

SUPREME COURT OF TONGA
CRIMINAL JURISDICTION

**INFORMATION FOR SELF-REPRESENTED DEFENDANTS ON THE
CRIMINAL TRIAL PROCESS**

CONTENTS

Introduction	2
Not legal advice	2
Committal	3
Indictment	3
Summary of facts	3
Arraignment	3
Credit for pleading guilty	3
Pleading not guilty	4
Mode of trial	4
Preparing for trial	5
Witness summons	5
Pre-trial conference	5
Jury trial	6
Role of the jury	6
Jury selection	6
Challenge process	6
Swearing in and instructions to the jury	7
Procedure during trial	7
Form of address and courtesy	7
Judge’s opening	8
Witnesses out	9
Prosecution case	9
Opening	9
Evidence in chief	9
Cross examination	9
Re-examination	10
Objections	10
Defence case	11
Whether to give or call evidence	11

Your opening	11
Giving evidence vs making submissions.....	11
Evidence in your case	12
Conclusion of the trial	13
Closing submissions	13
Jury trial - Judge's summing up	13
Jury verdicts.....	13
Judge alone	13
Verdict	14
Further assistance	14

Introduction

1. The purpose of this document is to provide information to accused persons:
2. who have pleaded not guilty to the offences with which they have been charged;
3. who intend to represent themselves at their trial;
4. in relation to the Court processes and procedures leading to and during the trial.

Not legal advice

5. In providing you with this document, the Court is not acting as your advisor. The Judge who conducts your trial cannot act as your advisor either. The Judge must remain impartial and be seen by the jury, the Prosecution and the public to be impartial.
6. This document does not, and cannot, contain any legal advice as to the merits of your case or any course which you should take. It cannot replace the advice and assistance that would be available to you if you had a lawyer representing you.
7. You are strongly advised to consult a lawyer for any legal advice you require, and if possible, to engage a lawyer to represent you at your trial.
8. In deciding to defend yourself and present your own case at trial, you are responsible for the conduct of your defence. You cannot relieve yourself of this responsibility by simply relying on this document or by relying on the fact that you are not represented by a lawyer. It is important that you prepare for the trial and give careful thought to the evidence you need to call and the arguments you will make in your defence.
9. The information in this document cannot cover all the things you need to know about conducting a jury trial because it cannot anticipate every type of issue that might arise during the trial. If during your trial you do not understand something, you should advise the Judge and he will provide an explanation.

10. The information below commences by recapping the events surrounding your committal to stand trial in the Supreme Court and then explains the procedures leading up to and during your trial.

Committal

11. You are standing trial in the Supreme court as a result of a Magistrate finding, on the documents presented and any other evidence adduced by the Prosecution, that there is a prima facie case for you to answer. That simply means that if the evidence the Prosecution relies on is accepted as true, the charge/s will be proved.
12. At the preliminary inquiry before the Magistrates Court, you were provided with a copy of the documents the Prosecution relied upon to demonstrate a prima facie case.
13. The Magistrate then referred the matter to the Supreme Court and required you to attend before the Supreme Court on a date about six weeks after your committal for your arraignment.

Indictment

14. After your committal, the Prosecution presented an indictment to the Supreme Court. The indictment states the offences with which you are charged, the sections of the *Criminal Offences Act* or other statute or law under which you have been charged and the grounds for each charge.
15. The Prosecution is to provide you with a copy of the indictment.

Summary of facts

16. The Prosecution is also required to provide you with a document entitled 'Summary of Facts'.
17. The Summary of Facts sets out a summary of what the Prosecution alleges occurred in your case.

Arraignment

18. With the indictment and summary of facts, together with the other documents provided to you at your committal in the Magistrates Court, you should have considered, and preferably obtained legal advice if you can, on whether you wish to plead guilty or not guilty to each of the charges on the indictment.
19. At your arraignment before the Supreme Court, you were asked whether you plead guilty or not guilty to each charge on the indictment.

Credit for pleading guilty

20. Any charges to which you pleaded guilty will be adjourned for sentencing at a later date.

21. If you pleaded guilty to any of the charges, the Court will ordinarily give you credit, meaning a discount or reduction, on the sentence which would otherwise be imposed if you are found guilty following a trial.
22. You should only plead guilty if you freely admit that you did commit the offence/s.
23. Generally, the earlier a guilty plea is entered, the more credit will be given.
24. You may seek the permission of the Court to change your plea at any time before verdict. If you did not commit the offence/s, you should not change your plea. However, if you decide that you are guilty of any of the offences and wish to change your plea, you should do so at the earliest possible opportunity to obtain the maximum credit available to you.

