

Solomon Islands Magistrates Bench Book

Produced by the Pacific Judicial Education Programme, in collaboration with the Solomon Islands National Judicial Education Committee, and with generous assistance from the governments of Australia, New Zealand and Canada.

Foreword

This Bench Book is a welcome assistance for Magisterial work. It is intended to be a practical, user-friendly and informative guide to many aspects of the jurisdiction of the Magistrates' Courts. I urge every Magistrate to use it often, to add to it and become part of developing and improving it further in the years ahead.

The Bench Book is an important milestone in the work of the National Judicial Education Committee and I am confident that it will lead to greater uniformity and consistency in the approach of Magistrates' Courts throughout Solomon Islands.

I gratefully acknowledge the initiative and commitment on the part of the Pacific Judicial Education Programme (PJEP) to produce this Bench Book, and the financial backing by the Governments of Australia and New Zealand through their respective aid agencies, AusAID and NZAID. In addition, the assistance provided by the Government of Canada through the Canada Fund, the Department of Foreign Affairs and International Trade as well as the University of Saskatchewan Native Law Centre.

I particularly commend the outstanding work of Assistant Registrar of High Court, Nelson Laurere; Tina Pope, the Bench Book Consultant; and Crystal Reeves, the Legal Researcher. They collaborated tirelessly in true team spirit to prepare and produce this Bench Book.

I appreciate the valuable contributions of PJEP Co-ordinator, Afioga Tagaloa Enoka Puni and PJEP Administration Manager, Mrs Vere Bakani; and Rex Faulkona, the Co-ordinator of the National Judicial Education Committee.

The Bench Book has been produced in loose leaf format to enable on-going revision and improvement. Comments are invited and should be referred to the Assistant Registrar of the High Court

This joint effort has resulted in a Bench Book of which we can all be proud and which will go a long way towards improving the standards and quality of services provided by the Magistrates Court to members of the public.

Sir John Muria

Chief Justice

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Pacific Judicial Education Programme

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1: THE CONSTITUTIONAL AND COURT FRAMEWORK

1 The Constitutional Framework of Solomon Islands

1.1 The Constitution of Solomon Islands

The Solomon Islands Constitution was adopted on July 7, 1978. It was enacted as a schedule of the Solomon Islands Independence Order 1978.

The Constitution details the basic elements of the Solomon Islands system of government by defining:

- the roles, responsibilities and powers of the Executive, Parliament and the Judiciary;
- the organization and structure of the legal system;
- the requirements of citizenship and details related to finance, land and leadership;
- that governance will be based on democratic principles;
- that principles of equality, social justice, human dignity and communal solidarity will be upheld.

The constitution is based on and outlines the doctrine of the Separation of Powers.

The Doctrine of Separation of Powers

There should be three distinct and separate branches of government:

1. The Executive: administrator and policy maker;
2. The Parliament (legislature): lawmaker;
3. The Judiciary: interpreter of the law.

Each branch of government checks the roles and functions of the other branches. This checking maintains the balance of power between the three branches and does not allow the executive to assume too much power.

In *Kenilorea v. Attorney General* [1984] SILR 179, the Court of Appeal ruled that Acts of Parliament may not alter the separation of powers of the three branches of government, and that any attempt by the legislature to usurp the powers and independence of the Judiciary was unconstitutional.

1.2 The Branches of Government in Solomon Islands

The Executive

Head of State:

The Head of State for Solomon Islands is the English Monarchy, represented by the Governor General.

The Governor General must be a person eligible to be a member of the Solomon Islands Parliament, and is appointed by the Queen on the advice of the Solomon Islands Parliament.

The office of the Governor General is for a five year term, unless removed by the Head of State in accordance with Parliament, for misbehaviour.

Section 32 of the Constitution provides that the Prime Minister is to keep the Governor General informed of the general conduct of the government.

The Governor General is required to act and exercise independent judgement with respect to:

- the appointment of a minister to act as Prime Minister if the Prime Minister or Deputy Prime Minister are ill or are absent from the country;

- the appointment of two members of the Committee on the Prerogative of Mercy;

- the removal of judges and acting judges in certain cases;

- the appointment of a member of the Judicial and Legal Services Commission;

- the removal of the Commissioner of Police;

- decisions on pensions for public officers, including constitutional officeholders.

Head of Government:

The Prime Minister:

is elected by members of Parliament from among their number in accordance with the provisions of Schedule 2 of the Constitution;

- heads Cabinet;

- advises the Governor General regarding the appointment of other Ministers of Cabinet.

There shall also be a Deputy Prime Minister, who is chosen from among the members of Parliament. The Deputy Prime Minister acts when the Prime Minister is temporarily prevented from performing the functions of his or her office due to illness or absence.

Cabinet:

The number of ministers in Cabinet is currently fixed in law at 11.

Ministers are appointed from among members of Parliament. They are appointed by the Governor General, who acts on the advice of the Prime Minister.

Each minister is responsible for overseeing the administration of a government department and Cabinet is collectively responsible for decisions taken by the Cabinet or by individual Ministers.

Secretary to Cabinet:

The Secretary to Cabinet is responsible for arranging the business for the meetings of Cabinet and conveying the decisions of Cabinet to the appropriate person or authority.

He or she shall also have other functions as the Prime Minister directs.

Attorney General

The Attorney General:

- is the legal advisor to the Cabinet and the principal legal adviser to the Government;

- is appointed by the Judicial and Legal Service Commission, on the advice of the Prime Minister;

- must be able to practise in Solomon Islands as an advocate, barrister or solicitor;

- shall not be entitled to vote in Parliament or in any election for the office of the Prime Minister.

The National Legislature (Parliament)

Parliament:

- consists of a single chamber;

- is presided over by a Speaker, who is elected by Parliament from among its members;

- is dissolved every four years unless a majority vote of Parliament dissolves it earlier;

- conducts itself in accordance with its standing orders.

The Parliament:

- has the power to “make laws for the peace, order and good government of Solomon Islands”;

- introduces and passes Bills, which becomes law after the assent of the Governor General and publication in the Gazette;

- makes provisions for the application of laws, including customary law.

The Speaker of Parliament has been given the power to make rulings in answer to questions regarding the interpretation of provisions in the Constitution, and it has been held that this is not a usurpation of the Court’s power to interpret the Constitution.

The Judiciary

The Judiciary is the third branch of government in Solomon Islands.

The Judiciary:

- is an independent body which is responsible for interpreting and applying Parliament's laws;

- creates and interprets case law;

- solves disputes of fact and law between individuals as well as between individuals and the State;

- comprises judges of the Court of Appeal, the High Court, the Magistrates' Court, the Local Courts and the Customary Land Appeal Court.

Provincial and Local Government

Provincial Government:

The Provincial Government Act 1981 set up seven provincial governments.

Provincial governments are made up of a Provincial Assembly, a Provincial Executive and staff.

Members of the Provincial Assembly are elected from electoral wards in the province. A Premier, who is elected by and from the Assembly, heads the provincial executive. The Premier then appoints other members of the Executive.

The Provincial Assembly may make provincial ordinances, but they require the assent of the responsible minister to have effect. The Minister must give assent unless he or she believes that the proposed provincial law is beyond the Provincial Assembly's powers, or conflicts with government policy for the whole country.

A number of functions of the national government can be transferred to provincial governments, as provided by the Provincial Government Act.

Local Government:

The Local Government Act provides for the establishment of Area Councils. Area Council representatives are elected by people living in the council area. For now, Area Councils have been suspended in Solomon Islands.

Area Council functions are:

- to promote health and welfare;

- maintain order and good government;

- prevent commission of offenses;

keep birth and death records.

2. The Solomon Islands' Court System

2.1 General Characteristics of the Court System

Solomon Islands has five types of Courts:

the Court of Appeal;

the High Court;

the Magistrates' Courts;

the Local Courts; and

the Customary Land Appeals Court.

The Court system is hierarchical:

This hierarchy is essential to the Doctrine of Precedent (see Chapter 2 The Law, paragraph 1.5).

The hierarchy provides an appeal system, which allows decisions to be checked by more senior Courts. This helps prevent inconsistency within the Courts and provides a check and balance system for the fair administration of justice.

2.2 Jurisdiction

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

If a Court acts outside its jurisdiction, it is said to be acting *ultra vires* (outside the power), which makes the Court's decision invalid on that matter.

An example where a Court would be acting outside its jurisdiction would be if a Magistrate's Court attempted to hear and determine a case involving murder, which carries a sentence of life imprisonment. The Magistrates' Courts can only hear criminal cases which carry a maximum sentence of 14 years: s27 Magistrates' Courts Act 1962.

Jurisdiction derived from statute

Statutes define a Court's power and authority. For example, the power and authority given to the Magistrates' Courts is set out in Part IV of the Magistrates' Courts Act 1962.

Inherent jurisdiction

Inherent jurisdiction means that the Court can fill in any gaps left by a statute or by case law. This jurisdiction is generally reserved for the highest Courts in any given country. The Court of Appeal and the High Court have inherent jurisdiction.

Original jurisdiction

This means that a Court is given power to hear certain kinds of cases in the first instance, for example:

the High Court has been given the power to hear first any cases dealing with fundamental rights or any other constitutional question;

the Magistrates' Courts have been given the power to hear first criminal cases where the maximum sentence is 14 years imprisonment or a fine of \$1000 and the power to hear civil cases where damage claimed is no more than \$2000;

the Local Courts have been given the power to hear first criminal cases where the maximum sentence is six months imprisonment and the power to hear civil cases where damage claimed is no more than \$200.

Concurrent jurisdiction

Concurrent Jurisdiction means that several Courts have the power to hear a particular kind of case.

The High Court and the Magistrates' Courts have concurrent jurisdiction on certain civil and criminal cases: s34 Magistrates' Courts Act 1962.

Territorial jurisdiction

Territorial jurisdiction refers to a Court's power to hear cases for a particular district or tract of land.

Section 4(1) Magistrates' Courts Act 1962 gives the Principal Magistrate's Court the power to hear cases throughout Solomon Islands, including over territorial waters.

However, s8 gives the Chief Justice the power to assign a Magistrate a particular district(s) in which to operate and the Magistrate may not, without special notification, exercise jurisdiction outside of that district(s).

Appellate jurisdiction

This is the right of a Court to hear appeals from a lower Court. The Court of Appeal, the High Court, the Magistrates' Courts and the Customary Land Appellate Court all have some type of appellate jurisdiction.

Criminal jurisdiction

A crime is the commission of an act that is forbidden by statute or the omission of an act that is required by statute.

The Penal Code 1963 sets out those acts that are crimes in Solomon Islands.

There are different categories of crime, and the category of crime determines which Court has jurisdiction to hear and determine the matter.

Criminal prosecutions are generally brought by the State, as represented by the Director of Public Prosecutions, against a person(s) who is alleged to have committed an offence.

Civil jurisdiction

This covers disputes between individuals, and between individuals and the State, that are not criminal matters.

Jurisdiction derived from custom

This is jurisdiction arising from the customs, traditions and values of the people of Solomon Islands.

This jurisdiction has been reaffirmed in Schedule 3 to the Constitution and in ss16 and 18 Local Courts Act 1942.

The Local Courts have jurisdiction derived from custom.

Supervisory jurisdiction

Supervisory Jurisdiction refers to the supervisory role that a higher Court has over subordinate Courts to ensure that justice is properly administered.

According to s84 of the Constitution, the High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate Court.

2.3 The Structure of the Solomon Islands Court System

Figure 1: Structure of Solomon Islands Court System

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2.4 A Brief Description of the Courts

The Court of Appeal

The Court of Appeal Act 1982 sets out the grounds for, and manner of, appeal to the Court of Appeal. The Court of Appeal Rules 1983 sets out appeal procedure.

According to the Court of Appeal Act 1982, the Court of Appeal may hear appeals in both civil and criminal matters.

Civil jurisdiction:

The Court has jurisdiction to automatically hear civil appeals:

from any decision where the High Court is the Court of first instance, including decisions made in chambers;

from any decision of the High Court under the provisions of the Islanders' Divorce Act;

in cases where the High Court has exercised its appellate jurisdiction, if it is not prohibited by statute and if the appeal is on a question of law only.

The Court has jurisdiction to hear civil appeals from the High Court with leave where:

an order was made by consent or is related to costs only;

the order or judgement is interlocutory, except in certain cases.

The Court may not hear an appeal in cases where:

a decision of the High Court is to be the final, as provided by statute;

an order has been given for unconditional leave to defend an action;

an order has been given allowing an extension of time in which to appeal.

The Court may also answer questions of law that have been referred by the High Court in the course of a trial.

Criminal jurisdiction:

A person convicted of a criminal offence before the High Court may appeal to the Court of Appeal:

as of right, against a conviction on any grounds where there is a question of law alone;

if granted leave by the Court of Appeal on a question of fact alone or a question of mixed law and fact, or on any other ground which the Court deems sufficient for an appeal.

The Director of Public Prosecutions may appeal to the Court of Appeal in cases where:

a person is tried before the High Court in the first instance and acquitted and where there is a question of law only;

the Director of Public Prosecutions has the opinion that the sentence imposed by the High Court is manifestly inadequate.

Any party may appeal to the Court of Appeal in criminal cases which originated in a Magistrate's Court and then were appealed to the High Court, if they involve a question of law only. This type of appeal does not apply to severity of sentence.

The High Court

The High Court has unlimited original civil and criminal jurisdiction. It also has original jurisdiction in cases with constitutional questions.

The High Court may also hear appeals from all civil judgements, orders and decisions of any Magistrate's Court except where:

it is made by consent;

it is ex parte;

it relates to costs only.

In these cases, special leave from the Magistrate's Court or the High Court is required.

The High Court hears appeals from the Customary Land Appeal Court on questions of law, other than customary law, or where there is an alleged failure to comply with a procedural requirement by the Customary Land Appeal Court. The decision of the High Court in these appeals is final.

The High Court has criminal appellate jurisdiction, as defined in Part IX of the Criminal Procedure Code. In these cases the appeals lie as of right or by way of case stated.

Magistrates' Courts

The Magistrates' Courts Act 1962 confers upon the Magistrates' Courts criminal and civil jurisdiction. The Chief Justice can also extend the jurisdiction of the Court in particular cases.

The Magistrates' Courts consist of a Principal Magistrate's Court and First and Second Class Magistrates' Courts.

The Principal Magistrate's Court exercises wider jurisdiction in terms of geographical area and in amount of damage or compensation in civil cases and penalty in criminal cases.

Civil jurisdiction:

The Magistrates' Courts have civil jurisdiction:

in personal suits arising in tort and contract where the value does not exceed \$2000 for First Class Magistrates and \$6000 for the Principal Magistrate;

in suits between landlord and tenant where the annual rent does not exceed \$500 for First Class Magistrates, and where annual rent does not exceed \$2000 for the Principal Magistrate;

to make guardianship and custody orders;

to grant injunctions and orders for detention;

to make a committal order for up to 6 weeks against a person who fails to pay or comply with a Court order for payment upon judgment.

The civil jurisdiction of a Second Class Magistrate is limited to cases involving a maximum of \$200.

Criminal jurisdiction:

All classes of Magistrates have jurisdiction to hear and determine criminal matters summarily.

The Principal Magistrate's Court has criminal jurisdiction in relation to:

offences where the maximum punishment is 14 years imprisonment or a fine, or both;

offences which the law has expressly stated that they are to be heard in the Principal Magistrate's Court.

The Principal Magistrate may only impose a term of imprisonment of 5 years or a fine of \$1000, or both.

First and Second Class Magistrates may summarily try any offence that carries a maximum punishment of one year imprisonment or a fine of \$200, or both.

First and Second Class Magistrates may also have jurisdiction to hear other offences if:

expressly provided for by law; or

the Chief Justice confers jurisdiction upon them by virtue of s26 Magistrates' Courts Act.

Other jurisdiction:

A Magistrate's Court has jurisdiction to hear appeals from decisions of the Local Courts operating within its area.

The Magistrate's Court has the power to make an order or pass sentence as the Local Court would have, or they can refer the matter back to the Local Court from which the appeal came or to any Local Court, to be reheard.

Sentences imposed by Local Courts must be confirmed by the Magistrate's Court, if those sentences exceed two months imprisonment. The Magistrate's Court may also reduce, remit or increase any sentence given by the Local Court.

The Magistrate's Court may also revise proceedings of the Local Court if an application has been made and such an action is warranted.

The Magistrate's Court may not hear actions where title to land or ownership of land is in dispute, unless the parties consent. See s19(6) MCA.

Local Courts

The Local Courts have jurisdiction over the geographic area for which they are established. The Local Court is to be constituted in accordance with the law or customs of Islanders from that geographic area.

The Local Court has civil and criminal jurisdiction over matters in which all the parties are resident islanders within the area where the Court has been given jurisdiction.

Before the Local Court can exercise its jurisdiction with respect to customary land disputes, it must be satisfied that:

the dispute has first been referred to the chiefs;

all traditional means of resolving the dispute have been exhausted;

no decision that is accepted by both parties has been made by the Chief. If the decision of the Chiefs has been accepted by both parties, the Court is to adopt that decision within three months.

The Local Court has exclusive jurisdiction to deal with all proceedings of a civil nature in connection with customary land unless:

the matters are expressly excluded by the Land and Titles Act; or

there is a question whether the land is actually customary land.

The Local Court may also deal with a civil matter referred to it by the High Court or by the Customary Land Appeal Court under the Land and Titles Act. These decisions may be subject to appeal to the Customary Land Appeal Court.

The criminal jurisdiction of the Local Courts is only for certain offences, as specified in law. The sentence imposed cannot be for a term exceeding six months or a fine exceeding \$200.

Punishments given according to customary law may not be repugnant to natural justice and humanity. Fines given shall not be excessive, but in proportion to the nature and circumstances of the offence.

Customary Land Appeal Court

This is a separate appeal Court established specifically to deal with:

customary land appeals from the Local Court; and

decisions of area councils under the Forest and Timber Utilisation Act 1970.

In making its decisions, the Court applies customary law relating to land matters.

Its decisions are subject to appeal to the High Court, but only on points of law other than customary law or on points of procedure.

2.5 Traditional Dispute Resolution

The sitting of the traditional chiefs is not a Court, but it does have an impact upon the jurisdiction and processes of the Local Courts.

Prior to the Local Courts making any decision related to customary land, they must have evidence that the parties referred the matter to the traditional Chiefs and that all traditional, lawful means of dispute resolution were exhausted.

If there is evidence that both parties consented to decision of the Chiefs, then the Local Court adopts the decision as a means of enforcing it. This evidence is given by way of the Accepted Settlement Form.

If the parties do not consent to the decision of Chiefs, then they must give a written statement as to why the decision is not acceptable and the reasons for not accepting the decision. This evidence is given on the Unaccepted Settlement Form. The matter then goes to the Local Court.

2: THE LAW

1 The Law

1.1 Sources of Law for Solomon Islands

The sources of law for the Solomon Islands, as provided for in the Constitution and in Schedule 3 to the Constitution, include:

- the Constitution;
- Acts of the Solomon Islands Parliament;
- certain pre-independence legislation of the British Parliament;
- customary law; and
- the rules and principles of common law and equity.

1.2 The Constitution

Section 2 of the Constitution states:

“This Constitution is the supreme law of the Solomon Islands and if any other law is inconsistent with this Constitution, that law shall, to the extent of any inconsistency, be void.”

This means any law passed before or after the Constitution, including legislation, customary law and the common law, which is inconsistent with the Constitution is void.

The Courts have upheld the supremacy of the Constitution in several cases. See *Director of Public Prosecutions v Sanau and Tanabore v Director of Public Prosecutions* [1987] SILR 1, *R v Rose* [1987] SILR 45 and *Gerea v DPP* [1984] SILR 161.

It is the Courts that interpret and decide the meaning of certain provision in the Constitution, so the Constitution is affected by developments in the common law.

The Constitution can be amended by Parliament only by special majorities. Amendment of most of the provisions requires a vote of not less than two-thirds of all members of Parliament after two separate readings.

Some provisions, such as fundamental rights and freedoms, the legal system, the Parliament, and office of the Ombudsman, can be amended only by at least three-quarters of the members.

1.3 Statute Law

Acts of Parliament

Parliament the power to make laws for the peace, order and good governance of the Solomon Islands: s59 of the Constitution.

In order for a Bill to become law, it must be passed by Parliament, assented to by the Governor General and then published in the Gazette.

The legislation passed by Parliament is the next superior law after the Constitution.

The laws that are prescribed by Parliament, in the form of statutes, are binding on the Courts and can only be changed by Parliament.

The Courts may also, in certain circumstances, recommend changes to the law, as they did in *Lifuasi v Dainitofea* (unreported Civil Case No. 160 of 1990) or they may declare a specific statute void if it is inconsistent with the Constitution.

Some Acts of the Parliament of the United Kingdom

Acts of Parliament of the United Kingdom, which are of general application and are in force on 1 January 1961, will be part of the law of the Solomon Islands, as long as they are not inconsistent with the Constitution or Acts of Parliament of the Solomon Islands: Schedule 3 of the Constitution.

Those United Kingdom Acts that apply to criminal jurisdiction include:

ss3, 4, 5 of the Criminal Procedure Act 1898;

Bankers Book Evidence Act 1879;

ss6, 8 of the Criminal Procedure Act 1865;

ss1, 14 of the Evidence Act 1851.

It is the role of the Courts to interpret and apply statutes, whether they are Acts of Parliament of the Solomon Islands or Acts of Parliament of the United Kingdom

Understanding and interpreting legislation

When interpreting statutes in the Solomon Islands, you must consider:

the Constitution;

the Interpretation & General Provisions Act 1978;

any definitions or rules of interpretation that are provided in the specific Act; and

common law rules of statutory interpretation.

You must recognise and understand the terms used in statutes to convey a particular meaning, for example:

when an Act says the Court “may” do something, that means the power may be exercised or not, at your discretion;

when an Act says you “shall” do something, this means you must. You have no choice.

It is important to note that the meaning of words and phrases in a statute is a question of law and not a question of fact, and that there is procedure that you should follow to determine the meaning of words.

- 1 Refer to the definition section of the statute you are considering;
- 2 Refer to s16 Interpretation and General Provisions Act 1978;
- 3 Refer to relevant Solomon Islands cases which may have given a definition for that word or phrase;
- 4 Refer to overseas case law in some instances;
- 5 Refer to a respected legal dictionary or legal textbook. This should only be used as a reference and may not be relevant to the particular statute or the context of the Solomon Islands.

1.4 Customary Law

Customary law has effect as part of the law of the Solomon Islands as long as it is not inconsistent with the Constitution or with Acts of Parliament: Schedule 3 of the Constitution.

The definition of customary law, set out in the Constitution, means rules of customary law prevailing in an area of the Solomon Islands.

Numerous Court cases have ruled on the application of customary law. For instance, in *Igolo v Ita* (1983) SILR 56, Daly CJ, his Lordship held that insofar as customary law does not conflict with the Constitution and an Act of Parliament, the rule of received law as to presumption of legitimacy would not override custom. It was argued in that case that, as the appellant was born while the marriage was still subsisting, according to received law there is a presumption that he is a legitimate child in the marriage unless the contrary is proved beyond reasonable doubt. The Local Court and Customary Land Appeal Court, however, dealt with the question of legitimacy of the appellant based on custom that he was an illegitimate child.

Much of the customary law applied in Solomon Islands relates to questions of ownership over customary land. Therefore, the majority of High Court and Court of Appeal decisions touching on customary law pertain to issues arising in connection to customary land. Other issues relate to custody of children. Guidance may still be had in relation to how to reconcile legislation and custom.

In *Sukutaona v Houanihou* (1982) SILR 12 at 13, Daly CJ states:

“It is quite right that custom law is now part of the law of Solomon Islands and Courts should strive to apply such law in cases where it is applicable. However, it must be done on a proper basis of evidence adduced to show the custom and its applicability to the circumstances. This evidence should be given by unbiased persons knowledgeable in custom law or extracted from authentic works on customs. In this case the evidence of custom, as counsel for the Respondent rightly consider was very slim, and I do not consider there was sufficient for the firm finding reached by the learned Magistrate.

In any event it remains open to question to what extent Rules of Custom Law of the kind discussed in this case should be firmly applied to cases where the welfare of children is at stake.

The Courts have always regarded the interest of the children to be of paramount importance and should continue to do so.”

The Court found that there was a conflict with received law, that of the welfare of children, and declined to follow customary law as it applied to questions of custody. See also Re B (1983) SILR 223, which followed and applied that decision.

1.5 Common Law

The principles and rules of the common law and equity shall have effect as part of the law of the Solomon Islands as long as they are not:

inconsistent with the Constitution or any Act of Parliament;

inapplicable or inappropriate to the circumstances of the Solomon Islands; or

inconsistent with the customary law applying to the matter: Schedule 3 of the Constitution.

The common law is law made and developed by Judges and Magistrates. Judges and Magistrates can make and develop the law by:

interpreting existing legislation;

interpreting the Constitution;

covering matters which are not dealt with by statute.

The development of the common law does not mean that Judges can make arbitrary decisions. They must follow the Doctrine of Judicial Precedent and must give reasons for their decision.

Doctrine of Judicial Precedent

The Doctrine of Judicial Precedent means that Judges and Magistrates in lower Courts are bound to follow decisions of higher Courts.

The operation of the Doctrine is regulated in the Solomon Islands by the practice directions given by the Chief Justice: Schedule 3 Constitution.

On 4 June 1981, the Chief Justice issued Practice Direction No. 1/81, which states that:

all Courts other than the Court of Appeal shall regard decision of the Court of Appeal as the binding authority;

the High Court shall regard earlier decisions of itself as persuasive authority;

a Magistrate's Court shall regard decisions of the High Court, whether on review of proceedings or otherwise, as binding authority;

a Magistrates Court shall regard decisions of another Magistrates Court as persuasive authority.

Binding authority means that lower Courts are "bound to" or must apply the legal principles announced in the decision of a higher Court.

