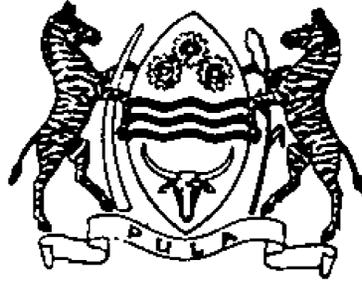


CUSTOMARY COURTS (AMENDMENT) ACT, 1986

No. 25



of 1986

ARRANGEMENT OF SECTIONS

SECTION

1. Short title
2. Amendment of section 5 of the principal Act
3. Insertion of new section 15A in principal Act
4. Insertion of new sections 16A and 16B in principal Act
5. Amendment of section 19 of the principal Act
6. Insertion of new section 19A in principal Act
7. Amendment of section 27 of the principal Act
8. Amendment of section 33 of the principal Act
9. Substitution of section 36 of the principal Act
10. Substitution of section 37 of the principal Act

An Act to amend the Customary Courts Act

Date of Assent: 24.12.86

Date of Commencement: 31.12.86

ENACTED by the Parliament of Botswana.

1. This Act may be cited as the Customary Courts (Amendment) Act, 1986. Short title
2. Subsection (1) of section 5 of the Customary Courts Act (hereinafter referred to as the "principal Act") is substituted by the following new subsection — Amendment of section 5 of the principal Act

"The Minister may, by notice in the Gazette, appoint officers in the Public Service to be Assistant Customary Courts Commissioners for the purposes of this Act."
3. The principal Act is amended by the addition after section 15 thereof of the following new section — Insertion of new section 15A in principal Act

"15A (1) Where any criminal proceedings before a customary court are —

 - (a) adjourned for any reason other than the failure of the person charged to appear on the day set for the hearing of the case, or
 - (b) suspended under the provision of sub-section (1) of section 32, or

"Recognizance

(c) transferred under the provision of sub-section (4) of section 32;

the customary court concerned may take from the person charged a recognizance with or without sureties conditioned for his appearance to answer the charge against him, at the time and place of trial and as often as may be necessary thereafter until final judgement in his case has been given, and may, instead of taking a recognizance in accordance with this section, fix the amount of the recognizance with a view to it being taken subsequently by any police officer above the rank of inspector or the police officer in charge of any police station or the person in charge of any place of detention to which the person charged is committed by the customary court.

(2) If on any day appointed for the hearing of the case, the person charged does not appear after he has been three times called by name in or near the court premises, the court may issue a warrant for his apprehension and may also call the person charged and his sureties (if any) upon their recognizance, and, in default of his appearance the same may then and there be declared forfeited; and any such declaration of forfeiture shall have the effect of a judgement on the recognizance for the amounts therein named against the person charged and his sureties respectively.

(3) A customary court may further add to a recognizance taken under subsection (1) of this section any conditions which it may deem necessary as to —

- (a) times and places at which and persons to whom the person charged shall present himself;
- (b) places where he is forbidden to go;
- (c) prohibition against communications by him with any named person or persons;
- (d) any other matters relating to his conduct.

(4) Where it appears to the customary court that default has been made in any condition of a recognizance taken by it, the court may issue a warrant for the apprehension of the person charged and an order declaring the recognizance for the amounts therein named against the person charged and his sureties respectively.”

Insertion of
new sections
16A and 16B
in principal
Act

4. The principal Act is amended by the addition after section 16 thereof of the following new sections —

“Binding
over

“16A (1) A person convicted of an offence before a customary court, a higher customary court, a customary court of appeal or the High Court under the provisions

of this Act may, instead of, or in addition to, any punishment to which he is liable be ordered to enter into his own recognizance, with or without sureties, in such amount as the court thinks fit, on condition that he shall keep the peace and be of good behaviour for a term not exceeding three years to be fixed by the court and may be imprisoned until such recognizance, with sureties, if so directed, is entered into, but so that the imprisonment for not entering into the recognizance shall not extend for longer than three months, and shall not, together with the fixed terms of imprisonment, if any, extend for a term longer than the longest term for which he might be sentenced to be imprisoned for the offence.

(2) When a person is convicted of any offence under the provisions of this Act a customary court, a higher customary court, a customary court of appeal or the High Court may, instead of passing sentence, discharge the offender upon his entering into his own recognizance, with or without sureties, in such sum as the court may think fit, to keep the peace and be of good behaviour for a term not exceeding three years to be fixed by the court on condition that he shall appear to receive judgement at some future sitting of the court or called upon.

16B. (1) Where in any criminal proceeding under the provisions of this Act before any customary court, a higher customary court, a customary court of appeal or the High Court, the court thinks that the charge is proved but is of the opinion that having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances in which the offence was committed, it is inexpedient to inflict any punishment, the court may, without proceeding to conviction, make an order dismissing the charge.

“Discharge without proceeding to conviction”

(2) An order made under this section shall, for the purpose of revesting or restoring any stolen property, and enabling the court to make any order restoring the property in respect of which the offence was committed or property seized for production in the trial have the like effect as a conviction.

