

Legislative Council—No 119A

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South Australia

Statutes Amendment (Appeals) Bill 2012

A BILL FOR

An Act to amend the *Criminal Law Consolidation Act 1935*; the *Magistrates Court Act 1991*; and the *Supreme Court Act 1935*.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Statutes Amendment (Appeals) Act 2012*.

2—Commencement

- 5 This Act will come into operation on a day to be fixed by proclamation.

3—Amendment provisions

In this Act, a provision under a heading referring to the amendment of a specified Act amends the Act so specified.

Part 2—Amendment of *Criminal Law Consolidation Act 1935*

3A—Amendment of section 5—Interpretation

Section 5(1), definition of *Full Court*—delete the definition and substitute:

Full Court has the same meaning as in the *Supreme Court Act 1935*;

4—Amendment of section 352—Right of appeal in criminal cases

(1) Section 352(1)(a)(iii)—before "the convicted person" first occurring insert:

subject to subsection (2)—

(2) Section 352—after subsection (1) insert:

(2) If a convicted person is granted permission to appeal under subsection (1)(a)(iii), the Director of Public Prosecutions may appeal under that subparagraph without the need to obtain the permission of the Full Court.

5—Amendment of section 353—Determination of appeals in ordinary cases

Section 353(3a)(a)—delete paragraph (a) and substitute:

(aa) it may revoke any permission to appeal granted by the court of trial;

(a) it may confirm, vary or reverse the decision subject to the appeal;

6—Insertion of section 353A

After section 353 insert:

353A—Second or subsequent appeals

(1) The Full Court may hear a second or subsequent appeal against conviction by a person convicted on information if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.

(2) A convicted person may only appeal under this section with the permission of the Full Court.

(3) The Full Court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.

(4) If an appeal against conviction is allowed under this section, the Court may quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial.

(5) If the Full Court orders a new trial under subsection (4), the Court—

(a) may make such other orders as the Court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

(b) may not make any order directing the court that is to retry the person on the charge to convict or sentence the person.

(6) For the purposes of subsection (1), evidence relating to an offence is—

(a) *fresh* if—

- (i) it was not adduced at the trial of the offence; and
(ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

(b) *compelling* if—

- (i) it is reliable; and
(ii) it is substantial; and
(iii) it is highly probative in the context of the issues in dispute at the trial of the offence.

(7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

7—Amendment of section 357—Appeal to Full Court

Section 357—after subsection (2) insert:

- (3) The Chief Justice may determine that the Full Court is to be constituted of only 2 judges for the purposes of any appeal to the Full Court under this Act.
- (4) The decision of the Full Court when constituted by 2 judges is to be in accordance with the opinion of those judges or, if the judges are divided in opinion, the proceedings are to be reheard and determined by the Full Court constituted by such 3 judges as the Chief Justice directs (including, if practicable, the 2 judges who first heard the proceedings on appeal).

8—Repeal of section 367

Section 367—delete the section

9—Amendment of section 369—References by Attorney-General

Section 369—after its present contents (now to be designated as subsection (1)) insert:

- (2) If a full pardon is granted to a convicted person in the exercise of Her Majesty's mercy in relation to a conviction of an offence, the Attorney-General may refer the matter to the Full Court and the Full Court may, if it thinks fit, quash the conviction.

Part 3—Amendment of *Magistrates Court Act 1991*

10—Amendment of section 42—Appeals

(1) Section 42(2)(ab)—after "person of" insert:

an offence that is, or offences that include,

(2) Section 42—after subsection (2) insert:

(2a) The Chief Justice may determine that the Full Court is to be constituted of only 2 judges for the purposes of hearing and determining an appeal to the Full Court of a kind referred to in subsection (2)(ab).

(2b) The decision of the Full Court when constituted by 2 judges is to be in accordance with the opinion of those judges or, if the judges are divided in opinion, the proceedings are to be reheard and determined by the Full Court constituted by such 3 judges as the Chief Justice directs (including, if practicable, the 2 judges who first heard the proceedings on appeal).

11—Insertion of section 43A

After section 43 insert:

43A—Second or subsequent appeals

(1) A Court to which a particular appeal against conviction lies under section 42 (the *appeal court*) may hear a second or subsequent appeal against conviction if the Court is satisfied that there is fresh and compelling evidence that should, in the interests of justice, be considered on an appeal.

(2) A convicted person may only appeal under this section with the permission of the appeal court.

(3) The appeal court may allow an appeal under this section if it thinks that there was a substantial miscarriage of justice.

(4) If an appeal against conviction is allowed under this section, the court may quash the conviction and either direct a judgment and verdict of acquittal to be entered or direct a new trial by the Magistrates Court.

(5) If the appeal court orders a new trial under subsection (4), the court—

(a) may make such other orders as the court thinks fit for the safe custody of the person who is to be retried or for admitting the person to bail; but

(b) may not make any order directing the Magistrates Court to convict or sentence the person.

(6) For the purposes of subsection (1), evidence relating to an offence is—

(a) *fresh* if—

(i) it was not adduced at the trial of the offence; and

(ii) it could not, even with the exercise of reasonable diligence, have been adduced at the trial; and

(b) *compelling* if—

(i) it is reliable; and

- (ii) it is substantial; and
 - (iii) it is highly probative in the context of the issues in dispute at the trial of the offence.
- (7) Evidence is not precluded from being admissible on an appeal referred to in subsection (1) just because it would not have been admissible in the earlier trial of the offence resulting in the relevant conviction.

Part 4—Amendment of *Supreme Court Act 1935*

12—Amendment of section 5—Interpretation

Section 5(1), definition of *Full Court*, (b)—delete paragraph (b) and substitute:

- (b) not less than 2 judges if—
 - (i) 3 judges are not available to sit in the Full Court; or
 - (ii) the Chief Justice has made a determination under section 357(3) of the *Criminal Law Consolidation Act 1935* or section 42(2a) of the *Magistrates Court Act 1991*;

13—Amendment of section 48—Jurisdiction of Full Court, single judge and master

Section 48—after subsection (2) insert:

- (3) Subject to subsection (4) and to the rules of court, where any Act provides that 1 or more of the following powers relating to appeals are exercisable by the Full Court, the power may, instead, be exercised by any judge of the Supreme Court in the same manner as the Full Court and subject to the same provisions:
 - (a) the power to give permission to appeal;
 - (b) the power to extend the time within which notice of appeal, or of an application for permission to appeal, may be given;
 - (c) the power to allow the appellant to be present at any proceedings in cases where he or she is not entitled to be present without permission;
 - (d) the power to admit an appellant to bail and to direct that time spent in custody by an appellant pending determination of an appeal be counted as part of a term of imprisonment.
- (4) If a judge refuses an application by an appellant to exercise any power of a kind referred to in subsection (3) in his or her favour, the appellant is entitled to have the application determined by the Full Court.

Schedule 1—Transitional provision

The amendments effected by this Act apply in relation to appeals instituted after the commencement of this Act, regardless of whether the offence to which the appeal relates was committed, or allegedly committed, before or after the commencement of this Act.