Persuasive authority means that the Court may apply the decision of another Court, but are not required to do so. You should always carefully consider the decision of the other Court but if the reasoning of the decision does not persuade you, do not apply it.

The Courts are not bound by any decision of a foreign Court given on or after 7 July 1978. However, they may consider decisions from foreign jurisdictions in order to develop the common law of the Solomon Islands. These decisions would have persuasive value only.

2 Criminal Law and Fundamental Human Rights

Chapter 2 of the Constitution sets out the fundamental rights and freedoms that are to be protected in the Solomon Islands.

Judges and Magistrates should ensure that all fundamental rights are respected in the administration of justice.

The rights to secure protection of the law, under s10 of the Constitution are particularly important for criminal trials.

Explanations of some of the rights follow.

Right to a fair hearing within a reasonable time by an independent and impartial Court

Section 10(1) states:

"if any person is charged with a criminal offence, then unless the charge is withdrawn, that person shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law."

Reasonable time:

In *Kimisi v Director of Public Prosecutions* [1990] SILR 82, the High Court set out four factors which should be considered when determining if a person has had a fair hearing within a reasonable time. The reasoning of the High Court was upheld on appeal to the Court of Appeal. The four factors that should be considered are:

the length of the delay;

the reason for the delay;

the defendant's assertion of his or her right under s10(1); and

any prejudice to the defendant.

Independent and impartial Court:

The issue of bias in the Magistrate's Court was raised in *Ngina v R* [1987] SILR 35.

The High Court held that a Magistrate should only disqualify themselves if they harbour malice or grudge against the accused.

The High Court in *Ngina* also applied the test from *Kamai v Aldo* CLAC No. 17 of 1982, which considered the 'likelihood of bias'. The test is "would a reasonable bystander conclude, having observed the proceedings, that justice has been clearly done."

In *Ngina*, it was found that no right-minded member of the public would feel there was a real likelihood of bias and this ground for appeal was dismissed.

In *Gerea v DPP* [1984] SILR 161, the Court of Appeal considered whether an accused was denied the right to a fair hearing by an independent Court under s10(1).

The Court ruled that a Court is independent within the meaning of s10(1) when, in the exercise of the functions of enforcing the law, it is subject neither to control nor pressure by any outside body.

The Court concluded that judicial independence is not affected by Parliament when it enacts provisions in the Penal Code which limits the sentencing discretion of Judges in cases of murder.

See also s9 Magistrates' Courts Act and s67(1) Criminal Procedure Code, which reinforce the principle that the Court should be impartial:

Section 9 MCA states that "where a Magistrate is a party to any cause or matter, or is unable, from personal interest or any other sufficient reason, to adjudicate on any cause or matter, the Chief Justice shall direct some other Magistrate to act instead....";

Section 67(1) CPC states that whenever it is made to appear to the High Court that a fair and impartial inquiry or trial cannot be held in any Magistrate's Court, the Court may order that the case be transferred to another Magistrate's Court, or that the case be committed to the High Court for trial.

Presumption of innocence

Section 10(2)(a) states:

"every person who is charged with a criminal offence shall be presumed innocent until he is proved or has pleaded guilty".

This is an extremely important principle in criminal law.

Judges and Magistrates must ensure that:

they do not base their finding of guilt on previous knowledge of the accused; and

the prosecution bears the burden of proving the accused's guilt beyond reasonable doubt.

For a good statement on presumption of innocence by the Court of Appeal, see David Kio v R (Unreported Criminal Appeal Case No. 11 of 1977).

Right to an interpreter

Section 10(2)(b) & (f) states:

“every person who is charged with a criminal offence shall be informed as soon as practicable, in detail and in a language that he understands, the nature of the offence charged; ... and shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.”

An accused must be able to:

fully understand the charge(s) he or she faces;

fully understand the implications of the charge(s);

instruct his or her legal representative, if he or she has one.

For the accused to have a fair trial, interpreters must be impartial, fluent in the language(s) being interpreted, and understand that they need to be accurate.

Section 184 CPC and s59 MCA reinforce the principle of having the right to interpreter:

Section 184 CPC states “ whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language which he understands”;

Section 59 MCA provides that any proceedings in the Magistrate’s Court, where the language of a party or witness requires interpretation into English, the Magistrate may appoint suitable persons as interpreters.

Right to adequate time and facilities

Section 10(2)(c-e) states:

“every person who is charged with a criminal offence shall be given adequate time and facilities for preparation of his defence, shall be permitted to defend himself before the Court in person or by a legal representative of his own choice, shall be afforded facilities to examine in person or by his legal representative the witness called by the prosecution...”

It is essential to uphold this right in order to guarantee a fair hearing for the accused.

In many cases, it will be important for an accused to have legal representation, or at least the advice of a lawyer, in order to understand the charges against him or her and to be able to defend him or herself against those charges.

The Court must not deny an accused time to meet with a legal representative if he or she so chooses.

What constitutes adequate time will be dependent upon the circumstances of the case.

Right not to be held guilty of a criminal offence if, at the time, it does not constitute an offence

Section 10(4) states:

“no person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence...”

Upholding this right prevents a person from being tried for something that is not an offence in law at the time they committed an act or omission. If there is no law, there is no offence. Therefore, the charge must either be thrown out or the accused be charged with some other offence that exists in law.

This right also prevents a person from being tried in the future according to future legislation, for an act or omission they committed before the legislation making it unlawful came into existence. For example, if a person commits an act in 2001, but no legislation exists regarding that offence until 2003, the person cannot then be tried for the act committed in 2001 using the 2003 legislation.

Right not to be tried again for the same offence

Section 10(5) states:

“no person who shows that he has been tried by a competent Court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at trial for that offence, save on the order of superior Court in the course of an appeal or review proceedings...”

In particular, this right prevents three abuses:

- a second prosecution for the same offence after acquittal;
- a second prosecution for the same offence after conviction; and
- multiple punishments for the same offence.

Upholding this right also guarantees that a person will not be subjected to endless proceedings regarding the same set of circumstances.

Right to be present in Court

Section 10(2)(f) states:

“except with his own consent, a trial shall not take place in his [the accused] absence unless he so conducts himself as to render the continuance of the proceedings impracticable and the Court has ordered him to be removed and the trial to proceed in his absence.”

Section 179 CPC supports this principle by requiring that “except as otherwise expressly provided, all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, or when his personal attendance has been dispensed with, in the presence of his advocate”.

An exception to the need for the accused to be present during his or her trial is provided for in s86(1) CPC. A Magistrate may dispense with the personal attendance of the accused in cases where:

a summons is issued for any offence other than a felony; and

the punishment is only by fine, or imprisonment not exceeding 3 months, or both; and

the accused consents to the trial taking place in his or her absence, and pleads guilty, in writing or through a lawyer or advocate.

Right not to give evidence in Court

Section 10(7) states:

“No person who is tried for a criminal offence shall be compelled to give evidence at the trial.”

In criminal cases, the prosecution has the burden of proving the charges against the accused.

The accused may give evidence in his or her own defence once the prosecution has finished presenting his or her case, but is not required to do so.

The Court may not infer anything whatsoever from the accused's choice not to give evidence. The Judge or Magistrate must base their decision solely on the evidence presented by the prosecution and whether the prosecution has met the burden and standard of proof.

3: JUDICIAL CONDUCT

1 Ethical Principles

As a Magistrate, you have sworn the following oath on appointment:

“I do swear [or solemnly affirm] that I will well and truly serve Her Majesty Queen Elizabeth II, Her Heirs and Successors, in the office of and will do right to all manner of people after the laws and usages of Solomon Islands, without fear or favour, affection or ill will. [So help me God].”

The judicial role is a public one and your conduct will be under public scrutiny. The respect and confidence of the public in the justice system requires that Judges and Magistrates respect and comply with the law, and conduct themselves in a manner which will not bring themselves or their office into disrepute.

The Oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

1.1 “Well and Truly Serve”

Diligence

You should be diligent in the performance of your judicial duties.

This means you should:

devote your professional activity to your judicial duties, which include not only presiding and sitting in Court and making decisions, but other judicial tasks essential to the Court’s operation;

bring to each case a high level of competence and be sufficiently informed to provide adequate reasons for each decision;

take reasonable steps to maintain and enhance the knowledge, skills and personal qualities necessary for your role;

not engage in conduct incompatible with the diligent discharge of judicial duties or condone such conduct in colleagues.

Decisions should be delivered as quickly as circumstances permit. Always try to do this immediately. This means you must:

be familiar with common offences, jurisdiction and procedure; and

prepare before sitting in Court.

1.2 “Do Right”

Integrity

You should strive to conduct yourself with integrity so as to sustain and enhance public confidence in the Judiciary.

This means you should:

make every effort to ensure that your conduct is above reproach in the view of reasonable, fair minded and informed persons; and

encourage and support your judicial colleagues to observe this high standard.

1.3 “All Manner of People”

Equality

You should conduct yourself and proceedings before you so as to ensure equality according to the law.

This means you should:

carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination;

strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnical background;

avoid membership in any organisation that you know currently practices any form of discrimination that contravenes the law;

in the course of proceedings before you, disassociate yourself from and disapprove of clearly irrelevant comments or conduct by Court staff, counsel, or any other person subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

1.4 “After the Laws and Usages of Solomon Islands”

Lawfulness

You should act within the authority of the law.

This means you should:

not take into account irrelevant considerations when making your decisions – the exercise of judicial discretion should only be influenced by legally relevant considerations;

not abdicate your discretionary powers to another person – it is for you to decide;

defend the constitutionally guaranteed rights of the Solomon Island people.

1.5 “Without Fear or Favour, Affection or Ill Will”

Judicial Independence

An independent Judiciary is indispensable to impartial justice under the law. You should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

This means you must:

exercise your judicial functions independently and free of irrelevant influence;

firmly reject any attempt to influence your decisions in any matter before the Court outside the proper process of the Court;

encourage and uphold arrangements and safeguards to maintain and enhance the independence of the Judiciary;

exhibit and promote high standards of judicial conduct so as to reinforce public confidence, which is the cornerstone of judicial independence.

Impartiality

You must be, and should appear to be, impartial with respect to your decisions and decision making.

This means you should:

strive to ensure that your conduct, both in and out of Court, maintains and enhances confidence in your impartiality and that of the Judiciary;

not allow your decisions to be affected by:

bias or prejudice;

personal or business relationships; or

personal or financial interests;

as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions on which it will be necessary to be disqualified from hearing cases;

review all commercial, social and political groups you are a member of, or have an interest in, and ask yourself, "could this involvement compromise my position as Magistrate?"

You must not only be impartial, but you must be seen to be impartial. The appearance of impartiality is to be assessed from the perspective of a reasonable, fair-minded and informed person.

This principle touches several different areas of your conduct.

a) Judicial demeanour

While acting decisively, maintaining firm control of the process and ensuring cases are dealt with quickly, you should treat everyone before the Court with appropriate courtesy.

b) Civic and charitable activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

Avoid any activity or association that could reflect adversely on your impartiality or interfere with the performance of your judicial duties.

Do not solicit funds (except from judicial colleagues or for appropriate purposes) or lend the prestige of the judicial office to such solicitations.

Avoid involvement in causes and organisations that are likely to be engaged in litigation.

Do not give legal or investment advice.

c) Political activity

You should refrain from conduct which, in the mind of a reasonable, fair minded and informed person, would undermine confidence in your impartiality with respect to issues that could come before the Courts.

All partisan political activity must cease upon appointment. You should refrain from conduct that, in the mind of a reasonable, fair minded and informed person, could give rise to the appearance that you are engaged in political activity.

You should refrain from:

membership in political parties and political fundraising;

attendance at political gatherings and political fundraising events;

contributing to political parties or campaigns;

taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the Judiciary or fundamental aspects of the administration of justice;

signing petitions to influence a political decision.

Members of your family have every right to be politically active. Sometimes this may adversely affect the public perception of your impartiality. In any case before the Court where there could reasonably be such a perception, you should not sit.

d) Conflict of interest

You must disqualify yourself in any case in which you believe that you will be unable to judge impartially.

You should also disqualify yourself if a reasonable, fair minded and informed person would have a personal suspicion of conflict between your personal interest (or that of your immediate family or close friends or associates) and your duty.

Never preside over a case where the accused or witness:

- is a near relative;
- is a close friend;
- is an employer or employee; or
- has a close business relationship with you.

Do not preside over a case where you may have or appear to have preconceived or pronounced views relating to:

- issues;
- witnesses; or
- parties.

For example, if you witness an accident, do not preside over any case arising out of that accident. It is possible that you might prefer your recollection to the evidence produced in Court.

Given that individual islands are so small, you should also be careful not to let person or local knowledge affect your judgment.

Disqualification is not appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification;
- no other Magistrates are available to constitute a Court to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

2 Conduct in Court

2.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with.

Make sure you have the relevant legislation at hand.

Criminal

Consider the offences – make sure you know what elements must be proved.

Civil

Study the file, affidavits, etc.

Identify the issues in dispute and the relief sought.

2.2 Principle that Affected Parties have the Right to be Heard

It is a well established principle, evolved from common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made.

This principle focuses on the procedural steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to allowing the person sufficient notice to prepare their submissions, to collect evidence to support their submissions and to rebut or contradict the other party's submissions.

Note that a person may be heard but the view they have expressed does not have to prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of the information is to be determined by you.

There are three aspects to the principle:

Prior notice

You should be satisfied that adequate notice has been given, as prescribed by law.

If the defendant or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.

For criminal matters, you will need proof of service of the warrant or summons. For civil matters, you will need proof of service of the writ with particulars of the claim.

Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

Fair hearing

The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.

The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with a new and relevant issue.

It always requires you to ensure you have all the relevant facts and materials before deciding.

Relevant material disclosed to parties

Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

Before a hearing is concluded, you should ask yourself, “has each party had a fair opportunity to state his or her case?”

2.3 Courtroom Conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the Judiciary:

Be courteous and patient.

Be dignified.

Be humble:

If a mistake is made you should apologise – there is no place on the Bench for arrogance.

Continually remind yourself that a party is not simply a name on a piece of paper:

The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.

Never make fun of a party or witness:

A matter which may seem minor to you, may be very important to a party or witness.

Remember there are no unimportant cases.

Show appropriate concern for distressed parties and witnesses.

Never state an opinion from the Bench that criticises features of the law:

Your duty is to uphold and administer the law, not to criticise it.

If you believe that amendments should be made, discuss the matter with who???

Never say anything or display conduct that would indicate you have already made your decision before all parties are heard.

Do not discuss the case or any aspect of it outside of the Court.

2.4 Maintaining the Dignity of the Court

Ensure that all people appearing before the Court treat it with respect by:

keeping order in Court;

being polite and respectful and expecting the same from them.

Deal effectively with unruly defendants, parties, witnesses and spectators by:

decisiveness and firmness;

dealing promptly with interruptions or rudeness;

clearing the Court or adjourning if necessary.

2.5 Communication in Court

Speaking

Use simple language without jargon.

Make sure you know what to say before you say it.

Avoid a patronising and or unduly harsh tone.

Generally, do not interrupt counsel or witnesses.

Always express yourself simply, clearly and audibly. It is important that:

the party examined and every other party understands what is happening in the Court and why it is happening;

the Court Clerk is able to hear what is being said for accurate note-taking; and

the public in the Courtroom are able to hear what is being said.

Listening Actively

Be attentive and be seen to be attentive in Court.

Make accurate notes.

Maintain eye contact with the speaker.

Questioning

Criminal

The criminal justice system is based on an adversarial procedure, which requires the prosecution to prove the case. Your role is not to conduct the case for them, but to listen and determine.

You should not ask questions or speak while the prosecution or defence are presenting their case, examining or cross-examining witnesses.

You may ask questions at the conclusion of cross-examination, but only to attempt to clarify any ambiguities appearing from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised.

Never ask questions to plug a gap in the evidence.

Civil

You may ask questions. If parties are unrepresented, you might do this to indicate what is needed to satisfy you and clarify what they are saying.

Be careful to be neutral when asking questions – your questions must not show bias to either side.

Avoid interrupting during submissions. If possible, wait until the party has finished their submissions.

Dealing with parties who do not understand

You may frequently be confronted with unrepresented defendants and parties who do not appear to understand what the proceedings are about.

It is your responsibility to ensure that the defendant or parties understand:

- the charge faced (criminal) or matters in issue (civil); and
- the procedures of the Court.

Criminal

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

- the nature of the charge;
- the procedure and formalities of the Court;
- the legal implications of the allegations.

At any stage in the proceedings, you may take the time to satisfy yourself that the defendant knows:

- why he or she is appearing in Court;
- what his or her rights are;
- what the Court is doing;
- why the Court is following that course.

Civil

You may need to be more attentive to an unrepresented party's needs. Take care to explain:

- the nature of the hearing and what will occur;
- what is expected when the party comes to speak; and
- to an applicant that they have to tell you what they want and why.

Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem. Often, however, one is not available. In this case:

- explain the nature of the charge or issues as slowly, clearly and simply as possible;
- if you are in any doubt about whether the defendant or a party properly understands what is happening, adjourn the hearing to enable an interpreter to be obtained.

4: THE MAGISTRATES' COURTS

1 Introduction

The Magistrates' Courts Act – Cap 3 (MCA) establishes Courts of summary jurisdiction in the Solomon Islands. These are the:

Principal Magistrate's Court;

Magistrates' Courts of the First Class; and

Magistrates' Courts of the Second Class: s3 MCA.

The Chief Justice may direct that there be a Magistrate's Court in any particular district. Magistrates' Courts have been established in the:

Central District;

Malaita District;

Western District;

Eastern District; and

Eastern Outer Islands District: s50 Magistrates' Courts (Districts) Order 1962.

The MCA confers both criminal and civil jurisdiction on Magistrates' Courts to hear and determine cases that arise in the area for which they are established.

The Chief Justice:

can confer extra-territorial jurisdiction on individual Magistrates;

decides on the jurisdiction to be exercised by each Court; and

can confer on a Court specific jurisdiction to hear particular cases normally outside its jurisdiction.

Proceedings are in English: s59 MCA; s183 Criminal Procedure Code – Cap 7. This includes Solomon Islands pidgin: s2 MCA.

2 Governing Legislation

The Magistrates' Courts Act establishes and governs the Magistrates' Courts.

Criminal

The Criminal Procedure Code – Cap 7 (CPC) sets out the procedure of the Magistrates' Courts.

Other relevant legislation includes:

Penal Code – Cap 26 (PC);

Traffic Act – Cap 131;

Traffic Regulations – Cap 131;

The Constitution;

Dangerous Drugs Act (Cap 98);

Death and Fire Inquiries Act (Cap 9);

Firearms and Ammunition Act (Cap 80);

Juvenile Offenders Act (Cap 14);

Local Courts Act (Cap 19);

Motor Vehicles (Third Party Insurance) Act (Cap 83);

Probation of Offenders Act (Cap 28);

Customs and Excise Act (Cap 121).

Civil

Affiliation, Separation and Maintenance Act (Cap 1);

Deportation Act (Cap 58);

Islanders Divorce Act (Cap 170);

Islanders Marriage Act (Cap 171);

Land and Titles Act (Cap 133);

Local Courts Act (Cap 19);

Workman's Compensation Act (Cap 78).

3 Composition of the Court

3.1 Magistrates

Appointment

Any person appointed pursuant to the Constitution may be empowered by the Chief Justice by warrant as a Principal Magistrate, First Class Magistrate, or Second Class Magistrate.

Under s118 of the Constitution, the Judicial and Legal Services Commission is responsible for the appointment of Magistrates, their removal and disciplinary control.

3.2 Clerk of the Court

A Clerk is:

- appointed by the Chief Justice or a High Court Judge;
- attached to each Magistrate's Court;
- under the immediate control of the Magistrate of that Court.

The Magistrate can appoint a temporary replacement Clerk if the Clerk is absent.

The duties of the Clerk are:

- to attend to the sittings of the Court, as directed by the Magistrate;
- to create all the Court documents and give these to the Magistrate for his or her signature;
- to issue civil processes;
- to make copies of proceedings, when asked to by the Magistrate;
- to record the judgments, convictions and orders of the Court;
- to receive all monies paid to the Court, and keep good records;
- to administer oaths when asked to by the Magistrate (who should be present);
- to do whatever else the Magistrate asks: ss13 and 33 MCA.

3.3 Other Officers of the Court

Other Officers of the Court are:

- the Sheriff; and
- the Bailiff.

The Chief Justice may appoint other Officers, for example Justices of the Peace.

See ss14, 15, 16 and 17 MCA for the appointment and duties of these officers.

4 Jurisdiction

4.1 Territorial Jurisdiction

A Principal Magistrate has jurisdiction to hear cases within any district throughout Solomon Islands.

Subject to the terms of their appointment, First and Second Class Magistrates have jurisdiction to hear cases within the limits of the district within which their Court is situated: ss4 and 8 MCA.

This jurisdiction extends to any territorial waters within and around the district: s4(3) MCA.

Every offence will normally be inquired into and tried by the Court with jurisdiction over the district in which the offence was committed (partly or in whole), or where the accused was caught: ss58, 59, 60, 61, 62 and 63 CPC; and s6 Penal Code – Cap 26.

Actions of, or under the authority of, a Magistrate will not be void or impeachable solely because of an error as to territorial jurisdiction: s31 MCA.

4.2 Criminal Jurisdiction

Preliminary Inquiries

Any Magistrate may conduct a preliminary inquiry and commit any person for trial to the High Court: s210 CPC.

Defended Hearings

Principal Magistrates

A Principal Magistrate has jurisdiction to try summarily any criminal offence:

which carries a maximum penalty not exceeding 14 years imprisonment, or a fine, or both; and

which he or she has been expressly given jurisdiction to hear: s27(1) MCA.

First and Second Class Magistrates

Both First and Second Class Magistrates have jurisdiction to try summarily any criminal offence:

which carries a maximum penalty not exceeding one year imprisonment, or a fine of \$200, or both;

which they have been expressly given jurisdiction to hear;

for which any penalty is expressly provided in respect of a conviction by a First or Second Class Magistrates' Court: s27(2) MCA.

In general the Chief Justice may by order invest a Magistrates Court with jurisdiction to try a particular class of offence which would otherwise be beyond its jurisdiction. A High Court Judge may do the same in respect of a particular case. However, the Magistrate may not impose a sentence which exceeds their sentencing jurisdiction: s27(3) MCA.

May hear:

Court Maximum imprisonment and/or fine

Principal Magistrate's Court 14 yrs and/or fine

First and Second Class Magistrate's Court 1 yr and/or \$200

Sentencing Jurisdiction

Principal Magistrates

A Principal Magistrate has jurisdiction to impose a sentence of up to:

5 years imprisonment; or

\$1,000 fine; or

both: s27(1) MCA; ss7 and 8 CPC.

First and Second Class Magistrates

Both First and Second Class Magistrates have jurisdiction to impose a sentence of up to:

one year imprisonment; or

\$200; or

both: s27(2) MCA; ss7 and 8 CPC.

Two or more offences arising out of the same facts

Any Magistrate may impose consecutive sentences for two or more offences arising out of the same facts, up to a total of twice their normal sentencing jurisdiction, that is:

in the case of a Principal Magistrate, 10 years imprisonment, or \$2,000, or both; and

in the case of First and Second Class Magistrates, two years imprisonment, or \$400, or both: s27(4) MCA; s9(2) CPC.

May sentence:

Court Maximum imprisonment and/or fine Maximum – 2 or more offences

Principal Magistrate's Court 5 yrs and/or \$1,000 10 yrs and/or \$2,000

First and Second Class Magistrate's Court 1 yr and/or \$200 2 yrs and/or \$400

Maximum default periods

The term of imprisonment to be imposed in default of payment of a fine shall not exceed the maximum period provided below. See s26 Penal Code – Cap 26.

Imprisonment in default of payment:

Amount of fine

Maximum period of imprisonment in default

Not exceeding \$2 7 days

Exceeding \$2 but not exceeding \$4 14 days

Exceeding \$4 but not exceeding \$20 6 weeks

Exceeding \$20 but not exceeding \$80 2 months

Exceeding \$ 80 but not exceeding \$200 3 months

Exceeding \$200 6 months

4.3 Civil Jurisdiction

A Magistrate's Court has civil jurisdiction (within its territorial limit):

in all personal suits including counter-claims and set-offs arising in both tort and contract, where the value of the claim does not exceed \$2000 (Principal Magistrate), \$1000 (First Class Magistrate) or \$200 (Second Class Magistrate);

in all suits between landlord and tenant for possession of any lands or houses where the annual rental value does not exceed \$2000 (Principal Magistrate), \$500 (First Class Magistrate) or \$200 (Second Class Magistrate);

to appoint guardians and make custody orders for infants;

to grant injunctions in proceedings instituted before it relating to property, torts or contract, where the value of the claim does not exceed \$2,000 (Principal Magistrate). \$1,000 (First Class Magistrate) or \$200 (Second Class Magistrate);

in all claims for relief by way of a person with an interest in land or other property attached in execution of a decree made by Magistrate, where the value does not exceed \$2000 (Principal Magistrate), \$500 (First Class Magistrate) or \$200 (Second Class Magistrate);

to enforce by attachment and sale or delivery any order or judgment of a Magistrate's Court, where the value of the claim does not exceed \$2,000 (Principal Magistrate). \$1,000 (First Class Magistrate) or \$200 (Second Class Magistrate);

to commit to prison for a term not exceeding 6 weeks any person for default in payment of a debt ordered by a Court, where such person has had the means to pay but defaulted;

to direct any debt due in pursuance of any Court order to be paid in instalments (and may vary or rescind such an order);

to commit a child under 16 years old to the care of a fit person.

See ss19, 20 and 29 MCA.

Monetary Value

A plaintiff may abandon part of his or her claim in order to bring it within the jurisdiction of the relevant Magistrate's Court and, if so, the judgment will be in full discharge of all demands in respect of that application: s20 MCA.

