Law Commission
Reforming the law

Criminal Appeals

Summary of the Issues Paper

This summary

This summary is intended to provide an overview of the key issues that we discuss in our Criminal Appeals issues paper. It explains what the project is about and the issues that we address.

In it, we set out a number of questions to which we are seeking responses.

Our aim is that anyone should be able to read this summary and engage with the key issues we address, and respond to the questions in this document. This may be particularly useful for members of the public who would like to share their views but may be less interested in engaging with the more detailed matters in the issues paper.

Where individuals or organisations have particular interest or expertise in any or all of the areas we examine then we would encourage them to read and respond to the full issues paper. It has a more detailed discussion and some of the questions are more detailed.

Who we are 	The Law Commission of England and Wales is an independent body established by statute to make recommendations to Government to reform the law in England and Wales.
What is it about? 	The Law Commission is conducting a review of the law governing appeals in criminal cases and considering the need for reform with a view to ensuring that the courts have powers that enable the effective, efficient and appropriate resolution of appeals. The review will be particularly concerned with inconsistencies, uncertainties and gaps in the law.
Why are we consulting? 	We are seeking views on whether and, if so, how the law needs to be reformed. Consultation is a crucial pillar of our work. We want any recommendations we ultimately make to have as strong an evidence base as possible.
Who do we want to hear from? 	We would like to hear from as many stakeholders as possible, including criminal law practitioners, and people with experience of the criminal appeals process. We are happy to receive responses from people who have tried to appeal, or are currently appealing, their conviction or sentence. However, we are unable to become involved in individual cases.
Where can I read the full issues paper? 	The full issues paper is available at our website: **www.lawcom.gov.uk/project/criminal-appeals/**

What is the deadline?

The deadline for responses is 31 October 2023.

How to respond

If you are responding to the full-length issues paper, we would appreciate responses using the online response form available at:
https://consult.justice.gov.uk/law-commission/criminal-appeals

If you are responding to the questions in this summary, we would appreciate responses using the online response form available at:
https://consult.justice.gov.uk/law-commission/summary-criminal-appeals

Otherwise, you can respond:

by email to **criminal.appeals@lawcommission.gov.uk**

by post to:
Criminal Appeals Team, Law Commission,
1st Floor, 52 Queen Anne's Gate, London, SW1H 9AG

(If you send your comments by post, it would be helpful if, whenever possible, you could also send them electronically).

What happens next?

We intend to publish a consultation paper in 2024, which will contain more detailed consideration of the law, including some technical matters not covered in this paper, and will contain provisional proposals for reform. There will then be a further consultation on that paper before we publish a report containing final recommendations.

It will be for Government to decide whether to implement the recommendations.

For further information about how the Law Commission conducts its consultations, and our policy on the confidentiality and anonymity of consultees' responses, please see the full issues paper.

Introduction

A person who has been convicted of a criminal offence can seek to challenge either their conviction or sentence by way of an appeal.

Appeals serve an important corrective function for individuals, whether this is to correct a miscarriage of justice, such as the conviction of someone who is factually innocent, or to correct a legal error, such as imposing a harsher sentence than is legally permissible.

However, they also serve important public functions, in ensuring that the criminal law is interpreted and applied consistently and predictably, and in the development of the common law.

In July 2022, the Law Commission was asked by the Government to conduct a review of the law relating to criminal appeals. The terms of reference for this project require us to consider the need for reform of the law, with a view to ensuring that courts have powers that enable the effective, efficient and appropriate resolution of appeals. This includes consideration of whether there is evidence that the tests employed in the Court of Appeal hinder the correction of miscarriages of justice, and whether the current arrangements for appeals from the magistrates' court are an efficient and effective use of court resources and judicial time.

At this stage we are not making provisional proposals for reform, or drawing any conclusions as to whether reform is necessary. The consultation on this issues paper serves as a call for evidence on the need for reform. Where respondents favour reform of the law in a particular area, we would welcome specific proposals for change, so that these can be assessed alongside the existing law.

