SENTENCING EXPLAINED

APPEALS AGAINST SENTENCE

This note explains the process for defendants seeking to appeal against a sentence imposed in either the magistrates' courts or the Crown Court. From the magistrates' courts, a convicted defendant is entitled to appeal against their sentence to the Crown Court. From the Crown Court, a convicted defendant is entitled to apply for permission to appeal, but is not entitled to appeal, against their sentence. Where the sentence is imposed in a magistrates' court, the appeal is to the Crown Court and if the sentence was imposed in the Crown Court the appeal is to the Court of Appeal (Criminal Division). It is not only the defendant who can appeal against a sentence. In some instances – in relation to some of the most serious offences heard in the Crown Court – the Attorney General can appeal against a sentence on the grounds that it was 'unduly lenient' in order to seek to have the sentence increased.[1]

What are the possible grounds for an appeal against sentence?

The two most common grounds for appeal against sentence are:

The sentence was 'manifestly excessive'

Whilst there is no clear definition as to when a sentence is 'manifestly excessive' it is understood to be engaged where a sentence imposed exceeded the proper range of sentences when all relevant factors about the offence and offender are taken into account. The Court of Appeal should not, therefore, intervene to reduce a sentence simply on the grounds that it is slightly more severe than it would have imposed in that case. There must be a clear error.

When appealing on the basis that a sentence is manifestly excessive, there are a number of bases on which such a submission is commonly made:

(a) The judge adopted too high a starting point.

(b) The judge gave too much weight to the aggravating factors.

(c) The judge gave too little weight to the mitigating factors.

[1] See our separate Explainer on Attorney General's References: https://sentencingacademy.org.uk/about-sentencing/sentencing-explained/attorney-generals-references/.

(d) The judge 'miscategorised' the offence when applying the Sentencing Council's definitive guidelines.

(e) The judge made an insufficient reduction for any guilty pleas.

When a sentence is considered as being 'wrong in principle' or 'wrong in law'

Alternatively, a sentence may be said to be wrong in principle or wrong in law. Again, there is no definition but the scope for making such a submission is clearer. A submission that a sentence is wrong in principle requires, unsurprisingly, the applicant to identify the principle that is said to have been contravened. For example, the principle of totality. Here, there is some overlap with the submission that the sentence is manifestly excessive, as bound up with the argument that the sentence is wrong in principle is the argument that the error of principle led to a sentence that was too long.

Additionally, an appeal might be brought on the basis that the sentence is wrong in law, that is to say that the judge imposed a sentence in contravention of the law. Here, perhaps obviously, it will be necessary to identify the provision (or common law rule) that is said to have been contravened. For example, a sentence that is in excess of the permitted statutory maximum would be wrong in law, as would a life sentence under the "dangerousness" provisions where the sentence was not as a matter of law available for that offence.

Appealing against a sentence imposed in a magistrates' court

Anyone who has been convicted in a magistrates' court is entitled to appeal against any sentence that has been imposed. The appellant must appeal within 21 days of the date of sentence and the appeal will be heard in the Crown Court.[2] These appeals will be heard by either a Circuit Judge or a Recorder (a part-time judge) sitting with two magistrates (these will be magistrates who were not involved in the case in the magistrates' court). This appeal is a full re-hearing of the original magistrates' court sentencing and decisions are made on a majority basis.

On hearing an appeal, the Crown Court may allow the appeal, dismiss the appeal or even effectively increase the sentence.[3] This is because the hearing is not a review of the sentencing exercise conducted in the magistrates' court but rather, a re-hearing, i.e. a fresh sentencing hearing, so the sentence imposed on the appeal may be greater than the original sentence imposed in the magistrates' courts. If the appeal is allowed, the court will quash the sentence and replace it with a reduced sentence. If the court considers it might be appropriate to increase the sentence, the court must give warning of this possibility at the start of the appeal to allow the appellant to abandon the appeal if they so wish; any increase in sentence must be within the maximum sentence available in the magistrates' court.

In 2019, there were 3,432 appeals against sentence to the Crown Court from magistrates' courts; of these, 1,705 appeals (50%) were allowed.[4]

[2] An appeal after 21 days of sentencing requires the permission of the Crown Court.
[3] Section 48(2) of the Senior Courts Act 1981.
[4] Ministry of Justice (2020) *Criminal court statistics quarterly: July to September 2020*, Table C11.

Appealing against a sentence imposed in the Crown Court

There is no automatic right to have an appeal against a sentence imposed in the Crown Court heard. The appellant must seek the permission of the Court of Appeal (Criminal Division) to appeal against a Crown Court sentence by serving an 'application for permission to appeal' alongside grounds of appeal within 28 days of the imposition of sentence.[5]

The application for leave to appeal against sentence is considered by the Court of Appeal (Criminal Division) and is governed by section 18 of the Criminal Appeal Act 1968 and Parts 36 to 39 of the Criminal Procedure Rules 2020.

The application for permission to appeal will first be heard by a single judge, who considers the application and the grounds of appeal. If they consider that there is sufficient merit in the appeal, permission will be granted for the appeal to go to the full Court of Appeal for a hearing. Where the single judge does not consider the appeal has sufficient merit, permission will be refused. In these circumstances, the applicant has 14 days to apply to renew the application for permission to appeal and, if they do so, the papers will be re-considered – this time by the full Court of Appeal which will decide whether to grant or refuse permission for a hearing.

If permission to appeal is granted, the Court will consider the merits of the grounds of appeal at an oral hearing and may either quash any sentence or order and replace it with the sentence or order it thinks appropriate for the case or it can dismiss the appeal, leaving the original sentence in place. Whilst the Court cannot make the overall sentence more severe than that imposed by the Crown Court, a 'loss of time' direction can be made if the Court considers that the appeal has no merit. For an appellant who is serving a custodial sentence, this means that the Court may direct that any time between the date the application for permission to appeal was lodged and the hearing of the appeal does not count towards the sentence, thus increasing the length of time to be spent in custody. The purpose of this provision is to deter unmeritorious appeals that have no arguable basis for succeeding.

In 2018-19, the Court of Appeal received 3,356 sentencing appeal applications and in 672 cases (20%) the appeal was allowed.[6]

Although rare in practice for sentencing appeals,[7] the Criminal Cases Review Commission has the power to later refer a case back to the Court of Appeal if it believes there may have been a miscarriage of justice where fresh evidence or an argument on a point of law not previously advanced at earlier appeals arises after an applicant has already unsuccessfully appealed. Once a case has been referred back to them, the Court of Appeal will review the appeal against conviction and/or sentence.

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[5] It is possible to submit an 'out of time' appeal with the permission of the Court of Appeal. However, it was noted in *R v Thorsby and Others* [2015] EWCA Crim 1 that: 'Where there is no good reason why an applicant should not have complied with well known time limits this court will be unlikely to grant an extension of time unless injustice would be caused in consequence' [at para 13].

[6] *Court of Appeal (Criminal Division) Annual Report 2018-19*, p. 53.

[7] In 2019/20 the Criminal Cases Review Commission referred only two sentence only cases back to the Court of Appeal (out of a total of 29 referrals). *Criminal Cases Review Commission Annual Report and Accounts 2019/20*, pp. 96-98.