However, a plaintiff may not split their claim into two or more different actions for the purpose of bringing them in a Magistrate's Court: s21 MCA.

The Chief Justice may authorise an increased civil jurisdiction: s26 MCA.

4.4 No Jurisdiction

A Magistrate's Court has no jurisdiction to hear any case:

where the title to any right, any duty, or any office is in issue;

where the validity of any will, or testamentary writing or bequest or limitation in a will is in issue;

where the legitimacy of any person is in issue;

where the validity or the dissolution of any marriage is in issue;

where malicious prosecution, or defamation, or seduction or breach of promise of marriage is in issue: s19(3) MCA.

4.5 General Powers

All Magistrates have power to:

issue writs of summons for the commencement of actions in the Magistrate's Court: s30 MCA;

issue summonses and warrants for the arrest of witnesses, and penalise them for non-attendance or refusal to give evidence: ss60, 61, 62, 63, 64 MCA;

arrest and commit to custody a person committing an offence in their presence: s25 CPC;

require various people, including accused and witnesses, to enter into a recognisance, with or without sureties: ss30, 31, 32, 33 CPC;

order allowances to be paid to witnesses: s65 MCA;

direct payment of costs, expenses and compensation: r3 Magistrates' Courts (Costs in Criminal Cases) Rules; ss153, 156 and 318 CPC;

order return or restitution of property: ss157 and 158 CPC;

order inspection of property: s67 MCA;

administer oaths and take solemn affirmations and declarations: s30 MCA; s2 Oaths Act – Cap 23;

receive production of books and documents: s30 MCA; and

make such decrees and orders and issue such process and exercise such judicial and administrative powers in relation to the administration of justice as shall from time to time prescribed by the Magistrates Court Act or any other Act or by rules of Court, or subject to any special order by the Chief Justice: s30 MCA.

Additionally, the Chief Justice may direct a Magistrate to draw up a list of available assessors and summon assessors for High Court trials: ss241 and 245 CPC.

5: CRIMINAL JURISDICTION

1 Introduction

A crime is the commission of an act that is forbidden by statute or the omission of an act that is required by statute.

The Penal Code – Cap 26 (PC) sets out those acts that are crimes in the Solomon Islands. There are different categories of crime, and the category of crime determines which Court has jurisdiction to hear and determine the matter.

Other legislation establishes offences, for example:

the Traffic Act;

the Firearms and Ammunition Act;

the Liquor Act;

the National Provident Fund Act.

This chapter lists the offences within the jurisdiction of the Magistrates' Courts, under the Penal Code and Traffic Act and Regulations. It does not, however, provide a complete list of all criminal matters which may come before you. You must always check whether you have jurisdiction to hear a criminal matter.

Guidance on some of the common offences are also provided, for quick reference. You may wish to add to these yourself, and share your additions with your judicial colleagues.

2 Criminal Jurisdiction of the Magistrates' Courts

For a detailed explanation of the criminal jurisdiction of the Magistrates' Courts, see Chapter 4 "The Magistrate's Court", paragraph 4.

The figure on the following page shows which Courts may hear which offences.

Figure 1: Criminal Jurisdiction

Ch 5 Criminal Jurisdiction

2.1 Table of Criminal Jurisdiction under the Penal Code

The following table lists the name and section of major offences set out in the Penal Code, and provides the maximum sentence that may be imposed and which Court has jurisdiction to hear the offence.

Use this table as a quick reference guide to determine if you have jurisdiction to hear a particular offence.

Offence Section of PC Maximum penalty Jurisdiction

Spreading false rumours s63 One year imprisonment or \$200 fine All Magistrates

Being member of unlawful society s68 3 years imprisonment Principal Magistrate

Unlawful assembly ss73, 74 One year imprisonment All Magistrates

Riot ss73, 75, 41 2 years or with a fine Principal Magistrate

Riot after proclamation s78 5 years imprisonment Principal Magistrate

Preventing or obstructing the making of proclamation s79 5 years imprisonment Principal Magistrate

Rioters injuring buildings, machinery, etc., s81 7 years Principal Magistrate

Riotously interfering with aircraft, vehicle or vessel ss82, 41 2 years or with a fine Principal Magistrate

Going armed in public s83, 41 2 years or with a fine Principal Magistrate

Affray s87 One year imprisonment All Magistrates

Challenge to fight a duel s88, 41 2 years or with a fine Principal Magistrate

Assembling for the purpose of smuggling ss90, 41 2 years or with a fine Principal Magistrate

Official corruption s91 7 years imprisonment Principal Magistrate

Extortion by public officers s92 3 years Principal Magistrate

Public officers receiving property to show favour s93 6 months imprisonment All Magistrates

Officers charged with administration of property of a special character or with special duties s94 One year imprisonment All Magistrates

False claims by officials ss95, 41 2 years or with a fine Principal Magistrate

Abuse of office ss96, 41 2 years or with a fine Principal Magistrate

False certificate by public officers ss97, 41 2 years or with a fine Principal Magistrate

Unauthorised administration of oaths ss41, 98 2 years or with a fine Principal Magistrate

False assumption of authority ss99, 41 2 years or with a fine Principal Magistrate

Personating public officers s100 3 years imprisonment. Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Insult to religion of any class ss131, 41 2 years or with a fine Principal Magistrate

Disturbing religious assembly ss132, 41 2 years or with a fine Principal Magistrate

Trespassing on burial places ss133, 41 2 years or with a fine Principal Magistrate

Hindering burial of dead body, etc ss134, 41 2 years or with a fine Principal Magistrate

Writing or uttering words with intent to wound religious feelings s135 1 year All Magistrates

Rape ss136 & 137 Life imprisonment High Court

Attempt rape s138 7 years Principal Magistrate

Abduction s139 7 years Principal Magistrate

Abduction of girl under 18 years of age with intent to have sexual intercourse ss140, 41 2 years or with a fine Principal Magistrate

Indecent assaults on female s141 5 years Principal Magistrate

Insulting the modesty of a woman or girl s141(3) 1 year All Magistrates

Defilement of girl under 13 years of age s142(1) Life imprisonment High Court

Attempt defilement of girl under 13 years s142(2) 2 years Principal Magistrate

Defilement of a girl between 13 and 15 years of age, or of idiot or imbecile s143 5 years Principal Magistrate

Procuration s144 2 years Principal Magistrate

Procuring defilement of woman by threats or fraud or administering drugs s145 2 years Principal Magistrate

Householder permitting defilement of girl under 13 on his premises s146 Life imprisonment High Court

Householder permitting defilement of a girl under 15 on his premises s147 2 years Principal Magistrate

Detention with intent or in a brothel s148 2 years Principal Magistrate

Disposing of minors under the age of 15 years for immoral purposes s149 2 years Principal Magistrate

Obtaining minors under the age of 15 years for immoral purposes s150 2 years Principal Magistrate

Living on earnings of prostitution or aiding prostitution ss153, 41 2 years or with a fine Principal Magistrate

Brothel ss155, 41 2 years or with a fine Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Conspiracy to defile ss156, 41 2 years or with a fine Principal Magistrate

Attempts to procure abortion s157 Life imprisonment High Court

The like by woman with child s158 Life imprisonment High Court

Supplying drugs or instruments to procure abortion s159 5 years Principal Magistrate

Unnatural offences s160 14 years Principal Magistrate

Attempts to commit unnatural offences and indecent assaults s161 7 years Principal Magistrate

Indecent practices between persons of the same sex s162 5 years Principal Magistrate

Incest by male s163(1) 7 years High Court

Incest by male of female under 13 years s163(1) Life imprisonment High Court

Attempted incest by male s163(3) 2 years or with a fine Principal Magistrate

Incest by female s164 7 years Principal Magistrate

Fraudulent pretence of marriage s169 10 years Principal Magistrate

Bigamy s170 7 years Principal Magistrate

Marriage ceremony fraudulently gone through without lawful marriage s171 5 years Principal Magistrate

Common nuisance s172 1 year All Magistrates

Traffic in obscene publication s173 2 years or \$200 fine Principal Magistrate

Possession of obscene video tape or photograph s174 (Refer to s173 also) 2 years or \$200 fine Principal Magistrate

Idle and disorderly persons s175 2 months or \$20 fine All Magistrates

Rouges and vagabonds s176 3 months (1 year for subsequent offence) Residence order not to exceed 3 years (6 months for failure to comply with residence order) All Magistrates

Offences in public way s178(a) 1 month or \$10 Fine All Magistrates

Driving cattle s178(b) 1 month or \$10 Fine All Magistrates

Exposing goods for sale s178(c) 1 month or \$10 Fine All Magistrates

Handing out cloths, etc s178(d) 1 month or \$10 fine All Magistrates

Extinguishing lamps, ringing bells and knocking at doors s178(e) 1 month or \$ 10 fine All Magistrates

Damaging signboard s178(f) 1 month or \$10 Fine All Magistrates

Placing stones timber, etc., in public way s178(g) 1 month or \$10 Fine All Magistrates

Throwing rubbish, etc., from houses s178(h) 1 month or \$10 Fine All Magistrates

Offence Section of PC Maximum penalty Jurisdiction

Throwing away rubbish etc., on footway s178(i) 1 month or \$ 10 fine All Magistrates

Dangerous dogs at large unmuzzled s178(j) 1 month or \$ 10 fine All Magistrates

Mad dogs s178(k) 1 month or \$10 Fine All Magistrates

Blasting rocks, etc. s178(l) 1 month or \$10 Fine All Magistrates

Indecency and obscenity s178(m) 1 month or \$10 Fine All Magistrates

Threatening abusive or insulting behaviour s178(n) 1 month or \$ 10 fine All Magistrates

Carrying meat without covering s178(o) 1 month or \$ 10 fine All Magistrates

Playing games in public way s178(p) 1 month or \$10 Fine All Magistrates

Careless driving s178(q) 1 month or \$10 Fine All Magistrates

Cattle or vehicle obstructing public way s178(r) 1 month or \$10 Fine All Magistrates

Obstructing free passage of public way s178(s) 1 month or \$ 10 fine All Magistrates

Leaving things on public way s178(t)(i) 1 month or \$ 10 fine All Magistrates

Placing blinds, etc., over public way s178(t)(ii) 1 month or \$ 10 fine All Magistrates

Carrying torches s178 (t) (iii) 1 month or \$ 10 fine All Magistrates

Drunk and incapable s179 \$20 fine All Magistrates

Shouting , etc., in town s180 1 month or \$20 fine All Magistrates

Polluting or obstructing watercourses s181 2 months or \$40 fine All Magistrates

Posting placards, etc., on walls without consent of owner s182 1 month or \$10 fine All Magistrates

Dangerous dogs and other animals s183 2 month or \$30. fine All Magistrates

Wearing of uniform without authority prohibited s184(1) 1 month or \$10 fine All Magistrates

Wearing and likely to bring contempt to uniform s184(2) 2 months or \$40 fine All Magistrates

Imports or sells uniform s184(3) 6 months or \$200 fine All Magistrates

Negligent act likely to spread infection of Disease s185 2 years or with a fine Principal Magistrate

Fouling air s186 2 years or with a fine Principal Magistrate

Offensive trades s187 1 year Principal Magistrate

Endangering property with fire, etc s188 2 years or with a fine Principal Magistrate

Criminal trespass s189 3 months to 1 year All Magistrates

Sorcery s190 2 months or \$40 fine All Magistrates

Libel s191 2 years or with a fine Principal Magistrate

Manslaughter s199 Life imprisonment High Court

Murder s200 Life imprisonment High Court

Offence Section of PC Maximum penalty Jurisdiction

Infanticide s206 Life imprisonment High Court

Attempt to murder s215 Life imprisonment High Court

Accessory after the fact to murder s216 7 years Principal Magistrate

Written threats to murder s217 10 years Principal Magistrate

Conspiracy to murder s218 10 years Principal Magistrate

Complicity in another's suicide s219 15 years High Court

Concealing the birth of children s220 2 years or with a fine Principal Magistrate

Killing an unborn child s221 Life imprisonment High Court

Disabling in order to commit felony or misdemeanour s222 Life imprisonment High Court

Stupefying in order to commit felony or misdemeanour s223 Life imprisonment High Court

Acts intended to cause grievous harm or prevent arrest s224 Life imprisonment High Court

Preventing escape from wreck s225 Life imprisonment High Court

Grievous harm s226 14 years Principal Magistrate

Attempting to injure by explosive substances s227 14 Years Principal Magistrate

Maliciously administering poison with intent to harm s228 14 Years Principal Magistrate

Unlawful wounding s229 5 years Principal Magistrate

Unlawful poisoning s230 5 years Principal Magistrate

Intimidation and molestation s231 3 years Principal Magistrate

Failure to supply necessaries s232 3 years Principal Magistrate

Cruelty to children s233 5 years Principal Magistrate

Reckless and negligent acts s237 2 years or with a fine Principal Magistrate

Other negligent acts causing harm s238 6 months All Magistrates

Dealing in poisonous substances in negligent manner s239 6 months or \$200 fine All Magistrates

Endangering safety of persons travelling by aircraft, vehicle or vessel s240 2 years or with a fine Principal Magistrate

Exhibition of false light , mark or buoy s241 7 years Principal Magistrate

Conveying person by water for hire in unsafe or overloaded vessel s242 2 years or with a fine Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Danger or obstruction in public way or line of navigation s243 \$200 fine All Magistrates

Common assaults s244 1 year All Magistrates

Assaults causing actual bodily harm s245 5 years Principal Magistrate

Assaults on Magistrates and other persons protecting wreck s246 7 years Principal Magistrate

Assaults punishable with 2 years imprisonment s247 2 years Principal Magistrate

Kidnapping s249 7 years Principal Magistrate

Kidnapping or abducting with intent to confine person s250 7 years Principal Magistrate

Kidnapping or abducting in order to subject person to grievous harm, slavery, etc s251 10 years Principal Magistrate

Wrongfully concealing in confinement kidnapped or abducted person s252 7 years Principal Magistrate

Child stealing s253 7 years Principal Magistrate

Abduction of girls under 15 s254 2 years or with a fine Principal Magistrate

Punishment for wrongful confinement s255 1 year or \$400 fine All Magistrates

Unlawful compulsory labour s256 2 years or with a fine Principal Magistrate

Simple larceny Second conviction s261s261(2) 5 years 10 years Principal Magistrate

Larceny of will s262 Life imprisonment High Court

Larceny of documents of title and other legal documents s263 5 years Principal Magistrate

Larceny of electricity s264 5 years Principal Magistrate

Larceny of minerals s265 5 years Principal Magistrate

Larceny of postal packets s266 10 years Principal Magistrate

Embezzlement of money by postal officer s267 Life imprisonment High Court

Embezzlement of other postal packets by postal officer s267 (b) 7 years

Larceny in dwelling-house s269 14 years Principal Magistrate

Larceny from the person s270 14 years Principal Magistrate

Larceny from ship, dock, etc s271 14 years Principal Magistrate

Larceny by tenant or lodger for more than \$10 s272 7 years Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Larceny by tenant or lodger for less than \$10 s272 (b) 2 years Principal Magistrate

Larceny and embezzlement by clerks or servants s273 14 years Principal Magistrate

Larceny of cattle s274 5 years Principal Magistrate

Larceny of dogs s275 18 months All Magistrates

Larceny of creatures not the subject of larceny at common law s276 6 months or \$200 fine
All Magistrates

Larceny of fish s277 \$10 fine All Magistrates

Conversion s278 7 years Principal Magistrate

Larceny of trees ss279, 41 2 years or with a fine Principal Magistrate

Larceny of fences ss280, 41 2 years or with a fine Principal Magistrate

Larceny of fruit and vegetables ss281, 41 2 years or with a fine Principal Magistrate

Damaging fixtures, trees, etc., with intent to steal s282 5 years Principal Magistrate

Fraudulent destruction of documents s283 5 years Principal Magistrate

Fraudulent destruction of document of title s284 3 years Principal Magistrate

Fraudulent destruction of will s285 Life imprisonment High Court

Fraudulent destruction of record, writ, etc s286 3 years Principal Magistrate

Miners removing minerals s287 2 years Principal Magistrate

Killing tame birds s288 \$10 fine All Magistrates

Killing animals with intent to steal s289 5 years (see also s274) Principal Magistrate

Larceny of or dredging for oysters s290 3 months All Magistrates

Factors obtaining advances on the property of their principals s291 7 years Principal
Magistrate

Unlawful use of vehicles, animals, etc s292 6 months or \$200. Fine or both All Magistrates

Armed Robbery and robbery with violence s293(1) Life imprisonment Principal Magistrate

Robbery s293(2) 14 years Principal Magistrate

Assault with intent to commit robbery s293(3) 5 years Principal Magistrate

Demanding money, etc., with menaces s294 Life imprisonment High Court

Demanding with menaces things capable of being stolen s295 5 years Principal Magistrate

Threaten to publish with intent to extort s296 2 years Principal Magistrate

Sacrilege s298 14 years Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Burglary s299 Life imprisonment High Court

House-breaking and committing felony s300 14 years Principal Magistrate

House-breaking with intent to commit felony s301 7 years Principal Magistrate

Being found by night armed or in possession of house-breaking implements s302 10 years All Magistrates

Breach of residence order s303 6 months All Magistrates Magistrate

Conversion by trustee s304 7 years Principal Magistrate

Director, etc., of any body corporate, or public company wilfully destroying books, etc s305 7 years Principal Magistrate

Fraudulent falsification of accounts s306 7 years Principal Magistrate

False pretences s308 5 years Principal Magistrate

Obtaining credit by false pretences s309 1 year All Magistrates

Pretending to tell fortunes s310 2 years or with a fine Principal Magistrate

Obtaining registration by false pretence s311 2 years or with a fine Principal Magistrate

False declaration for passport s312 2 years or with a fine Principal Magistrate

Receiving stolen property s313 Felony: 14 years Misdemeanour: 7 years Principal Magistrate

Receiving goods stolen outside Solomon Islands s314 7 years Principal Magistrate

Stealing from stores s315(2) 2 years or with a fine Principal Magistrate

Tracing possession and penalty for unlawful possession s316 6 months or \$100 fine All Magistrates

Arson s319 Life imprisonment High Court

Attempts to commit arson s320 14 years Principal Magistrate

Setting fire to crops and growing trees s321 14 years Principal Magistrate

Attempting to set fire to crops, etc s322 7 years Principal Magistrate

Casting away vessels s323 14 years Principal Magistrate

Attempts to cast away vessels s324 7 years Principal Magistrate

Injuring animals s325 2 years or with a fine Principal Magistrate

Malicious injuries s326(1) 2 years general penalty Principal Magistrate

Malicious injuries with explosive substance and to various types of property s326(2) – (7) (see also specific cases) Life imprisonment High Court

Attempts to destroy property by explosives s327 14 years Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Communicating infectious diseases to animals s328 7 years Principal Magistrate

Removing boundary marks with intent to defraud s329 3 years Principal Magistrate

Wilful damage, etc., to survey and boundary marks s330 2 years or with a fine Principal Magistrate

Threats to burn, etc s331 7 years Principal Magistrate

Forgery of certain documents with intent to defraud s336(1) Life imprisonment High Court

Forgery of certain documents with intent to defraud s336(2) 14 years Principal Magistrate

Forgery of certain documents with intent to defraud or deceive s337(1) Life imprisonment High Court

Forgery of certain documents with intent to defraud or deceive s337(2) 14 years Principal Magistrate

Forgery of certain documents with intent to defraud or deceive s337(3) 7 years Principal Magistrate

Forging copies of certificates of records s338 7 years Principal Magistrate

Forging registers of births, baptisms, marriages, deaths or burials s339 Life imprisonment High Court

Making false entry in copies of register sent to registrar s340 Life imprisonment High Court

Forgery of other documents with intent to defraud or deceive a misdemeanour s341 2 years or with a fine Principal Magistrate

Forgery of seals of courts of record and the UK s342(1) Life imprisonment High Court

Forgery of seals of births, baptisms, deeds, etc. s342(2) 14 years Principal Magistrate

Forgery of seals of court of justice, notary public s342(3) 7 years Principal Magistrate

Forgery of dies used by Chief Accountant or Comptroller s342(4) 14 years Principal Magistrate

Forgery of dies of post office s342(5) 7 years Principal Magistrate

Uttering s343 same as ss342(2)-(5) Principal Magistrate

Uttering cancelled or exhausted documents s344 (see also s336-342) See s336-342 for penalty of specific document Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Demanding property on forged document s345 14 years Principal Magistrate

Possession of forged documents, seals and dies s346 14 years Principal Magistrate

Possession of forged die for Post Office Act s346(3) 7 years Principal Magistrate

Making or having in possession paper or implements for forgery s347 7 years Principal Magistrate

Purchasing or having in possession certain paper before it had been stamped and issued s348 2 years or with a fine Principal Magistrate

Falsifying warrants for money payable under public authority s349 7 years Principal Magistrate

Procuring execution of documents by false pretences s350 Punished as if he had forged that document (see ss336-342) Principal Magistrate

Letter written for certain persons to be signed, etc., by writer s351 \$10 fine All Magistrates

Counterfeiting(Current gold or silver coin) s352(1)(b) Life imprisonment High Court

Counterfeiting(Current copper coin) s352(1)(b) 7 years Principal Magistrate

Gilding, silvering, filing and altering s353 Life imprisonment High Court

Impairing gold or silver and unlawful possession of filing, etc s354 7 years Principal Magistrate

Uttering and possession with intent to utter s355(1),(4) & (6) 1 year All Magistrates

Uttering and possession with intent to utter and possession of other false coins s355(2) 2 years or with a fine Principal Magistrate

Possession of 3 or more false silver and gold coins s355(3) 5 years Principal Magistrate

Possession of false coin and previous conviction for same offence s355(5) Life imprisonment High Court

Buying or selling, etc., counterfeit coin that is gold or silver for lower value than its denomination s356(1)(a) Life imprisonment High Court

Offence Section of PC Maximum penalty Jurisdiction

Buying or selling, etc., counterfeit coin that is copper for lower value than its denomination s356(1)(a) 7 years Principal Magistrate

Importing or exporting counterfeit coin s357 14 years Principal Magistrate

Making possessing and selling medals resembling gold or silver coin s358 1 year All Magistrates

Making mending and having possession of coining implements for gold or silver coin s359 Life imprisonment High Court

Making mending and having possession of coining implements for copper coin s359(3) 7 years Principal Magistrate

Defacing and uttering defaced coins s362 1 year All Magistrates

Tendering defaced coin s362(3) \$4 fine All Magistrates

Melting down of currency s363 6 months All Magistrates

Mutilating or defacing currency notes s364 \$40 fine All Magistrates

Imitation of currency s365(1) 6 months All Magistrates

Imitation of currency s365(2) \$10 fine for each document All Magistrates

Imitation of currency s365(3) \$20 fine All Magistrates

Personation in general s367 2 years or with a fine Principal Magistrate

Personation to obtain property s367 7 years Principal Magistrate

Falsely acknowledging deeds, recognisances, etc. s368 7 years Principal Magistrate

Personation of a person named in a certificate s369 Penalty as if he had forged the document (see ss336-342) Principal Magistrate

Lending, etc. certificate for personation ss370, 41 2 years or with a fine Principal Magistrate

Personation of person named in a testimonial of character s371 1 year All Magistrates

Lending, etc., testimonial for personation s372 2 years or with a fine Principal Magistrate

Corrupt practices s374 2 years or \$600 fine Principal Magistrate

Secret commission on government contracts s375 7 years or \$1000 fine Principal Magistrate

Attempts to commit offences ss379, 41 2 years or with a fine Principal Magistrate

Punishment of attempts to commit certain felonies s380 7 years Principal Magistrate

Offence Section of PC Maximum penalty Jurisdiction

Soliciting or inciting others to commit offence in S.I. or elsewhere s381 Penalty for an attempt to commit that same offence High Court (depending on the offence attempted to be committed)

Neglect to prevent felony s382 2 years or with a fine Principal Magistrate

Conspiracy to commit a felony s383 7 years Principal Magistrate

Conspiracy to commit misdemeanour ss384, 41 2 years or with a fine Principal Magistrate

Other conspiracies ss385, 41 2 years or with a fine Principal Magistrate

Punishment of accessories after the fact to felonies s387 3 years Principal Magistrate

2.2 Table of Jurisdiction under the Traffic Act

According to the Magistrates' Courts (Increase of Jurisdiction) (1990) Order L.N. 172/1990, all First Class Magistrates are given jurisdiction to hear and determine any offence under the Traffic Act apart from offences under ss38, 39 or 43.

Sections 38, 39 and 43 are to be heard by Principal Magistrates.

All First Class Magistrates' Courts are given jurisdiction to hear and determine offences under ss43(1)(b) and 43(2)(b) of the Traffic Act, according to the Magistrates' Courts (Increase of Jurisdiction) 1993 Order L.N. 77/93

The following tables will set out the name and section of the offence under the Traffic Act and the Traffic Regulations, as well as the maximum penalty, the jurisdiction of the Magistrates' Court and whether there is endorsement or disqualification.

Offences Section Maximum Penalty Jurisdiction Endorsable Disqual.

Unlicensed Motor Vehicle s7(1) 6 months Imp. or \$500 fine or both All Magistrates No No

Licensed in wrong class of vehicle s7(4) 6 months Imp. or \$200 fine or both All Magistrates No No

Identification plates s12 6 months or \$200 fine or both All Magistrates No No

License to be displayed on vehicle s13 6 months or \$200 fine or both All Magistrates No No

Dealer's general licence s16 6 months or \$500 fine or both All Magistrates No No

Offences Section Maximum Penalty Jurisdiction Endorsable Disqual.

