



ANALYSIS

1. Short title and commencement

2. Appeals

2011, No. 12

An Act to amend the Judicature Act 1980-81 to make better provision for the jurisdiction and powers of the Court of Appeal and to promote the efficient and timely determination of appeals

(9 December 2011)

BE IT ENACTED by the Parliament of the Cook Islands in Session assembled, and by the authority of the same, as follows:

1. Short title and commencement - (1) This Act may be cited as the Judicature Amendment Act 2011 and shall be read together with and deemed part of the Judicature Act 1980-81 (“the principal Act”).

(2) This Act shall come into force on the date that it is assented to by the Queen’s Representative.

2. Appeals – Part II of the principal Act is amended by repealing sections 51 to 75 and substituting the following sections –

**“PART II
APPEALS”**

Court of Appeal of the Cook Islands

51. Jurisdiction of Court - The Court of Appeal shall have –

- (a) power and jurisdiction to hear and determine all appeals which lie to the Court by virtue of the Constitution, this Act or as may be prescribed;
- (b) all such powers and jurisdiction as are or may from time to time be vested in the Court under or by virtue of the Constitution, this Act or as may be prescribed.

52. Seal of the Court - The Court of Appeal shall have and use, as occasion may require, a seal bearing a device or impression as the Minister of Justice may approve.

53. Sittings of Court of Appeal - (1) The Court of Appeal shall sit at such places and on such dates as the Chief Justice or President, after consultation with the Chief Justice, may determine from time to time.

(2) Without limiting the power conferred by subsection (1) of this section, the President may direct that an appeal be heard in whole or in part in any place within or outside the Cook Islands and, if directed, shall be heard as so directed.

(3) The President may direct that an appeal or any interlocutory phase of an appeal may be heard in whole or in part by way of video link or telephone conference –

(a) between the Cook Islands and any other place outside the Cook Islands;

(b) between any places outside the Cook Islands;

(c) between any places within the Cook Islands.

(4) Rules of Court may be made to deal with the necessary arrangements and procedures for such video links and telephone conferences.

54. Officers - (1) The Registrar, Deputy Registrars and other officers of the High Court shall, without further appointment, act in the like capacity in respect of the Court of Appeal.

(2) The Registrar may exercise such of the jurisdiction of the Court in such administrative or ancillary matters as shall be prescribed by this Act or by Rules of Court.

55. Delivery of determinations - (1) A determination of the Court of Appeal or of a Judge in an appeal or other matter before the Court may be delivered –

(a) by a Judge whether or not that Judge was present at the hearing of the proceeding;

(b) by a Court constituted differently from that which heard the proceeding;

(c) by the Registrar.

(2) It shall be lawful for any determination to be delivered by the effect thereof being pronounced in such terms as the Court or Judge or Registrar shall think appropriate, provided that the full terms of the determination are reduced to writing and a copy is made available to the parties.

56. Absence of Judge - If a Judge who has taken part in proceedings before a Court of Appeal is unable by death, illness or any other cause to continue to exercise his or her functions in relation thereto and 2 or more judges who heard the proceedings remain, then, -

(a) those proceedings shall continue; and

- (b) the Court shall remain and be deemed to be duly constituted for the purposes of the continuation and determination of the proceeding; and
- (c) any determination, including a reserved judgment, shall be in accordance with a decision of the majority of the remaining judges but otherwise, the decision appealed against shall stand.

57. Right of audience in the Court of appeal - (1) In any proceeding in the Court of Appeal, whether criminal or civil, any party may appear for himself or herself or be represented by a barrister or solicitor.

(2) No party shall be represented by an agent save in exceptional circumstances and with special leave of the Court.

(3) A corporation shall be represented by a barrister or solicitor.

Appeals in Civil Cases

58. Right to appeal - (1) A party to a judgment of the High Court may appeal against that judgment, –

- (a) subject to this section; and
- (b) if notice of appeal is filed within the time and manner prescribed by Rules of Court.

