008) 11 HKCFAR 637, [56].
163 (2006) 9 HKCFAR 614.

[24] Such a principle is well-established by overseas jurisprudence. In overseas jurisdictions, the courts in dealing with applications for extension of time for appeal against conviction have consistently applied the principle that time should not be extended for appeal only on the ground that an authoritative judgment subsequent to the conviction has held the previous understanding of the law to be incorrect."[164]

The policy behind this approach is the need for finality in criminal proceedings.[165]

1.17 TYPES OF APPEALS AND REVIEWS

The term "appeal" can have various meanings, and although a number of cases have attempted a taxonomy, none are likely to be exhaustive.[166] In *HKSAR v Ip Chin Kei*,[167] McWalters J provided an extremely useful discussion of the different types of appeal available in Hong Kong, which is discussed below.

As already stated, the common law has never recognised the right of a person convicted at trial (before a judge and jury or judge alone) to appeal either his or her conviction or sentence.[168] The common law has also never recognised the right of the Crown (HKSAR) to appeal an acquittal or a sentence. All criminal appeals are inventions of statute.[169] Accordingly, the legislature has been able to create a range of different types of appeal and review in criminal matters, depending upon the nature of the decision being appealed against.[170]

164 *Ibid.*, [23]–[24].

165 His Honour acknowledged the possibility that there might be a case where an extension of time could be granted on this basis, although it would be a very exceptional circumstance [25]. A case where the accused pleaded guilty could not be included in this category.

166 For attempts to categorise appeals in New Zealand, see, eg, *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437; *Kumar v R* [2015] NZCA 460, [80] and *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141. For Australia, see *Harris v Caladine* (1991) 172 CLR 84, 125; *Lacey v Attorney-General for the State of Queensland* (2011) 242 CLR 573, [57]; *Fox v Percy* (2003) 214 CLR 118, [20] and *Western Australia v Rayney* (2013) 46 WAR 1, [402]. For a discussion of the types and functions of appeal in sentencing matters in Victoria, see Arie Frieberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Sydney: Thomson Reuters, 3rd ed., 2014), [17.10]–[17.25]. Appeals could be categorised in terms of the stage in proceedings at which the appeal arises (pre trial, during trial, post trial, post sentence and even post appeal) or in terms of the nature of the decision being appealed (eg, a discretionary decision v an evaluative decision).

167 [2012] 4 HKLRD 383.

168 *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437, 441. The explanation for the failure of the common law to recognise criminal appeals is probably the widespread attitude of the English judiciary, up to the early part of the 20th century, that existing statutory rights to challenge various decisions were adequate and that it was not the role of the judiciary to act as law reformers, see generally Rosemary Pattendon, *English Criminal Appeals 1844-1994: Appeals against Conviction and Sentence in England and Wales* (Oxford: Clarendon Press, 1996). Appeal rights also require appeal courts, which may have to be created by the legislature at considerable expense.

169 In general, the functions and powers of an appeal court are determined by the relevant statute. If the statute does not provide for a second appeal to the particular appeal court in the same matter, then the court does not possess a statutory power to rehear the same case: *R v Nakhla (No 2)* [1974] 1 NZLR 453. The CA, eg, does not have inherent appellate jurisdiction, even against a decision made by the CFI in its inherent jurisdiction: *Taylor v C* [2017] NZCA 372, [25].

170 In Hong Kong, a statutory right to appeal a conviction and sentence upon indictment, on a question of fact or a combination of fact and law, was not recognised until 1933 with the enactment of an Ordinance to amend the Criminal Procedure Ordinance 1899. In England, the same right was recognised in 1907 with the enactment of the Criminal Appeal Act 1907. In the Australian jurisdictions, a statutory right to appeal conviction and sentence upon indictment was recognised from 1914. The reasons why Hong Kong did not recognise such a right until 1933 are discussed in Chapter 2. For discussion of why New Zealand was relatively slow to recognise a statutory right to appeal conviction and sentence upon indictment, see Jeremy Finn, "John James Meikle and the Problem of the Wrongly Convicted: An Enquiry into the History of Criminal Appeals in New Zealand" (2010) 41 VUWLR 519.

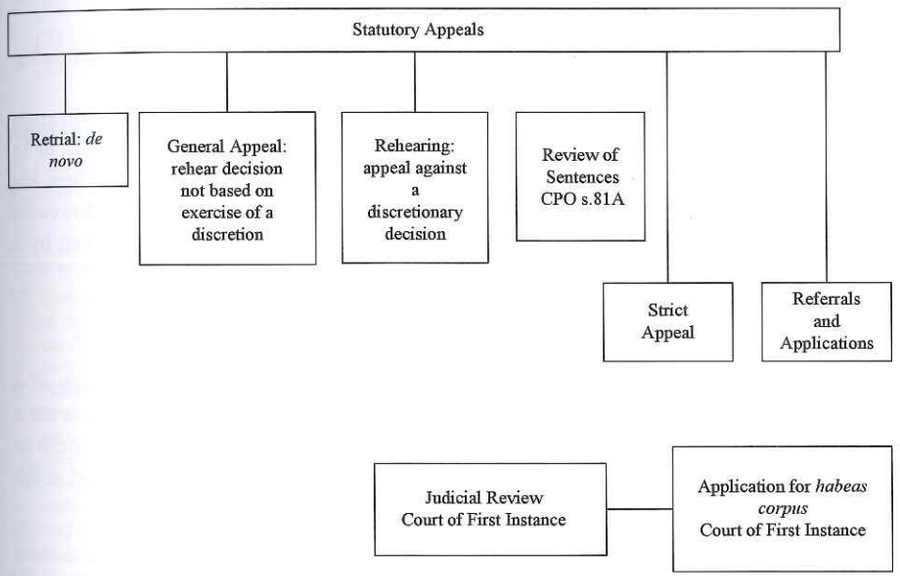
A system of criminal appeals requires the legislature to first endow a court with appellate jurisdiction and disposition powers, then to grant appeal rights to one or more of the parties and then to design rules of procedure. The courts have also written their own sets of statutory rules, Practice Directions and Practice Notes.

In the most general sense, an appeal is a form of review to a higher court in order to determine if some type of error has been made in the individual case and, if so, to correct this error. As already discussed, there are of course many types of errors that can be made in criminal proceedings and many types of remedies. The error may be an error of fact, an error of law or a combination of both.

It is important to identifying what type of appeal or review a particular matter involves. The type of appeal will determine the approach (or the standard) to be taken by the appeal court and what the appellant must persuade the appeal court of. For example, a stricter and more constrained approach will be taken to an appeal against a *discretionary decision*, compared to a general appeal where the appeal court can conduct a full review or rehearing of the merits of the case and substitute its own view for that of the CFI. This reflects the fact that a discretionary decision is a different type of decision than an evaluative decision.

The following diagram sets out a general typology of criminal appeals and reviews in Hong Kong.

Diagram 1.1: Categorising appeals and reviews



Categorising statutory appeals is based on (1) the nature of the decision being appealed; (2) who has the onus or burden of persuading the appeal court to interfere with the decision under appeal; (3) whether the appeal is against a question of fact or a question of law or a combination of both; (4) what material the appeal court can consider; (5) what type of error the appeal court must be satisfied of; and (6) the powers of the appeal court.

For the purposes of this book, it is suggested that there are six basic types of statutory appeal (not including judicial review). These are:

(1) a retrial or rehearing *de novo*;
(2) a general appeal (rehearing) not involving a discretionary decision;
(3) a rehearing of a discretionary decision;
(4) review of a sentence;
(5) a strict appeal; and
(6) referrals and applications.

In some circumstances, the relevant legislation granting the right to appeal will state what type of appeal it is, but where this is not the case, the appeal courts have decided what type of appeal it is.

1.17.1 Retrial: *de novo* hearing

The first type of appeal is a "retrial" or a hearing "*de novo*." This is the simplest type of appeal. The appellate court hears the whole case again ("afresh") without reference to the transcript of the court below and without regard to whether any error occurred in the hearing below.[171] The statement of findings of the magistrate is irrelevant.[172] The prosecution is required to prove the case again, and the appellant is not bound by his or her original plea.

An example is that under s.119(1)(d) of the MO, on the hearing of an appeal against the decision of a magistrate, a single judge of the CFI can order that the case be heard *de novo* by a magistrate.

A second example is that a review (under s.9J of the CPO) of a refusal of bail is a hearing *de novo* and is not a rehearing of the merits of the original decision.[173]

A third example is that under s.104(6) of the MO, a magistrate can grant an application to review a decision and the magistrate is empowered to "re-hear the case wholly or in part, and to take fresh evidence." The magistrate can then reverse, vary or confirm his previous decision. Whilst this is clearly an example of a court "reviewing" a previous decision, it is not an appeal in the true sense because the review is not undertaken by a higher court.

1.17.2 General appeal: rehearing (not from a discretion)

The most common form of appeal in criminal matters is a general appeal by way of a "rehearing."[174] This is a rehearing of the merits of the case as a whole. The appeal is not a hearing *de novo* in the sense that the appeal court does not decide the case entirely afresh or "from scratch."[175] Instead, the appeal court reviews the evidence that was presented at the original trial or hearing and decides whether the statutory grounds for allowing the appeal are made out.[176] The appeal court must have regard to the magistrate's Statement of Findings.[177]

The appellant has a fundamental burden of persuading the appeal court that the decision below is in error (in one or more of the ways specified by the legislation setting out the grounds upon which an appeal court can uphold an appeal). In a sense, there is a presumption that the decision under appeal is correct unless and until the appellant can show otherwise. The reason for this is that "an appellate court does not have the advantage of a trial court in having received the evidence at first hand and that this provides a strong rationale for limiting the basis on which it can interfere with primary findings of fact."[178]

Some features of a rehearing are:

(1) the appeal court will not interfere with the finding of the CFI regarding a primary finding of fact unless the appellant can show the finding is "plainly wrong";[179]
(2) the appeal is not limited to questions of law;
(3) the appeal court will not interfere with the finding of the court below regarding the credibility of a witness unless the appellant can show it is "plainly wrong";[180]
(4) the appeal court review will ordinarily be confined to the evidence that was adduced in the court below, except if the relevant legislation permits the appeal court to have regard to new or fresh evidence;[181]
(5) however, the appeal court must review the reliability of the evidence that was given below and come to its own conclusion as to whether the statutory grounds for upholding the appeal have been satisfied;
(6) the rehearing is as at the date of the appeal;[182]
(7) the appeal judge can make whatever orders he or she thinks just; and
(8) ordinarily the appeal court will have the same disposition powers as the court below.

An example of an appeal by way of rehearing is an appeal (by either party) from the decision of a magistrate to a single judge of the CFI.[183] Another example is an appeal by an offender against conviction or sentence on indictment.

171 In New Zealand, in civil appeals, if the parties and the court all agree, the evidence given at first instance can be treated as the evidence at the appeal: *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437, 440.

172 *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383, [22]: "live evidence is called, findings of fact are made, credibility of witnesses determined and issues of law resolved, all culminating in a determination of the guilt or innocence of the defendant; except this time these trial duties are performed by an appellate court."

173 *HKSAR v Siu Yat Leung* [2002] 2 HKLRD 147, [4]. This is made clear by CPO s.9J(2), which gives the reviewing court a power to "confirm, revoke or vary the decision of the DC or magistrate, and may make such other order in the matter including an order as to costs as he thinks just."

174 In *Lam Kau v R* [1962] HKLR 234, Rigby J referred to such appeals as an appeal "at large."

175 *Lo Yim Kai v R* [1966] HKLR 414 (Blair-Kerr J).

176 *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70, referring to *Harris v Caladine* (1991) 172 CLR 84, 125. For discussion of why an appeal under MO s.113 is classified as a rehearing, see *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70, 77 and *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383, 403. For features of a rehearing, see *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 203.

177 *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383, [23]: "One of the uses to which the appeal court will put the Statement of Findings is to inform itself of what determinations the magistrate made in respect of the credibility of witnesses and why the magistrate made these determinations. Such a use helps the appeal court to lessen the impact of the disadvantage it faces from having to conduct the appeal only on the transcript."

178 *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [52], referring to *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336, [35].

179 *HKSAR v Fok James Alistair* [2015] 4 HKC 247, [5]–[6] and *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [52].

180 *HKSAR v Fok James Alistair* [2015] 4 HKC 247, [5]–[6] and *HKSAR v Lin Tak Kam* [2018] HKCFI 21, [67].

181 *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [52]. On an appeal under MO s.113, the depositions before the magistrate are "admissible as evidence of the evidence given" (MO s.118(1)(a)). Fresh evidence is admissible under MO s.118(1).

182 *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383, [19], referring to *Harris v Caladine* (1991) 172 CLR 84, 125. The appeal court does not hear the witnesses again.

183 *HKSAR v Choi Wang* [2018] HKCFA 27, [8] and *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70, [17]. An appeal under MO s.113 is conducted as a rehearing on the evidence before the trial court supplemented by any further evidence the appeal judge permits under the statutory power to do so: *HKSAR v Ip Chin Kei* [2012] 4 HKLRD 383, [18].

