



Tonga

# COURT OF APPEAL ACT

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## COURT OF APPEAL ACT

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# COURT OF APPEAL ACT

*Act No. 14 of 1966*

## AN ACT TO REGULATE APPEALS TO THE COURT OF APPEAL.

Commencement [1st July, 1990]

### 1 Short title.

This Act may be cited as the Court of Appeal Act.

### 2 Interpretation.

In this Act, unless the context otherwise requires,—

“**appeal**” includes a case stated;

“**appellant**” includes a person who has been convicted and desires to appeal under this Act;

“**Registrar**” means the Registrar of the Court of Appeal;

“**sentence**” includes any order of the court made on conviction with reference to the person convicted.

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## **PART I. — GENERAL PROVISIONS**

### **3 Power to reserve questions of law for the opinion of the Court of Appeal.**

In addition, and without prejudice, to the right of appeal conferred by clause 91 of the Constitution a judge of the Supreme Court may reserve for consideration by the Court of Appeal, on a case to be stated by him, any question of law which may arise on the hearing of any cause or matter, and may give any judgment of decision subject to the opinion of the Court of Appeal, which shall have power to hear and determine every such question. The Registrar of the Court of Appeal shall forthwith remit any such opinion to the Supreme Court and any further proceedings in that Court shall be held or taken in accordance with that opinion.

### **4 President of Court of Appeal.**

The Chief Justice shall be President of the Court of Appeal. In his absence, the senior member of the Court of Appeal present at the hearing of any appeal, or considering any appeal pursuant to section 15 of this Act, shall be Vice-President and shall preside.

### **5 Precedence of members of Court of Appeal.**

The seniority and procedure of the members of the Court of Appeal shall be as follows—

- (a) the Chief Justice;
- (b) other members of the Court according to the respective dates of their first obtaining either of the qualifications prescribed in the proviso to clause 85 of the Constitution.

### **6 Number of members sitting.**

- (1) For the purpose of hearing and determining appeals in opening court the Court of Appeal shall be summoned in accordance with directions given by the Chief Justice, and, subject as otherwise sitting provided, the Court of Appeal shall be duly constituted if it consists of not less than 3 members:

Provided that provision may be made by rules of court for the hearing and determining of interlocutory applications and of specified cases by 2 members of the Court of Appeal:

Further provided that, at a sitting of the Court of Appeal at which the only matter before the Court is the delivering of judgments, the Court of Appeal shall be duly constituted if it consists of at least one judge who may be either a member of the Court of Appeal or a judge of the Supreme Court.

- (2) Any order contained in a judgment in any appeal or other proceeding read in open court at the sitting of the Court at which judgment is delivered in that appeal or other proceeding, shall, if concurred in by a majority of the judges comprising the Court which determined the appeal and the judgment or judgments in which such judges have expressed their concurrence are so read at that sitting, be deemed to be the order of the Court of Appeal and the appeal shall be deemed to have been duly determined upon the reading of the judgment or judgments in open court as aforesaid:

Provided that, notwithstanding the determination of an appeal under the provisions of this subsection, the Court of Appeal shall have the jurisdiction to hear and determine an application for any consequential or ancillary order arising out of the order so pronounced.

- (3) In all appeals and applications brought before the Court of appeal the determination of any question shall be according to the opinion of the majority. If, on the determination of an appeal or application, the Court of Appeal is equally divided, the appeal or application, as the case may be, shall be dismissed, and, in the case of a question of law reserved on a case stated, the proceedings in the Supreme Court shall continue as if no such question of law had been reserved and any judgment or decision given subject to the opinion of the Court of Appeal may be enforced, and proceedings had thereon, as if it were not so subject.

## **7 Sittings of the Court of Appeal.**

The Court of Appeal shall sit on such days and at such time as the Chief Justice may determine.

## **8 Registrar of the Court of Appeal.**

The Registrar of the Supreme Court shall be Registrar of the Court of Appeal and shall, subject to the directions of the Chief Justice, maintain and keep in his custody the records of proceedings and such registers and other records as may be requisite for the purposes of any appeals to the Court of Appeal.

**9 Rules of procedure.**

- (1) The Chief Justice may make rules of court for carrying this Act into effect and for regulating generally the practice and procedure under this Act.
- (2) Until other provision is made in that behalf, the fees of court payable in respect of appeals under Part II of this Act shall be those prescribed in respect of appeals to the King in Council immediately prior to the commencement of this Act.