Background

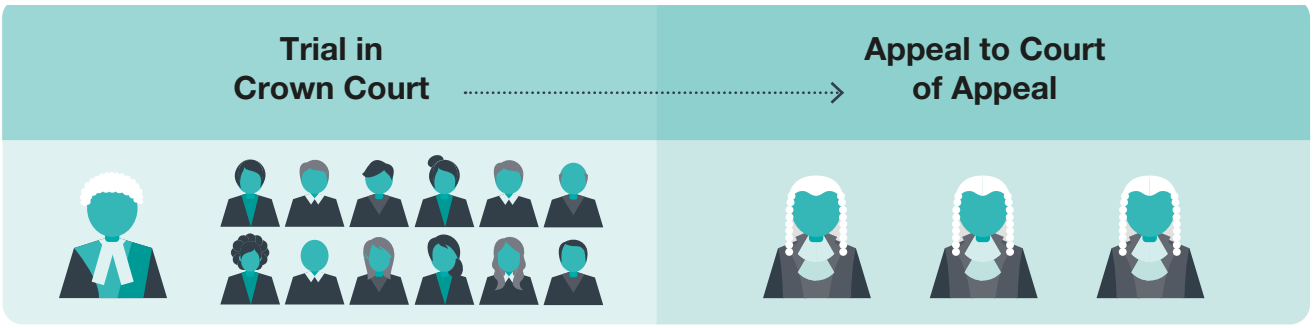
The vast majority of criminal cases in England and Wales are dealt with in summary proceedings in the magistrates' court. These include less serious offences (such as common assault and low-value criminal damage) which are "summary only", plus most "either way" offences (that is, offences which can be tried summarily in the magistrates' court or on indictment in the Crown Court). It also includes the overwhelming majority of trials involving minors, which are heard in a specialist type of magistrates' court called the Youth Court. Trials in magistrates' courts are heard either by a panel of lay magistrates, or a single District Judge (Magistrates' Court).

More serious cases are tried "on indictment" in the Crown Court. Unless the defendant pleads guilty, the case will almost always be heard by a jury.

The way that decisions of these courts can be appealed differs according to whether they were tried summarily or on indictment. The normal route of appeal against decisions in a magistrates' court, including convictions and sentence, is an appeal to the Crown Court. However, decisions in summary proceedings (including some Crown Court decisions in summary proceedings) can also be challenged in the High Court. Appeals from the Crown Court in trials on indictment are heard by the Court of Appeal Criminal Division.[1]

Summary proceedings

Proceedings on indictment



1 Sometimes a case tried by magistrates will be sent to the Crown Court for sentencing. An appeal against sentence then lies to the Court of Appeal.

Appeals in summary proceedings

There are currently three ways in which a decision of the magistrates' court may be challenged:

1. an appeal to the Crown Court;
2. an appeal to the High Court by way of case stated; and
3. an application to the High Court for judicial review.

The vast majority of appeals from the magistrates' court are made to the Crown Court. In 2022, there were over 6,000 appeals from magistrates' courts heard in the Crown Court. Around 44% were appeals against verdict, 47% appeals against sentence, and the rest appeals against other decisions.[2]

Appeal to the Crown Court

Where a defendant has been convicted and sentenced by the magistrates' court they may appeal against their conviction (if they had pleaded not guilty to the offence) or sentence to the Crown Court. The defendant does not require permission to appeal where the appeal is made within 15 days of the relevant decision. However, the Crown Court's permission is required to appeal outside the time limit.

Appeals in the Crown Court operate by way of rehearing. New evidence that has not been presented at the original trial or sentencing hearing can be presented on appeal. The Crown Court has the power to confirm or change the magistrates' court's decision and to send the case back to the magistrates' court with its opinion. Following an appeal, the Crown Court may sentence the appellant to a more severe sentence than that imposed by the magistrates' court.

Appeal by way of case stated

A conviction, sentence or an acquittal may be appealed to the High Court by way of case stated on the ground that it was wrong in law or in excess of the court's jurisdiction. This avenue of appeal is available to the prosecution and any person "aggrieved" by the decision, as well the defendant (except where they have appealed against the same conviction or sentence to the Crown Court).

An application must be made to the magistrates' court to state a case within 21 days of the relevant decision. The case stated must detail the factual basis on which the magistrates' court made its decision.

The High Court is required to determine whether the magistrates' court has reached a decision which it was not reasonably open to it to reach. The High Court has the power to confirm or change the magistrates' court's decision and to send the case back to the magistrates' court with its opinion.

