Criminal procedures

1. Common criminal offences

1.1 Introduction

The purpose of this chapter is to assist you in dealing with common offences.

Each offence contains:

- a reference and description of the offence itself;
- the elements of the offence, which the prosecution is required to prove;
- a commentary, which provides useful information you will need to consider; and
- a maximum sentence you may pass if the defendant is found guilty.

1.2 Description

At the top of each offence there is a reference to where the offence is found in legislation and a description of what the offence is.

1.3 Elements

The elements section lists all the general elements needed to prove any offence, and the specific elements required for the particular offence.

The elements section is very helpful as it provides a guide or method for you to make sure the prosecution has proved all that is required before a person can be found guilty. You should take careful notice that all the elements are proved by the prosecution.

The elements contained in these offences are intended for use as a handy reference on the bench and they do not replace careful study of the legislation itself.

When you are hearing an offence which is not listed here, you will need to list your own elements before hearing the case. By checking the legislation and considering what has been done here, you will develop the ability to identify the elements of any offence yourself.

1.4 Commentary

Where appropriate, useful case law and other commentary has been added to guide you further. It contains information about the identification of the defendant, what the prosecution and the defence need to prove, and to what standard.

Generally, the defence does not need to prove anything. Occasionally, the legislation requires the defence to specifically prove something. Where possible, definitions have been provided.

1.5 Sentencing

The sentencing section describes the maximum sentence for each offence. You do not have to pass the maximum sentence—that is reserved for the most serious breaches of the particular offence.

Imprisonment should be used only for the most serious breaches and where an alternative sentence is not appropriate.

See the chapter "Sentencing".

1.6 Common criminal offences

Criminal Offences Act (COA)

- Common assault, s 112
- Theft, ss 143, 145 or taking things according to Tongan custom, s 147
- Receiving, s 148
- Trespass, s 188
- Grievous bodily harm, s 106 or bodily harm, s 107
- Assault obstruction, s 113
- Housebreaking, s 173
- Robbery, s 154
- Embezzlement, s 158
- Falsification of accounts, s 159
- Fraudulent conversion of property, s 162

Defamation Act (DA)

- Defamation, s 5

Order in Public Places Act (OIPPA)

- Drunkenness, s 3(j) and (k)

1.7 Common assault

Common assault: s 112 COA	Any person is guilty of an offence who wilfully and without lawful justification: ➢ strikes at or actually hits another person with their hand or with anything held in their hand; ➢ seizes or tears the clothes of another person; ➢ pushes, kicks or butts another person; ➢ spits or throws liquid or any substance on or at another person; ➢ sets a dog on another person; ➢ applies or attempts to apply force to another person directly or indirectly; or ➢ threatens by any act or gesture to apply force to another person if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, the present ability to effect their purpose.

Elements of common assault	Every element below must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the common assault is alleged to have taken place. ➢ A place where the common assault was alleged to have been committed. **Specific** The defendant did **wilfully** and **without lawful justification** any of the following acts: ➢ Struck at or actually hit another person with their hand or with some object held in their hand. ➢ Seized or tore the clothes or another person. ➢ Punched, kicked or butted another person. ➢ Spat or threw liquid or any other substance on or at another person. ➢ Set a dog on another person. ➢ Applied or attempted to apply force to another person, directly or indirectly. ➢ Threatened (by any act or gesture) to apply force to another person and caused the person to whom the threat or strike, force, seizure, punch , kick, spit, liquid or dog was aimed at, to believe on reasonable grounds that the defendant had the present ability to effect their purpose.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who used physical force.

	Wilfully "Wilfully" is an important element of this offence. The prosecution will need to prove the defendant did their actions 'wilfully' and not by mistake or accident: see R v Sheppard [1981] AC 394; [1980] 3 All ER 899. **Without lawful justification** The prosecution will need to provide evidence that the defendant did not have any lawful reason for their actions. **Context** The context in which the alleged assault occurred is very important and you will need to give careful consideration to: ➢ what the situation was; and ➢ where the alleged assault occurred. If the person assaulted is injured, then a more serious assault charge might be more appropriate.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. For the statutory defence of lawful excuse or justification, the defendant will have to establish this to your satisfaction on the balance of probabilities (ie: more likely than not). The prosecution must then rebut this beyond reasonable doubt, eg: they must show that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable. (See the chapter on Criminal Responsibility).
Sentence	The maximum sentence is a fine not exceeding $5,000 or imprisonment for any period not exceeding one year; or both.

1.8 Theft and/or taking things according to Tongan custom

Theft: ss 143 and 145 COA; or Taking things according to Tongan custom:	Theft is the dishonest taking without any colour of right of anything capable of being stolen, with intent either to deprive: ➢ the owner permanently of such thing; or ➢ any other person permanently of any lawful interest possessed by them in such thing; and

s 147 COA	with the intention of converting such thing to the use of any other person without the consent of the owner or person possessing the property. "Stealing" has the same meaning: ss 143 and 145 COA. Every Tongan is guilty of an offence who, following the former Tongan custom, takes from one of their relatives anything capable of being stolen without the permission of its owner and with intent to deprive the owner permanently deprive of such thing: s 147 COA.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the common assault is alleged to have taken place. ➢ A place where the common assault was alleged to have been committed. **Specific** ➢ The defendant took anything capable of being stolen. ➢ The defendant did this without the consent of the owner. ➢ The defendant did this with the intent to either permanently deprive: • the owner of the thing; or • any other person of their lawful interest in the thing. ➢ The defendant did this dishonestly and without colour of right; ➢ The defendant did this with the intention of converting the thing to the use of any other person without the consent of the property owner or the person in possession. **Or (for s 147)** ➢ The defendant is a Tongan. ➢ The defendant took anything capable of being stolen from one of their relatives. ➢ The defendant was following the former Tongan custom. ➢ The defendant did this without the permission of the owner. ➢ The defendant did this with the intent to permanently deprive the owner of the thing.

Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who committed the offence. **Things capable of being stolen** Section 144 defines those things which are capable of being stolen. The things capable of being stolen are: ➢ Every animate thing which is the property of any person. ➢ Any inanimate thing if it is moveable or capable of being made moveable and has been made moveable even though it has been made moveable only to steal it. ➢ Money and all other property, real or personal, including things in action and other intangible property. **Taking** Theft requires the moving of the property by the defendant. If the defendant did not move the property in the slightest degree, then the offence does not amount to theft, although it may be attempted theft. **Colour of right** If the property which the defendant is charged with stealing was taken by the defendant by mistake or in the honest belief that they had a right to it, the defendant cannot be convicted of theft. **Permanently deprive** If the defendant had the intention of returning the thing taken to the owner, they cannot be convicted of theft. The prosecution must show that the defendant intended, at the time they took the thing, to keep the thing or use it as their own. It is the defendant's intention that is important. If the defendant later sells or gives the property away, they have used it. **Ownership** Whether the owner is named or not, ownership of the property must be proved by the prosecution as an essential element of the offence.

	For s 147, the prosecution must prove that the owner of the goods that were taken, were owned by a relative of the defendant. **Consent** The prosecution must also prove that the owner did not consent to the item being taken.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence such as colour of right (see above). The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution must then rebut beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum sentence is: ➢ where the value of the thing stolen does not exceed $10,000, imprisonment for any period not exceeding three years; ➢ where the value of the thing stolen exceeds $10,000, imprisonment for any period not exceeding seven years. The same maximum sentence applies for s 147 as for theft.

1.9 Receiving	
Receiving: s 148 COA	Any person is guilty of an offence who receives any property knowing or believing it to be stolen or obtained in any way under circumstances which amount to a criminal offence.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence is alleged to have taken place. ➢ A place where the offence was alleged to have been committed.

	Specific ➢ The defendant received any property. ➢ The defendant knew or believed the property to be stolen or obtained in any way which amounted to a criminal offence.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who received the stolen property. **Relation to principal offender** A defendant may be convicted of the offence of receiving property whether or not the principal offender has been convicted or is not otherwise amenable to justice: s 148(3) COA. **Receiving** For the purposes of all laws relating to receivers or receiving, a person shall be treated as receiving property if they dishonestly undertake or help keep, remove, dispose, or realize that property or arrange to do so: s 148(5) COA. **Intention** The prosecution will need to provide evidence that the defendant knew or believed the property had been stolen or obtained in any way which amounted to a criminal offence.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence such as colour of right (see above). The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution must then rebut this defence beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum sentence is the same as for theft ie: ➢ where the value of the property received does not exceed $10,000, imprisonment for any period not exceeding three years;

	➢ where the value of the property received exceeds $10,000, imprisonment for any period not exceeding seven years.
1.10 Trespass	
Trespass: s 188 COA	Any person is guilty of an offence who, without lawful excuse, enters upon the tax allotment, plantation, garden or other land belonging to or in possession of another person. The prosecution of this offence must be initiated by the owner or occupier against whom the trespass was committed.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the trespass is alleged to have taken place. ➢ A place where the trespass was alleged to have been committed. **Specific** ➢ The defendant trespassed upon a tax allotment, plantation, garden or other land. ➢ The land belonged to or was in the possession of another person. ➢ The defendant had no lawful excuse for entering the land.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. **Trespass** A trespasser is anyone who enters onto the property of another without being on lawful business.

	Owner or occupier The person who complains to the police and/or requests to have charges laid against the defendant for trespass on the property must either own the property or being in legal possession of it.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence such as colour of right (see above). For the statutory defence of lawful excuse or justification, the defendant will have to establish this to your satisfaction, on the balance of probabilities (ie: more likely than not). The prosecution has an opportunity to rebut this defence beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence:	The maximum sentence for trespass is a fine not exceeding $1,000 of which half shall be paid to such owner or occupier and the other half to the Government. If any damage to crops or land has been caused by such entry, the defendant must pay compensation up to an amount not exceeding $4,000. If the damage occurs on private property compensation shall be paid to the owner or occupier and if on Government property shall be paid to the Government. If the fine and compensation is not paid within the required time period, then a maximum sentence not exceeding four months may also be imposed.

1.11 Grievous bodily harm or bodily harm

Grievous bodily harm: ss 106 and 107 COA	Any person is guilty of an offence who wilfully and without lawful justification causes grievous harm to any person in any manner or by any means: s 106 COA. Any person is guilty of an offence who wilfully and without lawful justification causes harm to any person in any manner or by any means whatsoever: s 107 COA.
Elements	Every element must be proved by the prosecution beyond reasonable doubt.

	General ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence charged is alleged to have taken place. ➢ A place where the offence was alleged to have been committed. **Specific** ➢ The defendant caused grievous harm to a person in any manner or by any means: s 106. or ➢ The defendant caused harm to a person in any manner or by any means: s 107. ➢ The defendant did this wilfully. ➢ The defendant did this without lawful justification.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who did the offence. **Grievous harm** Grievous harm means: ➢ any harm endangering life; ➢ the destruction or permanent disabling of any external or internal organ, member or sense; ➢ any severe wound; ➢ any grave permanent disfigurement; or ➢ the transmitting to another person, by any means, of the human immunodeficiency virus (HIV): s 106(2) COA. **Degree of harm** It is vital that you have evidence to establish the degree of harm caused. This is usually medical evidence from a doctor. You may then decide whether it reaches the level required for this offence.

	If the degree of harm does not reach the required level for this offence, consider lesser and included offences, under ss 107 and 112 COA. **Harm** Harm for s 107 means: ➢ any injury which seriously or permanently injures health or is likely so to injure health; ➢ any injury involving serious damage to any external or internal organ, member or sense, short of permanent disablement; ➢ any wound which is not severe; or ➢ any permanent disfigurement which is not of a serious nature: s 107(2) COA. An offence under s 107 may be the offence of serious causing bodily harm or the offence of simple causing bodily harm: s 107(3). **Wilfully** "Willfully" is an important element of this offence. The prosecution will need to prove the defendant did their actions 'wilfully' and not by mistake or accident: see *R v Sheppard* [1981] AC 394; [1980] 3 All ER 899. **Lawful justification** Because this is an element of the offence, the prosecution will need to prove the defendant did not have lawful justification for their actions.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. For the statutory defence of lawful excuse or justification the defendant will have to establish this to your satisfaction, on the balance of probabilities (ie; more likely than not). The prosecution may then rebut this beyond reasonable doubt. For example, they must show that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable. (See the chapter on Criminal Responsibility).
Sentence	The maximum penalty is imprisonment not exceeding: ➢ 10 years for grievous bodily harm; ➢ five years for serious causing bodily harm; or ➢ three years for simple causing bodily harm.

1.12 Assault, obstruction

Assault, obstruction: s 113(a) COA	Any person is guilty of an offence who assaults any person with intent to commit an offence, or to resist or prevent the lawful apprehension or detention of themselves or of any other person, or to rescue any person from lawful custody.
Assault obstruction: s 113(b) COA	Any person is guilty of an offence who assaults, obstructs or resists any police officer acting in the execution of their duty or any person in aid of that officer.
Assault obstruction: s 113(c) COA	Any person is guilty of an offence who assaults, obstructs or resists any person acting in the lawful execution of any process against any property or with intent to rescue any movable property taken under that process or under any lawful distress.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence charged is alleged to have taken place. ➢ A place where the offence was alleged to have been committed. **Specific** **s 113(a)** ➢ The defendant used physical force on another person. ➢ The defendant intended to commit an offence. or ➢ The defendant used physical force on another person. ➢ The defendant resisted or prevented the lawful apprehension of themselves or any other person for an alleged offence. or ➢ The defendant used physical force on another person. ➢ The defendant attempted to rescue another from lawful custody. **s 113(b)** ➢ The defendant assaulted, obstructed or resisted a police officer acting in execution of their duty; or

	➢ The defendant assaulted, obstructed or resisted any person aiding the officer. s 113(c) ➢ The defendant assaulted, obstructed or resisted any person acting in the lawful execution of any process against any property; or ➢ The defendant assaulted, obstructed or resisted any person with the intent to rescue any movable property taken under a lawful process or under any lawful distress.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove it was the defendant who committed the offence. **Intent** s 113(a) It is important to remember that the assault must be done: ➢ with the intent to commit an offence; ➢ to resist any person's apprehension or detention; or ➢ to rescue any person from lawful custody. The prosecution will need to prove the defendant intended at least one of the three intentions described. It is the intention of the defendant that is important. You may have to infer this from the circumstances.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution may then rebut beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum penalty is imprisonment for a term not exceeding one year or a fine not exceeding $5,000.

1.13 Housebreaking	
Housebreaking: s 173 COA	A person is guilty of an offence who enters any building or part of a building as a trespasser and: ➢ with intent to commit any crime; or ➢ they committed or attempted to commit any crime in the building or that part of it.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence charged is alleged to have taken place. ➢ A place where the offence was alleged to have been committed. **Specific** ➢ The defendant entered any building or part of a building. ➢ The defendant entered with an intent to commit any crime. Or ➢ The defendant having entered any building or part of a building. ➢ The defendant then committed or attempted to commit any crime in the building or part of it.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who committed the offence.

	Building "Building" also includes an inhabited vehicle or vessel and applies to any vehicle or vessel at times when the inhabitant is or is not physically present: s 173(2) COA. **Enters** "Enters" means the putting of any part of the body of the defendant or any part of any instrument used by him or her inside the building: s 173(3) COA.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution may then rebut beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	An offence under this section may be the offence of serious housebreaking or the offence of simple housebreaking: s 173(4) COA. The maximum penalty is imprisonment not exceeding: ➢ 10 years for serious housebreaking; ➢ three years for simple housebreaking.

1.14 Robbery	
Robbery: s 154 COA	Every person is guilty of an offence who takes anything capable of being stolen through violence or threats of injury to the owner or person in lawful possession of the thing taken or to the property of the person to put them in fear and to overcome their opposition to the taking.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence is alleged to have taken place. ➢ A public place where the offence was alleged to have been committed.

	Specific ➢ The defendant took anything capable of being stolen. ➢ The defendant used violence or threats of injury to the owner or person in lawful possession of the thing taken, to put them in fear and to overcome their opposition to the taking. Or ➢ The defendant took anything capable of being stolen. ➢ The defendant used violence or threats of injury to any property of the owner or person in lawful possession to put them in fear and to overcome their opposition to the taking.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who was committing the offence. **Anything capable of being stolen** See the definition of "things capable of being stolen" in s 144 COA. **Violence or threat of injury** There must be actual violence or threat of injury. This violence may be to the owner, the person in lawful possession of the property or to the actual property of the person concerned and put them in such fear to overcome their opposition to the taking of the property.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution must then rebut beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum penalty is imprisonment not exceeding 10 years.

	If the defendant is armed with an offensive weapon when they commit armed robbery, then imprisonment can be for any period not exceeding 20 years.
1.15 Embezzlement	
Embezzlement: s 158 COA	Any person is guilty of an offence who, as an employee (or as a clerk or servant), fraudulently converts to their own use or benefit, or that of someone else, all or part of any money, valuable security or property which was delivered to or received by them for their employer. This section does not apply to persons in the public service.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence charged is alleged to have taken place. ➢ A public place where the offence was alleged to have been committed. **Specific** ➢ The defendant was employed. ➢ The defendant converted to their own use or benefit, or to the use or benefit of any other person, all or part of any money, valuable security or property. ➢ The money or property in question was delivered to or received by the defendant for their employer. ➢ The defendant did so fraudulently.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove it was the defendant who committed the offence.

	Valuable security "Valuable security" means any document which entitles or is evidence of the title of any person to any thing or proprietary right of any kind. A valuable security is given the same value as the title to the thing or proprietary right of which it is evidence: s 2 COA. **Fraudulently** The defendant must have had an intention to defraud. A fraud is complete once a false statement is made by a defendant who knows the statement is false and the victim parts with his or her property on the basis of that statement: see *R v Denning* [1962] NSWR 173.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution must then rebut beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum penalty is imprisonment not exceeding seven years. Because this offence involves a breach of trust, unless exceptional mitigating factors are present, conviction should always result in a term of imprisonment.

1.16 Falsification of accounts

Falsification of accounts: s 159 COA	Every person is guilty of an offence who, as an employee privately or working for the government, wilfully and with intent to defraud: ➢ destroys, alters or falsifies any book, valuable security, account or document which belongs to their employer; ➢ makes or agrees to make any false entry in any such book or document; or ➢ omits or alters or agrees to omit or alter any material particular in any such book or document.
Elements	

	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence charged is alleged to have taken place. ➢ A place where the offence was alleged to have been committed. **Specific** ➢ The defendant was employed privately or by the government. ➢ The defendant destroyed, altered or falsified any book, valuable security, account or document belonging to their employer. or ➢ The defendant made or concurred in making any false entry in any such book or document. or ➢ The defendant omitted or altered or concurred in omitting or altering any material particular in any such book or document. ➢ The defendant did so wilfully. ➢ The defendant did so with intent to defraud.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove it was the defendant who was found on a property unlawfully. **Evidence** Proving this offence will almost always require production of the document in question. For exceptions to this rule, see the evidence chapter. **Mens rea (intention)** There are two mental elements that must be proven for this offence: "intention to defraud" and acting "wilfully". For example, if a defendant altered a document based on wrong information given to them, they may do so wilfully, but without the intention to defraud.

	Intention to defraud The defendant must have had an intention to defraud. A fraud is complete once a false statement is made by a defendant who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *R v Denning* [1962] NSWR 173. **Wilfully** "Wilfully" is an important element of this offence. The prosecution will need to prove the defendant did their actions 'wilfully' and not by mistake or accident: see *R v Sheppard* [1981] AC 394; [1980] 3 All ER 899.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution must then rebut beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum penalty is imprisonment not exceeding seven years.

1.17 Defamation

Defamation: ss 2 and 8 DA	Any person is guilty of defamation who speaks, writes, prints, or otherwise puts into visible form any matter: ➢ damaging to the reputation of another; or ➢ causing another to be exposed to hatred, contempt or ridicule or causing them to be shunned: s 2(1) DA. Anyone who repeats defamatory matter about someone else also is guilty of defamation: s 2(2) DA. The Attorney General will bring all criminal proceedings for defamation by summons and preliminary inquiry before a magistrate: s 8 DA.
Elements	Every element must be proved by the prosecution beyond reasonable doubt.

	General ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence charged is alleged to have taken place. ➢ A place where the offence was alleged to have been committed. **Specific** ➢ The defendant spoke, wrote, printed or otherwise put into a visible form any matter. ➢ The matter was damaging to the reputation of another; Or ➢ The matter caused another to be exposed to hatred, contempt, ridicule or caused the victim to be shunned. Or ➢ The defendant repeated defamatory matter concerning another person.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed. **Identification** In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove that it was the defendant who committed the offence. **Truth of matter** In criminal proceedings for defamation, proving the truth of the matter does not entitle the defendant to be acquitted unless it is also proved that the publication of the matters was done for the public benefit: s 7 DA. **Absolutely privileged statements** No criminal or civil proceedings for defamation of character may be maintained in respect of any matter stated: ➢ in any petition to the King or Legislative Assembly; ➢ during any proceedings in the Legislative Assembly; ➢ during judicial proceedings before any court in Tonga; and ➢ in any communication made as part of official duties by any government official to the Privy Council, Cabinet or another government official: s 9 DA.

	Partially privileged statements No criminal or civil proceeding for defamation of character may be maintained for any bona fide communication: ➢ by a person in discharge of a legal, moral or social duty; ➢ for a matter in which the person making and the person receiving the communication have an interest; and ➢ where the person making the communication was not actuated by anger, ill-will or other improper motive: s 10 DA. **Publication in periodicals** No criminal or civil proceedings for defamation may be brought for publications made at the same time and without malice, in any monthly or more frequent periodical of: ➢ fair and accurate reports of proceedings: • in the Legislative Assembly; • heard in any open court having judicial authority; • of a public meeting; or ➢ fair comments on facts about matters of public interest: s 12 DA. This defence may not be used: ➢ to authorise the publication of any blasphemous or indecent matter; ➢ if it is proved that the defendant has been requested to insert in the periodical an explanation or contradictory statement and has refused or neglected to do so: s 12 DA **Procedure on alleged privileged statements** Whether or not a statement is privileged either partially or absolutely is to be decided by you at trial: s 11(1) DA. If you decide the statement is absolutely privileged, you must enter judgment for the defendant: s 11(2) DA. If you decide the statement is partially privileged, then unless there is evidence that the defendant was motivated by anger, ill-will or other improper motive, you must enter a verdict for the defendant: s 11(3) DA.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

	The defence would have to point to some evidence in support (on the balance of probabilities). The prosecution must then rebut this defence beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum penalty is a fine not exceeding $1,000 for defamation of anyone who is not a member of the royal family and in default of payment, imprisonment for a term not exceeding one year.

1.18 Drunkenness

Drunkenness: s 3(j) and (k) OIPPA	Any person is guilty of an offence, who: ➢ is found drunk in any public place; ➢ in any public place is drunk and incapable, or ➢ is drunk and behaves in a disorderly manner in a public place.
Elements	Every element must be proved by the prosecution beyond reasonable doubt. **General** ➢ The person named in the charge is the same person who is appearing in court. ➢ A date or period of time when the offence charged is alleged to have taken place. ➢ A place where the offence was alleged to have been committed. **Specific** ➢ The defendant was found drunk in a public place. or ➢ The defendant was drunk and incapable in a public place. or ➢ The defendant was drunk and behaved in a disorderly manner in the public place.
Commentary	**Burden and standard of proof** The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

	Identification In court, the prosecution should identify the person charged by clearly pointing out that person in court. The prosecution must provide evidence to prove it was the defendant who committed the offence. **Public place** "Public place" means any public way and any building, place or vessel to which for the time being the public are entitled or permitted to have access either without condition or upon condition of making any payment and any building or place which is for the time being used for any public or religious meeting or assembly or as an open court: s 2 OIPPA. The prosecution must prove by evidence that it was a public place that the defendant was in when drunk. Often a description of the place may be sufficient because you may know it. Otherwise, it needs to be proved that the place was public in nature.
Defences	If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defence would have to point to some evidence in support (on the balance of probabilities), which the prosecution must then rebut beyond reasonable doubt. (See the chapter on Criminal Responsibility).
Sentence	The maximum penalty is a fine not exceeding $1,000 and in default of payment, to imprisonment for any term not exceeding 12 months.

2. First appearances and callovers

2.1 Relevant legislation

- Criminal Offences Act (COA): s 16(2)
- Magistrate's Court Act (MCA): ss 11, 17, 19, 20, 24, 31, 90
- Constitution of Tonga (Constitution): Part I
- Convention on the Rights of the Child (CRC): Articles 3, 12, 16, 37, 40

2.2 Preparation for hearing

2.2.1 Sitting of court

The Magistrate's Court sits regularly at Nuku'alofa (Tongatapu), Lifuka (Ha'apai), Neiafu (Vava'u).

For the Magistrate's Court at 'Eua and in the outer islands of the Ha'apai group, Angaha (Niuafo'ou) and Hihifo (Niuatoputapu), sittings shall be held at such times and places as scheduled by the Chief Magistrate.

The Chief Magistrate may determine additional sittings of the Magistrate's Court at varying times and places: s 6 MCA.

2.2.2 Daily case list

Prior to the beginning of court each day, the clerk shall prepare a list of all the criminal cases to be tried that day. The list must state the name of each defendant, the offence with which they are charged and the name of the prosecutor: s 19 MCA.

2.3 First appearances

2.3.1 Procedural list matters

The court clerk will call the defendant's name. What you do depends on whether the defendant appears or not. The defendant should be present either:

- after arrest and in police custody;
- after arrest and on police bail; or
- on summons.

Every defendant is entitled to be present in court during the whole of their trial unless they misconduct themselves to such an extent that it is impractical to continue the trial: cl 11 Constitution; ss 20 and 24 MCA.

The immediate issues are these:

- appearances or non-appearances by the parties and legal representation including:
  - Whether the defendant has appeared, and if they are the right person (identification of the person charged).
  - If the defendant does not appear, whether the case should be adjourned (because the defendant may have a good reason), or whether you should issue a warrant (see below).
  - Whether an unrepresented defendant understands the charge (see below).

- whether the Information correctly sets out the defendant's personal details;
- whether you have jurisdiction to hear the matter;
- whether the matter is simple enough that you can put the charge to the defendant, or if it is complex enough that you should grant an adjournment so that the defendant can get legal advice (see the "Summary trial" chapter);
- taking pleas (and if relevant any election for trial):
  - If the defendant pleads not guilty, what directions are called for to set the matter down for trial (see the "Summary trial" chapter).
  - If the defendant pleads guilty what needs to be before the court on sentence (for example, victim impact statements; probation, psychiatric, psychological, and reparation reports — see the "Summary trial" and "Sentencing" chapters).
- any application for bail (if made) and whether you remand the defendant at large, on bail, or in custody (see the "Bail applications" chapter).

2.3.2 Conflict of interest

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship that could mean that you might be biased, or could create the appearance of bias, you should not hear the case.

See the "Judicial conduct" chapter to find out more about conflicts of interest.

At first appearance, the matter will generally be adjourned to a fixed date. This adjourned hearing is usually called a callover (see below).

2.3.3 Jurisdiction to hear the matter

Jurisdiction is the power and authority to hear or determine a particular matter. Courts may only act within their jurisdiction, as defined by law.

Check that you have jurisdiction to hear the matter before you. You may have done this when you reviewed all the summons before coming into court.

The limits of the jurisdiction for the Magistrate's Court are set out in s 11 of the Magistrate's Court Act (MCA). You will also need to check the statute creating the offence which sets out the maximum penalties that may apply on sentencing to see if it is within the limits of your jurisdiction.

See the "Constitutional framework" chapter to find out more about your criminal jurisdiction.