In New Zealand, a rehearing means the appellate court rehears the case on the basis of the material that was before the original court and forms its own independent opinion.[184] In *Austin, Nichols & Co Inc v Stichting Lodestar*,[185] the Supreme Court stated that on a "general appeal, the appeal court has the responsibility of arriving at its own assessment of the merits of the case." The appeal court reconsiders the facts and the law. The appellant carries the burden of persuading the appellate court that there is error in the decision being appealed. The appellant must identify the respects in which the judgment under appeal is said to be in error.[186] There is no assumption that the decision being appealed is infected with error. The appeal court must take into account any advantage enjoyed by the CFI, such as assessing the credibility of witnesses, but the appeal court must nevertheless arrive at its own conclusions.[187] The appeal court should only interfere with the decision if it concludes that the decision is wrong. The appeal court can modify, vary, quash or confirm the decision being appealed or can remit the case back to the court whose decision is being appealed.[188]

In *K v B*,[189] the Supreme Court stated that those exercising general rights of appeal are entitled to judgment of the appeal court "even where that opinion involves an assessment of fact and degree and entails a value judgment."[190]

Thus, Justice Kós has summarised the nature of a general appeal:

> "An appeal by way of rehearing is to be undertaken on the basis of the evidential record from the tribunal below. The appellate tribunal must form its own view and if that view differs from that of the lower tribunal's, the appealed decision is a wrong one, although any special advantage enjoyed by the first instance decision maker may still warrant the customary deference)."[191]

184 This will often mean the appeal court must absorb very large amounts of written information, as well as the oral submissions. If the relevant material is not available, the applicable principles are set out in *King v R* [2016] NZCA 160, [30]. The unavailability of material is not in itself a ground to uphold an appeal against conviction.

185 [2008] 2 NZLR 141, [5].

186 *Ibid.*, [4].

187 The Supreme Court described the general nature of appeals from one court to another court. Elias CJ stated: "Those exercising general rights of appeal are entitled to judgment in accordance with the opinion of the appellate court, even where that opinion is an assessment of fact and degree and entails a value judgment. If the appellate court's opinion is different from the conclusion of the tribunal appealed from, then the decision under appeal is wrong in the only sense that matters, even if it was a conclusion on which minds might reasonably differ. In such circumstances, it is an error for the High Court to defer to the lower Court's assessment of the acceptability and weight to be accorded to the evidence, rather than forming its own opinion" (at [16]). Followed in *Green v Green* [2017] 2 NZLR 321, [28].

188 Kós P (writing extrajudicially) states that the judgment in *Austin, Nichols & Co Inc v Stichting Lodestar* was not a "revolution" as the same approach had been enunciated in *Shotover Gorge Jet Boats Ltd v Jamieson* [1987] 1 NZLR 437, 440: Stephen Kós, "A Short History of Appeal" (paper presented to Australia and Hong Kong Law and History Society Conference, Christchurch, December 2017 (updated June 2018)) [55], available at Courts of New Zealand, www.courtsofnz.govt.nz.

189 [2011] 2 NZLR 1, [32].

190 In *Green v Green* [2017] 2 NZLR 321, [29]–[31], the CA emphasised that on a general appeal, the appellant carries the onus of persuading the appeal court that there is error and a different conclusion should be reached. The appeal court may still however have regard to the advantages the lower court possessed.

191 Stephen Kós, "A Short History of Appeal" (paper presented to Australia and Hong Kong Law and History Society Conference, Christchurch, December 2017 (updated June 2018)) [55], available at Courts of New Zealand, www.courtsofnz.govt.nz.

1.17.3 General appeal: Appealing exercise of a judicial discretion

In many cases, the decision being appealed is the result of the exercise of a judicial discretion by the CFI (or other tribunal), as distinct from the judicial application of a specific legal test to the facts (or the decision of a jury).

(In *Taipeti v R*,[192] the CA distinguished between an appeal against a decision that was an exercise of discretion and an appeal against "an evaluative decision." An evaluative decision is a decision where the court (being appealed against) considers specific statutory considerations (or a rule) and evaluates or applies these considerations (or the rule) to the facts in the particular case).[193]

Examples of the exercise of judicial discretion include the determination of a sentence,[194] the determination of an application for name suppression, the decision to continue with the trial in the absence of the defendant and the determination of a cost order. In these examples, the CFI is required to take into account a range of (often competing) considerations and to arrive at a final decision that balances all relevant matters. The decision is very much a matter of independent judgment for the particular judicial officer.[195] In these cases, reasonable minds can differ as to what is an "appropriate" outcome as distinct from what is the one and only "correct" outcome.

In *Secretary for Justice v Wong Chi Fung*,[196] the CFA expressly endorsed the following statement of principles from the Australian High Court case of *House v The King*[197] as being applicable in Hong Kong on appeals from discretions:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if, upon the facts, it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

192 [2018] 3 NZLR 308, [2].

193 In *R v Gwaze* [2010] 3 NZLR 734, [49], the Supreme Court held that when deciding the admissibility of evidence under the rules of exclusion in the Evidence Act 2006, the Court is not exercising a discretion. These rules "prescribe standards to be observed … whether these standards are met entails judgment, not the exercise of a judicial discretion. If the standards are not met and the evidence is wrongly admitted, the error is one of law which can be corrected on appeal."

194 *Secretary for Justice v Yan Shen* [2012] 3 HKLRD 652 and *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [50]. For New Zealand, see *R v Vhavha* [2009] NZCA 588; *James v R* [2010] NZCA 206 and *Manikpersadh v R* [2011] NZCA 452. In some cases, the availability of a particular sentencing option is subject to a precondition being met, which does not involve the exercise of a discretion.

195 In *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, [22], Collins J stated: "The process of evaluating penalty options and deciding what penalty to impose involved an exercise of discretion by the Tribunal in the same way that a decision about bail or name suppression also involves the exercise of discretion by judicial officers. All involve the careful evaluation of options and the choosing of the most suitable option that is available. In this respect the Tribunal's penalty decision can be distinguished from its role when interpreting the law, deciding facts and /or applying the law to established facts when determining if a practitioner has committed a disciplinary offence." For discussion, see Rodriguez Ferrere MB, "The Unnecessary Confusion in New Zealand's Appellate Jurisdiction" (2012) 12(4) Otago LR 829.

196 (2018) 21 HKCFAR 35, [50].

197 (1936) 55 CLR 499, 505 (Dixon J, Evatt J and McTiernan J).

From these *dicta*, the key examples of error are:

(1) acting upon a wrong principle of law;
(2) allowing irrelevant matters to affect the decision;
(3) mistaking the facts; or
(4) failing to take into account a relevant consideration.

In the absence of any legislative prescriptions for upholding an appeal, these are the only grounds upon which an appeal court can interfere in the exercise of a discretion.

The appeal is not the occasion for the appellate court to review the merits of the case again.[198] It is assumed that the decision under appeal is correct until the appellant can demonstrate that it is infected with error. It is not sufficient that the appeal court might have arrived a different decision to the judicial officer at the first instance; the appeal court must be satisfied that the decision being appealed is infected with error.

The onus is on the applicant or the appellant to demonstrate to the appeal court that the CFI fell into one or more of these errors. If this cannot be demonstrated, then the application or appeal will not succeed.

In some cases, it may not be apparent how and why the sentencing judge fell into error, but given the sentence, it is clear an error was made. There are thus "disclosed errors" and "undisclosed errors." One of the most common grounds in a sentence appeal is that the sentence is "manifestly excessive," even though it is not clear how or why the sentence arrived at the particular sentence.

1.17.3.1 *Deciding if a decision is a discretion or not*

Whilst the appellate approach to an appeal against the exercise of a discretion compared to an appeal against a decision that is not the exercise of a discretion may be clear, the difficulty is how to distinguish between the two types of decision.

According to Rodriguez Ferrere:

> "The key element here is that this exercise of discretion is an irreplicable decision-making process. There may be factors that guide the discretion, but there is no way for an appellate court to replicate the process and thus assess its validity. The inability of the court to do so provides a practical reason why it will only intervene in situations where the answer arrived at by the decision-maker-her choice-is clearly beyond the limits of her choice."[199]

In the New Zealand case of *Opthalmological Society of New Zealand Inc v Commerce Commission*,[200] McGrath J stated:

> "A key indication of a discretion is whether the area for personal appreciation by the first instance court or decision maker is large. In the context of the orders and decisions of Masters, whether the interests involved in a particular matter are purely procedural, or concern wider issues of principle in relation to the application of the law to the facts, will also be relevant to whether a decision is discretionary in nature."

198 *Manikpersadh v R* [2011] NZCA 452, [12].
199 Rodriguez Ferrere MB, "The Unnecessary Confusion in Hong Kong's Appellate Jurisdiction" (2012) 12(4) Otago LR 829, 833.
200 [2003] 2 NZLR 145, [37].

In reviewing the previous cases, the New Zealand CA in *Taipeti v R*[201] stated:

> "These decisions show that the classes of case which appeal courts classify as an exercise of a discretion are dwindling. Three possible indicia of the presence of discretion emerge. First, the extent to which the decision-maker can apply his or her own "personal appreciation" has been identified as a "key indication." Clearly, the greater the level of prescription in terms of what is required of the decision-making process the more likely the decision is an evaluative process, rather than the exercise of a discretion. Second, procedural decisions are more likely to be an exercise of discretion than wider issues of principle involving the application of law to the facts. Third, if only one view is legally possible, that points away from a discretion. In other words, where there is scope for choice between multiple legally 'right' outcomes, that points towards a discretion."

Understandably, in criminal cases, appeal courts are reluctant to interfere with the exercise of a judicial discretion, unless the appellant can demonstrate clear error.

A clear example of the exercise of a judicial discretion is the decision of a sentencing judge to impose a sentence of imprisonment rather than a sentence of home detention, or vice versa.[202] Indeed most sentencing decisions are, generally speaking, the exercise of a sentencing discretion.[203]

Although deciding an appropriate sentence is an exercise of a discretion, it is important to emphasise that in sentence appeals, the common law principles in cases such as *Secretary for Justice v Wong Chi Fung*[204] have been displaced by statutory grounds for upholding an appeal. These grounds are set out in s.83G of the CPO. Not surprisingly, the statutory grounds do not significantly differ from the common law approach because they are based on the common law.[205] However, on an appeal by an offender against sentence, the principles

201 [2018] 3 NZLR 308, [49].
202 In *Manikpersadh v R* [2011] NZCA 28, the CA stated: "We agree with Counsel for the respondent's assessment that the proper approach of an appellate court in cases such as this is that 'the choice between home detention and a short term of imprisonment is the exercise of a fettered discretion, with appellate review focussing, as in other sentencing appeals to this Court, on the identification of error, if any, in the court below'." The discretion is "fettered" in the sense that, in exercising this particular discretion, the sentencing judge is required to consider factors in any applicable legislation. The exercise of an "unfettered" discretion is not constrained by such a requirement.
203 *Kumar v R* [2015] NZCA 460, [81]. Writing extrajudicially, Kóz P states that sentencing is "a fundamentally discretionary exercise": Stephen Kós, "A Short History of Appeal" (paper presented to Australia and Hong Kong Law and History Society Conference, Christchurch, December 2017 (updated June 2018)) [56], available at Courts of New Zealand www.courtsofnz.govt.nz, citing *Fisheries Inspector v Turner* [1978] 2 NZLR 233, 237.
204 (2018) 21 HKCFAR 35, [50].
205 Section 83G of the CPO provides that an appeal court must allow the appeal if satisfied that a different sentence should be imposed. A different sentence should be imposed if the Court thinks that the original sentence is erroneous. The error must be of sufficient importance to justify substituting a different sentence; an appeal court should not "tinker" with the sentence imposed. The error must be "material." Section 83G can be traced back to s.4(3) of the Criminal Appeal Act 1907 (UK), which provided that on an appeal against sentence, the CA shall, if it thinks that a different sentence should have been passed, quash the sentence passed and pass such other sentence warranted in law. The very early English cases stated that a sentence will not be interfered with unless the appellant could show that the trial court acted on a wrong principle of law or had given undue weight to some of the facts proved in evidence.

6.6 APPEAL AGAINST SENTENCE UPON INDICTMENT

6.6.1 Right of offender to appeal against sentence

Under s.83G of the CPO:

> "A person who has been convicted of an offence on indictment may appeal to the Court of Appeal against any sentence (not being a sentence fixed by law) passed on him for the offence, whether passed on his conviction or in subsequent proceedings."

Leave to appeal is required.[38] Section 83G is a direct implementation of the right to appeal recognised in art.11(4) of the Hong Kong Bill of Rights.

Where a person has been sentenced to two or more sentences (on conviction on indictment), an appeal or application for leave to appeal in respect of only one of these sentences is to be treated as an appeal against the two or more sentences passed.[39]

Note that unlike a conviction appeal, s.83G of the CPO does not specify any grounds upon which a sentence appeal must be based. The grounds of a sentence appeal are therefore to be found in common law principles and clues in other statutory provisions. Section 83I of the CPO simply states that the CA can quash the sentence and pass another sentence if it "considers that the appellant should be sentenced differently."