Pleading not guilty

25. If you plead 'not guilty' to any one or more charges on the indictment, the judge will ask:
26. whether you intend to represent yourself at trial or be represented by a lawyer;
27. what mode of trial you elect (discussed below); and
28. you and the Prosecutor how long the trial is likely to take.
29. The judge will then list the matter by giving it a trial date and you will be remanded to stand trial on those charges.
30. If you are already on bail, and have not breached any of the conditions of your bail, the court will normally extend your bail on the existing conditions for you to appear again either at your trial or at a Pre-Trial Conference (discussed below) if one is directed which will be shortly before your trial date.

Mode of trial

31. Every accused has the option of trial by judge and jury or judge alone. After your arraignment, you will be asked to choose which of those two modes of trial you prefer.
32. Trial by judge alone means that only a judge will hear the evidence and submissions from the Prosecution and any you wish to make, and then decide all issue statement of facts fact and law in reaching his/her verdict as to whether you are guilty or not guilty of each charge.
33. Trial by judge and jury means that a jury of seven people from the community will be chosen to consider all the evidence and ultimately determine whether you are guilty or not guilty. The judge's role is to ensure the trial process is fair, to determine all issues of law and to sum up the evidence and direct the jury in relation to the law which they are then to consider in arriving at their verdict.
34. Trial by judge and jury is discussed in further detail below.

Preparing for trial

35. You are **not required** to give evidence or call witnesses to give evidence on your behalf. It is for the Prosecution to prove its case against you beyond reasonable doubt. These matters are discussed further below.
36. If you do intend to give evidence and/or call other witnesses to give evidence at your trial, then well before your trial date you should prepare your evidence, what you want to say, and any documentary or other exhibits you wish to place before the court.
37. Remember, any evidence you give during your trial will be on oath or affirmation. That means that if you knowingly do not tell the truth, very serious penalties may apply for perjury.
38. Similarly, any witnesses you intend to call must give truthful evidence. Coaching or influencing a witness or getting them to give the evidence you want them to give, if it is not the truth, can also lead to very serious penalties. Your witnesses must give their own evidence freely and according to their own recollection of the relevant events.

Witness summons

39. If you wish to call a witness to give evidence at the trial, and that person has not agreed to attend court on your behalf voluntarily, you may request the Court to issue a summons requiring the person named to appear in Court together with any documents specified in the summons.
40. Any request for a witness summons should be made to the court well before your trial date and preferably before the pre-trial conference, so that by that time, the total number of witnesses to be called can be known.
41. The witness summons must be served personally on the person named in the summons. Service must be proved by a certificate or affidavit of service setting out the date, time and place service was effected and how the person served was identified.
42. The summons must be served within 12 weeks after the date of its issuance and not less than 4 days or such other period as the Court or Registrar may fix, before the day on which attendance before the Court is required.

Pre-trial conference

43. Usually, a pre-trial conference will be listed to take place between two and four weeks prior to your trial date. At that time, the Judge will confirm whether the case is ready to proceed on the trial date listed.
44. The Judge will endeavour to answer any questions you may have about the charges, the evidence the Prosecution intends to call or the procedures which will take place at your trial. As mentioned at the outset, the Judge cannot give you any legal advice about the merits of your case.

Jury trial

45. If you elected trial by judge and jury, then while the main part of the trial is the same as a trial by judge alone, special procedures are involved in relation to juries and their part in the trial process.

Role of the jury

46. The jury's role is to consider the evidence presented in accordance with directions by the judge in summing up at the end of the trial as to the applicable law, and then deliver a verdict as to whether you are guilty or not guilty of the offence/s with which you have been charged.

Jury selection

47. At the commencement of your trial, a jury will be empanelled by selecting 7 jurors from the panel. The jury panel consists of ordinary men and women from villages as far away from the village in which you reside as practical. Names are randomly selected by number.

Challenge process

48. You will be given a list of all the people who have been selected as possible jurors before the jury selection process begins.
49. The following people are excluded from serving on a jury:
50. Persons who are related to a party or witness.
51. Ministers of the Crown and the Governors;
52. Members of the Legislative Assembly;
53. Judges and Magistrates;
54. Heads of Government Departments or Ministries;
55. Law practitioners;
56. Members of the police force and of the armed forces of Tonga;
57. Officers of the Supreme Court and Magistrates Court;
58. Officers of any prison;
59. Ministers of religion;
60. Persons of unsound mind;
61. Persons incapable of serving by reason of permanent physical infirmity.