2.4 Appearance or non-appearance of the parties

2.4.1 Non-appearance by the defendant

Sections 20A and 21 MCA.

If the defendant is represented by a lawyer (even if not present), then continue as if the defendant was present.

If the defendant or their lawyer does not appear before the court on the date specified in the summons, you may:

- adjourn the hearing to a later date;
- after proof of service of the summons, hear and determine the case in their absence; or
- after proof of service of the summons, issue a warrant for the defendant's arrest and adjourn the hearing: s 21(1).

If the defendant is subsequently arrested under a warrant issued for non-appearance, they must be brought before you. You may either admit the defendant to bail or order them to be remanded in custody until the next sitting of the court: s 21(2).

At the next sitting of the court, you must proceed with the hearing of the case, unless it is impossible to complete the hearing of the case. If so, you may adjourn the hearing to the subsequent sitting and admit the defendant to bail or order them to be remanded in custody until the next court sitting: s 21(3).

See the "Summary Trial" and "Adjournments" chapters to find out more about non-appearance by the defendant and adjournments.

In some cases, an defendant may plead guilty in writing to an offence under the Traffic Act without appearing in court. The offence must:

- be under the Traffic Act;
- not be triable in the Supreme Court; and
- not carry a sentence of imprisonment: s 20A.

See the "Summary Trial" chapter to find out more about how to deal with minor traffic offences.

2.4.2 Non-appearance of complainant

Section 22 MCA.

If, when the case is called, the defendant is brought before the court on a warrant of arrest and the complainant does not appear, you may dismiss or adjourn the hearing to a future day. Provided that you are satisfied that the complainant had due notice of the time and place of the hearing.

As a dismissal for want of prosecution is deemed an acquittal, this should not be granted too readily if delay is the only concern. Ask the court clerk to make further inquiries including:

- the extent of the delay (whether the police have been guilty of serious delay);
- the reasons for it;
- the merits of the police's case, so far as they can be assessed; and
- whether the delay has seriously prejudiced the defendant.

Ultimately you must always stand back and have regard to the interests of justice.

2.4.3 Non-appearance of both parties

Section 23 MCA.

If, when the case is called, neither the complainant nor the defendant appear, you may adjourn or dismiss the case (where the police have been plainly derelict) as you think fit.

2.5 Where the defendant appears

2.5.1 Legal representation

Section 20 MCA.

Both the defendant and the complainant are entitled to conduct their case in person or through a licensed lawyer.

You may explain to the defendant the purpose/benefits of obtaining legal assistance and confirm that having a lawyer is a part of the process and not seen as being prejudicial to their case, as well as their practical options for obtaining legal assistance.

Where the charge is brought by the prosecution, the complainant does not ordinarily have separate legal representation as the prosecutor performs that role, but may have a support person.

2.5.2 Unrepresented defendant

Part 1 Constitution.

Whenever a defendant is unrepresented, you must ensure that their rights are respected, and that justice is done. It is not your responsibility to conduct the case for the defendant, but only to see that the trial is fair.

Where the defendant is representing themselves, consider their fundamental rights under Part I of the Constitution including:

- their right to a fair hearing in accordance with principles of fundamental justice by an independent and impartial court under clauses 14 and 15;
- due process at any hearing under clause 11;
- the burden of proof that is on the police to prove the charge(s) beyond reasonable doubt (see the "Dealing with evidence" chapter).

You should inform the defendant of their right to legal counsel once their name has been called in the list. You may advise them not to enter a plea to any charge(s) before getting legal advice, depending on:

- the seriousness of the offence(s);
- if it is not the defendant's first offence; or
- if the defendant looks unsure or afraid and does not understand the proceedings.

Whenever a defendant is unrepresented. if they still wish to enter a plea you should:

- confirm the defendant's plea and ensure it is recorded;

- provide an interpreter if necessary; and
- explain to the defendant:
  - the procedure to be followed;
  - the right to cross-examine prosecution witnesses;
  - the right to give and call evidence; and
  - the obligation to put their case to any witness.

If you ask any questions of a witness after re-examination has concluded, ask both the prosecutor and the defendant if they have any further questions raised by the witness' testimony.

In Cocker v Police Department [1999] TOSC 10; CR APP 1251/1998, 5 March 1999, the Chief Justice of the Supreme Court noted that:

> "In all cases the duty of the magistrate is to ensure that an unrepresented person charged with a criminal offence, understands both the charge and the proceedings and also that, if he has a defence, he has an opportunity to present it…Once he is satisfied the accused understands the charge he faces and that he has admitted it, the magistrate should proceed to hear the facts and mitigation…"

In R v Fukofuka [2019] TOCA 11; AC 20 of 2018, 17 April 2019 the Court of Appeal stated:

> "Obviously enough, the police and prosecutors should take care to avoid any such conflicts of language and judges must be alert to ensure misunderstandings do not arise, particularly with unrepresented accused."

See the "Management of proceedings" chapter to find out more about dealing with an unrepresented defendant.

2.5.3 Identifying the defendant

The defendant has been called by name and has been brought before you. You must first check who the defendant is (of course, you may already know the person).

The court clerk or you should ask the defendant their full name; occupation; age and any other relevant details.

More than one person may share the same name and so the other details are important; or someone may have more than one name that they use.

The name that should be used where there is a conflict is the one the defendant has on their passport, or, if they don't have one, their birth certificate.

2.5.4 Child and youth defendants

Section 16 COA; s 116 EA; Convention on the Rights of the Child (CRC) Art 3(1), 12(1), 12(2), 16, 37(a),(b),(c), and (d).

If the defendant is a child or young person under the age of 18 years, you will need to transfer the matter to the Youth Court. The Youth Court deals with all 'summary offences' committed by children and young persons. All 'indictable offences' will go to the Supreme Court.

Children under the age of seven years are not criminally liable for any alleged offences: s 16(1) COA.

Nothing done by a child above seven years of age and under 12 years of age is deemed to be an offence, unless in the opinion of the court or jury, the child had sufficient maturity of understanding to know the nature and consequences of their conduct about the act in question: s 16(2) COA. This test of maturity should be applied using a high threshold, given the low age bracket it applies to.

If the defendant is not of the age for criminal responsibility, then there is no need for them to make a plea. In cases where the defence of "immature age" is raised, evidence as to the child's age should be given.

For child witnesses the general rule is that every witness in any criminal matter shall be examined upon oath. However, if you think that a young child as a witness does not understand the nature of an oath, you may take their unsworn evidence if you think that the child can give evidence and understands the duty of speaking the truth: s 116 EA.

You may take guidance from the standards in the Convention on the Rights of the Child (CRC) as to acceptable treatment of children.

See Tone anors v Police [2004] Tonga LR 144.

The CRC requires that children be diverted from criminal justice processes wherever possible (Art 40(3)(b)) and where they proceed, children (under 18 years old) have the right to:

- legal representation (Art 37(c), Art 40(2)(b)(ii) and (iii));
- expedited hearings of their cases (Art 40(2)(b)(iii));
- 'best interests of the child' should be the primary consideration (Art 3(1));
- privacy (Art 16 and Art 40(2)(b)(vii)), closed court, use of pseudonym in public court listings and judgment;
- right to understand, be heard and participate in the process (Art 12);
- bail, or detention only as a last resort and for the shortest possible time (Art 37(b));
- non-custodial sentences wherever possible (Art 40(3)(b));
- where a child is detained or sentenced in custody, they must be held in a facility separated from adults with access to family visits, education and recreational activities (Art 37(c)).

See the "Principles of criminal responsibility" and "Dealing with evidence" chapters to find out more about child defendants and witnesses.

2.6 Considering issues about the summons

Section 90 MCA.

At a first appearance, or later during a defended hearing, you may have to consider if the charge needs amending if either party applies or of your own accord. You must amend the charge if you think there is a minor error in the summons or warrant, such as the time and place of the offence, and that this may be done without injustice to the defendant: s 90 MCA.

You may also adjourn the hearing to a future date if it appears to you that the defendant has been misled by the charge as originally stated.

See the "Summary trial" chapter to find out more about amending the summons or alternative charges.

2.7 Applications for name suppression

Suppression orders should be made in all cases involving children under the age of 18, in both criminal and civil cases, and regarding the details of complainants in cases involving victims of sexual and family violence offences.

The suppression order (pseudonym) should be applied to all public references of the case, including in court listings and the judgment.

See the "Management of proceedings" chapter to find out more about name suppression.

2.8 Adjournments

Section 31 MCA.

A trial should proceed continuously after it has started, especially if the defendant is held in pre-trial detention or is a child, unless you decide it is necessary and fair to grant an adjournment. You have a general power to grant an adjournment under s 31.

The party applying for an adjournment must show "reasonable cause" and if you grant an adjournment, you must state the time and place of the adjourned hearing in front of both parties. This does not include multiple applications for adjournment by the prosecution.

See the "Adjournments" chapter to find out more about adjournments.

2.9 Process for callovers

At the first appearance, you will usually adjourn the matter to a fixed date called the callover, except for certain minor matters where, if the defendant pleads guilty, you can deal with sentencing immediately. Adjourn for reports only if necessary.

If the offence is beyond your jurisdiction to sentence, then take the plea, order the probation report and adjourn to the next judge's sitting. You may state the following:

> "This matter is adjourned for sentencing at the next sitting before a Supreme Court judge with the date to be set by a registrar of the Supreme Court. A probation report is ordered."

2.10 Key principles

2.10.1 Self-represented defendant

- It is important that the defendant understands the process at their first appearance. Take the time to explain the process in simple language, repeatedly if needed, and checking they have understood.
- Every defendant may defend the proceedings personally or through a licensed lawyer in Tonga: s 20 MCA.
- Inform the defendant of the purpose and role of legal representation in the legal process and their options for securing legal representation.
- Where the defendant is representing themselves, consider their fundamental rights under Part I of the Constitution including:
  - their right to a fair hearing in accordance with principles of fundamental justice by an independent and impartial court: cls 14 and15 Constitution; and
  - due process at any hearing under clause 11 of the Constitution.

Note: The burden of proof is on the police to prove the charge(s) beyond reasonable doubt (see the "Dealing with evidence" chapter).

- Check whether you have jurisdiction to deal with the matter before you under s 11 MCA (see the "Constitutional framework" chapter).
- Be careful not to let the defendant incriminate themselves (cl 14 Constitution). It is better for the defendant to get advice from others – for example: a lawyer, senior elders, family and so on.
- Where possible be careful not to let the defendant incriminate themself. It is better for the defendant to get advice from others – for example: senior elders and family.
- Allow the defendant to be present in court during the whole of their trial unless the defendant behaves so badly that attendance is impracticable: cl 11 Constitution; ss 20 and 24 MCA.

2.11 Checklist

2.11.1 Procedural list matters

The following are the immediate issues to consider:

- Appearance or non-appearance by the parties and legal representation including:
  - whether the defendant has appeared, and if they are the right person (identification of the person charged);
  - if the defendant does not appear, whether the case should be adjourned (if the defendant has a good reason for non-appearance), or whether you should you issue a warrant (see below);
  - if the defendant is unrepresented, whether they understand the charge and the legal consequences of making a plea (see below).

- Whether the summons correctly sets out the defendant's personal details.
- Whether you have jurisdiction to hear the matter: s 11 MCA.
- If the matter is simple, you may put the charge to the defendant; or you may grant an adjournment to allow the defendant to get legal advice if it is more complex (see the "Summary trial" chapter). If the defendant is a child (under 18 years) they should have legal representation whether the matter is simple or complex.
- Taking pleas:
  - If the defendant pleads not guilty, you need to consider what directions you call for to set down the matter for trial (see the "Summary trial" chapter).
  - If the defendant pleads guilty, consider what needs to be before the court when sentencing (for example, victim impact statement; and probation, psychiatric, psychological, and reparation reports – see the "Summary trial" and "Sentencing" chapters).
- Any application for bail (if made) and whether you remand the defendant at large, on bail or in custody (see the "Bail applications" chapter).
- Whether the defendant needs or is seeking name suppression (see the "Management of proceedings" chapter).

Note: At first appearance, the matter will generally be adjourned to a fixed date. This adjourned hearing is usually called a callover.

2.12 Conflict of interest

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship that could mean that you might be biased, or could create the appearance of bias, you should not hear the case (see the "Judicial conduct" chapter).

2.13 Legal representation

You should inform the defendant of their right to legal counsel once their name has been called in the list: s 20 MCA. You may advise them not to enter a plea to any charge(s) before getting legal advice, depending on:

- the seriousness of the offence(s);
- if it is not the defendant's first offence;
- if the defendant looks unsure or afraid and/or does not understand the proceedings; or
- if the defendant is a child.

2.14 Non-appearance of the parties

2.14.1 Non-appearance of the defendant

If the defendant does not appear before the court on the date specified in the summons, you may:

- adjourn the hearing to a later date;
- after proof of service of the summons, hear and determine the case in their absence; or

- after proof of service of the summons, issue a warrant for the defendant's arrest and adjourn the hearing: s 21(1) MCA.

Note: Where a defendant is subsequently arrested under a warrant issued for non-appearance, they must be brought before a magistrate who may either bail them or order them to be remanded in custody until the next sitting of court: s 21(2) MCA.

See the "Bail applications" chapter to find out more about how to decide on bail applications.

At the next sitting of the court, you must hear the case if there is sufficient time, or if not you may adjourn the hearing to the subsequent sitting and admit the defendant to bail or order them to be remanded in custody until the next court sitting: s 21(3) MCA.

See the "Management of proceedings" chapter to find out more about adjournments.

2.14.2 Minor traffic offences

In some cases, a defendant may plead guilty in writing to an offence under the Traffic Act without appearing in court. The offence must:

- be under the Traffic Act;
- not be triable in the Supreme Court; and
- not carry a sentence of imprisonment: s 20A(1) MCA.

See the "Management of Proceedings" chapter to find out more about dealing with minor traffic offences.

2.14.3 Non-appearance of complainant

If, when the case is called, the defendant is brought before the court on a warrant of arrest and the complainant does not appear, you may dismiss or adjourn the hearing to a future day. Provided that you are satisfied that the complainant had due notice of the time and place of the hearing: s 22 MCA.

2.14.4 Non-appearance of both parties

- If, when the case is called, neither the complainant nor the defendant appear, you may adjourn or dismiss the case (where the police have been plainly derelict) as you think fit: s 23 MCA.
- As a dismissal for want of prosecution is deemed an acquittal, this should not be granted too readily if delay is the only concern. Ask the registrar to make further inquiries including:
  - the extent of the delay (whether the police have been guilty of serious delay);
  - the reasons for it;
  - the merits of the police's case, so far as they can be assessed;
  - whether the delay has seriously prejudiced the defendant.
- Ultimately you must always stand back and have regard to the interests of justice.

2.15 Where the defendant appears

2.15.1 Identification of the defendant

- The defendant has been called by name and has been brought before you. You must first check who the defendant is (if you do not already know them). Either the court clerk or you should ask the defendant:
  - their full name;
  - occupation;
  - age (including proof of age for those who may have been children at the time of the alleged offence);
  - any other relevant details.

Note: More than one person may share the same name and so the other details are important (or someone may have more than one name that they use).

- Use the name on their passport or birth certificate if there is any conflict.

2.15.2 Children and young offenders

- If the defendant is a child or young person under the age of 18 years, you will need to transfer the matter to the Youth Court, which deals with all criminal offences committed by children except for murder or manslaughter.
- You may refer to standards provided in the Convention on the Rights of the Child (CRC) especially as Tonga does not have specific laws for charges against children except as per below.
- Children under the age of seven years are not criminally liable for any alleged offences: s 16(1) COA.
- Nothing done by a child above seven years of age and under 12 years of age is deemed to be an offence, unless you think the child had sufficient maturity of understanding to know the nature and consequences of their conduct about the act in question: s 16(2) COA. Given this age bracket is younger than the CRC standard, the test of a child's maturity should be applied with a high threshold.
- If the defendant is not of the age for criminal responsibility then there is no need for them to make a plea.
- In cases where the defence of "immature age" is raised, evidence as to the child's age should be given.

See the "Principles of criminal responsibility" chapter to find out more about this.

2.16 Considering issues about the charge(s)

- At a first appearance, or later during a defended hearing, you may have to consider if the charge needs amending.
- You must amend the charge if you think there is a minor error in the summons or warrant, such as the time and place of the offence, and this may be done without injustice to the defendant: s 90 MCA;

- you may also adjourn the hearing to a future date if it appears to you that the defendant has been misled by the charge as originally stated: s 90 MCA.

See the "Summary trial" chapter to find out more about amending charges.

2.17 Applications for name suppression

- Suppression orders should be made in all cases involving children under the age of 18, and regarding the details of complainants in cases involving victims of sexual and family violence offences.
- The suppression order (pseudonym) should be applied to all public references of the case, including in court listings and the judgment.

See the "Management of proceedings" chapter to find out more.

2.18 Adjournments

- A trial should proceed continuously after it has started unless you decide it is fair to grant an adjournment. You have a general power to grant an adjournment: s 31 MCA.
- The party applying for an adjournment must show "reasonable cause" and if you grant an adjournment, you must state the time and place of the adjourned hearing in front of both parties: s 31(1) MCA. This does not include multiple applications for adjournment by the prosecution.

See the "Adjournments" chapter to find out more about adjournments.

2.19 Callovers (adjourned court sitting)

- Where a defendant in your list enters and pleads guilty and the matter is within your jurisdiction, sentence immediately if you can.
- You may first need to stand the matter down for a pre-sentence report and/or a reparation report. Adjourn for reports only if necessary.
- If the offence is beyond your jurisdiction to sentence, then take the plea, order the probation report and adjourn to the next Supreme Court judge's sitting.

2.20 Statements in court

Unrepresented defendant enters a plea after the reading of the charge:

> "The charge was read and the defendant was advised of their right to seek legal representation before entering a plea. However, the defendant chose to enter a plea of [guilty/not guilty]."

A defendant enters a plea through counsel:

> "The defendant entered a plea of [guilty/not guilty] through counsel."

If a guilty plea is entered in either case above and sentencing is to be carried out immediately:

> "The defendant is convicted and sentenced as follows: [the defendant's sentence is read]."

If sentencing is to wait until a sentencing date and a probation report is required, you may say:

> "This matter is adjourned for sentencing before a [single JP/ three JPs] on [date]. A probation report is ordered to be available by [date two days before sentencing] with copies to be made available to prosecution and defence. The defendant is remanded [at large/on bail/in custody – if remanded on bail, enter conditions]."

If a not guilty plea is entered above (either by an unrepresented defendant or through counsel) you may say:

> "This matter is adjourned to a defended hearing on [date] before [a single JP/ three JPs]. The defendant is remanded [at large/on bail/in custody – if remanded on bail, enter conditions]."

If no plea is taken, perhaps on a first appearance, and the matter is adjourned to a callover say:

> "No plea was taken and this matter is adjourned for a callover on [date]. The defendant is remanded [at large/on bail/in custody – if remanded on bail, enter conditions]."

3. Bail applications

3.1 Relevant legislation

- Constitution of Tonga (Constitution), cl 9
- Convention on the Rights of the Child, Art 37(b)
- Bail Act (BA)
- Tonga Police Act (TPA), s 116
- Magistrate's Court Act (MCA), ss 8, 22, 31, 48, 75 and 76

3.2 Introduction

Bail Act (BA); cls 9, 10 and 14 Constitution; s 8(e) Magistrate's Court Act (MCA); Art 37 Convention on the Rights of the Child (CRC); Art 9 International Covenant on Civil and Political Rights (ICCPR); s 60 Mental Health Act (MHA)

The Bail Act (BA) deals with bail applications. You will usually consider bail at the first or any subsequent appearances of the defendant (eg: after conviction or on appeal), or where the defendant is remanded in custody.

Note the following definitions are used in the Bail Act:

- "police officer" means a police officer with the rank of sergeant or above or an officer in charge of a police station and, for the purpose of granting bail, if no such police officer is available, includes a justice of the peace appointed under section 94A of the MCA.
- "surrender to custody" means a person released on bail surrenders themselves to the custody of the court or a police officer as required at the time and place appointed: s 2 BA.

If not released on bail immediately and no bail has been applied for, the defendant has the right to apply for bail after being remanded in custody and they should be brought before a court to apply for bail.

You have a general jurisdiction to grant bail to all persons charged with committing offences: s 8(e) MCA.

The fundamental common law principle is in favour of freedom unless there is a just and proper reason to refuse bail, or in the case of a person aged under 18 years, only as a matter of last resort and for the shortest possible time.

Notes:

- Clause 9 of the Constitution of Tonga also provides the law of the writ of habeas corpus applies to every person. A writ of habeas corpus may be used to bring a prisoner or other detainee (eg: institutionalized mental patient) before the court to determine if the person's imprisonment or detention is lawful.
- Clause 10 of the Constitution of Tonga requires that a person not be punished unless they have been sentenced.
- Clause 14 of the Constitution of Tonga provides a right to a fair trial, which includes the right to liberty, except where provided by law.

Pre-trial detention which commences lawfully can become arbitrary or unlawful under these constitutional provisions (and Art 9 ICCPR) where it is not regularly reviewed to ensure it remains strictly necessary or where it becomes protracted.

Alternatives to detention should be found for people aged under 18 years, to the maximum extent possible. Detention for children should only be used as a last resort and for the shortest possible time (Art 37 CRC) and where they are detained, their cases should be expedited: Art 10(2)(b) ICCPR.

It is the responsibility of magistrates to monitor and minimise the length of pre-trial detention through regular reviews as to whether it remains necessary or whether circumstances have changed such that bail can now be granted, and also through ensuring the trial is completed without delay through prioritisation and careful case management. Note, Art 9(3) of the ICCPR guarantees a right to trial within a reasonable time, meaning a right to a final judgment without undue delay, or alternatively, the right to release.

Where a person is remanded in custody, they have the right to be held separately from sentenced prisoners: Art 10(2)(a) ICCPR.

Where a child is remanded in custody, they also have the right to be held separately from adults: Art 10(2)(b) ICCPR and Art 37(c) CRC.

3.3 Right to bail

Section 3 BA; Art 9(3) ICCPR.

Everyone is generally entitled to bail as of right, who:

- is arrested for or charged with a criminal offence;
- has been convicted of a criminal offence and
  - has appealed against sentence or conviction; or
  - whose case has been adjourned for the purpose of obtaining sentencing information: s 3(1).

The exception to this presumption is that a person charged with murder or treason may only be granted bail by the Supreme Court or Court of Appeal: s 3(2).

3.4 Bail before conviction is granted at your discretion

3.4.1 Offences not punishable by imprisonment

Section 4(3) BA; s 60 MHA.

You must grant bail to anyone who is arrested and charged with any offence not punishable with imprisonment, unless you or a police officer (if it is an arrest) are satisfied that the defendant:

- has been granted bail previously and has failed to surrender to custody and is likely to fail to surrender to custody;
- is already in custody pursuant to a sentence of a court; or
- should be kept in custody for their own protection and welfare. This provision should be used only as a last resort after exhaustive efforts by the court to find an acceptable alternative. If the person suffers from mental illness and you determine they would benefit from treatment, you can order they receive assessment in a mental health facility: s 60 MHA.

3.4.2 Offences punishable by imprisonment

Section 4(1) BA.

You must grant bail to anyone who is arrested or charged with an offence punishable by imprisonment (except for murder or treason) unless you or a police officer (if it is an arrest) are satisfied that:

- there are substantial grounds for believing that, if released on bail with or without conditions, the defendant will:
  - fail to surrender to custody;
  - commit an offence while on bail; or
  - interfere with witnesses or otherwise obstruct the course of justice, whether in relation to the defendant or any other person;
- the defendant should be kept in custody for their own welfare (same advice applies as above, to minimise use of this provision);
- the case has been adjourned for inquiries which would be impractical to make unless the defendant is kept in custody;
- the defendant is already in custody for another sentence of a court; or
- the defendant has already been released on bail and has been arrested for absconding or breaking the conditions of bail.

See for example *R v De Feng Mo ors* [2013] TOSC 50; CR 80/13, 8 August 2013, Cato J, where bail was declined primarily based on:

- the nature of allegations involving a high level of group intimidation; and
- a serious attempt had already been made to interfere with the course of justice.

It was held these factors weighed against bail being granted, although none of the defendants had previous convictions and none appeared to be a flight risk.

The high bar set for refusing bail has been highlighted in two recent decisions, one by the Supreme Court and the other by the Court of Appeal overturning decisions made by magistrates/judges to refuse bail, citing several flaws in decisions to refuse bail, including:

- the lack of quality and tested evidence for refusing bail;
- the lack of opportunity for the defendant to cross-examine and put forward their own material in support of bail; and
- the standard of proof for 'substantial grounds' is on the balance of probabilities, and the need for careful application of the correct legal test, noting in particular courts' misinterpretation of the Bail Act, by considering the seriousness of the offence to be grounds for refusing bail, when it is not.

In *Wight v R* [2022] TOSC 3; AM 1/22, 14 January 2022, the Court stated:

> "In the present case, no evidence was given at all. The statement which the prosecution gave to the Magistrate was not sworn and was therefore not evidence, and no opportunity was afforded to either accused to cross-examine the officer. The transcript ought to have stated that such opportunity was given but it does not.
> Furthermore, the officer did not say how it was that he came by the information which he conveyed to the Magistrate. It could well be that as a prosecuting officer, he was not the investigating officer and that he had taken no part in the arrest of the 2 accused. So that what he related was entirely hearsay, and was inadmissible evidence.
>
> **No valid ground**
> Furthermore, the grounds upon which the Magistrate refused bail to the two accused were (1) that the charges against them were serious and (2) that the quantity of methamphetamine found on them was large and it indicated that the defendants were involved in the distribution of the illicit drug.
>
> Those are not grounds upon which bail may be refused. Neither ground is included in the eight grounds which are listed in s 4 of the Act as quoted above.
>
> It would appear that the Learned Magistrate may have misunderstood the application of subsection (2)(a) of s 4 of the Act."

See also the decision of *Cox v R* [2021] TOCA 23; AC 25/2021, 29 October 2021 where the Lord Chief Justice overturned a decision to deny bail, emphasising the role of the Court to ensure that the defendant has:

- A full and fair opportunity to comment on, and answer, any evidence or other information presented against them
- an opportunity to cross examine the relevant witness/es.
- been permitted to give or call evidence or produce other information in relation to the matters prescribed by s 4.

Any disputes on the facts in relation to the above matters are to be determined on the balance of probabilities.

In deciding whether substantial grounds have been established, the Court should take into account the quality of the material before it (whether by way of sworn evidence, documentary proof, matters of record, hearsay, assertion or submission) and attach such weight to each piece of information as it considers appropriate.

The ultimate obligation of the Court is to evaluate the information in the light of the serious potential consequences to the defendant and to weigh up all the relevant circumstances of the case. The existence of substantial grounds for the purpose of s 4(1)(i) requires more than mere suspicion or supposition and will ordinarily be established only by compelling and admissible evidence and/or an admission.

Only in "very exceptional circumstances" should bail be granted to allow overseas travel before trial: *Lin v Police [2012] TOSC 37; AM 26 of 2012 (16 August 2012)*. For example, if the charges are not serious and the offender has a very significant link with Tonga then there is an unlikelihood of absconding. But if the defendant has no ties to Tonga, and there is nothing to guarantee return other than monetary penalty, bail should not be granted as the defendant is too great a "flight risk". In Lin v Police bail was refused as s 4(1)(a) expressly provides that the Court may decline bail if there are substantial reasons to believe if released on bail the defendant will fail to surrender to custody. The Court held the Magistrate failed to give sufficient weight to the international aspect of the importation and difficulties encountered in co-ordinating a multi-national investigation.

