IN THE HIGH COURT OF AUSTRALIA
BRISBANE REGISTRY

No. B48 of 2017

BETWEEN:

Michael James Irwin
Appellant

and

The Queen
Respondent

APPELLANT'S SUBMISSIONS

Part I: INTERNET PUBLICATION

The appellant certifies that this submission is in a form suitable for publication on the internet.

Part II: ISSUES ON APPEAL

1. The appellant was convicted at trial of causing grievous bodily harm. The Court of Appeal held that the complainant's evidence could not rationally be accepted. However, on the appellant's evidence he admitted to pushing the complainant who stumbled and fell causing him to break his hip. The Court of Appeal held that it was open to the jury to conclude in accordance with s 23(1)(b) of the *Criminal Code* (Qld) that an ordinary person *could* reasonably have foreseen the possibility of a broken hip as the result of a push of the kind that occurred, although it held that the jury could equally have come to the opposite conclusion.

2. However, the test under s 23(1)(b) of the *Criminal Code* (Qld) is whether an ordinary person *would* not *could* reasonably have foreseen the possibility of – in this case – the broken hip.

3. In applying the wrong test the Court of Appeal also made a critical error of fact in relation to what the medical evidence at trial said about the force used to push the complainant.

4. The issues that arise on the appeal are:

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HIGH COURT OF AUSTRALIA
FILED
22 SEP 2017
THE REGISTRY BRISBANE

a. Whether the appellant received an appeal according to law given that the Court of Appeal applied the wrong statutory test and/or made a critical error of fact;

b. Whether it was open to the Court of Appeal in an unreasonable verdict appeal to uphold a conviction on the basis that both a verdict of guilty and a verdict of not guilty were equally open to the jury.

Part III: SECTION 78B OF THE *JUDICIARY ACT 1903* (*CTH*)

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The appellant considers that notice is not required to be given pursuant to s 78B of the *Judiciary Act 1903* (*Cth*).

Part IV: CITATION OF JUDGMENT APPEALED FROM

The judgment of the Court of Appeal has not been reported. The judgment has the internet citation of *R v Irwin* [2017] QCA 2.

Part V: RELEVANT FACTS

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5. The appellant was convicted after trial of one count of causing grievous bodily (Count 1) and acquitted of one count of assault occasioning actual bodily harm (Count 2).

6. Count 1 (GBH) was particularised by the Crown on the basis that the appellant either kicked or otherwise applied force to the complainant and that either the kick/force caused the hip to fracture or the fall to the ground did (QCA at [3]).

7. The summary of the relevant facts, as found by McMurdo P at [6] to [33], is unimpeachable and accepted by the appellant for the purpose of this appeal. The
30 critical aspects are as follows.

8. The complainant, a Mr Ross, gave evidence of an altercation between himself and the appellant. He described two parts of the incident.

9. Firstly, he described in his evidence in chief walking up a ramp and then turning to see the appellant whom he described as "very angry, seething at the mouth and his eyes were glazed". He described the complainant saying "I've been waiting for this effing time for a long time". He then described the appellant pushing him, and as he went backwards "his fist come across and I turned my head and it missed it or caught it by
40 the ear and on the cheek" (QCA at [7]).

10. As a result, the complainant said he was "a little bit off balance – I was going backwards a bit. And the next minute I just felt this almighty pain in my – in my left leg up near my hip". He went on "I just collapsed at that point" and he confirmed that the pain was "before [he] connected with the ground" (QCA at [7]).

11. Obviously enough, on that account there was no obvious candidate in the appellant's actions to have caused the pain in the hip, which turned out to be multiple fractures. In cross-examination, the complainant for the first time ventured that it was a "king kick" that caused his hip to be fractured, although he claimed not to have seen it (QCA at [13].

12. The complainant described that after he collapsed on the ground the appellant was kicking him and yelling at him to get up. He estimated six, seven or eight times to the back, around the thigh and in the kidney area. (QCA at [7]).