Judicial review

The magistrates' court decision may also be challenged by both the defendant and the prosecution by way of judicial review in the High Court on the ground that it was unlawful or irrational or there has been procedural impropriety. An application for judicial review requires permission from the High Court, which must be obtained "promptly" and no later than three months from the date of the relevant decision.

The High Court has the power to quash the magistrates' court's decision, including a conviction, and to send the case back to the magistrates' court for reconsideration in line with its findings.

2 Ministry of Justice, Criminal Courts Statistics Quarterly, January to March 2023.

Proposals for reform

Previous reviews have found the way appeals from the magistrates' court operate to be confusing and to result in the duplication of proceedings, given the overlap between the three routes of challenge and the requirement for a rehearing in the Crown Court. Several proposals for reform have been put forward, including:

1. Replacing the automatic right of appeal to the Crown Court with a requirement to apply for permission to appeal.
2. Replacing the requirement for a rehearing in the Crown Court with a review of the magistrates' court decision by the Crown Court, so the Crown Court would examine the way in which the trial was conducted to decide if the conviction or sentence should stand.
3. Removing the procedures for challenging magistrates' decisions in the High Court (both by way of case stated and judicial review) so that all appeals from the magistrates' court are made to the Crown Court.

However, some stakeholders have expressed concern about changing the current process in respect of appeals to the Crown Court, as it may have serious implications for how the magistrates' courts operate. It would require the recording of proceedings in the magistrates' court and detailed reasons to be provided by magistrates for their decisions, which could affect the magistrates' court's ability to deal with its large volume of cases.

Summary Question 1

Is there a need to reform the processes by which decisions of magistrates' courts in criminal cases can be appealed or otherwise reviewed?

Appeals in proceedings on indictment

Serious offences in England and Wales are tried "on indictment" in the Crown Court, almost always before a jury.[3]

The fact that trials on indictment are heard by a jury has important consequences for the ability to appeal a conviction.

1. Juries do not give reasons for their verdicts.
2. Juries' deliberations are secret.
3. The Court of Appeal are very reluctant to quash a conviction arrived at by a properly directed jury.

Appeals against conviction

A person convicted on indictment may seek leave to appeal their conviction to the Court of Appeal. Leave to appeal must be requested within 28 days of conviction, even if the person is not sentenced until a later date. This time limit can be extended by the Court of Appeal, but only where the applicant can show that there is a good and exceptional reason for allowing an appeal outside the limit.

The sole ground of appeal is that the conviction is "unsafe". "Unsafe" is not defined. It is not limited to situations where the person is factually innocent, but also includes situations where:

1. the evidence was not sufficient for a properly directed jury to be sure that the appellant committed the offence;
2. the appellant did not receive a fair trial; or
3. the prosecution amounted to an abuse of process.

Fresh evidence

The Criminal Appeal Act 1968 says that the Court of Appeal may admit fresh evidence "if they think it necessary or expedient in the interests of justice". When deciding whether to admit fresh evidence, the Court of Appeal must have regard to whether:

1. the new evidence appears capable of belief;
2. it appears that the evidence may provide any ground for allowing the appeal;
3. the evidence would have been admissible in the Crown Court proceedings; and
4. there is a reasonable explanation for the failure to adduce it in the Crown Court proceedings.

However, although these are frequently referred to as "conditions", the Court of Appeal is entitled to admit the fresh evidence even if they are not met.

Fresh evidence or legal error and the "jury impact" test

Where there is fresh evidence or a legal error has been identified, it is for the Court of Appeal to decide whether this renders the conviction unsafe.

The Court of Appeal is not required to consider whether the jury might have found the appellant not guilty had they had the new evidence, or had they been properly directed.

3 There are provisions for trials to be held without a jury where jury tampering has taken place or there is a risk of jury tampering.

However, in *Pendleton* it was said that "it would usually be wise for the Court of Appeal, in a case of any difficulty, to test their own provisional view by asking whether the evidence, if given at the trial, might reasonably have affected the decision of the trial jury to convict."[4]

Summary Question 2

Is there evidence that the Court of Appeal's approach to assessing the safety of a conviction hinders the correction of miscarriages of justice?

Remedies following the quashing of a conviction

Where a conviction is quashed, the court can order a retrial. If a retrial is ordered, the successful appellant must be arraigned (that is, brought before a court to enter a plea) within two months. This can be extended by the court. However, if the person is arraigned outside this time without leave of the court, the proceedings will be a nullity (that is, the retrial, and any conviction from it, is held to have been invalid).