3.5 Relevant factors for your discretion to grant bail

Section 4(2) BA.

There is a presumption in favour of granting bail unless the court is satisfied, on the balance of probabilities, that there are substantial grounds for believing that the person will either:

- fail to surrender to custody;
- commit an offence; or
- interfere with witnesses or obstruct justice.

The seriousness of the offence **is not** one of the three grounds for refusing bail.

In deciding if there are 'substantial grounds' for believing the defendant will fall into one of those three categories, you must consider all relevant all relevant circumstances, including:

- the nature or seriousness of the offence (and the probable method of dealing with the defendant);
- the character, background, associations and community ties of the defendant;
- the defendant's record in keeping their obligations under previous grants of bail (including any history of offending whilst on bail which the police must provide evidence of); and
- the strength of the evidence against the defendant having committed the crime.

You should also consider:

- **Is the defendant likely to appear in court on the date they have been remanded to?** If the defendant has a record of failing to turn up on bail in the past or breaching court orders, then bail is less likely.
- **Risk of interfering with witnesses or evidence.** This ground of opposition to bail requires specific evidence from the police. What evidence do they have to back up their claim?
- **Other matters.** Keep in mind that the fact that the defendant faces serious charges, is not in itself a legal basis for remanding them in custody. Following recent court decisions clarifying the high threshold legal test which must be met to refuse bail, great care needs to be taken in applying these now clarified requirements. But if the charge is minor then a remand on bail is even more likely. In some cases, the defendant's own safety may be a factor, but this should be only relied upon as a basis for detention where there has been an exhaustive search for an alternative to being held in custody. You should never remand a defendant in custody for a longer period than any prison sentence he or she is likely to get if convicted.

3.6 Bail after conviction

Section 4A BA.

You must grant bail to a person who has been convicted of a criminal offence that is punishable with imprisonment and whose case is adjourned to obtain further information for sentencing if satisfied that:

- it is unlikely that the person will be sentenced to imprisonment; or
- it would be impracticable to obtain further information if they are kept in custody; and
- there are substantial grounds for believing that the person will surrender to custody without committing any offence: s 4A(1) BA.

You must not grant bail where the defendant:

- is already in custody under a sentence of a court;
- has been arrested under s 9 of the Bail Act; or
- should be kept in custody for their own protection or welfare: s 4A(2) BA.

When making this decision, you must consider all relevant circumstances including:

- the nature of the offence and any probable sentence;
- the defendant's character, background, associates, and community ties; and
- the defendant's record in surrendering to custody at the trial and on other occasions: s 4A(3) BA.

3.7 Bail after non-appearance of defendant or on adjournment

Sections 21 and 31 MCA.

When the defendant is arrested under any warrant issued for non-appearance at their court date after being summoned under s 21(1) MCA, the defendant must be brought before you and you may either:

- grant them bail in accordance with the Bail Act; or

- order them to be remanded in custody until the next sitting of the court: s 21(2) MCA.

When you adjourn the defendant's case for good cause under section 31(1) MCA you may:

- allow the defendant to go at large;
- grant the defendant bail with conditions for their appearance at the time and place to which the hearing is adjourned; or
- commit them by warrant to prison for no longer than eight days after their committal: s 31(2) MCA.

See the "Adjournments" chapter for more details about adjournments.

3.8 Bail applications for youth defendants

Contrary to international standards, no special statutory provisions exist in Tonga regarding bail for children under the age of 18. However, you can use the terms of the CRC as a guide to what is acceptable treatment of children, as per *Tone anors v Police* [2004] Tonga LR 144.

Any child in custody brought before the court has a right to be legally represented to challenge their detention. Article 37(d) CRC states that:

> "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court ... and to a prompt decision on any such action."

The already strong presumption favour of granting bail is even stronger for people aged under 18 years for whom alternatives to pre-trial detention need to be found by the court, except as a measure of last resort.

Article 37(b) of the CRC states that:

> "No child shall be deprived of [their] liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

If a child is denied bail, then they must be held separated from adults and provided with facilities for education, sport/recreation and regular family visits: Article 37(c) CRC. If these standards cannot be met, then an alternative to detention needs to be found.

Tonga has acceded to this Convention as noted in *R v Valu* [2008] Tonga LR 44. This case concerned a sentencing decision for a 13-year-old who committed seven separate offences of housebreaking and theft. The Supreme Court noted that three days prior to the commission of the defendant's last offence the young person was granted bail due to his age and a final attempt to keep him out of prison, which did not work.

In *R v Tongatu'a anor* [2013] Tonga LR 8 on a voir dire ruling Cato J held at [4]:

> "It is important that young offenders be granted bail unless there are very good reasons why bail should be declined."

In *R v Tu'amoheloa* [2018] TOSC 19; (AM 16/17, 1 June 2018, on an appeal against conviction for a 15-year-old defendant, Cato J at [14] stated:

> "Whist the police may have had concerns that he would not impede their inquiry by being granted bail, as a 15 year old, in my view, he should have been granted bail on appropriate conditions by the Magistrate that would prevent his impeding any investigation such as being placed on curfew or being required to live with a relative for an appropriate period, elsewhere."

3.9 Bail applications for family violence offences

Family violence offending has a unique risk profile, in which conditions of bail can be crucial in managing the risk of future family violence occurring.

If bail is granted you should ensure that Protection Orders are in place, with appropriate conditions attached and ensure that both the defendant and the complainant are aware of these conditions and the consequences of breach.

3.10 Bail on appeal

Section 4B BA, ss 75 and 76 MCA.

You must grant bail to a person who has been convicted and sentenced to imprisonment for a criminal offence and who is appealing against the conviction or sentencing if you are satisfied that:

- there is a reasonable prospect of success for the appeal;
- it is unlikely that the appeal will be heard before the whole (or a substantial portion) of the sentence has been served; and
- there are substantial grounds that the person will surrender to custody without committing any offence whilst on bail: s 4B(1).

In making this decision, you must have regard to all the relevant circumstances and in particular:

- the nature of the offence and length of the sentence;
- the grounds of appeal;
- the character, history, associations and community ties of the person; and
- their record in surrendering to custody at the trial and on other occasions: s 4B(2).

Notes:

In *Sefo anor v R* [2004] Tonga LR 366, the Supreme Court noted that:

- section 4B is a comprehensive code for dealing with applications for bail pending appeal;
- the granting of bail after conviction was a totally different proposition from the granting of bail pending trial, at which point the presumption of innocence still prevailed;
- under s 4B(1)(a) of the Bail Act the court could grant bail to a person who had appealed or applied for leave to appeal against conviction or sentence if the court was satisfied that there were reasonable prospects of the appeal succeeding. That required a consideration of the grounds of each appeal;

- the applicants had an onus to establish at least a prima facie basis for the court being able to hold that the appeals had a reasonable, as distinct from a meagre or fanciful, prospect of success.

In *Salt v R* [2009] Tonga LR 515, the Supreme Court noted that:

> "In most jurisdictions, admission to bail pending appeal is unusual, and exceptional circumstances must be shown to exist, before bail will be granted": at 518.
>
> "Under the Bail Act, however, I am clearly required to make an assessment of the merits of the appeal at this stage based upon the material I have before me": at 521.

Having made his assessment, Shuster J decided there was a very limited prospect or chance of success on appeal. He also considered that all the relevant circumstances under s 4B(2) included:

- Breach of public trust is a serious offence.
- The defendant was not a first-time offender and so he is a moderate risk as an offender.

Upon notice of appeal being given and the appeal fee paid, bail may be allowed or refused at the discretion of the magistrate by whom such decision was given. However, the appellant may appeal within 14 days of any refusal of bail against such refusal by petition to the Judge of the Supreme Court: s 75 MCA.

Where bail is allowed, the magistrate must order the appellant within 14 days after the date of the decision appealed from to enter into a bail bond in Form 17 in the Schedule with or without a surety or sureties: s 76 MCA.

If the appellant is in custody, the magistrate after taking the bail bond must release the defendant: s 76 MCA.

3.11 Bail conditions and requirements for bail

Section 5 BA.

The police will suggest what conditions should be imposed on the bail. All bail conditions must relate to the concerns about granting bail. When granting bail, you need to state what conditions apply. Try to keep the bail conditions to a minimum and keep these simple so that the defendant can understand and comply with them.

Any person to whom you grant bail must surrender to custody: s 5(i).

Additionally, before you release the defendant on bail, you may require that the defendant:

- give a surety themselves or on their behalf; and/or
- provide a surety or sureties: s 5(ii).

You may require a defendant who has been granted bail to comply with any requirements to ensure that the defendant:

- surrenders to custody;

- does not commit an offence while on bail;
- does not interfere with witnesses or otherwise obstruct justice in relation to themselves or to another; and
- makes themselves available for the purpose of enquiries or reports to be used in assisting the court in dealing with the defendant: s 5(iii).

You may forbid overseas travel pending trial: s 5(iv).

If you decide to grant bail, consider the following bail conditions:

- Return date—a person granted bail shall surrender to custody (bail must always specify a date which surrender must take place).
- Residence reporting and travelling—whether to require the defendant to reside at a particular address and to report to a specified police station at regular intervals.
- Security—whether the defendant should give security for themselves and provide a surety or sureties.
- Sureties—where sureties are required, the sureties who bind themselves to pay a specified sum if the defendant fails to surrender to custody must have the consequences explained to them and must satisfy the court they are able to pay the amount specified in the event of default by the defendant.
- Surrender passports and travel documents—where the defendant's passport has been surrendered it should be returned immediately after acquittal.

> The order to give is:
> "The matter is adjourned to … and bail is granted with the following conditions: …

3.12 Varying or imposing conditions of bail

Section 6 BA.

Where a court or a police officer has granted bail, you or a higher court on appeal may, on application by the defendant, the prosecutor or a police officer, vary the conditions of bail or impose conditions in respect of bail which has been granted unconditionally.

If sureties are required for the bail bond, they shall continue in force and the order varying the conditions of bail bond will not take effect until the parties consent in writing or a new bail bond is entered into.

3.13 Sureties

Section 10 BA.

You must certify, in writing, that bail has been granted in the form of a bail bond. This will include the amount of the bail bond, and whether it is with or without sureties. The court staff will print this out and give it to you, to sign in court, or to the registrar.

When deciding on the suitability of a surety, you may consider the surety's:

- financial resources;

- character and previous convictions;
- proximity (as to kinship, residence or otherwise) to the defendant: s 10(2).

Where you grant bail based on a surety, but no suitable surety can be found, you must fix the amount for which a suitable surety will be bound later: s 10(3).

A surety may enter into a bail bond (recognizance) before:

- a police officer of the rank of inspector or above or who is in charge of a police station;
- a magistrate; or
- a registrar of the Supreme Court: s 10(4).

If the police, magistrate or registrar declines to take a surety's bond because they are not satisfied of the surety's suitability, the surety may apply to the court which fixed the amount of the bail bond to accept their bond: s 10(5) BA.

3.14 Process for bail applications

Sections 7 and 11 BA.

At a defendant's first appearance, the matter will usually be adjourned to a fixed date. Consider whether the defendant is to be kept in custody or released on bail.

Bail expires each time a defendant is brought back to court. So, if a defendant who has been granted bail is now before you (usually on a callover), then on that second (or next) court date when the Information is before the court, then the original grant of bail has expired.

This means you must re-grant bail each time the defendant is required to appear subsequently, even if the new grant is on the same terms as the previous one(s). Each time bail is re-granted a new bail bond is also required, even if it is only to change the court date. This is because if a new bond is not given to the defendant and they do not turn up next time, it would be hard to prosecute the defendant for breach of bail, and a Bench Warrant for non-appearance might not be justified.

You may need to consider whether a defendant's bail is to be varied or revoked. Usually, it would be re-granted unless there are new reasons to amend the bail conditions or revoke bail.

If a defendant is granted bail, they may later make an application to vary the conditions of the bail order.

Where you grant, withhold or impose bail, or vary the conditions of bail, you must make a written record of the decision and the reasons for it. A copy of the record must be given to the defendant as soon as practicable, but no longer than 24 hours after it was made: s 7(1)(a) and (b).

Where you grant bail, the bail bond must be in Form 1 of the Schedule: s 11(1).

Where you withhold bail, you must inform the defendant that they may apply to the Supreme Court to be granted bail: s 7(2).

3.15 Police process for bail applications

Sections 6, 7 and 11 BA; s 116 Tonga Police Act (TPA).

Where a police officer withholds bail, the person arrested shall be brought before a court as soon as is practicable and in any event within 24 hours of withholding bail: s 6(2) BA.

If it is not practicable to bring the person arrested before a magistrate having jurisdiction within 24 hours after they have been taken into custody, the police officer of the rank of sergeant or above, or the police officer in charge of the police station, must:

- inquire into the case: and
- grant or withhold bail in accordance with the Bail Act: s 116 TPA.

Where a police officer grants or withholds bail, the police officer must make a written record of the decision and the reasons for it. A copy of the record must be given to the defendant as soon as practicable, but no longer than 24 hours after it was made: s 7(1) BA.

Where a police officer grants bail, the recognizance must be in Form 2 of the Schedule: s 11(2) BA.

3.16 Breach of bail

Sections 8-10 BA.

You may issue a warrant to arrest a defendant who has been released on bail if they:

- fail to surrender to custody; or
- are absent from the court without leave of the court at any time after they have surrendered to custody: s 9(1).

A police officer may arrest a person released on bail, without warrant if they:

- have reasonable grounds to believe that the person is not likely to surrender to custody;
- have reasonable grounds to believe that the person is likely to break any of the bail conditions or has broken any of the bail conditions; or
- are notified in writing by the surety that the defendant is not likely to surrender to custody and for that reason the surety wishes to be relieved of their obligations as a surety: s 9(2).

A person arrested on the above grounds must be brought as soon as practicable before you, but within 24 hours (excluding Saturdays, Sundays and holidays) of their arrest. You may then remand the defendant in custody or grant them bail subject to the same or different conditions as originally imposed: s 9(3).

If a defendant who has been released on bail fails, without reasonable cause, to surrender to custody, you may order that:

- the whole or part of the defendant's security be forfeited to the Crown; and/or
- unless *reasonable cause* is shown, that the whole or part of the security given by a surety is to be forfeited to the Crown: s 10(7).

It is an offence for a defendant who has been released on bail to not surrender to custody, without reasonable cause. Conviction carries a penalty of a maximum $1,000 fine and/or one year imprisonment: s 8(1).

It is up to the defendant to prove that they had reasonable cause for their failure to surrender to custody as a defence: s 8(2).

3.17 Refusal of bail and remand in custody for trial

Section 48 MCA.

When you have committed the defendant for trial you must, unless bail is granted under the Bail Act, commit the defendant to prison to await their trial before the Supreme Court: s 48(1) MCA. The police officer to whom the warrant of commitment is directed will then take the defendant to the prison and deliver them together with the warrant to the keeper of the prison: s 48(2) MCA.

Bail may only be refused in certain circumstances and for just cause under the Bail Act. Where you withhold bail, you must inform the defendant that they may apply to the Supreme Court to be granted bail: s 7(2) BA.

Any defendant who has been remanded in custody on any charge and has not been released on bail may be brought before the court at any time to deal with that charge, notwithstanding that the period of their remand has not expired.

A remand in custody places a defendant under the control of the court and:

- ensures their attendance at the hearing; and
- removes the defendant from the community in the case of a serious offence.

In the interests of justice, long remands in custody should be avoided as much as possible. If a long remand in custody is likely, you may remand the defendant to appear as soon as possible before a judge and let the judge decide.

3.18 Principles

The defendant is presumed innocent, unless otherwise proven guilty and their freedom throughout the trial period is an important central principle. You need to consider the defendant's fundamental rights under the Constitution including the right to not be deprived of their liberty except by law and their right to a fair trial: cls 9, 10 and 14.

If not released on bail immediately and no bail has been applied for, the defendant has the right to apply for bail after being remanded in custody and they should be brought before a court to apply for bail.

You have a general jurisdiction to grant bail to all persons charged with committing offences: s 8(e) MCA.

The fundamental common law principle is in favour of freedom unless there is a just and proper reason to refuse bail.

The ICCPR contains a similar presumption in favour or liberty: Art 9(3).

International human rights requires that pre-trial detention is only imposed on children as a last resort and for the shortest possible time: Art 37(b) CRC. For adults, pre-trial detention is reserved only if it is reasonable and strictly necessary: Art 9 ICCPR.

People who are not released pending trial must be tried as expeditiously as possible, to the extent consistent with their rights of defence. Their cases should be prioritised as prolonged pre-trial detention can become unlawful or arbitrary, in breach of cl 9, 10 and 14 of the Constitution.

The length of time spent by anyone in pre-trial detention needs to be carefully monitored and managed by you. The need for ongoing detention needs to be regularly reviewed and if possible, or if circumstances have changed, the person released. Otherwise, delays in completing the trial should be avoided through firm but fair case management.

3.19 Checklist

3.19.1 Bailable as of right

- Everyone who has been arrested or charged with a criminal offence, or who is appealing a criminal conviction or sentence, or whose case has been adjourned to obtain sentencing information, is generally entitled to bail as of right, unless there are good reasons why not as set out in the Bail Act: s 3(1) BA.
- In any decision to deny bail, the reasons for doing so need to be decided on a balance of probabilities, confined to criteria in the BA (which does not include the seriousness of the offence), based on strong evidence specific to the defendant, which the defendant has had full opportunity to cross-examine and put forward their own material. *Wight v R* [2022] TOSC 3; AM 1/2022, 14 January 2022, *Cox v R* [2021] TOCA 23; AC 25/2021, 29 October 2021.

3.19.2 No right to bail

There is no right to bail for murder or treason. You must remand the defendant in custody to go before a judge in the Supreme Court or Court of Appeal: s 3(2) BA.

3.19.3 Discretion to grant bail before conviction

There is a strong presumption in favour of granting bail.

For any offences punishable by imprisonment (except for murder or treason) you have discretion to grant bail unless you or a police officer (if it is an arrest) are satisfied that:

- there are substantial grounds for believing that, if released on bail with or without conditions, the defendant will:
  - fail to surrender to custody;
  - commit an offence while on bail; or
  - interfere with witnesses or otherwise obstruct the course of justice.

- the defendant should be kept in custody for their own welfare (used only as a last resort after an exhaustive search for alternatives to custody). If the person suffers from mental illness and you determine they would benefit from treatment, you can make an order for the purpose of assessment of their condition at a mental health facility: s 60 MHA;
- the case has been adjourned for inquiries which would be impractical to make unless the defendant is kept in custody;
- the defendant is already in custody for another sentence of a court; or
- the defendant has already been released on bail and has been arrested for absconding or breaking the conditions of bail: s 4(1) BA.

For any offences not punishable with imprisonment you have discretion to grant bail unless you or a police officer (if it is an arrest) are satisfied that the defendant:

- has been granted bail previously and has failed to surrender to custody and is likely to fail to surrender to custody;
- should be kept in custody for their own protection and welfare (used only as a last resort after an exhaustive search for alternatives to custody). If the person suffers from mental illness and you determine they would benefit from treatment, you can make an order for the purpose of assessment of their condition at a mental health facility: s 60 MHA; or
- is already in custody pursuant to a sentence of a court: s 4(3) BA.

When deciding whether to grant bail, you must consider all relevant circumstances, including:

- the nature or seriousness of the offence (and the probable method of dealing with the defendant);
- the character, background, associations and community ties of the defendant;
- the defendant's record in keeping their obligations under previous grants of bail (history of offending whilst on bail); and
- the strength of the evidence against the defendant: s 4(2) BA.

You may:

- decide to grant bail to a person, even if they are not 'bailable as of right' after considering all the relevant factors set out in s 4(2) BA;
- consider what bail conditions are suitable (see bail conditions below): s 5 BA;
- refuse bail and remand the defendant in custody.

This may involve the following situations:

- the police may not oppose bail but are seeking bail conditions;
- the police are opposing bail; or
- the defendant does not ask for bail and agrees to be remanded in custody.

3.19.4 Bail after conviction

- You must grant bail to a defendant after conviction of an offence punishable with imprisonment if adjourned for sentencing and you are satisfied that:
  - it is unlikely that the defendant will be sentenced to imprisonment; or
  - it would be impracticable to obtain further information if they are kept in custody; and
  - there are substantial grounds for believing that the defendant will surrender to custody without committing any offence while on bail: s 4A(1) BA.
- You must not grant bail where the defendant:
  - is already in custody under a sentence of a court;
  - has been arrested under s 9 of the Bail Act; or
  - should be kept in custody for their own protection or welfare: s 4A(2) BA. This provision should be used only as a last resort after exhaustive efforts by the court to find an acceptable alternative. If the person suffers from mental illness and you determine they would benefit from treatment, you can make an interim treatment order for the purpose of assessment and preparation of a report for the court by an authorised psychiatrist: s 64 MHA.
- When making this decision, you must consider all relevant circumstances including:
  - the nature of the offence and any probably sentence;
  - the defendant's character, background, associations and community ties; and
  - the defendant's record in surrendering to custody at the trial and on other occasions: s 4A(3) BA.

3.19.5 Bail after non-appearance of defendant or on adjournment

- When the defendant is arrested under any warrant (for non-appearance), the defendant must be brought before you and you may either:
  - grant them bail in accordance with the Bail Act; or
  - order them to be remanded in custody until the court date: s 21(2) MCA.
- If you adjourn the defendant's case for good cause you may:
  - allow the defendant to go at large;
  - grant the defendant bail with conditions for their appearance at the time and place to which the hearing is adjourned; or
  - commit them by warrant to prison for no longer than eight days after their committal: s 31(2) MCA.

3.19.6 Magistrate's process where bail is opposed

The following process applies where bail is opposed by the police (on all issues the burden of proof of each element lies on the police):

- ask the police why they oppose bail and hear from them what the evidence is in support;
- the seriousness of the charge is not a criterion for denying bail;
- you must be satisfied of substantial reasons for believing that the defendant will:

- fail to surrender to custody;
- commit an offence while on bail; or
- interfere with witnesses or otherwise obstruct the course of justice.

➢ test the quality of the police evidence and ensure the defendant is given a full opportunity to cross-examine the police officer and put forward their own material in support of bail;

➢ ask the defendant for their reply and especially if they are not represented, probe the police evidence yourself by asking non-leading questions to ensure it is not hearsay or based on assumption of guilt of the charges;

➢ identify all possible bail conditions which would address any risks. Where the presumption in favour of bail is not displaced, bail should be granted with appropriate bail conditions (see Bail Checklist);

➢ make sure you record your reasons for your bail decision in the magistrate's minutes books and on the file (if a file has been opened) or on the clerk's minute book: s 7(1) BA.

3.19.7 Police process for bail applications

➢ Where a police officer withholds bail, the person arrested shall be brought before a court as soon as is practicable and in any event within 24 hours of withholding bail: s 6(2) BA.

➢ If it is not practicable to bring the person arrested before a magistrate within 24 hours after they have been taken into custody, the police officer of the rank of sergeant or above, or the police officer in charge of the police station, must:

- inquire into the case: and
- grant or withhold bail in accordance with the Bail Act: s 116 TPA.

➢ Where a police officer grants or withholds bail, they must make a written record of the decision and the reasons for it. A copy of the record must be given to the defendant as soon as practicable, but no longer than 24 hours after it was made: s 7(1)(b) BA. In each case check that these legal requirements have been met by the police. If they appear not to have been met, then summons the relevant officer to give evidence as to the reasons why their statutory obligations were not met.

➢ Where a police officer grants bail, the bail bond must be in Form 2 of the Schedule: s 11(2) BA.

3.19.8 Bail for young defendants

➢ No special statutory provisions exist in Tonga regarding bail for children under the age of 18. However, you can use the terms of the CRC as a guide to what is acceptable treatment of children, as per *Tone anors v Police* [2004] Tonga LR 144.

➢ Any child in custody brought before the court has a right to be legally represented to challenge their detention. Article 37(d) CRC states that:

> "Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court … and to a prompt decision on any such action."

- The already strong presumption in favour of granting bail is even stronger for people aged under 18 years for whom alternatives to pre-trial detention need to be found by the court, except as a measure of last resort and for the shortest possible period of time.
- Article 37(b) of the CRC states that:

> "No child shall be deprived of [their] liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

- If a child is denied bail, then they must be held separated from adults and provided with facilities for education, sport/recreation and regular family visits: Art 37(c) CRC. If these standards cannot be met, then an alternative to detention needs to be found (ie: bail with appropriate conditions).

3.19.9 Bail for family violence offenders

- Family violence offending has a unique risk profile, and conditions of bail may be crucial in managing the risk of future family violence occurring.
- Where bail is granted you should ensure that Protection Orders are in place, with appropriate conditions attached and ensure that both the defendant and the complainant are aware of these conditions and the consequences of breach. The complainant should also be advised to immediately report any breach.

3.19.10 Bail on appeal

- You must grant bail to a person who has been convicted and sentenced to imprisonment for a criminal offence and who is appealing against the conviction or sentencing if you are satisfied that:
  - there is a reasonable prospect of success for the appeal;
  - it is unlikely that the appeal will be heard before the whole (or a substantial portion) of the sentence has been served; and
  - there are substantial grounds that the person will surrender to custody without committing any offence whilst on bail: s 4B(1) BA.

3.19.11 Refusal of bail

- In the interests of justice, avoid long remands in custody and if likely, you may remand the defendant to appear as soon as possible before a judge.
- If remanded in custody on any charge:
  - the defendant may be brought before the court at any time to deal with that charge, even if the period of their remand has not expired. Good practice is to schedule regular detention supervisory hearings (monthly) where you review the need for ongoing detention and determine if circumstances have changed which may now warrant release on bail. These hearings also provide an opportunity to ensure the parties are progressing the matter for trial in a timely way, to avoid delay and minimise any remaining period of pre-trial detention;
  - you must issue a warrant of commitment for their detention in custody for the period of the adjournment: s 48(1) MCA;

- the police officer to whom the warrant of commitment is directed will deliver the defendant together with the warrant to the keeper of the prison: s 48(2) MCA;
- record your reasons carefully for refusing bail in the magistrate's minutes books and on the file (if a file has been opened) or on the clerk's minute book: s 7(1) BA;
- where you withhold bail, you must inform the defendant that they may apply to the Supreme Court to be granted bail: s 7(2) BA. If the defendant is unrepresented ensure they know how they can do so and where they can obtain assistance.

3.19.12 Granting bail

If you decide to grant bail you must:

- consider what conditions may apply under s 5 BA;
- certify, in writing, that bail has been granted in the form of a bail bond (Form 1 of the Schedule): s 11(1) BA;
- include:
  - The amount of the bail bond;
  - any conditions ;
  - whether it is with or without sureties.
- sign the bail bond in court (or the registrar may do this).

3.19.13 Bail conditions

- The police will suggest what conditions should be imposed on the bail. All bail conditions must relate to any concerns about granting bail.
- State what conditions apply. These bail conditions should be kept at a minimum and simple so that the defendant can understand and comply with them.
- If a defendant is granted bail, the defendant must attend personally at the time and place to which the hearing is adjourned.
- If you decide to grant bail, consider the following bail conditions:
  - return date to court
  - residence reporting and travelling
  - security
  - sureties
  - surrender passports and travel documents.
- You or a police officer may require the defendant at any time to comply with any necessary requirements to ensure the defendant:
  - surrenders to custody (appears in court on their due date);
  - does not commit an offence while on bail;
  - does not interfere with witnesses or any evidence;

- makes themselves available for enquiries or a report to be made to assist the court in dealing with them for the offence;
- does not leave Tonga pending trial and surrenders their passport and travel documents to ensure compliance with such order: s 5(iii) BA.