6.6.1.1 *Appellate approach to a sentence appeal*

A sentence passed by a judge is the exercise of a judicial discretion because the judge has to take into account a broad range of factors and arrive at what he thinks is an appropriate sentence.[40] An appeal against the exercise of a discretion is a slightly different type of appeal than an appeal against conviction. Whilst a sentence appeal is a rehearing (as described above), the appeal court takes an even more constrained approach to interfering with the sentence.

As discussed in Chapter 1, in *Secretary for Justice v Wong Chi Fung*,[41] the Court of Final Appeal expressly endorsed the following statement of principles from the Australian High Court case of *House v The King*[42] as being applicable in Hong Kong on appeals from discretions:

> "If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if, upon the facts, it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred."

38 CPO s.83I. In Victoria, leave to appeal the sentence is also required (Criminal Procedure Act 2009 s.278). In New Zealand, leave to appeal sentence is not required (Criminal Procedure Act 2011 s.244(1)). Under the Criminal Appeal Act 1907 (UK), leave to appeal a sentence was required.

39 CPO s.83I(2).

40 *Secretary for Justice v Yan Shen* [2012] 3 HKLRD 652 and *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [50]. For New Zealand, see *R v Vhavha* [2009] NZCA 588; *James v R* [2010] NZCA 206 and *Manikpersadh v R* [2011] NZCA 452. In some cases, the availability of a particular sentencing option is subject to a pre-condition being met that does not involve the exercise of a discretion. In *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354, [22], Collins J stated: "The process of evaluating penalty options and deciding what penalty to impose involved an exercise of discretion by the Tribunal in the same way that a decision about bail or name suppression also involves the exercise of discretion by judicial officers. All involve the careful evaluation of options and the choosing of the most suitable option that is available. In this respect, the Tribunal's penalty decision can be distinguished from its role when interpreting the law, deciding facts and /or applying the law to established facts when determining if a practitioner has committed a disciplinary offence." For discussion, see Rodriguez Ferrere MB, "The Unnecessary Confusion in New Zealand's Appellate Jurisdiction" (2012) 12: 4 Otago LR 829.

41 (2018) 21 HKCFAR 35, [50].

42 (1936) 55 CLR 499, 505 (Dixon J, Evatt J and McTiernan J).

From these *dicta*, the key examples of error are:

(1) acting upon a wrong principle of law;
(2) allowing irrelevant matters to affect the decision;
(3) mistaking the facts; or
(4) failing to take into account a relevant consideration.

In the absence of any legislative prescriptions for upholding an appeal, these are the only grounds upon which an appeal court can interfere in the exercise of a discretion. For sentence appeals, these grounds are condensed into (1) manifestly excessive; or (2) wrong in principle.[43]

It is instructive that s.81A of the CPO sets out the grounds upon which a prosecution appeal against sentence can be brought. These grounds are that the sentence is (1) not authorised by law; (2) wrong in principle; (3) manifestly excessive; or (4) manifestly inadequate. These are all questions of law and would also apply to an offender appeal against sentence, except the last ground. However, an offender appeal against sentence allows for a broader range of grounds to appeal including factual errors.

The appeal is not the occasion for the appellate court to review the merits of the case again.[44] It is assumed that the decision under appeal is correct until the appellant can demonstrate that it is infected with error. It is not sufficient that the appeal court might have arrived a different decision to the judicial officer at first instance; the appeal court must be satisfied that the decision being appealed is infected with error.

The onus is on the applicant or the appellant to demonstrate to the appeal court that the DC fell into one or more of these errors. If this cannot be demonstrated, then the application or appeal will not succeed.

In some cases, it may not be apparent how and why the sentencing judge fell into error, but, given the sentence, it is clear an error was made. There are thus "disclosed errors" and "undisclosed errors." One of the most common grounds in a sentence appeal is that the sentence is "manifestly excessive," even though it is not clear how or why the sentence arrived at the particular sentence.

In *HKSAR v Yeung Kwai Kuen*,[45] Stock JA stated:

> "The essential function of this court, upon an application which pertains to a sentence, is to determine whether the applicant should be sentenced differently for the offence

43 *HKSAR v Bangoura Charles* (CACC 281/2016, [2017] HKEC 487), [31].

44 *Manikpersadh v R* [2011] NZCA 452, [12].

45 [2002] 3 HKLRD 91, [17].

for which he was dealt with by the court below … and the court will not intervene unless it is of the opinion that the sentence was manifestly excessive or wrong in principle. Generally, the court's function is to look at the factors which prevailed at the date of sentence and not to act as an administrative review, or a supervisory tribunal to take into account factors since sentence. That is not to say there are never instances in which the court will give weight to developments since sentence, or that the court is precluded from doing so. See, for example *R v Sze Tak Hung* [1991] 1 HKLR 109, 112. But the circumstances in which it will give effect to post-sentence events are limited."

One of the most common grounds in a sentence appeal is that the sentence is "manifestly excessive." A sentence is "manifestly excessive" if it is obviously and clearly well outside the range of sentences for the particular circumstances, even if it is not clear why the sentence made the error.

When the CA hears a sentence appeal or a review, it "functions as a court of review and does not conduct a sentencing exercise of its own, so it ordinarily relies entirely, or almost entirely, on material before the sentencing court."[46] The appeal court does not have the advantages enjoyed by the court at first instance, and this provides a strong basis for limiting the basis upon which the findings can be interfered with.[47]

The key and central issue is whether the appeal court considers that a *different* sentence should be passed. This does not mean a slightly different sentence but rather a significantly different sentence. An appeal court should not simply "tinker" with a sentence.

6.6.1.2 *Notice of application for leave to appeal sentence*

An application for leave to appeal a sentence must use Form XI.[48] The notice must include the grounds of the application.[49] The notice also includes a note warning the appellant that the CA has power under s.83W of the CPO to order that any time served in custody pending the determination of the appeal "shall not be reckoned as part of the term of any sentence to which you are for the time being subject." This is to deter unmeritorious applications. The notice also includes a note warning the appellant that the CA has power under s.83I of the CPO to either increase or reduce the sentence that was passed.

Notice of application for leave to appeal sentence must be filed within 28 days from the date of sentence.[50]

6.6.1.3 *Notice of application to extend time to apply for leave to appeal sentence*

A notice of application to extend time to apply for leave to appeal sentence must use Form XI. The approach of the CA to applications for leave to appeal out of time is discussed in Chapter 7 at 7.6.5.

46 *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [52], referring to *R v A* [1999] 1 Cr App R (S) 52.

47 *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [52], referring to *Ting Kwok Keung v Tam Dick Yuen* (2002) 5 HKCFAR 336, [35].

48 CAR r.41.

49 It is not sufficient to simply state the sentence was "excessive" or "wrong in principle." The grounds must set out in what way the sentence is excessive or wrong in principle. Leave to appeal will not be granted unless the ground of appeal is reasonably arguable.

50 CPO s.83Q(2).Time commences to run from the date sentence was passed (CAR r.36).

6.6.1.4 *Disposition powers on an appeal against sentence*

Section 83I(3) of the CPO states:

"On an appeal against sentence the Court of Appeal, if it considers that the appellant should be sentenced differently for an offence for which he was dealt with by the court below, may–

(a) quash any sentence or order which is the subject of the appeal;
(b) in place of it pass such sentence or make such order as it thinks is appropriate for the case (whether more or less severe) and as the court below had power to pass or make when dealing with him for the offence."

Note that the CA has power to pass any sentence which the court below could have passed.[51]

The term of any sentence passed by the CA shall begin to run from the time when it would have begun to run if passed in the proceedings from which the appeal lies.[52]

On any appeal, the CA can annul or vary any order made under s.73 (compensation) or 84 (restitution) of the CPO.[53]

6.6.2 Application by Secretary for Justice to review sentence

Under s.81A of the CPO, the SJ may, with leave of the CA, apply to the CA for a review of any sentence (other than a sentence fixed by law) passed by any court (other than the CA itself) on the ground that the sentence is not authorised by law, is wrong in principle or is manifestly excessive or manifestly inadequate.[54]

The CA has jurisdiction to entertain such an appeal pursuant to s.13(3)(c) of the HCO.

Note the application is for a "review" as distinct from an "appeal" of sentence.

Section 81A is not an implementation of the right to appeal recognised in art.11(4) of the Hong Kong Bill of Rights because art.11(4) only applies to the offender, not the prosecution. The prosecution has no rights under the Hong Kong Bill of Rights to appeal. The prosecution can however seek judicial review.

A "sentence" includes any order made by a court in dealing with an offender including a hospital order.[55] Note that the SJ must first get leave of the CA before the court would review the sentence. Also note that the Secretary can apply on the basis that the sentence is excessive (though this would be rare). This reflects the role of the Secretary in ensuring that inappropriate and unjust sentences are not imposed.

51 This includes a power to deal with a suspended sentence that had been previously passed on the appellant for another offence: CPO s.83I(4).

52 *Ibid.*, s.83W(4) This gives the appellant the benefit of time because the new sentence is the sentence that should have been imposed originally by the trial court.

53 CAR r.24. A person who is affected by the order can appear before the CA and make submissions (s.25).

54 In New Zealand, the right of the prosecution to appeal a sentence is found in s.246(1) of the Criminal Procedure Act 2011 (previously in Crimes Act 1961 s.383). In Victoria, the equivalent right is found in s.287 of the Criminal Procedure Act 2009 (Vic).

55 CPO s.80. The power of the CA to pass a sentence on the appeal includes a power to recommend deportation under the Immigration Ordinance (Cap.115) s.21.

6.6.2.1 *Appellate approach to prosecution sentence appeals*

The right of the prosecution to appeal a sentence is not the converse right of the offender to appeal a sentence.[56] A more stringent test for allowing a prosecution appeal is applied. The primary reason for this difference of approach lies in the double jeopardy principle.[57] As discussed in Chapter 1, under the double jeopardy principle, it is impermissible for the prosecution to try a person more than once for the same offence and it is impermissible for a person to be sentenced more than once for the same offence. A prosecution sentence appeal exposes the offender to being sentenced again and to a more severe sentence. This is a very significant power of the Hong Kong Special Administrative Region (HKSAR), and appeal courts are very aware of these considerations.[58]

Appeal courts take these considerations into account when deciding (1) whether to grant leave to appeal; and (2) the disposition of the review.

In *Secretary for Justice v Wong Chi Fung*,[59] the CFA stated:

> "Nevertheless, whilst an increase in sentence is not incompatible with the concept of double jeopardy, as a matter of practice the Court of Appeal customarily makes allowance for the concept when increasing a sentence on review by applying a discount to the increased sentence."

This is sometimes referred to as the *residual discretion*.

This discount particularly applies where the initial sentence was a community service order, and the order has been completed by the time of the prosecution appeal.[60] By comparison, if the offender is already serving a term of imprisonment, then no discount should ordinarily be given.[61]

If the court below has made an error as to the facts upon which the sentence was based then on appeal, the CA can correct the (factual) error and impose a different sentence.[62]

On the review, the prosecution is not permitted to rely on a different factual basis to that relied on in the DC.[63] The prosecution cannot change the way the case was initially presented. The CA also cannot ascribe a different weight to a particular factor to that given

56 *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [48], referring to *Re Applications for Review of Sentences by Attorney-General* [1972] HKLR 370, 376. The right of the prosecution to appeal a sentence was not introduced in Hong Kong until 1972. It was initially thought that such appeals would be rare and exceptional, but over time, prosecution sentence appeals have become much more common.

57 Recognised in art.11(6) of the Hong Kong Bill of Rights.

58 See Department of Justice, Prosecution Code, 3.8 and 21, available at http://www.doj.gov.hk/eng/public/pubsoppapcon.htmtl. See 22.8 that states that a review of a sentence should only be made in "exceptional cases." At sentencing, prosecutors should not make submissions on quantum. Also see Hong Kong Bar Association, Code of Conduct: available at http://www.hkba.org/content/code.

59 (2018) 21 HKCFAR 35, [51], referring to *Secretary for Justice v Lo King Fat* [2016] 2 HKC 230, [109]–[116] and *Re A-G's Reference (Nos 90 and 91 of 2003)* [2004] EWCA Crim 1839, [11]. Also see *Secretary for Justice v Wan Hoi Ming* [2017] 1 HKLRD 1205, [68]. It appears that the provision of a discount in this context was first recognised in 1975: *Attorney-General v Tsang Wing* [1975] HKLR 365, 368. Also see the comments of Lord Lane in *R v Dickson* (1991) 92 Cr App R 166, 172.

60 *HKSAR v Chan Pak Hoe Pablo* (2012) 15 HKCFAR 244, [52] and *Secretary for Justice v Buk Chui Ying* [2008] 5 HKLRD 185, [26].

61 *Attorney-General v Wong Kwok Wai* [1991] 2 HKLR 384.

62 *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [59] and *Re A-G's Reference (Nos 90 and 91 of 2003)* [2004] EWCA Crim 1839, [10].