The Court of Appeal has the power to substitute a conviction for another offence. It must be an offence of which the appellant could have been convicted on the indictment that was the basis of the Crown Court trial.

Where a person was sentenced for multiple offences, and these sentences were related, and the appellant successfully appeals one or more, but not all, of those convictions, the Court of Appeal can resentence the appellant for any related offences for which they remain convicted.

However, the sentence imposed cannot be of greater severity than the sentence, taken as a whole, originally imposed for all the related offences.

In some circumstances, a person who has been wrongly convicted may be eligible for compensation. Compensation will only be payable if the person's conviction was quashed (or they received a pardon) because newly discovered evidence shows that there has been a miscarriage of justice. Compensation will not be payable if the conviction was quashed in an "in time" appeal, and will only be payable where it can be shown beyond reasonable doubt that the person did not commit the offence.

Summary Question 3

Are the options and remedies available following the quashing of a conviction by the Court of Appeal adequate and appropriate?

Appeals against sentence

Under the Criminal Appeal Act 1968, a person sentenced following conviction on indictment may appeal their sentence to the Court of Appeal. The test for an appeal against conviction is not statutory. The court will determine whether the sentence imposed by the Crown Court is "not justified by law", "manifestly excessive" or "wrong in principle".

Where the appellant has been convicted of multiple offences, the court is required to examine the sentence as a whole.

4 [2001] UKHL 66.

Historically, appeals against sentence were an important way of encouraging consistency and laying down guidance for sentencing courts. The introduction of sentencing guidelines for most offences (and statutory provisions governing the "starting point" when setting the minimum term for murder) has changed the nature of sentencing appeals, which now often turn on consideration of whether offences have been properly categorised and the guidelines properly followed.

However, the Court of Appeal does have a continuing role to play in laying down guidance for sentencing courts, for instance where there is no guideline for an offence, or the issue is about a general principle of sentencing practice.

Summary Question 4

Are the powers of the Court of Appeal in respect of appeals against sentence adequate and appropriate?

The Criminal Cases Review Commission

The Criminal Cases Review Commission (CCRC) was created in 1995 as an independent body which can investigate claimed miscarriages of justice and refer cases back to the Court of Appeal (or, where the case was tried summarily, to the Crown Court).

There is no time limit within which an application must be submitted to the CCRC. The CCRC has a range of statutory investigatory powers, including the power to obtain documents and appoint an investigating officer, to assist with the examination of the case.

The CCRC may only refer a case for an appeal where:

1. there is a "real possibility" that the court would not uphold the conviction or sentence because of a new argument or evidence that has not been raised in the original proceedings or on appeal; and
2. the conviction or sentence has previously been appealed against (unless there are exceptional circumstances justifying a referral).

The test used has been criticised by some as unduly restrictive while others have criticised the way that it is applied by the CCRC. The Ministry of Justice's 2013 triennial review of the CCRC found:

There are a number of respondents who are critical of the CCRC believing it to have the right powers to refer cases but interpreting them too narrowly. Others are critical of the Court of Appeal itself which they say prevents the referral by the CCRC of cases where there is a lurking doubt about the person's guilt, but there is no new evidence or argument – as the Court of Appeal has made it clear that it will not consider such cases.