The order to give is: "The matter is adjourned to … and bail is granted with the following conditions: … "

3.19.14 Release of the defendant on bail

- The defendant will be released when:
  - all the parties have entered into the bond;
  - notice has been given by the registrar or the superintendent; and
  - you endorse on the remand warrant a certificate that all the parties to the bond have entered into it and the defendant is to be released.

3.19.15 Variation of conditions of bail and renewal (new grant) of bail

Bail expires each time a defendant is brought back to court.

- You must re-grant bail and issue a new bail bond each time the defendant is required to appear even if the new grant is on the same terms as the previous one(s).
- Usually bail would be re-granted unless there are new reasons to amend the bail conditions or revoke bail.
- If a defendant or a police officer applies to vary the conditions of bail you may make an order changing:
  - the terms on which bail has been granted; or
  - the conditions of any bail bond entered into: s 6(1) BA.
- If sureties are required for the bail bond, they continue until the parties consent in writing or a new bail bond is entered into.
- Record your reasons and decision in the minute book: s 7(1) BA.

3.19.16 Process where bail is breached

You may issue a warrant of arrest for a defendant released on bail if satisfied that the defendant:

- has failed to surrender to custody; or
- is absent from the court without leave of the court at any time after they have surrendered to custody: s 9(1) BA.

The police may arrest the defendant released on bail without a warrant if (on reasonable grounds) they think that:

- the defendant is not likely to surrender to custody;
- is likely to break any of the bail conditions or has broken any of the bail conditions; or

- the surety notified them in writing that the defendant is not likely to surrender to custody and for that reason the surety wishes to be relieved of their obligations as a surety: s 9(2) BA.

After the person is arrested and brought before you within 24 hours at the latest (unless a weekend or holiday), if you are satisfied of those grounds, you may:

- remand the defendant in custody; or
- grant them bail subject to the same or different conditions as originally imposed: s 9(3) BA.

3.20 Bail checklist: for your discretion to grant bail and bail conditions

There is a presumption in favour of granting bail unless you are satisfied there are substantial grounds for believing that the defendant will:

- commit further offences; or
- interfere with witnesses or obstruct justice; and
- that bail conditions would not adequately address these risks.

Note: the defendant is presumed innocent, unless otherwise proven guilty and their freedom is an important principle when making your assessment.

3.21 Risk of the defendant's flight or failing to appear

Factors to consider include:

- What are the circumstances, nature and seriousness of the offence?
- What is the severity of the likely penalty if the defendant is found guilty?
- Look at the defendant's background and community ties eg: residence, employment, family situation, previous criminal history.
- Any specific indications against granting bail (eg: prior failure to surrender to custody or to observe bail conditions); or in favour of granting bail (eg: voluntary surrender to the police at the time of arrest).
- Any other matters in the circumstances relevant to whether the defendant is likely to appear.

Consider conditions which could address these risks such as requiring the defendant to:

- regularly report to the police station;
- live at a fixed address;
- make themselves available for enquiries or a report to be made to assist the court in dealing with them for the offence;
- not to leave Tonga pending trial and to surrender their passport and travel documents to ensure compliance with such order: s 5 BA.

3.22 Public interest

Factors to consider include:

- a need to minimise use and length of pre-trial detention. Consider the length of time before a hearing and final determination of the case (eg: if several months this may weigh against custody);
- whether there is a risk of the defendant tampering with police witnesses, evidence or the alleged victim;
- whether there is a risk that the defendant may re-offend while on bail;
- any possible prejudice to the defendant in preparing for their defence; and
- any other matters relevant to the public interest.

3.23 Bail conditions

Factors to consider include:

- Whether the condition(s) are reasonable and necessary to address the bail concerns.
- Whether the condition(s) are proportionate to the charges.
- Whether it is reasonably practicable for the defendant to comply with the condition(s).
- Whether the bail conditions unreasonably interfere with the defendant's home life, work, or their right to act or move freely, other than appearing in court.
- Whether the bail bond/surety would cause the defendant financial hardship or their guarantor.

3.24 Youth specific factors (not already addressed above)

- age (including different legal criteria if aged under 18; detention only as a last resort and for shortest time);
- adult supervision;
- supervision in the community;
- supervised work;
- residence;
- family support;
- previous appearances in court;
- health issues (including any physical or mental disabilities) or any other reasons why the experience of custody would cause particular hardship for the defendant.

3.25 Bail judgment if bail is opposed

Your judgment should contain:

- the charges faced by the defendant and the fact that police oppose bail;
- a summary of the grounds of police opposition to bail;
- a summary of defence submissions as to the grounds in favour of bail being granted;

- the law on bail;
- a brief summary of the facts relevant to the case at hand;
- a conclusion as to whether bail is granted or refused;
- a further hearing date when detention will be reviewed;
- if the defendant is a child, specify that they must be held in a facility:
  - separated from adults;
  - close to where their family live so they can have regular family visits;
  - which provides access to education, recreation facilities and regular visits from family.

3.26 Bail conditions and bail bond

If the concern is that the defendant will not turn up to court, then consider the following conditions:

- report to the police station (maybe once or twice a week);
- remain in Tonga;
- not to leave their village and live at a particular address or town where the court directs;
- surrender their passport and travel documents.

Other conditions will depend on the nature of the offence, for example:

- if the offence was a night burglary, the condition may be a curfew;
- if the offence was an assault, the condition may be that the defendant stay away from a specified person;
- if the offence was for driving offences, the conditions may be that the defendant must not drive a motor vehicle or carry passengers when driving a motor vehicle, or not consume alcohol or use an illegal drug.

You may impose any other condition that you think appropriate relating to the conduct of the defendant.

In addition to these conditions, a defendant must enter into a bail bond, with or without surety, for such sum as you fix. A surety is seldom used, however when it is used, it usually involves quite large sums. It is used for people who would like to travel overseas pending a continuation of their proceedings.

3.27 Template for bail applications[1]

Bail decision

Name of defendant: Date:
Age of defendant*:

The defendant (bail applicant) faces the following charges:

Brief summary of facts of the charges and plea (guilty or not guilty) if any

Alleged facts:

Plea:

- ☐ No plea
- ☐ Not guilty
- ☐ Guilty

Summary of police reasons for opposing bail

Note: The defendant is presumed innocent unless proven guilty. The onus is on the police to show just cause for the defendant's continued detention.

The police position, as to the risk(s) the defendant poses if bailed, is/are:

- ☐ the likelihood of the defendant failing to appear at the next court date;
- ☐ the seriousness of the offending;
- ☐ the likelihood of offending while on bail; and
- ☐ the risks of interference with witnesses or evidence against the defendant.

Summary of defence reasons for granting bail and any conditions

Interests of the defendant:

[1] Bail Decision Template: Section 8 – Source: IJS / Bench Books / District Court Bench Book / Bail / Bail decision template: Section 8 – Last saved on 27/05/2020
Cook Island Judicial Orientation Training June 2020-Bail template & Bail notes

- The length of time the defendant is likely to have to remain in custody before the case is heard (long time favours release).
- The need for the defendant to obtain legal advice and to prepare a defence.
- The need for the defendant to be at liberty for other lawful purposes, such as employment, education, care for dependants.
- Any health issues (including physical or mental disabilities) or other reasons which would make the experience of being held in custody particularly difficult for the defendant.
- Age of the defendant (under 18, youth or old age).
- Harshness of custody conditions.

Relevant law

Apply the facts stated by both parties to the law. Consider the relevant legal tests to grant or refuse bail and any relevant case law (use the bail checklist for legal and factual criteria). Balancing act deciding bail.

Summary of reasons for refusing or granting bail

If you refuse bail:

- Are there substantial reasons for believing the defendant will fail to appear in court, commit further offences or interfere with witnesses/obstruct justice?
- Are you satisfied that bail conditions would not address the risks?

If you grant bail:

- What are the appropriate bail conditions and bail bond?
- See 'Conditions and Bail bond'.

4. Pre-trial matters

4.1 Relevant legislation

- Constitution of Tonga (Constitution): cl 11, 13, and 14
- Magistrate's Court Act (MCA): ss 13-17, 52, 68, and 69

4.2 Starting proceedings

Section 13 MCA; cls 11 and 14 Constitution.

Every person who wishes to start criminal proceedings in a Magistrate's Court must apply in person to the clerk for a summons. The complainant must clearly state:

- the nature of the offence complained of; and
- the time and place at which it was committed.

For the writing of the summons, "clerk" has been interpreted to include a member of the police force.

Clause 11 of the Constitution also applies to ensure that the defendant must have received a written indictment that clearly states the offence(s) and the grounds for the charge(s), before being tried, or summoned to appear before the court, or punished for failing to appear.

Clause 14 upholds the right of the defendant not to be deprived of their liberty, and security except in accordance with the law.

4.3 The summons

Clauses 11 and 13 Constitution; ss 13-17 MCA.

4.3.1 Content

If it appears that an offence triable by a magistrate has been committed within the district, the clerk then makes out a summons (Form 1 in the Schedule). The summons must:

- state concisely the offence charged including the relevant sections of the Act creating the offence;
- state the grounds of the offence including the time and place at which it was committed; and
- require the defendant to appear at a specified time before the Magistrate's Court to answer the charge: ss 13 and 14 MCA; cls 11 and 13 Constitution.

Each summons must be for one offence only. A complainant may bring more than one charge against the same defendant at the same time by taking out separate summons in respect of each charge. You may deal with such summons either together or separately: s 15 MCA.

The defendant must only be tried on any charge which appears in the indictment, summons or warrant for which they are being brought to trial: cl 13 Constitution. The defendant may be convicted of another offence (not being a more serious offence) arising out of the same circumstances: cl 13(d) Constitution.

See the "Summary Trial" chapter to find out more about alternative charges.

Before being issued for service, the summons must be read by you and you must sign your signature and seal it: s 16 MCA.

In any district in which there is no resident magistrate, the summons may be signed by the government representative for that district or a justice of the peace: s 16 MCA.

4.3.2 Service

A bailiff, constable or other officer of the police service must serve the summons on the defendant by either:

- delivering it to the defendant personally; or
- leaving it or a copy with some adult inmate of the age of 16 years or upwards at their last home address: s 17 MCA.

A certificate of service completed according to section 11 of the Bailiffs Act is sufficient evidence of service of such documents: s 17(3) MCA.

If the summons is not served on the defendant more than 24 hours before the time and date stated in the summons for the hearing (if served within the district) or more than 14 days (if served outside the district), the case must only proceed with the express consent of the defendant. This consent must be recorded in the minute books: s 14 MCA.

4.4 Defendant fails to appear on summons

Section 52 MCA.

4.4.1 Arrest warrants

You must issue a warrant for arrest if it appears on oath that the person accused of any criminal offence is likely to abscond. This must be done even if a summons in respect of the same charge has been issued and the time for appearance stated in the summons has not yet expired: s 52(1) MCA.

You may also issue a warrant for arrest when empowered by other provisions of the Magistrate's Court Act or any other enactment: s 52(1) MCA.

The warrant of arrest (Form 4 of the Schedule) must:

- be dated, signed and sealed by the magistrate who issued it;
- be directed to the constables of the Kingdom; and
- briefly state the offending, the name or description of the person to be arrested and order that such person be apprehended and brought before the issuing magistrate: s 52(2) and (3) MCA.

See also the "Summary Trial" chapter to find out more about non-appearance of the parties at trial.

4.5 Appearance of witnesses

Section 68 MCA.

4.5.1 Subpoenas

If any party requires a witness to be summoned to give evidence, the party must state the name and address of the witness to the clerk, who will prepare a separate subpoena for each witness. You must sign and seal every subpoena before issuing it.

4.5.2 Service

Service of subpoenas shall be carried out and proved in the same way as a summons for a defendant by way of a certificate of service.

4.5.3 Witness fails to appear on subpoena

Section 69 MCA.

If a witness summoned to attend or to produce any document in a criminal case fails or refuses to attend the hearing or trial, you may, upon proof on oath that the summons was properly served, issue a warrant for the arrest of the witness. You may withdraw the warrant at any time before it is served.

After their arrest, they must be brought before you to inquire into why the witness did not attend. Unless their non-attendance was due to circumstances beyond their control, you may order imprisonment for up to eight days or a fine not exceeding $200.

4.6 Principles

- Clause 11 of the Constitution applies to ensure that the defendant has received a written indictment that clearly states the offence(s) and the grounds for the charge(s) before being tried, or summoned to appear before the court, or punished for failing to appear.
- The defendant must only be tried on any charge which appears in the indictment, summons or warrant for which they are being brought to trial: cl 13 Constitution. But they may be convicted of another offence (not being a more serious offence) arising out of the same circumstances: cl 13(d) Constitution.
- Clause 14 upholds the right of the defendant not to be deprived of their liberty and security, except in accordance with the law.

4.7 Checklist

4.7.1 Commencing proceedings

- Every person who wishes to start criminal proceedings in the Magistrate's Court must apply in person to the clerk (or a member of the police) for a summons. The complainant must clearly state:
  - the nature of the offence complained of; and
  - the time and place at which it was committed: s 13 MCA.

4.7.2 Issuing a summons

- If it appears that an offence triable by a magistrate has been committed within the district, the clerk then makes out a summons (Form 1 in the Schedule).
- The summons must:
  - state concisely the offence charged;
  - state the time and place at which it was committed; and
  - require the defendant to appear in a specified time before the Magistrate's Court to answer the charge: s 14 MCA.
- Each summons must be for one offence only: s 15 MCA. But a complainant may bring more than one charge against the same defendant at the same time by taking out separate summons in respect of each charge.
- You may deal with such summons either together or separately: s 15 MCA.
- Before being issued for service, the summons must be read by you and you must sign your signature and seal it: s 16(1) MCA.
- In any district in which there is no resident magistrate, the summons may be signed by the government representative for that district or a justice of the peace: s 16(2) MCA.

Proof of service of the summons is on file:

- A certificate of service completed according to the Bailiffs Act is sufficient evidence of service of such documents: s 17(3) MCA.
- If the summons is not served on the defendant more than 24 hours before the time and date stated in the summons for the hearing (if served within the district) or more than 14 days (if served outside the district) the case must only proceed with the express consent of the defendant. This consent must be recorded in the minute book: s 14 MCA.

4.7.3 Issuing a warrant to arrest

- Once a summons has been issued, you must issue a warrant for arrest if it appears on oath that the person accused of any criminal offence is likely to abscond. This must be done, even if a summons in respect of the same charge has been issued and the time for appearance stated in the summons has not yet expired: s 52(1) MCA.
- You may also issue a warrant for arrest when empowered by other provisions of the Magistrate's Court Act or any other enactment: s 52(1) MCA.
- Check that the warrant (Form 4 of the Schedule):
  - is dated, signed and sealed by you as the magistrate who issued it;
  - is directed to the constables of the Kingdom; and
  - briefly states the offending, the name or description of the person to be arrested and order that such person be apprehended and brought before you: s 52(2) and (3) MCA.
- Any warrant to arrest a defendant may be withdrawn by the person who issued it at any time before it is carried out.

4.7.4 Appearance of witnesses

- If any party requires a witness to be summoned to give evidence, the party must state the name and address of the witness to the clerk, who will prepare a separate subpoena for each witness: s 68(1) MCA.
- You must sign and seal every subpoena before issuing it: s 68(1) MCA.
- Service of subpoenas shall be carried out and proved in the same way as a summons for a defendant: s 68(1) MCA.
- If a witness summoned to attend or to produce any document in a criminal case fails or refuses to attend the hearing or trial, you may, upon proof on oath that the summons was properly served, issue a warrant for the arrest of the witness: s 69 MCA;
- You may withdraw the warrant at any time before it is served.
- After their arrest, the witness must be brought before you to inquire into why the witness did not attend, and unless it appears that their non-attendance was due to uncontrollable circumstances, you may order imprisonment without hard labour for up to eight days or a fine not exceeding $200: s 69 MCA.

5. Summary trials

5.1 Relevant legislation

- Constitution of Tonga (Constitution): cls 13 and 14
- Criminal Offences Act (COA): s 17
- Magistrate's Court Act (MCA): ss 20A-26, 35, 36, 68-71, and 90
- Evidence Act revised (EA): ss 121 and 147

5.2 Matters at commencement of trial

5.2.1 Conflict of interest

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship which could mean that you might be biased, or could create the appearance of bias, you should not hear the case. See the "Judicial Conduct" chapter to find out more about conflicts of interest.

5.2.2 Non-appearance by defendant

Sections 20 and 21 Magistrate's Court Act (MCA).

Both the complainant and the defendant are entitled to conduct their cases in person or by a law practitioner: s 20 MCA.

Usually, you cannot proceed unless the defendant or their representative, the police (or other informant) and all the witnesses are present in court.

However, if the defendant is absent you may decide to proceed at your discretion: s 21(1)(b) MCA.

If the defendant does not appear before the court on the date specified in the summons, you may:

(a) adjourn the hearing to a later date;

(b) after proof of service of the summons, hear and determine the case in their absence; or

(c) after proof of service of the summons, issue a warrant for the defendant's arrest and adjourn the hearing: s 21(1) MCA.

A certificate of service completed according to s 11 of the Bailiffs Act is sufficient evidence of service of such documents: s 17(3) MCA. This should contain the date, time and mode of service, and who carried out the service. See the "Pre-Trial matters" chapter to find out more about service.

See also *Filipe v R* [1998] Tonga LR 232 where the Supreme Court looked at the discretion under s 21(1) on whether to proceed without the presence of the defendant or whether to issue a warrant for their arrest and, if so, adjourn the hearing:

> "The ultimate decision is for the individual Magistrate, but there must certainly be times when principle and justice require the Magistrate to proceed under s 21(1)(b) and hear the case without the defendant being present." (at 234)
> ...

> "The discretion to issue a warrant of arrest must itself rest on firm reasons that justify an arrest. The history of a particular defendant's appearances before the court may be a factor. The penalty provided for the offence charged, and the likely penalties for the particular defendant, are important factors." (at 234)

Therefore, when exercising your discretion to issue a warrant for the defendant's arrest under s 21(1)(c) consider:

- what efforts the police have made to serve the defendant;
- whether the defendant has failed to appear previously without good reason (for example, a good reason might be lack of transport);
- the likely penalty for the defendant if convicted of the offence(s).

The court support staff will, in court, prepare the warrant of arrest and hand it up to you for signature before you move on to the next matter.

If the defendant is subsequently arrested under a warrant issued for non-appearance, they must be brought before you. You may either admit the defendant to bail or order them to be remanded in custody until the next sitting of court: s 21(2) MCA.

You must also cancel the bench warrant, since once the defendant has been brought before the court, the bench warrant is now executed.

At the next sitting of the court, you must proceed with the hearing of the case, unless it is impossible to complete the hearing of the case. If so, you may adjourn the hearing to the next sitting and admit the defendant to bail or order them to be remanded in custody until the next court sitting: s 21(3) MCA.

See the "Bail applications" chapter for more details on your discretion to grant bail or remand in custody.

Record your orders in the minute book.

5.2.3 Non-appearance of prosecution or complainant

Section 22 MCA.

If, when the case is called, the defendant is brought before the court on a warrant of arrest and you are satisfied that the complainant had due notice of the time and place of the hearing and does not appear, you may:

- dismiss the complaint (where the police have been plainly derelict); or
- adjourn the hearing to a future day: s 22 MCA.

5.2.4 Non-appearance of both parties

Section 23 MCA.

If, when the case is called, neither the complainant nor the defendant appears, you may adjourn or dismiss the case as you think fit: s 23 MCA.

See the "Adjournments" chapter to find out more about adjournments.

5.2.5 Interests of justice

Ultimately you must always stand back and have regard to the interests of justice.

5.3 Open court and orders to exclude persons

Section 86 MCA.

All trials are held in an open court, unless you order certain persons to be excluded from the court (closed court proceedings): s 86 MCA.

5.4 Pleas

5.4.1 Putting the charge to the defendant

Section 24 MCA.

At the outset of the hearing, you must:

- tell the defendant of the offence they are charged with in the summons; and
- ask the defendant whether they are guilty or not guilty: s 24(2) MCA.

If the defendant is not legally represented, before putting the charge to them explain the purpose of legal representation in the process, where they might be able to obtain legal representation, and then ask them if they wish to seek legal representation before entering a plea.

See the chapter "Management of proceedings" to find out more about unrepresented defendants.

Then the court clerk reads the charge to the defendant.

If they are not legally represented, you or the registrar must explain the charge to the defendant, so that that the defendant fully understands the charge against them. This may require you to explain it several times or in different ways. Check that the defendant has understood the charge by asking them to explain it back to you.

If you have any doubt that the defendant really understands the charge, you should clearly explain the elements involved and the nature of the offence to the defendant; or use an interpreter or duty solicitor to do so; or consider their fitness to plead (see below).

Unless the defendant clearly understands the nature of the offence with which they are charged, the defendant will not be able to work out if they have a defence or should enter a plea.

When you are satisfied that the defendant understands the charge, explain to them the legal consequences of pleading guilty or not guilty to the charge. Once they have also understood this, then ask the defendant how they plead to the charge.

If the defendant refuses or is unable to plea or will not answer directly, you or the clerk may enter a plea of not guilty. In practice, the clerk will only deal with minor matters.

The defendant may, with leave of the court change:

- a not guilty plea to guilty at any time;
- a guilty plea to not guilty at any time, but this must be before sentencing.

5.4.2 Fitness to plead

Section 17 Criminal Offences Act (COA), s 17(2) MCA.

Before taking a plea, you should consider Part III of the Criminal Offences Act (COA), "Exemptions from criminal responsibility and responsibility for acts of involuntary agents". A mentally ill defendant cannot make a lawful plea: s 17 COA. A defendant is under a disability if they cannot plead, understand the nature of proceedings, or instruct a lawyer.

In these situations, it is better to find out the nature of the problem first, rather than to allow proceedings to continue. You should adjourn the hearing to obtain expert medical evidence (psychological or psychiatric report). See the "Management of proceedings" chapter.

Also, if the defendant is not of the age for criminal responsibility (being under seven years old) then there is no need for them to make a plea.

In addition, a child between seven and 11 years of age is deemed not to be capable of committing an offence, unless in the opinion of the court or jury, the child had sufficient maturity of understanding to know the nature and consequences of their conduct about the act in question: s 16(2) COA.

This test of maturity should be applied using a high threshold, given the still low age bracket of children that it applies to and bearing in mind the CRC Committee guidance that the age of criminal responsibility should be somewhere between 14 and 16 years old.

5.4.3 Not guilty plea

Section 24 MCA.

If a defendant pleads not guilty, follow the procedure for trial as outlined in s 24 MCA (see below).

If the defendant denies the charge (for example, pleads not guilty or if you enter a plea of not guilty for them) then you may have an immediate hearing, if:

- you are able to do so;
- all parties and witnesses are ready; and
- the matter can be dealt with quickly.

If the plea of not guilty occurs at first appearance, the prosecution will normally request an adjournment until a date so that they may call their witnesses. Before fixing the date:

- inform the defendant of their right to legal counsel and how they might obtain legal counsel (if unrepresented);
- advise the defendant to prepare for hearing the case and how they should do so, assuming they will be self-represented;

- set a date for the defendant to appear again either for hearing or for counsel to appear;
- find out the number of witnesses the parties intend to call to estimate the probable length of the trial, and set a date for the trial;
- deal with bail/remand in custody based on the presumption to grant bail; (see the 'Bail' chapter for further guidance); and
- issue summonses for witnesses if necessary.

5.4.4 Guilty plea

If the defendant admits the charge:

- ask the police to read a brief summary of the facts;
- tell the defendant to listen very carefully to the summary of facts;
- explain that they will be asked at the end whether they agree with the summary of facts; and
- then ask the defendant whether they agree with the summary of facts.

If the defendant disputes any of the facts, consider whether the disputed facts are relevant to the elements of the offence.

Note: a guilty plea is a plea to the elements of the charge but may not be acceptance of the police summary of facts. If the facts in dispute are not relevant to the elements, enter a plea of guilty.

When a defendant pleads guilty, you must be aware that, if the defendant comments or disputes some facts in the police brief, that it may indicate a possible defence. If this occurs, enter a plea of not guilty and proceed as a defended trial. This is important as the defendant may not really understand the elements of the offence in the abstract and it may only become apparent following an initial plea of guilt that their true position is that they contest facts in the brief which are relevant to the elements of the crime.

See *Cocker v Police Department* (Cr App 1251/98, 5 March 1999, Ward CJ). If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the defendant may amount to a defence, you must enter a plea of not guilty for the defendant.

> "Often a short inquiry will make it plain that the plea is properly entered but in any case where it is not, the magistrate must enter a plea of not guilty and try it as a contested case."

If the defendant pleads guilty and you are satisfied that the defendant understands the nature and consequences of their plea, you may:

- convict the defendant (find the person guilty); or
- deal with the defendant in any other manner authorised by law.

You may adjourn the matter to a later date for sentencing if the matter is more complicated and order that a sentencing report is prepared, rather than dealing with sentencing immediately. This may be necessary where the defendant is a child, young person, or where you think they may have a mental illness or disability, as all of these elements may affect your sentence.

The defendant may also withdraw a plea of guilty with your leave at any time before the defendant has been sentenced or otherwise dealt with (see "Withdrawal of the complaint" below). The overall principle is whether this would be in the interests of justice or fairness.

Prior to sentencing, some key reasons that have been justified as grounds to set aside a guilty plea include:

- In entering the plea, the defendant acted upon a material mistake and there was a clear defence to the charge (the defence must at least be reasonably arguable); and
- Proceedings were defective or irregular.

5.5 Amending the charge or summons

Section 90 MCA, cls 12 and 13 Constitution.

No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which they are being brought to trial: cl 13 Constitution.

At the hearing if the evidence discloses a distinct offence from that charged in the summons or warrant you must dismiss the charge: s 90 MCA.

However, if you think there is a minor error in the summons or warrant (such as the time and place of the offence), you must amend the charge if this can be done without injustice to the defendant: s 90 MCA.

You may also adjourn the hearing to a future date if it appears to you that the defendant has been misled by the charge as originally stated: s 90 MCA.

Clause 12 of the Constitution provides that no one shall be tried again for any offence for which they have already been tried, whether they were acquitted or convicted, except in cases where the defendant confesses after having been acquitted by the court and when there is sufficient evidence to prove the truth of the confession.

5.6 Alternative charges

cl 13 Constitution, ss 3 and 42(3) COA.

The defendant may be convicted of another offence (not being a more serious offence) arising out of the same circumstances: cl 13(d) Constitution. This means the defendant may be convicted of a lesser offence within the summons, even though the whole offence charged is not proved, or they may be convicted of an attempt to commit any offence so included: cl 13(a) and (b).

If the defendant faces an allegation of another offence falling within the same facts, they may be found guilty of that other offence or of an offence of which they could be found guilty on a summons specifically charging that alternative offence: s 42(3) COA.

However, except for s 42(3) COA, if the defendant has been charged with an offence, they must not be found guilty of any other offence on the evidence submitted to the court if such evidence is insufficient to establish the offence with which such person is charged: s 3 COA.

5.7 Cross complaint

Section 26 MCA.

Where cross complaints are made by the same parties with reference to the same matter, the magistrate may hear and determine the complaints together: s 26 MCA.

5.8 Minor traffic offences

Section 20A MCA.

In some cases, a defendant may plead guilty in writing to an offence under the Traffic Act without appearing in court. This is where the offence:

- is under the Traffic Act;
- is not triable in the Supreme Court; and
- does not carry a sentence of imprisonment: s 20A(1).