13. Secondly, the complainant described the appellant leaving, during which time the complainant pulled himself up by a wire fence. He then described the appellant returning, which he knew as a result of feeling more kicks, which "sent me back to the ground". Once back on the ground he described the appellant choking him and spitting into his face. During this time he alleged that the appellant was "yelling and screaming" (QCA at [7]-[8].

14. However, his evidence was significantly irreconcilable with the eyewitness evidence of an entirely independent observer, Ms Joanne Broad. The complainant described the appellant as stopping only because "a lady" was yelling at him to stop. He said that the appellant got up – yelled a bit at the lady – and then left for good (QCA at [8]).

15. It was common ground at the trial that "the lady" that the complainant referred to as witnessing the incident was the witness Jodie Anne Broad. The appellant confirmed in cross-examination that Mrs Broad was present during the first part and then during the second part (QCA at [30-[31]]).

16. Mrs Broad was entirely independent of the complainant and the defendant. She described hearing yelling while she was using an ATM machine. She saw the complainant on the ground and the defendant standing. She saw the defendant kick the complainant twice. She did not know whether the first kick connected and could not say where the second kick connected (QCA at [14]).

17. The witness, Mr Shamus Bradley, gave evidence that he saw the appellant on 2 August 2012 (some five days after the incident) when the defendant asked to speak with him. When they did speak Mr Bradley claimed that the appellant said that he had broken the complainant's leg and that he had "tried to break the other one and put him in a wheelchair". Mr Bradley recounted the appellant then saying "I wanted to choke him. He tried to choke him" and that "I waited for him, and then I just got stuck into him" (QCA at [20]-[21]).

18. In cross examination Mr Bradley agreed that he and the complainant were and remained good friends, and that two days before the alleged conversation with the appellant he had been told by the complainant's wife details of what the complainant said that the appellant had done. Mr Bradley also agreed that later the complainant

released him from a lease obligation early where the obligation on the lease annually was more than $200,000 (QCA at [22]).

19. The other civilian witness, the complainant's son, Lloyd Ross Junior, gave evidence of seeing the complainant shortly after the incident having difficulty standing, with blood on his ear and dirt on his clothes. It was essentially neutral given the competing accounts of the complainant and the defendant (QCA at [18]).

20. Important medical evidence was given by Dr Angus Nicholl and Dr Sarjit Singh.

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21. Dr Singh is the emergency doctor who treated the complainant on the day. She referred his hip injury to Dr Nicholl but also examined the complainant from "top to bottom". The source of the blood that others observed to the complainant's ear was described as a "very minor skin tear". That examination revealed no other injury at all (QCA at [25]).

22. Dr Singh clarified that her notes meant that she had detected no other injuries to the complainant's arms, legs, torso, head, back or chest "no matter how slight" (QCA at [25]).

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23. Dr Nicholl is an orthopaedic surgeon who treated the complainant. He diagnosed the complainant as having a fracture of the hip. It was a single fracture which "extended in such a way that it was broken into three pieces" (QCA at [23]).

24. Dr Nicholl opined that the fracture would have been "more likely to have occurred when he struck – when he fell onto his side onto the ground, rather than from some other mechanism of injury". The type of fracture was not typical with a simple fall but could be seen with an accelerated fall, for example, a fall when moving quickly such as when "moving or stumbling backwards". Specifically, he accepted that the fracture was
30 consistent with "being pushed and then falling onto a hard surface" (QCA at [23]-[24]).

25. If it had been caused by direct force the doctor opined that this would require "a high energy impact, such as a motor vehicle" or by a "baseball bat being swung incredibly hard". He agreed that causing such an injury by a kick to the area wearing a sandshoe was not likely, in fact, quite unlikely (QCA at [23]-[24]).