62. During the jury selection process, you and the Prosecution may challenge the selection of persons to serve on the jury.
63. If you wish to make a challenge, you must say “CHALLENGE” after the juror’s name has been called but before he or she takes his or her seat.
64. The grounds on which you can challenge a person who is called to serve on the jury are:
65. *Challenge without cause* - For any reason of your own, if you do not wish a particular person to serve on the jury you may challenge that person. You may challenge up to 6 potential jurors. You do not have to give reasons for a challenge of this kind.
66. *Challenge for cause or lack of qualification* - You are also entitled to challenge for cause if you think that a called juror is:
 67. not neutral between the parties;
 68. not capable of acting effectively as a juror because of a mental or physical disability; or
 69. disqualified from serving on a jury.

You are entitled to any number of challenges if you think that a person is not qualified or is disqualified from serving on a jury. You will have to give reasons for challenges for cause and for lack of qualification. The Judge will determine every such challenge after hearing from you.

Swearing in and instructions to the jury

70. After the jury is empanelled, the members of the jury will take an oath to decide the case according to the evidence that is presented to them and the relevant law explained to them by the judge.
71. The Prosecutor will appoint a member of the jury to act as the foreperson. The role of the foreperson is to be the spokesperson for the jury for any questions or other communications with the judge and, at the end of the trial, to declare the verdict on behalf of all members of the jury.
72. The clerk of the Court will then read to the jury the charges against you in the Indictment, advise them that you have pleaded not guilty to the charges and inform them of their duty to determine whether you are guilty or not guilty on each of the charges only on the evidence presented during the trial.

Procedure during trial

73. This section explains the main part of the trial, whether it be by judge alone or judge and jury.

Form of address and courtesy

74. You must stand whenever:

75. the Judge enters or leaves the courtroom;
76. the members of the jury enter or leave the courtroom;
77. you wish to speak or whenever the Judge speaks to you.
78. Throughout the trial, you should address:
79. the Judge as “Your Honour”;
80. the Prosecutor as “Mr (or Ms) Prosecutor”;
81. the jury (where you have elected trial by judge and jury) as “Members of the Jury”; and
82. any witness as “Mr” or “Ms” and their surname, or otherwise as “Witness”.
83. If you consider it necessary to interrupt someone speaking during the trial, for example, to object to some evidence, you must stand and say “I object” so that the Judge can deal with your objection.
84. You ought not interrupt when the Prosecutor is making submissions to the Court unless absolutely necessary, or whenever the Judge is speaking. Ordinarily, you will have an opportunity to respond after either have finished. The same courtesy will be afforded to you. However, the judge may ask you or the Prosecutor questions during any statement or submission either of you might make in order to understand or test any proposition stated.

Judge’s opening

85. At the beginning of the trial, the Judge will address the jury about a range of matters which may include:
86. the role of the jury as judges of the facts;
87. the role of the Prosecution and its onus or responsibility to present the Crown’s evidence on the charges against you;
88. that you are presumed to be innocent of the charges unless and until proven guilty;
89. that before the jury can convict you on any of the charges, the Prosecution must prove your guilt beyond a reasonable doubt;
90. that ‘beyond reasonable doubt’ is a very high standard of proof;
91. if the jury have any reasonable doubts about any element of each charge, they must acquit you;
92. that the jury are only to consider the evidence presented during the trial;
93. that the jury is to ignore any media reports about the charges and not to speak to anyone outside the jury room about the trial while it is in progress;

94. that the jury must follow any directions by the judge in relation to the law on the charge/s;
95. that there is no obligation on you to prove that you are not guilty or to explain or respond to the evidence offered by the Prosecution unless you want to.

Witnesses out

96. You or the Prosecutor may ask the Court to order any witnesses to remain out of the courtroom until after they have given their evidence. The Judge will decide whether to make such an order. If the Judge makes an order excluding witnesses you must ensure that your witnesses, if any, are out of the courtroom until they are called to give their evidence. If they are not, you should raise the matter with the Judge immediately.

Prosecution case

Opening

97. After the judge's opening remarks to the jury, the Prosecutor will outline or 'open' the Crown's case to the jury. The purpose of this initial address is to identify the issues that will arise in the trial and to provide a summary of the evidence of the witnesses the Prosecution intends to call. You should already be aware of that expected evidence from the documents and other information you received at your committal and prior to your arraignment.