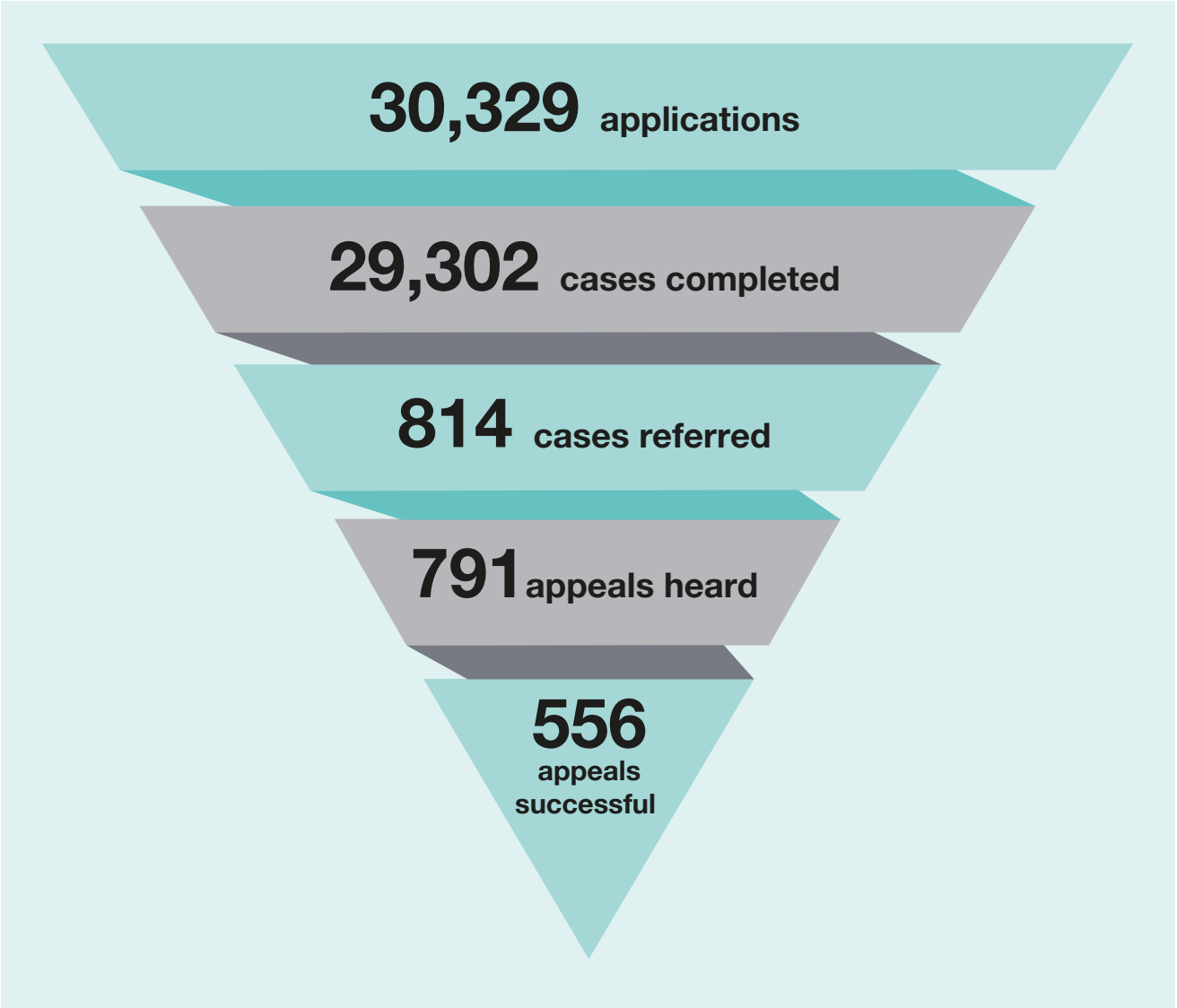
Most respondents to the review who expressed a view said that it was the right test for referral of cases to the Court of Appeal.[5]

However, in 2021, the Westminster Commission on Miscarriages of Justice said that:

The test encourages the CCRC to be too deferential to the Court of Appeal and to seek to second-guess what the Court might decide, rather than reaching an independent judgement of whether there may have been a miscarriage of justice.[6]

5 Ministry of Justice, *Triennial Review: Criminal Cases Review Commission* (2013) p 9.
6 Westminster Commission on Miscarriages of Justice, *In the Interests of Justice* (2021) p 36.

CCRC case data, April 1997 to May 2023



Summary Question 5

Is there evidence that the referral test used by the Criminal Cases Review Commission when considering whether to refer an appeal hinders the correction of miscarriages of justice? If so, are there any alternative tests that would better enable the correction of miscarriages of justice?

The "substantial injustice" test for appeals based on a change of law

Where the law is changed by legislation, this does not affect the validity of convictions brought under the previous law.

However, the situation is complicated in the case of development of the common law (that is, the law as developed and applied by the courts). In such cases, the courts are not changing the law prospectively, but correcting a prior misunderstanding or misapplication. The criminal law usually develops through decisions in appeals. For instance, the appellant's conviction is quashed because the trial court, while applying what was believed to be the correct interpretation of the law, is held to have applied the wrong interpretation of the law.