63 *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [61] and *Attorney-General v Li Ah Sang* [1995] 2 HKCLR 239.

by the trial judge. The question of how much weight to be given to a factor is a matter for the trial judge's discretion, and unless the sentence is manifestly inadequate, the court cannot "reweight" (as it were) any particular factor.

A sentence is regarded as "manifestly inadequate" if it "falls outside the range of sentences which the judge, applying his mind to all the relevant factors, could reasonably consider appropriate."[64] To determine what is the range of sentences, the Court can look at reported cases and in particular to any applicable sentencing guideline.

6.6.2.2 *Procedure on application*

The application must be in writing and signed by the Secretary.[65] The application must be filed with the Registrar of the High Court within 21 days after the date when sentence was passed.[66]

The application must be accompanied by the documents set out in s.81A(2A) of the CPO.[67] There is no statutory limitation on the material that the appeal court can have regard to. The materials listed in s.81A(2A) are not the only documents the Court can examine.

The documents required under s.81A(2A) include (1) the statement of the reasons for the verdict placed on record in accordance with s.80 of the DCO and a statement of the reasons for the sentence; and (2) any report concerning the respondent that was before the court that passed sentence.[68] The DC judge who passed the sentence must provide these documents to the SJ within seven days of a request being made.[69] The judge's statement of reasons for sentence can be crucial to the outcome of the appeal as the reasons can often disclose error.

The CA can order the respondent be detained in custody until an order has been made under s.81B(1).[70] However, the CA can admit the respondent to bail.

If the CA refuses to review the sentence, the Court can award costs against the Secretary.[71]

6.6.2.3 *Disposition powers on review under s.81A*

Upon the hearing of the application, the CA may order:

> "(a) if it thinks that the sentence was not authorised by law, was wrong in principle or was manifestly excessive or manifestly inadequate, quash the sentence passed by the court and pass such other sentence (whether more or less severe) warranted in law in substitution therefor as it thinks ought to have been passed;
> (b) in any other case, refuse to alter the sentence."[72]

It is crucial that practitioners note these are the only grounds upon which the CA can interfere with a sentence. When formulating an application for leave, the applicant must

64 *Re A-G's Reference (No 4 of 1989)* [1990] 1 WLR 41, 46A–46C, accepted by the CFA as applicable to a review under CPO s.81A in *Secretary for Justice v Wong Chi Fung* (2018) 21 HKCFAR 35, [63].

65 CPO s.81A(2)(a).

66 *Ibid.*, s.81A(2)(c).

67 *Ibid.*, s.81A(2)(b).

68 *Ibid.*, s.81A(2A). For detailed discussion of the required contents of the statement of reasons for verdict, see *HKSAR v Yip Kim Po* (2014) 17 HKCFAR 202, [20]–[25].

69 CPO s.81A(2B).

70 *Ibid.*, s.81A(3).

71 *Ibid.*, s.81A(5).

72 *Ibid.*, s.81B(1).

specify in what way the sentence was either not authorised by law or was wrong in principle or was manifestly excessive or manifestly inadequate. If the CA is not satisfied of any of these criteria, then it will not interfere with the sentence.

The CA can exercise any of the powers set out in s.83V of the CPO.[73]

On the hearing of the review, the SJ is entitled to be heard.[74] The Court can determine the review in the absence of the respondent; if satisfied, the respondent was served with the application or given notice of it.

The CA must not review a sentence if the respondent has already appealed the conviction (unless the appeal has been disposed of).[75]

The right of the SJ to apply for review of a sentence does not affect the rights of a convicted person, but the CA can hear an application for review at the same time as hearing an appeal by the respondent against the sentence.[76]

6.7 APPEAL BY SECRETARY FOR JUSTICE AGAINST ACQUITTAL

Under s.84 of the DCO, the SJ can appeal (by way of case stated) to the CA against a verdict or order of acquittal, including any order quashing or dismissing the charge.[77] The appeal can only be on a question of law.

This is a particularly important appeal right because it enables the prosecution to challenge the acquittal of the accused and the CA to order the retrial of the accused or to convict and sentence the accused. *Prima facie*, this may appear to breach the rule against double jeopardy. However, as discussed in Chapter 3, the rule against double jeopardy only applies with respect to "final" orders of acquittal (and usually the verdict of a jury). In the case of a judge-alone trial, the decision of acquittal is not final because the DCO recognises a right to challenge the legal correctness of the decision (as distinct from the factual basis of the decision and as distinct from the verdict of a jury).

It is in the public interest for the legal accuracy of the decision of a judge to be challenged and if found to be in error, for the decision to be quashed. This is a different function from challenging the correctness of a jury's verdict of not guilty.

The appeal must be commenced within seven days of the acquittal. The person acquitted may well feel relieved when the period for appealing has passed, but the CA has the power to grant the SJ leave to appeal out of time, and has done so.[78]

73 Section 83V sets out the powers of the CA on the hearing of an appeal. These include a power to order the production of documents or the attendance of a person to give evidence before it. Under HCO s.13(4), the CA has all the powers of the DC.

74 CPO s.81B(2).

75 *Ibid.*, s.81C(1).

76 *Ibid.*, s.81C(2). This contributes towards court efficiencies.

77 The acquittal could be the result of the judge's *verdict* after hearing all the evidence from both parties, the judge may have ruled that there was insufficient evidence to found a prosecution or that the charges were defective, in which case an order of acquittal is made. It appears that if the SJ makes an application to the DC judge to state a case, the judge cannot refuse to state a case. DCO s.84 begins with the words "An appeal shall lie at the suit of the Secretary for Justice."

78 In *HKSAR v Wong Chun Wai* (CACC 238/2016, [2016] HKEC 2023). The accused was acquitted of dangerous driving causing death and the SJ challenged the verdict. There is no record on HKLII of the result of the application.

6.7.1 Procedure on prosecution appeal against acquittal

The appeal is conducted under the procedure for a case stated. The procedure is thus similar to the case-stated procedure used to challenge the decision of the Magistrates' Court to acquit or discharge the accused — discussed in Chapter 5 at 5.12. (The case-stated procedure for decisions of a magistrate is set out in ss.106–109 of the MO.)

(1) Within seven clear days after the reasons for the acquittal have been recorded or after the order of acquittal, a written application must be made to the judge to:

> "state a case setting forth the facts and the grounds on which the verdict or order was arrived at or made and the grounds on which the proceeding is questioned for the opinion of the Court of Appeal."[79]

The provisions in ss.106–109 of the MO covering appeals from the Magistrates' Court will apply with respect to the procedure for setting down the case stated.[80] This means that the SJ (appellant) must within 14 days of delivery of the case stated transmit the case stated to the Registrar of the CA but must first give a copy of the notice of application and the case stated to the respondent.[81] The DC judge can amend the case stated before delivery to the CA.[82] When the case has been sent to the Registrar, it will be set down for hearing at the request of either party.[83]

The CA can send the case stated back for amendment if required.

(2) A judge of the High Court may, following an application made to him in chambers, issue a warrant to arrest the respondent and to bring him or her before the Court, and the judge can either release the respondent on bail pending the outcome of the case stated or remand the respondent in custody.[84]

(3) At the hearing of the appeal (regardless of whether the respondent appears), the CA shall:

(a) if satisfied there is no sufficient ground to interfere with the acquittal, dismiss the appeal;

(b) reverse the verdict or order and order that the trial be resumed, the accused be retried (as the case may be) or find the accused guilty, record a conviction and sentence the accused; and

(c) give any such other directions as the Court thinks fit.[85]

If the CA records a conviction and sentences the respondent, the respondent has no right to appeal that decision, except for an application for leave to appeal to the CFA.

In *Secretary for Justice v Wong Sau Fong*,[86] a DC judge acquitted the accused of all charges. The then Attorney-General, now SJ, commenced an appeal under s.84 of the DCO with respect to the acquittal on charge one. Both the appellant and the respondent agreed

79 DCO s.84(a).

80 *Ibid.*

81 MO s.106.

82 *Ibid.*, s.107.

83 *Ibid.*, s.108.

84 DCO s.84(b).

85 *Ibid.*, s.84(c).

86 [1998] 2 HKLRD 254.

that the judge had erred in acquitting the accused on charge one. The issue was whether the CA could remit the case back to the DC for sentence (the CA had quashed the conviction and entered a verdict of guilty).

In *Attorney-General v Yeung Sun Shun*[87] the CA held that, under s.84 of the DCO, after an acquittal, the CA had no power to order that the trial be resumed before the DC judge and hence no power to order the DC to sentence the respondent.[88] The issue for the Court in *Wong Sau Fong* was whether it was bound by the decision in *Yeung Sun Shun*.

After considering the enactment of the Hong Kong Bill of Rights in 1992, the Court focussed on art.11(4) of the Hong Kong Bill of Rights that recognises a right of all people to appeal conviction and sentence. The Court held that s.84 of the DCO must be interpreted in accordance with art.11(4) of the Hong Kong Bill of Rights. The Court held that to deny the respondent a right to appeal, the decision of the CA (on an appeal under s.84 of the DCO) would be in breach of art.11(4) of the Hong Kong Bill of Rights.[89] The CA held it was not obliged to follow the earlier decision in *Yeung Sun Shun* because that was delivered prior to the enactment of the Hong Kong Bill of Rights. The CA held it had power to not only reverse the verdict of acquittal but also to direct that the trial be resumed in the DC (ie, for sentence).

6.8 PROHIBITION ON STAYING OR REVERSING JUDGMENTS OR ALLOWING OF THE APPEAL ON SPECIFIED GROUNDS

Section 83O of the CPO is a particularly important provision because it prevents the CA from ordering a stay or reversal of a judgment under s.81 (state a case) and prevents the Court from allowing an appeal under s.83 (offender sentence appeal), 83K (appeal against finding of insanity) or 83N (appeal against finding of disability), where the ground of the appeal relates to a procedural defect that could have been remedied before or during the course of a criminal trial, specifically where the appeal relies on:

(1) a defect which, if pointed out before the jury were empanelled or during the course of the trial, might have been amended by the trial court;
(2) an error committed in summoning or swearing a juror;
(3) any objection that might have been relied on to challenge a juror; and
(4) any informality in the swearing of a witness.

These circumstances emphasise that it is the responsibility of the trial court judge and the trial court counsel to ensure that all steps are taken to prevent any procedural irregularity, particularly irregularities that might otherwise constitute grounds to appeal a conviction or sentence. It is inappropriate for the valuable resources of the CA to be taken up with issues that could and should have been dealt with in the trial court.

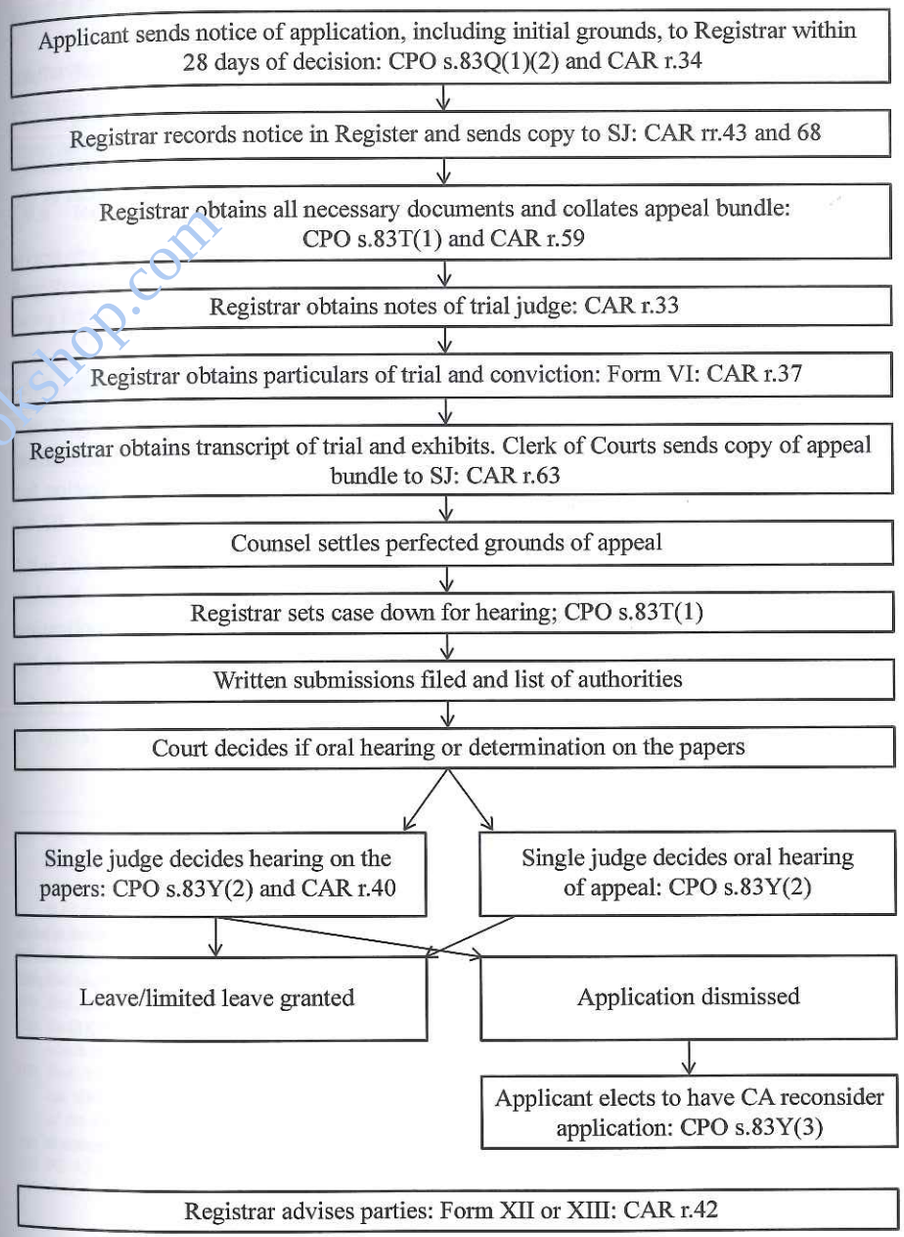
Section 83O does however provide that these exceptions do not apply if the CA is of the opinion that a miscarriage of justice has actually occurred.

