

LEGISLATIVE COUNCIL.

Draft Bill.

No. S 82.—The following bill is published for general information :—

[No. 13 :—9.11.32.—8.]

C.S.O. 1 in 3667/30.

A BILL

INTITULED

An Ordinance to amend the Criminal Procedure Ordinance, 1899.

BE it enacted by the Governor of Hong Kong, with the advice and consent of the Legislative Council thereof, as follows :—

Short title.

1. This Ordinance may be cited as the Criminal Procedure Amendment Ordinance, 1933.

Substitution for Ordinance No. 9 of 1899, s. 10.

2. Section 10 of the Criminal Procedure Ordinance, 1899, is repealed and the following section is substituted therefor :—

Rules and orders as to practice and procedure.

10.—(1) The Chief Justice may make rules and orders regulating the practice and procedure under this Ordinance :

Provided that no such rules and orders shall be binding until the same have been approved by the Legislative Council and have been published in the *Gazette*.

(2) Such rules and orders may provide for regulating and prescribing forms to be used, the times for or within which documents must be filed or notices given, the duties of the various officers of the court, the manner in which cases and arguments are to be presented, the assigning of solicitors and counsel as legal aids in or incidental to capital cases, or appeals or cases reserved, the fees and costs to be allowed therefor, and generally for the better carrying out of the provisions of this Ordinance.

(3) Subject to the provisions of this Ordinance and to such rules and orders and any other enactment (including any enactment relating to juries) applicable thereto, the practice and procedure in all criminal causes and matters (including trials for treason or misprision of treason) shall be, as nearly as possible, the same as the practice and procedure from time to time and for the time being in force for similar cases in England.

New headings and sections 78A, B and C added to Ordinance No. 9 of 1899.

3. The following headings and sections are inserted after section 78 of the Criminal Procedure Ordinance, 1899 :—

Appeals.

Appeals 7 Ed. 7, c. 23. s. 3.

78A.—(1) A person convicted on indictment may appeal to the Full Court—

(a) against his conviction on any ground of appeal which involves a question of law alone; and

(b) against his conviction, with the leave of the Full Court or upon the certificate of the judge who tried him that it is a fit case for appeal, on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Full Court or to the judge who tried him to be a sufficient ground of appeal; and

(c) with the leave of the Full Court or upon the certificate of the judge who tried him against the sentence passed on his conviction, unless the sentence is one fixed by law.

(2) On an appeal against conviction and, subject to the provisions of sub-section (5) of this section and section 78B, the Full Court shall allow the appeal if they think that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law, or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal: 7 Ed. 7,
c. 23, s. 4
(1).

Provided that the Full Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred.

(3) The Full Court may, if they allow an appeal against conviction, quash the conviction, and either direct a judgment and verdict of acquittal to be entered or order a new trial. 7 Ed. 7,
c. 23, s. 4
(2).

(4) On an appeal against sentence the Full Court shall— 7 Ed. 7,
c. 23, s. 4
(3).

(a) if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence (whether more or less severe) warranted in law by the verdict in substitution therefor as they think ought to have been passed; and

(b) in any other case, dismiss the appeal.

(5) If it appear to the Full Court— 7 Ed. 7,
c. 23, s. 5.

(a) that an appellant, though not properly convicted on some count or part of the indictment, has been properly convicted on some other count or part of the indictment, the Full Court may either affirm the sentence passed on the appellant at the trial, or pass such sentence in substitution therefor as they think proper, and as may be warranted in law by the verdict on the count or part of the indictment on which they consider that the appellant has been properly convicted;

(b) that on the finding of the jury, where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, the jury must have been satisfied of facts which proved him guilty of that other offence, the Full Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity;

(c) that, where on the conviction of the appellant the jury have found a special verdict, a wrong conclusion has been arrived at by the court before which the appellant has

been convicted on the effect of that verdict, the Full Court may, instead of allowing the appeal, order such conclusion to be recorded as appears to them to be in law required by the verdict and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law;

(d) that, although the appellant was guilty of the act or omission charged against him, he was insane at the time the act was done or omission made so as not to be responsible according to law for his actions, the Full Court may quash the sentence passed at the trial and make such order and report as would have been made by the trial judge under section 76 if a special verdict had been found by the jury;

7 Ed. 7,
c. 23, s. 6
(2).

(e) that any order made on the trial for the restitution of any property to any person should be annulled or varied, although the conviction is not quashed, the Full Court may annul or vary the order; and the order, if annulled, shall not take effect, and, if varied, shall take effect as so varied.