First, the prosecution must notify the clerk that the defendant has been served with a summons, a notice in Form 22 (Schedule to Traffic Act) and a concise statement of facts relating to the charge before the court: s 20A(1).

Then, the clerk will notify the prosecution if the defendant has sent in a written guilty plea (unless withdrawn at any time beforehand in writing) without wishing to appear before the court: s 20A(2).

You may:

- proceed to hear and dispose of the case in the absence of the defendant, whether or not the prosecutor is also absent; or
- adjourn the trial and deal with the matter in the usual way as if the defendant's notification had not been given: s 20A(2).

The clerk must inform the prosecutor if at any time before the hearing they receive written notice from the defendant to withdraw their guilty plea and you must deal with the case as if such notification had not been given: s 20A(3) MCA.

Before accepting the plea of guilty and convicting the defendant in their absence, you must have the following documents read aloud in the court:

- the notification of the guilty plea;
- the exact same statement of facts (that was notified to the defendant) without any changes by the prosecutor; and
- any submissions received which the defendant wishes to be brought to the attention of the court to mitigate their sentence: s 20A(4) and (5).

5.9 Election of summary trial

Section 35 MCA.

If a person is accused of having committed an offence which is triable only in the Supreme Court, you may, on the application of any of the parties or of your own accord but with their consent, deal with the case summarily in the manner provided by s 24 MCA (see below). This is only in cases where you think that due to the nature and circumstances of the case, the punishment you may inflict under this Act would be adequate.

See the "Preliminary enquiries" chapter to find out more about electing a summary trial.

5.10 Remission from Supreme Court

Section 36(1) MCA.

Sometimes a judge of the Supreme Court will of their own accord or on the application of the parties, remit a case to the enhanced jurisdiction of the Magistrate Court under s 24(4) MCA, if both the parties (prosecution and defendant) agree. In such cases, you must deal with the matter as a summary trial in accordance with the provisions of s 24 Magistrate's Court Act: s 36(1) and (2) MCA.

Despite having a case remitted to the Magistrate's Court from the Supreme Court, you may, upon conviction, commit the person back to Supreme Court for sentencing if you think that a greater punishment than you can give is required: s 36(3) MCA.

5.11 Procedure where both parties appear at a defended hearing

Section 24 MCA.

If, when the case is called, both the complainant and the defendant appear, you must proceed to hear and determine the complaint and follow the process set out in s 24. See the process diagram for a "Summary Trial".

You should:

- state to the defendant at the outset of the hearing the offence(s) charged in the summons and shall ask them to plead (ie: guilty or not guilty);
- if the defendant pleads guilty, make such order(s) as the justice of the case requires;
- if the defendant pleads not guilty, order the witnesses on both sides to remain out of the hearing of the court until called on to give their evidence (given on oath or affirmation: s 71 MCA);
- allow the prosecutor to address the court at the commencement of their case;
- proceed to hear the evidence of the complainant and any other prosecution witnesses (evidence in chief);

- allow the defence to cross-examine the complainant and each of the prosecution's witnesses on all facts relevant to the charge if they so choose. The defence may make a submission that there is no case to answer at the end of the prosecution's case. If such a submission is made, you should give the prosecution the opportunity to reply. If a self-represented defendant wishes to cross-examine a vulnerable (or child) complainant, then ask the defendant to direct their questions to you, and then you ask the questions to the witness;
- allow the defendant (if self-represented) or their lawyer to address the court either at the commencement or the conclusion of their case as they choose;
- hear the evidence of the defendant (if they elect to give evidence) and any defence witnesses. Note: the defendant may choose to make an unsworn statement instead of giving evidence and is not compellable either to give evidence or to make any statement for or against themselves (evidence-in-chief);
- allow the prosecutor to cross-examine the defendant (if they gave evidence) and each of the defendant's witnesses on all facts relevant to the charge;
- hear any further evidence on behalf of the prosecution in reply to the evidence given by the defence (re-examination);
- if any evidence has been given by or on behalf of the defendant allow at your discretion, the prosecutor to address the court a second time at the conclusion of the case;
- give your decision, either at the same or at an adjourned sitting of the court by either:
  - dismissing the complaint; or
  - convicting the defendant and making such order against them as the justice of the case requires.

The clerk shall in every case take and keep a record the minute book of the complaint, the evidence and your order: s 24(10) MCA.

5.12 Witnesses

5.12.1 Witnesses' non-appearance at trial

Sections 68-70 MCA; ss 162-164 EA.

In any criminal case, if any party requires any witness to be summoned to give evidence, they must give the names and addresses to the clerk who will prepare a separate subpoena for each witness for you to sign and seal: s 68 MCA.

This will then be served on the witness by a bailiff, constable or other police officer either by delivering it to the witness personally, or if they cannot be found by leaving it or a copy of it for them with an adult (aged over 16 years) at their last known address. A certificate of service completed according to the Bailiffs Act is sufficient proof of service: ss 17 and 68 MCA.

You may also issue a warrant if you are satisfied that any person whose evidence at the hearing is required by either party, will not attend to give evidence without being compelled to do so. You may withdraw this warrant at any time before it is executed: s 69 MCA.

Upon the arrest of such person under the warrant, once the witness has been brought before you, you must inquire into the grounds for their non-attendance. Unless it appears that such non-attendance was due to circumstances beyond their control, you may order them to:

- be imprisoned for any term not exceeding eight days; or
- pay a fine not exceeding $200: s 69 MCA.

5.12.2 Evidence to be on oath or affirmation

Section 71 MCA.

Evidence is to be given on oath. However, where any witness objects to being sworn in due to conscientious motives, they are entitled to make a solemn affirmation instead.

The penalties for lying under solemn affirmation are the same as are provided against persons guilty of perjury.

5.12.3 Form of oath or affirmation

Section 72 MCA.

For an oath, the person taking the oath shall stand and hold the Bible (or in the case of a Jew the Old Testament) in his or her uplifted right hand and shall repeat after you the following:

> "I swear by Almighty God that I will speak the truth, the whole truth and nothing but the truth in the evidence that I shall give before the Court."

The person taking the oath shall then kiss the Bible (or Old Testament) by touching it with their lips, forehead or nose.

For an affirmation, the person making the affirmation shall repeat after you the following:

> "I solemnly and truly affirm that I will speak the truth and nothing but the truth in the evidence that I shall give before the Court."

If a witness refuses to be sworn, they may be cited for contempt of court. See the "Management of Proceedings" chapter to find out more about contempt of court.

5.12.4 Self-incrimination by a witness

Watch out for self-incriminatory statements (saying something that indicates guilt) for the witness. If a question is asked, which could be self-incriminatory:

- warn the witness to pause before answering the question;
- explain that any evidence the witness gives in court that is self-incriminating could be used to prosecute them for a crime; and
- explain that the witness may refuse to answer the question.

It would be wise to stand the witness down to see a lawyer to explain the consequences.

5.12.5 General powers at trial to question witnesses or get them to produce evidence

Sections 162 and 163 Evidence Act (EA).

At trial you may:

- ask any question in any form at any time of a witness, provided that any party with your leave may then cross-examine that witness: s 162 EA;
- require any person present to give evidence or produce any document in their possession and that person is subject to the same rules as if they had been summoned to appear (including being punished for refusal to obey the court): s 163 EA.

5.12.6 No adverse comment if the defendant does not give evidence

Section 121 EA, s 24(6) MCA, cl 14 Constitution.

Where the defendant does not give evidence as a witness, no adverse comment can be made by the prosecution or you about not giving evidence: s 121(1)(c) EA. The defendant has a legal right not to give evidence in their own defence: cl 14 Constitution; s 24(6) MCA. This does not mean they are guilty or give any indication of guilt.

Likewise, where the defendant does not call their spouse as a witness, no adverse comment about that can be made: s 121(1)(c) EA.

5.12.7 Credibility of witness and hostile witnesses

Section 147 EA.

The general rule is that a party is not entitled to cross-examine or impeach the character of their own witness by asking questions or introducing evidence concerning such matters, such as the witness's bad character or previous convictions, except with your permission when you believe the witness to be hostile: s 147(1) EA.

A hostile witness is one who, from the way in which they give their evidence, shows they do not want to tell the truth to the court: s 147(2) EA.

In *R v Lavaka* (CR 115/2007, 19 September 2007, Ford CJ) the Supreme Court assessed the credibility of various witnesses and rejected the evidence of the defendant as "unworthy of belief".

See the "Dealing with evidence" chapter to find out more about examining witnesses.

5.12.8 Witness refusing to give evidence

Section 70 MCA.

You must find a witness in contempt when they:

- refuse to be sworn or affirmed;
- refuse to give evidence when ordered by you; or

- pretend to misunderstand the questions put to them: s 70 MCA.

At your discretion, you may then imprison the witness for not less than one hour and not more than one month. However, this power to detain a witness in custody is an extreme sanction and should be exercised only after the witness has been warned and offered the chance to take legal advice. The court should appoint legal counsel to the witness if necessary.

See the "Management of Proceedings" chapter to find out more about contempt of court.

5.13 No case to answer

Whether the defendant is represented or not, the defence may make a submission at the end of the prosecution's case that there is no case to answer (ie: that the evidence does not establish the offence). If such a submission is made, you should give the prosecution the opportunity to reply.

See *R v Anau* [2008] Tonga LR 248 where the Court sets out the correct procedure to follow for a submission of "no case to answer" and goes on to say (at p 253):

> "Whilst it is likely that a 'submission of no case to answer' will usually be made by the defence; the court may raise the issue of its own volition, and also act of its own motion; and should always do so; wherever a defendant is unrepresented."

When a submission of 'no case to answer' is made, your sole function is to consider whether there is sufficient evidence which, if believed, would entitle the court to convict. See Practice Note 01/92 "Submission of 'No Case to Answer'", 16 January 1992.

Before you can accept a submission that there is no case to answer, you must be satisfied that the evidence is so insufficient towards proving the core elements of the charge that no reasonable court will convict the defendant.

If there is some evidence in relation to the core elements, you should allow the case to be tried. You are only deciding whether there is sufficient evidence submitted by the prosecution towards the elements. The weight of the evidence is up to the jury so you should allow the case to be tried if on the facts, there is evidence on which a jury could properly conclude that the defendant is guilty.

If a prima facie case is made out at this stage, you must commit the defendant to trial (for example, if a reasonable court might convict on the evidence given so far, there is a case to answer).

Under the common law, the defendant is entitled to a discharge without having to give or call evidence, if you find that there is no case to answer.

If you dismiss the case at this stage, great care should be taken when compiling the record of proceedings in the minute book to ensure that all the evidence led is recorded and the reasons why you considered it insufficient. You should not comment on reliability or credibility: See Practice Note 01/92 "Submission of 'No Case to Answer'", 16 January 1992.

5.14 Withdrawal of complaint

Sometimes the police will make a request to withdraw a complaint at any time before conviction, dismissal of the charges or if the defendant has pleaded guilty but before being sentenced or otherwise dealt with. This is up to your discretion depending on the on the circumstances and the reasons for the withdrawal.

Usually this will only be considered for very minor offences (for example, swearing in public, being drunk and disorderly) where the complainant no longer wishes to pursue the charges. It is good policy to inquire into the reason for the withdrawal to ensure it is not due to threats or intimidation, for example in a family violence related matter, and that justice has been done in the case. For more serious offences such as family violence, theft or housebreaking, the request for withdrawal is taken as a mitigating factor for sentencing. This is to discourage people thinking that if they just go and apologize to the victims they can walk free.

Occasionally, withdrawal will be sought in cases of assault or other violent crimes. You must be very careful in these situations that the withdrawal is not being sought because the complainant is being coerced or threatened in some manner. In such cases, you should consider refusing the application for withdrawal. If you do refuse the application, you should nevertheless take the reasons given in support of the withdrawal into account as mitigating factors.

5.15 Adjournments

Sections 31, 69, 73A and 90 MCA.

During the trial and prior to sentencing you may adjourn:

- under your general power to adjourn for reasonable cause: s 31 MCA;
- where you have amended the written complaint or charge to correct any minor defects if you think that the defendant has been misled by the charge as originally stated: s 90 MCA;
- for non-appearance of witnesses after being duly summoned or failure to produce any document: s 69 MCA;
- if a complex question of law arises the Chief Magistrate may request a ruling from the Supreme Court: s 73A MCA;
- If the defendant is remanded in custody, the adjournment cannot be longer than eight days: s 31(2) MCA.

See the chapter "Adjournments" to find out more.

5.15.1 Process where an adjournment is granted

Section 31(2) MCA.

Every adjournment must be made for a specific time and date. Usually hearing dates are fixed in consultation with the parties and well in advance. However, you may adjourn for no more than eight days if the defendant is remanded in custody: s 31(2) MCA.

Before fixing the date:

- inform the defendant of their right to legal counsel (if unrepresented);
- advise the defendant to prepare for hearing the case;
- set a date after considering the time the parties need to prepare their cases and the court diary.

Once you have adjourned a matter you need either to:

- allow the defendant to go at large (see the chapter on Bail); or
- release the defendant on bail, on the condition that they attend trial at the date and time scheduled and any other relevant bail conditions under the Bail Act;
- remand the defendant for up to eight days: s 31(2) MCA.

Record all the above in the minute book.

5.16 Evidential matters

See the "Dealing with evidence" chapter.

5.17 Documentary evidence (exhibits)

5.17.1 Production of exhibits

Though it is the clerk's function to mark the exhibits, you may have to intervene to ensure that each exhibit (especially with a set of photos) is:

- distinctively marked; and
- recorded in your notes in the evidence sheet in a manner that leaves no doubt to what the exhibit mark refers.

Generally, prosecution exhibits are numbered 1, 2, 3, etc, and defence exhibits are letters A, B, C, etc. An exhibit produced by a prosecution witness in the course of cross-examination is a defence exhibit.

5.17.2 Marking of exhibits by witness

Often parties pass exhibits to witnesses and invite them to mark some point, such as the impact point in a collision. Ensure that the witness marks all photos, plans, or maps with a differently coloured pen and your notes should clearly describe it.

If, however, by marking a plan or photograph, it is possible that a later witness may be influenced by such marking, it may be preferable to have a copy of the exhibit marked and produced as a separate exhibit with the original being kept in an unmarked state.

5.18 Checklist

5.18.1 Matters at commencement of trial

5.18.1.1 Conflict of interest

If you consider there might be a "conflict of interest" because you are related to the defendant or in some other relationship which could mean that you might be biased, or could create the appearance of bias, you should not hear the case. See the chapter "Judicial Conduct" to find out more about conflicts of interest.

5.18.2 Fitness to plead

Section 17 COA; s 17(2) MCA.

Before taking a plea, you should consider Part III of the Criminal Offences Act. A mentally ill defendant cannot make a lawful plea: s 17 COA. A defendant is under a disability if they cannot plead, understand the nature of proceedings, or instruct a lawyer.

In these situations, it is better to find out the nature of the problem first than to allow proceedings to continue. You should adjourn the hearing to obtain expert medical evidence (psychological or psychiatric report). See "Management of proceedings" chapter.

5.18.3 Age of defendant

If the defendant is not of the age for criminal responsibility (being under seven years old) then there is no need for them to make a plea: s 16(1) COA.

In addition, a child between seven and 11 years of age is deemed not to be capable of committing an offence, unless in the opinion of the court or jury, the child had sufficient maturity of understanding to know the nature and consequences of their conduct about the act in question: s 16(2) COA.

This test of maturity should be applied using a high threshold, given the still low age bracket of children that it applies to and bearing in mind the CRC Committee guidance that the age of criminal responsibility should be somewhere between 14 and 16 years old.

Divert children under the age of 18 from the criminal process where possible.

Where charges proceed:

- expedite the hearing of the case;
- ensure pre-trial detention is only used as a last resort and for the shortest possible time;
- ensure the child has a lawyer and appoint one if necessary;
- adapt the process (reduce formality, simplify language and adjust tone);
- protect the privacy of the child by closing the court and using a pseudonym in public documents (listings and judgment);
- use non-custodial sentences wherever possible.

5.18.4 Non-appearance of the defendant

Usually, you cannot proceed unless the defendant, the police (or other informant) and all the witnesses are present in court. Both the complainant and the defendant are entitled to conduct their cases in person or by a law practitioner: s 20 MCA.

If the defendant fails to appear at the trial date you may:

- adjourn the hearing to a later date;
- after proof of service of the summons, hear and determine the case in their absence; or
- after proof of service of the summons, issue a warrant for the defendant's arrest and adjourn the hearing: s 21(1)(a)-(c) MCA.

When the defendant is subsequently arrested under a warrant issued for non-appearance, they must be brought before you. You may either:

- admit the defendant to bail; or
- order them to be remanded in custody until the next sitting of court: s 21(2) MCA.

At the next sitting of the court, you must proceed with the hearing of the case, unless it is impossible to complete the hearing of the case. If so, you may:

- adjourn the hearing to the subsequent sitting and admit the defendant to bail; or
- order them to be remanded in custody until the next court sitting: s 21(3) MCA.

5.18.5 Non-appearance of complainant

If, when the case is called, the defendant is brought before the sourt on a warrant of arrest and you are satisfied that the complainant had due notice of the time and place of the hearing and does not appear, you may dismiss the complaint or adjourn the hearing to a future day: s 22 MCA.

5.18.6 Non-appearance of both parties

If, when the case is called, neither the complainant nor the defendant appears, you may adjourn or dismiss the case as you think fit: s 23 MCA.

5.19 Open court and orders to exclude persons

All trials are held in open court, unless you order certain persons to be excluded from the court (closed court proceedings): s 86 MCA.

Close court for cases involving children and parts of trials where vulnerable victims give their evidence.

5.20 Legal representation

You should ensure the defendant is aware that they have a right to be represented by a lawyer and how they can secure legal representation. If the defendant is a child, appoint a lawyer. A defendant must be given time to meet with a legal representative if they so choose. Once they have been advised and if they don't wish to instruct a lawyer, you may wish to note on the record "informed of rights."

A defendant who does not have a lawyer to represent them in criminal cases will need your help to ensure they receive a fair trial. They may be on your list for the first time:

- after arrest and being held in police custody or on police bail;
- on summons after the police have laid an Information.

5.20.1 Key issues for a self-represented defendant in a criminal hearing

It is important that the defendant understands the process at their first appearance. Where the defendant is representing themselves (as entitled to under s 20 MCA), you need to consider their fundamental rights under the Constitution and presumptions under the common law including:

- their right to a fair hearing in accordance with principles of natural justice;
- the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial court; and
- to not be convicted of any offence except for the breach of a law in force at the time of the act or omission: cl 14 Constitution.

5.21 Issues for magistrates

It is your responsibility to ensure that the defendant understands using simple language:

- the criminal charges faced;
- the legal consequences of the choice they make to plead guilty or not guilty;
- their role in preparing their own defence;
- the procedures of the court;
- what the court is doing;
- why the court is following that course.

When dealing with unrepresented defendants, you should explain to them:

- the nature of the charge: cl 11 Constitution;
- the possible legal outcomes, including the possibility of a prison term if they are convicted;
- that legal representation is available (s 20 MCA) and how they can obtain it;
- that they need to present their case and how they can go about doing that;
- their right to not give evidence, which cannot be used negatively against them: s 121(1)(c) EA; and

You may adjourn the hearing to enable an interpreter to be obtained and sworn in if needed.

5.22 Putting the charge to the defendant and entering a plea

After the court clerk reads the charge to the defendant:

- explain the charge (including the elements involved in the charge) to the defendant, so that that the defendant fully understands the charge against them: s 24(2) MCA; and

- when you are satisfied that the defendant understands the charge, and the legal consequences of pleading guilty or not guilty, ask the defendant how they plead to the charge: s 24(2) MCA.

Note: a defendant is under a disability if they cannot plead, understand the nature of proceedings or instruct a lawyer. If this may be an issue:

- adjourn the hearing to obtain expert medical evidence. See the chapter on "Management of proceedings: The mentally ill".

If fitness to plead is not an issue, ask the defendant whether the charge is true or not.

If the defendant says it is true:

- Ask the prosecution to read a brief summary of the facts.
- Tell the defendant to listen very carefully to this. Explain that they will be asked at the end whether the facts are true.
- After the prosecution has read the facts, ask the defendant whether they are true or not.
- If the defendant admits the truth of the facts, this will suffice as a plea of guilty: s 24(3) MCA.

If the defendant disputes any of the facts, consider if these disputed facts are:

- not relevant to the elements and enter a plea of guilty; or
- relevant to any of the elements, or if comments made by the defendant may amount to a defence and enter a plea of not guilty for the defendant: s 24(4) MCA.

If the defendant refuses or is unable to plead or will not answer directly, you may enter a plea of not guilty.

Note: the defendant may change a not guilty plea to a guilty plea at any time.

A plea of guilty may, with your leave, be withdrawn any time before the defendant has been sentenced or otherwise dealt with. Consider:

- the overall principle if this would be in the interests of justice;
- did the applicant act upon a material mistake?;
- is there is a clear defence to the charge (at least reasonably arguable)?;
- are the proceedings defective or irregular.

5.22.1 Minor traffic offences

- For minor traffic offences, the clerk may accept a written guilty plea if the defendant is liable to a fine and the offence does not carry a sentence of imprisonment under the Traffic Act, without the defendant appearing in court: s 20A(1) MCA.
- This applies to offences under the Traffic Act and:
  - not triable in the Supreme Court; and
  - do not carry a sentence of imprisonment: s 20A(1) MCA.

- The clerk must have been notified by or on behalf of the prosecutor that the following documents have been served upon the defendant with the summons:
  - a notice in Form 22 of the Schedule; and
  - a statement of facts relating to the charge: s 20A(1)(a) and (b) MCA.
- If you are satisfied that the defendant has been so served you may:
  - proceed to hear and dispose of the case in the absence of the defendant, whether or not the prosecutor is also absent; or
  - decide not to proceed and adjourn the trial to deal with the case as if the defendant had not given notification of a guilty plea: s 20A(2) MCA.
- The clerk must inform the prosecutor if at any time before the hearing they receive written notice from the defendant to withdraw their guilty plea and you must deal with the case as if such notification had not been given: s 20A(3) MCA.
- Before accepting the plea of guilty and convicting the defendant in their absence you must have the following documents read aloud in the court:
  - the notification of the guilty plea;
  - the exact same statement of facts (that was notified to the defendant) without any changes by the prosecutor; and
  - any submissions received which the defendant wishes to be brought to the attention of the court to mitigate their sentence: s 20A(4)-(5) MCA.

5.22.2 Guilty plea

For a guilty plea under s 24(3) MCA you may then:

- record their admission as nearly as possible in the words used by them;
- convict them;
- adjourn the case for later sentencing if more complex;
- pass sentence or make an order against them (either immediately or later);
- record all of the above on the court record.

5.22.3 Not guilty plea

For a not guilty plea under s 24(4) MCA you may then have an immediate hearing, if:

- you can do so and all parties and witnesses are ready; and
- the matter can be dealt with quickly.

More usually you will adjourn the hearing to a later date and:

- find out the number of witnesses to estimate the probable length of the trial, and set a date for the trial;
- issue witness subpoenas if necessary under s 68 MCA or a warrant to arrest the witness under s 69 MCA if you are satisfied the witness will not voluntarily attend to give evidence;

- deal with bail/remand in custody if bail is not granted; and
- record all of the above in the minute book.

5.22.4 Election for summary trial

- If a person is accused of having committed an offence which is triable only in the Supreme Court, you may on the application of any of the parties or of your own accord but with their consent, deal with the case summarily in the manner provided by section 24 MCA: s 35(1) MCA;
- This is only in cases where you think that due to the nature and circumstances of the case, the punishment you may inflict under this Act would be adequate.

See the "Preliminary enquiries" chapter to find out more about election of summary trial.

5.22.5 Remission from the Supreme Court

Under certain circumstances, a judge of the Supreme Court may remit a case to Magistrate's Court, and the procedure outlined above for summary trials must be followed in such cases: s 36(1) MCA.

5.23 During trial

5.23.1 The defendant's right to be heard at trial

It is important that the defendant is properly "heard" and there are three parts to this:

- **Prior notice:** of the charges against the defendant as set out by the relevant statute creating the offence; proof of service of any court documents such as the summons; sufficient time to prepare.
- **Fair hearing:** the way the hearing is managed and witnesses are examined. All sides should be heard and be able to correct any mistakes or unfavourable material if they are able to. This also requires you to ensure you have all the relevant facts and materials before deciding a case.
- **Relevant material disclosed:** the defendant must have the opportunity to deal with or answer any key facts or evidence that you may rely on to convict them.

5.23.2 Process for defended summary hearing

- Follow the process outlined in s 24 MCA.

5.23.3 No adverse comment if defendant does not give evidence

- Where the defendant doesn't give evidence as a witness, no adverse comment can be made by the prosecution or you about not giving evidence: s 121(1)(c) EA. The defendant has a legal right not to give evidence in their own defence: cl 14 Constitution; s 24(6) MCA. This does not mean they are guilty.
- Likewise, where the defendant doesn't call their spouse as a witness, no adverse comment about that can be made: s 121(1)(c) EA.

5.23.4 Witnesses

- You may issue a subpoena for any person to appear as a witness at a hearing, where a witness is being difficult about appearing in court: s 68 MCA.
- You may also issue a warrant if you are satisfied that any person whose evidence at the hearing is required by either party, will not attend to give evidence without being compelled to do so. You may also withdraw this warrant at any time before it is executed: s 69 MCA.

See the "Pre-trial matters" chapter to find out more about non-appearance of witnesses.

5.23.5 Witnesses refusing to give evidence

You must find a witness in contempt when they:

- refuse to be sworn or affirmed;
- refuse to give evidence when ordered by you; or
- pretend to misunderstand the questions put to them: s 70 MCA.

At your discretion, you may then imprison the witness for not less than one hour and not more than one month. However, this power to detain a witness in custody is an extreme sanction and should be exercised only after the witness has been warned and offered the chance to take legal advice.

The court should appoint legal counsel if necessary.

See the "Management of Proceedings" chapter to find out more about contempt of court.

5.23.6 Self-incrimination by a witness:

Watch out for self-incriminatory statements for the witness. If a question is asked, which could be self-incriminatory:

- warn the witness to pause before answering the question;
- explain that any evidence the witness gives in court that is self- incriminating could be used to prosecute them for a crime;
- explain that the witness may refuse to answer the question;
- stand the witness down to see a lawyer to explain the consequences.

5.23.7 Credibility of witness and hostile witnesses

- A party is not entitled to cross-examine or impeach the credit of their own witness by asking questions or introducing evidence concerning such matters as the witness's bad character or previous convictions, except by your permission when you believe the witness to be hostile: s 147(1) EA;
- a hostile witness is one who, from the way in which they give their evidence shows they do not want to tell the truth to the court: s 147(2) EA.

See the "Dealing with evidence" chapter to find out more about examination of witnesses.

5.23.8 Amending or dismissing the charge during trial

- No one shall be tried on any charge but that which appears in the indictment, summons or warrant for which they are being brought to trial: cl 13 Constitution.
- But they may be convicted of another offence (not being a more serious offence) arising out of the same circumstances: cl 13(d) Constitution.
- At the hearing, if the evidence discloses a distinct offence from that charged in the summons or warrant you must dismiss the charge: s 90 MCA.

But you must amend the charge if you think:

- it may be amended without injustice to the defendant;
- the defendant has been misled by the charge as originally stated; and
- there is only a variance between the summons or warrant and the evidence as to:
  - the time or place at which the offence charged was committed, or
  - some other minor error or discrepancy in the summons or warrant: s 90 MCA.
- You may also adjourn the hearing to a future date if it appears to you that the defendant has been misled by the charge as originally stated: s 90 MCA.