Drivers to be licensed s20 6 months or \$200 fine or both All Magistrates Yes (Sch. 2) Discretionary

Drivers to be licensed: second conviction s20 6 months or \$500 fine or both All Magistrates Yes (Sch. 2) Discretionary

Provisional driving licence s23 2 months or \$150 fine or both All Magistrates Yes (Sch. 2) Discretionary

Production of driving licence s25 \$50 fine All Magistrates No No

Applying for or obtaining licence, or driving while disqualified s35 12 months (custodial obligatory) unless special reason, then \$500 fine or both All Magistrates Yes (Sch. 1) Obligatory to not less than 12 months unless for special reason to less period or not to disqualify

Endorsement of licence s36(4) \$200 fine and licence suspended until produced First & Second Class No (except for the present offence for which it was not produced) No

Endorsement of licence s36(6) \$200 fine (licence so obtain shall have no effect All Magistrates No (but for the present offence for which it was not produced) No

Causing death by reckless or dangerous driving s38 5 years Principal Magistrate Yes (Sch. 1) Obligatory

Reckless and dangerous driving s39(a) 2 years or \$1000 or both High Court Yes (Sch. 1) Obligatory

Reckless and dangerous driving s39(b) 12 months or \$600 fine or both Principal Magistrate Yes (Sch. 1) Obligatory

Careless and inconsiderate driving s40 6 months or \$700 Fine or both All Magistrates Yes (Sch 2) Discretionary

Speeding s41 6 months or \$700. fine All Magistrates Yes (Sch.2) Discretionary

Minimum age for driving s42 6 months or \$400 fine All Magistrates Yes (Sch.2) Discretionary

Offences Section Maximum Penalty Jurisdiction Endorsable Disqual.

Driving motor vehicle whilst under the influence of drink or drugs s43(1)(a) 2 years or \$2000 fine or both High Court Yes (Sch. 1) Obligatory

Driving motor vehicle whilst under the influence of drink or drugs s43(1)(b) 12 months or \$400 fine Subsequent convictions: 12 months or \$400 fine All Magistrates Yes (Sch. 1) Obligatory

In charge of motor vehicle whilst under the influence of drink or drugs s43(2)(a) 6 months or \$500 fine or both High Court Yes (Sch. 2) Discretionary

In charge of motor vehicle whilst under the influence of drink or drugs s43(2)(b) 6 months or \$200 fine Subsequent convictions: 6 months or \$300 fine All Magistrates Yes (Sch. 2) Discretionary

Improper condition or overloading s46 6 months or \$200 fine or both All Magistrates Yes (Sch. 2) Discretionary

Motor racing on public road s47 6 months or \$200 fine or both All Magistrates Yes (Sch. 2) Discretionary

Restrictions on carriage of person on motor cycle s48 \$100 fine All Magistrates Yes (Sch. 2) Discretionary

Reckless and dangerous cycling s49 3 months or \$150 fine All Magistrates No No

Careless and inconsiderate cycling s50 3 months or \$150 fine All Magistrates No No

Cycling when under the influence of drink or drugs s51 3 months or \$150 fine All Magistrates No No

Cycle racing on roads s52 \$50 fine All Magistrates No No

Drivers failing to comply with traffic directions s53 \$300 fine All Magistrates Yes (Sch. 2) Discretionary

Offences Section Maximum Penalty Jurisdiction Endorsable Disqual.

Pedestrians failing to comply with directions to stop by police regulating traffic s54 \$100 fine All Magistrates No No

Leaving vehicle in dangerous position s55 3 months or \$150 fine All Magistrates Yes (Sch. 2) Discretionary

Obstructing driver of motor vehicle s56 3 months or \$100 fine All Magistrates No No

Riding in dangerous position s57 3 months or \$100 fine All Magistrates No No

Throwing objects at or impeding progress of vehicles on roads s58 3 months or \$200 fine All Magistrates No No

Taking vehicles without authority s59(a) 6 months or \$500 fine or both High Court Yes (Sch. 2) Discretionary

Taking vehicles without authority s59(b) 3 months or \$200 fine All Magistrates Yes (Sch. 2) Discretionary

Offence to temper with motor vehicle s60 3 months or \$200 fine All Magistrates No No

Holding or getting on to vehicle in order to be towed, or carried s61 \$50 fine Subsequent convictions: \$100 fine All Magistrates No No

Carelessness while in charge of animals s62 \$50 fine All Magistrates No No

Duty to stop and report s63 3 months or \$200 fine Subsequent conviction: 6 months or \$300 fine or both All Magistrates Yes (Sch. 2) Discretionary

Offences Section Maximum Penalty Jurisdiction Endorsable Disqual.

Inspection of vehicle involved in an accident s64 6 months or \$300 fine or both All Magistrates No No

Closure of roads s69 \$200 fine Subsequent conviction: \$300 fine All Magistrates No No

Inspection of vehicles s71 \$100 fine All Magistrates No No

Removal of vehicles from road s72 12 months or \$800 fine or both All Magistrates No No

Failure to meet instruction under s72 s72(7) \$200 fine All Magistrates No No

Owner or other person to furnish information as to identity of driver of vehicle s77 6 months or \$200 fine or both All Magistrates No No

Owner to keep list of drivers employed s78 \$100 fine All Magistrates No No

Giving false information s80 6 months or \$300 fine or both All Magistrates No Discretionary

Fraudulent imitation, etc., of documents s81 12 months or \$600 fine or both All Magistrates No No

Highway authorities' powers to make traffic orders s83 \$100 fine All Magistrates No No

Breach of section 8 of M.V. (Third Party Ins.) Act s8 T.P.I. Act 2 years or \$800 fine or both High Court Yes (Sch. 2) Discretionary

Breach of section 8 of M.V. (Third Party Ins.) Act s8 T.P.I. Act 4 months or \$150 fine or both All Magistrates Yes (Sch. 2) Discretionary

Consuming liquor in a vehicle s66 Liquor Act 12 months or \$1000 fine or both First & Second Class under (L.N 172/1990) Yes (Sch. 2) Discretionary

2.3 Table of Jurisdiction under the Traffic Regulations

Offences Section Maximum Penalty Jurisdiction Endorsable

Offences under Part III of the Traffic Regulations s49 (General penalty) 2 months or \$80 fine or both Subsequent conviction: 3 months or \$100 fine First & Second Class No

Penalty for contravention of regulations 60 and 61(1) s62 2 months or \$80 fine or both First & Second Class No

Offences under Part VI s73 1 month or \$10 fine or both First & Second Class No

Maximum number of passengers s74 2 months or \$80 fine or both First & Second Class No

Display of Taxi sign without licence s78 2 months or \$80 fine or both First & Second Class No

Taxi to be inspected quarterly s79 2 months or \$80 fine or both First & Second Class No

Driving a public service vehicle without passenger insurance s80 2 months or \$80 fine or both
Subsequent conviction: 3 months or \$100 fine First & Second Class No

Wearing of protective headgear Traffic (Motorcyclist headgear) Regulation (MCR) s3 \$20 fine
Subsequent conviction: \$50 fine First & Second Class No

Failing to comply with directions of police officers (MCR) s4 \$10 fine First & Second Class No

6: CRIMINAL RESPONSIBILITY

1 Introduction

The Penal Code is the statute that sets out:

those acts or omissions which should be regarded as a criminal offences in the Solomon Islands;

the party(s) which should be held criminally responsible for those acts or omissions; and
rules as to when a person can be excused from criminal responsibility.

Part IV Penal Code sets out the rules as to criminal responsibility. Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

Generally, an accused's case will either be that:

the prosecution has not proved all the elements beyond reasonable doubt;

he or she has a specific defence, specified in the actual offence (e.g. "lawful excuse"); or

that he or she was not criminally responsible, relying on one of the sections under Part IV of the Penal Code.

In the case of a defence under Part IV, the accused must point to some evidence to support such a defence. Then, it is the prosecution that bears the burden of proving that such

evidence should be excluded and that the accused was criminally responsible for his or her act(s) or omission(s).

The exception is insanity. In this case, it is for the accused to prove, on the balance of probabilities, that they were insane at the time of the offence and therefore, did not have the required mens rea for the offence.

The rules in Part IV Penal Code can be divided into two categories:

1. Those rules that relate to a denial of the mens rea of the offence or to a denial that the accused was acting voluntarily:

Honest claim of right;

Intention;

Automatism;

Accident

Mistake;

Insanity;

Intoxication; and

Immature age.

2. Those rules that relate to excuses or circumstances which justify, in law, the conduct of the accused:

Compulsion; and

Defence of person or property.

2 Rules Relating to the Mens Rea of an Offence and to Involuntary Acts

2.1 Ignorance of the Law: s7 Penal Code

Ignorance of the law does not afford any excuse for any act or omission which would constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence: s7 Penal Code.

The fact that an accused did not know that his or her act or omission was against the law at the time of the offence is not a valid excuse to avoid criminal responsibility. Therefore, it cannot be raised as a defence by the accused and the prosecution is not required to prove the accused's knowledge of the law in order to prove his or her case.

The exception to this rule, set out in s7 Penal Code, is when knowledge of the law is a required element of an offence. If knowledge of the law is expressly set out in a statute as being an element of an offence, then:

the accused can raise evidence that they did not know that their acts or omissions were against the law at the time of the offence; and

the prosecution is required to prove beyond reasonable doubt that the accused had such knowledge of the law.

2.2 Bona-fide Claim of Right: s8 Penal Code

A person is not criminally responsible for an offence relating to property if the act or omission with respect to the property was done in the exercise of an honest claim or right and without an intention to defraud: s8 Penal Code.

For this defence to be successful:

the offence must relate to property;

there must be an honest claim of right; and

there must be no intention to defraud.

An honest claim of right is when a person honestly asserts what he or she believes to be a lawful claim relating to property, even though it may be unfounded in law or in fact.

Honesty, rather than reasonableness, is what is required for asserting a claim of right: *Toritelia v R* [1987] SILR 4.

The accused must raise evidence that he or she had no intention of depriving the owner of the property.

This is a question of fact, so whether there was an intention to deprive or defraud the owner will differ, depending on the circumstances of the case.

How the property is dealt with is also relevant as to intention to defraud. A person who intends to, and has the ability to, restore or return the property may successfully argue that they did not intend to defraud, even if they cannot return it before the charge. Again, this will depend on the circumstances of each case: *Toritelia v R* [1987] SILR 4.

2.3 Intention, Involuntary Acts and Accident: s9 Penal Code

Subject to the express provisions of the Penal Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident: s9 Penal Code.

Negligent acts or omissions

Sections 237 to 243 of the Penal Code deals with acts or omissions that are criminally negligent.

Criminal negligence is where the accused's act or omission, which constitutes the offence, fails to comply with the standards of the reasonable person. This is a different standard of fault than most criminal offences, which require proof of the accused's state of mind.

Therefore, a person can be found criminally negligent for something, even if it is an accident, if a reasonable person would have been aware of the risks of that conduct in the same situation.

Involuntary acts and automatism

A person is not criminally responsible for an act or omission that occurs independently of the exercise of his or her will: s9 Penal Code.

Most criminal offences require that the accused's acts or omissions be 'willed' or 'voluntary'.

Involuntary Acts

An accused will not be criminally responsible for acts or omissions that are involuntary, not only because there is a lack of the required mens rea for the offence but also because involuntary movements cannot constitute the necessary actus reus of any offence.

An example of an involuntary act would be if Sami was thrown out of a shop window by his enemies and landed on a car window. Sami would not be criminally responsible for the damage to the car because it was not Sami's act that led to the damage of the car.

Automatism

Automatism is when an accused is not consciously in control of his or her own mind and body.

This defence is limited to cases where there is a total loss of voluntary control. Impaired or reduced control is not enough.

The defence of automatism may be invalid when the accused is at fault for falling into the condition in the first place. The prosecution would have to prove the accused was reckless as to what would happen if he or she fell into the condition for it not to be a defence.

The state of automatism can arise from:

concussion;

sleep disorders;

acute stress;

some forms of epilepsy; or

some forms of neurological and physical ailments.

The prosecution bears the legal burden of proving that the actions of the accused were voluntary and that the defence of automatism does not apply. However, the accused must give sufficient evidence to raise the defence that his or her actions were involuntary: *Bratty v Attorney-General for Northern Ireland* (1961) 46 CrAppR 1, 21.

The evidence of the accused will rarely be enough to raise the defence of automatism. Expert medical evidence is required: *Bratty v Attorney-General for Northern Ireland* (1961) 46 CrAppR 1, 21.

Accidents

A person is not criminally responsible for an event that occurs by accident: s9 Penal Code.

The event must not be intended by the accused. An event is an accidental outcome of the willed act, which then leads to a result.

To raise a defence of accident, it is the event which must be proved to be accidental and not that the result.

The event must not have been able to be easily foreseen by the accused under the circumstances.

The question you should ask is “would such an event have been easily foreseen by an ordinary person in the same circumstances?”

The prosecution bears the burden of proving that the act or omission was not an accident, beyond a reasonable doubt. However, when the defence of accident is raised by the accused, he or she must point to some evidence in support of the defence.

Points to note from s9 Penal Code

Unless intention to cause a particular result is expressly declared to be an element of the offence committed, the result intended to be caused by an act or omission is immaterial: s9 Penal Code.

A person cannot raise as a defence that they did not intend a certain result when they do an act or omit to do an act.

Also, intention as to the result of an act or omission does not have to be proved as an element of an offence unless it has been expressly provided to be an element of the offence.

Unless expressly declared, the motive by which a person acts or omits to do an act, or to form an intention, is immaterial so far as it regards criminal responsibility:

The underlying reasons (motive) for why a person has done an act or omission or why they have formed an intention to commit an offence does not need to be considered when determining criminal responsibility.

A person cannot use lack of motive as a defence, nor does the prosecution have to prove motive as an element of an offence, unless it has been expressly declared to be an element of an offence.

2.4 Mistake of Fact: s10 Penal Code

A person who acts or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if things were as he or she believed them to exist: s10 Penal Code.

This rule may be excluded by the express or implied provisions of the law relating to the subject: s10 Penal Code.

For the defence of mistake of facts to succeed:

the accused must have been under an honest, but mistaken, belief as to the existence of any state of things; and

the offence must have been committed while holding the honest and reasonable, but mistaken, belief.

Whether the accused was under an honest, but mistaken, belief is a subjective test.

The test to be applied is, from the evidence presented; did the accused actually have a genuine and honest belief as to the state of things, even though he or she was mistaken in that belief?

The mistaken belief must have been reasonable. Reasonableness is an objective test.

The test to be applied is, is the accused's mistaken belief one which a reasonable person would have or ought to have made?

Although "reasonable, but mistaken, belief" is still included as an element of "mistake of fact" in s10 of the Penal Code, it has been removed in common law. The traditional requirement that mistakes have to be reasonable was refuted by the House of Lords in *Director of Public Prosecutions v Morgan* [1976] AC 182.

Since *Morgan* (supra), it has been held that:

the prosecution has the burden of proving the unlawfulness of the accused's action;

if the accused has been labouring under a mistake as to the facts, he or she must be judged according to his or her mistaken view of the facts; and

if the accused was or may have been mistaken as to the facts, it is immaterial that on an objective view, that the mistake was unreasonable.

2.5 Insanity: s11 Penal Code

Presumption of sanity

Every person is presumed to be of sound mind, and to have been of sound mind at any time which it comes into question, until it is proved otherwise: s11 Penal Code.

Proof of insanity

A person will not be criminally responsible for an act or omission at the time of the commission of the act or omission if, through the disease of the mind, he or she is:

incapable of understanding what he or she is doing; or

incapable of knowing that he or she ought not to do an act or omission: s12 Penal Code.

Section 12 Penal Code is subject to any express provisions in the Penal Code or any other law in force in the Solomon Islands: s12 Penal Code.

It is the accused who bears the onus of proof for a defence of insanity, and the burden of proof is on the balance of probabilities.

Section 12 Penal Code and the common law

There are two differences between s12 Penal Code and the common law with regards to insanity:

Section 12 refers any disease affecting the mind; and

Section 12 sets out people as insane if they do not have the capacity to understand or a capacity to know that they ought not to do the act done or omitted to be done. The common law simply refers to actual knowledge.

Test for insanity

A test for insanity is set out in R v Ephrem Suraihou (Unrep. Criminal Case No. 33 of 1992:

If, through a disease of the mind, a person could not reason about the matter with a moderate degree of sense and composure, he or she could not know that what he or she was doing was wrong:

Wrong is defined according to the every day standards of reasonable people.

If a disease so governs the mind of the accused that it is impossible for him or her to reason with some moderate degree of calmness as to the moral quality of what he or she is doing, he or she does not have the capacity to know what he or she does is wrong.

Even if the disease is shown to have affected the accused's mind, it is not enough. He or she must show, on the balance of probabilities, that the disease deprived him or her of the capacity to know or the capacity to understand.

What is disease of the mind?

The meaning of disease of the mind is a legal question for a judge to decide rather than a medical question, even though medical evidence may be required.

The mind refers to the mental faculties of reason, memory and understanding, in the ordinary sense.

If the disease must so severely impair these mental faculties, and lead the accused not to know the nature and quality of the act that he or she was doing, or that he or she did not know that what he or she was doing was wrong. See the M'Naughten rules from M'Naughten (1843) 10 CL & F 200.

The term 'disease of the mind' has often been defined by what it is not. It is not:

a temporary problem of the mind due to an external factor such as violence, drugs, or hypnotic influences; or

a self-inflicted incapacity of the mind; or

an incapacity that could have been reasonably foreseen as a result of doing or omitting to do something, such as taking alcohol with pills against medical advice.

In these cases, the accused may not be excused from criminal responsibility, although there are difficult borderline cases.

Expert evidence

In order to plead a defence of insanity, the accused should have medical evidence which points to his or her mental incapacity. The accused's evidence alone will rarely be enough to prove this defence.

The evidence from a psychologist with no medical qualification is not sufficient to raise the defence of insanity.

2.6 Intoxication: s13 Penal Code

Intoxication cannot be used as a defence to a criminal charged, except as provided in s13 Penal Code.

Section 13 Penal Code allows intoxication to be used as a defence to any criminal charge in the following situations:

1. If at the time of the offence, the accused did not know that the act or omission was wrong or he or she did not know what he or she was doing because his or her state of intoxication was caused without consent, due to the malicious or negligent act of another person: s13(2)(a) Penal Code.

This is referred to as involuntary intoxication

If the defence above is established, you must discharge the accused: s13(3) Penal Code.

Involuntary intoxication is not a defence if the accused forms the necessary mens rea of the offence, either because of or despite the intoxication.

2. If at the time of the offence, the accused did not know the act or omission was wrong or he or she did not know what he or she was doing because intoxication caused him or her to be insane, temporarily or otherwise: s13(2)(b) Penal Code. This defence is referred to as voluntary intoxication.

3 Intoxication must also be taken into account for determining whether the accused had formed any intention, specific or otherwise, for offences which, if intention were absent, he or she would not be guilty of the offence: s13(4) Penal Code.

The question is whether the accused's mind was so affected by alcohol that he or she could not have formed the intention to do what he or she did or that his or her mind was so affected by alcohol that he or she did not know what he or she was doing at the time: R v Kauwai [1980] SILR 108.

Intoxication under s13 Penal Code includes a state produced by narcotics or drugs: s13(5) Penal Code.

The onus of proof lies with the prosecution which in the case of intoxication, must prove beyond reasonable doubt that the accused did know what he or she was doing or that it was wrong.

2.7 Immature Age: s14 Penal Code

A person who is under the age of 8 is not criminally responsible for any act or omission: s14 Penal Code.

A person under the age of 12 is not criminally responsible for an act or omission, unless it is proved that at the time of the act or omission, he or she had the capacity to know that he ought not to do the act or make the omission: s14 Penal Code.

A male person under the age of 12 is presumed to be incapable of having sexual intercourse: s14 Penal Code.

Evidence of age

In cases where the defence of “immature age” is raised, evidence as to the child’s age should be given.

The accused should be able to point to some kind of evidence as to age, although the onus of proof is on the prosecution to show that such evidence ought to be excluded.

Capacity to know and understand for children between 10 and 12 years

It is for the prosecution to prove, beyond reasonable doubt, that when committing the offence, the child knew that his or her act was seriously wrong. This is distinct from an act of mere naughtiness or childish mischief.

Clear positive evidence as to the child’s capacity is required, not just evidence as to the offence itself.

The surrounding circumstances are relevant and what the accused child said or did both before and after the act may go towards proving guilty knowledge. However, sometimes this behaviour may be consistent with naughtiness or mischief rather than wrongdoing.

Proof that the accused was a normal child for his or her age will not necessarily prove that he or she knew his action was seriously wrong.

Capacity or understanding may be proven by:

calling any person who knows the child and is able to show that the child did know that he or she ought not to commit the offence:

this can include teachers, parents, relatives;

the investigating officer asking the following questions:

Did you know that what you did was seriously wrong?

Why did you know it was seriously wrong?

Would you have done what you did if a police officer, your parents, teachers, village elders or your pastor could see you?

3 Rules Relating to Excuses or Special Circumstances

3.1 Compulsion (or Duress): s16 Penal Code

A person is not criminally responsible for an offence if:

it is committed by two or more offenders; and

the act is done or omitted to be done only because, during the time of the offence, the person is compelled to do the act or omission by threats of death or grievous bodily harm by the other offender or offenders he or she refuses to carry out the offence: s16 Penal Code.

The threat of future injury does not excuse any offence.

Compulsion by threats

Compulsion by threats is when an accused commits an act or omission in order to comply with the demands of the person threatening him or her.

Type of Threat

There must be threats of death or grievous bodily harm.

Serious psychological injury is not enough of a threat.

Threats of death or grievous bodily harm made to third parties, especially close relatives, may be enough of a threat to give a defence.

Reasonableness

The fact that the accused believed that a threat of death or grievous bodily harm would be carried out is not sufficient. It is whether a person of reasonable firmness sharing the characteristics of the accused would not have given way to the threats.

The test for compulsion by threats

1. Were there two or more parties to the offence?
2. Was the accused driven to act as he or she did because he or she had a reasonable belief, because of what the other party did or said, that if he or she did not act, the other party would kill or cause grievous bodily harm to him or her.
3. If the accused had such reasonable belief, has the prosecution proved that a person of reasonable firmness, sharing the characteristics of the accused, would not have responded the same as the accused if that person reasonably believed what was said or done by the other party to the offence?

Compulsion by circumstances

Compulsion by circumstances is when an accused does an act or omission in order to escape from the threats of the other person.

This defence is available only if, from an objective standpoint, the accused was acting reasonably and proportionately in order to avoid a threat of death or grievous bodily harm.

Compulsion by spouse

For any offence except murder or treason, it is a good defence that an offence was committed in the presence of and under the coercion of the accused's spouse: s19 Penal Code.

The spouse should provide evidence that his or her will was overcome by the wishes of his or her spouse because of:

physical force; or

a threat of physical or moral force.

3.2 Defence of Person or Property: s17 Penal Code

Subject to the express provisions in the Penal Code or any other law in operation in the Solomon Islands, criminal responsibility for the use of force in defence of person or property is determined according to the principles of English common law: s17 Penal Code.

Section 204 Penal Code

A person who, by an intentional and unlawful act, causes the death of another person, the offence committed shall be manslaughter, not murder, if it is proved that:

he or she was justified in causing harm to the other person; and

in causing the person harm in excess of what was justified, he or she acted from such terror or immediate death or grievous harm that it deprived him or her of self-control.

Principles

It is lawful to use such force as is reasonably necessary in order to defend oneself or one's property or any other person.

The question to be answered is whether the force used was reasonable in all circumstances, which is an objective test.

What force is necessary is a matter of fact to be decided on a consideration of all the surrounding factors: R v Zamagita & Others [1985-86] SILR 223.

The state of mind of the accused should also be taken into account. This is a subjective test.

Force may include killing the aggressor, but there must be a reasonable necessity for the killing or at least an honest belief based on reasonable grounds that there is such a necessity.

It would only be in the most extreme circumstances of clear and very serious danger that a Court would hold that a person was entitled to kill simply to defend his or her property, as there are many other effective remedies available: R v Zamagita & Others [1985-86] SILR 223.

The onus is on the prosecution to prove that the accused did not act in self-defence or in defence of property, once the issue has been raised by the accused and evidence has been presented.

4 Parties

According to the law, different people can be held criminally responsible for an offence, as parties. In the Solomon Islands, parties to offences include:

principal offenders and accessories, under s21 Penal Code;

joint offenders who are in prosecution of a common purpose, under s22 Penal Code;

accessories after the fact, under Chapter XLI Penal Code; and

conspirators, under Chapter XL Penal Code.

4.1 Principal Offenders and Accessories: s21 Penal Code

There are two categories of persons who are deemed in law to have criminal responsibility for an offence:

principal offenders; and

accessories.

Principal offenders

A principal offender is the person(s) whose actual conduct satisfies the definition of the particular offence in question.

Section 21(a) Penal Code states that every person who actually does the act or makes the omission that constitutes the offence:

is deemed to have taken part in committing the offence and to be guilty of the offence; and may be charged with actually committing it.

It must be proved that the accused had both the mens rea and actus reus for the particular offence that they have been charged with in order to be a principal offender.

In cases where there is only one person who is involved in the offence, he or she will be the principal offender.

For Example:

If a person punches another on the face causing injury, that person would be considered the principal offender for the offence of assault.

Accessories

An accessory is a person who:

enables or aids;

aids or abets; or

counsels or procures,

the commission of an offence.

Although an accessory is not a principal offender, he or she can be charged and convicted of the actual offence, as if he or she had been the principal offender.

An accessory may be found criminally responsible for all offences, unless expressly excluded by statute.

The actus reus of an accessory involves two concepts:

aiding, enabling, abetting, counselling or procuring; and
the offence.

The mental element (mens rea) for an accessory is generally narrower and more demanding than that required for a principal offender. The mental element for principal offenders includes less culpable states of mind such as recklessness or negligence, while the mental elements required for an accessory are:

knowledge: the accessory must know at least the essential matters which constitute the offence; and

intention: the accessory must have had an intention to aid, abet, enable, counsel or procure. This does not necessarily mean that he or she had the intention as to the principal offence that was committed. Note that a common intention is not required for procuring.

Enabling or Aiding: s21(b) Penal Code

Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence:

is deemed to have taken part in committing the offence and to be guilty of the offence; and
may be charged with actually committing it: s21(b) Penal Code.