S.S. Ord.
No. 5 of
1931.
s. 3 (6).

(6) Unless the Full Court direct to the contrary in cases where, in their opinion, the appeal involves a question of law on which it would be convenient that separate judgments should be pronounced by the members of the court, the judgment of the Full Court shall be pronounced by the president or such other member of the Full Court hearing the case as the president directs.

7 Ed. 7,
c. 23, s. 7.

(7) Notice of appeal or of an application for leave to appeal shall be given within ten days of the date of conviction, or (except in case of a conviction involving sentence of death) within such extended time as the Full Court may allow, in such manner as may be provided by rules and orders made under section 10 of this Ordinance or as may be directed by the Chief Justice in any matter not provided for by any such rules. Such rules shall enable any person convicted to present his case and his argument in writing instead of by oral argument if he so desires. In the case of a conviction involving sentence of death or corporal punishment the sentence shall not be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be given; and if notice is so given the appeal or application shall be heard and determined with as much expedition as practicable, and the sentence shall not be executed until after the determination of the appeal, or, in cases where an application for leave to appeal is finally refused, of the application.

7 Ed. 7,
c. 23, s. 9.

(8) For the purposes of this Ordinance, the Full Court may, if they think it necessary or expedient in the interests of justice—

(a) order the production of any document, exhibit, or other thing connected with the proceedings the production of which appears to them necessary for the determination of the case; and

(b) order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Full Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules and orders made under section 10 of this Ordinance before any judge of the court or before any officer of the court or any magistrate, justice of the peace or other person appointed by the Full Court for the purpose, and allow the admission of any depositions so taken as evidence before the Full Court; and

(c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness; and

(d) where any question arising on the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation which cannot in the opinion of the Full Court conveniently be conducted before them, order the reference of the question in manner provided by such rules and orders as aforesaid for inquiry and report to a special commissioner appointed by the Full Court, and act upon the report of any such commissioner so far as they think fit to adopt it; and

(e) appoint any person with special expert knowledge to act as assessor in any case where it appears to the Full Court that such special knowledge is required for the proper determination of the case:

and exercise in relation to the proceedings of the Full Court any other powers which may for the time being be exercised by the Full Court on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Full Court. Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

(9) The Full Court may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of the appeal. 7 Ed. 7,
c. 23, s. 14.

Further provisions relating to appeals and cases reserved.

78B. Except where, in the opinion of the Full Court, a substantial miscarriage of justice has actually occurred, no judgment shall be stayed or reversed under section 78 and no appeal shall be allowed under section 78A— Prohibition
of staying
or reversal
of judgment
on specified
grounds.

(a) on the ground of any defect which, if pointed out before the jury were empanelled or during the progress of the trial, might have been amended by the court; or

(b) because of any error committed in summoning or swearing the jury or any of them; or

(c) because any person who has served on the jury has not been returned by the Registrar; or

(d) because of any objection which might have been stated as a ground of challenge of any of the jurors; or

(e) because of any informality in swearing the witnesses or any of them.

78C.—(1) Persons committed to prison under section 78 (1) and appellants not admitted to bail under section 78A (9) shall, pending the determination of their cases by the Full Court, be treated in such manner as may be directed by any rules, made under the Prisons Ordinance 1899, relating to prisoners committed for trial for any indictable offence. Treatment
pending
determina-
tion of case
by Full
Court.
7 Ed. 7.
c. 23, s. 14.
Ordinance
No. 4 of
1899.