87 [1987] HKLR 987.
88 The Court construed DCO s.84 as only giving it three dispositions: (1) order trial to be resumed; (2) order a retrial; or (3) record a finding of guilt and pass sentence (at 999).
89 *Attorney-General v Yeung Sun Shun* [1987] HKLR 987, [26].

6.9 PROCEDURE ON APPLICATION FOR LEAVE TO APPEAL CONVICTION OR SENTENCE

The following diagram sets out the steps involved in an application for leave to appeal a conviction or a sentence from the DC to the CA.

6.9.1 Diagram 1: Application for leave to appeal conviction and sentence



6.9.2 Notice of application

A person who wishes to apply for leave to appeal must give notice of appeal or notice of application for leave to appeal in accordance with the rules and orders made under s.9 of the CPO.[90] The appellant must send to the Registrar of the High Court a notice of application for leave to appeal.[91] Form XI is used. The notice must be signed by the appellant or his lawyer. The notice must be sent within 28 days of the date of the conviction.[92]

A notice of application for leave and notice of application to extend time must be signed by the appellant or applicant, unless otherwise permitted under r.8 or 9 of the CAR or as directed by the CA.[93]

Notice of application must be given within 28 days from the date of the conviction, verdict or finding appealed against; in the case of a sentence appeal, from the date sentence was passed or where an order is being appealed, from the date of the order.[94]

If an application for leave to appeal a conviction or a sentence is granted, it is not necessary for the applicant to then prepare a notice of appeal. The notice of application suffices as the notice of appeal.[95]

If the sentence was passed more than seven days after the date of conviction, verdict or finding, then the notice of application for leave to appeal against the conviction or verdict or finding may be given within 28 days from the date on which sentence was passed.[96]

The CA can extend the time for appealing (either before or after it expires).[97]

6.9.3 Initial grounds of appeal

Where there are reasonable grounds for appeal, the solicitor or counsel who appeared at the trial should draft initial grounds of appeal and attach that document to the application for leave to appeal.[98]

6.9.4 Application to extend time

If the time for filing an application for leave has expired, the applicant can file an application to extend time for filing the application for leave, using Form VI of the CAR.[99]

6.9.5 Copy of notice to Secretary for Justice

Upon receipt of the notice of application, the Registrar forwards a copy to the SJ.[100]

90 CPO s.83Q(1). The notice is addressed to "The Registrar, High Court, Hong Kong" (CAR r.5).
91 CAR r.34.
92 CPO s.83Q(2). Time commences to run from the date of conviction: CAR r.35.
93 CAR r.3. If the appellant is unable to write, then he or she can affix his mark upon the notice (s.7). If the person appears to be insane, then his or her solicitor can sign on their behalf (s.8). If the appellant is a body corporate, the notice can be signed by the secretary, clerk, manager or solicitor for the body corporate (s.9). Notices must be sent by registered post addressed to the person to whom such a notice is required to be given (s.6).
94 CPO s.83Q(2). For the time limits applicable to protected prisoners of war or protected internees, see s.83Q(6).
95 CAR r.38.
96 CPO s.83Q(2).
97 *Ibid.*, s.83Q(3).
98 PD 4.2 para.4.
99 *Ibid.*, para.5(c). A grounding affidavit must be provided explaining the reasons for the delay. For discussion of the approach taken, see *R v Wong Kai Kong* [1990] 1 HKC 279.
100 CAR r.43.

6.9.6 Registrar obtains all necessary documents: appeal bundle

The Registrar must obtain and lay before the CA in proper form all necessary documents, exhibits and other things that are necessary for the proper determination of the application.[101] Any exhibits in the case will remain in the custody of the Registrar pending the application or appeal.[102] Pending the determination of the application or appeal, such documents are open to inspection by the parties.[103] The CA or a judge can order the production of any document or exhibit, on application by a party, and any person having custody must produce it to the Registrar.[104]

6.9.7 Registrar obtains trial judge's notes

The Registrar must obtain from the trial judge the whole or part of his note of the trial or a copy, as the judge may certify as being necessary for the purposes of the appeal.[105]

6.9.8 Registrar obtains particulars of trial and conviction

When the Registrar receives a notice of appeal or application for leave to appeal, the Registrar must prepare for the information of the CA particulars of the trial and conviction using Form VI.[106]

6.9.9 Registrar obtains transcript

The Registrar can request a shorthand writer to furnish a copy of the transcript of the proceedings under appeal.[107]

6.9.10 Copy of appeal bundle sent to the parties

After the appeal bundle is completed, the Clerk of Court will send a copy to the applicant and to the SJ.[108]

6.9.11 Perfected grounds of appeal

When all the necessary documents have been obtained, counsel must "perfect" the grounds of appeal and send a copy to the Registrar of the High Court and to the SJ.[109] Written

101 CPO s.83T(1)(b) and CAR r.59(1). The CAR may enable the appellant to obtain from the Registrar documents and the like, which are necessary for the appeal (CPO s.83T(2)). If the trial judge is of the opinion that the title of any property, which is the subject of a restitution order, is not in dispute, the judge can arrange for the property or a sample or a copy to be available to the Court of Appeal (CAR r.27).
102 CAR r.22.
103 *Ibid.*, s.59(1). After the appeal, the exhibits are returned to the person who originally produced it (s.60(1)).
104 *Ibid.*, s.59(3).
105 *Ibid.*, s.33.
106 *Ibid.*, s.37. The Registrar must keep a Register of all Notices of Appeal and Notices of Application for leave to appeal, which is open to the public (s.68).
107 *Ibid.*, s.11. A party can apply to the Registrar for a copy of the transcript upon payment of a fee (s.12). The Registrar can also arrange for the translation of a transcript upon payment of a fee (s.12). The Registrar must provide a free copy of the transcript to any legal aid lawyer representing a party (s.13). If there is a record of the proceedings other than a shorthand note, the Registrar can order copies of that record for the use of the Court of Appeal (s.15).
108 PD 4.2 para.6.
109 *Ibid.*, para.5.

submissions in support of the application must be filed in accordance with directions from the Directions Judge.

6.9.12 Registrar obtains hearing date

The Registrar must take all necessary steps for obtaining a hearing of an appeal or application that has not been dismissed under s.83S of the CPO.[110]

6.9.13 Determination of application

A single judge of the CA determines the application — either on the papers or at an oral hearing. An applicant is entitled to be present at the hearing of an application for leave to appeal and an appeal unless the CA orders otherwise.[111]

6.9.14 Review by Court of Appeal of dismissal

If the application for leave to appeal is dismissed, the applicant decides whether to request a further review by the CA.[112] The further review is not an appeal but merely the extension of the original proceedings. The judge who refused to grant leave can sit on the CA to determine the review.

6.9.15 Registrar advises result

The Registrar then advises the applicant of the result using either Form XII or Form XIII.[113] The Registrar must maintain a record of all orders made by the CA under the CAR.[114]

6.9.16 Case proceeds as appeal

If leave is granted, the case proceeds as an appeal. In some case, the Court will hear and determine the appeal itself at the same time as determining the application for leave. This saves time, money and inconvenience.

6.10 PROCEDURE ON APPEAL FROM THE DISTRICT COURT

The following diagram sets out the steps involved in the determination of the appeal, after leave to appeal conviction or sentence has been granted, or where the appeal is of right:

110 CPO s.83T(1)(a). If the appellant is in custody and is entitled to be present, the Registrar must advise him or her and the Commissioner of Correctional Services of the probable date of the hearing (CAR r.70)

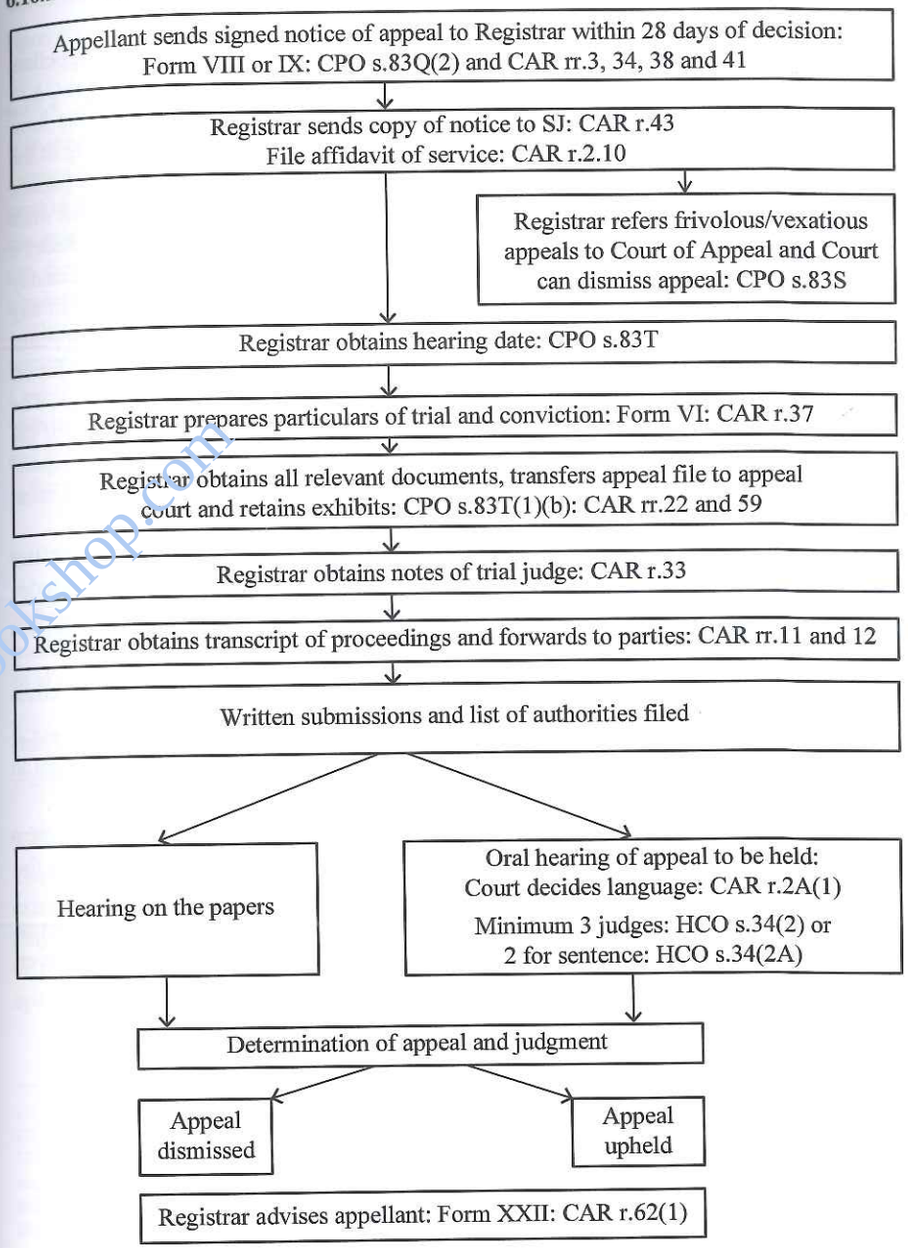
111 CPO s.83U(1). A loss of time order can be made under s.83W(1), discussed further in Chapter 7 at 7.6.16.

112 *Ibid.*, s.83Y(3). Under CAR r.74, an applicant can apply for leave to extend the time required for an application for review of the dismissal.

113 CAR r.42(1).

114 *Ibid.*, r.26.

6.10.1 Diagram 2: Procedure on conviction (and sentence) appeal to the Court of Appeal



6.10.2 Notice of appeal

A person who wishes to appeal must give notice of appeal in accordance with the rules and orders made under s.9 of the CPO.[115] The appellant must send to the Registrar of the

115 CPO s.83Q(1). The notice is addressed to "The Registrar, High Court, Hong Kong" (CAR r.5).

High Court the notice of appeal.[116] The notice must be sent within 28 days of the date of the conviction.[117]

A notice of appeal and notice of application to extend time must be signed by the appellant or applicant, unless otherwise permitted under r.8 or 9 of the CAR or as directed by the CA.[118]

A notice of conviction appeal on a question of law alone uses Form VIII.[119] The form requires the appellant to advise whether he or she wishes to be present at the hearing of the appeal. The form also advises the appellant that the appeal can be determined on the papers. If the appellant wishes to have the appeal determined on the papers, the appellant must include his or her argument in support in the notice of appeal. The notice also includes a note that the CA has power under s.83W of the CPO to order that any time served in custody pending the determination of the appeal "shall not be reckoned as part of the term of any sentence to which you are for the time being subject." This is to deter unmeritorious appeals.

