SECOND READING SPEECH

CRIMINAL APPEALS AMENDMENT BILL 2019

The Criminal Appeals Amendment Bill 2019 will amend the *Criminal Appeals Act 2004*, introducing a new statutory right for a person to make a second or subsequent appeal against a conviction on indictment in circumstances in which "fresh and compelling" or "new and compelling" evidence has come to light. A pillar of our justice system is the principle of finality, which dictates that once a court has handed down a decision, that decision is final. This is an essential element of the way our legal system works, creating certainty and consistency in expectations. However, there are limited circumstances in which the principle of finality must be put aside for the purpose of allowing justice to be served, however belatedly. This bill seeks to provide that avenue.

As it stands, a convicted person who has exhausted all of their appeals has no further right to appeal, even if fresh or new evidence later emerges that has the potential to exonerate them. It is this circumstance that necessitates the statutory enactment to allow for that fresh or new evidence to be heard and assessed, addressing and rectifying any substantial miscarriage of justice. Without this important bill, a person who is the subject of a substantial miscarriage of justice, even where there is new evidence showing his or her innocence, has to lodge a petition for the exercise of the Royal Prerogative of Mercy by the Governor, or petition the Attorney General to refer the case to the Court of Appeal.

This bill creates a transparent scheme for second or subsequent appeal direct to the Court of Appeal without reliance on the discretion of an Attorney General who may be reluctant to deal with such matters expeditiously or at all.

I now turn to provide some detail of what is contained in this bill. This bill will allow for an offender convicted of an offence on indictment to bring a second or subsequent appeal to the Court of Appeal against conviction, not against sentence, if there is either fresh and compelling evidence or new and compelling evidence relating to the offence and conviction. There are two limbs to the definition of fresh evidence. Firstly, evidence is fresh if, despite the exercise of reasonable diligence, it was not and could not have been tendered at the trial of the offence or any previous appeal. Secondly, evidence is fresh if the evidence was not tendered at the trial of the offence or any previous appeal, but with the exercise of reasonable diligence, could have been so tendered, and the failure to tender the evidence was due to the incompetence or negligence of a lawyer representing the offender.

Evidence is new if it was not tendered at the trial of the offence or any previous appeal, but, with the exercise of reasonable diligence, could have been tendered at the trial of the offence or at any previous appeal.

In either circumstance, the evidence must be compelling, meaning that it must be highly probative in the context of the issues in dispute at the trial of the offence. The level of proof required for successful appeal differs between cases based on whether the evidence is fresh or new. The Court of Appeal must allow an appeal based on fresh and compelling evidence if it is satisfied that there was a miscarriage of justice.

The appeal, however, can be dismissed if the court is of the view that no substantial miscarriage of justice has occurred, notwithstanding.

The threshold for new evidence is, understandably, much higher. The Court of Appeal must allow an appeal based on new and compelling evidence only if it is satisfied on the balance of probabilities that, in light of all the evidence, the evidence establishes that the offender is innocent.

This bill has significant safeguards to protect against the flooding of unmeritorious appeal applications, thereby protecting the victims and next of kin from re-traumatisation. The requirement for an application for special leave to appeal in every case is designed to act as a filter for vexatious, frivolous or spurious applications. As a further deterrent in this regard, the bill provides the court discretion to order the appellant to pay the other party's costs of, or relating to, that appeal. Other safeguards are the ability for a single judge of the Court of Appeal to hear the special leave application, which must be decided upon prior to the hearing of the appeal, unless there are special circumstances, and to determine the application upon the paperwork. In addition, the refusal of special leave is not, itself, able to be the subject of an appeal.

The proposed amendments in the bill will operate retrospectively, insofar as they will apply to any person convicted prior to the commencement of these amendments. I also point out that the proposed amendments will not alter the current powers of the executive with respect to an application of the Royal Prerogative of Mercy, and the power of the Attorney General to refer matters back to the Court of Appeal under section 140 of the *Sentencing Act 1995*. As this will be a new process introduced for criminal appeals, the bill also incorporates a provision for a review of the operation and effectiveness of the amendments to occur within five years of the commencement of the legislation.

This bill strikes an appropriate balance between the public interest in correcting substantial miscarriages of justice, and the public interest in the finality of litigation. It takes into account the right of victims of these crimes to feel confident in the finality of the court's findings and to not be re-traumatised as well as the rights of a potentially innocent person, who, unless through a successful petition, has no recourse against the injustice served upon him or her. There is the overarching and inextinguishable right of all members of our society, offenders and victims included, to have absolute belief in the judicial process that the right outcome will always be found. In considering the cases of Mallard, the Mickelbergs, and von Deutschburg, we as a collective have experienced that belief waver in light of exposed corruption and, more positively, advances in medical science and technology—for example, new DNA methods that can exonerate a wrongfully convicted person. We are buoyed again only by the rightful reconsideration and rectification of previous mistakes.

Pursuant to Standing Order 126(1), I advise that this Bill is not a uniform legislation Bill. It does not ratify or give effect to an intergovernmental or multilateral agreement to which the Government of the State is a party. Nor does this Bill, by reason of its subject matter, introduce a uniform scheme or uniform laws throughout the Commonwealth.

I commend the bill to the house and table the explanatory memorandum.