26. The appellant gave evidence. His account was that he had a lengthy professional history with the complainant but that they had little or no contact between 2010 and June 2012. The appellant was upset at a text message that the complainant had sent him at
40 1.30am in June 2012 which accused the appellant of owing the complainant money and having stolen from him and his partner (QCA at [27]).

27. The appellant described the events of 29 July 2012. He was walking down to the beach to cool down after training at the gym and saw the complainant about four or five metres on his right hand side. The appellant kept walking but the complainant came up on his right shoulder, pushed him and said "Irwin where's my money". He told the complainant to "fuck off" but he was again pushed on his right shoulder. The appellant

was angry but continued walking until the complainant pushed him again such that the appellant stumbled onto one knee (QCA at [29]).

28. The appellant then stood up and pushed the complainant in the chest. The complainant stumbled back and fell down "reasonably hard". The appellant then accepted that he kicked the complainant twice in the right buttock while he was on the ground having said "if you want a fight we can have a fight" (QCA at [30]).

29. The appellant gave evidence that "a lady" (accepted to be Mrs Broad) told him to stop and he did and then left. He returned shortly afterwards and the complainant was leaning up against the wire fence. The appellant was upset and angry and yelled at him more about the claim that he owed money to the complainant (QCA at [30]-[31]).

30. He then left again and did not return. During this second part Mrs Broad was present. He denied ever making the claimed admissions to Mr Bradley (QCA at [30]-[31]).

31. The conclusions on the appeal are found in the judgment of McMurdo P at [50] to [52]. Her Honour concluded that the jury could not safely act on the complainant's evidence or that of Mr Bradley. This left the medical evidence and the appellant's evidence that he pushed the complainant.

32. Her Honour noted that "[t]he medical evidence makes it most likely that the complainant broke his hip after the appellant pushed him with a considerable degree of force, causing him to fall heavily".

33. Her Honour's key reasoning is at paragraph [51]:

> "A jury may well have considered that an ordinary person in the position of the appellant *could* not have reasonably foreseen the complainant would in those circumstances suffer a fractured hip. That, it seems, was the trial judge's view. But that is not the test for this Court. It was *equally open* to the jury on the evidence to reach the contrary conclusion, that an ordinary person in the position of the appellant *could* have foreseen that the complainant might suffer a serious injury such as a fractured hip from such a forceful push. The resolution of the issue was a matter for the jury. They had the advantage of seeing the height and build of the 55 year old complainant and appellant. Assuming they were of average build and height, the appellant's push of the complainant, necessarily on the medical evidence forceful, on a slight downward sloped tiled ramp, *could* foreseeably result in the complainant falling badly and seriously injuring himself, even breaking his hip. Such a result was not theoretical or remote." (emphasis added)

Part VI: APPELLANT'S ARGUMENT

The Court of Appeal applied the wrong statutory test

34. Intention is not an element of the offence of causing grievous bodily harm. It follows by operation of s 23(2) of the *Criminal Code Act 1899* (*Qld*) ("Code") that intention is irrelevant to proof of guilt.

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35. However, the second limb of s 23(1)(b) provides, relevantly, a person is not criminally responsible for an event - here grievous bodily harm in the form of a badly broken hip - that an ordinary person would not reasonably foresee as a possible consequence of his or her act or omission. If raised on the evidence then the Crown must exclude the operation of s 23(1)(b) beyond reasonable doubt.

36. President McMurdo, applied the wrong statutory test by substituting the word "could" for the word "would". Her Honour did so in two formulations of the test.

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a. First, in holding that a jury "may well have considered that an ordinary person in the position of the appellant *could not* have reasonably foreseen the complainant would in those circumstances suffer a fractured hip";

b. Second, in holding that a jury may equally have concluded that "an ordinary person in the position of the appellant *could* have foreseen that the complainant might suffer a serious injury".

37. The first formulation more closely resembles the statutory formula in that it uses the negative form. However, it set the bar higher than was required for an acquittal. All that
30 a jury was required to find in order to acquit was that it was reasonably possible that an ordinary person in the position of the appellant would not have reasonably foreseen the possibility of the relevant event.