5. Section 19 of the principal Act is amended by the deletion of the words and figures “48 hours” appearing therein and the substitution therefor of the words “seven days”.

Amendment of section 19 of the principal Act

Insertion of
new section
19A in
principal Act

6. The principal Act is hereby amended by inserting therein, immediately after section 19, the following new section —

“Suspended
sentences

“19A. (1) Whenever a person is convicted before the customary court of appeal or any customary court of any offence the court may in its discretion postpone for a period not exceeding three years the passing of sentence and release the offender on one or more conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may order to be inserted in recognizance to appear at the expiration of the period, and if at end of such period the offender has observed all the conditions of the recognizance, the court may discharge the offender without passing any sentence.

(2) Whenever a person is convicted before the customary court of appeal or any customary court of any offence the court may in its discretion pass sentence but order that the operation of the whole or any part of the sentence be suspended for a period not exceeding three years, which period in the absence of any order to the contrary, shall be computed in accordance with the provisions respectively of subsections (3) and (4). Such order shall be subject to such conditions (whether as to compensation to be made by the offender for damage or pecuniary loss, good conduct or otherwise) as the court may specify therein.

(3) The period during which any order for the suspension of a part of a sentence, made under subsection (2) and affecting a sentence of imprisonment shall run, shall commence on the date upon which the person convicted was lawfully discharged from prison in respect of the unsuspended portion of such sentence, or if not then discharged because such person has to undergo any other sentence of imprisonment, such period shall commence upon the date upon which such person was lawfully discharged from prison in respect of such other sentence. If any portion of such other sentence is itself suspended, the periods of suspension of all such sentences shall, in the absence of any order to the contrary, run consecutively in the same order as the sentences.

(4) The period during which any order for the suspension of the whole of a sentence of imprisonment shall run, shall commence —

(a) where the convicted person is not serving another sentence, from the date from which the sentence wholly suspended was expressed as taking effect, or took effect; and

(b) where the convicted person is serving another sentence, from the date of expiration of that sentence including any period thereof which may be subjected to an order of suspension.

(5) If during the period of suspension of the whole of a sentence the convicted person is sentenced to imprisonment the portion then remaining of the sentence wholly suspended shall be deemed to be consecutive to the sentence of imprisonment subsequently awarded.

(6) If the offender has, during the period of suspension of any sentence under this section, observed all the conditions specified in the order, the suspended sentence shall not be enforced."

7. Paragraph (b) of section 27 of the principal Act is amended by substituting for the words and figures "sections 32, 34 and 37" therein the words and figures "sections 32 and 34".

Amendment
of section 27
of the
principal
Act

8. Section 33 of the principal Act is amended —

(a) by the deletion in subsection (1) thereof of the figure "35" appearing therein;

(b) by the deletion in subsection (2), thereof of the words and figures "or under section 37" appearing therein.

Amendment
of section 33
of the
principal
Act

9. Section 36 of the principal Act is substituted by the following new section —

"36 (1) The Minister may, by warrant under his hand, appoint customary courts of appeal to hear and determine such cases as he specifies in the warrant.

(2) A customary court of appeal may sit with assessors whenever the court deems it necessary so to do.

(3) A customary court of appeal shall consist of three persons of whom one shall be appointed, by the Minister, to be the president.

(4) The Minister may, by warrant under his hand appoint a panel of three other persons to be alternate members of each customary court of appeal.

(5) Where because of illness or absence out of the country or because of a personal or pecuniary interest in the matter or thing a member of a customary court of appeal is unable to attend a sitting of the court, the president of the court may nominate a person from the panel of alternate members to sit in place of the member who is absent, and such alternate member shall be a member of the said court until the member in whose place he was appointed to sit is able to resume his seat."

Substitution
of section
36 of the
principal
Act

Substitution
of section
37 of the
principal
Act

10. Section 37 of the principal Act is substituted by the following new section —

“37 (1) Any person aggrieved by any order or decision of a lower customary court may within 30 days from the date of that order or decision appeal therefrom to a higher customary court, or, if there be no higher customary court, to the customary court of appeal.

(2) Any person aggrieved by any order or decision of a higher customary court may within 30 days from the date of that order appeal to a customary court of appeal.

(3) Any person aggrieved by any order or decision of a customary court of appeal may within 30 days of that order or decision appeal therefrom to the High Court.

Provided that —

- (i) an appeal to the High Court under this subsection shall lie only in cases where the status of any person is at issue or where the amount of the judgement exceeds P200 or where sentences of imprisonment for a period exceeding six months or of corporal punishment exceeding eight strokes has been imposed; or
- (ii) notwithstanding the provisions of paragraph (i) any judge of the High Court sitting in chambers may on the application of any court or person concerned grant special leave to appeal against any order or decision made or given by a customary court under this Act.”

PASSED by the National Assembly this 11th day of December, 1986.

C.G. MOKOBI,
Clerk of the National Assembly.