5.23.9 Application for change of plea

- The defendant may change a not guilty plea to a guilty plea at any time.
- You may grant leave for a plea of guilty to be withdrawn any time before the defendant has been sentenced or otherwise dealt with.

5.23.10 Withdrawal of complaint

- Sometimes the police will make a request to withdraw a complaint at any time before conviction, dismissal of the charges or if the defendant has pleaded guilty but before being sentenced or otherwise dealt with.
- Ask the police for their reasons to withdraw the charge and note these on the criminal record.
- Weigh up the interests of justice in deciding this application where the defendant opposes an application to withdraw the charge and seeks a dismissal instead.
- You must discharge and release the defendant once leave to withdraw has been granted, unless a substituted Information is laid.

5.23.11 Adjournments

During the trial and prior to sentencing you may adjourn a matter:

- under your general power to adjourn for reasonable cause: s 31 MCA. If the defendant is in custody, you can adjourn only for a maximum of eight days: s 31(2) MCA;
- where you have amended the written complaint or charge to correct any minor defects if you think that the defendant has been misled by the charge as originally stated: s 90 MCA;
- for non-appearance of witnesses after being duly summoned or failure to produce any document: s 69 MCA;

- if a complex question of law arises so that the Chief Magistrate may request a ruling from the Supreme Court: s 73A MCA.

Once you have adjourned a matter you need to:

- allow the defendant to go at large;
- release the defendant on bail on the condition that they attend trial at the date and time scheduled and any other relevant bail conditions under the Bail Act: s 31(2) MCA; or
- remand the defendant for a maximum period of eight days: s 31(2) MCA.

See the "Adjournments" and "Bail applications" chapters for more information on adjournments and bail applications.

5.24 Evidential matters

See the "Dealing with evidence" chapter to find out more about dealing with evidence in a defended hearing.

5.25 Documentary evidence (exhibits)

5.25.1 Production of exhibits

Though it is the clerk's function to mark the exhibits, you may have to intervene to ensure that each exhibit (especially with a set of photos) is:

- distinctively marked; and
- recorded in your notes in the Evidence Sheet in a manner that leaves no doubt what the exhibit mark refers to.

Generally, prosecution exhibits are numbered 1, 2, 3, etc, and defence exhibits are letters A, B, C, etc. An exhibit produced by a prosecution witness in the course of cross-examination is a defence exhibit.

5.25.2 Marking of exhibits by witness

- Often parties pass exhibits, to witnesses and invite them to mark some point, eg: the impact point in a collision. Ensure that the witness marks all photos, plans, or maps with a differently coloured pen and your notes should clearly describe it.
- If, however, by marking a plan or photograph, it is possible that a later witness may be influenced by such marking, it may be preferable to have a copy of the exhibit marked and produced as a separate exhibit with the original being kept in an unmarked state.

5.26 Trial court checklist for a defended criminal hearing

Trial court checklist for a defended criminal hearing

- Ask witnesses to leave the court.
- Confirm the defendant's plea and ensure this is recorded on the criminal record: s 24(2) MCA.
- Ask the defendant whether they prefer to have the hearing interpreted and arrange for an interpreter if needed.
- Provide the defendant with a simple and clear explanation of:
  - the procedure to be followed;
  - the right to give and call evidence;
  - the right to cross-examine;
  - the need to put their case to any witness of the police.
- Caution to defendant when undefended – before the evidence for the prosecution is heard, the Court should give the following directive:

> "When the evidence against you has been heard, you will be asked whether you wish to give evidence yourself or to call witnesses. You are not obliged to give or call evidence, and, if you do not, that fact will not be allowed to be the subject of any comment; but if you do, the evidence given may be used against you."

- Ask the prosecutor to open their case and call witnesses. The complainant or their lawyer may address the court at the commencement of their case: s 24(8) MCA.
- The prosecution then will call their witnesses [who enter into the court room when they are called]. Consider the rules of evidence: s 24(5) and (8) MCA.
- In the case of each witness:
  - swear/affirm an interpreter, if necessary
  - swear/affirm the witness: ss 24(6) and 71 MCA.
- For an oath: the witness stands in the witness box, holds the Bible uplifted in their right hand, and faces you and repeats after you:

> "I swear by Almighty God that I will speak the truth, the whole truth and nothing but the truth in the evidence that I shall give before the Court."

- The person taking the oath shall then kiss the Bible (or Old Testament) by touching it with their lips, forehead or nose: s 72 MCA.
- For an affirmation, the person making the affirmation shall repeat after you the following:

> "I solemnly and truly affirm that I will speak the truth and nothing but the truth in the evidence that I shall give before the Court."

- The clerk should record the evidence at each stage of questioning.
- The witness must be shown and must identify any documents relied upon.
- Allow cross-examination by the defendant (s 24(7) MCA) but ensure that vulnerable witnesses/complainants are protected from harassment or intimidation.
- Allow re-examination by the prosecutor only as to new matters raised in cross-examination.
- If you ask any questions of a witness after re-examination ended, ask the prosecutor and the defendant if there are any further matters raised by your questions, which they wish to put to the witness.
- After each witness has given evidence, excuse the witness from further attendance and warn them not to discuss the evidence with other witnesses who have yet to give evidence.
- At the close of the prosecutor's case, hear a "no-case" submission, if any. The defendant is always entitled to argue that the defence has no case to answer.
- Decide whether the defendant has no case to answer. If necessary, adjourn briefly to consider the matter. The defendant is entitled to a discharge without having to give or call evidence if you decide there is no case to answer. Give and record your reasons.
- If there is a case, give reasons and explain rights and choices to the defendant to remain silent if the defendant wishes: s 24(6) MCA; cl 14 Constitution. Explain their right to:
  - silence at this stage, as the burden of proof is on the police. The issue at this stage is only whether the defendant is guilty, and, if they are found guilty, they will be able to speak at sentencing later; or
  - make an unsworn statement (explain the significance of this): s 24(6) MCA;
  - give evidence on oath and/or, if the defendant wishes, to call witnesses. (Explain that all such evidence can be questioned by the police and by the court, and that the defendant must decide who the witnesses will be: s 24(5) MCA.
- If the defendant is self-represented, then, on the completion of the examination of the witnesses by the prosecution, the following question, or words to the effect, shall be addressed to them by or under the direction of the court:

> "Do you wish to give or call evidence?"

- If the defendant makes an unsworn statement, record it and do not allow any questions: s 24(6) MCA.
- If the defendant wishes to present evidence, follow the steps for the police's witnesses above.
- Do the police/prosecution wish to recall a prosecution witness to answer any new matter raised by the defence which has taken the prosecution by surprise. Recall should follow immediately after the defence evidence.

Addresses

- The defendant may sum up or address the court upon the evidence at the conclusion of their case: s 24(8) MCA.

- The prosecution may sum up or address the court only if evidence is given by or on behalf of the defendant: s 24(8) MCA.

Verdict: finding the defendant guilty/not guilty

- If necessary, adjourn to consider the verdict, and reserve your decision. Explain to the defendant that you are going to consider all of the evidence and will make a decision once you have done so. Set a date for handing down the decision. If the defendant is in custody, this can only be for up to eight days: s 31(2) MCA.
- If adjourning, consider extending bail, hearing an application for bail (see Bail chapter).
- Consider all the evidence and decide from the facts before you whether the defendant's guilt has been established beyond reasonable doubt. Announce a finding that the defendant is guilty as charged, or is acquitted, and record the decision.
- On acquittal, the defendant is entitled to leave the courtroom immediately and go free, unless there are other charges on which they can be held lawfully in custody.
- If you are reserving your decision, see the chapter "Decision-making: oral or reserved judgments" to guide your decision.

6. Preliminary inquiries

6.1 Relevant legislation

- Magistrate's Court Act (MCA), ss 8, 11, 32, 33, 35, 36, 44, 45, 68-71 and 90

6.2 Role and purpose of a preliminary inquiry (committal hearing)

Section 32(1) Magistrate's Court Act (MCA).

If a person is accused of having committed an offence which is triable only in the Supreme Court (except under section 35 election of summary trial) you must hold a preliminary inquiry in the Magistrate's Court without the calling of witnesses.

Your role as a Magistrate is to inquire into the evidence and determine whether enough evidence exists to commit the defendant to trial before the Supreme Court, as the case may be. Your role is not to conduct a trial.

You should not:

- determine, or even comment on, the guilt or innocence of the defendant;
- believe or disbelieve any of the witnesses;
- disallow any evidence.

The only question to be answered by you is:

> "Would a judge, at the trial, convict the defendant on the evidence placed before me, if that evidence was not contradicted?"

A preliminary inquiry protects the defendant from baseless charges because you must discharge the defendant in cases where there is not sufficient evidence to commit them to trial.

6.3 Jurisdiction of magistrates

Sections 8 and 11 MCA.

Your general jurisdiction and powers are set out in s 8 and your criminal jurisdiction is set out in s 11.

For summary trials, the Magistrate's Court has jurisdiction to hear and determine criminal cases in which the maximum punishment provided by law does not exceed three years imprisonment or a fine of $10,000: s 11(2).

However, this jurisdiction can be enhanced under s 11(4) MCA for certain named magistrates by Order of the Lord Chief Justice. Enhanced jurisdiction gives those magistrates jurisdiction to hear and determine cases with a maximum penalty of seven years or a fine up to $50,000.

See the chapter "Constitutional framework" to find out more about the jurisdiction of both the Supreme Court and the Magistrate's Court.

6.4 Compelling appearance

Sections 32 and 33 MCA.

You may compel a person accused of a criminal offence to appear for the purposes of a preliminary inquiry, where the defendant is accused of committing an offence triable before the Supreme Court or Chief Police Magistrate, either:

- within your district; or
- outside your district but is to be found, or likely to be found, in your district: s 32(1).

You may compel the defendant to appear in court by way of:

- a summons; or
- a warrant for arrest where it is proved on oath to your satisfaction that the defendant is likely to abscond: s 32(2).

If a summons is issued for a preliminary inquiry, it must conform to all the requirements in terms of content, preparation, issue and service of a summons for trial in the Magistrate's Court as outlined in sections 14-17: s 33. See the chapter "Pre-trial matters" for more details about summons.

6.5 Disclosure by prosecution

Section 32(3) MCA.

At least five days before the date of the preliminary inquiry, the prosecutor must lodge with you two sets of documents, including one copy of:

- a fair summary of the statements of the prosecution witnesses; and
- the list of exhibits and any documentary exhibits to be produced.

6.6 Process for a preliminary inquiry (committal hearing)

Section 32(4) MCA.

At the preliminary inquiry you must:

- cause to be handed to the defendant in open court, the defendant's set of prosecution witness documents as per the disclosure above; and
- endorse on the remaining copy that the defendant has received their set of documents.

Before you decide whether the defendant should be committed for trial you must consider:

- all written statements which will be given at the trial; and
- any submissions made by either party.

The proper result of a preliminary inquiry depends very much on the quality of evidence tendered and for this reason it is essential that witnesses, testimony and exhibits be handled with care and according to law. See the chapter "Dealing with evidence" for more information about the rules of evidence.

If you decide that the documents do not disclose that a sufficient case has been made out to put the defendant on trial before the Supreme Court, you must discharge him. This should be recorded in the minute book.

You may decide that a sufficient case has not been made where:

- no evidence has been presented to support an essential element of the offence; or
- the evidence presented is insufficient for a reasonable court to find beyond a reasonable doubt that the defendant committed the offence.

6.7 Committal for trial

Section 32(4) MCA.

You must commit the defendant to the Supreme Court for trial if you find that the documents show a sufficient case to answer has been made out.

You may order the defendant to be:

- remanded in custody; or
- released on bail as appropriate; and
- forward the remaining set of documents together with a record of the proceedings (form 21 in the Schedule) to the Registrar of the Supreme Court.

Note: that a finding that there is a case to answer is not an indication that the defendant is likely to be guilty of the offence.

6.8 Election of summary trial

Section 35 MCA.

During the preliminary inquiry, it may appear to you that the case can be successfully dealt with through summary trial in the Magistrate's Court. To do so, you must be satisfied that the punishment you have decided upon is appropriate after considering:

- the representations made by the prosecutor in the presence of the defendant;
- the representations made by the defendant; and
- the nature and circumstances of the case.

Before making the decision to proceed by summary trial, it may be necessary to gather information on the circumstances of the offence and look at guidance cases. For example, in assault cases, you must gather information about the victim's injuries before ordering a summary trial.

See *Hu'ahulu anor v Police* [1994] Tonga LR 93.

> "In a case of causing bodily harm, I would suggest the decision whether or not to proceed summarily can not properly be made without enquiry first as to the injuries. When that has occurred, the fact that enquiry has been made should be noted in the record. "

If you are satisfied that the punishment you have the power to order would be adequate, then you may conduct a summary trial in accordance with the provisions of section 24: s 35(1).

See the chapter "Summary trial" to find out more about summary trials.

You should tell the defendant that they may consent to be tried summarily instead of being tried by a judge of the Supreme Court or by a jury and explain to them what this means: s 35(2).

You must be careful when deciding to proceed by summary trial as it will then bind your sentencing discretion. If, having allowed summary trial and heard the case, it is more serious than you originally thought, you are not empowered to send it up for sentence on that basis.

You may only commit the defendant to the Supreme Court for sentencing if you receive information, unknown to you when you agreed to a summary trial, relating to previous convictions or other matters concerning the defendant's character: *R v King's Lynn Justices ex p Carter* [1969] 1 QB 488; [1968] 3 All ER 858, *R v Hartlepool Justices ex p King* [1973] CrimLR 637: cited with approval in *R v Veamatahau* [1999] Tonga LR 195:

> "Only on hearing that [the general nature and scale of the evidence], can the decision be made and, as with all judicial decisions, it should be recorded with the reasons why the magistrate reached that decision. In this case the magistrate failed to consider the nature or circumstances of the case and equally failed to record any reasons for the decision."

See *Hu'ahulu anor v Police* [1994] Tonga LR 93.

6.9 Supreme Court Judge may remit case to Magistrate's Court

Section 36 MCA.

Sometimes a judge of the Supreme Court will of their own accord, or on the application of the parties, remit a case to the enhanced jurisdiction of the Magistrate's Court under s 24(4) MCA, if both the parties (prosecution and defendant) agree. In such cases, you must deal with the matter as a summary trial in accordance with section 24 of the Magistrate's Court Act: s 36(1)-(2).

If you hear a case remitted to you under this section, you may not order any punishment greater than that specified in s 11(2) or s 11(4) MCA (whichever applies): s 36(3).

6.10 Evidence of sick or absent witnesses

Sections 44 and 45 MCA.

You may take the evidence of a person at the place where the person is lying ill or, in the case of a person who is about to leave the Kingdom for a long time beyond the trial date, in open court: s 44(1).

Before taking this evidence, you must give both parties reasonable notice in writing, specifying the time and place where the evidence will be given as in (Form 16 of the Schedule). The parties must then have the opportunity to attend and cross-examine the person whose evidence is being taken: s 44(1).

If the defendant is in custody, you may order the custodian to convey the defendant to the place and time where the evidence is being taken: s 44(2).

Any evidence taken from sick or absent witnesses must state the date and place where it was taken, the reason for taking it, and the names of those present when it was taken: s 45.

In indictable cases, two transcribed copies of sick or absent witnesses must be included in the copies of the record of the preliminary inquiry forwarded to the registrar of the Supreme Court or the Chief Police Magistrate. These written transcripts may be used as evidence at trial unless it is proved that the person who gave the evidence has returned to the Kingdom or has recovered from illness and can present evidence in person: s 45.

7. Adjournments

7.1 Relevant legislation

- Magistrate's Court Act (MCA): ss 17, 21-23, 25, 31, 68, 69, 73A, and 90
- Constitution: cls 9 and 14

7.2 General power to grant an adjournment before or during a trial

Section 31 Magistrate's Courts Act 2020 (MCA).

A trial should proceed continuously after it has started unless you decide it is fair to grant an adjournment. You have a general power before or during the hearing of a criminal charge to grant an adjournment for reasonable cause under s 31 of the MCA.

The party applying for an adjournment must show "reasonable cause" and if you grant an adjournment, you must state the time and place of the adjourned hearing in front of both parties: s 31(1) MCA. This does not include multiple applications for adjournment by the prosecution.

When deciding to adjourn a case, you may take into account:

- the interests of justice, including the interests of the defendant in having a fair trial (which includes minimising any period of pre-trial detention of the defendant);
- the interests of the public in ensuring efficient prosecution;
- the reasons for the adjournment including any fault causing the delay that could have been avoided;
- the effect of the adjournment on the parties, including children and other vulnerable parties; and
- when a new trial could be heard.

You should hear the application in full and ask for the other party to respond before ruling. Your discretionary power must be exercised in such a way as to ensure that the defendant has a fair trial according to law, which includes ensuring they are held in pre-trial detention for the minimum possible period and that detention does not become arbitrary or unlawful under cl 14 or 9 of the Constitution, due to delay. (Article 9(3) of the ICCPR guarantees a right to trial within a reasonable time, meaning a right to a final judgment without undue delay, or alternatively the right to release).

There are three main trial stages when you may consider it necessary or advisable to adjourn, or in the absence of any of the parties or witnesses or any other reasonable cause:

- pre-trial for procedural steps;
- at the start of a defended hearing trial; and
- during the trial and prior to sentencing.

General reasons that an adjournment may be requested are:

- if the defendant is sick (must be supported by a medical certificate);
- to obtain further details of the charge(s) in the summons (s 16 MCA);
- to obtain legal representation; or

- natural justice: each party needs to be given the reasonable opportunity to prepare their case.

Note: Your discretionary power must be exercised in such a way as to ensure that the defendant has a fair trial according to law, which includes ensuring they are held in pre-trial detention for the minimum time and receive a final judgment without undue delay.

See *Tu'ivai v Lokotui* [2005] Tonga LR 178 which was an application to judicially review an adjournment decision where the Supreme Court upheld the Magistrate's decision. The Supreme Court noted that:

> "in relation to applications for adjournments, the fundamental principle of natural justice is that a party has to be given a reasonable opportunity to prepare his case."

In addition:

> "A Magistrate has to exercise his discretion in a judicial manner; and is not entitled to punish the prosecution for delays or inefficiency by dismissing the information: *R v Sutton Justices ex p DPP* [1992] 2 All ER 129.
>
> "...in relation to abuse of process in committal proceedings, the powers of magistrates must be exercised very sparingly and only in the most obvious circumstances which disclose blatant injustice."

7.3 Specific reasons for adjournments

Sections 21-23, 25, 31, 68, 69, 73A and 90 MCA.

The following are other possible reasons for adjourning a case.

Reasons for adjourning a case at the first appearance or pre-trial:

- Non-appearance of either the defendant or the prosecution or both parties: ss 21-23 MCA; or where the trial has been adjourned if one or both fail to appear subsequently: s 31(3) and (4) MCA.
- Lack of jurisdiction: at any time and place appointed for the hearing of any charge, if the court has no jurisdiction to hear the charge under section 11, you may adjourn the hearing to be heard by the appropriate authority: ss 25 and 31 MCA.

Reasons for adjourning a case at the start of, or during, a defended hearing:

- Amendments to the summons: if the defendant would be misled because you have amended the original written complaint or charge to correct any minor defects: s 90 MCA.
- Non-appearance of witnesses: if witnesses do not appear after being duly summoned or fail to produce any document: ss 68 and 69 MCA.
- Questions of law: if a complex question of law arises the Chief Magistrate may request a ruling from the Supreme Court: s 73A MCA.
- Sentencing inquiries: to make inquiries into the circumstances of the case, sentence or otherwise deal with the defendant after conviction but before sentencing.

7.4 Failure to appear by one or more of the parties

7.4.1 Non-appearance of the prosecution or the defendant

Sections 17, 21 and 22 MCA.

For non-appearance of the parties, it depends on who is not present and what their reasons are.

If the prosecution does not attend the proceedings (having had due notice of the set time and place) you may adjourn the hearing or dismiss the charge (in extreme cases): s 22 MCA.

If the defendant does not attend the proceedings, you may:

- adjourn the hearing of the case to a later date (there may be a valid reason such as sickness or lack of transport, or no proof of service, but evidence must be provided in support): s 21(1)(a) MCA; or
- after proof of valid service:
  - hear and determine the case in the absence of the defendant: s 21(1)(b) MCA; or
  - issue a warrant for the arrest of the defendant and adjourn the hearing: s 21(1)(c) MCA.

After being arrested under warrant and brought before you, you may either:

- admit the defendant to bail under the Bail Act; or
- as a matter of last resort, order them to be remanded in custody until the next sitting of the court: s 21(2) MCA.

At the next hearing date, if it is not possible to complete the hearing of the case you may adjourn the hearing to the subsequent sitting and admit the defendant to bail under the Bail Act or as a matter of last resort, order them to be remanded in custody: s 21(3) MCA.

A certificate of service completed according to section 11 of the Bailiffs Act is sufficient evidence of service of such documents: s 17(3) MCA. This should contain the date, time and mode of service, and who carried out the service.

See the chapter "Summary Trials" to find out more about your discretion if the defendant fails to appear.

7.4.2 Non-appearance of both parties

Section 23 MCA.

If, when the case is called, neither the complainant nor the defendant appear, you may adjourn or dismiss the case as you think fit: s 23 MCA.

Ultimately you must always stand back and have regard to the interests of justice.

7.4.3 Non-appearance of the parties where a trial has already been adjourned

Section 31 MCA.

If at the time and place to which the hearing is adjourned the defendant does not appear, you may:

- issue a warrant for their arrest; and
- adjourn the hearing until the first sitting of the court after their arrest: s 31(3) MCA.

If the complainant does not appear, you may:

- further adjourn the hearing; or
- dismiss the complaint: s 31(4) MCA.

7.5 Lack of jurisdiction at the hearing

Sections 25 and 31 MCA.

If at the hearing of a case, you think that the case is one which is by law triable only before the Supreme Court, or if the Attorney General provides a written opinion to that effect, you must not decide the case but have the evidence taken and the case dealt with in all respects as if the charge had been for an offence triable only in the Supreme Court: s 25 MCA.

If you do not have jurisdiction to hear any charge before you, you will then need to adjourn the hearing of the case to be decided by the Supreme Court under your general powers of adjournment: s 31 MCA.

7.6 Witnesses' non-appearance

Sections 68 and 69 MCA.

If any person who has been summoned to attend as a witness or to produce any document, fails or refuses to attend in obedience to the summons, you may issue a warrant for their arrest on proof upon oath of the summons having been duly served.

You will have to adjourn the hearing under s 31 MCA.

7.7 Questions of law

Section 73A MCA.

If a question of law arises for any offence, the Chief Magistrate may request a ruling from the Supreme Court without hearing from the parties. The proceedings are suspended until the Supreme Court makes a written ruling: s 73A(4).

7.8 Sentencing inquiries

You may from time to time adjourn the hearing after the defendant has been convicted and before they have been sentenced or otherwise dealt with, to make inquiries or to determine the most suitable method of dealing with their case.

After adjournment, any justice with jurisdiction to deal with offences of the same kind, even if they were not the initial justice to whom the charge was heard, may, after inquiry into the circumstances of the offence, sentence or otherwise deal with the defendant for the offence to which the adjournment relates.

7.9 Process where an adjournment is granted at trial

Every adjournment must be made for a specific time and date. Usually hearing dates are fixed well in advance in consultation with the parties.

Before fixing the date:

- Inform the defendant of their right to legal counsel and how they may be able to secure legal representation (if unrepresented).
- Advise the defendant to prepare for hearing the case, and if they are unrepresented, how they should go about doing so.
- Consider both the time the parties need to prepare their cases and the court diary.
- If the defendant is to be remanded, consider the impact of adjournment on the defendant's right to the shortest possible period of detention and a final judgment without undue delay.
- If the defendant is remanded in custody, the adjournment cannot be longer than eight days: s 31(2) MCA.

Once you have adjourned a matter you need to either:

- allow the defendant to go at large;
- release the defendant on bail on the condition that they attend trial at the date and time scheduled, and subject to any other relevant bail conditions; or
- remand the defendant for up to eight days: s 31(2) MCA.

In deciding which of these options to apply:

- consider relevant Constitutional rights (any detention to be lawful, cl 9; to be considered innocent until proven guilty, cl 10; and prohibition on unlawful denial of liberty, cl 14);
- only remand into custody as a last resort; and
- only remand into custody where there is strong evidence that the defendant presents an unacceptable flight risk or, unless detained, will not attend their trial.

Record all the above in the minute book.

7.10 Key principles

The basic overall principle is one of fairness. Usually a trial, after it has started, should proceed continuously, subject to the power of the court to adjourn it, especially where the defendant is held in pre-trial detention, which needs to be kept to the minimum period possible.

- You may adjourn at any time before or during a trial for reasonable cause, however if the defendant is remanded in custody, the adjournment cannot be for longer than eight days: s 31(2) MCA.

- The party applying for an adjournment must show "reasonable cause". A lack of preparation by one of the parties is not sufficient.

"Reasonable cause" may not include multiple applications for adjournment by the prosecution.

- However, a defendant must be given a reasonable chance to prepare a defence (for example, if presented with an amended summons).

When deciding to adjourn a case, you may take into account the following:

- The interests of justice, including the interests of the defendant in having a fair trial. For defendants who are remanded in custody, a fair trial includes the right to be held in pre-trial detention for the shortest possible period and the right to receive a final outcome without undue delay.
- The interests of the public in ensuring efficient prosecution.
- The reasons for the adjournment including any fault causing the delay that could have been avoided.
- The effect of the adjournment on the parties, including children and other vulnerable parties.
- When a new trial could be heard.
- If no adjournment would mean that the defendant would not have a fair trial, then grant the adjournment but require reasonable and tight timeframes where the defendant is held in pre-trial detention, as minimising detention is also part of a fair trial process.

7.11 Checklist

There are three different times you may consider it necessary or advisable to adjourn a case:

- Pre-trial for procedural steps;
- At the start of a defended hearing trial; and
- During the trial and prior to sentencing.

7.12 General reasons

General reasons that an adjournment may be requested are:

- where the defendant is sick (must be supported by a medical certificate);
- to obtain further details of the charge(s) in the summons;
- to obtain legal representation; or
- natural justice: each party needs to be given the reasonable opportunity to prepare their case.

7.13 Specific reasons for adjournments

7.13.1 First appearance or pre-trial

You may adjourn for:

- A lack of jurisdiction to hear the charge under s 11, to be heard by the appropriate authority: ss 25 and 31 MCA.
- Non-appearance of either the defendant or the prosecution or both parties: ss 21-23 MCA as follows:
  - If the prosecution does not attend the proceedings (having had due notice of the set time and place) or dismiss the charge (in extreme cases): s 22 MCA.
  - If the defendant does not attend the proceedings if there is a valid reason such as sickness or lack of transport, or no proof of service, but evidence must be provided in support: s 21(1)(a) MCA; or
  - After proof of valid service:
    - Hear and determine the case in the absence of the defendant: s 21(1)(b) MCA; or
    - Issue a warrant for the arrest of the defendant and adjourn the hearing: s 21(1)(c) MCA.

After the defendant has been arrested under warrant and brought before you, you may either:

- admit the defendant to bail under the Bail Act; or
- as a matter of last resort, order them to be remanded in custody until the next sitting of the court: s 21(2) MCA.

At the next hearing date, if it is not possible to complete the hearing of the case you may:

- adjourn the hearing to the subsequent sitting and admit the defendant to bail under the Bail Act; or
- as a matter of last resort, order them to be remanded in custody: s 21(3) MCA.

A certificate of service completed according to s 11 of the Bailiffs Act is sufficient evidence of service of such documents: s 17(3) MCA. This should contain the date, time and mode of service, and who carried out the service.