38. The second formulation turns the negative form of the statutory formula into a positive statement of what the Crown must prove. Substituting "could" for "would" fundamentally changed what the Crown had to prove.

39. In short, "could" does not mean "would". Black's Law Dictionary, 6th ed, 1990, at p 1607 defines "would" to mean: "A word sometimes expressing what might be expected or
40 preferred or desired. Often interchangeable with the word 'should', but not with 'could'.

40. To prove that a reasonable person "would" reasonably foresee something is significantly more onerous than proving that a reasonable person "could" reasonably foresee that thing.

41. In *R v Taiters; ex parte Attorney-General (Qld)*[1] the Queensland Court of Appeal set out the test in a form suitable for jury direction, that is, not using a double negative:[2]

> "The crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome".[3]

42. The test as put in *Taiters* (i.e. without a double negative) was later approved by the Queensland Court of Appeal in *R v Katsidis:*[4]

> "...there is, in my opinion, no inconsistency between the direction suggested in *Taiters* and the decision of this Court in *Van den Bemd*. The former applied *Van den Bemd* and, at the same time, suggested a proposed formulation of the test set out in that earlier case and in the High Court case decision of *Kaporonovski v The Queen* (1975) 133 CLR 209 by expressing it, without the use of double negatives, in terms of what the Crown is obliged to establish in order to exclude this limb of the defence of accident, now contained in s 23(1)(b) of the Criminal Code."

43. It follows that the substitution of "could" for "would" in both formulations of the test by the Court of Appeal was a fundamental error, inconsistent with the statutory test and which significantly raised the bar for the appellant to succeed on his appeal.

44. Even on this incorrect and more onerous standard the Court of Appeal held that the case was evenly balanced. It is at least highly likely that applying the correct statutory test would have led it to allow the appeal and to acquit the appellant.

The Court of Appeal erred in finding that the medical evidence permitted the conclusion that the push to the complainant was with a "considerable degree of force"

45. The misapplication of s 23(1)(b) was compounded by a critical error of fact in respect of the expert evidence in her Honour's key reasoning at [50]-[51].

46. Relevantly, Dr Nicholls gave unchallenged evidence that a very substantial amount of force would be required to cause this injury if it was caused by a direct blow. However, if the injury was caused by a fall, all it would require is an accelerated fall, for example, a fall when moving quickly such as when "moving or stumbling backwards". Importantly, Dr Nicholl accepted that the fracture was consistent with "being pushed and then falling onto a hard surface" (QCA at [23]-[24]).

47. It follows that the medical evidence was silent about the level of force required. The appellant was not cross-examined as to how hard the push was. In the absence of any

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[1] [1997] 1 Qd R 333 ("*Taiters*").
[2] *Taiters*, at 336.
[3] *Taiters*, at 338.
[4] [2003] QCA 82, at [13] per Davies JA with whom McPherson JA and Philippides J agreed.

evidence as to the question of physics, the required forcefulness of the push was that it had to be sufficient to cause a "moving or stumbling backwards" resulting in a fall. No other factual conclusion was permissible. However, McMurdo P concluded that the push to the complainant was "with a considerable degree of force".

48. This was an impermissible conclusion and it materially affected the outcome. Her Honour said at [51] "an ordinary person in the position of the appellant could have foreseen that the complainant might suffer a serious injury such as a fractured hip from such a forceful push". There was no evidence of "such a forceful push".

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49. It is highly likely that if the Court of Appeal had applied the correct statutory test as required by s 23(1)(b) against the permissible medical evidence of Dr Nicholl, the Court of Appeal would have allowed the appeal.