(2) An appeal shall lie to the Court of Appeal as of right -

- (a) if the High Court certifies that the case involves a substantial question of law as to the interpretation or effect of any provision of the Constitution;
- (b) when the matter in dispute on the appeal amounts to or is of the value of \$4,000 or more;
- (c) from any judgment of the High Court involving any question as to the interpretation or application or effect of any provision of Part IVA of the Constitution.

Court – (3) An appeal shall lie to the Court of Appeal with leave of the High

(a) if, in the opinion of the High Court, the question involved in the appeal ought to be submitted to the Court of Appeal for decision because of –

- (i) its general or public importance; or
- (ii) the magnitude of the interest affected;

(b) from a judgment of the High Court in relation to judicial review, any extraordinary remedies, injunctions or statutory relief;

(c) where the justice of the case so requires.

(4) Notwithstanding subsection (2)(b) and unless with leave of the High Court, an appeal shall not lie to the Court of Appeal from a judgment of the High Court -

High Court –

- (a) on an appeal from a judgment of one or more Justices of the Peace;
 - (b) made with the consent of the parties;
 - (c) as to costs only.
- (5) No appeal shall lie to the Court of Appeal from a judgement of the High Court –
- (a) allowing an extension of time for appealing a decision of the High Court;
 - (b) giving unconditional leave to defend an action;
 - (c) where it is provided by an enactment that the judgment is to be final;
 - (d) from an interlocutory judgment of the High Court, except -
 - (i) where the liberty of the subject or the custody of infants is concerned;
 - (ii) where an interim injunction or interim relief of an administrative nature or the appointment of a receiver is granted or refused;
 - (iii) a judgment which -
 - (A) determines the claim of any creditor; or
 - (B) refuses the claim of any creditor;
 - (C) determines liability of any contributory or the liability of any director or other officer under the Companies Act 1970-71 in respect of misfeasance or otherwise.
 - (iv) a judgment or order in an admiralty action determining liability;
 - (v) a judgment refusing unconditional leave to defend an action;
 - (vi) in such other cases as may be prescribed by Rules of Court.
- (6) For the purposes of this section, the term "judgment" includes any judgment, decree, order, writ, declaration, or other determination.
- (7) Nothing in this section shall affect the jurisdiction of the Court of Appeal to grant special leave to appeal from a judgment of the High Court under Article 60(2) of the Constitution. Applications for special leave to appeal to the Court of Appeal under Article 60(2) of the Constitution shall be made in accordance with Rules of Court.
- (8) Rules of Court may prescribe –
- (a) the procedure for applications for leave to the High Court;
 - (b) the procedure for applications for special leave to the Court of Appeal;
 - (c) the manner and time within which security for costs are fixed and paid;
 - (d) the consequences of non-compliance with any such rules or orders made pursuant to the rules;
 - (e) the incidental powers of a Judge and Registrar relating to such order.

59. Powers to be exercised by President or Judge of Court of Appeal - The President of the Court of Appeal or a Judge of the Court of Appeal who is not also a Judge of the High Court may exercise the following powers of the Court in its civil jurisdiction -

- (a) to give leave to appeal if the High Court has refused leave to appeal or when no Judge of the High Court is readily available to consider an application for leave;
- (b) to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;
- (c) to give directions as to service;
- (d) to stay execution or make an interim order to prevent prejudice to the claims of any party pending an appeal;
- (e) to grant an adjournment of the hearing of any appeal;
- (f) to give judgment by consent or make any order by consent;
- (g) to dismiss an appeal for want of prosecution or for other causes specified in the Rules;
- (h) to dismiss an appeal on the application of the appellant;
- (i) to deal with costs and other matters incidental to the exercise of the powers conferred by this section;
- (j) generally, to hear any application, make any order or give any direction that is incidental to an appeal or intended appeal.

