



Supreme Court of Victoria

Practice Note SC CA 2

Interlocutory appeals and reserved questions of law in criminal proceedings

1. INTRODUCTION

- 1.1 The Chief Justice has authorised the issue of the following Practice Note.
- 1.2 The purpose of this Practice Note is to outline the procedure to be followed in relation to appeals against interlocutory decisions¹ and the reservation of questions of law pursuant to Divisions 4 and 5 of Part 6.3 of the *Criminal Procedure Act 2009*.
- 1.3 This Practice Note is to be read in conjunction with Part 4 of Order 2 and Order 3 of the *Supreme Court (Criminal Procedure) Rules 2017*.
- 1.4 For ease of reference a flowchart setting out the Court of Appeal's process for hearing interlocutory appeals is attached as Annexure 1.

2. COMMENCEMENT

- 2.1 This Practice Note was reissued on 8 March 2022, replaces the earlier version issued on 30 September 2019, and applies to all interlocutory appeals and reserved questions of law in criminal proceedings, whenever commenced.
- 2.2 This Practice Note replaces Court of Appeal Practice Statement No. 1 of 2016 which is hereby revoked.

3. DEFINITIONS

- 3.1 In this Practice Note:

CPA means the *Criminal Procedure Act 2009*.

Rule or Rules means the *Supreme Court (Criminal Procedure) Rules 2017*.

¹ As defined in s 3 of the *CPA*.

4. FILING AND CORRESPONDENCE WITH THE COURT

- 4.1 Subject to Rule 1A.01 and unless otherwise directed by the Court, all documents required to be filed must be filed electronically in searchable PDF format in RedCrest.²
- 4.2 All correspondence to the Court of Appeal must be sent to the registry by email to coaregistry@supcourt.vic.gov.au and be copied to all other parties. Such correspondence may also be copied to a specific person at the registry, however they should not be the sole addressee.
- 4.3 A party who is self-represented and in custody without access to email may file documents and send correspondence to the Court by post.

5. CONTACTING THE COURT OF APPEAL REGISTRY

- 5.1 The intending applicant in an interlocutory appeal must contact the registry as soon as is reasonably practicable following the Judge's decision in relation to certification.³ This contact may be made, either by telephone or by email to coaregistry@supcourt.vic.gov.au, prior to the formal commencement of the interlocutory appeal, and will enable the registry to start preparing for the interlocutory appeal by taking actions such as requesting the relevant transcript from VGRS.
- 5.2 At the time of contacting the registry, the intending applicant must notify the registry of:
- (a) the name of the Judge who made the interlocutory decision;
 - (b) the names of all parties and their legal representatives (both solicitors and counsel);
 - (c) contact details for the parties' legal representatives and availability of their trial counsel;
 - (d) the dates of the hearings relevant to the interlocutory decision and application for certification, and the dates on which the Judge made the interlocutory decision and ruled on certification;
 - (e) the offence(s) for which the accused is being prosecuted;
 - (f) the status of the trial proceedings;
 - (g) details of any previous interlocutory appeal from the trial proceedings;
 - (h) whether the accused is in custody and, if so, how long they have been in custody and whether they wish to attend the interlocutory appeal hearing;

² Rules 1.10(1), ord 1A; *Supreme Court (General Civil Procure Rules) 2015* r 27.03(13.1); Practice Note SC Gen 19 (RedCrest Electronic Case Management System).

³ See *CPA* s 295(3).

- (i) a realistic estimate of the time required for oral submissions for the interlocutory appeal (bearing in mind that the application for leave to appeal or review may be treated as the hearing of the appeal); and
- (j) the nature of any material or documents tendered or referred to in submissions before the Judge regarding the interlocutory decision.

6. INTERLOCUTORY APPEALS

- 6.1 Practitioners are reminded that the Court may only give leave to appeal where satisfied that it is in the interests of justice to do so, for example, where the determination of an appeal against an interlocutory decision may: render the trial unnecessary; substantially reduce the time required for the trial; resolve an issue of law, evidence or procedure that is necessary for the proper conduct of the trial; or reduce the likelihood of a successful appeal against conviction in the event that the accused is convicted at trial.⁴
- 6.2 Further, the Court must not give leave to appeal after the trial has commenced, unless the reasons for doing so clearly outweigh any disruption to the trial.⁵