Enabling or aiding is different from aiding and abetting in two respects:

criminal responsibility is attached to those who do not in fact aid in the commission of an offence but who engage in conduct for the purpose of aiding or enabling. Therefore, the person could be found guilty for an offence because they tried to aid even though they did not actually succeed in aiding; and

a person can be found guilty for an offence by failing or omitting to do something that enables or aids the person committing an offence.

Elements for Enabling or Aiding

An offence must have been committed by the principal offender.

The accused must have done something (or omitted to do something) for the purpose of assisting or encouraging the principal offender (but need not in fact have assisted or encouraged the principal offender).

Aiding or Abetting: s21(c) Penal Code

Every person who aids or abets another person in committing the offence:

is deemed to have taken part in committing the offence and to be guilty of the offence; and
may be charged with actually committing it: s21(c) Penal Code.

The term "to aid and abet" generally means to give assistance and encouragement at the time of the offence.

To prove the offence of aiding and abetting to another person in the commission of an offence it must be established that he or she:

is present (actual or constructive); and

knows the facts necessary to constitute the offence; and

is actively encouraging or in some way assisting the other person in the commission of the offence.

Actual knowledge of, or wilful blindness towards the circumstances which constitute the offence is required. This does not mean the same mental state as that required by the principal party in the commission of the substantive offence. Rather, the secondary party must know of the principal's mental state and the facts which would make his or her purpose criminal.

In Attorney-General Reference (No. 1 of 1975) [1975] 2 All ER 684, it was found that some sort of mental link is required between the principal offender and the secondary party in order for there to be aiding and abetting. This requires that the principal offender and the secondary party were together at some stage discussing the plans made in relation to the alleged offence.

In *Wilcox v Jeffrey* [1951] 1 All ER 464, the Court held that mere presence alone is insufficient to act as an encouragement. There must, on behalf of the secondary party, be an intention to encourage, or actual encouragement, beyond an accidental presence at the scene of the crime.

In *R v Allan* [1965] 1 QB 130, the Court held that, to be a principal in the second degree to an affray, there must be some evidence of encouraging those who participated. Courts cannot convict a man for his thoughts unaccompanied by any other physical act beyond his presence.

Elements for Aiding or Abetting

An offence must have been committed by the principal offender.

The accused was acting in concert with the principal offender (encouragement in one form or another is a minimal requirement).

There was some sort of mental link or meeting of minds between the secondary party and the principal offender regarding the offence.

Counselling or Procuring: s21(d) Penal Code

Every person who counsels or procures any other person to commit an offence:

is deemed to have taken part in committing the offence and to be guilty of the offence; and may be charged with actually committing it or may be charged with counselling or procuring its commission: s21(d) Penal Code.

A conviction of counselling or procuring the commission of an offence entails the same consequences as a conviction for the offence as a principal offender: s21 Penal Code.

The term "to counsel or procure" generally describes advice and assistance given at an earlier stage in the commission of the offence.

Counselling

The normal meaning of counsel is to incite, solicit, instruct or authorise.

The accused must counsel before the commission of the offence.

When a person counsels another to commit an offence and the offence is committed, it is immaterial whether:

the offence actually committed is the same as the one that was counselled or a different one;
or

the offence is committed in the way counselled or in a different way: s23 Penal Code.

The one who counselled will be deemed to have counselled the offence actually committed by the principal offender, provided the facts constituting the offence actually committed are a probable consequence of the counselling: s23 Penal Code.

The Elements for Counselling

An offence must have been committed by the principal offender; and

The accused counselled the principal offender to commit an offence; and

the principal offender acted within the scope of his or her authority: R v Calhaem [1985] 2 All ER 267.

Procuring

To procure means to bring about or to cause something or to acquire, provide for, or obtain for another.

Procuring must occur prior to the commission of the offence.

Procuring was defined in Attorney-General's Reference (No. 1 of 1975) [1975] 2 All ER 684:

Procure means to produce by endeavour.

You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening.

You cannot procure an offence unless there is a causal link between what you do and the commission of the offence.

There does not have to be a common intention or purpose but there must be a causal link.

Any person who procures another to do or omit to do any act that, if he or she would have done the act or made the omission themselves and that act or omission would have constituted an offence on his or her part:

is guilty of the offence of the same kind; and

is liable to the same punishment as if he or she had done the act or made the omission; and may be charged with doing the act or the omission: s21(c) Penal Code.

The Elements for Procuring

An offence must have been committed by the principal offender; and

The accused procured the principal offender to commit an offence; and

There is a causal link between the procuring and the commission of the offence.

For other case law on parties see; *Ferguson v Weaving* (1951) 1KB 814; *National Coal Board v Gamble* (1958) 3 All ER 203.

Withdrawal

Sometimes there may be a period of time between the act of an accessory and the completion of the offence by the principal offender. An accessory may escape criminal responsibility for the offence if they change their mind about participating and take steps to withdraw their participation in the offence.

What is required for withdrawal varies from case to case but some of the common law rules set down are:

withdrawal should be made before the crime is committed;

withdrawal should be communicated by telling the one counselled that their has been a change of mind

this applies if the participation of counsellor is confined to advice and encouragement;

withdrawal should be communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn;

withdrawal should give notice to the principal offender that, if he or she proceeds to carry out the unlawful action, he or she will be doing so without the aid and assistance of the one who withdrew.

4.2 Prosecution of a Common Purpose: s22 Penal Code

When two or more persons form a common intention to carry out an unlawful purpose with one another and, in carrying out that unlawful purpose, an offence is committed that was the probable consequence of carrying out that unlawful purpose, each of them is deemed to have committed the offence: s22 Penal Code.

Section 22 Penal Code does not apply in circumstances where the offenders form a common intention to commit an offence and, in fact, do nothing further than commit the offence. In this case, s21 Penal Code would be applied because both are equally culpable for the offence that was proposed and committed.

Section 22 Penal Code applies when, during the commission of the intended, original offence, an additional offence is carried out.

Example:

Steven and Nelson decide to commit a robbery. Steven is inside the store taking the money while Nelson is holding the door and making sure no one comes into the bank. Steven will be liable for the offence of robbery as the principal offender under s21(a), while Nelson will be liable for the offence of robbery as a secondary party under s21(c).

However, if during the course of the robbery, Steven shoots and kills the shopkeeper, Steven will be liable as the principal offender for killing the shopkeeper.

Whether Nelson will be held liable for killing the shopkeeper, which was not part of the common purpose of robbing the shop, will depend on whether Nelson knew or ought to have known that killing the shopkeeper would be a probable consequence of robbing the shop.

If Nelson knew or ought to have known that killing the shopkeeper was a probable consequence of carrying out the common purpose of robbing the shop, he will be liable for the killing as a secondary party under s22 Penal Code. Both Nelson and Steven will be jointly charged with murder under s22 Penal Code and the relevant provisions for murder.

The Elements for Prosecution of a Common Purpose

A common intention between the accuseds;

Carrying out an unlawful purpose;

An offence is committed while carrying out that unlawful purpose;

The offence is a probable consequence arising from carrying out the unlawful purpose.

Points to note:

There should be a joint enterprise or unlawful purpose.

The accused must all be parties to the joint enterprise.

The acts of the accused must have been done in furtherance of that joint enterprise.

Each person involved in the joint enterprise is criminally responsible for the acts of the others when the acts are done in the pursuance of the joint enterprise.

Criminal responsibility extends to any unusual consequences which arise out of the joint enterprise.

Each one is not liable if one of them acts beyond what was expressly or tacitly agreed to as part of the joint enterprise.

4.3 Accessories After the Fact: ss386 – 387 Penal Code

A person is said to be an accessory after the fact to an offence when he or she:

has knowledge that a person is guilty of an offence; and

receives or assists another so that he or she is able to escape punishment: s386 Penal Code.

Any person who becomes an accessory after the fact to a felony, is guilty of a felony, and shall be liable to imprisonment for three years if no other punishment is available: s387 Penal Code.

A person does not become an accessory after the fact for an offence of their spouse if they

receive or assist the spouse in order to help the spouse escape punishment; or

receive or assist, in the presence and authority of their spouse, another person who is guilty of an offence the spouse took part in: s386 Penal Code.

The Elements for Accessories After the Fact

The principal offender was guilty of a felony; and

The accused knew of the principal offender's guilt; and

The accused received or assisted the principal offender; and

The accused received or assisted the principal offender in order to enable the principal to escape punishment.

Points to note:

The principal offender received or assisted must have been guilty of a felony.

The assistance must be given to the felon personally.

The assistance must be given in order to prevent or hinder him or her from being apprehended or being punished.

; Assistance given indirectly or for motives other than hindering arrest of the principal offender, such as avoiding arrest him or herself or to make money for him or herself, would not make the person guilty as an accessory after the fact.

The Court must be satisfied that the accused knew that an offence had been committed by the principal offender.

Proof that a felony has been committed is sufficient to prove a person guilty of being an accessory after the fact, even if there has not yet been a conviction of the principal offender.

An accessory cannot be convicted if the principal offender has been acquitted so the guilt of the principal offender should be determined before a plea of guilty is taken from an accessory.

4.4 Conspiracy: ss383 – 385 Penal Code

Any person who conspires with another to commit any felony, or to do any act in any part of the world that if done in the Solomon Islands would be a felony and which is an offence in the place where the felony is proposed to be done, is:

guilty of a felony; and

liable to imprisonment for:

7 years if no other punishment is provided for; or

if the punishment for the person convicted of the felony is less than 7 years, then that lesser punishment: s383 Penal Code.

Any person who conspires with another to commit a misdemeanour, or to do any act in any part of the world that if done in the Solomon Islands would be a misdemeanour and which is an offence in the place where the misdemeanour is proposed to be done, is guilty of a misdemeanour: s384 Penal Code.

Any person who conspires with another to effect any unlawful purpose or effect any unlawful purpose by any unlawful means is guilty of a misdemeanour: s385 Penal Code.

The Elements for Conspiracy

Actus Reus

Agreement is the essential element of conspiracy. It is the actus reus of conspiracy. There is no conspiracy if negotiations fail to result in a firm agreement between the parties.

The offence of conspiracy is committed at the moment of agreement.

An intention between two parties is not enough for a charge. What is required is an agreement between two or more to do an unlawful act by unlawful means

At least two persons must agree for there to be a conspiracy. However, a single accused may be charged and convicted of conspiracy even if the identities of his or her fellow conspirators are unknown.

Mens Rea

Conspiracy requires two or more people to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary mens rea for conspiracy.

Knowledge of the facts is only material, in so far as such knowledge throws light onto what was agreed to by the parties.

Knowledge of the relevant law that makes the proposed conduct illegal need not be proved.

7: EVIDENCE

1 Introduction

Evidence refers to the information used to prove or disprove the facts in issue in a trial. In criminal trials, it is generally the prosecution that bears the burden of proving or disproving the facts in issue, in order to establish the guilt of the accused.

The subject of evidence, and the rules related to it, is a complex area of law. This chapter provides a brief introduction to the subject of evidence and outlines some of the rules of evidence that you may encounter in a criminal trial. It should not replace in-depth study of the rules of evidence and their application in criminal trials in the Magistrate's Court.

In order to properly apply the rules of evidence in a criminal trial, it is important to understand how evidence is classified.

2 Classification of Evidence

Evidence is generally distinguished by reference to the form it takes or by reference to its content. You must take into account both the form of evidence and the content of the evidence in a criminal trial. For example, oral evidence (which is a form of evidence) given during a trial may be direct or circumstantial (which is the content of the evidence).

2.1 Classification by Form

Classification by form refers to the way evidence is presented in Court and it is divided into three main categories.

1. Documentary evidence:

consists of information contained in written or visual documents.

2. Real evidence:

is usually some material object or thing (such as a weapon) that is produced in Court and the object's existence, condition or value is a fact in issue or is relevant to a fact in issue.

3. Oral evidence:

is the most important category of evidence in criminal cases; and consists of the statements or representation of facts given by witnesses.

2.2 Classification by Content

Classification by content refers to the way the evidence is relevant to the facts in issue. This method of classification divides evidence into three categories.

1. Direct evidence:

is evidence which, if believed, directly establishes a fact in issue. For example, direct evidence would be given by a witness who claimed to have personal knowledge of the facts in issue.

2. Circumstantial evidence:

is evidence from which the existence or non-existence of facts in issue may be inferred; is circumstantial because, even if the evidence is believed, the information or circumstances may be too weak to establish the facts in issue or to uphold a reasonable conviction; and often works cumulatively and there may be a set of circumstances which, individually, would not be enough to establish the facts in issue but taken as a whole would be enough to do so.

3. Corroborating or collateral evidence:

is evidence which does not bear upon the facts in issue either directly or indirectly but is relevant for the credibility or admissibility of other evidence in the case (either the direct or circumstantial evidence); and

should come from another independent source, e.g., an analyst or medical report.

3 Documentary Evidence

This is information that is contained in written documents. These documents may include:

public documents (statutes, parliamentary material, judicial documents, public registers);

private documents (business records, agreements, deeds, see s4 Evidence Act);

plans and reports (see s180 CPC);

certificates;

statements in documents produced by computers (note that certain rules may apply to this form of documentary evidence);

tape recordings; and

photographs.

By definition, documentary evidence will always consist of 'out of Court' statements or representations of facts, and therefore the question of whether the document is hearsay evidence will always arise. Often, documentary evidence will only be admissible under an exception to the hearsay rule, or it may be admissible under s43 Interpretation and General Provisions Act.

It is best if the documents produced at the trial are the originals. If the original cannot be produced, then copies may be ruled admissible depending on the circumstances.

Secondary evidence

Secondary evidence refers to evidence that is not original. It may not be given as much weight as original evidence.

Examples of secondary evidence include:

shorthand writing;

photocopy; or

fax copy.

4 Real Evidence

Real evidence usually refers to material objects or items which are produced at trial.

Documents can also be real evidence when:

contents of the document are merely being used to identify the document in question or to establish that it actually exists; or

where the document's contents do not matter, but the document itself bears fingerprints, is made of a certain substance, or bears a certain physical appearance.

The following may also, in some circumstances, be regarded as real evidence.

a person's behaviour;

a person's physical appearance; and/or

a person's demeanour or attitude, which may be relevant to his/her credibility as a witness, or whether he/she should be treated as a hostile witness.

Often little weight can be attached to real evidence, unless it is accompanied by testimony identifying the object and connecting it to the facts in issue. In some cases, the Court may have to inspect a material object out of Court when it is inconvenient or impossible to bring it to Court. Furthermore, you may also make orders for inspection of any real or personal property which may be material to the determination of the matter in dispute: s67 Magistrates' Courts Act.

5 Exhibits

When real or documentary evidence is introduced in Court, it becomes an exhibit. When a party is tendering an exhibit in Court, you should check:

has the witness seen the item?

has the witness been able to identify the item to the Court?

has the party seeking to have the item become an exhibit formally asked to tender it to the Court?

has the other party been put on notice about the existence of the exhibit?

Once an article has become an exhibit, the Court has a responsibility to preserve and retain it until the trial is concluded. Alternatively, the Court may mark and record the existence of the item, and entrust the object or document to the police or Director of Public Prosecutions for safekeeping.

The Court must ensure that:

proper care is taken to keep the exhibit safe from loss or damage; and

that if the DPP's office or the police are entrusted with the item, that the defence is given reasonable access to it for inspection and examination.

6 Oral Evidence

Oral testimony consists of statements or representations of fact. These statements may be 'in Court' statements or 'out of Court' statements.

In Court statements are defined as those made by a witness who is giving testimony. If a witness wants to mention in his or her testimony a statement which he or she, or somebody else made outside of the Court, the witness is making an 'out of Court' statement.

The distinction between 'in Court' statements and 'out of Court' statements is very important in the law of evidence. If a witness wants to refer to 'out of Court' statements in his or her testimony, you must decide whether it should be classified as hearsay or original evidence.

If the purpose of the 'out of Court' statement is to prove the truth of any facts asserted, then the out of Court statement is classified as hearsay evidence and will generally be ruled inadmissible, pursuant to the hearsay rule.

If the purpose of mentioning the 'out of Court' statement is simply to prove that the 'out of Court' statement was made, then it should be treated as original evidence and should generally be ruled admissible.

The value of oral evidence is that you can observe:

the demeanor of the witness;

the delivery;

the tone of voice;

the body language; and

the attitude towards the parties.

You must ensure that at every stage of the proceedings, you take down in writing oral evidence given before the Court or that which you deem material: s69 Magistrates' Courts Act; s182 CPC.

Evidence should be recorded:

in the presence of the accused or his counsel;

in the English language; and

in the form of a narrative and not in the form of question and answer, unless you think otherwise: s182 CPC.

If you are temporarily unable to write down the oral evidence, then you may direct the Clerk of the Court to do so.

7 Evidentiary Issues Relating to Witness Testimony

There are a number of important issues that relate specifically to witness testimony during the course of a criminal trial. These issues include:

1. the competence and compellability of witnesses including spouses, children, the accused and co-accused;
2. examination of witnesses;
3. leading questions;
4. refreshing memory;
5. lies;
6. corroboration;

7. hostile witnesses;
8. warnings to witnesses against self incrimination; and
9. identification evidence by witnesses.

7.1 Competence and Compellability of Witnesses

A witness is competent if he or she may be lawfully called to testify. The general rule is that any person is a competent witness in any proceedings unless they fall under one of the exceptions in statute or at common law.

Compellability means that the Court can require or compel a witness to testify once they have been found competent. You may compel a witness to give material evidence in a criminal trial, subject to just exceptions: ss60 and 63 Magistrates' Court Act & s127 CPC.

Special statutory and common law rules have been developed regarding the competence and compellability of certain kinds of witnesses.

The accused and co-accused

The general law rule is the accused is not a competent witness for the prosecution. This means that a co-accused cannot be called by the prosecution to give evidence against another, unless certain qualifications are present.

An accused cannot be compelled to give evidence at his or her own trial: s10(7) Constitution.

A co-accused can only lawfully be called to give evidence for the prosecution when he or she has ceased to be a co-accused, which is when:

he or she pleads guilty; or

he or she is acquitted; or

he or she is tried separately; or

the Director of Public Prosecutions puts an end to the proceedings against him or her; or

he or she has been sentenced.

Every person charged with an offence and their spouse shall be competent witnesses for the defence at every stage of the proceedings provided that:

he or she does so on his or her own application;

his or her failure to give evidence shall not be commented upon by the prosecution;

his or her spouse gives evidence upon his or her application;

no communication between the accused and his or her spouse during marriage shall be compelled to be disclosed during the proceedings;

he or she is subject to cross-examination by the prosecution;

he or she is not to be questioned on other offences not charged and of bad character unless exceptions apply; and

he or she gives evidence from the box: s141 CPC.

Spouses

The spouse of the accused shall be a competent witness for the prosecution and defence without the consent of the accused in any case where:

the law in force at the time specifically provides for a spouse to be called without the consent of the accused; or

the accused is charged with an offence under Part XVI (Offences Against Morality) or s170 (Bigamy) Penal Code; or

the accused is charged with an act or omission affecting the person or property of their spouse or the children of the either of them: s136 CPC.

Although a spouse is competent to be called to testify for the prosecution in certain cases, whether they can be compelled to do so in those cases is a different question. The English case *R v Pitt* [1983] QB 25, 65-66, sets out a number of points relating to a spouse who is competent but not compellable for the prosecution. These points are:

the choice whether to give evidence is that of the spouse and the spouse retains the right of refusal; and

if the spouse waives the right of refusal, he or she becomes an ordinary witness and in some cases, an application may be made to treat the spouse as a hostile witness; and

although not a rule of law or practice, it is desirable that when a spouse is determined a competent but not a compellable witness, that the judge [or Magistrate] explain that he or she has the right to refuse to give evidence but if he or she does choose to give evidence, he or she will be treated like any other witness.

Section 141 CPC sets out that a wife or husband of the accused shall be a competent witness for the defence at every stage of the proceedings. However, the spouse will not be called as a witness for the defence except upon application of the accused.

Section 141(d) also states that nothing in s141 will make a husband or wife compellable to disclose any information made by him or her to their spouse during the course of their marriage.

Children

Every witness in any criminal matter shall be examined upon oath. However, the Court may take without oath the evidence of any person of immature age, provided that the Court thinks it just and expedient to do so (and the reasons are recorded in the proceedings): s134 CPC.

This provision provides for the possibility that children can be competent witnesses in a criminal trial, even in cases where they might not understand the implications of swearing an oath.

Regardless of whether a child shall be called to give sworn or unsworn evidence (i.e. is competent) it is at your discretion and will depend upon the circumstances of the case and upon the child who is being asked to give evidence.

7.2 Examination of Witnesses

General

The Court may at any stage of any trial, summon any person as a witness or examine any person in attendance though not summoned: s133 CPC.

The Court may adjourn any case for up to 8 days and remand a witness where he or she:

refuses to be sworn;

having being sworn, refuses to answer any question;

refuses or neglects to produce any document or exhibit; or

refuses to sign his or her deposition: s135 CPC.

Where you deem the examination of a witness is necessary for the ends of justice, and the attendance of such witness cannot be procured without unreasonable delay, expense and inconvenience, you may, with the consent of the parties, issue a commission to a magistrate within the local jurisdiction to take the evidence of the witness: s137 CPC.

Examination-in-chief

The object of examining a witness by the party calling him or her is to gain evidence from the witness that supports the party's case.

Examination-in-chief must be conducted in accordance with rules of general application such as those relating to hearsay, opinion and the character of the accused.

There are also other rules that relate to examination-in-chief including:

the rule requiring the prosecution to call all their evidence before the close of their case;

leading questions; and

refreshing memory.

Cross-examination

The object of cross-examination is:

to gain evidence from the witness that supports the cross-examining party's version of the facts in issue;

to weaken or cast doubt upon the accuracy of the evidence given by the witness in examination-in-chief; and

in appropriate circumstances, to draw questions as to the credibility of the witness.

7.3 Leading Questions

A general rule is that leading questions may not be asked of a witness during examination-in-chief. A leading question is one which either:

suggests to the witness the answer which should be given; or

assumes the existence of facts which are in dispute.

Leading questions may be allowed in the following circumstances:

in regard to formal or introductory matters. For example, the name, address and occupation of the witness;

with respect to facts which are not in dispute or introductory questions about facts which are in dispute;

for the purpose of identifying a witness or object in Court;

in cases where the interests of justice requires it at the discretion of the Magistrate.

7.4 Refreshing Memory

In the course of giving his or her evidence, a witness may refer to a document in order to refresh his or her memory. The basic rules are:

a witness may refresh their memory from notes;

the notes must have been made by the witness or under their supervision;

the notes must have been made at the time of the incident or almost immediately after the incident occurred. Notes made after a day or two could not usually be used;

the witness should not normally read from the notes, but should use them only to refresh their memory. However, if the notes are lengthy and complex, then the only sensible and practicable course is to allow the witness to actually read them; and

if the accused or counsel wishes to see the notes, there is a right to inspect them.

7.5 Lies

If it is established that the accused lied (i.e. told a deliberate falsehood as opposed to making a genuine error), this is relevant to his or her credibility as a witness. It does not necessarily mean, however, that the accused is guilty. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

As with an accused, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

7.6 Corroboration

Where corroboration is required as a matter of practice, as in the prosecution of sexual offence cases, you must look for it in the prosecution evidence. If at the end of the hearing, you find that the complainant's evidence does not have support from another witness but you were nevertheless convinced that the complainant was telling the truth, you may still convict the accused.

You must make it clear on the record or in your judgment that you were aware of the danger of convicting on the uncorroborated evidence of the complainant alone, but were nevertheless satisfied beyond reasonable doubt that the accused was guilty of the offence charged.

It is important to watch the witness as well as recording details of facts. You may want to:

record how they give their evidence;

record any inconsistencies within their evidence, or with their evidence and another witness' evidence; and

see whether they avoid giving straight answers in areas of importance.

7.7 Hostile Witnesses

The general rule is that a party is not entitled to impeach the credit of his or her own witness by asking questions or introducing evidence concerning such matters as the witness's bad character, previous convictions, bias or previous inconsistent statements.

In the case where the witness appears to be hostile, (i.e. there are not desirous of telling the truth to the court at the instance of the party calling them), the general rule is modified in two respects:

Under ss4 and 5 Criminal Procedure Act 1865 (UK), the party may, by leave of the Judge or Magistrate, prove a previous inconsistent statement of the witness. In R v Henry Bata and Ken Arasi (Unrep. Criminal Appeal No. 1 of 1998), the Court of Appeal held that ss4 and 5 CPA 1865 (UK) were applicable to the Solomon Islands by virtue of Schedule 3.1 of the Constitution);

At common law, the party calling the witness may cross-examine him or her by asking leading questions.

It is important to remember that the discretion of the Magistrate is absolute with respect to declaring a witness as hostile. The following guidelines are suggested:

The prosecutor or defence who has called the witness must apply to have the witness declared hostile, and must state the grounds for the application. The grounds for asking that a witness be declared hostile should be based on definite information and not just on speculation.

Sometimes the witness will show such clear hostility towards the prosecution that this attitude alone will justify declaring the witness hostile.

The mere fact that a witness called by the prosecution gives evidence unfavourable to the prosecution or appears forgetful, is not in itself sufficient ground to have them declared hostile.

You should show caution when declaring a witness hostile. The effect of the declaration can be to destroy the value of that witness's evidence.

7.8 The Warning to a Witness against Self Incrimination

You will need to be constantly vigilant about self-incriminatory statements by a witness. If a question is asked of a witness, the answer to which could be self-incriminatory, you should:

warn the witness to pause before answering the question;

explain to the witness that they may refuse to answer the question; and

explain that any evidence the witness gives in Court that is self-incriminating could be used to prosecute them for a crime.

The warning against self-incrimination does not apply to a question asked of an accused, where the question relates to the offence being considered by the Court.