60. Powers of Court - (1) For all the purposes of and incidental to the hearing or determination of an appeal against any decision or determination of the High Court, and the amendment or enforcement of any judgment or order made thereon, the Court of Appeal has, in addition to all other powers exercisable by it, all the jurisdiction of the High Court and may -

- (a) confirm, reverse or vary the decision or determination of the High Court;
- (b) remit the appeal or any matter arising thereon to the High Court with such declaration or directions as the Court of Appeal thinks proper;
- (c) order a retrial or make any such order as could be made in pursuance of an application for a new trial;
- (d) adjourn the hearing from time to time;
- (e) draw any inference of fact that might have been drawn, or give any judgment or make any order that might have been given or made by the original court, and make such further or other order as the case requires;
- (f) when the appeal is by case stated, amend the case stated or remit it, with such declarations or directions as the Court thinks proper, for hearing and determination by the original

court or for restatement or amendment or for a supplemental case to be stated thereon;

- (g) make such order as to the costs and expenses incurred in the appeal and in the proceedings in the High Court as the Court of Appeal thinks fit;
- (h) make such other order as is necessary for the due determination of the appeal.

(2) The powers of the Court of Appeal in respect of an appeal to which subsection (1) applies -

- (a) are not restricted by reason of any interlocutory order from which there has been no appeal; and
- (b) may be exercised notwithstanding that a notice of appeal or notice of cross-appeal -
 - (i) has not been given in respect of any particular part of the decision of the High Court; or
 - (ii) has not been given by any particular party to the proceedings in the High Court; or
 - (iii) does not specify any ground for allowing the appeal or for affirming or varying the decision of the High Court.

61. Appeal by way of rehearing - (1) All appeals to the Court of Appeal shall be by way of rehearing by reference to the evidence heard at the trial as certified by the High Court.

(2) The Court of Appeal may admit and hear further evidence in its discretion.

(3) Such further evidence may be given in such manner and at such place and time as the Court or a Judge may direct.

62. Transfer of civil proceedings from High Court to Court of Appeal - (1) If the circumstances of a civil proceeding pending before the High Court are exceptional, the High Court may order that the proceeding be transferred to the Court of Appeal.

(2) Without limiting the generality of subsection (1), the circumstances of a proceeding may be considered exceptional if -

- (a) a party to the proceeding intends to submit that a relevant decision of the Court of Appeal has been incorrectly decided;
- (b) the proceeding raises one or more issues of considerable public importance that need to be determined urgently, and those issues are unlikely to be determined urgently if the proceeding is heard and determined by both the High Court and the Court of Appeal;
- (c) the proceeding does not raise any question of fact or any significant question of fact, but does raise one or more questions of law that are the subject of conflicting decisions of the High Court.

(3) In deciding whether to transfer a proceeding under subsection (1), a Judge of the High Court must have regard to the following matters -

- (a) the primary purpose of the Court of Appeal as an appellate court;
- (b) the desirability of obtaining a determination at first instance and a review of that determination on appeal;
- (c) whether the proceeding raises any question of fact or any significant question of fact;
- (d) whether the parties have agreed to the transfer of the proceeding to the Court of Appeal;
- (e) any other matter that the Judge considers that he or she should have in regard to the public interest.

(4) The fact that the parties to a proceeding agree to the transfer of the proceeding to the Court of Appeal is not in itself a sufficient ground for an order transferring the proceeding.

(5) If the High Court transfers a proceeding under subsection (1), the Court of Appeal has the jurisdiction of the High Court to hear and determine the proceeding.

63. Stay of execution - An appeal to the Court of Appeal shall not operate as a stay of execution of any judgment in the High Court unless the High Court or the Court of Appeal otherwise orders.

64. Irregularities - No judgment of the High Court on appeal to the Court of Appeal shall be set aside on the grounds of either -

- (a) error or irregularities in the proceedings in the High Court;
- or
- (b) any defect of form or substance in the judgment; or
- (c) improper admission or rejection of evidence,

unless the Court of Appeal is of the opinion that a miscarriage of justice has occurred.