Evidence in chief

98. The Prosecution will then call the each of the witnesses it relies on to prove its case.
99. Each witness will stand or sit in the witness stand to give their evidence. All witnesses must give their evidence on oath or affirmation whereby they swear to tell the truth.
100. Each witness will be asked questions by the Prosecutor in relation to that witness's evidence about the charge/s. This is called evidence in chief.
101. You have the right to hear each Prosecution witness and, once the Prosecution has finished adducing evidence from each witness, you will have the chance to question that witness. This is called cross-examination.

Cross examination

102. In cross-examination, if you wish, you may ask questions of a Prosecution witness with a view to obtaining evidence which is helpful to your case or which damages the Prosecution's case. This may include questions which challenge the reliability or credibility of the witness.
103. Before the trial commences, you should consider the evidence each witness is expected to and whether it will be necessary to cross-examine them. Carefully prepare the questions you wish to ask each witness. Decide what points you need to make and how you are

going to ask your questions. Ideally, you should write out the questions that you might ask so that you have them clearly set out and do not get lost or diverted.

104. You are not bound to only ask questions about the evidence a witness gave when answering the Prosecutor's questions. You may cross-examine a witness on matters that are relevant to any issues before the Court.
105. The Judge may ask questions at any time, of any witness. If he does, you and the Prosecutor will have the opportunity to further question the witness after they have provided their answers to the Judge's questions.

Re-examination

106. At the conclusion of your cross-examination of each witness, the Prosecution will be entitled to re-examine any witness in relation to matters arising out of your cross examination, usually where a witness's answer was left unclear or incomplete.

Objections

107. If at any time during the trial, you think a Prosecution witness is giving evidence that you do not like you cannot interrupt the witness simply because you disagree with their evidence.
108. If you think that a question by the Prosecutor or an answer by a witness should not be given you must immediately stand and state, politely, that you object to the evidence. There are a number of grounds for objections. The most common include that the evidence is irrelevant to any issue in the trial or that the evidence is impermissible hearsay. Hearsay evidence is any oral or written statement made by any person not called as a witness by which it is sought to prove any fact. Exceptions to the hearsay rule are set out in section 89 of the *Evidence Act*.
109. In a jury trial, if you raise an objection, the Judge will usually send the jury out of the courtroom and then ask you to explain the grounds for your objection.
110. The judge will hear the Prosecutor's response to your objection and then determine whether or not to allow the objection. In a jury trial, the jury will then return to the courtroom.
111. If the Judge allows an objection, the evidence the subject of the objection will not be presented. If the Judge does not allow, or overrules, the objection, the trial will proceed and the evidence will be given.
112. The Judge has the power to refuse to admit evidence which he considers to be irrelevant or improper and to instruct the jury in this regard.

Defence case

113. When the Prosecution has called all of its witnesses, it will close its case. You will then have an opportunity to present your case to the jury if you wish to give or call evidence in your defence.

Whether to give or call evidence

114. The Judge will ask if you wish to present any evidence in support of your case.
115. Remember, you are under **no obligation** to give or call any evidence during your trial. The onus or legal responsibility to prove the charges always remains with the Prosecution. You do not have to prove your innocence.
116. However, if after you've heard all the evidence from the Prosecution witnesses, you wish to give evidence or call evidence from other witnesses in your defence, this is now your opportunity to do so.

Your opening

117. You may give an opening address, but you are not required to. If you decide to give an opening address, you should summarise your defence to the charges and provide an outline of the witnesses and evidence you will call.
118. Just as the Prosecutor opened the Crown case at the start of the trial, *if you decide to give or call evidence*, it will now be for you to open your case to the jury (in a jury trial) or the judge (in a judge alone trial). You should outline your defence to each of the charges and provide a summary of the evidence you intend to call.
119. It is important that you plan what you will say in your evidence ahead of time so that you present it in a manner that the jury will find easy to understand.
120. If you do wish to give evidence and/or call witnesses, the same procedure for the giving of that evidence will apply as occurred when the Prosecution witnesses gave their evidence.

Giving evidence vs making submissions

121. If you give evidence, you must be very careful to keep in mind the distinction between "giving evidence" and "making submissions".
122. Evidence consists of statements made (and any documents produced) from the witness stand by a person who has taken an oath or affirmation to tell the truth.
123. A witness cannot make a submission or an argument from the witness stand. Submissions are observations and comments about the Prosecution's case that would tend to persuade the Court that it has no or insufficient merit, or about your defence position and its merit.