**PART II. — CIVIL APPEALS****10 Right of appeal in civil cases.**

- (1) An appeal shall lie in any cause or matter other than a criminal proceeding to the Court of Appeal from a judge of the Supreme Court sitting in first instance in the following cases—
  - (a) from all final orders, judgments and decisions provided that no appeal shall lie from an order made by consent or as to costs except by special leave of the judge of first instance or of the Court of Appeal;
  - (b) by special leave of the judge of first instance or of the Court of Appeal but not otherwise, from all interlocutory orders, judgments and decisions made in the course of any cause or matter.
- (2) An appeal from any interlocutory order, judgment or decision may be finally determined by 2 members of the Court of Appeal and shall be determined in the manner, and according to the procedure, provided for in section 15 of this Act.

**11 Powers of Court in civil appeals.**

For all the purposes of and incidental to the hearing and determination of any appeal under this part of the Act and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court.

**12 Conditions precedent to appeal.**

Subject to the provisions of the next section, the Court of Appeal shall not hear any appeal brought under this part of this Act unless the appellant has fulfilled all the conditions of appeal as prescribed by this part of this Act and any rules of court regulating such appeals.

**13 Discretionary power of Court of Appeal.**

Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain an appeal made under the provisions of this part of this Act on any terms which it may think just.

**14 Decisions.**

- (1) The judgment of the Court of Appeal or of any judge who is a member of the Court which determines an appeal, shall be delivered in open court either at the hearing of the appeal or at any subsequent time of which notice shall be given by the Registrar to the parties to the appeal.
- (2) The judgment of the Court of Appeal or of any such judge as aforesaid may be read in open court by any judge, whether present at the hearing of that appeal or not, or by a Judge of the Supreme Court or the Registrar.

**15 Determination of appeals on written submissions.**

- (1) Notwithstanding anything contained in this Act, with the concurrence in writing of the appellant and the respondent or their respective licensed representatives, an appeal may be determined in the manner and according to the procedure hereinafter in this section provided for.
- (2) The appellant shall file with the Court and serve on the respondent written arguments in support of his appeal. The respondent shall thereafter file with the Court and serve on the appellant written arguments in opposition to the appeal. The appellant may thereafter file with the Court and serve on the respondent further written arguments in reply.

The time, manner and procedure for filing and serving written arguments shall be prescribed by rules of Court.

- (3) There shall be no oral hearing of the appeal and it shall not be necessary for all or any of the members of the Court of Appeal to meet together to determine the appeal.

Such of the members of the Court of Appeal as shall be nominated for the purpose by the Chief Justice (not being less than 3) shall consider the written arguments and each give his final determination the appeal in writing, either in the form of a judgment or by concurring with one or both of the judgments of the other members of the court. To enable the members of the Court to reach their final determination of the appeal they may enter into such communications each other as they may deem fit. As soon as each member has reached his final determination in writing he shall sign and date it and it shall thereupon become his final judgment.

- (4) The judgment of the majority of the members considering the appeal shall be the judgment of the Court on that appeal.
- (5) The Chief Justice may issue, and from time to time vary, general or special directions governing the procedure to be adopted in carrying subsection (3) of this section into effect.
- (6) Notwithstanding anything contained in subsection (3) of this section, the effective date of a judgment signed and dated in pursuance of that subsection shall be the date upon which it is read in open court.

## **PART III. — APPEALS IN CRIMINAL CASES**

### **16 Right of appeal in criminal cases.**

A person convicted on a trial held before the Supreme Court may appeal under this part of this Act to the Court of Appeal—

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

### **17 Determination of appeals in ordinary cases.**

- (1) The Court of Appeal on any such appeal against conviction shall allow the appeal if they think that the verdict 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:

Provided that the Court of Appeal 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 occurred.

- (2) Subject to the special provisions of this Act, the Court of Appeal shall, if they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial.
- (3) On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as they think ought to have been passed, and in any other case shall dismiss the appeal.