65. Costs - The Court of Appeal shall have power to make such order as to costs of an appeal or any other proceeding in that Court as may seem just.

66. Enforcement of orders - The determination of the Court of Appeal on an appeal from the High Court shall be transmitted to the Registrar of the High Court under the seal of the Court of Appeal, and -

- (a) judgment shall thereupon be entered in the High Court in conformity with that determination; or
- (b) such other proceedings by way of a new trial or otherwise shall be taken in the High Court as are required by such determination.

Appeals in Criminal Cases

67. Appeals as of right - (1) A person convicted before a Judge of the High Court sitting with or without a jury may appeal as of right to the Court of Appeal against -

- (a) his or her conviction; and/or
- (b) his or her sentence if the sentence is not fixed by law and -
 - (i) is one of imprisonment; or
 - (ii) is a fine exceeding \$200.

(2) The Solicitor-General may appeal as of right against the adequacy of any sentence imposed by a Judge of the High Court whether imposed after a trial or an appeal from a Justice or Justices of the Peace under section 76.

68. Appeals with leave - (1) A person convicted before a Judge of the High Court sitting with or without a jury -

- (a) whose sentence is a fine less than \$200; or
- (b) who has been sentenced to a community sentence; or
- (c) who has been convicted and discharged,

may, with the leave of a Judge of the High Court, appeal to the Court of Appeal against his or her conviction or sentence or both conviction and sentence.

(2) Both the prosecutor and any person convicted by a Justice or Justices of the Peace who has appealed to a Judge of the High Court under section 76(7) may further appeal to the Court of Appeal against the decision of the Judge of the High Court, with the leave of a Judge of the High Court.

(3) If a Judge of the High Court refuses leave to appeal under subsections (1) or (2), the intended appellant may apply in accordance with the Rules of Court to a single Judge of the Court of Appeal who is not also a Judge of the High Court for leave to appeal to the Court of Appeal.

(4) Leave to appeal may be given on conditions as to filing the appeal within a stated period but there shall be no condition imposed requiring the giving of security for costs of the appeal.

69. Powers of Court on appeal - (1) The Court on an appeal against conviction shall allow the appeal if it thinks that the verdict of the jury or the decision of the Judge of the High Court should be set aside on the ground that -

- (a) the verdict or decision is unreasonable or cannot be supported having regard to the evidence; or
- (b) the judgment is materially affected by a wrong decision of a question of law; or
- (c) there was a miscarriage of justice,

but otherwise, shall dismiss the appeal -

Provided that the Court may, notwithstanding that it is of the opinion that the point raised in 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 provisions of this Act the Court shall, if it allows an appeal against conviction, quash the conviction, and direct a judgment or verdict of acquittal to be entered or, if the interests of justice so require, order a new trial at such time and place as the Court may think fit.

(3) If it appears to the Court of Appeal that an appellant, though not properly convicted on some count or part of the information, was guilty of some other offence, the Court may substitute a verdict of guilty of that other offence and pass such sentence in substitution for the sentence passed at trial as may be warranted in law for that other offence, not being a sentence of greater severity than that imposed in the High Court.

(4) On an appeal against sentence the Court may quash the sentence passed at the trial and pass a sentence (whether more or less severe) in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal.

(5) On an appeal with leave given under section 68(2), the Court of Appeal shall, with all necessary modifications, have the same powers as it has under this section.

70. Notice of appeal - (1) If a person intends to appeal as of right to the Court or to obtain the leave of the High Court to appeal, that person shall give notice of appeal or notice of the application for leave to appeal in such manner and in such time as may be directed by Rules of Court after the date of his or her conviction.

(2) The time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court.

(3) For the purposes of this section, the "date of conviction" shall, be the date on which the High Court sentences or otherwise deals with the offender.