The Court of Appeal erred in upholding the conviction on the basis on the basis that both a verdict of guilty and not guilty were equally open to the jury

50. In *M v The Queen*[5] the plurality set out the approach that an intermediate appellate court must take when considering an appeal based on a submission that the jury's
20 verdict was unreasonable and cannot be supported having regard to the evidence:

> "The question which the court must ask itself is whether it thinks that upon the whole of the evidence, it was open to the jury to be satisfied beyond reasonable doubt that the accused was guilty... Where the evidence lacks credibility for reasons which are not explicable by the manner in which the evidence was given, the reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced."

51. The plurality went on to point out:

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> "But in answering that question the court must not disregard or discount either the consideration that the jury is the body entrusted with the primary responsibility of determining guilt or innocence, or the consideration that the jury has had the benefit of having seen and heard the witnesses. On the contrary, the court must pay full regard to those considerations."

52. The Court of Appeal concluded that the jury could not safely act on the complainant's evidence or that of Mr Bradley. The only pathway to conviction was based on the medical evidence and the appellant's evidence that he pushed the complainant.

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53. It was common ground that there was a push. Ironically, the appellant's account of the push was more forceful than the complainant's description.

54. The only pathway to conviction therefore required that the case be assessed on the basis that the appellant pushed the complainant hard enough in the chest to cause him

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[5] (1994) 181 CLR 487, 493-495.

to stumble backwards and fall. The question to be applied to that conclusion was whether the Crown had proved beyond reasonable doubt that an ordinary person in the position of the appellant would have reasonably foreseen the possibility that the complainant would suffer grievous bodily harm, in this case by way of a badly broken hip.

55. In assessing that pathway, the Court of Appeal was in equally as good a position to apply s 23(1)(b) to the facts. It follows that any reasonable doubt held by the Court of Appeal was one that ought to have led it to allow the appeal.

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56. President McMurdo concluded (albeit based on the legal and factual errors identified above) that a jury could have concluded that a reasonable person could not have foreseen the possibility of grievous bodily harm, but that it was "equally open" for the jury to conclude the opposite.

57. A jury with two equally open conclusions available to it, one consistent with innocence, is obliged to acquit because it holds a reasonable doubt.

58. An intermediate Court of Appeal which finds on an unreasonable verdict appeal that
20 the jury had two equally available conclusions open to it – one consistent with innocence – also holds a reasonable doubt. There is nothing in the record to explain why that reasonable doubt should not also have been held by the jury.

59. On that basis, even putting to one side the legal and factual errors identified above, the Court of Appeal was obliged to allow the appeal.

A verdict of acquittal should be entered by this Court

60. If the Court accepts that any of the errors alleged above were made then it should itself
30 determine whether the verdict was unreasonable or cannot be supported having regard to the evidence rather than remit that question to the Court of Appeal.

61. The length of this trial is comparable to *BCM* and *GAX v The Queen*[6] where this Court determined the question for itself. The goal of finality[7] also suggests that this Court should determine whether the verdict was unreasonable.

62. Unusually in this case, it can be confidently said that the Court of Appeal would almost certainly have allowed the appeal had it not made the errors alleged.

40 63. On that basis, there are three ways in which this Court could conclude that a verdict of acquittal should be entered:

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[6] [2017] HCA 25 at [26].

[7] *MFA v The Queen* (2002) 213 CLR 606 at 627 [69]. On 6 May 2016, the appellant was sentenced to a term of 18 months imprisonment wholly suspended forthwith with an operational period of 2 years. The appellant has approximately 8 months of the operational period to serve. He has no other criminal history.

a. If this Court concludes that the Court of Appeal in fact held a reasonable doubt about guilt on the basis of its finding that conclusions consistent with innocence and guilt were equally open then the appropriate remedy is a verdict of acquittal without the need for further consideration of the evidence; **or**

b. If not, then this Court should proceed on the basis of the findings made by the Court of Appeal other than the error in respect of the medical evidence. It would be unfair for the appellant to be deprived of the benefit of those findings because of errors otherwise made by the Court of Appeal where, had they not been made, the appeal would have been allowed; **or**

c. This Court could assess all of the evidence on the record for itself.

