

## VI Appeals, retrials and reservations of questions of law

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## 1. Appeals to the High Court

### 1.1 Introduction

ss [76](#), [80-83](#) Judicature Act 1980–81 (JA).

This part is for your information only, as it relates to how an appeal from your decision is dealt with in the High Court. There is nothing that you need to do except when, after delivering your decision in court, counsel for one of the parties indicate they intend to appeal. In that case, you should grant a stay of execution of the judgment.

### 1.2 The right to appeal

In any civil or criminal proceedings, parties may appeal a decision made by a justice sitting alone or three justices sitting together to a judge of the High Court: s [76](#) JA.

In [Police v Ngau \[1992\] CKHC 3](#), the police appealed against the unanimous acquittal of Laurence Ngau by three justices. The judge considered whether the right of appeal under s [76](#) should override the longstanding common law principle of double jeopardy. “Double jeopardy” is the common law principle that no person shall be charged (tried) twice for one and the same offence.

Dillon J set out three important points regarding the right to appeal under s [76](#) of the JA. They are:

1. Section 76 of the Judicature Act cannot override the common law principle of double jeopardy, unless there was a clear intention in the Judicature Act to do so, which there is not.
2. Appeals to a judge under s [76](#) JA that are based on the same evidence, facts, and charges as the original proceedings are not satisfactory as there needs to be evidence that the justices improperly applied the law or some new evidence or facts should be given.
3. Simply stating that one is “not satisfied” with the decision of a justice is not enough for leave to appeal under s [76](#) JA. There must be evidence as to why the appellant is not satisfied.

See the “[Appeal to High Court](#)” process diagram in the Quick guides for more information.

### 1.3 General powers on appeal

s [80\(1\)](#) JA.

On any appeal from a determination of a justice or justices, a judge may:

- affirm the judgment (so the decision stands),
- reverse the judgment,
- vary the judgment,
- order a retrial,
- make an order with respect to the appeal, at their discretion, or
- award costs against any party to the appeal.

On any appeal against any conviction, the judge may quash the conviction and substitute a conviction if the facts justify this, and pass a sentence to reflect the substituted conviction.

On appeal against sentence, if the judge thinks that a different sentence should have been passed, they shall:

- quash the sentence and pass another sentence allowed in law; or
- vary the sentence, or any part of it, or any conditions, within the limits of the law; or
- dismiss the appeal.

#### 1.4 Abandonment of appeal

s [82](#) JA.

An appellant in an appeal from a justice(s) may abandon their appeal at any time by giving notice to the registrar.

Once such notice is given, the appeal is treated as dismissed, subject to the right of the respondent to apply for costs.

#### 1.5 Non-prosecution of appeal

s [83](#) JA.

If the appellant does not make any reasonable effort to progress their appeal or observe any of the conditions the judge imposed under s 79 JA (security of costs), the judge may dismiss the appeal. The judge may deal with any costs of the appeal, and/or security for costs as the judge chooses.

## 2. Retrials

ss [102](#), [104](#) Criminal Procedure Act 1980–81 (CPA).

### 2.1 Retrial applications by parties

s [102](#) CPA.

The police or the defendant may apply in writing to a judge for a retrial for any offence tried by the justice(s) where the justice(s) has acquitted, convicted, or made an order against the defendant. This application must be made within 14 days of the acquittal, conviction or the making of the order. However, the judge may allow a longer time if they are satisfied the application could not have been made sooner.

The retrial application must state:

- the grounds of the retrial application, and
- whether a complete retrial or a limited retrial is sought.

If the applicant does not appear at the time and place appointed for the retrial, the court of retrial may order that the original acquittal, conviction, sentence or order be confirmed without holding a retrial.

Note that retrials should be ordered only sparingly as they can create legal uncertainty and breach prohibitions on 'double jeopardy', being a procedural defence applied in common law jurisdictions preventing an accused person from being tried again on the same or similar charges, following their acquittal or conviction.

While the Cook Islands Constitution does not include a specific provision prohibiting 'double jeopardy', it is widely considered a fundamental aspect of providing a fair trial, as reflected in the New Zealand Bill of Rights Act, 1990 s [26\(2\)](#) which states that:

"No one who has been finally acquitted or convicted of, or pardoned for, an offence shall be tried or punished for it again."

The recent New Zealand High Court case of 20 December 2022, found that the classification of a deportee as a returning prisoner and the subsequent imposition of special conditions on him amounted to double jeopardy and was therefore unlawful and contrary to s [26\(2\)](#) of the New Zealand Bill of Rights Act 1990, as the man had already previously completed his criminal sentence for drug offences in Australia. (see CIV-2021-485-399 [2022] NZHC 3514 available here: <https://www.courtsofnz.govt.nz/assets/cases/2022/2022-NZHC-3514.pdf>).

See the "[Appeal to High Court](#)" process diagram in the Quick guides for more information.

### 2.2 Removal of a case for retrial by a judge

If a question of law arises on a trial before a justice or 3 justices, the Court, whether of its own accord or on the application either party, may refuse to continue the trial and adjourn it for retrial before a Judge.

If this is done, the Information or charge remains valid; but every other step taken, document filed, or direction or determination given in that trial is void, unless ordered by you or the 3 Justices to remain valid.

The retrial of that person will begin and proceed before a judge as if no steps, other than those saved as valid had been taken.

### 2.3 Powers of judge on application for retrial

ss [102](#), [104](#) CPA.

The decision (acquittal, conviction, sentence, or order) made on the original trial no longer applies: s [104](#) CPA.

On the hearing of any such application, the judge may (s 102 CPA):

- refuse a retrial, or
- order a complete retrial by the court who originally heard the offence or by a different court, or
- order a retrial with specific limitations and on terms the judge thinks fit, either by the court who originally heard the offence or by a different court.

The court of retrial shall have the same powers and follow the same procedure as the court that held the trial: s [104](#) CPA.

If the defendant was sentenced to a term of imprisonment that has not expired, and the retrial cannot be held immediately, you must remand the defendant in custody until the date fixed for the retrial unless the provisions for bail provide otherwise: s [104](#) CPA.

If the applicant does not appear at the time and place appointed for the retrial, the court of retrial may, without holding a retrial, order that the original acquittal, conviction, sentence, or order be confirmed.

### 3. Reservation of question of law for a judge (case stated)

#### 3.1 Reserving a question of law for a judge

s [106](#) CPA.

A justice sitting alone or 3 justices sitting together may reserve a question of law for a judge to decide where such a question arises:

- on the trial of any person for any offence, or
- in any of the proceedings before, after or related to the trial.

If the justice(s) decides to reserve a question, they shall state a case for the determination of a judge.

Either the police or the defendant may also apply to reserve a question of law during the trial. This is for you to decide. If you refuse to reserve a question of law for a judge, you must take note of the application.

When such a question is reserved, the judge shall have the power to consider and determine that question.

In [Police v Tehaamatai \[2017\] CKHC 7](#), CJ Williams noted that determining the question of law reserved for the High Court should not influence your decision on the facts of the case or as to any sentence that may be imposed, if a conviction is entered.