71. Provision of record and security for costs - (1) The Registrar of the Court of Appeal shall take all necessary steps for facilitating the prompt hearing of any appeal or application for leave to appeal of which notice is given and shall obtain and lay before the Court in proper form all documents, exhibits, and other things connected with the proceedings in the Court from which decision is appealed and which appear necessary for the proper determination of the appeal or application.

(2) For every appeal against conviction or sentence, the Registrar must prepare the case on appeal comprising –

(a) the trial transcript;

(b) the trial Judge's summing up to the jury, if the Registrar considers the summing-up relevant to the grounds of appeal;

(c) any other documents, exhibits or other things connected with the proceedings that the Registrar considers are relevant to the grounds of appeal.

(3) Any documents, exhibits, or other things connected with the proceedings on the trial of any person who, if convicted, is entitled or may be authorised to appeal against conviction or sentence shall be kept in the custody of the High Court,

for such time and subject to such powers for the conditional release from that custody as the Rules of Court provide.

(4) The record prepared by the Registrar under subsection (1) shall be furnished to –

- (a) the prosecutor and the appellant or applicant; and
- (b) the Registrar of the Court of Appeal –
 - (i) where the appeal is of right;
 - (ii) if the application for leave to appeal is pursuant to section 68(3);
 - (iii) if the application for leave to appeal is to the High Court and leave is granted.

(5) No appellant or applicant for leave to appeal shall be required to pay for the costs of producing the record or to pay for a copy thereof.

(6) No payment of Court fees and no security for costs shall be paid by any appellant or any applicant for leave to appeal in criminal proceedings in the Court of Appeal.

72. Release from custody - (1) When a notice of appeal as of right against conviction or sentence has been given or where leave to appeal to the Court of Appeal has been given by a Judge of the High Court or by a Judge of the Court of Appeal, the High Court may release the appellant from custody on bail pending the determination of the appeal.

(2) Any person so released on bail may, for proper reason, be at any time by order of the High Court arrested and committed to prison.

(3) Any period during which an appellant has been at large on bail shall not be computed as part of any term of imprisonment to which he or she has been sentenced.

(4) The provisions of sections 83 to 95, 128 to 129 and 132 of the Criminal Procedure Act 1980-81 shall apply with necessary modifications to the granting of bail under this section as if the appellant were a defendant who had been granted bail.

(5) Any fine, community sentence or order for restitution of property or compensation imposed on an appellant by the High Court shall be stayed pending an appeal to the Court of Appeal either against conviction or against that particular sentence.

(6) An appeal to the Court of Appeal shall not operate as a stay of sentence of imprisonment unless an order is made under subsection (1) of this section.

73. Abandonment or non-prosecution of appeal - (1) An appellant may at any time abandon the appeal by giving notice to the Registrar.

(2) If such notice is given, any sentence imposed on the appellant by the High Court shall take immediate effect.

(3) A constable may arrest without warrant an appellant who has abandoned his or her appeal under this section and who had been sentenced to imprisonment but has not completed all of that sentence.

74. Appeal to be by way of rehearing - (1) All appeals to the Court of Appeal in its criminal jurisdiction shall be by way of rehearing.

(2) The appeal shall be determined on the evidence given at the trial in the High Court.

(3) No further evidence shall be heard or admitted without the leave of the Court of Appeal or a single Judge thereof.

75A. Orders for hearing of appeal - (1) A single Judge of the Court of Appeal may give directions as to the hearing of the appeal in accordance with the justice of the case and the need for the speedy resolution of criminal appeals.

(2) Without restricting the powers of the Judge in subsection (1), orders may be made for hearing the appeal on written submissions (by consent of the appellant) and/or by video or telephone links.

(3) An appellant convicted by a Judge of the High Court sitting with or without a jury is entitled to be present at the hearing of the appeal against conviction unless the appellant has consented to the appeal being considered by the Court of Appeal on written submissions.

(4) The right of an appellant to be present at the hearing of the appeal is satisfied if the appellant participates in a video conference.

(5) Any rules for video conferences for civil appeals to the Court of Appeal and for proceedings in the High Court shall apply with necessary modifications to criminal appeals.