### **18 Powers of Court in special cases.**

- (1) If it appears to the Court of Appeal 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 Court may either affirm the sentence passed on the appellant at the trial or pass 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 the Court consider that the appellant has been properly convicted.
- (2) Where an appellant has been convicted of an offence and the judge, or in the case of a trial by jury, the jury could on the indictment have found him guilty of some other offence, and on the findings of the judge or jury, as the case may be, it appears to the Court of Appeal that the judge or jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by such judge or 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 great severity.
- (3) Where on the conviction of the appellant the jury have found a special verdict and the Court of Appeal consider that a wrong conclusion has been arrived at by the court before which the appellant has been convicted on the effect of that verdict, the Court of Appeal may, instead of allowing the appeal, order such conclusion to be recorded as appears to the Court 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.
- (4) If on any appeal it appears to the Court of Appeal 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 Court may quash the conviction and the sentence passed at the trial end, in such case, the Court shall order that the appellant be detained in safe custody pending the decision of the Privy Council, and the resident of the Court shall forthwith

report the decision of the Court to the Prime Minister who shall submit the matter to the Privy Council for decision as to the place and mode of detention of the appellant.

## **19 Suspension of order for restoration or payment of compensation, or expenses etc.**

- (1) The operation of any order made on conviction by the judge before whom the conviction takes place for the payment of compensation or of any of the expenses of the prosecution or for the restoration of any property to any person, and the operation of the provisions of any law re-vesting in case of any such conviction in the original owner or his personal representative the property in stolen goods, shall (unless the judge before whom the conviction takes place directs to the contrary in any case in which in his opinion the title to the property is not in dispute) be suspended—
  - (a) in any case until the expiration of 60 days after the date of the conviction; and
  - (b) in cases where notice of appeal or leave to appeal is given within 60 days after the date of conviction, until the determination of the appeal;

and in cases where the operation of any such order or provisions is suspended until the determination of the appeal, the order or provisions shall not take effect as to the property in question if the conviction is quashed on appeal.

- (2) The Court of Appeal may by order annul or vary an order made in the trial for the payment of compensation or of any of the expenses of the prosecution or for the restitution of any property to any person, although the conviction is not quashed and the order, if annulled, shall not take effect and, if varied, shall take effect as so varied.

## **20 Time for appealing.**

- (1) When a person convicted desires to appeal under this part of the Act to the Court of Appeal, or to obtain leave of that Court to appeal, he shall give notice of appeal or notice of his application for leave to appeal, in such manner as may be directed by rules of court, within 60 days of the date of conviction. Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave of appeal may be given, may be extended at any time by the Court of Appeal.

- (2) In the case of a conviction involving sentence of death or corporal punishment—
- (a) the sentence shall not in any case be executed until after the expiration of the time within which notice of appeal or of an application for leave to appeal may be granted under this section; and
  - (b) if notice is so given, 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.

## **21 Judge's notes and report to be furnished on appeal.**

The judge before whom a person is convicted, shall in the case of an appeal under this part of the Act against the conviction or against the sentence, or in the case of an application for leave to on appeal under this part of the Act, furnish to the Registrar of the Court of Appeal, in accordance with rules of court, his notes of the trial and shall also furnish to the Registrar in accordance with rules of court a report giving his opinion upon the case or upon any point arising in the case.

## **22 Supplemental powers of Court of Appeal.**

In the exercise of their jurisdiction under this part of the Act, the Court of Appeal 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 Court of Appeal, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in the manner provided by rules of court, or in the absence of rules of court making provision in that behalf, as they may direct, before any judge of the Court or before the Registrar or any magistrate or other person appointed by the Court for the purpose and allow the admission of any depositions so taken as evidence before the Court; and
- (c) receive the evidence, if tendered, of any witness (including the appellant) who is a competent but not compellable witness, and, if the appellant makes an application for the purpose, of the husband or wife of the appellant, in cases where the evidence of the husband or wife could not have been given at the trial except on such application; and

- (d) where any question arising in the appeal involves prolonged examination of documents or accounts, or any scientific or local investigation, which cannot in the opinion of the Court conveniently be conducted before the Court, order the reference of the question in the manner provided by rules of court for inquiry and report to a special commissioner appointed by the Court, and act upon the report of any such commissioner as far as they think fit to adopt it; and
- (e) appoint any person with special expert knowledge to act as assessor to the Court in any case where it appears to the Court that such special knowledge is required for the proper determination of the case;

and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters and issue any warrants necessary for enforcing the orders or sentences of the 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.