Evidence in your case

124. If you wish to give evidence yourself, it is customary that you are the first defence witness. Although this is not a legal requirement, if you follow this custom you will avoid any suggestion by the Prosecution that you waited until you had heard what your other witnesses had to say before deciding what your evidence would be.
125. When giving evidence, you must restrict what you say to what you personally saw, heard, said, did, received, etc.
126. Generally, a witness cannot testify about what someone else might have seen or heard, even if that other person told the witness about it. Refer above to the rule against hearsay.
127. If you give evidence, you must rely on your memory rather than on reading a prepared statement of evidence. You may be able to look at a document created at about the time of the relevant events to refresh your memory but you must first ask the judge for permission to do so. You will be required to tell the Judge what the document is and why you need to look at it so that he can determine whether or not it is permissible. Otherwise, you will not be permitted to have any document that is not an exhibit in the trial before you.
128. The same applies to any witnesses you call. You must only ask them questions in the evidence in chief about what they saw, heard, said, did, received, etc in relation to the charges and the issues that are before the Court.
129. During your evidence or that of other witnesses, you may ask the judge for permission to show a witness a document you wish to tender as evidence. If permitted, then once you or your witness identifies the document, you may ask the judge to allow you to tender the document as evidence. If there is any dispute about tendering a document, the Judge will hear submissions about that in the absence of the jury. Once a document has been tendered, you may question a witness about it.
130. If you propose to present any documents in evidence, make sure you bring the originals and sufficient copies for the Prosecution, the witness, the Judge and the jury (if you elected trial by judge and jury). If you are unable to bring copies, you should advise the Judge at the pre-trial conference and the Court may arrange to have copies made for the trial.
131. After you have given your evidence in chief, the Prosecution may cross-examine you. The same applies to each of the witnesses you call to give evidence.
132. After the Prosecution has cross-examined each of your witnesses, you may re-examine the witnesses. In re-examination, you cannot ask questions about new matters that were not referred to in cross-examination. As mentioned above, the purpose of re-examination is to clarify or complete answers given in cross-examination.
133. Once you and any witnesses you called have completed your/their evidence, you will close your case.

Conclusion of the trial

Closing submissions

134. If you chose not to give or call any evidence, then after the Prosecution completed its evidence, it will then make closing submissions to the jury (in a jury trial) or the judge (if a judge alone trial).
135. At the conclusion of the Prosecution's closing address, you will be permitted to make submissions on why you say the charge/s have not been proven beyond reasonable doubt, if you consider that to be the case. This is an opportunity for you to accurately summarise the evidence presented during the trial and to try to persuade the jury or the judge (as the case may be) in relation to the facts that you say should be accepted and why, any issues of law you wish to address, and generally why you say you should be found not guilty.
136. If you gave or called evidence, you will usually make your closing submissions first, followed then by the Prosecutor.

Jury trial - Judge's summing up

137. In a jury trial, after closing submissions, the Judge will sum up the evidence and arguments by both sides, explain the law and direct the jury on the matters they need to decide to arrive at just verdicts.

Jury verdicts

138. The jury will then retire to consider the evidence and discuss their verdict. They will make their decisions in private will not be able to discuss the case with any person who is not on the jury during this time.
139. When the jury return to give their verdicts, the clerk of the Court will ask the foreman of the jury if they are all agreed on their verdicts. If they are all agreed the foreman will then deliver the jury's verdicts on each of the charges in the Indictment. The verdicts will be either guilty or not guilty on each charge.
140. If the jury is unable to reach unanimous verdicts and the Judge believes they are unlikely to reach unanimous verdicts if given further directions or more time to do so, the Judge will discharge the jury and on a later date a new jury will be empanelled and the case retried before the new jury.

Judge alone

141. In a judge alone trial, the Judge may deliver a decision immediately after the closing submissions, orally in court (called an "ex tempore" decision). A transcript of that decision can be obtained after the trial, if required.

142. More often, however, the Judge will reserve his/her decision in order to fully consider all the evidence, any legal issues and the competing arguments and prepare a written judgment setting out the reasons for his/her decision and verdict.

Verdict

143. If the verdict/s is/are not guilty, you will be free to go.
144. If any verdict is guilty, you will be remanded for sentencing, usually a month after verdict. In that time, a pre-sentence report and submissions on sentence by you and the Prosecution will be filed.

Further assistance

145. If you require further clarification on any of the matters discussed in this document or any other procedural matter or issue, you may ask the Judge at the pre-trial conference or in Court before the start of your trial.

Michael Whitten QC

Lord Chief Justice

March 2020