7. COMMENCEMENT OF AN INTERLOCUTORY APPEAL WHERE THE INTERLOCUTORY DECISION HAS BEEN CERTIFIED BY THE TRIAL JUDGE

- 7.1 If the Trial Judge certifies an interlocutory decision in accordance with s 295(3) of the *CPA*, an interlocutory appeal may be commenced by filing a 'notice of application for leave to appeal against interlocutory decision'.⁶
- 7.2 The notice shall be signed by the applicant or their legal practitioner,⁷ and state in precise terms the grounds on which it is sought to appeal.⁸
- 7.3 The notice must be filed in accordance with the timeframe prescribed by s 298(1) of the *CPA*, being:
- (a) subject to paragraph (b), if the trial has not commenced when the interlocutory decision is made, within ten days after the day on which the interlocutory decision is made or any extension of that period granted under s 313; or
 - (b) if the trial commences within ten days after the day on which the interlocutory decision is made, within two days after the day on which the trial commences or any extension of that period granted under s 313; or

⁴ *CPA* s 297(1)(b).

⁵ *CPA* s 297(2).

⁶ Rule 3.03(1), Form 6-3A.

⁷ Rule 1.17.

⁸ Rule 3.03(2).

- (c) if the trial has commenced when the interlocutory decision is made, within two days after the day on which the interlocutory decision is made or any extension of that period granted under s 313.

7.4 The applicant must serve a copy of the notice on the respondent in accordance with s 298(2) of the *CPA*. The Court of Appeal registry will not serve the notice on the respondent.

8. COMMENCEMENT OF AN INTERLOCUTORY APPEAL WHERE THE JUDGE HAS REFUSED TO CERTIFY AN INTERLOCUTORY DECISION

8.1 If the Trial Judge refuses to certify an interlocutory decision in accordance with s 295(3) of the *CPA*, an interlocutory appeal may be commenced by filing a 'notice of application for review of refusal of Judge to certify'.⁹

8.2 The notice shall be signed by the applicant or their legal practitioner,¹⁰ and state in precise terms the grounds on which it is sought to review the decision.¹¹

8.3 Pursuant to s 296(4) of the *CPA*, on a review, the Court of Appeal:

- (a) must consider the matters referred to in s 295(3); and
- (b) if satisfied as required by s 297, may give the applicant leave to appeal against the interlocutory decision.

Accordingly, in addition to filing a 'notice of application for review of refusal of Judge to certify', the applicant must also file a 'notice of application for leave to appeal against interlocutory decision' (see ss 7.1 and 7.2 above) when commencing an application for review.

8.4 The notices must be filed in accordance with the timeframe prescribed by s 296(2) of the *CPA*, being:

- (a) subject to paragraph (b), if the trial has not commenced when the Judge refuses to certify, within ten days after the day on which the Judge refuses to certify or any extension of that period granted under s 313; or
- (b) if the trial commences within ten days after the day on which the Judge refuses to certify, within two days after the day on which the trial commences or any extension of that period granted under s 313; or
- (c) if the trial has commenced when the Judge refuses to certify, within two days after the day on which the Judge refuses to certify or any extension of that period granted under s 313.

8.5 The applicant must serve a copy of both the 'notice of application for leave to appeal against interlocutory decision' and 'notice of application for review of refusal of Judge to certify' on the respondent in accordance with s 296(3) of the

⁹ Rule 3.04(1), Form 6-3B.

¹⁰ Rule 1.17.

¹¹ Rule 3.04(2).

CPA. The Court of Appeal registry will not serve either notice on the respondent.

9. APPLICATION FOR AN EXTENSION OF TIME

- 9.1 As the appeal period is set by the CPA, Rules 1.07 to 1.09 relating to the calculation of time do not apply to the filing of an interlocutory appeal.
- 9.2 To apply for an extension of time under s 313 of the CPA, the applicant must file and serve the following documents together with the 'notice of application for leave to appeal against interlocutory decision' and, if applicable, 'notice of application for review of refusal of Judge to certify':
- (a) an application for extension of time;¹² and
 - (b) an affidavit in support which states the reasons for not filing within time.

10. LISTING

- 10.1 The Registrar will determine the urgency of an interlocutory appeal and make suitable arrangements to list the matter for hearing.
- 10.2 The Registrar will not delay listing an interlocutory appeal on the basis of the applicant obtaining advice as to the merits of the interlocutory appeal.
- 10.3 It is expected that trial counsel, wherever practicable, will appear at the hearing of an application for leave or review.
- 10.4 Upon listing an interlocutory appeal, the Registrar will notify the Trial Judge as to the listing date.