7.9 Identification Evidence by Witnesses

The visual identification of the accused by witnesses needs to be treated with caution. Honest and genuine witnesses have made mistakes regarding the identity of the accused.

The fundamental principle of identification evidence is that the weight to be assigned to such evidence is determined by the circumstances under which the identification was made.

The authority on the issue is the English case of *R v Turnbull and Others* [1977] QB 224, where the Court made the following guidelines for visual identification:

How long did the witness have the accused under observation?

At what distance?

In what light?

Was the observation impeded in any way, as, for example, by passing traffic or a press of people?

Had the witness ever seen the accused before?

How often?

If only occasionally, had they any special reason for remembering the accused?

How long elapsed before the original observation and the subsequent identification to the police?

Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his or her actual appearance?

In *Director of Public Prosecutions v John Fufue and Nelson Fafeloa v R* (Unrep. Criminal Appeal Nos. 3 and 4), Kapi JA, as a member of the Court of Appeal, ruled that the guidelines in *R v Turnbull & Others* was appropriate for the Solomon Islands.

8 Rules of Evidence

8.1 Introduction

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence can be found in the Magistrates' Courts Act, the Criminal Procedure Code, and the Penal Code. Also, certain evidentiary rules from UK statutes still apply in the Solomon Islands.

The rules of evidence are many and complicated. A brief overview of some of the important rules of evidence that will arise in defended criminal proceedings in the Magistrate's Court follow.

8.2 Burden and Standard of Proof

There are two principal kinds of burden of proof: the legal burden and the evidential burden.

Legal burden

The legal burden is the burden imposed on a party to prove a fact or facts in issue. The standard of proof required to discharge the legal burden varies according to whether the burden is borne by the prosecution or the accused.

If the legal burden is borne by the prosecution, the standard of proof required is 'beyond reasonable doubt.'

If the legal burden is borne by the accused, the standard of proof required is 'on the balance of probabilities.'

The term balance of probabilities means that the person deciding a case must find that it is more probable than not that a contested fact exists.

The general rule is that the prosecution bears the legal burden of proving all the elements in the offence necessary to establish guilt. There are only three categories of exception to the general rule.

Insanity

If the accused raises this defence, he or she will bear the burden of proving it, on the balance of probabilities.

Express statutory exceptions

Where a statute may expressly cast on the accused the burden of proving a particular issue or issues.

Implied statutory exceptions

Where a statute, on its true construction, may place the legal burden of proof on the accused.

You must decide whether a party has discharged the legal burden borne by them at the end of the trial, after all the evidence has been presented.

Evidential burden

The evidential burden is the burden imposed on a party to introduce sufficient evidence on the fact or facts in issue to satisfy you that you should consider those facts in issue.

Generally, the party bearing the legal burden on a particular issue will also bear the evidential burden on that issue. Therefore, the general rule is that the prosecution bears both the legal and evidential burden in relation to all the elements in the offence necessary to establish the guilt of the accused.

Where the accused bears the legal burden of proving insanity or some other issue, by virtue of an express or implied statutory exception, they will also bear the evidential burden. However, in relation to some common law and statutory defences, once the accused discharges his or her evidential burden, then the legal burden of disproving the defence will be on the prosecution.

8.3 Judicial Notice

The doctrine of judicial notice allows the Court to treat a fact as established in spite of the fact that no evidence has been introduced to establish it. The purpose of this rule is to save the time and expense of proving self-evident or well-established facts.

There are two forms of judicial notice that apply to the Magistrates' Court.

Judicial Notice Without Inquiry

If a fact is of such common knowledge that it requires no proof, the Magistrate, without relying on other sources of information, may take judicial notice of it and direct the Court to treat it as an established fact.

For example, in *R v Kwaoga* [1999] SBHC 60 (Criminal Case No. 22 of 1998), Palmer J took judicial notice of the fact that at 6.10 p.m., there would be plenty of daylight around as compared to the timing at 7.00 to 7.30 p.m.

Judicial Notice without Inquiry Pursuant to Statute

Judicial notice of a fact may be required by statute. For example, s4 Interpretation and General Provisions Act states that every Act is a public act and shall be judicially noticed as such.

8.4 Admissibility of Evidence

At any time during the course of the proceedings, there may be questions or objections as to the admissibility of evidence.

If there are questions or objections to the admissibility of evidence, the parties will be called upon to make submissions to the Court and it is up to you to rule on whether the evidence should be admitted or excluded, according to the common law and statutory rules which have been developed.

The submissions on the admissibility of evidence should be dealt with in the following manner:

The party objecting must state the grounds of the objection.

The other party must be given an opportunity to reply.

In cases where the accused is unrepresented, you should instruct him or her to try and see a solicitor to represent him or her on this matter.

You should then rule on the objection.

If you disallow the objection, counsel may ask that the objection be noted.

If you allow the objection and hold that evidence to be inadmissible, you must take great care to disregard that part when making your decision at the conclusion of the hearing.

In your decision at the conclusion of the case, you should record the objections to evidence and whether you ruled the evidence admissible or inadmissible and on what basis.

In some circumstances, a voir dire will be required to determine the admissibility of evidence.

Hearings on the voir dire

Voir dire literally means a trial within a trial. It is the procedure whereby the Court stops the main proceedings to hold a special hearing to determine whether certain items of evidence are admissible for the purpose of proving or disproving disputed facts.

In a voir dire hearing, evidence should be limited to matters relevant to the admissibility of the disputed evidence. In trials for indictable offences, a voir dire may be held to determine:

the competency of a witness;

the admissibility of a confession or some other variety of admissible hearsay such as a dying declaration;

the admissibility of a tape recording; or

the admissibility of a plea of guilty against an accused who subsequently changes his or her plea to not guilty.

See R v Abusae [1996] for an example of where a voir dire was held to determine the admissibility of a statement made by the accused under caution.

Relevance

The cardinal rule regarding the admissibility of evidence is that, subject to the exclusionary rules, all evidence that is sufficiently relevant to the facts in issue is admissible, and all evidence which is irrelevant or insufficiently relevant to the facts in issue should be excluded.

Relevant evidence means evidence which makes the matter which requires proof more or less probable. Relevance is a question of degree and will have to be determined by you, according to the common law rules of evidence and according to specific facts in the case at hand.

Weight

Upon evidence being ruled admissible, you must then determine what weight (i.e. the amount of importance) the evidence should be given.

In *Samuel Dalu v R* (Unrep. Criminal Case No. 43 of 1992), Palmer J. stated that:

“Questions on the weight of evidence are not determined by arbitrary rules, but by common sense, logic and experience... for weighing evidence and drawing inferences from it, there can be no canon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited.”

Discretion to exclude at common law

Every person charged with a criminal offence has the right to a fair trial before a Court of law: s10(1) Constitution. In order to ensure that the accused receives a fair hearing, you have discretion according to the common law to exclude otherwise admissible prosecution evidence if, in your opinion, it is gravely prejudicial to the accused.

The discretion to exclude evidence has developed on a case by case basis in relation to particular types of otherwise admissible evidence. The judicial discretion to exclude prosecution evidence has been most commonly used in cases where evidence was unlawfully, improperly or unfairly obtained by the police or prosecution.

8.5 Best Evidence Rule

The best evidence rule relates to the use of documents as evidence. The rule is that if an original document is available and can be produced without any difficulty, it should be produced.

If the original has been lost or destroyed, or there is some other good explanation as to why the original cannot be produced, a copy may be produced as it is the best evidence that is now available.

8.6 Hearsay Rule

The general rule is that an assertion that is made by a person other than the one giving oral evidence in a proceeding is inadmissible as evidence to prove the truth of some fact that has been asserted.

Despite the general rule, in order to determine whether evidence is hearsay, you must:

determine the purpose for which the evidence will be used before ruling it hearsay evidence:

for example, a statement made to a witness by a person who is not called to be a witness may or may not be hearsay;

it would be hearsay and inadmissible if the object of the evidence would be to establish the truth of what is contained in the statement;

it would not be hearsay and would be admissible when the statement is used to establish not the truth of the statement itself, but the fact that it was made;

ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement if prosecution relies on the evidence as being the truth of what is contained in the statement. See *Frank Norman Hiki v R* (Unrep. Criminal Appeal Case No. 9 of 1979).

The reason for the hearsay rule is because the truthfulness and accuracy of the person whose words are spoken to another witness cannot be tested by cross examination because that person is not or cannot be called as a witness. See *Teper v R* [1952] 2 All ER 447 at 449.

Although the rule against hearsay evidence is fundamental, it is qualified by common law and, in some cases, statutory exceptions.

Exceptions to the hearsay rule

Some of the exceptions to the hearsay rule which exist at common law include:

confessions;

dying declarations. (See s228 CPC, which sets out the statutory exception to the hearsay rule based on dying declarations);

res gestae (certain statements made in the course of, or soon after, a transaction that is the subject of the Court's inquiry); and

telephone conversations.

8.7 Opinion Evidence

The rule on opinion evidence is that witnesses may only give evidence of facts they personally observed and not evidence of their opinion. A statement of opinion is only an inference drawn from the facts.

Sometimes the borderline between fact and opinion is a very narrow one, and you must exercise ordinary common sense in deciding whether or not the evidence is admissible and (if so) what weight you should give it.

There are two exceptions to the rule on opinion evidence.

experts;

non-experts or lay persons.

Experts

Expert witnesses are allowed to give opinion evidence if:

they are qualified to do so; and

if the matter requires such expertise.

In order to give opinion evidence, an expert witness must relate to the Court his or her background, qualifications and experience, to establish their credentials to speak as an expert in a specific field. Having done that, as a general rule they should be allowed to give their opinion on all relevant matters within their competency.

Expert opinion should only be admitted where the Court has been shown that an issue of fact requires the application of knowledge, experience and understanding that is beyond that of ordinary persons.

Some examples of expert opinion evidence include:

a registered medical practitioner giving an opinion about the health of a patient. (See R v Paul [1999] SBHC 48);

a registered architect giving an opinion about the structure of a building;

a qualified motor mechanic giving an opinion about the condition of a motor vehicle; and

A seismologist giving evidence on the timing of an earthquake. See R v Paul [1999] SBHC 48).

In the case of reports written by expert witnesses, it is the general rule that they are not admissible if the expert is not called as a witness. However, s180 CPC provides a statutory exception to this rule.

Any document which is a plan by a surveyor, a report of an analyst or geologist employed by the government, or a report by a medical practitioner can be presumed to be genuine and be used as evidence in any inquiry subject to the Code: s180 CPC.

The Court is given the discretion whether to call these experts as witnesses or let their reports and plans stand on their own as evidence: s180(3) CPC.

Non-experts

Non-experts may give a statement of opinion on a matter in order to convey relevant facts personally perceived by him or her.

In order for a non-expert or layperson to give evidence of opinion, there must be a factual basis for their opinion.

The witness should be asked to describe the persons or circumstances prior to being asked for his or her opinion.

In some cases, non-experts have given evidence of opinion in regards to:

the identity of an object;

the handwriting of which he or she was familiar;

a person's age;

the speed of a vehicle;

the weather;

whether relations between two persons appear to be friendly or unfriendly.

8.8 Character Evidence

Admissibility of evidence of bad character

As a general rule, it is not open to the prosecution to introduce evidence of the bad character of the accused in any form.

Therefore, the previous convictions of the accused may not form part of the case against him or her, nor may his previous misconduct, his disposition towards wrong doing or immorality, or his or bad reputation in the community in which he or she lives.

The only way that evidence of bad character of the accused can be introduced is by exceptions to the rule. Some of the exceptions to this rule at common law are:

if evidence of other misconduct forming part of the same transaction of the offence charged is also be admissible at common law; or

if the accused puts his or her character in issue, evidence of bad character may be admitted at common law; or

where the accused gives evidence, he or she may in certain circumstances face cross-examination on his character.

When the accused is called as a witness for the defence, the previous convictions and the bad character of the accused can be admitted as evidence under s141(f) CPC where:

the proof that he or she has committed or been convicted of the other offence is ruled admissible as evidence to show he or she is guilty of the charge now being determined; or

if the accused has personally or by his or her lawyer asked a question of a prosecution witness in order to establish his or her own good character; or

if the accused has him or herself given evidence as to his or her own good character; or

part of the defence case involves impugning the character of the complainant or witnesses; or

when the accused has given evidence against any other person charged with the same offence.

Also the previous convictions of a witness, other than the accused, may be admitted as evidence on cross-examination in some cases. See s6 Criminal Procedure Act 1865 (UK).

The cross-examiner may call evidence to prove the conviction if the witness:

denies having been so convicted;

does not admit a conviction; or

refuses to answer.

Admissibility of evidence of good character

An accused may introduce evidence to show that he or she is of good character. By doing so, however, they put their character in issue and the prosecutor may cross-examine witnesses or, in some cases, the accused about their character and about any previous convictions.

The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the accused, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the accused upon conviction of an offence.

See R v Tahoe [1996] SBHC 34 (Criminal Case No. 14 of 1995) regarding the use of good character evidence in a criminal trial. Also, see R v Sine [2001] SBHC 16 (Criminal Case No. 16 of 2000).

8: MANAGEMENT OF PROCEEDINGS

1 General Organisation for Court

Before you go to Court:

make sure that both clerks are present and ready for Court to commence;

if there is a need to have a Court interpreter, then ensure that the person is duly sworn and his or her role is explained before the proceedings start;

ensure that you have a Police orderly for your Court and that he or she is briefed about the order of proceedings;

if there are chamber matters, they should not proceed beyond 9:30 am.

When in Court:

start Court on time and rise at the expected time. This is not only for your benefit but also for counsel, the prosecutors and Court staff. General rising times are:

morning break 10.00am – 10.15am

lunch 12.00 noon- 1.00pm

afternoon break 3.00pm – 3.15pm

finish 4.00pm.

2 Keeping the Court Record

When dealing with the case, always fill out, sign, and date the Court record making sure that you note what you have done. Abbreviations may be used. Remember, you or another Magistrate will need this information in the future.

Standard information to be noted on the Court record is:

election (if appropriate);

plea;

name of counsel, or if unrepresented, that you have raised the matter with the accused and he or she has declined or neglected to arrange legal advice;

all remands and any conditions;

the grant of bail and any conditions;

adjournments and details;

any amendment to the charge;

witness numbers and hearing time when defended;

preliminary hearings – whether a prima facie case is established or not, committal to the High Court;

the conviction or discharge;

the sentence and full details;

any award of costs, the amount and to whom they are to be paid.

If there is a report on the file which would be relevant, note on the Court record:

“see report from on file”

Longer notes should be dictated and left on the file rather than recorded on the Court record.

Do not record reasons for your decisions on the Court record – just the decisions. If your reasons are recorded and on the file, you can indicate this on the Court record, for example:

“Bail refused – for reasons, see memo on file”.

Common abbreviations include:

NG Not Guilty

G Guilty

ROB Remanded on Bail

BTC Bail to Continue

RAL Remanded at Large

WA Warrant of Arrest

3 Order of Calling Cases

The following is a suggestion in the order of calling cases.

Call through defended hearing cases to find out which are ready to proceed and stand down cases according to estimated time for hearing.

Next, call cases where the accused is in custody to free up Police and prison officers.

Call adjourned cases and those that had the accused previously remanded.

Deal with matters that counsel appear consecutively so they can get away.

Deal with sentencing matters and judgments near the end of the list.

Finally deal with the balance of the list, which may include closed-Court proceedings.

4 Disclosure

Natural justice requires that an accused is entitled to know what the charge the evidence against them before they enter a plea to the charge.

Counsel should know the evidence against their client before they advise them what to do:

Early disclosure of the Police evidence is essential for the proper working of the case-flow management in criminal proceedings.

5 Adjournments

You have the discretion to adjourn a hearing at any time before or during the hearing of any case to a certain time and place: s52 MCA. You must state the new time and place in the presence of the parties or their advocates.

In the meantime, the accused may:

go at large;

be committed to prison; or

be released upon entering into a recognisance, with or without sureties.

No adjournment shall be for more than:

30 days, if the accused is at large; or

15 days, if the accused is remanded in custody.

See s191 CPC.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

the interests of the accused to a fair trial;

the interests of the public in ensuring efficient prosecutions;

the reasons for the adjournment;

any fault.

Note your discretionary power must be exercised in such a way as to ensure that the accused has a fair trial according to law.

Cases offering guidance include:

Carryer v Kelly (1969-1970) 90 WN (Part 1) NSW 566;

R v Maher [1987] 1 QdR 171;

Appleton v Tomasetti (1983) 5 ALR 428;

R v Swansea Justices & Davies, Ex parte DPP (1990) 154 JPR 709: "The power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the Court shall have the best opportunity of giving the fairest available hearing to the parties".

6 The Mentally Ill Accused

The procedure in cases where the accused is of unsound mind or otherwise incapacitated is provided for under ss144-149, s256 CPC.

If at any time after a formal charge has been presented, you have reason to believe that the accused may be of unsound mind so as to be incapable of making his or her defence, you may adjourn or postpone the case from further proceedings.

If the offence allows bail to be taken, you may release the person on sufficient security that the person will be looked after safely and prevented from doing harm to him or herself or to any other person.

Alternatively, if the case is one where bail is not available, you must order the accused into safe custody as you think fit.

You will need to transmit the Court record to the DPP for consideration by the Governor General: s144 CPC.

The Governor General then has discretion to direct the accused to be detained in a mental hospital or other suitable place of custody until the Governor General makes a further order to have the accused attend the Court to be tried on the charges as before: s144(5) CPC.

Where there is a postponement of proceedings, proceedings may be resumed if you receive certification from the DPP that the accused is capable of making his or her defence: s147 CPC.

Where the accused raises the defence of insanity at trial and the evidence before the Court supports such contention, you can make a special finding to the effect that the accused was

not guilty by reason of insanity, and report the case to the Governor General for a committal order: s146 CPC.

7 Cultural Knowledge

Some knowledge about the different ethnic groups and their diverse cultures would be an added bonus for the Magistrate in his or her daily work. What may appear strange and weird for one set of group may be the acceptable norm in another.

Cultural ties/connections (wantokism) are strong, and do explain the behaviour of people in certain situations. Wantokism can be a blessing but, if not controlled properly, can become a burden. It can affect decision making in certain situations, whereby preferences are sometimes given to wantoks or relatives.

8 Victims

Victims of crime are usually the main prosecution witnesses.

Magistrates are expected to treat victims with courtesy and compassion. In particular, you should restrain defence lawyers from humiliating victims of crime in Court. Especially vulnerable witnesses, such as the very young, very old, or disabled, are entitled to special measures for the giving of evidence. Consider the use of screens and allowing people in wheelchairs to give evidence from the floor of the Court instead of the witness box and ensuring that a family member or friend can sit with a child victim or elderly victim while giving evidence.

8.1 Checklist

1. Identify the victim/s.
2. At all times treat the victim/s with courtesy and compassion.
3. At all times respect the victim/s privacy and dignity.

4. If the victim and offender both want a meeting, encourage that to occur.

5. Take into account the victim's views on a bail application.

6. Before sentencing, consider:

the impact on the victim;

giving the victim the opportunity to speak to the Court;

receiving a victim impact report.

8.2 Judicial Language and Comment

Ensure that you acknowledge any statements by the victim in your sentencing remarks. A brief summary is appropriate.

Be careful about "blaming" the victim, for example, stating words like "she was drunk" is not relevant or appropriate unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

8.3 Victims of Sexual Offences

Three factors that make sexual offence trials particularly distressing for victims are:

the nature of the crime;

the role of consent, with its focus on the credibility of the victim;

the likelihood that the accused and victim knew each other before the alleged offence took place.

Nature of the crime

The crime experienced by sexual offence victims is more than an assault. Due to the sexual nature of the acts and the physical invasion of the person, victims often experience feelings that are not present in other types of crimes.

The trial process adds to the difficulty that sexual offence victims experience because:

they must face the accused in open Court;

they are usually required to recount the offence against them in explicit detail in order to establish the elements of the offence;

they may be subject to cross-examination by the accused if there is no defence counsel, which can be a very embarrassing for the victim and his or her family.

Focus on the victim's credibility

The role of consent makes adult sexual offence trials different from most other criminal proceedings. Behaviour that is ordinarily legal (engaging in sexual activity with another adult) becomes illegal in the absence of consent.

When the alleged offence occurs in private, which is often the case, often the trial comes down to the word of the victim against the word of the accused. Therefore, the trial often turns on whether the victim is a credible witness.

Due to the fact that the credibility of the victim is at issue, it is necessary for the defence to use cross-examination of the victim to try and discredit them. This may further victimise the victim. Overseas research shows that some victims find this to be like a second rape/sexual offence.

Relationship between the victim and accused

Unlike some other types of crimes, it is often the case that the victim and accused knew each other before the offence occurred. This can increase the distress and difficulty experienced by the victim because they have been betrayed by someone they trusted, and because family and other relationships usually mean on-going contact between the accused and the victim.

Dealing with victims of sexual offences

In order to minimise the distress of victims of sexual offences, you should:

conduct the trial and control the demeanour of those in the Courtroom in a manner that reflects the serious nature of the crime;

ensure the safety of the victim in the Courtroom;

ensure that Court staff understands the danger and trauma the victim may feel;

consider allowing an advocate of the victim to sit with them during the trial to offer support;

enforce motions that protect the victim during testifying, such as closing the Courtroom and providing a screen to block the victims' view of the accused. This is especially important where the victim is a juvenile;

know the evidentiary issues and rules that apply in sexual offence cases, such as corroboration, recent complaint and the inadmissibility of previous sexual history. This will enable you to rule on the admissibility of evidence and weigh its credibility;

consider allowing a victim impact statement in sentencing.

9 Child Witnesses

Section 134 CPC sets out that every witness in any criminal matter shall be examined upon oath. However, the Court may take without oath the evidence of any person of immature age provided that the Court thinks it just and expedient to do so. This provision provides for the possibility that children can be competent witnesses in a criminal trial, even in cases where they might not understand the implications of swearing an oath.

It is important that special arrangements be made if a child is to be called as a witness in a criminal proceeding. You should use your discretion to protect the child witness.

In cases of indecency, the Courtroom should be closed.

You should also consider whether a screen should be used to screen the child witness from the accused. The prosecution can be ordered to provide a screen. In the rural Courts, a mat may have to be used as a screen.

If a screen is not available, you can ask the child to face you and not to look anywhere else during evidence-in-chief and cross-examination.

When cross-examination of the child is conducted, you are expected to be sensitive to the child's special vulnerability in deciding whether or not you should allow the questions to be asked, as under the Convention of the Rights of the Child, the judiciary must give primary consideration to the interests of children.

Regardless of whether a child shall be called to give sworn or unsworn evidence (i.e. is competent) is at your discretion, and will depend upon the circumstances of the case and upon the child who is being asked to give evidence.

10 Unrepresented Accused

Because of the expensive cost of hiring lawyers to conduct proceedings, a significant number of litigants appear in the Magistrate's Court on their own behalf. Most have little or no idea of Court procedures and what is involved and rely on the system to assist to some extent.

If at all possible, all accuseds charged with an offence carrying imprisonment terms should be legally represented. However, if legal representation is not available, then you are to ensure that he or she understands the following:

the charge(s);

that if found guilty, there is a probability of an imprisonment term;

that legal aid may be available and how to apply for it.

To assist in the smooth running of any hearing, you should give an initial explanation outlining:

the procedure;

the obligation to put their case;

the limitation of providing new evidence;

the need to ask questions and not make statements;

any issues arising out of the evidence.

For an unrepresented accused, before plea or election is entered:

advise of the right to a lawyer;

advise of the right to apply for legal aid;

put each charge and ask for election/plea.

11 Disruption and Misbehaviour

The accused is entitled to be present in Court during the whole of his or her trial, unless he or she interrupts the proceedings: s10(2)(f) Constitution.

Where a accused is required to appear in Court, but fails to do so, you may

issue a warrant for his arrest: s88 CPC;

adjourn the proceedings to such time and conditions as you think fit; or

where the maximum penalty is only 6 months and a fine not exceeding \$100, proceed without the accused: s188 CPC.

You have power to impose criminal sanctions for offences relating to judicial proceedings: s121 Penal Code. Offences under this provision include:

failure to attend Court after being summoned: s121(1)(b) PC;

refusal to be sworn in: s121(1)(c) PC;

refusal to answer question during trial: s121(1)(d) PC;

obstructing or disturbing the proceedings: s121(1)(f) PC.

Where the above offences are committed in view of the Court, you may order that the accused be detained in custody till the rising of the Court on the same day: s121(2).

Magistrates do not have inherent jurisdiction to cite anyone with Contempt of Court. If you think that someone should be charged with one of the offences under s121 Penal Code, then refer the matter to the DPP for investigation and prosecution.

12 Case Management

The American Bar Association expresses the following in relation to case-flow management:

“From the commencement of litigation to its resolution, any elapsed time, other than time reasonably required for pleadings, discovery or Court events, is unacceptable and should be eliminated”.

On the question of who controls litigation, it says:

“To enable just and efficient resolution of cases, the Court, not the lawyers or litigants should control the pace of litigation. A strong judicial commitment is essential to reducing delay and maintaining a current docket”.

Judicial commitment is required to make any case management system.

Goals

The goals of case management are to:

ensure the just treatment of all litigants by the Court;

promote the prompt disposal of cases;

improve the quality of the litigation process;

maintain public confidence in the Court; and

use efficiently the available judicial, legal and administrative resources.

The following quotes from the 1995 Report of the New Zealand Judiciary, at page 14, provides a good description of case-flow management:

“It is essentially a management process and does not influence decisions on the substantive issues involved in a case. Case-flow management acknowledges that time and resources are not unlimited, and that unnecessary waste of either should be avoided”.

“The principles of case-flow management are based on the managing of cases through the Court system to ensure they are dealt with promptly and economically and that the sequence of events and their timing are more predictable. The progress of cases through the Courts is closely supervised to ensure agreed time standards are met, and the early disposition of cases that are not likely to go to trial is encouraged”.