64. If the second course is taken then the only question for this Court would be whether the Crown proved beyond reasonable doubt that an ordinary person in the position of the appellant would have foreseen the reasonable possibility that grievous bodily harm in the form of a broken hip would be caused by a single push to the complainant's chest with enough force to cause him to stumble and fall to the ground.

65. Grievous bodily harm is defined in s 1 of the Code in this way:

> "(a) the loss of a distinct part or an organ of the body; or
>
> (b) serious disfigurement; or
>
> (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health."

66. The prosecution needed to prove that the kind of injury sustained was a reasonably foreseeable possibility[8] although it did not need to prove that the precise nature of the injury was reasonably foreseeable.[9]

67. It cannot be concluded beyond reasonable doubt that an ordinary person would reasonably foresee the possibility of a broken hip amounting to grievous bodily harm as the result of a push sufficient only to cause a person to stumble and fall.

68. If this Court determines to consider all of the evidence for itself (i.e. to put to one side the Court of Appeal's findings) then a verdict of acquittal should still be entered.

69. For the same reasons given by the Court of Appeal (QCA at [50]-[52]):

69.1.1. The complainant's evidence could not rationally be accepted;

69.1.2. The evidence of Shamus Bradley could not rationally be accepted; and

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[8] *R v Stuart* [2005] QCA 138, *R v Condon* [2010] QCA 117.
[9] *R v Stuart* [2005] QCA 138, *R v Coomer* [2010] QCA 6.

69.1.3. This left only the appellant's account of the push understood in the context of the medical evidence.

70. The Court would then be left in the same position discussed above, namely that s 23(1)(b) is to be assessed against a single push to the chest sufficient to cause the complainant to stumble backwards and fall, a position that – for the reasons set out above – necessitates an acquittal.

10 **PART VII: APPLICABLE STATUTORY PROVISIONS**

The applicable statutory provisions are attached in the annexure.

PART VIII: ORDERS SOUGHT

I. The appeal be allowed.

II. The orders of the Court of Appeal be set aside.

20 III. The conviction be quashed and a verdict of acquittal entered in its place.

PART IX: TIME ESTIMATE

The presentation of the appellant's oral argument is estimated to take half an hour to an hour.

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Dated: 21 September 2017

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IN THE HIGH COURT OF AUSTRALIA

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ANNEXURE TO PART VII

LEGISLATIVE PROVISIONS

Statement of currency:

Reproduced below are the legislative provisions relevant to this case and to the argument the appellant will advance. They are reproduced in the form in which they were at the time the offence was committed.

***Criminal Code Act 1899* (*Qld*)**

Section 1 Definitions

grievous bodily harm means—

(a) the loss of a distinct part or an organ of the body; or

(b) serious disfigurement; or

(c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available.

Section 23 Intention - motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for-

(a) an act or omission that occurs independently of the exercise of the person's will; or

(b) an event that-

(i) the person does not intend or foresee as a possible consequence; and

(ii) an ordinary person would not reasonably foresee as a possible consequence.

Note –
Parliament, in amending subsection 1(b) by the Criminal Code and Other Legislation Amendment Act 2011, did not intend to change the circumstances in which a person is criminally responsible.

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

Section 668E – Determination of appeal in ordinary cases

(1) The Court on any such appeal against conviction shall allow the appeal if it is of opinion 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 of trial should be set aside on the ground of the wrong decision of any question of law, or that on any ground whatsoever there was a miscarriage of justice, and in any other case shall dismiss the appeal.

(1A) However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(2) Subject to the special provisions of this chapter, the Court shall, if it allows an appeal against conviction, quash the conviction and direct a judgment and verdict of acquittal to be entered.

(3) On an appeal against a sentence, the Court, if it is of opinion that some other sentence, whether more or less severe, is warranted in law and should have been passed, shall quash the sentence and pass such other sentence in substitution therefore, and in any other case shall dismiss the appeal.