11. SUMMARY OF CONTENTIONS AND LIST OF AUTHORITIES AND MATERIALS RELIED UPON

- 11.1 In each interlocutory appeal the Registrar will give directions for the filing and service of documents.
- 11.2 Unless directed to do so, no affidavit is required to be filed and served pursuant to Rule 3.05. However, the Registrar may direct the parties to file an agreed document setting out a succinct narrative history of the conduct of the matter to date.
- 11.3 The Registrar will ordinarily direct each party to file and serve the following documents by specified dates, with the applicant being directed to file and serve first:
- (a) a summary of contentions; and
 - (b) a list of authorities and materials relied upon.

¹² Rule 2.22, Form 6-2H.

- 11.4 A summary of contentions must:
- (a) outline the contentions relied upon in support of each ground of appeal;
 - (b) refer to relevant authorities and legislation;
 - (c) unless the Registrar otherwise permits, not exceed five A4 pages of 12 point type, 1½ spaced, including footnotes of no less than 10 point type; and
 - (d) be signed by counsel or, if counsel is not retained, by the applicant's solicitor or, if the applicant is not legally represented, then by the applicant personally. The signature of counsel or solicitor must be accompanied by their name in type below their signature.
- 11.5 A summary of contentions is not required to include a summary of facts.
- 11.6 A list of authorities and materials relied upon must:
- (a) be in the form set out in Annexure 3 to Practice Note SC CA 1, Criminal Appeals, and comprise the following parts:
 - (i) 'Part A' containing a list of authorities and legislation which will be read from in any hearing;
 - (ii) 'Part B' containing a list of additional authorities and legislation to be referred to but not read from in any hearing; and
 - (iii) 'Material Relied Upon' containing a list of all materials upon which the applicant intends to rely. Those materials must be identified by detailed descriptions, including any exhibit number, to enable them to be identified by the Registrar;
 - (b) reference authorities in accordance with the current edition of the *Australian Guide to Legal Citation*. Where a case is reported, the reported version rather than the unreported version must be cited, and authorised reports must be used over unauthorised reports.
- 11.7 Parties are not required to file copies of authorities, whether reported or unreported, unless directed to do so.

12. TRANSCRIPT

- 12.1 The Court of Appeal registry will obtain the transcript of the submissions before the Trial Judge in relation to the interlocutory decision, the Judge's decision and, if applicable, the transcript in relation to certification. Copies of the transcript will be provided by the registry to the parties.
- 12.2 Parties must refer to the PDF format version of the transcript supplied by the registry, both in their documents and during any oral hearing, to ensure it is the same as the version used by the bench.

13. DOCUMENTATION OR MATERIAL TENDERED OR REFERRED TO IN SUBMISSIONS BEFORE THE TRIAL COURT IN REGARD TO THE INTERLOCUTORY DECISION

13.1 The Registrar will obtain and provide to the parties a copy of all relevant documentation or material referred to in submissions before the Trial Judge relating to the interlocutory decision. Usually these documents will be obtained in an electronic format from the associate to the Trial Judge so as to expedite the process of preparing the interlocutory appeal for hearing.

14. ABANDONMENT

14.1 An interlocutory appeal may be abandoned at any time before the hearing of the appeal is commenced by filing with the Registrar a notice of abandonment.¹³ A notice of abandonment must be signed by the applicant personally before a witness.¹⁴ The application shall be taken to be dismissed on the date such notice is filed.¹⁵

14.2 To avoid wasted preparation by the Court, the parties must advise the registry as soon as a decision is made to abandon an interlocutory appeal or application for review.

15. RESERVED QUESTIONS OF LAW

15.1 In general, and making allowance for their different nature, the Registrar will manage reserved questions of law, or the refusal to reserve a question of law, pursuant to ss 302 and 304 of the *CPA* in accordance with this Practice Note, and, in the case of a refusal to reserve a question of law, Part 4 of Order 2 of the Rules.

AMENDMENT HISTORY

8 March 2022: This Practice Note was reissued on 8 March 2022, replacing the version issue on 30 September 2019.

30 September 2019: This Practice Note was reissued on 30 September 2019 and replaced the version issued on 30 January 2017.

30 January 2017: This Practice Note was issued on 30 January 2017 and replaced Practice Note No 1 of 2015.

Vivienne Mahy
Executive Associate to the Chief Justice
8 March 2022

¹³ *CPA* s 314; Rule 2.40(1), Form 6-2N.

¹⁴ Rule 2.40(2).

¹⁵ Rule 2.41.

ANNEXURE 1

Interlocutory appeal flowchart