### **23 Right of appellant to be present.**

- (1) An appellant, notwithstanding that he is in custody, shall be entitled to be present on the hearing of his appeal, if he desires it and is not prevented by sickness or other cause, 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 of court provide that he shall have the right to be present or where the Court of Appeal gives him leave to be present.
- (2) The power of the Court of Appeal under this Act to pass any sentence, may be exercised notwithstanding that the appellant is for any reason not present.

### **24 Determination of appeal without a sitting of the Court.**

- (1)
- (a) In the case of an appeal which appears to the Chief Justice to involve a question of law alone and in respect of which appeal the Chief Justice is of opinion that, because of delay that would otherwise occur in determining the appeal, or for any other reason, the appeal ought to be disposed of under the provisions of this section; or

- (b) in the case of any appeal in respect of which the appellant himself has specifically requested in writing addressed to the Registrar that such appeal be determined without a hearing in open court under the provisions of this section,

the provisions of section 15 of this Act apply to such appeal with such modifications as may be necessary.

- (2) Any rules of court made under section 15 and any directions issued by the Chief Justice under that section, may make provision for the procedure in respect of criminal appeals that are to be determined in the manner provided for in this section.

## **25 Costs of appeal.**

- (1) On the hearing and determination of an appeal under this part of the Act no costs shall be allowed to either side.
- (2) The expenses of any witness attending on the order of the Court of Appeal or examined in any proceedings incidental to the appeal, and of the appearance of an appellant when in custody on the hearing of his appeal or on any proceedings preliminary or incidental to the appeal, and all expenses of and incidental to any examination of witnesses conducted by any person appointed by the Court for the purpose, or any reference of a question to a special commissioner by the Court, shall be defrayed out of general revenues of the Kingdom up to an amount allowed by the Court but subject to any provision as to rates and scales of payment prescribed by regulations made by the King in Council.

## **26 Admission of appellant to bail and custody when attending before Court of Appeal.**

- (1) An appellant who is not admitted to bail shall pending the determination of his appeal be treated in like manner as a prisoner awaiting trial.
- (2) The Court of Appeal may, if it sees fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal.
- (3) When an appellant under this part of the Act is admitted to bail under this Act the time during which he is at large after being so admitted shall be disregarded in computing the term of any sentence to which he is for the time being subject.
- (4) Subject as hereinafter provided, 6 weeks of the time during which any appellant, when in custody, is treated as a prisoner awaiting trial in pursuance of the provisions of sub-section (1) of this section, or the whole of that time if it is less than 6 weeks, shall be disregarded in computing the term of any such sentence as aforesaid:

Provided that—

- (a) the foregoing provisions of this subsection shall not apply where leave to appeal is granted under this part of the Act or where any such certificate as is mentioned in paragraph (b) of section 16 of this Act has been given for the purpose of the appeal; and
  - (b) in any other case, the Court of Appeal may direct that no part of the said time, or such part thereof as the court thinks fit (whether shorter or longer than 6 weeks) shall be disregarded as aforesaid.
- (5) Subject to the foregoing provisions of this section, the term of any sentence passed by the Court of Appeal under this part of the Act in substitution for a sentence passed on the appellant in the proceedings from which the appeal is brought shall, unless the Court otherwise directs begin to run from the time when it would have begun to run if passed in those proceedings, and references in this section to any sentences to which an appellant is for the time being subject shall be construed accordingly.
- (6) The King in Council may make regulations, providing for the manner in which an appellant, when in custody, is to be brought to place at which he is entitled to be present for the purpose of any proceedings under this part of the Act and for the manner in which he is to be kept in custody while absent from prison for that purpose; and an appellant, whilst in custody in accordance with regulations, shall be deemed to be in legal custody.

## **27 Duties of Registrar with respect to notices of appeal etc.**

- (1) The Registrar shall take all necessary steps for obtaining a hearing under this part of the Act of any appeals for applications, notice of which is given to him under this Act, and shall obtain and lay before the Court of Appeal in proper form all documents exhibits and other things relating to the proceedings in the court before which the appellant or applicant was tried which appear necessary for the proper determination of the appeal or application.
- (2) If it appears to the Registrar that any notice of an appeal against a conviction, purporting to be on a ground of appeal which involves a question of law alone, does not show any substantial ground of appeal, the Registrar may submit the appeal to the Justice who may, if he sees fit, refer the appeal for summary determination to any 3 members of the Court of Appeal of whom the Chief Justice himself may be one. Where the case is so referred, the Court may, if all 3 members (being the members to whom the appeal has been referred as aforesaid) consider that the appeal is frivolous and vexatious and can be determined without a full hearing, order that the appeal be summarily dismissed without holding a sitting of the court, and without calling on any persons to attend a hearing thereof or to appear thereon, and the appeal shall thereupon stand dismissed as from

the date upon which the Chief Justice shall record such order upon the proceedings. The Registrar shall forthwith cause the appellant to be informed of such order.