A notice of conviction appeal where the trial judge has certified the case is fit for an appeal must use Form IX.[120] The notice must attach the certificate of the trial judge. The form requires the appellant to advise whether they wish to be present at the hearing of the appeal. The form also advises the appellant that the appeal can be determined on the papers. If the appellant wishes to have the appeal determined on the papers, the appellant must include his or her argument in support in the notice of appeal.

A notice of conviction appeal where the appellant must obtain leave to appeal must use Form XI.[121] The notice must include the grounds of the application. The notice also includes a note warning the appellant that the CA has power under s.83W of the CPO to order that any time served in custody pending the determination of the appeal "shall not be reckoned as part of the term of any sentence to which you are for the time being subject." This is to deter unmeritorious applications.

A notice of application to extend time for applying for leave to appeal must use Form XI.[122] When an application for leave or to extend time has been dealt with by a single judge, the Registrar must advise the applicant using Form XII.[123]

If an application for leave to appeal a conviction or a sentence is granted, it is not necessary for the applicant to then prepare a notice of appeal. The notice of application suffices as the notice of appeal.[124]

If the sentence was passed more than seven days after the date of conviction, verdict or finding, then the notice of appeal against the conviction, verdict or finding may be given within 28 days from the date on which sentence was passed.[125]

The CA can extend the time for appealing (either before or after it expires).[126]

116 CAR r.34.
117 CPO s.83Q(2). Time commences to run from the date of conviction: CAR r.35.
118 CAR r.3. If the appellant is unable to write, then he or she can affix his mark upon the notice (r.7). If the person appears to be insane, then his or her solicitor can sign on his or her behalf (r.8). If the appellant is a body corporate, the notice can be signed by the secretary, clerk, manager or solicitor for the body corporate (r.9). Notices must be sent by registered post addressed to the person to whom such a notice is required to be given (r.6).
119 *Ibid.*, r.41.
120 *Ibid.*, r.41.
121 *Ibid.*, r.41.
122 *Ibid.*, r.41.
123 *Ibid.*, r.42.
124 *Ibid.*, r.38.
125 CPO s.83Q(2).
126 *Ibid.*, s.83Q(3).

6.10.3 Copy of notice to Secretary for Justice

Upon receipt of the notice of application, the Registrar forwards a copy to the SJ.[127]

6.10.4 Disposal of groundless appeal

If it appears to the Registrar of the High Court that a notice of an appeal purporting to be a ground of appeal, which involves a question of law alone, does not show any substantial ground of appeal, he may refer the appeal to the CA for summary determination.[128] Where the case is so referred, if the CA considers that the appeal is frivolous or vexatious, it can determine the appeal without adjourning it for a full hearing and dismiss the appeal summarily, without calling on anyone to attend the hearing or to appear for the HKSAR.[129]

This is an important mechanism to enable the CA to relatively quickly deal with unmeritorious appeals that purport to be on a question of law but in fact are groundless and a waste of the Court's resources. Note that this summary disposition process is not available with respect to appeals where the ground of appeal relates to questions of fact or mixed law and fact.

Form XXX is used.[130]

6.10.5 Registrar obtains hearing date

The Registrar must take all necessary steps for obtaining a hearing of an appeal or application that has not been dismissed under s.83S.[131]

6.10.6 Registrar obtains particulars of trial and conviction

When the Registrar receives a notice of appeal, the Registrar must prepare for the information of the CA particulars of the trial and conviction using Form VI.[132]

6.10.7 Registrar obtains all necessary documents

The Registrar must obtain and lay before the CA in proper form all necessary documents, exhibits and other things that are necessary for the proper determination of the application.[133] Any exhibits in the case will remain in the custody of the Registrar pending the application or appeal.[134] Pending the determination of the application or appeal, such documents are open to inspection by the parties.[135] The CA or a judge can order the production of any

127 CAR r.43.
128 CPO s.83S.
129 *Ibid.*, s.83S. This is not a denial of the right to appeal in art.11(4) of the Hong Kong Bill of Rights as the appellant has had his ground(s) of appeal determined.
130 CAR r.76.
131 CPO s.83T(1)(a). If the appellant is in custody and is entitled to be present, the Registrar must advise him or her and the Commissioner of Correctional Services of the probable date of the hearing (CAR r.70).
132 CAR r.37. The Registrar must keep a Register of all Notices of Appeal and Notices of Application for leave to appeal, which is open to the public (r.68).
133 CPO s.83T(1)(b) and CAR r.59(1). The CAR may enable the appellant to obtain from the Registrar documents and the like, which are necessary for the appeal (CPO s.83T(2)). If the trial judge is of the opinion that the title of any property, which is the subject of a restitution order, is not in dispute, the judge can arrange for the property or a sample or a copy to be available to the CA (CAR r.27).
134 CAR r.22.
135 *Ibid.*, r.59(1). After the appeal, the exhibits are returned to the person who originally produced it (r.60(1)).

document or exhibit, on application by a party, and any person having custody must produce it to the Registrar.[136]

6.10.8 Registrar obtains trial judge's notes

The Registrar must obtain from the trial judge the whole or part of his note of the trial or a copy, as the judge may certify as being necessary for the purposes of the appeal.[137]

6.10.9 Registrar obtains transcript

The Registrar can request a shorthand writer to furnish a copy of the transcript of the proceedings under appeal.[138]

6.10.10 List of authorities

At least two days prior to the hearing in the CA, the parties must file a list of authorities to be relied on.[139]

6.10.11 The hearing of the application for leave or the appeal

6.10.11.1 *Language*

At the hearing of the appeal or the application for leave, the CA may use either or both of the official languages as it considers appropriate for the just and expeditious disposal of the appeal.[140] The decision of the court is final. A party to or witness in any appeal may use either or both of the official languages and may address the court in any language.[141] A legal representative may use either or both of the official languages.[142] Documents filed in an appeal or served may be in either official language.[143] The official record of the proceedings, and the transcript, must be kept in the official language directed by the Court.[144]

6.10.11.2 *Security*

The CA can order the attendance of prison officers to attend sittings of the CA.[145]

136 *Ibid.*, r.59(3).
137 *Ibid.*, r.33.
138 *Ibid.*, r.11. A party can apply to the Registrar for a copy of the transcript upon payment of a fee (r.12). The Registrar can also arrange for the translation of a transcript, upon payment of a fee (r.12). The Registrar must provide a free copy of the transcript to any legal aid lawyer representing a party (r.13). If there is a record of the proceedings other than a shorthand note, the Registrar can order copies of that record for the use of the Court of Appeal (r.15).
139 Practice Direction 5.5 Submission of Authorities (1 December 2017).
140 CAR r.2A(1). See also Official Languages Ordinance (Cap.5) rr.3(1) and 5(1).
141 *Ibid.*, r.2A(3). See *HKSAR v Kong Lai Wah* [2009] 1 HKLRD 284.
142 *Ibid.*, r.2A(4).
143 *Ibid.*, r.2A(5). A party served with a document written in an official language with which he or she is not familiar can request (within three days of being served) the SJ to provide a translation of the document into the other official language (r.2A(6)). The time for the next step in an appeal begins to run if a request has been made under r.2A(6) from the date the person receives the translation (r.2A(8)).
144 *Ibid.*, r.2A(9).
145 *Ibid.*, r.57.

6.10.11.3 *Presence of appellant*

An appellant who has been admitted to bail shall, by order of the CA, be ordered to be personally present at the hearing of the appeal and at the final determination.[146] If the (bailed) appellant is not present, the CA can decline to hear the appeal, summarily dismiss it, issue an arrest warrant, adjourn the hearing or consider the appeal in the absence of the appellant and may make any orders it thinks fit.[147]

If the appellant is not on bail, when he or she attends the appeal hearing, must surrender himself or herself into the custody of the Court.[148]

If the appellant is in custody, he or she can be brought before the CA or a judge.

A defendant (who is not bailed) is entitled to be present at the hearing of an application for leave to appeal and an appeal unless the CA orders otherwise.[149]

6.10.12 Determination of appeal

Three Appeal Justices will ordinarily hear and determine the appeal.[150] If the appeal raises a particularly important issue, a bench of five Appeal Justices can hear the appeal. The appeal will be upheld or dismissed.

6.10.13 Delivery of judgment and reasons

The Court can deliver judgment and reasons on the same day as the hearing of the appeal or can reserve judgment and reasons for a later date.[151] The judgment can be read out at the later date, or the Court can provide a written copy to the parties.[152] The Court will ordinarily hand down reserved judgments rather than deliver the judgment in court.[153]

6.10.14 Registrar advises result

The Registrar then advises the applicant of the result using either Form XII or Form XIII. The Registrar must maintain a record of all orders made by the CA under the CAR.[154]

6.10.15 Abandonment of appeal

An appellant can abandon an appeal at any time before the hearing by giving notice to the Registrar. Form VII is used.[155] When the notice is received, the appeal is deemed to be dismissed.

146 *Ibid.*, r.49(1). When the appellant is present at the hearing, the Court can admit the appellant to bail, revoke or vary bail, enlarge the recognizance or substitute a surety (s.50).
147 *Ibid.*, r.49(2).
148 *Ibid.*, r.48(1).
149 CPO s.83U(1). The CA can pass sentence on a person even if the person is not present (s.83U(3)).
150 HCO s.34(2).
151 CAR r 61(1).
152 *Ibid.*, r.61(2)(3).
153 See Practice Direction 4.3, Criminal Appeals in the Court of Appeal, Handing Down Judgments (15 November 1999).
154 CAR r.26.
155 *Ibid.*, r.39.

The CFA is thus a critical influence on the overall development of the common law in Hong Kong, particularly in respect to constitutional issues and human rights. A distinguishing feature of the CFA is that appellate judges from other common law jurisdictions (notably Australia and England) are routinely invited to it on the CFA.[17]

8.4 CRIMINAL JURISDICTION OF THE COURT OF FINAL APPEAL AND THE RIGHT TO APPEAL

Like all other courts in Hong Kong, the CFA has no inherent appellate jurisdiction. Its criminal jurisdiction is that authorised by statute.[18] Under s.4 of the HKCFAO, the CFA has jurisdiction conferred on it by the HKCFAO and by any other law. The CFA has no jurisdiction in respect to "acts of state."[19]

Section 31 of the HKCFAO states:

> "An appeal shall, at the discretion of the Court, lie to the Court in any criminal cause or matter, at the instance of any party to the proceedings, from –
>
> (a) any final decision of the Court of Appeal;
> (b) any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal."

Section 31 is the primary source of the right to appeal to the CFA in respect to criminal matters. This is a potentially very broad jurisdiction as it covers "*any* criminal cause or matter" and from "*any* final decision" of the CFI and the CA (italics added). It is important to emphasise that appeals from the CA can only be in respect to a "final" decision of the CA and appeals from the CFI can also only be in respect to a "final decision" from which no appeal lies to the CA.[20]

17 HKCFAO s.5(3) (and Basic Law art.82) provides that the CFA "may as required invite judges from other common law jurisdictions to sit on the Court". HKCFAO s.9(1) states that there shall be a list of judges from other common law jurisdictions. The Chief Executive appoints the judges, on the recommendation of the Judicial Officers Recommendation Commission. Under HKCFAO s.16(1), only one judge from another common law jurisdiction can sit with four of the Hong Kong judges. For discussion, see Simon Young, "The Hong Kong Multinational Judge in Criminal Appeals" (2007) 26 SSRN (*Law in Context: Criminal Appeals 1907–2007: Issues and Perspectives*) 130. Also see, Sir Anthony Mason, "The Hong Kong Court of Final Appeal" (2001) 2 Melbourne Journal of International Law 216. As at 22 May 2019, there are 15 non-permanent judges from other jurisdictions on the list.

18 *Solicitor v Law Society of Hong Kong* (2003) 6 HKCFAR 570, [31]. The Court has inherent jurisdiction to do all things necessary in the performance of its role as the final appeal court.

19 CFO s.4(2). It is very unlikely that "acts of state" could affect the jurisdiction of the CFA to hear and determine criminal matters but it is possible. An example might be the criminal liability of a consular official or an ambassador.

20 In *HKSAR v Lai Chun Ho* [2019] HKCA 40, the CA granted a certificate but expressed some doubt as to whether the decision was a "final" decision of the CA. The CA decision was a decision regarding the constituent elements of the offence of manslaughter. An appeal had been brought to the CFA on an interlocutory appeal from the CFI under Criminal Procedure Ordinance (Cap.221) (CPO) s.81 on this issue.