See the chapter "Summary trials" to find out more about your discretion if the defendant fails to appear.

If, when the case is called, neither the complainant nor the defendant appear, you may:

- adjourn or dismiss the case as you think fit: s 23 MCA.

If at the time and place to which the hearing is adjourned the defendant does not appear, you may:

- issue a warrant for their arrest; and
- adjourn the hearing until the first sitting of the court after their arrest: s 31(3) MCA.

If the complainant does not appear, you may:

- further adjourn the hearing; or
- dismiss the complaint: s 31(4) MCA.

7.13.2 At the start of, or during, a defended hearing

You may adjourn for:

- Amendments to the summons—if the defendant would be misled because you have amended the original written complaint or charge to correct any minor defects: s 90 MCA.
- Non-appearance of witnesses—if witnesses do not appear after being duly summoned or fail to produce any document: ss 68 and69 MCA.
- Questions of law—if a complex question of law arises the Chief Magistrate may request a ruling from the Supreme Court: s 73A MCA.
- Sentencing inquiries—to make inquiries into the circumstances of the case, sentence or otherwise deal with the defendant after conviction but before sentencing.
- If the defendant is remanded in custody, the adjournment cannot be longer than for eight days: s 31(2) MCA.

7.14 Procedure for adjournments

Every adjournment must be made for a specific time and date. Usually hearing dates are fixed in consultation with the parties and well in advance.

Before fixing the date:

- inform the defendant of their right to legal counsel (if unrepresented);
- advise the defendant to prepare for hearing the case;
- consider both the time the parties need to prepare their cases and the court diary.

In the meantime, you must decide if you should:

- remand the defendant in custody for up to eight days: s 31(2) MCA. This option should be where it is reasonable and necessary and where there is strong evidence specific to the defendant that they will not attend court unless they are detained;
- allow the defendant to go at large; or
- release the defendant on bail on the condition that they attend trial at the date and time scheduled, and subject to any other relevant bail conditions: s 31(2) MCA.

Record all the above in the minute book.

7.15 Comments used for adjournment

If no plea is taken at a first or second appearance and the matter is adjourned to a callover say:

> "No plea was taken and this matter is adjourned to a callover on [*date*]. The defendant is remanded [*at large/on bail/in custody*].
>
> If remanded on bail also enter and state the bail conditions.
>
> **Note:** You must enter reasons for the adjournment and for the remand in custody/at large/or on bail on the Criminal Decision Sheet.

8. Decision-making: oral or reserved judgments

8.1 Making a decision: reaching a verdict

8.1.1 Preparing to make a decision

- Know what the essential elements of the offence are.
- The onus of proof is on the prosecution to prove all the essential elements beyond reasonable doubt. The defendant does not have to prove anything (unless there are statutory exceptions: see "Burden and standard of proof").
- Take full notes.
- Witnesses should give their evidence at your speed.
- Questions from you are for clarification only.

8.1.2 Who is your audience?

Consider who you are giving the decision for:

- prosecution;
- defendant;
- media;
- public;
- appellate court.

Consider their need for reasons. This is really the most important aspect of a judgment. Who are you writing for? The answer is firstly and most importantly the parties to the criminal proceeding and any victim(s) involved.

For a criminal conviction, the essence of a judgment is that you are telling the defendant why they have, or have not, been convicted and, in doing so, you are also telling the prosecution why they have, or have not, succeeded.

There are other less important audiences. You are writing to tell the public the reasoning and result of the criminal charge. Finally, you are writing so that any appeal court can understand why you reached the decision you did.

The essence of judging is both the decision and the reasons for the decision.

8.2 Oral or reserved judgments

Judgments may be oral or reserved.

The reasons why you may want to deliver an oral judgment include:

- immediate decision;
- no delay;
- fresh in your mind;
- brings matters to a conclusion for the parties.

There are reasons why, in some circumstances, an oral judgment cannot or should not be made in more complex cases:

- time required to consider and reflect;
- time to re-read evidence;
- consider submissions and research the law;
- if there is tension in the court and a likelihood of violence.

Decisions (whether oral or reserved) should:

- be ordered, logical and structured;
- make factual findings;
- apply the law;
- give reasons;
- provide a decision.

8.2.1 Oral judgments

The difference is in the preparation.

Before the trial:

- You need to know and have written down beforehand the legal ingredients of each charge.
- You need to find out what the trial issues are (if possible).
- Get out your template.
- From the template, before trial, you should fill in the law section, possibly the issues section and perhaps prepare an introduction.

At the trial:

- Once the trial begins, make notes under each heading. For example, identify facts not in dispute and facts in dispute (maybe using coloured pens).
- Do the same for any dispute about the law.
- At the end of the trial, your template should contain relevant written material.
- Do not forget that you need reasons for all your conclusions.
- Sometimes it is better to adjourn for an hour or so to structure a decision, or even adjourn until first thing the next morning to deliver judgment.

Do not give an "interim" oral decision first. The decision must be either entirely oral with reasons clearly stated for the transcript or written and read out entirely accurately. What you say becomes the official court record and the basis for any appeal, not what you write.

You should not alter the substance of reasons for decisions given orally. While the correction of slips or poor expression including citations omitted at the time of delivery of oral judgments is acceptable, this should not extend to the addition or omission of material reasons or findings. When delivering an oral judgment, it is not necessary to state that you are reserving the right to edit the judgment.

8.2.2 Reserved judgments

You should try to deliver reserved decisions within a month. Start immediately after the hearing to do a draft while it is still fresh in your mind.

When you are judgment writing, you must:

- use straightforward language – no legal jargon;
- focus on the real issues in the case;
- make clear findings;
- give reasons for your decisions.

If you do this, then you will have spoken to your audience.

General writing rules include:

- use plain English and short sentences;
- do not use legal terms unless essential;
- stick to a format (suggested below);
- avoid maybe/possibly – you must reach a firm conclusion on facts/law.

8.3 Format for oral or reserved judgments (template)

The following structure is suggested for oral or reserved judgments.

Introduce the case and the charge(s) – what are they?
Use the language of the statute. Common assault: Any person is guilty of an offence who assaults any other person: s 112 COA. Defence: Self-defence against unprovoked assault or provoked assault: "In May 2016 outside the Courthouse, Mr Kalosil and Mr Lini were having an argument. Mr Lini claims that Mr Kalosil then punched him in the face. Mr Kalosil agrees he punched Mr Lini, but says he did so in self-defence. The issue for me to resolve is therefore whether the prosecution has proved beyond reasonable doubt Mr Kalosil did not act in self-defence."
The legal ingredients of the charge(s)
The onus of proving the charge is on the prosecution (the standard of proof being beyond reasonable doubt).

Elements of common assault:

General

1 The person named in the charge is the same person who is appearing in court.

2 A date or period of time when the common assault is alleged to have taken place.

3 A place where the common assault was alleged to have been committed.

Specific

4 Direct or indirect force - the defendant:

(a) applied force to the person of the complainant; and

(b) the application of force was deliberate; [to accidentally strike A while intending to strike B is an assault].

5 There was no legal excuse or justification for the force being used.

Undisputed facts

For example:

> "On 18 May 2016, Mr Kalosil and Mr Lini had been summoned to be witnesses in a court case. They both arrived at the courthouse at about the same time. They knew each other and began talking about the case in which they both were to be witnesses. It seems they had opposing views of the case. They began arguing."

Disputed facts and a resolution

Summarise the disputed facts as you have found them and explain why the prosecution / defence witness evidence is not accepted or is accepted. E.g.

> "Mr Lini said that without warning Mr Kalosil punched him in the face. In cross-examination he denied that his voice was raised, or that he threatened to punch Mr Kalosil or that he had raised his fist immediately before Mr Kalosil had punched.

In contrast Mr Kalosil said:

> "I must therefore resolve the conflict between the evidence of these witnesses.
> I accept the evidence of Mr ..... and reject the evidence of Mr ..... I do so for these reasons ....."

Relevant law

In this case, the relevant law is self-defence. You would not need to detail the law of assault because the defendant has agreed he assaulted Mr Lini. But he says his assault is excused because he acted in self-defence.

The defendant will have to provide evidence in support of their claim of self-defence and then it is up to the prosecution to disprove self-defence beyond reasonable doubt.

Apply the facts to the law
Apply the law (including "defences"). Show each element of each charge has been proved or not proved, beyond reasonable doubt For example, in this case you could say: "The prosecution must prove that Mr Kalosil was not justified in using such force as in the circumstances it was reasonable to use in defence of himself. [The definition of self-defence]. I have found that Mr Kalosil was threatened by Mr W Lini, that Mr Lini did raise his hand and that Mr Kalosil believed Mr Lini was going to hit him. I am satisfied beyond reasonable doubt that when Mr Kalosil struck Mr Lini, Mr Kalosil believed he was about to be struck by Mr Lini. Therefore, Mr Kalosil acted in defence when he punched Mr Lini. I am satisfied in the circumstances Mr Kalosil's reaction was reasonable.
Formal decision
Use wording of charge and "beyond reasonable doubt". "I am satisfied beyond reasonable doubt it was reasonable in the circumstances for Mr Kalosil to strike first. The prosecution therefore has not disproved self-defence beyond reasonable doubt. I therefore find Mr Kalosil not guilty of the charge of assault."

8.4 Details of the structure of a judgment

8.4.1 Introduction and the legal charges

This short section is intended to tell the reader in a few short sentences what the case is about and what the issues are, for example, assault/self-defence.

In the example in the Template, the facts and the issue have been identified.

Note: Mr Kalosil and Mr Lini are used; it is important to use formal terms of address. They are entitled to be addressed respectfully.

8.4.2 Elements of an offence

Elements of an offence are components of an offence. Each element must be proved beyond reasonable doubt before a charge can be proved.

Elements of offences form the basis of many key aspects of the criminal trial process, including a decision whether a defendant is guilty of a charge or not.

8.4.3 The facts

Keep in mind these questions:

- What are the undisputed facts?
- What are the disputed facts?

Undisputed facts: when describing the undisputed facts (generally those that lead up to the alleged crime) you do not need to recount what each witness has said. Simply describe what has happened. There is no need to say this witness said this and the next witness said the same.

Disputed facts: for the disputed facts of the case, you now need to recount what each party says about what happened next. Summarise the expert evidence or the witness statements of one party, then the other, and then say which evidence you believe and why you believe it.

Consider the rules of evidence: see the "Dealing with evidence chapter."

At the end of this section, summarise the disputed facts as you have found them. If after hearing all the evidence you are just not sure whom to believe, then the verdict must be "not guilty". If you are "not sure," you have not been persuaded beyond a reasonable doubt.

8.4.4 The relevant law

Describe the law as relevant to the case. You need to identify if there is any dispute about what the law is; if there is a dispute, you need to resolve it and declare the relevant law.

Typically, you will need to:

- identify each element of a criminal charge;
- say the onus of proof is on the prosecution to prove each element of the charge beyond reasonable doubt before there can be a conviction; and
- identify any other aspects of the case which the prosecution has to prove beyond reasonable doubt.

For example, looking at self-defence, the prosecution must prove beyond reasonable doubt the defendant did not act in self-defence to prove their case.

Some questions (for example, questions related to bail, custody and visitation, or sentencing) rely almost entirely on your discretion. For questions of this sort, you can sometimes find help in guidelines established by statute or case law that tell you what factors to consider. These guidelines can be useful, but ultimately it will be up to you to make a just and reasonable decision based upon your understanding of the facts and the likely consequences of deciding one way or another.

8.4.5 Applying the law to the facts

It is helpful to have some idea what the issues in the trial are before the case begins. Ask the lawyers and the defendant. This means you can have a focus on the relevant facts.

8.4.6 Conclusion or verdict

The final sentence is the formal finding.

8.4.7 Use of pseudonyms

Remember to use pseudonyms to protect the identities of any parties who have suppression orders in place.

9. Sentencing

9.1 Introduction

At the end of a trial, after you have heard and considered all the relevant evidence, you must sentence the defendant to an appropriate sentence without delay.

The defendant (or their representative) should be allowed to ask the court to take their comments into consideration before you pass sentence (known as a plea in mitigation).

You must explain the sentence and your reasons for it so that the defendant understands what they need to do.

9.2 Jurisdiction

Section 11 Magistrate's Court Act (MCA).

If you need to check whether you have power to impose a sentence, please check the relevant law creating the offence and the Magistrate's Court Act.

The Magistrate's Court has jurisdiction to hear and determine criminal cases:

- in which the maximum punishment provided by law does not exceed three years imprisonment or a fine of $10,000: s 11(2); or
- which the court has determined to hear summarily under s 35 MCA, or the Supreme Court has remitted to it for trial under s 36: s 11(3); or
- where any named magistrate has been invested with enhanced power with the consent of the prosecution and the defendant in accordance with sections 35 or 36 of MCA to inflict a maximum punishment not exceeding seven years imprisonment or a fine of $50,000: s 11(4).

But if the statute provides a lower maximum sentence than those limits, then that is the maximum penalty or fine you may sentence someone. Likewise, if the statute provides a minimum penalty, you must sentence the defendant to not less than that minimum penalty.

See the "Constitutional framework" chapter for more details about your criminal jurisdiction.

9.3 Principles of sentencing

There are five basic purposes of sentencing that need to be considered when deciding on an appropriate sentence:

- **Punishment.** Punish the offender for their criminal behaviour.
- **Deterrence.** Deter the offender from breaking the law again and act as a warning to others not to do the same. *See* *R v Wolfgramm anors* [2020] TOSC 78; CR 35 to 41 of 2019, 16 October 2020 and *R v Kohinoa* [2008] Tonga LR 41.
- **Prevention.** Prevent the offender from doing the same thing again or offending during the period of punishment.

- **Rehabilitation.** Change the defendant's behaviour so they do not reoffend. See *R v PMP* [2020] TOSC 112; CR 284 of 2020 (3 December 2020), *R v Toutai'olepo* [2020] TOSC 3; CR 174 of 2019, 21 February 2020, *R v Tau'alupe* [2018] TOCA 3; AC 8 of 2017, 26 March 2018, *R v Taufa* [2009] Tonga LR 462.
- **Restoration.** Restore or repair the damage done to others.

9.3.1 Case notes

Fifita v R [2000] Tonga LR 289 (CA) – The Court of Appeal provides a good summary of the sentencing principles (at 291):

> "The purposes of a sentence imposed on an offender are to punish so far as is just and fitting in the circumstances; the deterrence of criminal behaviour by the offender and others; the rehabilitation of the offender to fulfil a useful role in society; the vindication of society's standards; and the protection of law abiding members of the community."

9.4 Sentencing discretion

Clause 20 Constitution.

The level of sentence in each case is up to you to decide, from a minimum level up to the maximum limit for the offence. It must also be within your sentencing jurisdiction.

You must decide on what is a just and correct sentence in the particular facts of the case before you.

The defendant has the right not to be sentenced to a more severe punishment than would have been imposed under the law in force at the time of the commission of the offence: cl 20. See *R v Fakauho* [2000] Tonga LR 50 and *Edwards v Kingdom of Tonga* [1994] Tonga LR 62.

When deciding on a suitable sentence for the defendant you need to balance or weigh up:

- relevant sentencing principles (above);
- the gravity or seriousness of the offence;
- any aggravating or mitigating factors relating to the offending or the defendant;
- consistency in dealing with similar offences.

See "Sentencing principles, checklist, process and templates" for more information on how to use your discretion.

A higher court on appeal will exercise its own discretion when reviewing your sentencing decision.

In *Rex v Vake* [2012] Tonga LR 145 (CA) the Court of Appeal noted that:

> "[15] Sentencing involves the exercise of a discretionary judgment, and in general more than one sentence will be available, legally, to the sentencing judge. An appellate court does not substitute its view for that of the sentencing judge. The appellant must identify some error of fact or principle, or a disparity between the facts and the sentence that demonstrates that the latter was not a sound exercise of the discretion."

In *Fangupo v R; Fa'aoa v R* [2010] Tonga LR 124 (CA) the Court of Appeal held that the sentencing judge took matters into account that should not have been considered and stated that (at 127):

> "the prison sentences imposed by the judge and the sentence of whipping were excessive."

The Court of Appeal ignored the exercise of sentencing discretion by the judge and exercised its own.

In setting aside the sentence of whipping the child offenders, the Court also made some important observations, including that the sentence of whipping is contrary to the international prohibition on torture and likely unconstitutional (at 128).

> "... we make reference to the International Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment as being particularly apposite. In this connection we note the judgment of the Chief Justice in *Tavake v Kingdom* [2008] Tonga LR 304 at para 52 to the effect that most international jurists now accept that the prohibition against torture is part of customary international law and is a jus cogens rule from which states cannot derogate whether or not they are a party to the various treaties which prohibit it. Additionally a purposive interpretation of clauses 1 and 14 of the Constitution may lead to the conclusion that the whipping provision is unconstitutional."

Interpreted in the light of international conventions and decisions of this Court such as *Tu'itavake v Porter* [1989] Tonga LR 14 it might be argued that the whipping provision is now unconstitutional.

9.4.1 Aggravating (bad) and mitigating (good) factors

These are factors related to the nature of the offending or to the defendant themselves and their personal circumstances.

Aggravating (bad) factors will cause you to deal with the defendant more harshly including violence, vulnerability of victim (young or old age, disability), abuse of a relationship of trust, (ie: defendant was in a position of trust or authority over the victim, such as a family member, teacher, chief, religious authority, carer) multiple defendants and use of a weapon.

Mitigating (good) factors will cause you to deal with the defendant more lightly including first offender, minor or no harm caused, young offender, genuine remorse and acts of restitution.

Factors may fall in between these two, depending on the circumstances, where you must decide on their relevance and weight in sentencing (for example, previous good character and family ties).

See "Sentencing principles, checklist, process and templates" for more examples of aggravating or mitigating factors.

Drunkenness/drugs: If the defendant chooses to drink or take drugs this is not a mitigating factor.

Age: If a defendant is young or very old this is relevant to sentencing. Young people are less responsible for their offending. Their brains are not fully developed, so they are less able to understand the consequences of what they are doing.

Custodial sentences for children under the age of 18 should be avoided wherever possible and kept as short as possible (Art 37(b) CRC) and alternative community-based sentences used instead, such as community service orders (s 25A COA).

It is best practice to seek a probation report or if necessary, directly identify all people in a child's life who may be able to contribute support to the child in getting them back on track and included in arrangements for a sentence.

For sentencing purposes, the relevant time for determining age is the age of the person at the time of the offence, and not the time of sentencing (ie: if the defendant was under 18 at the time of the offence, they are entitled to be treated as a child in sentencing).

Where a person who is aged under 18 is given a custodial sentence, for as a long as they remain a child they must be held separated from adults and provided with facilities for education, sport/recreation and regular family visits (Art 37 (c) CRC). If these standards cannot be met, then an alternative to imprisonment should be applied.

See *Rex v Toutai'olepo* [2020] TOSC 3; CR 174 of 2019, 21 February 2020, when sentencing young offenders the Supreme Court cited the Court of Appeal in *Rex v Tau'alupe* [2018] TOCA 3; AC 8/17, 26 March 2018, which cautioned:

> "[16] It is well established that the sentencing of young offenders raises special considerations: see for example the discussion in *R v Churchward* [2011] NZCA 531 at [77]-[92]. An offender's youth may impinge on an assessment of their culpability. As Mr Mo'ale said, prison for any period is known to carry an enhanced risk of trauma for young people. And, as this Court recognised in *Mo'unga v R* [1998] Tonga LR 154, young offenders have a greater capacity for rehabilitation."

Disabilities: Take into account whether the defendant has any significant physical or mental disabilities. A mental disability may make the defendant less responsible (culpable) than a defendant without that disability. If you suspect the defendant may have a mental disability, obtain medical assessment of the disability prior to sentencing (if evidence is not already before the court), to inform your decision as to whether the disability makes that person less culpable. A physical disability such as being in a wheelchair, or having a sight, hearing or speech impediment may add extra difficulty if imprisoned than for an able-bodied person.

Other health issues: Other chronic or acute health issues requiring access to specific medical treatment which may not be available in prison, should also be considered. This includes access to drug or alcohol rehabilitation services for those with addiction.

9.4.2 Consistency

It is important you are consistent when sentencing so that you treat:

- similar cases in the same way;
- serious cases more seriously than less serious cases;
- minor cases less seriously than serious cases.

9.5 Sentencing process

Where you have found the defendant guilty (conviction) or the defendant has pleaded guilty, if it is a simple matter you may sentence the defendant immediately. Use Template 1 for simple sentencing matters.

But where it would be useful to obtain background reports you may then adjourn the case for two or so weeks, to make further enquiries to decide the most suitable method of dealing with their case. These reports may be required to assess appropriate sentencing options and include:

- a probation report;
- police submissions;
- a victim impact statement (from the police);
- psychiatric or disability assessment (if necessary);
- defence submissions (including letters of support).

If you are adjourning, you will also need to consider bail or whether to remand in custody until the next hearing. See the "Bail applications" chapter for more details.

Use Template 2 for more complex sentencing matters.

9.5.1 Charges

You should start by restating each charge and the maximum penalty. Say whether the defendant pleaded guilty (and whether they did so after being charged), or whether the defendant was convicted after trial. You will know which charges the defendant was convicted on after trial. Make sure the charges you are sentencing on are the same charges on which you convicted the defendant.

If there is a guilty plea, again check each guilty plea has been recorded in writing by a judicial officer and you are sentencing only on those charges the defendant has pleaded guilty to.

When you have the court file check the charges, the section in the relevant statute (Criminal Offences Act (COA) or other criminal statute) and check the maximum penalty for each charge. Make sure you are legally allowed to sentence the defendant (ie: it is within your jurisdiction).

9.5.2 Summary of facts

Briefly check:

- the legal elements of each charge (see the table of Common Criminal or Traffic Offences);
- the summary of facts details each ingredient of each charge;
- aggravating or mitigating features relating to the offending and the defendant.

It is good practice, after a guilty plea, to get the defendant to acknowledge the correctness of the police Summary of Facts, either orally or by their initialling the Summary.

This may not be usual for ordinary low-level offending but should be followed in cases serious enough that sentencing will not occur on the day the plea is entered and a Probation Report is called for.

In other cases, if the relevant facts (essential to the verdict) on which the defendant is to be sentenced are in dispute, you could issue a minute setting out the express and implied facts you regard as essential to the verdict and leave it to the parties to apply for a hearing of the disputed facts if they disagree. If the defendant declines to have such a hearing, record this before proceeding further.

If they do apply, you can follow the NZ Disputed Facts on Sentencing Procedure set out in section 24 of the Sentencing Act 2002 (NZ).

9.5.3 Reports

Provide a very brief summary of the essential points and support for any sentences. Some probation reports may make a recommendation as to the sentence. While of some value, you do not need to impose this sentence.

9.5.4 Summary of submissions of prosecution and defence

This is a summary of the main points. You should briefly look over those parts of the submissions including aggravating/mitigating facts. Both sides should be equally covered.

If a particular sentence is suggested, include this suggestion in your summary. If the defence want, for example, a respected person from the defendant's village to speak about the defendant personally (not about the offending) then welcome this.

9.5.5 Victim impact

You may have a written victim impact report before sentencing or perhaps a victim will come to court and want to speak personally or through the prosecution. Explain to the victim they are there to speak about the effect of the crime on them rather than abuse the defendant or their family. Include a brief comment in your remarks about the effect on the victim.

9.5.6 Other considerations

Other sentencing considerations include:

- traditional apologies: see *Ta'ani v Police* [1994] Tonga LR 84;
- full recovery of complainant/compensation paid;
- principles or guidelines issued by superior courts:
  - guideline judgments: see *Mafi v R* [1991] Tonga LR 53;
  - circular memoranda issued by the Chief Justice.

9.5.7 Starting sentence

This is the sentence you would impose based on the facts alone (not including the offender's personal circumstances). Where do the facts of this case fall, from the least serious to the most serious offence of this type?

Start with a brief summary of the facts setting out the good or bad features. Are there any aggravating personal circumstances? For example, offending while on bail or when subject to another sentence would justify a small increase in the starting sentence. Likewise, are there any good personal circumstances that would justify decreasing the starting sentence? Be specific on how these affect the starting sentence.

You would say:

> "Therefore, the starting sentence is ….",

You now have a starting sentence, plus or minus personal aggravating or mitigating factors. If the defendant has pleaded guilty, they will be entitled to a deduction. The deduction is typically a maximum of 25 percent to 33 percent of the above sentence. The maximum is only given where the guilty plea is at the earliest reasonable opportunity. The later it is before trial, the lower the percentage, eg: if a guilty plea is one to two days before trial then perhaps only 10-15 percent. State this percentage for a guilty plea.

You will then have a final sentence. Ask yourself if this is a fair sentence overall for this offence and this offender?

> Finally at the end tell the defendant what the sentence is:
>
> Mr/Ms [X] on the charge of ……you are sentenced to …… .
>
> Add on here any specific conditions (for example, terms of probation, time to pay, fine, amount of compensation).

At the sentencing hearing the usual procedure is:

1 **Submissions.** The police will make submissions on sentencing options first. Include where appropriate, a victim impact statement, a medical report (in case of injury to a person), information in regard to reparation, or other material.

2 **Previous convictions.** The police will set out the defendant's prior convictions (if any) to help you to assess their character and the likelihood of re-offending. The defendant has to accept them as correct first. If the convictions are in dispute, the police will need to show the court records as evidence.

3 **Plea of mitigation.** The registrar or you should ask the defendant whether they have anything to say as to why the sentence should not passed upon them according to the law. Also ask if they have anything to say on their own behalf, or counsel, so any mitigating factors are outlined to you.

4 **Pronounce sentence.** Your sentence will include not only the penalty but also orders as to costs, reparation and possibly compensation.

5 **Appeal.** Defence counsel may indicate that the defendant intends to appeal against your sentence. There is a time limit to lay a formal documented appeal.

See "Sentencing principles, checklist, process and templates" for more information on the sentencing process.

9.6 Where the defendant is convicted of more than one offence

When the defendant is sentenced for more than one offence at the same time, or if the defendant is sentenced for one offence while still serving a prior sentence, you may direct that the sentences take effect:

- one after the other (cumulatively); or
- at the same time/in parallel (concurrently).

Where an act or omission constitutes an offence under two or more provisions of the Criminal Offences Act or any other Act, the defendant may be punished under any one of those provisions or relevant Acts. But no-one is liable, on conviction, to be punished twice in respect of the same offence: cl 12 Constitution.

Where any charges are framed in the alternative and the defendant is convicted, you may limit the conviction to one of the alternative charges (not being a more serious offence): cl 13(d) Constitution. See the "Summary trial" chapter to find out more.

9.7 Types of sentences

There are various types of sentences you can impose under s 24 of the Criminal Offences Act:

(a) payment of compensation;

(b) community service order;

(c) fine;

(d) whipping; (likely unconstitutional, see *Fangupo v R; Fa'aoa v R* [2010] Tonga LR 124 ; and

(e) imprisonment, including suspension in whole or part of the sentence for up to three years: s 24(3)(a) COA.

You may also order:

- probation: s 198 COA;
- release on adjournment: s 201 CoA;
- discharge without conviction (which is deemed to be an acquittal): s 204 COA.

For all the different sentences, record your reasons and final order(s) on the Criminal Decision Sheet and include any conditions, costs etc. Sentencing options are set out in the chart below:

Type of sentence & Statute(s)	Application
Compensation ss 25(2)-(3) and 194 COA	You may order a defendant to make compensation not exceeding $5,000 to any person who was injured or suffered loss by the offence either as a substitute or in addition to any other punishment: s 25(2) and (3) COA. If the defendant is found in default, they are liable to a maximum of three months imprisonment: s 25(3) COA. Any money that was found upon them at the time of arrest may be applied to any compensation you direct to be paid: s 194 COA.