Principles

The principles of case-flow management are:

Unnecessary delay should be eliminated;

It is the responsibility of the Court to supervise the progress of each case;

The Court has a responsibility to ensure litigants, the prosecution, and counsel are aware of their obligations;

The system should be orderly, reliable and predictable and ensure certainty;

Early settlement of disputes is a major aim;

Procedures should be as simple and easily comprehensible as possible.

Standards

It will be the Solomon Islands judiciary, in consultation with the Attorney-General and the Director of Public Prosecutions, who needs to set the standard it wishes to apply to disposition of criminal cases. Experience has shown that without the support of one these other parties, the judicial objective to efficiently manage its cases cannot be achieved.

9: PRE-TRIAL MATTERS AND FIRST APPEARANCE

1 The Criminal Process

The following diagram shows the general process of a criminal case, to preliminary inquiry (for indictable offences) and trial (for summary offences). This chapter and its diagrams explain this process in more detail.

The Criminal Process

Ch 9 Criminal Process

2 How a Case Comes to the Magistrate's Court

How a case comes to the Magistrate's Court

Ch 9 How a case comes

Criminal proceedings may be instituted by either:

making a complaint to the Magistrate; or

bringing before the Magistrate a person believed to have committed an offence, who is under arrest without warrant: s76(1) CPC.

Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint or bring the person before the Magistrate: s76(2) CPC.

A complaint may be made orally or in writing. If made orally, you should put it in writing. All complaints should be signed by the complainant and yourself: s76(3) CPC. If not already done so, you should draw up or ask the Clerk to draw up, a formal charge containing a statement of the offence with which the accused is charged, and sign it: s76(4) CPC.

In most cases, the Police will make the complaint, and they will present a signed formal charge, which is deemed to be a complaint: s76(3) CPC.

Initial steps

How the accused is dealt with by the Police will determine the steps that are taken by the Court. The accused may be:

issued with a Police Notice, under s78 CPC;

charged and released on Police bail;

at large; or

in Police custody.

Police Notice to attend Court – s78 CPC

A Police officer may personally serve a notice upon any person who is reasonably suspected of having committed an offence specified in s78, requiring him or her to:

attend court at a specified time and place (at least 10 days after service); or

appear by advocate; or

enter a written plea of guilty;

and, if he or she does not intend to appear in person, to enter a written consent to the trial taking place in his or her absence.

The Police files a Notice of Prosecution in the Magistrate's Court and serves the Notice on the accused not later than 14 days from the date of the alleged offence.

The Notice should generally state:

the place, time and date (not less than 10 days from the date of service) in which the accused is required to appear and answer the charge;

the full name of the informant and the capacity in which they are acting (e.g. Police Constable):

the accused's name, address, occupation and age;

the date and nature of the alleged offence;

a summary of facts, sufficient to inform the accused fully and fairly of the allegations made against him or her.

The printed Notice also contains a notice of the accused's right to enter a plea of guilty in writing. The Court Clerk will insert a date in the Notice (at least 10 days away) by which time the accused must exercise his or her rights.

If the accused does nothing, denies the charge or wishes to appear before the Court, the Clerk will prepare a summons to the accused. The case then proceeds as any other case.

If the accused pleads guilty in writing, and consents to the matter being dealt with in his or her absence, it may be dealt with in the absence of the accused.

The offences to which this process applies are:

any offence under the Traffic Act which is punishable only by a fine or by imprisonment not exceeding four months, or both;

any offence under the Bicycles Act;

any offence under the Trespass and Branding Act.

Accused charged and released on bail and/or recognisance

Where:

an accused is in custody without a warrant; and

the alleged offence is not murder or treason; and

the offence is not of a serious nature; and

the person is prepared to give bail;

the accused may be released on his or her entering a recognisance, with or without sureties, for a reasonable amount to appear before a Magistrate's Court at a time and place named in the recognisance: ss23, 106 and 107 CPC.

A signed copy of the notice will be forwarded to the Court before the date on which the offence is to be heard.

When the Clerk receives the charge, he or she will forward it to the Magistrate for his or her direction.

Note that all charges for plea to be taken on Monday morning should be received no later than noon on the preceding Friday.

Accused at large

Where a charge is laid without the accused being arrested, the Police will include a prepared summons with the charge.

When the Clerk receives the charge, he or she will forward it to the Magistrate for his or her direction. The Magistrate will draw up or cause to be drawn up and shall sign a formal charge containing the statement of the offence with which the accused is charged.

Accused is in Police custody

Any person who is arrested or detained, without an order or warrant, and not released, must be brought before the Court without undue delay: s5 Constitution; s20 CPC.

The Police should have prepared a charge sheet: s76(5) CPC. Often this will be accompanied by an application for remand in custody. Wherever possible, these should be presented in advance to the Clerk, and the Clerk will open a file and register the case in the Court record before putting it before the Magistrate. The Magistrate should hear the matter at the earliest opportunity.

Occasionally, the charge will be put directly to the Magistrate.

3 Process up to First Appearance

The diagram on the following page shows the process up to the first appearance of the accused in Court.

Process up to first appearance

Ch 9 Process up to first appearance

3.1 Personal Interest

At this stage, ask yourself whether there is any reason for you not to hear the matter. You should excuse yourself if you have or appear to have:

bias or prejudice in the matter;

a personal or business relationship with the accused or victim/complainant; or

a personal or financial interest in the matter.

See Chapter 3 “Judicial Conduct”, paragraph 1.5.

Where you are unable, from personal interest or any other sufficient reason, to adjudicate, the Chief Justice will direct another Magistrate to hear the case: s9 MCA. In practice, it may be possible for you to arrange for another Magistrate in the same district to hear the case.

You must satisfy yourself that it is a good cause or reason. The mere fact that an objection has been raised does not mean that a Magistrate should recuse himself or herself automatically. You must find out what the objection is about and, if you are satisfied that it has good basis and that it would not be in the interests of justice to continue to preside over the matter, then you may excuse yourself.

3.2 Validity of the Charge

General requirements

A formal charge is an accusation of the commission of an offence.

A charge should be filed:

at the Court within the district in which the offence is alleged to have been committed (wholly or partly); or

at the Court within the district in which the accused was apprehended; or

at the Court within the district in which the accused is in custody or has appeared in answer to a summons: ss58 – 62 CPC.

Every charge must contain:

a statement of the specific offence or offences with which the accused is charged;

such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: s117 CPC.

Section 120 CPC sets out how a charge is to be framed. However, unless the Court considers that there has been a miscarriage of justice, you may not quash, hold invalid or set aside any information or complaint only because of any defect, omission, irregularity or want of form or its contents.

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms wherever possible. It should include:

a statement of offence. It is not necessary that all the essential elements of the offence be included;

a reference to the section of the enactment creating the offence;

particulars of the offence, unless specifically not required by enactment.

Where there is more than one count, they should be numbered consecutively, and may be put in the alternative: s118 CPC. Check that the charge does not improperly charge more than one offence for the same action (duplicity), unless put in the alternative. For example, separate counts for common assault and assault causing actual bodily harm arising from the same set of facts would have to be put in the alternative. If not, the charge will be defective for duplicity and will have to be amended at the first appearance.

The charge need not go into any exceptions or exemptions to the offence.

Generally, people and property should be reasonably identified, although names need not be given where they are not known.

There is a time limit for laying a charge for certain summary offences in the Magistrates Court. Offences carry a maximum penalty of 6 months imprisonment, or a fine of \$100, or both, cannot be tried by a Magistrate unless the charge is laid within:

6 months from the date the alleged offence was committed; or

a longer time if specially allowed by law: s206 CPC.

Validity

Check that the charge sheet:

is sworn;

is within time;

sets out the offence, section and particulars of the offence sufficiently.

Refer to ss58 – 62, 117, 120 and 206 CPC.

Ensure that the charge sheet is accurately completed before you sign it.

If the charge is defective:

return it to the prosecution without directing a case file be opened; or

raise it with the prosecution at the first appearance, for amendment or withdrawal.

If the only issue is that it is out of time according to s206 CPC:

direct that it be included in one case file opened for all such charges (if there are more than one); and

at first appearance, declare that it is out of time and not triable, according to s206; and

discharge the accused.

3.3 Joined Charges

More than one offence may be charged together in the same charge as long as:

they are founded on the same facts; or

they form or are a part of a series of offences of the same or similar character: s118(1) CPC.

They must each be set out in a separate paragraph in the charge, called a count: s118(2) CPC.

At any time, before or during trial, you may direct that a count or counts be tried separately. This is particularly desirable if you are of the opinion that the accused will be embarrassed in his or her defence by the counts being tried together: s118(3) CPC.

3.4 Joined Accused

The following persons may be joined in one charge and may be tried together:

Persons accused of the same offence committed in the course of the same transaction;

Persons accused of an offence and persons accused of or attempting to commit such offence;

Persons accused of different offences committed in the course of the same transaction;

Persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of the offences of the same or similar character: s119 CPC.

3.5 Summons for Attendance

Accused

A summons for attendance may be required to compel the attendance of the accused: s77 CPC.

A summons will not be necessary where:

the accused has been served a Police Notice under s78 CPC; or

the accused has been released on Police bail or recognisance.

The Police will generally have prepared a summons in advance and attached it to the charge.

Every summons must:

be in writing, in duplicate;

be signed by the Magistrate or Officer of the Court;

be directed to the person summoned and require him or her to appear at a stated time and place; and

state shortly the offence charged: s70 CPC.

Sections 80 – 85 CPC detail how service may be effected.

Witnesses

If it is clear from the charge that material evidence can be given by or is in the possession of any person, you may issue a summons requiring their attendance or requiring them to bring and produce documents as specified: s127 CPC; s60 MCA.

The Police will generally prepare any necessary summonses in advance and attach these to the charge.

3.6 Transferring the Case

If it appears that the cause of the complaint arose outside the limits of the jurisdiction of your Court, you may direct the case to be transferred to the Court having jurisdiction: s65 CPC.

If you think the accused should remain in custody or be placed in custody, direct that the Police take to the Court having jurisdiction:

the accused; and

the complaint and recognisances taken, if any.

Issue a warrant for that purpose.

If the accused is not to be held in custody, explain to him or her that you have directed the case be transferred to another Court and have him or her bailed to appear at the other Court.

4 First Appearance

4.1 General

An accused, on first appearance, will be present:

after arrest and in Police custody;

after arrest and on Police bail or notice; or

on summons.

At the first hearing, you will be concerned with some or all of the following:

The integrity of the charge (if not already considered);

Non appearance, therefore summons and warrants;

Legal representation;

Plea, including fitness to plead;

Election;

Remands in custody;

Bail;

Adjournments.

Ask unrepresented accused persons if they have seen a lawyer or not, or whether they wish to see a lawyer. If so, then advise them to see the Public Solicitor. This will save time.

4.2 Non-Appearance by the Accused

The diagram on the following page shows the process to follow if the accused does not appear.

First appearance: Accused does not appear

Ch 9 Accused Doesn't appear

If the accused does not appear, either in response to a summons, Police bail or Police Notice, check that the accused has in fact been served. Note that an affidavit of service is proof enough, until the contrary is proved: s85 CPC.

If service has been effected, you may:

dispense with the attendance of the accused in certain cases; or

issue a warrant to arrest the accused.

Dispensing with attendance of accused

Where a summons has been issued, you may dispense with the personal attendance of the accused if:

the offence in the charge is not a felony; and

you see reason to do so or the maximum punishment of the offence is a fine or imprisonment of 3 months or both; and

the accused has consented to the trial taking place in his or her absence and pleaded guilty in writing or appeared by advocate: s86 CPC.

Note that you may direct attendance at any later time.

If the accused appears by advocate, then continue as if the accused is present.

If the accused has pleaded guilty in writing, convict and sentence.

Warrants for arrest

Where the accused does not appear, and his or her personal attendance has not been dispensed with under s86 CPC, you may issue a warrant to apprehend him or her and cause him or her to be brought before the Court: s88 CPC.

Some relevant considerations are:

What effort has the Prosecution made to serve the accused?

Is the failure to serve the accused a result of false information by the accused?

Does the offence with which the accused is charged carry a term of imprisonment?

How long after the alleged offence was the summons issued?

Every warrant:

will in most cases be directed generally to all Police officers and occasionally to other specified persons;

must be under the hand of the Magistrate;

must state shortly the offence with which the accused is charged;

must name or otherwise describe the accused;

must order the person to whom it is directed to apprehend the accused and bring him or her before the Court to answer the charge and be further dealt with by the law. See ss89 and 91 CPC.

You may endorse the warrant to the effect that if the accused executes a bond with sufficient sureties for his or her attendance, the officer to whom the warrant is directed shall take such security and shall release the accused from custody. The endorsement will state:

the number of sureties;

the amount in which they and the accused are to be respectively bound; and

the time at which he or she is to attend before the Court: s90 CPC.

This would be useful where the accused is in a remote place, pending the next tour.

4.3 Indictable Offences

Indictable Offences

Ch 9 Indictable Offences

The words in the body of the charge and the maximum penalty which the offence carry will indicate if the offence is an offence punishable summarily or an indictable offence. The section creating the offence warrants checking.

Election

You will be faced with three types of offences:

Summary offences where the accused may be tried summarily in the Magistrate's Court;

Indictable offences where the Prosecutor may elect to have the charge heard in the Magistrate's Court;

Indictable offences that can only be heard in the High Court.

The decision whether an indictable offence can be heard in the High Court or the Magistrate's Court is usually made by the prosecution. However, where a Magistrate forms the opinion that the matter should go to the High Court, a preliminary inquiry is held. Sometimes the Magistrate can commit the matter to the High Court for sentence under s208 CPC.

Preliminary inquiries are required only for the purpose of determining if a matter should go to the High Court.

Consider bail/remand in custody, set a date for the preliminary inquiry (if possible at this stage) and adjourn.

Note that the accused must come back before the Court:

within 15 days if remanded in custody;

within 30 days if bailed.

4.4 Summary Offences

The diagram on the following page shows the process for summary offences at the first appearance of the accused.

Summary offences

Ch 9 Summary Offences

4.5 Reconciliation

See s35 MCA.

In criminal cases, a Magistrate's Court may promote reconciliation and encourage and facilitate the settlement of proceedings in an amicable way for:

common assault; or

offences of a personal or private nature not amounting to a felony and not aggravated in degree.

Settlement may be by payment of compensation or other terms approved by the Court.

The complainant/victim must agree – you cannot impose this on parties. You may only encourage and facilitate reconciliation.

It is a good idea to adjourn the proceedings to give the accused time to carry out the terms of the settlement. When you are satisfied that the terms have been satisfied, you may order that the proceedings be terminated.

4.6 Unrepresented Accused

See the general section on Legal Representation in Chapter 8 “Management of Proceedings”.

If at all possible, all accused persons charged with offences carrying imprisonment as a penalty, should see the Public Solicitor. This may require an adjournment to the next plea day.

If an accused insists on representing him or herself, be careful that you comply with s10 of the Constitution. This section outlines the rights of accused persons charged with criminal offences.

It is your duty to see that the hearing is fair.

4.7 Arraignment

Identification of the accused

When an accused person is brought before you, you must first ascertain who he or she is. Record his or her:

full name;

address; and

age.

This is very important. More than one person may share the same name. The accused person might be a juvenile and you would need to treat a juvenile accused differently to adults. See Chapter 16 "Juvenile Offenders".

The charge

You must know the elements of the offence charged. The elements are those particulars the prosecutor must prove beyond reasonable doubt to secure a conviction.

Your understanding of the elements of the offence is very important. Unless you know and understand the elements:

you will not be able to clearly explain them to the accused;

you will not be able to decide which evidence is relevant and which is not, affecting admissibility of evidence.

Explain the charge to the accused

You must clearly explain the nature of the offence to the accused person. This involves explaining the elements.

Unless the accused clearly understands the nature of the offence with which he or she is charged, he or she will not be able to work out if he or she has a defence. This will affect his or her ability to enter a plea.

Check understanding

Check whether the accused understands the charge. Only when you are sure the accused understands the full nature of the offence charged, ask the accused how he or she pleads to

the charge. Never take for granted that the accused person might have understood your explanation without his or her confirmation.

4.8 Plea

After you are sure that the accused understands the charge, take a plea. See s195 CPC.

An accused can plead:

guilty; or

not guilty; or

one of the “special” pleas, e.g. autrefois acquit (previous acquittal).

Where the accused is represented, a plea by Counsel is acceptable.

Ask the accused whether the charge is true or not. If the accused says it is true:

ask the prosecution to read a brief summary of the facts;

tell the accused to listen very carefully to this. Explain that he or she will be asked at the end whether the facts are true;

after the prosecution has read the facts, ask the accused whether they are true or not.

If the accused admits the truth of the facts, this will suffice as a plea of guilty. You then:

record his or her admission as nearly as possible in the words used by him or her;

convict him or her; and

pass sentence or make an order against him or her (either immediately or at a later date).

If the accused admits the truth of the charge, but makes some remarks or comments, you must listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this if the accused is unrepresented.

If the accused disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence. Note that a plea of guilty is a plea to the elements of the charge not necessarily acceptance of the Police summary of facts. If the facts in dispute are not relevant to the elements, enter a plea of guilty.

If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the accused may amount to a defence, you must enter a plea of not guilty for the accused.

For example, on a charge of malicious damage, one of the elements is actual damage to property. If the accused pleads guilty but disputes the amount of damage (e.g. the prosecution alleges 10 glasses were damaged and the accused says only 3 were damaged), then the element of damage is not disputed, just the amount. That is relevant to sentence, not guilt, and you should enter a plea of guilty.

On a charge of drunk and disorderly, one of the elements is the behaviour must be in a public place. If the accused admits to being drunk and disorderly, but it was in his friend's backyard, that is relevant and you should enter a plea of not guilty for the accused. It is then up to the prosecution to prove he was in a public place.

If the accused denies the charge, i.e. pleads not guilty, or if you enter a plea of not guilty for him or her, then:

proceed with the trial if all parties are ready and the matter can be dealt with quickly; or

ascertain the number of witness the parties intended to call at the trial so as to know the probable duration of the trial and set a date for the trial;

deal with bail/remand in custody, and summonses for witnesses if necessary; and

adjourn the matter.

Where the accused refuses to plead, a plea of not guilty should be entered: s195(4) CPC.

A plea should be clearly recorded on the charge sheet. Note whether he or she was represented by Counsel or not.

Fitness to plead

You will need to be conscious in particular cases of whether the accused is fit to plead.

The issue to be determined is whether the accused is under a disability.

An accused is under a disability if he or she cannot:

plead;

understand the nature of the proceedings; or

instruct Counsel.

Remand the accused in the custody of the Police and direct them to arrange a medical assessment and report.

See s144 CPC.

4.9 Guilty Plea – Next Steps

Entering conviction

The accused admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her: s195(2) CPC.

Convict the accused, enter this on the record and sentence (either immediately or adjourn for reports). You should never sentence a person without convicting him or her first.

If you are adjourning, consider bail/remand.

See Chapter 13 “Sentencing”.

4.10 Not Guilty Plea – Next Steps

Immediate hearing

Sometimes all parties are ready to proceed with a defended hearing (including witnesses). In this case, proceed to hear the matter or adjourn the case to later in the day.

Remands / bail after plea

If a plea of not guilty is entered:

remand the accused to a hearing date (ascertained from the Prosecutor, the accused's Counsel and your Court diary) and obtain an estimate of hearing time; or

release the defendant on bail on such condition or conditions that he or she attends trial at the date and time scheduled; and

record all of the above on the Court record.

Bail

See Chapter 10 "Bail".

If bail is granted, the terms, if any, should be noted carefully on the Court record.

Reasons must be given for refusing bail.

Warrants of commitment

Ensure all warrants of commitment (remands in custody) are completed before you leave the Court for the day.

Any instructions to the Prison should be recorded on the warrant. For example, the accused is to be kept apart from adult prisoners, a need for medication or risk of self-harm.

Warrants/summons for witnesses to attend

On your own motion or on the application of a party, you may issue a summons for any person to appear as a witness, or to appear and produce any material evidence: s127 CPC; s60 MCA.

If you are satisfied by evidence on oath that a person will not attend unless compelled to, you may issue a warrant to ensure their attendance: s129 CPC; s60(2) MCA.

4.11 Adjournments

Before or during the hearing of any case, you have the discretion to adjourn the hearing to a certain time and place. You must state the time and place in the presence of the parties or their advocates.

In the meantime, the accused may:

go at large;

committed to prison; or

released upon entering into a recognisance, with or without sureties.

No adjournment shall be for more than:

30 days, if the accused is at large; or

15 days, if the accused is remanded in custody.

See s191 CPC.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

the interests of the accused to a fair trial;

the interests of the public in ensuring efficient prosecutions;

the reasons for the adjournment;

any fault.

Palmer J stated in *Tatau v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 289 of 1992), that “discretionary power must be exercised in such a way as to ensure that the accused has a fair trial according to law”.

Cases offering guidance include:

Carryer v Kelly (1969-1970) 90 WN (Part 1) NSW 566;

R v Maher [1987] 1 QdR 171;

Appleton v Tomasetti (1983) 5 ALR 428;

R v Swansea Justices & Davies, Ex parte DPP (1990) 154 JPR 709: "The power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the Court shall have the best opportunity of giving the fairest available hearing to the parties".

4.12 Accused is a Corporation

If the accused is a corporation, it may appear by its representative as long as they are appointed to represent it. Ask the person appearing if they are so authorised.

If written authority is produced, place original or photocopy of it on the Court file. In any event, obtain the name and status of the person and endorse it on the charge sheet:

"Accused represented by _____. Is Director/ Managing Director/Secretary etc. States has been duly appointed by accused to represent it"

or

"See written authority on file".

10: BAIL

1 Jurisdiction

A Magistrate's Court has jurisdiction to grant bail except when the accused is charged with treason or murder: s106 CPC.

An accused charged with murder or treason must be brought before a Magistrate's Court as soon as practicable: *R v Baefaka* [1983] SILR 26 at p29 per Daly CJ. You must remand any accused charged with murder or treason in custody. The accused may then make an application to the High Court.

There is a presumption that an accused is innocent until proved guilty and, therefore, an accused is prima facie entitled to bail. See:

s10(2)(1) Constitution – right to personal liberty;

s5(3)(b) Constitution;

R v Perfili (Unrep. Criminal Case No 30 of 1992) per Muria ACJ at p3 – “The common law presumption of innocence is embedded under the Constitution of Solomon Islands and it is done without qualification.... Thus prima facie, an accused person is entitled to bail”;

John Mae Jino & John Gwali Ta ari v R (Unrep. Criminal Appeal Case No. 72 of 1999) per Palmer J at p1 – “Bail is a right protected by law (section 106 of the Criminal Procedure Code). The granting of bail by the Court however is discretionary. That means it is not to be unreasonably withheld”;

Wells Street Magistrates Court; *Ex parte Albanese* (1982) 74 CrAppR 180; [1981] 3 AllER 769 per Ralph Gibson J at p187 – “The public duty of the Court is to grant bail unless, inter alia, it considers that there are substantial grounds for believing that the accused would fail to surrender to custody”.

The prosecution must satisfy you on the balance of probabilities that an accused should not be granted bail.

See ss20, 23 and 106 CPC, which set out the requirements for bringing an accused before the Court for bail consideration.

See also s107 (recognisance of bail); s108 (discharge from custody); s109 (deposit instead of recognisance); s110 (power to order sufficient bail when that first taken is insufficient); s111 (discharge of sureties); s112 (death of surety); s113 (persons bound by recognisance absconding may be committed); s114 (forfeiture of recognisance); s115 (appeal from and revision of orders); and s116 (power to direct levy of amount due on certain recognisances).

2 Relevant Factors

There are a number of factors relevant to the grant of bail. These include:

the protection of the right to personal liberty contained in s5 Constitution;

whether the accused will abscond while on bail;

the nature and circumstances of the offence charged, including the possibility of a sentence of imprisonment;

the weight of the evidence against the accused, bearing in mind the presumption of innocence contained in s10 (2)(1) Constitution;

the history and characteristics of the accused, including character, physical and mental condition, family ties, employment, financial resources, length of residence in community, community ties, past conduct, criminal history and record concerning appearances at court proceedings;

whether at the time of the current offence or arrest, the accused was subject to a sentence or awaiting trial;

the nature and seriousness of any possible danger to any person or the community if the accused is released;

whether the accused will interfere with prosecution witnesses and Police investigation;

the possibility of a repetition of the offence or of further offences;

any danger posed by the accused to the alleged victim;

the accused's record of past convictions and any evidence indicating prior failure to appear for scheduled Court hearings;

the length of any delay;

the family needs of the accused..

Some relevant case law follows:

Absconding

R v Kong Ming Khoo (Unrep. Criminal Case of 1991) per Ward CJ at p3:

“The principal consideration in all bail applications is whether the accused will attend his trial”

Also see R v Dickson Maeni (Unrep. Criminal case No. 117 of 1999) per Palmer J at p2.

Nature of accusation/seriousness of alleged offence

See:

R v Philip Tagea, Amos Teikagei & Damaris Teikagei (Unrep. Criminal Case No. 14 of 1995), Palmer J at p1;

R v Perfili (Unrep. Criminal Case No. 30 of 1992), Muria CJ at p2;

R v Phillips (1947) 32 CrAppR 47.

The nature of the evidence to be adduced

See:

R v Kong Ming Khoo (Unrep. Criminal Case No. ... of 1991), Ward CJ at p3;

R v Philip Tagea, Amos Teikagei & Damaris Teikagei (Unrep. Criminal Case No. 14 of 1995), Palmer J at p1;

R v Perfili (Unrep. Criminal Case No. 30 of 1992), Muria CJ at p2;

R v Phillips (1947) 32 CrAppR 47.

The severity of the punishment which conviction would entail

See:

R v Kong Ming Khoo (Unrep. Criminal Case No. ... of 1991), Ward CJ at p3:

"I must also bear in mind that the nature of the offence and the penalty if convicted raise a prima facie risk the accused may try to avoid the trial."

