



The Court of Appeal for Bermuda

PRACTICE DIRECTION

ISSUED BY THE PRESIDENT OF THE COURT

Ref. A/50

Friday, 3 July 2020

CIRCULAR No. 16 of 2020

CRIMINAL APPEALS PROCEDURE

Introduction

1. This practice direction follows from the Court's concerns expressed in the judgment of *Re Tucker et al (Application to Adjourn from Session)* [2019] CA (Bda) 14 Crim and a meeting between executive members of the Bermuda Bar Council and the President of the Court. Counsel and self-represented litigants are expected to comply with the procedure set out below effective immediately.

Notices of Appeal/Notices of Application for Leave to Appeal

2. Practice Direction No. 12 of 2017 is repealed and substituted by this direction. Counsel are reminded that Criminal Form No. 1 (Notice of Appeal) is used where the grounds of appeal concern a point of law **only**. If an intending appellant wishes to argue an appeal concerning fact only or mixed fact and law, then Criminal Form No. 2 (Notice of Application for Leave to Appeal) is the correct form that must be filed. Similarly, if an intending appellant wishes to appeal against a sentence imposed by a lower Court, Criminal Form No. 2 is the appropriate form. This is the procedure governing appeals from the Supreme Court when it sits either in its appellate or original jurisdiction.

The filing of a Notice

3. These directions do not affect the statutory requirements regarding the prescribed time limits for the filing of a notice. Notices must still be filed within the 21-day limit in relation to the occurrence that is the subject of appeal (i.e. 21 days from conviction and 21 days from sentence). If an intending appellant has exceeded the time limit, they are required to file a Criminal Form No. 7 with an affidavit in support setting out good and substantial reasons as to the delay; this should be accompanied with an exhibit of the draft notice setting out the grounds of appeal.

The Procedure

4. Court Associates who are assigned to criminal trials in the Supreme Court are expected to print a daily tag report of the trial and maintain the printouts in the Supreme Court record. On the filing of a notice, the Clerk of the Court of Appeal will perfect the following:
- a) The CourtSmart Tag Report (“the Report”) and CourtSmart audio (“the CD”) will be produced and provided to the appellant and respondent within three days after the filing of said notice.
 - b) In the case of an appeal from a criminal proceeding originating in the Supreme Court, a transcript of the judge’s summation will be expedited upon filing of the appeal.
 - c) Within fourteen days following the receipt of the summation, the appellant and or respondent shall (if necessary) file a Notice of Motion with affidavit in support for any transcripts that are required other than those provided for in Order 3 Rule 10 of the Rules of the Court of Appeal for Bermuda (“the Rules”). Unless the Court decides otherwise, it will determine the application for further transcripts on the papers. If no application is made within this prescribed period it will be presumed that there is no request for further transcripts and the Court will proceed on that basis. Any requests made thereafter may be considered unfavourably unless extenuating circumstances exist and are proven by affidavit evidence setting out the reasons for the delay.
 - d) Once the Record of Appeal is issued – which shall consist of those materials in Order 3 Rule 10 and all transcripts ordered and provided – the appellant shall have 45 days to file their submissions and the Respondent shall have 14 days thereafter to file its submissions. The Court reserves the right to extend or reduce these deadlines and/or to impose further directions. Where a Criminal Form 2 is filed, the Clerk of the Court will issue administrative directions for an *inter partes* hearing before a Single Judge of the Court of Appeal, for leave to be given or refused pursuant to section 19 of the Court of Appeal Act 1964.
 - e) Once the parties have filed their submissions and the Court is satisfied that the Order for Directions has been complied with, the Clerk of the Court will issue a Certificate of Compliance and confirm that the appeal is fit for prosecution and will be assigned to the ensuing session.

Incompetence of Counsel

5. There has been some ambiguity in respect to the process concerning grounds of appeal pleading alleged incompetence of trial counsel. If an intending appellant wishes to plead such a ground he must:
- a) File an affidavit at the same time as filing his notice which speaks particularly to: -
 - i) what the appellant says he or she instructed their barrister to do;
 - ii) how their barrister did not comply with that instruction(s); and

iii) how, as a result of their barrister not complying with their instructions, he or she suffered prejudice.

b) Sign a waiver of privilege;

c) Prior to the appellant filing his or her affidavit with his or her notice, he or she must first serve it on the Counsel alleged to have been incompetent. He or she shall file a response to the intending appellant's affidavit within 10 business days and return it to the Appellant.

d) Following items (a), (b) and (c) above, the appellant must then file:

i) The Notice of Application for Leave to Appeal;

ii) The appellant's affidavit;

iii) The waiver of privilege; and

iv) The attorneys reply affidavit

6. This ground of appeal (and any others that are mixed fact and law or fact alone) will be considered at the leave stage by the Single Judge of the Court of Appeal. It follows that if the Single Judge has refused leave, then the person aggrieved by such refusal shall be entitled to have the application determined by the Court of Appeal as duly constituted for the hearing and determining of appeals.

The Clerk of the Court

7. Order 1 Rule 5 of the Rules provide that:

"The President may assign...to any officer of the Supreme Court Registry any functions required by these Rules to be exercised by the Registrar.

8. The Administrative Officer of the Court who also serves as Clerk of the Court of Appeal shall be authorised to exercise any powers delegable to the Registrar under these Rules. It is envisaged that this will provide continuity and swift progress in moving appeals along. The Clerk of the Court shall not exercise any powers of taxation under Order 4 of the Rules. The exercise of these powers are subject to the discretion of the President.

Conclusion

9. These procedures are implemented in the hope that they will allay the concerns expressed by members of the criminal bar, whilst equally providing realistic time limits with which counsel and litigants can be expected to comply.

10. The Court continues to maintain one of its overriding objectives which is to dispense with appeals swiftly and fairly so that finality is brought to litigation. This can only be achieved when all involved in the litigation comply with the Court's orders. Accordingly, counsel are reminded that failure to comply with Orders of the Court (and this practice direction) may be considered to be a

contempt of court. Section 5 of the Administration of Justice (Contempt of Court) Act 1972 provides that:

“(1) If any person disobeys or fails to comply with an order of a court the court may, on its own volition...order him to be...brought before the court...”

(2)...

(3)...the court on being satisfied that such person has disobeyed or failed to comply with an order of the court, shall have the same powers in respect of such person as are provided in section 4(2)”

11. With the exception of imprisonment under section 4, the court can impose a fine against an offending party in a proceeding. This may be an appropriate way forward where the Court finds continued disregard for its Orders.
12. Special thanks are extended to all who participated in the joint consultative exercise in structuring this procedure. The Court hopes that this guidance will make the problems referred to in *Tucker* a thing of the past. Questions and or concerns regarding this new procedure should be addressed to the Clerk of the Court.

C.S.E.S. Clarke
The Rt. Hon. Sir Christopher Clarke
PRESIDENT OF THE COURT OF APPEAL



**CC: The Honourable Chief Justice
The Attorney-General & Minister of Legal Affairs
The Clerk of the Court of Appeal
The Registrar of the Supreme Court
Office of the Director for Public Prosecutions
The Commissioner of Police
The Commissioner of Prisons
The Attorney-General's Chambers
The Legal Aid Office
The Bermuda Bar Association**