(2) The time during which any such person or appellant is admitted to bail under section 78 (1) or section 78A (9), and, subject to any directions which the Full Court may give to the contrary, the time during which any such person or appellant is in custody pending the determination of his case shall not count as part of any term of imprisonment under Effect on
sentence.

his sentence, which shall be deemed to be resumed or to begin to run, as the case requires, if the person or appellant is in custody, as from the day on which the case is determined by the Full Court, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

Presence
of accused.
7 Ed. 7,
c. 23, s. 11.

(3) An appellant notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules, and orders made under section 10 of this Ordinance provide that he shall have the right to be present or where the Full Court gives him leave to be present. Such leave may be given also in any case under section 78; but without it the accused shall not be entitled to be present.

Absence
of accused.
7 Ed. 7,
c. 23, s. 11.

(4) The power of the Full Court to pass any sentence under this Ordinance may be exercised notwithstanding that the accused is for any reason not present.

General
powers.

(5) The Full Court in every appeal or case reserved under this Ordinance shall, subject to the express provisions of this Ordinance, have all the powers of the court of trial, with regard to sentence, commencement of sentence, costs, compensation, release on recognizances or any other matter.

Repeal of
Ordinance
No. 9 of
1899, ss. 68
and 109.

4. Sections 68 and 109 of the Criminal Procedure Ordinance, 1899, are repealed.

Objects and Reasons.

1. Section 10 of the Criminal Procedure Ordinance, 1899 (No. 9 of 1899) provides that the procedure of the Court under that Ordinance shall be, as nearly as possible, the same as the practice and procedure in criminal causes and matters in the High Court of Justice and the Courts of Assize in England.

2. It contains no provision for special rules of practice in criminal cases, though a limited power to make such rules is given by section 32 of the Supreme Court Ordinance (No. 3 of 1873).

3. Other Ordinances, notably the Probates Ordinance (No. 2 of 1897, s. 74), dealing with special classes of court procedure, make provision for the making of such rules in respect of the proceedings to which the Ordinances relate.

4. As the principal object of this amending Ordinance is to make provision for criminal appeals in this Colony on the lines of the Criminal Appeal Act, 1907, in England and the Criminal Appeal Ordinance, 1931, in the Straits Settlements, both of which have provisions relating to rules of court, it appears desirable to amend section 10 of the Criminal Procedure Ordinance. This is done by section 2 of the Amending Ordinance. A feature of the new section 10 is the provision for assigning counsel and solicitors as legal aids

in capital cases, cases reserved and appeal cases. It has been the practice to so assign them in capital cases only. Provision is now made for some extension of the practice so as to correspond with the provision made in England by section 10 of the Criminal Appeal Act, 1907, and in the Straits Settlements by section 12 of Ordinance No. 5 of 1931.

5. Section 3 of the amending Ordinance introduces new headings and sections 78A, 78B and 78C into the principal Ordinance. Section 78, which provided for reservation of questions of law, is retained as it enables the judge to reserve a question either on his own motion or at the request of either party. The new sections 78A and 78C enact, generally, the provisions of sections 3, 4, 5, 6 (2), 7, 9, 11 and 14 of the Criminal Appeal Act, 1907, except that the Full Court is given, as under section 78, power to direct a new trial and that the provision against separate judgments is derived from section 3 (6) of the Straits Settlements Ordinance, No. 5 of 1931. Another material variation from the model appears in the new section 78A (1) (c) where the words "or upon the certificate of the judge who tried him" have been inserted at the suggestion of the judges who consider that the trial judge should have the power to issue such a certificate.

6. The Court which will hear the criminal appeal will be the Full Court as defined and constituted by the Full Court Ordinances No. 27 of 1912 and No. 35 of 1931 which are being consolidated and amended, under another bill which has been approved by the Secretary of State in his despatch of the 24th August, 1932.

7. Section 4 of the amendment Ordinance repeals sections 68 and 109 of the principal Ordinance the effect of which has been preserved in the new sections 10 and 78B.

C. G. ALABASTER,
Attorney General.

November, 1932.