This issue has arisen recently in relation to a large number of people convicted under the doctrine of "joint enterprise" (or strictly, "parasitic accessory liability"). In the 2016 case of *Jogee*,[7] the Supreme Court ruled that the law had taken a "wrong turn" in allowing a person to be convicted as an accessory to a serious offence on the basis that they were involved in a joint criminal enterprise with another person, and foresaw that that person might commit a more serious offence.

While cases in which the common law is "corrected" operate retrospectively for the individual involved in the proceedings, the result is not to invalidate every conviction under the old law. If a change of law afforded any convicted person grounds for challenging their conviction or sentence, this could lead to an unmanageable number of appeals.

Moreover, a change of law will not always mean that the person who was convicted under the "old" law would have been acquitted had the law been correctly applied. In some cases, the change of law may mean just that they should have been convicted of a different, maybe equally serious offence. In other cases, the most that could be concluded was that the person might have been acquitted had the law been correctly applied.

Where a person seeks to challenge their conviction or sentence on the basis of a change in the law, the Court of Appeal uses the mechanism of the leave requirement to restrict appeals. If the appeal is brought in time – within 28 days of conviction or sentence – it will be dealt with under the corrected law. However, leave to appeal out of time will only be granted if the person can demonstrate a "substantial injustice". The court applies the same test if the case is referred by the CCRC, so before referring a case, the CCRC must consider whether there is a real possibility that the court will accept that substantial justice has been demonstrated.

7 *R v Jogee, Ruddock v The Queen* [2016] UKSC 8, UKPC 7.

Joint Enterprise

When two or more parties commit a crime together, they are all liable to be convicted of the offence. This includes those who encouraged or assisted commission of the offence. For instance, three people rob a bank together: one threatens the staff with a gun; the second bags up the money; the third acts as a lookout, and drives the getaway vehicle. Although only one of the three has threatened violence, and only one has physically handled the cash, all are guilty of robbery.

This is the usual form of joint enterprise: it is not a form of "guilt by association". It requires that the defendant engaged in a course of criminal conduct (including by encouragement or assistance), and that they possessed any necessary mental element: for instance, in a murder case, that they intended to cause death or serious injury.

Under the doctrine of "parasitic accessory liability", if one party to a joint criminal enterprise foresaw that the other party might commit some other offence as part of that enterprise, both could be convicted of the other offence. For instance, if two people agreed to commit a robbery together, and during that robbery, one of the parties stabbed a householder, intending to cause serious harm, the other person could be convicted of the stabbing if they had foreseen that this might happen. If the householder were to die, that would constitute murder.

In *Jogee*, the Supreme Court held that this was wrong. To be convicted of the more serious offence, the party to the joint enterprise had to intend, not just foresee, that the other party to the joint enterprise would commit it. That intent might be conditional – for instance, if they intended that, if necessary, the householder should be stabbed. Foresight was something from which a jury might (but need not) infer the necessary (conditional) intent.

What is "substantial injustice"?

In *Johnson*,[8] the Court of Appeal said that in deciding whether the "substantial injustice" test has been met, it would "primarily and ordinarily have regard to the strength of the case advanced that the change in the law would, in fact, have made a difference" to the outcome. This is interpreted as meaning that the appellant must show that they would not have been convicted if the law had been applied correctly.

However, proving that a person would not have been convicted is not necessarily sufficient. In *Ordu*,[9] the Court of Appeal held that the mere fact that someone had been convicted of a criminal offence of which they were, as the law is now properly understood, innocent, was not necessarily enough to amount to a substantial injustice. Even though it was clear that Ordu had had a defence to the offence that he was convicted of, the court refused to quash his conviction, saying

> **He has now lived through all the adverse consequences [of] the conviction and emerged to a happier, more settled and safe life in the United Kingdom. The conviction and sentence is now a long time ago and quashing the conviction will not remedy the unpleasant memories which are now its only legacy.**

However, in other similar cases, the court has been willing to hold that there is a substantial injustice in maintaining a conviction even though the sentence has been served, for instance, because the conviction has consequences for a person's immigration status or employment.

A further issue that the Court of Appeal will consider is whether the appellant would have been guilty of other serious offences. A particular difficulty that arises in post-*Jogee* cases where the appellant was convicted of murder is that the appellant would almost always have been guilty of manslaughter if they were not guilty of murder.