- (3) Any documents, exhibits, or other things connected with the proceedings on the trial of any person before the Supreme Court who, if convicted, is entitled, or may be entitled, to appeal under this part of the Act, shall be kept in the custody of the Court of Appeal in accordance with rules of court made for the purpose for such time as may be provided by the rules, and subject to such power as may be given by the rules for the conditional release of any such documents, exhibits, or things from that custody.
- (4) The Registrar shall furnish the necessary forms and instructions in relation to notices of appeal or notices of application under this part of the Act to any person who demands the same, and to officers of courts, the Chief Gaolers and such other officers or persons as he thinks fit and the Chief Gaolers shall cause these forms and instructions to be placed at the disposal of prisoners desiring to appeal or to make any application under this part of the Act and shall cause any such notice given by a prisoner in his custody to be forwarded on behalf of the prisoner to the Registrar.

## **28 Powers which may be exercised by a judge of the Court of Appeal.**

The powers of the Court of Appeal under this part of the Act to give leave to appeal, to extend the time within which notice of appeal or of an application for leave to appeal may be given, to allow the appellant to be present at any proceedings in cases where he is not entitled to be present without leave, and to admit an appellant to bail, may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application on the part of the Appellant to exercise any such power in his favour, the appellant shall be entitled to have the application determined by the Court as duly constituted for determining appeals under this Act.

## **29 Judgment in criminal appeals.**

- (1) In an appeal under this part of the Act the Court of Judgment shall ordinarily give only one judgment, which may be by the senior member present at the hearing of the appeal or by such other member so present as he may direct:

Provided that—

- (a) if any member dissent from the decision of the Court it shall not be obligatory on him to sign the same; and

- (b) separate opinions shall be given if the Court is of the opinion that it is convenient that there should be separate opinions.
- (2) The judgment of the Court or of any judge who is a member of the Court which determines the appeal shall, except in the case of an appeal disposed of under the provisions of section 27(2) of this Act, delivered in open court either at the hearing of the appeal or at any subsequent time of which notice shall be given by the Registrar to the parties to the appeal.
- (3) The decision of the Court or of any such judge as aforesaid may be read in open court by any member, whether present at the hearing of that appeal or not, or by a Judge of the Supreme Court or the Registrar.

### **30 Power of pardon.**

Nothing in this Act shall affect the power of the King to grant Pardon, but the King, in considering the existence of such power with reference to the conviction of a person by or in the Supreme Court, or to the sentence passed on a person so convicted, whether or not the person convicted has petitioned in that behalf, may, if he thinks fit, at any time either—

- (a) refer the whole case to the Court of Appeal and the case shall then be heard and determined by the Court of Appeal as in the case of an appeal by the person convicted; or
- (b) if he desires the assistance of the Court of Appeal on any point arising in the case, refer that point to the Court of Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the King with their opinion thereon accordingly.

## **PART IV.-TRANSITIONAL**

### **31 Transitional.**

- (1) The Court of Appeal shall have exclusive power and jurisdiction to hear and determine any appeal from the Supreme Court by way of petition to the King in Council brought under the Supreme Court Act and not finally determined upon the date upon which the Constitution (Court of Appeal Amendment) Act, 1966 comes into force.
- (2) Unless and until provision is made to the contrary by rules of court specifically made applicable to appeals to the King in Council which are to be determined by the Court of Appeal pursuant to subsection one of this section, the rules of procedure to be observed in respect of such appeals shall be those applicable thereto immediately prior to the date specified in subsection one hereof and references in such rules to the Court of Appeal

and to the Clerk of the Court of Appeal shall be deemed to be references to the Court of Appeal established under Clause 84 of the Constitution and to the Registrar respectively.

- (3) For all purposes of and incidental to the hearing and determination of any such appeal and the amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the powers, authority and jurisdiction which it has in respect of an appeal brought under Part II of this Act.

### **32 Commencement.**

This Act shall come into operation on such date as the King may by proclamation appoint.