(6) The Superintendent of any prison in which an appellant is detained shall upon notification by the Registrar of the hearing of an appeal brought by that appellant and without further authority than this subsection, cause the appellant to be taken for the hearing of the appeal to the Court or to some other place in the Cook Islands where any video and conference hearing of the appeal is to take place.

(7) Any appellant to whom subsection (3) does not apply may make application to a Judge of the High Court or to a Judge of the Court of Appeal for an order allowing him or her to be present at the hearing of his or her appeal. If such an order is made, the Superintendent of any prison, if the appellant is in custody, shall cause the appellant to be present at the hearing as if the appellant were a person to whom subsection (3) applied.

75B. Appeals in quasi-criminal proceedings - (1) An appeal shall lie to the Court of Appeal from any order of imprisonment or a fine for contempt of court made by a Judge of the High Court or by one or more Justices of the Peace.

(2) An appeal shall lie to the Court of Appeal in any civil or criminal proceeding against the grant or refusal to grant an application for a writ of *habeas corpus*.

(3) Any appeal under subsections (1) and (2) shall be made by leave of a Judge of the High Court or a Judge of the Court of Appeal.

(4) The provisions of this Part of the Act relating to criminal appeals shall apply to such appeals with all necessary modifications.

(5) For the purposes of disposing of an appeal under this section the Court may exercise any of the powers of the High Court or remit the case to that Court for determination.

75C. Powers of President - (1) The President of the Court of Appeal or a Judge of the Court of Appeal who is not also a Judge of the High Court may exercise any of the following powers of the Court of Appeal in its criminal jurisdiction -

- (a) to give leave to appeal;
- (b) to extend the time within which notice of appeal or an application for leave to appeal may be given;
- (c) to allow an appellant to be present at any proceedings;
- (d) to order a witness to attend for examination;
- (e) to admit an appellant to bail and make any incidental order or direction;
- (f) to hear and determine such other matters preliminary or incidental to an appeal as may be prescribed.

(2) The President may, in any cause or matter pending before the Court of Appeal, give any directions incidental to the appeal and not involving the decision of the appeal.

75D. Power to reserve question for Court of Appeal - (1) A Judge of the High Court before whom any accused person is tried may, either during or after the trial, reserve for the opinion of the Court of Appeal any question of law arising either on the trial or on any of the proceedings preliminary, subsequent, or incidental thereto, or arising out of the direction of the Judge.

(2) If the decision of the question may in the opinion of the High Court depend on any questions of fact, that Court may in its discretion ask the jury questions as to the facts separately, and the Court shall make a record of those questions and the findings thereon.

(3) Either the prosecutor or the accused may during the trial apply to the High Court to reserve any such question as aforesaid, and the High Court, if it refuses so to reserve it, shall nevertheless make a record of the application unless it considers the same to be frivolous.

(4) If the result of the trial is acquittal the accused shall be discharged subject to being arrested if the Court of Appeal orders a new trial.

(5) If the result of the trial is conviction, the High Court may in its discretion respite the execution of the sentence or postpone sentence until the question reserved has been decided by the Court of Appeal.

75E. Rules - (1) Rules of Court may provide for appeals, procedures and applications in the Court of Appeal whether civil or criminal.

(2) Where no Court of Appeal Rule is applicable, the Rules of the High Court shall apply with necessary modification.

(3) In the event that Rules of Court are either generally or in respect of a particular cause or matter inadequate, the President may by Practice Note make provision for such inadequacy.

75F. Transitional - (1) The repeal of sections 51 to 75 of the principal Act shall not affect -

- (a) the validity, invalidity, effect or consequence of anything already done or suffered thereunder;
 - (b) any status or capacity acquired thereunder.
- (2) Subject to subsection (1), every proceeding before the High Court and the Court of Appeal on the commencement of this Act shall be dealt with in accordance with the provisions of this Act.”

This Act is administered by the Ministry of Justice