8.4.1 What is a "final decision?"

In general terms, a final decision is a decision which finally determines the rights of the parties or finally determines the whole action.[21] However, in *HKSAR v Mak Wan Ling*,[22] the CFA held that it had jurisdiction to hear and determine an appeal against the decision of the CA in respect to an interlocutory application under s.81 of the CPO (case stated). In *HKSAR v Mak Wan Ling*, the trial judge made a pretrial, interlocutory ruling that where the accused is charged with manslaughter by gross negligence, the prosecution must establish that, (in addition to the objective, reasonable man test), "the defendant's subjective state of mind was culpable in that the defendant was subjectively aware of the obvious and serious risk of death of the deceased."[23] In other words the judge ruled that the prosecution must satisfy both an objective test and a subjective test.

The prosecution appealed the correctness of that ruling. The appeal was to the CA pursuant to s.81 of the CPO, using the case-stated procedure. The CA held that the ruling of the trial judge was incorrect and that the prosecution only has to establish the objective reasonable man test. The defendant then applied to the CFA for leave to appeal the correctness of the decision of the CA. The CFA held that s.31(a) of the HKCFAO includes decisions of the CA which are in response to an application under s.81 of the CPO (case stated).

The CFA held that the appropriate approach to determining what is a final judgment is set out in *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd.*[24] The CFA held that a decision may be "final" even if it does not finally determine the whole action. The Court considered:

> "... the purpose and substance of the application, the issue dealt with and determined by the court and the effect of a determination of this issue on the rights of the parties, the further conduct of the proceeding and the final disposal of the whole action."[25]

In *HKSAR v Mak Wan Ling*, the CFA held that the Court in *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd* held that:

> "... a broad commonsense approach should be adopted and that if the issue dealt with and determined by the court is a "substantive part of the final trial" or a "crucial issue" in the case or a point "that goes to the root of the case" or a "dominant feature of the case," then the order or judgment, even if it did not finally dispose of the whole action, should nevertheless be regarded as a final judgment."[26]

On this basis, the CFA was prepared to treat the ruling of the trial judge (regarding the mental element for manslaughter by gross negligence) as a final judgment for the purposes

21 *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd* (2003) 6 HKCFAR 222, [26].

22 [2019] HKCFA 11.

23 *Ibid.*, [1].

24 (2003) 6 HKCFAR 222.

25 *Shell Hong Kong Ltd v Yeung Wai Man Kiu Yip Co Ltd* (2003) 6 HKCFAR 222, [31].

26 *HKSAR v Mak Wan Ling* [2019] HKCFA 11, [12]. The CFA also referred to *Pasa Danaville Dizon v HKSAR* (2009) 12 HKCFAR 960, but stated that the *dictum* in that case must be read with great care as the court was only dealing with HKCFAO s.31(b).

of s.31 of the HKCFAO.[27] The CFA held that this ruling was a substantive part of or a crucial issue in the trial. The CFA granted leave to appeal and the appeal will be heard on 5 September 2019.

The decision in *HKSAR v Mak Wan Ling* is significant, because it provides a broad (and common sense) approach to which decisions can be appealed to the CFA. In determining the meaning of "final decision," the Court did not take a narrow, technical approach which would limit the rights of the parties but, rather, adopted a purposive and "rights-based" approach.

Section 31 of the HKCFAO does not recognise a direct appeal to the CFA from the District Court or the Magistrates' Court.

Section 31 is not confined to an appeal by the person convicted. Any party to the proceedings may appeal, including the Secretary for Justice (SJ). The prosecution is equally entitled to apply for leave to the CFA, although somewhat different considerations are taken into account with prosecution appeals, as discussed below.

Section 31 appears to envisage that only one appeal is possible by a party in respect to the same issue or case.[28]

8.5 LEAVE TO APPEAL

The CFA has no jurisdiction to hear and determine an appeal unless it has first granted leave to appeal.[29]

As discussed in Chapter 1, "leave" of the Court is a form of permission, consent or approval for a party to take a particular step in the proceedings.[30] It is not surprising that a grant of leave is required in order for the CFA to hear and determine an appeal. In the absence of a leave requirement, the Court would be unable to control the number of cases required to be heard and determined. This consideration concerns the issue of court resources.

More importantly, the requirement of leave also enables the Court to monitor the type or nature of cases proceeding to a final hearing, not just the number. This does not concern the issue of court resources and efficiencies but, rather, the role of the Court in only dealing with those cases that satisfy the leave criteria in s.32(2) of the HKCFAO. The Court itself determines if the strict leave criteria (set out in s.32(2)) are satisfied.

As already discussed in Chapter 1, the requirement of leave creates a two-step procedure for the determination of a criminal appeal. The first step is the application for leave. If leave is granted, the second step is the hearing and determination of the appeal. The specific steps involved in the process of applying for leave are set out below. In applying for leave to appeal, the person applying is referred to as the "applicant" and if leave is granted, the applicant becomes the "appellant." It is crucial that in the Notice of Application for Leave, applicants address the specific criteria for a grant of leave.

27 *HKSAR v Mak Wan Ling* [2019] HKCFA 11, [13].

28 *Leung Wai Lun v HKSAR* (2009) 12 HKCFAR 754, discussed below at Section 8.7. However, the CFA, like other appeal courts, has an inherent power to reopen a perfected judgment in limited circumstances, discussed below.

29 HKCFAO s.32(1).

30 See Chris Corns, "Leave to Appeal in Criminal Cases: The Victorian Model" (2017) 29(1) Current Issues in Criminal Justice 39.

The applicant must persuade (three judges of) the Court that the case is suitable and appropriate to be heard and determined by five Appeal judges. In deciding whether to grant leave, the Court does not deal with the substantive merits of the case (which is the focus of the appeal), but rather the focus is on whether the statutory grounds for a grant of leave are satisfied. Just because leave is granted, does not entail that the appeal should or would succeed. Leave is a preliminary step. The test for deciding leave is different from the approach taken by the CFA in deciding the appeal.

8.5.1 The test for deciding leave to appeal

The specialised and specific role of the CFA is reflected in the criteria for a grant of leave to appeal which are set out in s.32(2) of the HKCFAO:

> "Leave to appeal shall not be granted unless it is certified by the Court of Appeal or the Court of First Instance, as the case may be, that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done."

This is a certification process only, not a grant of leave.

Under s.32(3) of the HKCFAO:

> "Where the Court of Appeal or the Court of First Instance declines to certify as mentioned in subsection (2), the Court may so certify and grant leave to appeal."

(Both the High Court of Australia and the Supreme Court of New Zealand has a requirement of leave, although each is expressed in somewhat different terms to s.32(2) of the HKCFAO.)[31]

It can be seen that there are two limbs to s.32(2). Under the first limb, the criterion is whether the case involves "a point of law of great and general importance."[32] Under the second limb, the criterion is whether it is shown that "substantial and grave injustice has been done." In most cases, leave to appeal is granted in respect to the first limb. The second limb is generally regarded as a "fall-back" or "last-resort" limb, reserved for exceptional cases. This is because the primary role of the CFA is to decide questions of law, not questions

31 In order for the Australian High Court to grant "special leave" to appeal, the Court must have regard to "(a) whether the proceedings in which the judgment to which the application relates was pronounced involves a question of law (i) that is of public importance, whether because of its general application or otherwise; or (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law: and
(b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates" (Judiciary Act 1903 s.35A). In order for the New Zealand Supreme Court to grant leave to appeal, the Court must be satisfied "that it is necessary in the interests of justice for the court to hear and determine the appeal". It is necessary in the interests of justice for the Court to hear and determine the appeal if "(a) the appeal involves a matter of general or public importance; or (b) a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard or (c) the appeal involves a natter of general commercial significance" (Senior Courts Act 2016 s.74).

32 This phrase is probably derived from the power of the Privy Council to hear an appeal if in its opinion "the question involved is one which, by reason of its great general or public importance, or otherwise ought to be submitted to Her Majesty in Council for decision": see Peter Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (2nd ed., Hong Kong: Longman Asia Ltd, 1994) pp.138–139.

of fact. Having said this, it is not unusual for the Court to grant leave on the second limb. It is possible for a ground of appeal to relate to both limbs.

Under the first limb of s.32(2), not only is the work of the CFA concerned with questions of law but also, the questions of law must be of "great and general" importance. This means that if the question of law had very little scope or application beyond the facts of the particular case, the Court would be unlikely to grant leave.[33] The question of law must affect the whole of Hong Kong. However, in less frequent cases, under the second limb, the CFA will consider a factual matter where the basis of the appeal is not a question of law, but rather whether a "substantial and grave injustice" has been done."[34]

In *Secretary for Justice v Wong Chi Fung*,[35] the CFA described the leave requirements as:

> "… high thresholds for the grant of leave in keeping with the Court's primary role in the administration of criminal justice, namely to resolve real controversy on points of law of great and general importance."

Because of the stringency of the leave requirements, if leave is granted, there will always be a strong public interest in the appeal being heard as the appeal will involve a matter of general public interest. That public interest goes beyond the personal interests of the appellant.

It is important to note that an appellant to the CFA can be the prosecution and not just the person convicted. Section 32(2) is, for example, broad enough to include a prosecution appeal against the decision of the CA to enter an acquittal.[36] Most of the prosecution appeals to the CFA from decisions of the CFI are brought to clarify a point of law (under the first limb of s.32(2)) rather than to simply have a conviction reinstated.[37] By comparison, appeals to the CFA by the person convicted are often attempting to quash a conviction or sentence, rather than to clarify a point of law, albeit the appellant will still have to show error in the court below.

It would only be in exceptional circumstances that the CFA would entertain an appeal based on a point of law which had not been raised in the courts below.[38] This is because it is expected that the parties will present their strongest arguments and submissions in the courts below, particularly in the intermediate CA. However, in some cases, the CFA can identify a point of law which neither party, nor the courts below, had identified.

33 A good example of such a question of law is whether upon the acquittal of a defendant, there are any circumstances when it would be justified and appropriate for the trial court to not order costs to the defendant? This was the issue in *Qamar Sheraz v HKSAR* (2007) 10 HKCFAR 696. The CFA held that it was an error for a court to deny an acquitted defendant costs just because the trial magistrate or judge thought the defendant had brought suspicion on himself or thought the defendant should have been convicted.

34 In *Chou Shih Bin v HKSAR* (2005) 8 HKCFAR 70, [2] for example, the CFA determined the facts of the case and held that the handling of the case by the lowers courts did "involve a departure from accepted norms so serious as to constitute a substantial and grave injustice."

35 (2018) 21 HKCFAR 35.

36 Leave to appeal was granted by the CFA in *HKSAR v Lam Sze Nga* (FAMC 54/2005, [2005] HKEC 1547).

37 If the prosecution appeal against an acquittal is upheld, the CFA has a power to restore the conviction but often the CFA will decline to restore the conviction, particularly if the prosecution do not seek restoration. This is a residual discretion of the CFA.

38 *Wong Tak Yue v Kung Kwok Wai* (1997–98) 1 HKCFAR 55.

8.5.2 The Appeal Committee

In the CFA, an Appeal Committee decides applications for leave in both civil and criminal matters.[39] The Appeal Committee consists of the Chief Justice and two permanent judges nominated by the Chief Justice or three permanent judges nominated by the Chief Justice.[40] When deciding an application for leave, the Appeal Committee represents or constitutes the Court as a whole.[41] No appeal lies from decisions made by the Appeal Committee.[42] The Appeal Committee is by definition, expert at deciding if the statutory grounds for an appeal exist.

As already stated, the Appeal Committee can grant leave to appeal if the CA or the CFI (as the case may be) has first certified that "a point of law of great and general importance is involved in the decision" or, it is shown that a "substantial and grave injustice" has been done.[43] Even if the CA or the CFI has provided the requisite certification, the CFA can override that certification if the Court thinks that there is no point of great and general importance.[44] If the CA or the CFI has refused to certify the question of law, the Appeal Committee can certify the question and grant leave in respect to that question of law. The CFA determines if it will hear an appeal, not the intermediate courts.

The Appeal Committee has a power to award costs where leave to appeal is refused.[45]

If leave is granted, the Appeal Committee can impose a timetable for the prosecution of the appeal.[46] All proceedings before the Appeal Committee (and the hearing of appeals) are in general held in open court to which the public has access.[47]

Different procedures apply depending upon which of the two limbs is relied upon in an application for leave to appeal.

In *Zeng Liang Xin v HKSAR*,[48] the Court stated:

> "(1) Where an applicant relies on only the "point of law" limb, he should apply to the lower court for the certificate. If granted by the lower court, he should then

39 Neither the High Court of Australia nor the New Zealand Supreme Court has an Appeal Committee. The equivalent rules simply provide that "the Court" determines the application for leave. See Chris Corns and Douglas Ewan, *Criminal Appeals and Reviews in New Zealand* (Wellington: Thomson Reuters, 2019), [10.290] and Chris Corns, Susan Borg and Adrian Castles, *Criminal Appeals and Review in Victoria* (Sydney: Thomson Reuters, 2017), [9.250]. In Australia and New Zealand, there is no equivalent system of the lower court certifying that the case is suitable for appeal in the High Court or the Supreme Court. In Victoria, however, on an appeal against an interlocutory ruling to the Victorian CA, the trial judge is required to certify that the case is suitable for an appeal.