However, the court's approach here has been criticised by commentators for not accepting that there is a substantial difference between a conviction for murder, which carries a mandatory life sentence and means that the person, even if released is liable to be recalled for the rest of their life, and manslaughter, which may result in a fixed-term sentence.

Summary Question 6

Is there evidence that the application of the "substantial injustice" test to appeals brought out-of-time on the basis of a change in the law hinders the correction of miscarriages of justice?

8 [2016] UKSC 8.
9 [2017] EWCA Crim 4.

Appeals other than by the defendant

So far, this summary has concentrated on appeals brought by the convicted person. However, appeals can also be brought by others. For example:

1. The prosecution can appeal decisions in summary proceedings, through an appeal by way of case stated or by bringing judicial review proceedings.
2. The prosecution can appeal certain decisions made in preparatory proceedings, and against "terminating" rulings during the course of a trial.
3. Reporting restrictions made in proceedings on indictment can be appealed to the Court of Appeal, for example by a journalist, newspaper or broadcaster.
4. Third parties who are the subject of an order made in criminal proceedings – including parents who are made subject to a parenting order in proceedings against a child – can appeal that decision.

Rights of those other than the defendant to appeal decisions in criminal cases are covered in greater detail in the issues paper. In this summary, we concentrate on two issues: proceedings which result in the quashing of an acquittal, and references to the Court of Appeal by the Attorney General.

Tainted acquittals and "double jeopardy" appeals

In general, there is no right of the prosecution or anyone else to appeal an acquittal in proceedings upon indictment. However, there are two relatively recent exceptions to this principle.

First, where a person has been convicted of an "administration of justice offence" (such as jury tampering or witness intimidation) in relation to proceedings which resulted in an acquittal, and there is a "real possibility" that the person acquitted in those proceedings would not have been acquitted but for the interference, the High Court can quash the acquittal. These are referred to as "tainted acquittals".

Second, under a reform introduced in the Criminal Justice Act 2003, for certain very serious offences, the prosecution can apply to have an acquittal quashed by the Court of Appeal if there is compelling new evidence against the acquitted person. The proceedings can only be brought with the consent of the Director of Public Prosecutions. In the issues paper, we refer to these as "double jeopardy" appeals.

The "tainted acquittal" procedure was an early exception to the principle of "double jeopardy" and the threshold for having an acquittal set aside is a high one, requiring that a person is actually convicted of the "administration of justice" offence. The conditions are therefore more restrictive than those for bringing a "double jeopardy" appeal on the basis of compelling new evidence. For instance, if the person accused of interfering with the trial at which the person was acquitted were to die before they could be prosecuted, it would not be possible to quash the acquittal.

Summary Question 7

Do you have any views on the circumstances in which an acquittal might be quashed, including the law relating to acquittals tainted by interference with the course of justice?

Attorney General's references

There are two circumstances in which the Attorney General, on behalf of the state, may refer a case to the Court of Appeal. The first is where a person has been acquitted of an offence, and the Attorney seeks a ruling on a point of law which has arisen during the proceedings. The reference does not affect the acquittal. However, it enables a legal error to be recognised and corrected, so that the error is not followed in other proceedings.

The second is the ability for the Attorney General to refer a sentence to the Court of Appeal on the grounds that it is "unduly lenient". The power is restricted to certain offences: those which are "indictable-only", and others which have been included in the Criminal Justice Act 1988 (Reviews of Sentencing) Order 2006.

The Attorney General's Office is often made aware of cases as a result of concern expressed by interested parties (such as victims or the bereaved) or MPs, or following media coverage.

Notice of the reference must be given to the Court of Appeal within 28 days of sentencing. Unlike the similar time limit for a defendant to appeal their sentence, this is an absolute deadline. This can cause some difficulties. First, the trial court has 56 days to correct a sentencing error under the "slip rule". Where the sentence is unlawful it would normally be more appropriate to seek to have it corrected under the slip rule. However, if this is not done within 28 days, the opportunity to challenge it as unduly lenient will be lost. Second, where there are reporting restrictions in place, the public may only become aware of the sentence after the deadline for making a reference has passed.

Summary Question 8

Are the powers of the Attorney General to refer a matter to the Court of Appeal adequate and appropriate?