Community service order s 25A COA	Instead of or in addition to imprisonment or any other sentence, you may order the defendant to perform unpaid work for the community: s 25A(1) and (9) COA. You must not make a community service order unless satisfied that proper arrangements will be made for supervision: s 25A(3) COA. The order must specify: ➢ the number of hours to be worked, which shall be not less than 40 and not more than 200; and ➢ the nature and location of the work. The work should be completed within a year from the date of the order, unless you extend the period for completion under s 25A(2)(b) and (8) COA. If any person subject to a community service order commits an offence punishable by imprisonment, you may revoke the order and deal with them in any other manner appropriate to the original offence: s 25A(7) COA. If either the defendant or the supervisor applies due to a change in circumstances, and you are satisfied it would be just to do so, you may: ➢ revoke or vary the order; or ➢ extend the period to complete the community service: s 25A(8) COA. Examples of when community service orders are appropriate include when: ➢ imprisoning a defendant would unduly harm their family; ➢ a defendant's skills are needed in the community; or ➢ a young defendant's future would be severely disrupted by imprisonment.
Fine ss 11(2) and 27 MCA; ss 26-30 COA	You may order a fine up to a maximum of $10,000: s 11(2) MCA. In any case where a defendant is convicted of an offence punishable by imprisonment, you may sentence the defendant to pay a fine instead: s 30 COA. When imposing a fine, consider the defendant's ability to pay the fine. If the defendant fails to pay the fine for 14 days (exclusive of Sundays) from the date for payment, you may: ➢ extend the time for payment of the fine or compensation up to six months under s 27 COA; ➢ extend the time for payment if the defendant applies under s 27(2) MCA;

	➢ order payment by instalments if the defendant applies: s 27(2) MCA; ➢ imprison the defendant in default of payment for a period not exceeding three months, unless the fine is paid earlier: s 26(1) COA, s 27(1)(a) MCA; or ➢ issue a warrant of distress to levy this sum under s 53 MCA: s 27(1)(b) MCA. The imprisonment begins after any period of imprisonment ends for the original offence and is calculated from the date on which the defendant entered the prison and not from the date of conviction: s 26(2) and 28 COA. If the defendant fails to pay the fine imposed, you may impose any term of imprisonment up to the maximum term depending on the fine in accordance with the scale below: ➢ one month imprisonment for up to $500 fine; ➢ three months imprisonment for between $500 to $5000 fine; ➢ six months imprisonment for over $5000 fine: s 28 MCA. If the defendant is imprisoned for non-payment of a fine, they must be discharged from the prison: ➢ once payment of the sum specified in the warrant of commitment is made to the prison keeper, if they are not in custody for another matter: s 29(1) COA; or ➢ once they have completed the proportion of the sentence equal to the unpaid sum if they part pay the fine, so long as the defendant is not in custody for another matter: s 29(2) COA.
Whipping ss 31, 107, 115, 130 and 142 COA	While sentences of whipping have not been repealed from the COA, the Court of Appeal has observed that sentences of whipping are likely unconstitutional. See *Fangupo v R; Fa'aoa v R* [2010] Tonga LR 124. They also breach the Convention on the Rights of the Child (CRC). Whipping sentences also breach the prohibition on torture in customary international law (which is binding upon Tonga), as well as the Convention against Torture and other Cruel Inhumane or Degrading Treatment or Punishment (CAT) in Art 2(1) and the International Covenant on Civil and Political Rights (ICCPR) in Art 7, both of which can be referred to as guidance in interpreting the Criminal Offences Act. It is therefore advised that whipping sentences not be used for any categories of defendants and especially not in sentences for children. The COA provides that whipping may only be used on a male offender (but not females) and only when the law expressly provides for this punishment: s 31 COA.

	Section 142 COA sets out which offences the Act states whipping may be used instead of, or in addition to, imprisonment. Within your jurisdiction these offences are: • s 106 – grievous bodily harm; • s 107 – bodily harm; • s 115 – cruelty to children and young persons; • s 118 – rape; • s 121 – carnal knowledge of child or young person; • s 122 – attempted carnal knowledge of child or young person; • s 125 – indecent assault on child; • s 132 – incest by male person; • s 136 – sodomy and bestiality. **Note:** most other offences for which whipping is an option are indictable offences triable by the Supreme Court. The Act states that a male defendant can be whipped once or twice, with a minimum of 14 days between the whippings and that the number of strokes to be inflicted must be specified, up to a maximum of 26 strokes in total for a defendant above 16 years: s 31(3) COA. Before a sentence of whipping is carried out, the defendant must be examined by a doctor or a Government medical assistant who must certify that the defendant has no physical or mental impairment which renders him unfit for such a punishment: s 31(6) COA. For defendants above 16 years of age, whipping must be inflicted on the breech with a cat approved by Cabinet: s 31(5) COA. Every sentence of whipping must be carried out in the presence of a magistrate by the chief gaoler or gaoler for the district within the prison precinct: s 31(4) COA. **Punishment of child by whipping** The offences are those in sections 118 to 129 COA (both inclusive) if the offender does not exceed 16 years: s 130 COA. For male offenders who are above the age of seven years and below the age of 15 years, instead of inflicting any other punishment within your jurisdiction, the Act provides that the offender may be whipped by a constable or sergeant of Police: s 30(1) MCA.

	The offender may have his parent or guardian present at the whipping if he so chooses: s 30(1) MCA. For an offender under 16 years, the Act provides that a person can be sentenced to being whipped once or twice, with a maximum total of 20 strokes, with not more than 10 strokes inflicted at any one session. There must be at least 14 days between whippings: s 31(3) COA; s 30(2) MCA. The whipping must be inflicted on the breech with a light rod or cane composed of tamarind or other twigs: s 31(5) COA; s 30(2) MCA.
Imprisonment and suspended sentence ss 24 and 32 COA	**Imprisonment** Imprisonment is appropriate only when no other sentence is appropriate, particularly for young offenders, or a first offender who has committed an offence solely against property, unless there are unusual circumstances that render imprisonment necessary. People under 18 at the time of the offence should not be sentenced to imprisonment except as a last resort and for the shortest possible period of time. See the Court of Appeal in *Mo'unga v R* [1998] Tonga LR 154 (CA) at 156, *Valikoula v R* [2021] TOCA 5; AC 9 of 2020, 30 March 2021, *R v Selupe* [2021] TOSC 47; CR 47 of 2020, 9 April 2021. Any defendant who is imprisoned must do hard labour unless the sentence or warrant expresses the contrary: s 32 COA. **Suspended sentence** When imposing a sentence of imprisonment, you may suspend the whole or part of the sentence for up to three years: s 24(3)(a) COA. All suspended sentences must be conditional on the offender not being convicted of an offence during the period of suspension: s 24(3)(b) COA. If the offender is convicted of an offence punishable by imprisonment during that period, they must serve the term of the suspended sentence and any sentence for the other offence: s 24(3)(c) COA. The court may also impose conditions during the period of suspension, including supervision by a probation officer or another responsible member of the community. A breach of such conditions may, upon application, result in the termination of the suspensions order: s 24(3)(d) COA. In special circumstances you may release the offender from serving the suspended sentence after another conviction and you may extend the original period of suspension for a maximum of one year: s 24(e) COA.

	In considering whether to suspend all or part of the sentence, the court is obliged to have regard to the interests of the defendant and the interest of the wider community in their rehabilitation: *Rex v Tau'alupe* [2018] TOCA 3 at 15; AC 8 of 2017, 26 March 2018, at 6 cited in *Rex v Toutai'olepo* [2020] TOSC 3; CR 174 of 2019, 21 February 2020.
Probation ss 198-200 COA	Instead of imprisoning the defendant, or in addition to any other sentence, you may discharge them on probation where you think that: ➢ it would be inappropriate to inflict any punishment, or ➢ only a nominal punishment would be appropriate: s 198 COA. You may form the opinion that probation would be appropriate based on: ➢ the character, background, age, health or mental condition of the person charged; ➢ the trivial nature of the offence; or ➢ the mitigating circumstances under which the offence was committed: s 198 COA. **Probation order** The recognizance (probation order) must require that the defendant be of good behaviour and that they must appear for sentence when called at any time specified in the order, up to a maximum of three years: s 198 COA. With a probation order, you may order the defendant: ➢ to be supervised by a person named in the order for the duration of the probation period; ➢ to live at a certain address; ➢ to not drink alcohol; and ➢ to comply with other conditions to secure supervision: s 199 COA. When making a probation order, you must furnish the defendant a notice in writing, stating in simple terms the conditions they must observe: s 200 COA.
Release on adjournment s 201 COA	You may release the defendant on adjournment for a period of up to three years instead of convicting them where you think that it is appropriate, usually for minor offences. You need to consider: ➢ the character, antecedents, age, health or mental condition of the person charged; ➢ the trivial nature of the offence; or ➢ the mitigating circumstances under which the offence was committed: s 201(1) COA.

	The defendant must first give an undertaking to comply with the mandatory conditions below and any further conditions imposed by you. The conditions are that the defendant: ➢ must appear before the court if called on to do so during the period of the adjournment, and if the court so specifies, at the time to which the further hearing is adjourned; ➢ is of good behaviour during the period of the adjournment; and ➢ observes any special conditions imposed by you: s 201(2) COA. You may also make an order for restitution or compensation in addition to probation: s 201(4) COA. A defendant who has given an undertaking may be called upon to appear before the court by: ➢ order of the court; ➢ notice issued by a court officer on the authority of the court: s 201(5) COA. You must discharge the defendant without any further hearing if you are satisfied that the defendant has observed the conditions of the undertaking at the adjourned date: s 201(6) COA.
Liability of guardian for costs s 29 MCA	You may order that the parent or guardian of any child offender, who is proved or appears to be above seven years of age and below 15 years of age, pay costs or costs and compensation to the complainant: s 29 MCA. In such cases, the parent or guardian shall have the opportunity to be heard and provide evidence in their defence before you order any payment: s 29 MCA. If such costs or costs and compensation are not paid by the parent or guardian within 14 days from the date of the order, you may issue a warrant of distress: s 29 MCA.
Discharge without conviction s 204 COA	You may order the defendant to be discharged without conviction absolutely or on the condition that they commit no offence during such period, not exceeding three years from the date of the order. You may do so where you think that: ➢ it is inappropriate to inflict punishment; and ➢ a probation order is not appropriate: s 204(1) CoA. You must first consider: ➢ the circumstances including the nature of the offence; and ➢ the character of the offender.

	Such a discharge is deemed to be an acquittal: s 204(2) COA. You may make an order for: ➢ payment of costs; ➢ the restitution of any property; or ➢ the payment of any sum that you think fair and reasonable to compensate any person who from the offence, has suffered: ➢ loss of, or damage to property; ➢ emotional harm; or ➢ loss or damage consequential on any emotional or physical harm or loss of, or damage to, property: s 204(3) COA.

9.7.1 Suggested speech for sentencing

You may say:

> "[X] on the charge of ……., a conviction is entered, and you are sentenced to a term of imprisonment of ….. months."

If there are other charges:

> "And on the additional charge of ….., you are similarly sentenced to a term of imprisonment of ….. months, to be served concurrently [or cumulatively] with the other charge of ….."

9.7.2 Relevant legislation

- Constitution of Tonga (Constitution): cls 12, 13 and 20.
- Criminal Offences Act (COA): ss 24-32, 107, 115, 130, 142, 198-200, and 204.
- Magistrate's Court Act (MCA): ss 11 and 29.

9.7.3 Relevant case law

Discharge without conviction

In *R v Maile* [2019] TOCA 17; AC 23 of 2018, 17 April 2019 the Court of Appeal citing *R v 'Ala* (AC 19 of 2018, 17 April 2019) set out the correct approach that the Court is to take when considering an application for a discharge without conviction under s 204 COA. They cited from paras [10] – [12] as follows:

> "First, the Court must assess the seriousness of the offending including the gravity with which it is viewed by Parliament along with all aggravating and mitigating factors relevant to the particular case before it. Secondly, the Court must consider the character and circumstances of the offender which will include any previous offending, the effect of the entry of a conviction on his career, his finances, his reputation, any civil disabilities that flow from the entry of a conviction as well as any indirect consequences. Thirdly, the Court must be satisfied that the consequences of entering a conviction are out of all proportion to the gravity of the offending. Finally, and only if the Court is so satisfied, it must still consider whether in all the circumstances of the case the granting of a discharge without conviction is the appropriate result.
>
> Circumstances where it will be appropriate for the Court to grant a discharge without conviction will rarely arise and the Court should exercise its discretion sparingly. It will not be sufficient without more that an offender is generally a person of good character, has no prior convictions or is a young person. If those factors were sufficient discharges without conviction would be routinely given and that should not be the case.
>
> In considering an application for a discharge without conviction the Court will not accept mere speculation about the consequences of the entry of a conviction. The Court can only act upon evidence and the offender will need to provide proof to satisfy the Court that there is a real and appreciable risk that adverse consequences will ensue (*DC (CA47/13) v R* [2013] NZCA 255 at [43] referred to in *Edwards v The Queen* [2015] NZCA 583 (supra) at [25])."

Suspended sentence

See *Mo'unga v R* [1998] Tonga LR 154 (CA) the Court of Appeal adopted as appropriate to Tonga the approach suggested *R v Petersen* [1994] 2 NZLR 533 (CA), namely, that suspension of sentence may be appropriate in the following situations:

> "(i) Where the offender is young, has a previous good record, or has had a long period free of criminal activity.
> (ii) Where the offender is likely to take the opportunity offered by the sentence to rehabilitate himself or herself.
> (iii) Where, despite the gravity of the offence, there is some diminution of culpability through lack of premeditation, the presence of provocation, or coercion by a co-offender.
> (iv) Where there has been cooperation with the authorities."

Cited with approval in *Tukuafu v Police* [2001] Tonga LR 151.

See also: *Valikoula v R* [2021] TOCA 5; AC 9 of 2020, 30 March 2021, *R v Selupe* [2021] TOSC 47; CR 47 of 2020, 9 April 2021, *Rex v Toutai'olepo* [2020] TOSC 3; CR 174 of 2019, 21 February 2020, and *Rex v Tau'alupe* [2018] TOCA 3; AC 8 of 2017, 26 March 2018.

9.8 Key principles for sentencing

9.8.1 List court sentencing

Do not put sentencing off if you do not need to. You need to balance efficiency, time constraints and the need to give reasons in open court. Consider simply imposing the sentence. If comments are made, keep them brief.

9.8.2 Reasons – the audience

Who is the audience for your sentencing remarks?

Firstly, and most importantly, the defendant. They are entitled to know why you are imposing the sentence you are.

Secondly, the victim(s), if any, and the public. Telling the wider public what you are doing and why will help boost public confidence in courts, especially in the criminal courts.

Lastly, if there is an appeal, your audience is the Appellate Court. If you give clear concise reasons for your sentence, then the Appellate Court can more easily assess whether your sentence was correct.

9.8.3 Sentencing options

One of the most common sentences many of you will impose will be a fine. Consider the following when deciding how much this should be:

- What is the maximum fine for the offence?
- What are the facts? Is this a serious or less serious offence of its type? You can place the fine in the range between $1 and the maximum.
- The defendant's ability to pay. You can order weekly or monthly payments – but be careful about extending the payment period beyond 12 months. Children or unemployed youth are unlikely to be able to pay fines.

If you have to choose between a reparation order and a fine, it is better to order reparation so that the victim gets payment instead of the state.

9.8.4 Early guilty plea

Generally, a reduction in sentence (up to a third) may be appropriate where the defendant enters an early guilty plea. This is because it saves a great deal of public resources and private distress of any victims, family or other witnesses in having a defended hearing.

9.8.5 More than one offence – concurrent sentences

Where the defendant is being sentenced on more than one crime, generally these are concurrent on the longest sentence (that is, served at the same time).

When you consider the total sentence to be served for all the offending, ask yourself: Is it a fair sentence?

9.9 Sentencing checklist to use before sentencing

Relevant principles

Consider which of these sentencing principles are relevant when deciding on an appropriate sentence:

- **Punishment:** The sentence is to punish the offender for their criminal behaviour.
- **Deterrence:** The sentence is to deter the offender from breaking the law again and be a warning to others not to do the same.
- **Prevention:** The aim is to prevent the offender from doing the same thing again.
- **Rehabilitation:** The goal is to change the defendant's behaviour so they don't reoffend.
- **Restoration:** The sentence serves to restore or repair the damage done to others.

Note: Generally, the threat of a prison sentence does not stop people from offending, for the simple reason that they do not think of the consequences at the time.

Sentencing of children

Custodial sentences for children under the age of 18 should be avoided wherever possible and kept as short as possible (Art 37(b) CRC) and alternative community-based sentences used instead, such as community service orders (s 25A COA).

For sentencing purposes, the relevant time for determining age is the age of the person at the time of the offence, and not the time of sentencing (ie: if the defendant was under 18 at the time of the offence, they are entitled to be treated as a child in sentencing).

Where a person who is aged under 18 is given a custodial sentence, for as a long as they remain a child they must be held separated from adults and provided with facilities for education, sport/recreation and regular family visits (Art 37(c) CRC). If these standards cannot be met, then an alternative to imprisonment should be applied.

Whipping sentences are likely unconstitutional and should be avoided, especially for children and also for adults: see the legal guide for further information.

Starting point

- Where does this case fit within the possible range of a maximum and minimum sentence for this offence?
- What are the minimum requirements, such as mandatory disqualification?
- What is the maximum sentence according to the relevant statute?
- What prior sentences for similar offences have been made in other cases (consistency)?

Establishing the facts

- You must sentence on an agreed set of facts of the offending. If the sentencing comes after a trial, then it is your view of the facts from that trial on which you should sentence.
- On a guilty plea, unless all the important facts raised by the prosecution are accepted by the defence, you may issue a minute setting out the facts you regard as essential to the verdict and leave it to the parties to apply for a hearing if they disagree.

Factors that increase the sentence (aggravating)

- violence;
- major impact on the victim and/or hostility to victim because of age/ disability/race/religion;
- multiple defendants;
- use of a weapon;
- abuse of power/trust (including the age and vulnerability of the victim);
- planning (pre-meditation);
- forced or unwanted home entry (home invasion);
- the amount of damage to person or property;
- value of property stolen;
- danger to the public;
- how common this type of offending is in the community;
- persistent offending;
- defendant's personal information including previous conviction(s) and lack of remorse.

Factors that decrease the sentence (mitigating)

- no or minimal harm to person or property;
- defendant's personal information including their age (if young or very old) and good character including no previous convictions (first offender);
- physical or mental disabilities, depending on the degree of disability;
- the defendant's early guilty plea (but note that you cannot penalise an offender for exercising their right to plead not guilty);
- genuine remorse and steps taken to restore the damage or make reparation payments to the victim(s) for the harm done;
- reconciliation (having made peace with/friendly relationships with the victims).

Factors that may be relevant but are less important

- family ties and custom ties;

- whether the defendant holds any positions of responsibility;
- if the defendant played a minor role.

Reports

- probation reports including community sentence reports;
- police submissions and victim impact statements;
- quotes for reparations;
- defence submissions that may include letters of support;
- psychiatric reports if required.

Scaling

Scaling means increasing the sentence to reflect aggravating circumstances and decreasing it to reflect mitigating circumstances. You may consider reductions if reasonable and just for the following:

- time spent in custody;
- punishment meted out by other tribunals;
- traditional or customary penalties;
- a guilty plea.

Totality principle

Look at the overall sentence and ask yourself whether the total sentence reflects the totality of the offending. Some obvious sentencing considerations include:

- multiple counts;
- serving prisoner;
- concurrent/consecutive terms;
- avoiding excessive lengths;
- suspending the sentence.

9.10 Sentencing Template 1

For simple matters use this template – for example, fines

Name of defendant: **Date:**

Age of defendant*:

Charges and maximum penalty

Any minimum or mandatory requirements (such as mandatory disqualification)

Plea (guilty or conviction after trial)

Summary of facts

Agreed facts

Any facts in dispute

Summary of police submissions

Criminal convictions and traffic history

Victim impact (brief description if known)

Summary of defence submissions

Starting point for sentence

Starting point

- Based on facts of crime only

Features that increase the sentence

- Indicate how much you would *increase* your starting sentence.

Features that decrease the sentence

- Indicate how much you would *decrease* your starting sentence.

Early guilty plea

- Reduce sentence (if relevant):

Where does this case sit between the maximum and minimum sentence range?

What can the defendant afford to pay?

Final sentence

- Bring all of the above together

State sentence in simple terms

Give reasons

9.11 Sentencing Template 2

For more complex matters use this Template 2

Name of defendant: **Date:**

Age of defendant*:

Charges and maximum penalty

Any minimum or mandatory requirements, such as mandatory disqualification

Plea (early guilty plea or conviction after trial)

Common law

What do the higher courts say?

Summary of facts

Agreed facts

Any facts in dispute

Pre-sentencing reports if any

Summary of police submissions

Criminal convictions and traffic history

Victim impact (brief description if known):

Summary of defence submissions

Starting point for sentence

- Based on facts of crime only.

Personal circumstances adjusting the sentence from starting point

- Based on "good" and "bad" of defendant's circumstances.

Features that increase sentence

- Indicate how much you would *increase* your starting sentence.

Features that decrease sentence

- Indicate how much you would *decrease* your starting sentence.

Early guilty plea

- Reduce sentence (if relevant).

General comments and final sentence

- Bring all of the above together

State sentence in simple terms

- State any compensation/reparation awarded.

Give reasons

- Deal with any arguments that the defence or their lawyer has put forward in submissions;
- Relevant principles;
- Relevant factors from reports/written statements.

10. Appeals and questions of law

10.1 Relevant legislation

- Magistrate's Court Act (MCA): ss 73A, 74-83
- Bail Act (BA): s 4B
- The Constitution of Tonga (the Constitution): cls 9, 10 and 14
- Evidence Act (EA): s 165

10.2 Introduction

The content about appeals is for your information as it relates to how an appeal from your decision is dealt with in the Supreme Court. There is nothing that you need to do except that if in Court, after your decision, counsel for one of the parties indicate they intend to appeal, you should grant a stay of execution of the judgment.

However, you may need to know what to do when you:

- reserve a question of law and state a case; or
- remove a trial on a question of law.

10.3 Right of appeal

Section 74 MCA.

Any party has the right to appeal to the Supreme Court a decision, sentence or order of a Magistrate made in a civil case or criminal case tried summarily in Magistrate's Court: s 74(1).

Any party to any appeal to the Supreme Court has a further right of appeal on a point of law to the Court of Appeal if it has the permission ("leave") of the Supreme Court or Court of Appeal: s 74(2).

10.4 Commencement of an appeal

Section 75 MCA.

To begin an appeal an appellant must, within 42 days after you have given your decision, provide to you and the other party written notice that they intend to appeal the decision and state the general grounds of the appeal. At this time, the appellant must also pay the prescribed fee to the clerk, unless the fee is waived due to financial hardship.

10.5 Bail for appellant

Sections 75 and 76 MCA; s 4B Bail Act (BA); The Constitution of Tonga (the Constitution), cl 9, 10 and cl 14.

Once an appeal against your decision has begun, you still have a role to play before the case is dealt with by the Supreme Court.

Once the appellant has given notice and paid the appeal fee, you may allow or refuse bail at your discretion. The appellant may appeal, by way of petition, any refusal of bail to the Supreme Court within 14 days of your refusal: s 75(3) MCA.

1Without bail, the defendant may face lengthy detention throughout the appeal period and so a decision to refuse bail carries very serious consequences for the person.

A person convicted of and sentenced to imprisonment for a criminal offence who has appealed or applied for leave to appeal against sentence or conviction must be granted bail if you are satisfied that:

- there is a reasonable prospect of the appeal succeeding;
- the appeal is unlikely to be heard before the whole or a substantial portion of the sentence has been served; and
- there are substantial grounds for believing that, if released on bail (with or without conditions) the person will surrender to custody without committing any offence while on bail: s 4B(1) BA.

In making the decision on whether to grant bail to an appellant you must have regard to all the relevant circumstances and particularly to:

- the nature of the offence and length of sentence;
- the grounds of appeal;
- the character, antecedents, associations and community ties of the person; and
- the appellant's record in surrendering to custody at trial and on other occasions: s 4B(2) BA.

If you allow bail, you must require the appellant to enter into a recognizance in Form 17 of the Schedule to the Magistrate's Court Act within 14 days from the date of your decision being appealed. This recognizance must require the appellant to appear and present their appeal before the Supreme Court and to pay any costs and abide by any orders of the Supreme Court: s 76 MCA.

As part of the recognizance, you may or may not require a surety or sureties: s 76 MCA.

Once the recognizance has been entered into, you must stay execution of your decision until the appeal has been disposed of, and if the appellant is in custody, you must release them: s 76 MCA.

10.6 Documents

Section 77 MCA.

Once the appellant has completed the required obligations, the clerk must forward to the Registrar of the Supreme Court:

- the appellant's notice of appeal;
- the recognizance entered into by the appellant; and
- a correct transcript of all proceedings of the case in the Magistrate's Court.

10.7 Supreme Court appeal process

Sections 78, 79 and 81 MCA; s 165 Evidence Act (EA).

Once the appeal reaches the Supreme Court, the Registrar of the Supreme Court gives the parties the date fixed for the hearing of the appeal: s 78 MCA.

The Supreme Court will decide on the merits of the case based on a review of the written evidence given in the lower court and forwarded to the Registrar of the Supreme Court by the clerk: s 81 MCA. It does not look at defects in any of the proceedings in the lower court.

The Supreme Court may, in its discretion, examine any or all the witnesses from the original hearing and, on good cause being shown by either party, may admit new evidence: s 79.

The improper admission or rejection of evidence at the first trial is not of itself, grounds for a new trial or reversal of any decision, if it appears to the appellate court that independently of the evidence objected to or rejected, there was sufficient evidence to justify the decision already made: s 165 EA.

10.8 General powers on appeal

Sections 80, 82 and 83 MCA.

On any appeal from a determination of a Magistrate, a Judge may:

- Affirm the judgment (so the decision stands)
- Reverse judgment
- Vary the judgment
- Remit the case with the opinion of the Supreme Court to the Magistrate
- Make such other order (including as to the payment of costs by either party) as it thinks just and may by its order exercise any power which the Magistrate might have exercised: s 80 MCA.

If the appellant is acquitted in a criminal appeal, the Supreme Court must order the appeal fee to be refunded to the appellant: s 82 MCA.

Upon the decision of the Supreme Court, the Registrar must transmit to you a certificate in Form 18. This certificate authorises the carrying out of the decision and allows for the issuance of any warrant of distress or commitment which may be required: s 83(1) MCA.

10.9 Non-prosecution or abandonment of appeal

If the appellant does not make any reasonable effort to progress their appeal the Judge may dismiss the appeal.

An appellant may abandon their appeal at any time by giving notice to the Registrar. Once such notice is given, the appeal is treated as dismissed, subject to the right of the respondent to apply for costs.

The Judge may deal with any costs of the appeal, and/or security for costs as the Judge chooses.

10.10 Reserving a question of law (case stated)

Section 73A MCA.

The Chief Magistrate may, in relation to any proceedings in the Magistrate's Court, request a ruling from the Supreme Court on any question which has arisen, or which may arise, in those proceedings, without hearing from the parties. Until this issue is decided, the proceedings are suspended.

On receipt of a written ruling by the Supreme Court, the Chief Magistrate must notify the parties and provide them with a copy of the ruling.