40 HKCFAO s.18(1). If there are insufficient numbers of permanent judges, the Chief Justice can nominate a non-permanent Hong Kong judge to sit on the Appeal Committee (s.18(2)). A judge cannot sit on the Appeal Committee in respect to a judgment or order made by the judge in a court below or in respect to a conviction or sentence passed by the judge or where the judge refused to grant a certificate under s.32(2) (s.8(2A)).

41 *Ibid.*, s.18(2).

42 *Ibid.*, s.18(3). If an appeal was available, then there would be no end to applications for leave. This is an example where the principle of finality is paramount.

43 *Ibid.*, s.32(2).

44 *Lau Suk Han v HKSAR* (1997–98) 1 HKCFAR 150, 154C–154F (Li CJ).

45 The power to award costs is found in HKCFAO s.43(2). The Costs in Criminal Cases Ordinance (Cap.492) (CCCO) does not apply to proceedings in the CFA. However, under CCCO s.9B, where the prosecutor unsuccessfully applies for certification under HKCFAO s.32(2), the CA or the CFI has a power to award costs against the prosecutor. An analogous power is found in CCCO s.13B in respect to unsuccessful applications under HKCFAO s.32(2) by the defendant. In *Liu Sik Keung v HKSAR* (FAMC 41/2003, [2003] HKEC 1350), the Court stated that if an application for leave gets to the oral hearing stage, then the general approach is that no costs will be awarded if the application is unsuccessful unless "something sufficiently out of the ordinary" is needed. The Court stated that it did not wish to deter applications for leave to appeal.

46 HKCFAO s.32(4). The Court can vary the timetable on the application of a party or of its own motion (s.32(4)).

47 *Ibid.*, s.47(2). The Court can close the hearings to the public if required (s.47(3)).

48 (1997–98) 1 HKCFAR 12, 22.

apply to the Court of Final Appeal for leave. If declined by the lower court, he then applies to the Court of Final Appeal for the certificate and for leave.

(2) Where an applicant relies only on the "substantial and grave injustice" limb, he must apply straight to the Court of Final Appeal for leave. The application is not one for any certificate."

8.5.3 Applications for leave: "point of law of great and general importance" limb

An application for a certificate referred to in s.32(2) of the HKCFAO must be made immediately after judgment is given.[49] If a party wishes to apply for an extension of time within which to apply for certification, it is not appropriate to do so by letter. Instead, a summons should be taken out with a notice of motion.

8.5.3.1 *Refusing leave where certificate issued under s.32(2)*

If the CA or the CFI has issued a certificate under s.32(2) of the HKCFAO that the point raised is of great and general importance (under the first limb), the CFA can nevertheless refuse to grant leave to appeal.[50] The final decision as to whether leave should or should not be granted lies with the CFA, and not with the intermediate appeal courts.

If the CA or the CFI has refused to certify a point of law, an applicant can still apply to the Appeal Committee for certification of the question of law (or some other question of law).[51]

8.5.4 Applications for leave: "substantial and grave injustice" limb

As stated, the second limb upon which the Appeal Committee can grant leave is if the applicant can show "that substantial and grave injustice has been done." This limb has been interpreted as a residual safeguard which would only be engaged in rare and exceptional circumstances.[52] The focus of this limb is not a specific question of law but, rather, the broader issue of whether the conviction or sentence cannot stand because of some form of miscarriage of justice.

This will often involve questions of fact. This limb would only be engaged in exceptional cases, because the CFA is not a second appeal court as its primary role is to resolve questions of law. Having said this, as the final appeal court for Hong Kong, the CFA cannot ignore a possible miscarriage of justice which is not only unfair and unjust for the individual applicant but, if established, could undermine public confidence in the administration of criminal justice. The second limb of s.32(2) is also broad enough to cover a prosecution appeal against an acquittal, and in this sense, the alleged miscarriage of justice is suffered by the general public.[53]

To repeat, the requirement of certification from the lower court (under s.32(2)) does not apply to the second limb of substantial and grave injustice.[54]

At the leave stage, the applicant does not have to show that a substantial and grave injustice has in fact occurred. That is the issue on the appeal if leave was granted. What

49 Practice Direction 2.2 para.3.

50 *HKSAR v Lau Suk Han* (1997–98) 1 HKCFAR 150; *Tang Siu Man v HKSAR* (1997–98) 1 HKCFAR 4.

51 HKCFAO s.32(3).

52 *So Yiu Fung v HKSAR* (1999) 2 HKCFAR 539; *Kwok Hung Fung v HKSAR* (1997–98) 1 HKCFAR 78.

53 *HKSAR v Chak Hang* (2015) 18 HKCFAR 541.

54 *Zeng Liang Xin v HKSAR* (1997–98) 1 HKCFAR 12, [33].

the applicant has to do is to "… make out a reasonably arguable case to that effect."[55] The term "substantial and grave injustice" is derived from the Privy Council decision in *Re Dillet*.[56]

In *Zeng Liang Xin v HKSAR*,[57] the Court described this second limb as a "high hurdle." In *Kwok Hung Fung v HKSAR*,[58] the Court stated that the objective of showing a reasonably arguable case "would not be an easy one to achieve."

In *So Yiu Fung v HKSAR*, Bokhary PJ stated that the second limb in s.32(2) is designed to cover cases where:

> "…there is a real danger of something so seriously wrong that justice demands an inquiry by way of a final criminal appeal despite the absence of any real controversy on any point of law of great and general importance. To obtain leave under this limb, an appellant has to show-as this appellant has shown-that it is reasonably arguable that substantial and grave injustice has been done."[59]

8.5.4.1 *The test for determining appeal under the "substantial and grave" limb*

There is no statutory test to determine an appeal based on the substantial and grave injustice ground. The test that applies to this limb is explained as follows:

> "Reviewing convictions to see if they are safe and satisfactory is entrusted to the intermediate appellate court. If the matter proceeds further to this court, our task does not involve repeating that exercise. We perform a different one. In order for an appeal brought under the "substantial and grave injustice" limb of s.32(2) of the Hong Kong Court of Final Appeal Ordinance to succeed, it must be shown that there has been to the appellant's disadvantage a *departure from accepted norms* which departure is so serious as to constitute a substantial and grave injustice. That is the test."[60] (Emphasis added)

An "accepted norm" here refers to what is accepted as the appropriate or correct procedure, standard or practice to be followed in respect to the conduct of a criminal case.[61] Clearly, it is insufficient for the appellant to simply show that there has been some form of departure from the rules.[62] The departure has to be of the most serious kind. It is typical in such cases

55 *Kwok Hung Fung v HKSAR* (1997–98) 1 HKCFAR 78, [9].

56 *Re Dillet* (1887) 12 App Cas 459, 467. The more modern equivalent phrase is "miscarriage of justice" or "substantial miscarriage of justice."

57 (1997–98) 1 HKCFAR 12, [37].

58 (1997–98) 1 HKCFAR 78, [10].

59 *So Yiu Fung v HKSAR* (1999) 2 HKCFAR 539, 543.

60 *Ibid.*, 541–543., followed in *Lam Sou Fung v HKSAR* (FAMC 12/2004, [2004] HKEC 500). Also see *Van Weerdenburg v HKSAR (No 2)* (2010) 13 HKCFAR 457, 8.

61 The concept of "accepted norms" is very broad and can include any aspect of criminal procedure including pretrial, during the trial, sentencing and post-sentencing. The applicant has the burden of explaining to the CFA what the particular norm relied on is, and why it is alleged the norm was not followed in the particular case. Examples could include (1) the level of competency expected of defence counsel; (2) directions that should be given in particular circumstances and (3) what a reasonable time is for the delivery of a judgment.

62 In *HKSAR v Choi Wang* [2018] HKCFA 27, [7], the Court stated "It is therefore not enough merely to find fault with the decisions below in a manner that might be appropriate on an intermediate appeal. It must be reasonably arguable that an error or errors have occurred which are so serious as to constitute a substantial and grave injustice to the applicant's disadvantage, looking at the case in the round".

that the trial has not been fair. In an application for leave to appeal, the applicant must be able to demonstrate what the particular "accepted norm" is, and how there was a departure from that norm at the trial or in the court below.

In *Van Weerdenburg v HKSAR (No 1)*,[63] Bokhary PJ stated:

> "It is therefore very much in the best interests of applicants carefully and precisely to identity what they invoke as accepted norms. That is the first step. The next step is to identity, also with care and precision, the departures from accepted norms of which they complain. Such are the steps to be taken for the purposes of seeking leave to appeal under the "substantial and grave injustice" limb of s.32(2). If the existence of any accepted norm invoked is disputed, it is possible that such dispute will generate a question or questions of law-perhaps of great and general importance so as to justify leave to appeal under the "point of law" limb of s.32(2)."

8.5.5 Appellate approaches to applications for leave by the prosecution

In *HKSAR v To Chak Hang*,[64] the CFA stated:

> "The scope of s.32(2) is certainly wide enough to embrace appeals by the prosecution against acquittal on the ground of a substantial and grave injustice but, like all appeals on that ground, they will be rare."

Similarly, in *HKSAR v Chu Chin Wah*,[65] the prosecution appealed to the CFA against the decision of the Court of Appeal not to order a retrial following the CA quashing the appellant's conviction. The CFA dismissed the appeal and stated:

> "It would take something very special to make the CFA consider if it is appropriate to reverse an intermediate appellate court's grant of a retrial. And it would take something even more special to make the CFA consider if it is appropriate to reverse an intermediate appellate court's refusal of a retrial."[66]

An example of a successful appeal by the person convicted is *HKSAR v Chan Ka Chun*[67] where the summing up by the trial judge was based on a number of misinterpretations of the appellant's statements in a video-recorded interview (VRI). The misinterpretations arose because of errors in the translation. As a consequence, the summing up was not balanced or accurate and this resulted in an unfair trial for the appellant. The CFA quashed the conviction.

Another example is *HKSAR v Nguyen Anh Nga*[68] where the trial judge failed to give an adequate direction concerning inferential reasoning, and in doing so, failed to refer to the facts of the case. The CFA quashed the appellant's conviction and ordered a retrial. There had been a serious departure from established norms.

63 (2010) 13 HKCFAR 453, [8]–[9].
64 (2015) 18 HKCFAR 541, 542.
65 *HKSAR v Chu Chi Wah* (FAMC 58/2010, [2010] HKEC 1668).
66 *Ibid.*, [3]. As discussed in Chapter 7, the issue of whether to order a retrial can be complex and requires the appeal court to examine a rage of often competing considerations. The CFA has taken the view that the CA is in the best position to make that judgment.
67 (2018) 21 HKCFAR 284.
68 (2017) 20 HKCFAR 149.

8.5.6 Application for leave in reliance on both limbs in s.32(2)

If an applicant wishes to rely on both limbs in s.32(2) of the HKCFAO, then the following steps should be taken into account (in summary):

(1) an application is first made to the lower court for certification in respect to the point of law;
(2) if granted, the applicant should then apply to the CFA for leave (a) on the basis of the certificate and (b) raising the "substantial and grave injustice" limb. The Appeal Committee will then decide whether to grant leave and if so, whether on both limbs or one of them:
(3) if the lower court refuses to grant the certificate, the applicant should apply to the CFA (a) for a certificate for the point of law limb and (b) for leave firstly on the basis of the certificate (if granted) and secondly the "substantial and grave injustice" limb. The court can then decide on whether to grant leave, and, if leave is granted, whether on both limbs or one of them.[69]

8.6 THE REGISTRAR

The Registrar of the CFA is responsible for the administration of the Registry of the Court.[70] The Registrar is appointed by the Chief Executive and is responsible for assisting the judges of the Court by, eg, supervising the collation of documents which are necessary for an application or an appeal.

8.7 HOW MANY APPLICATIONS FOR LEAVE TO APPEAL CAN BE MADE?

In general, an applicant will apply for leave to appeal once only. In *Leung Wai Lun v HKSAR*,[71] the CFA stated:

> "It is unnecessary in the present case to decide whether, and if so the circumstances in which, there is jurisdiction to entertain a second application for leave to appeal in a criminal case, after dismissal of the original application. Plainly, it is in the interests of society for there to be finality in the criminal process. See *HKSAR v Hung Chan Wa* (2006) 9 HKCFAR 614 at para 21. Assuming such a jurisdiction exists, it would be a wholly exceptional one and the occasions on which the circumstances would justify its exercise would be rare in the extreme."[72]

This *dicta* suggests that a second application for leave could be possible, but it would only be in exceptional circumstances that a second application would be entertained.

69 *Zeng Liang Xin v HKSAR* (1997–98) 1 HKCFAR 12, [34].
70 HKCFAO s.41.
71 (2009) 12 HKCFAR 754, [10].
72 In *Choi Man Wai v HKSAR* [2001] 4 HKC 641, a second application for leave after dismissal of the first was described by Bokhary PJ as "misconceived." In *R v Pinfold* [1988] QB 462, the English CA held there could only be one appeal against conviction to that court.