Unduly Lenient Sentence referrals, 2021

676 sentences considered by the Attorney General

151 sentences referred to the Court of Appeal

- Sentence increased: **106**
- Leave granted, sentence unchanged: **10**
- Leave refused: **35**

Retention and disclosure of evidence and records of proceedings

Our terms of reference require us to consider whether appeals are hampered by laws governing the retention and disclosure of evidence and retention and access to records of proceedings.

Retention of evidence

Minimum retention periods for material gathered during the course of a criminal investigation are set out in the Code of Practice issued under section 23(1) of the Criminal Procedure and Investigations Act 1996 (CPIA 1996). The Code of Practice says that following a conviction "all material which may be relevant" must be retained at least:

1. where a custodial sentence or a hospital order is imposed, until the person is released from custody or discharged from hospital; and
2. in all other cases, for six months from the date of conviction.[10]

Where at the end of the minimum period above an appeal is pending or the CCRC is considering an application for a referral, all material which may be relevant must be retained until the determination of the appeal or the decision of the CCRC not to make a referral to the appellate court.[11]

Disclosure of evidence post-conviction

The CPIA 1996 places statutory disclosure duties on the prosecution before and during the trial. However, disclosure post-conviction is governed by the common law. In the case of *Nunn*,[12] the Supreme Court held that while an appeal is pending, the duty of disclosure extends to "any material which is relevant to an identified ground of appeal and which might assist the appellant". In other circumstances post-conviction, where the prosecution or the police come into possession of material "which might afford arguable grounds for contending that the conviction was unsafe", they have a duty to disclose such material to the person convicted of the offence. The court added that "if there exists a real prospect that further enquiry may reveal something affecting the safety of the conviction, that enquiry ought to be made".

The court said that others, such as legal representatives, could make a request for post-conviction disclosure to the police or the prosecution and that "if there appears to be a real prospect that further enquiry will uncover something of real value, there should be co-operation in making those further enquiries". It noted that the CCRC provides a safety net in cases where a request for the review of case materials is disputed.

10 The Criminal Procedure and Investigations Act 1996 (section 23(1)) Code of Practice (September 2020) ("CPIA Code of Practice").
11 CPIA Code of Practice, para 5.10.
12 *R (Nunn) v Chief Constable of Suffolk Constabulary* [2014] UKSC 37, [2015] AC 225.

However, several stakeholders have stated that police forces are misapplying *Nunn*, telling applicants who request disclosure of evidence or access to evidence for testing that they must go through the CCRC.

Summary Question 9

Is the law governing post-trial retention and disclosure of evidence, whether used at trial or not, satisfactory?

Retention of records of proceedings

Retention of records of court proceedings are governed by rules issued by the Ministry of Justice.[13] Case files relating to appeals from magistrates' courts are kept for five years. Case files relating to trials on indictment are kept for seven years. Files relating to cases involving terrorism, homicide, sexual offences, or which result in a life sentence or a sentence of longer than seven years, or which have been appealed to the Court of Appeal, should be kept for permanent preservation.

Analogue audio recordings of Crown Court trials are routinely destroyed after five years, while digital recordings are kept for seven years.[14]

In the "Shrewsbury 24" case,[15] the Court of Appeal indicated that existing rules on retention and destruction of records of proceedings were no longer appropriate:

This case provides the clearest example as to why injustice might result when a routine date is set for the deletion and destruction of the papers that founded criminal proceedings (the statements, exhibits, transcripts, grounds of appeal etc.), particularly if they resulted in a conviction. At the point when the record is extinguished by way of destruction of the paper file (as hitherto) or digital deletion (as now), there is no way of predicting whether something may later emerge that casts material doubt over the result of the case.

Given most, if not all, of the materials in criminal cases are now presented in digital format, with the ability to store them in a compressed format, we suggest that there should be consideration as to whether the present regimen for retaining and deleting digital files is appropriate, given that the absence of relevant court records can make the task of this court markedly difficult when assessing – which is not an uncommon event – whether an historical conviction is safe.

Summary Question 10

Is the law governing retention of, and access to, records of proceedings following a trial satisfactory?

13 Ministry of Justice, Magistrates' Courts Records Retention and Disposition Schedule (July 2020) and The Crown Court Records Retention and Disposition Schedule (August 2020).
14 Ministry of Justice, The Crown Court Records Retention and Disposition Schedule (August 2020), p 5, row 13 of the table.
15 *R v Warren and others* [2021] EWCA Crim 413, [2021] 3 WLUK 373 at [101] and [102].