See also:

R v Philip Tagea, Amos Teikagei & Damaris Teikagei (Unrep. Criminal Case No. 14 of 1995), Palmer J at p1;

R v Perfili (Unrep. Criminal Case No. 30 of 1992), Muria CJ at p2;

R v Phillips (1947) 32 CrAppR 47.

Whether the accused will interfere with prosecution witnesses and Police investigation

In R v Perfili (Unrep. Criminal Case No. 30 of 1992), at pp 2 and 4:

“Although I am satisfied that if the applicant is released on bail he will not abscond there are other factors that this Court is entitled to consider.

One of these and the main one raised by Prosecution is the possibility of tampering with evidence and interference with prosecution witnesses and investigation.....

It is obviously in the interests of justice that police are allowed the opportunity to investigate all avenues and sources, links and persons properly and that no possibility of interference is permitted.”

See also:

R v Kong Ming Khoo (Unrep. Criminal Case No. ... of 1991), Ward CJ at p3;

R v Philip Tagea, Amos Teikagei & Damaris Teikagei (Unrep. Criminal Case No. 14 of 1995), Palmer J at p2;

R v Dickson Maeni (Unrep. Criminal Case No. 117 of 1999), Palmer J at p2;

The State v Tohian [1990] PNGLR 173 at pp177-178.

However an accused should not be held in custody only on the basis that the arresting or investigating officer needs to finalise his or her investigation: see Peter Hou v The Attorney-General [1990] SILR 88 at pp 90-91.

The possibility of a repetition of the offence or of further offences

See R v Kong Ming Khoo (Unrep. Criminal Case No. ... of 1991), Ward CJ at p3.

See R v Phillips (1947) 32 CrAppR 47 at p48:

“Some crimes are not likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and house-breaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it.”

The length of any delay

In R v Perfili (Unrep. Criminal Case No. 30 of 1992), Muria CJ held at p2:

“The question of delay in bringing an accused person to trial is a relevant factor to be taken into account in considering bail applications. I feel it is particularly important that the liberty of an accused person must be borne in mind in order to minimize any delay in bringing an accused person to trial.”

In R v Philip Tagea, Amos Teikagei & Damaris Teikagei (Unrep. Criminal Case No. 14 of 1995), Palmer J held at p2:

“The accused has spent a better part of his time in custody and now that a trial date has been fixed not more than a month away, it needs to be shown that further remand in custody until that time taking all relevant matters into account would be prejudicial to this accused’s interests.”

The family needs of the accused

In R v Philip Tagea, Amos Teikagei & Damaris Teikagei (Unrep. Criminal Case No. 14 of 1995), Palmer J held at p3:

“It has not been shown that his wife and children urgently need him; that if he is not released on bail that something drastic will happen to them.”

3 Information to Support Bail Grounds

The prosecution must provide grounds for their opposition to bail.

The following table sets out what information may be needed to support various grounds.

Nature of the risk Information needed for assessment

Absconding Fixed address

Community ties

Employment history

Seriousness of the offence

Strength of evidence

Probable outcome

Possibility of surety (or security)

Bail history

Commission of further offences Previous convictions

Present situation- alleged offending while on bail?

Present Court orders – in breach? complying?

Interference with witnesses Nature of present offence

Relationship of witnesses to accused

Vulnerability of witnesses

Expressed threats

Past interference with witnesses

Danger to victim Nature of present offence

Relationship of victim to accused

Vulnerability of victim

Expressed threats

Difficulty in preparing report Likelihood of absconding

Accused's mental health, attitude

Physical/geographical constraints

Bail Procedure

An accused who is arrested or detained must be brought without undue delay before the Court: s5(3) Constitution; s20 CPC.

Ch 10 Bail Procedure

Where the hearing is to be adjourned you may either:

allow the accused to go at large;

grant the accused bail;

remand the accused in custody for the period of the adjournment (which shall not be more than 15 days): s191 CPC.

Ask the Police whether they wish to oppose bail. Hear from the prosecution first, then the accused. Evidence may be called if necessary.

If you refuse bail, you must give reasons. Ensure that your reasons are recorded.

If bail has been refused by another Magistrate, and the accused later makes further application, you should refer it to that Magistrate, if available.

If the original Magistrate is not available, in order for you to hear the application the accused must demonstrate a change in circumstances or fresh grounds. If this can not be done then an appeal is the appropriate way to challenge the decision.

5 Conditions

If you grant bail it must be to a particular date. In addition, you may impose further conditions of release, such as:

reporting to Police at such time(s) and place(s) as ordered;

any other condition considered reasonably necessary to ensure that the accused:
appears in Court on date to which remanded;
does not interfere with any witness or evidence; and
does not commit any offence while on bail.

Note any conditions you impose as precisely as possible. Examples are:

“Not in any way to associate with ()”;

“Not in any way to communicate directly, or through any other person, with () during the remand period”;

“To reside at (address)”;

“To surrender passport to the Police”;

“To be within address between 7.00 p.m. and 7.00 a.m. daily”;

“To report to Police (time and place)”.

On any breach of a condition of bail, an accused may be brought back to Court and a warning noted, or bail cancelled or varied.

In *R v Perfili* (Unrep. Criminal Case No. 30 of 1992), Muria CJ held at pp 3-4:

“The common law presumption of innocence is embedded under the Constitution of Solomon Islands and it is done without qualification.... Thus, prima facie, an accused person is entitled to bail. However, the law also allows conditions to be put on the bail in order to secure the attendance of the accused at his trial. Once conditions are imposed on a bail granted, it is for the accused to show that those conditions do not apply to him and that he will attend at his trial.”

See also:

R v John Robu, Henry Faramasi, Lency Maenu & Peter Ka abe (Unrep. Criminal Case No. 29 of 1998), Palmer J at p2;

R v Dickson Maeni (Unrep. Criminal Case No. 117 of 1999), Palmer J at p2;

John Mae Jino & John Gwali Ta ari v R (Unrep. Criminal Case No. 172 of 1999), Palmer J at p2.

6 Young Persons

Special conditions apply to those under 18 years of age. See chapter 16 “Juvenile Offenders”.

7 Bail Judgment

Judgment should contain:

- The charges faced by the accused 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, briefly;
- an identification of the facts relevant to the case at hand;
- a conclusion as to whether bail is granted or refused.

8 Bail Remarks

Sometimes one or more of the following explanations can be included in your remarks to the accused:

- that if he or she fails to comply with any condition of bail, a warrant of arrest may be issued and he or she may be refused further bail and thus in custody until trial;
- that committing a crime while on release may lead to more severe punishment than he or she would receive for committing the same crime at any other time.

11: DEFENDED HEARINGS

1 Introduction

If an accused pleads not guilty, the case proceeds to a defended hearing, otherwise known as a trial.

1.1 Role of Prosecution

The duty of the person prosecuting (usually the Police) is to the Court. They must not mislead or deceive the Court. They must:

assist the Court to arrive at a conclusion which is in accordance with truth and justice; and place the case impartially before the Court, including all relevant facts.

The Police have two distinct roles, which you must be aware of:

The duty of Police as prosecutor is to present and argue the case for the prosecution.

When a Police officer is giving evidence as a witness, they are in no different position from anyone else coming before the Court. Their evidence is judged by the same standards as evidence from other sources – it is no more or less credible.

The prosecution must prove all elements of the offence beyond reasonable doubt.

1.2 Defence Counsel

A defence lawyer has a duty to the Court. They must not mislead or deceive the Court, but remember that their interests are those of the accused, and they are under no duty to be impartial.

2 Proving an Offence

2.1 Innocent Until Proved Guilty

One of the most important principles in criminal law is that the accused is innocent until proved guilty. Unless and until the prosecution proves that the accused is guilty of all the elements of the offence, he or she is innocent in the eyes of the law. You must always remember this.

2.2 Burden and Standard of Proof

The prosecution has the burden, or responsibility, of proving their case. They must prove all the elements of the offence, beyond reasonable doubt.

This is decided first when the prosecution concludes their case. If you decide that the prosecution has not proved all the elements of the offence beyond reasonable doubt, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at that stage, then the defence has a chance to present their case and again you must decide whether the prosecution has proved their case beyond reasonable doubt, taking into account what the defence has shown.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If the defence evidence casts a reasonable doubt on any of the elements, then the prosecution has failed.

Beyond Reasonable Doubt

This means you are sure the accused is guilty of the charge, and there is no doubt in your mind. If you are uncertain in any way, you must find the accused not guilty.

Lawful excuse

In some cases, once the prosecution has established facts to support all the elements, the burden of proof is then on the accused to satisfy the Court that he or she acted with lawful excuse, good reason or lawful justification. Examples are:

s140 Penal Code;

s143 Penal Code;

s146 Penal Code;

s348 Penal Code;

s356 Penal Code;

s357 Penal Code;

s358 Penal Code;

s359(1) and (2) Penal Code.

The standard of proof for the defence to prove this is not as high as the prosecution. They have to prove this “on the balance of probabilities”, which means that what the defence is seeking to prove is more likely than not.

3 Defended Hearing Procedure

Defended Hearing Procedure

Ch 11 Defended Hearing Procedure

The following outline applies where the accused is unrepresented. With necessary modifications, however, it also applies when the accused is represented.

Take care to fully advise the accused of the procedure to be followed and to accurately record the advice given to the accused.

The following steps should be followed:

Confirm plea

Before the hearing begins, it is usual to confirm the plea. Ensure this is recorded on the Court record.

In some cases where advice has been given, the plea may change to guilty. If this happens, convict the accused, enter this on the Court record and sentence (either immediately or adjourn for reports).

Exclude witnesses

Make an order for the exclusion of witnesses and record this.

Prepare accused for prosecution case

Request the accused to be seated at one of Counsel's tables and have your Clerk provide a pen and paper for note taking.

Explain:

the elements of the charge;

how the case will proceed;

the right to cross-examine witnesses.

Prosecution case: s196 CPC

The prosecution may make an opening statement.

The Prosecutor calls the witnesses individually to give evidence. If there is more than one, the other witnesses must not be present in Court, nor able to hear what is being said.

You must record this evidence: s182 CPC.

Once the prosecution have finished with each witness, invite the accused to ask questions (cross-examination). Record the accused's answer.

The prosecution may re-examine that witness if they feel it necessary to do so.

When the prosecution have called their final witness, that concludes their case.

After each witness has given evidence, excuse the witness from further attendance unless the parties object.

If you ask any questions of a witness after re-examination has concluded, you should ask the prosecution and the accused if there are any further matters raised by your questions, which they wish to put to the witness.

Without overdoing it, you must expect to have to help the accused from time to time during the hearing.

No case to answer: s197 CPC

The following applies whether the accused is represented or not.

At the close of the prosecution case, if you consider that a case is not made out against the accused sufficiently to require him or her to make a defence, dismiss the case and acquit the accused, with reasons.

A convenient test is found in the Practice Note at (1962) 1 All ER 448:

“A submission that there is no case to answer may properly be made and upheld: when there has been no evidence to prove an essential element in the alleged offence, when the evidence adduced by the Prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it ... if a submission is made that there is no case to answer the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer”.

If you decide that there is a case to answer announce:

“I find that there is a case to answer”.

Sometimes brief reasons are appropriate. Care should be taken to ensure that the accused does not feel that the case is already decided against him or her.

Defence case: s198 CPC

If the prosecution have made their case, the defence may or may not:

make an opening address;

call evidence and make submissions;

make a closing address.

Tell the accused:

“ You have three options:

You have the right to remain silent, but you have heard what the prosecution have said against you; or

You may make a statement from the witness box and will not be cross-examined by the prosecutor. However whatever you say will not be as worthy of belief as if it is made under oath because you have not promised to tell the truth and the truth about it has not been tested under cross-examination; or

You have the right to give evidence yourself by giving evidence on oath, in the witness box. If you do, you may be cross-examined by the Prosecutor. It is entirely a matter for you to decide. You are not obliged to give evidence, if you do not wish to do so.

Do you fully understand what I have said?

You also have the right to produce other evidence or call witnesses to give evidence on your behalf. Again, if they give evidence on oath in the witness box, they may be cross-examined by the Prosecutor. You are not obliged to call witnesses – it is entirely a matter for you to decide. Do you fully understand this?”

Record the fact that you have given this advice and that the accused has understood.

If the accused decides to give evidence, after she or he is sworn, say:

“State your full name, occupation and where you live. Now, slowly and clearly, tell the Court the evidence that you wish to give relevant to the charges you are facing”.

It is often helpful to lead the accused through the preliminary matters in order to help provide confidence for him or her to give their own account of the crucial event.

If reference to damaging evidence given by the prosecution is omitted, draw attention to it and enquire if the accused wishes to comment on it.

After the accused has been cross examined, ask:

“Is there any further evidence you wish to give arising out of the questions just put to you by the Prosecutor?”

Witnesses may be cross-examined and re-examined.

Evidence in reply: s199 CPC

If the accused adduces evidence introducing new matter which the prosecution could not have foreseen, you may allow the prosecution to adduce evidence in reply to rebut it.

Closing addresses: s200 CPC

If the defence has adduced evidence, the prosecution may address the Court: s200(2).

Then ask the accused:

“Are there any comments or submissions you wish to make on the evidence?”

Decision

After hearing all submissions on the law and the evidence:

give your judgment immediately, if straightforward; or

adjourn briefly to consider the matter or structure your decision and deliver it the same day;
or

reserve your decision, adjourn the matter to a later date for delivery.

See Chapter 12 "Judgment".

4 Minor Offences Procedure

Section 209 CPC provides a 'short' procedure for hearing minor offences.

A minor offence is one which has a maximum penalty of no more than \$100 fine, 6 months imprisonment, or both.

If the prosecution requests, you may deal with the offence in the following way (so long as the accused is at least 16 years old). The maximum penalty that you may impose under this procedure is a fine of \$10 (or one month imprisonment in default of payment).

Basically, the procedure is the same, except certain "shortcuts" may be made, as follows:

Recording evidence

It is enough for you to record the names of witnesses and take notes as you consider desirable.

Plea

Where the accused makes a statement admitting the truth of the charge, it is enough to simply enter a plea of guilty in the record.

Judgment

It is enough to record your finding and sentence or other final order. You do not have to record the points for determination and reasons.

However, it is a good idea to note your reasons briefly on the file because:

if requested by either party, you must record a sufficient note of any question of law and of any relevant evidence relating to it; and

you may be required by a Judge to give reasons in writing.

5 Non –Appearance

5.1 Accused Does Not Appear

Where the accused was summoned, check whether the accused has been served a reasonable time before the hearing. There should be proof of service. If there is no proof that the summons has been served a reasonable time before the hearing, then adjourn for a reasonable time to allow the prosecution to serve, or to prove service.

If the accused has been arrested and bailed by Police, check the Police bail form to ensure that the accused signed the bail form and was bailed to the appropriate date before continuing.

If the offence charged amounts to a felony and you are satisfied that the accused has failed to obey summons or breach his bail conditions, you may order a warrant for his arrest and adjourn the hearing: s192 CPC.

If:

the offence charged does not amount to a felony; and

you are satisfied that the accused has failed to obey a summons or breached bail conditions; and

his or her personal attendance has not be dispensed with under s86 CPC,

you may proceed to hear and determine the case in the absence of the accused, provided he or she has consented to it: s188 CPC.

If, after an adjournment, the accused does not appear before the Court which made the order of adjournment, the Court may proceed with the hearing if the offence charged does not amount to a felony.

5.2 Prosecution Does Not Appear

If the prosecution does not appear, you may:

dismiss the charge (which is not a bar to further proceedings); or
adjourn the hearing on conditions as you think fit: s187 CPC.

If you adjourn the hearing:

release the accused on bail; or

remand him or her in custody; or

take such security for his or her appearance as you think fit: s187(1) CPC.

The issue of costs in favour of the accused may also be considered: ss153 and 192(1) CPC.

5.3 Witness Does Not Appear

If a witness has been summons and fails to appear, without a satisfactory excuse, he or she is guilty of contempt of Court and you may issue a warrant of arrest to compel his or her attendance: s61 CPC.

6 Amending the Charge

If at any stage before the close of the prosecution case, it appears that the charge is defective in substance or form, you may make an order for the alteration of the charge, either by:

amending it;

substituting one charge for another; or

adding a new charge: s201 CPC.

You must:

clearly explain the difference in the essential ingredients of the former charge and the altered charge;

put the amended charge to the accused and take a plea;

allow the accused to recall witnesses to give their evidence afresh or be further cross-examined (and be re-examined by the prosecution).

You may adjourn the hearing if:

you think the accused has been misled or deceived; or

either party requests more time to prepare a case on the altered charge.

Make sure you record the amendment of the charge and the plea.

If the amended charge is heard by you, evidence already given on the original charge is deemed to have been given for the purposes of the amended or substituted charge, but with rights for further examination, cross examination or re-examination if the amendment has substituted one charge for another.

Check whether the new charge falls within the time limits in s206 CPC.

Note that if the defect in the charge relates to the day on which the alleged offence was committed, this is immaterial and does not require an amendment.

7 Withdrawal of Complaint

The prosecutor may apply to withdraw the charge at any time before the final order is passed.

It is your duty to ascertain whether the grounds for the application to withdraw are reasonable. If not, you may exercise your discretion to refuse the application.

The time that the charge is withdrawn is important:

If it is withdrawn after the accused is called upon to make his or her defence, then you must acquit the accused. The doctrine of *autrefois acquit* or *autrefois convict* applies. This means that the accused may not be brought back to Court on the same set of facts under which he has been previously acquitted or convicted.

If it is withdrawn before the accused is called upon to make his or her defence, then you may either:

acquit the accused; or

discharge the accused. This means that the prosecution may recharge the accused at some later date.

Note that, if you find that there is no case to answer, s197 CPC requires that you acquit the accused.

In *DPP v Clement Tom* (1988/89) SILR 118, Ward CJ held:

“When the Magistrate is satisfied there should be withdrawal and it is before the accused has been called upon to make his defence, he must decide the appropriate order under subsection (2)(b). Where there is no evidence, or the wrong charge has been laid or the wrong person charged, the order should be one of acquittal. In all other cases, the appropriate order is one of discharge under (2)(b)(ii).”

If there is an outstanding warrant of arrest ordered pending execution the Magistrate ought to address the warrant of arrest first before proceeding to withdraw the complaint: *R v Solo Sade Cr. App. Case No 253/2001*, Judgment 19 September 2001.

8 Adjournments

Before or during the hearing of any case, you have the discretion to adjourn the hearing to a certain time and place. You must state the time and place in the presence of the parties or their advocates.

In the meantime, the accused may:

go at large;

committed to prison; or

released upon entering into a recognisance, with or without sureties.

No adjournment shall be for more than:

30 days, if the accused is at large; or

15 days, if the accused is remanded in custody.

See s191 CPC.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

the interests of the accused to a fair trial;

the interests of the public in ensuring efficient prosecutions;

the reasons for the adjournment;

any fault.

Palmer J stated in *Tatau v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 289 of 1992), that “discretionary power must be exercised in such a way as to ensure that the accused has a fair trial according to law”.

Cases offering guidance include:

Carryer v Kelly (1969-1970) 90 WN (Part 1) NSW 566;

R v Maher [1987] 1 QdR 171;

Appleton v Tomasetti (1983) 5 ALR 428;

R v Swansea Justices & Davies, Ex parte DPP (1990) 154 JPR 709: “The power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the Court shall have the best opportunity of giving the fairest available hearing to the parties”.

12: JUDGMENT

1 A Structured Approach to Defended Criminal Cases

Decision making is a process of applying particular facts to the relevant law.

You must adopt a judicial approach, which will divert you from reaching conclusions before all the evidence and arguments have been placed before you.

The way to do this is to employ a structured approach.

There are three tasks:

1. To be clear what the defendant is charged with and all the essential elements of the offence/s:

For the defendant to be found guilty, every element of the offence must be proven beyond reasonable doubt. It is vital that you are clear about the elements that must be proved.

2. To determine what the facts of the case are – what happened, what did not happen:

The defendant is presumed to be innocent and the prosecution must prove that he or she is guilty. This is done by reference to the evidence produced.

This may involve assessment of the credibility of witnesses and the reliability of their evidence.

3. To make your decision:

This is done by applying the facts to the law.

You must make the decision. Under no circumstances should you ask anyone else to decide the matter.

2 Note Taking

A suggestion is to note each element of the charge on a separate sheet of paper. As the evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision.

3 Delivering your Judgment

See ss150 – 152 CPC.

You must deliver your judgment in every trial in open Court, either immediately after the termination of the trial or at some subsequent time. You may simply explain the substance of the judgment, unless either party requests the whole judgment to be read out.

If you reserve your decision to a later date, you must notify the parties when your judgment will be delivered.

The accused person should be present when you deliver your judgment.

Every judgment must be written in English and contain:

the offence of which, and section of the Penal Code or other Act under which, the accused person is charged;

the point or points for determination (the issues);

the decision on each of those points; and

the reasons for your decision.

In the case of an acquittal, you must direct that the accused person be set at liberty.

In the case of a conviction, include the sentence either at the same time or at a later date, as appropriate.

Sign and date the judgment in open Court at the time you deliver it.

Note, however, that if the accused pleads guilty, your judgment need only contain the finding and sentence or other final order.

3.1 Judgment Format

The format on the following page is a useful format for making and delivering your decision. This must be applied to each charge.

It is a good idea to have the 'losing' party in mind when giving your reasons – make sure you address all their evidence and submissions thoroughly.

Criminal Judgment Format

Introduction

What the case is about.

What is alleged by the prosecution in the summary of facts.

The law

What must be proved beyond reasonable doubt.

The elements of the offence.

The facts not in dispute

The facts that are accepted by the defence.

The elements that those accepted facts prove.

The facts in dispute

The facts that are disputed by the defence. These are usually the issues (points for determination) in the case.

Your finding of the facts, with reasons. Which evidence you prefer and why.

Apply the facts to the law

Apply the facts as you have found them to the elements of the offence.

Do the facts prove all the essential elements?

Deliver your judgment

This will be conviction or acquittal.

Structure your judgment before delivering it.

Make sure you give adequate reasons and that the parties understand.

Orders

Pronounce any orders as to costs, return of exhibits, etc.

13: SENTENCING

1 Introduction

At the end of a trial, after you have heard and considered all the relevant evidence, you must sentence the offender to an appropriate sentence without delay.

Remember that a person charged and found guilty of an offence has the right not to be sentenced to a more severe punishment than was applicable when the offence was committed.

2 Jurisdiction

Although you may hear and determine offences carrying a maximum sentence of 14 years, you cannot exceed your sentencing jurisdiction. Therefore, while you may decide that an accused is guilty of an offence for which the maximum sentence is 14 years, you will not be able to sentence the offender to 14 years imprisonment because the sentence exceeds your jurisdiction.

Principal Magistrates

A Principal Magistrate has jurisdiction to impose a sentence of up to:

5 years imprisonment; or

\$1,000 fine; or

both: s27(1) MCA; ss7 and 8 CPC.

First and Second Class Magistrates

Both First and Second Class Magistrates have jurisdiction to impose a sentence of up to:

one year imprisonment; or

\$200; or

both: s27(2) MCA; ss7 and 8 CPC.

Two or more offences arising out of the same facts

Any Magistrate may impose consecutive sentences for two or more offences arising out of the same facts, up to a total of twice their normal sentencing jurisdiction, that is:

in the case of a Principal Magistrate, 10 years imprisonment, or \$2,000, or both; and

in the case of First and Second Class Magistrates, two years imprisonment, or \$400, or both: s27(4) MCA; s9(2) CPC.

Court	Maximum imprisonment and/or fine	Maximum – 2 or more offences
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Principal Magistrate's Court	5 yrs and/or \$1,000	10 yrs and/or \$2,000
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First and Second Class Magistrate's Court	1 yr and/or \$200	2 yrs and/or \$400
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Maximum default periods

The term of imprisonment to be imposed in default of payment of a fine shall not exceed the maximum period provided below. See s26 Penal Code – Cap 26.

Imprisonment in default of payment:

Amount of fine	Maximum period of imprisonment in default
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Not exceeding \$2	7 days
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Exceeding \$2 but not exceeding \$4	14 days
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Exceeding \$4 but not exceeding \$20	6 weeks
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Exceeding \$20 but not exceeding \$80	2 months
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Exceeding \$80 but not exceeding \$200	3 months
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Exceeding \$200	6 months
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3 Sentencing Principles

There are four basic sentencing principles to be considered by the Court. These are:

Deterrence;

Prevention;

Rehabilitation; and/or

Retribution.

Deterrence

The punishment is designed to deter the offender from breaking the law again and be a warning to others not to do the same.

Prevention

Prevention relates to dealing with an offender so that he or she is strictly limited in the opportunity to offend during the period of punishment.

Rehabilitation

The penalty is selected so as to aid an offender to reform and not offend again.

Retribution

The punishment is for wrong-doing imposed on behalf of the community, to mark it's disapproval of the offence committed.

4 Sentencing Discretion

While limits of sentence are imposed upon the Court by legislation, the level of sentence in each case is a matter for you to decide. The level of sentence in a particular case must be just and correct in principle and requires the application of judicial discretion.

The judicial act of sentencing needs you to balance:

the gravity of the offence; and

the needs of the society; and

an expedient and just disposal of the case.

One of the most common criticisms of the Court is that sentences are inconsistent. Failure to achieve consistency leads to individual injustice. A means of ensuring consistency is to seek continuity in the approach to sentencing.

Although, there is no set or fixed formula in applying the principles, you may have to consider and assess the following factors when selecting the most appropriate penalty or sentence:

the purpose of the legislation;

the circumstances of the offence;

the personal circumstances of the offender; and

the welfare of the community.

On sentencing, either the accused or counsel may make submissions, but not both.

5 A Structured Approach to Sentencing

5.1 The Tariff

The first step in sentencing is to identify the tariff for the offence.

The tariff is the range within which sentences have been imposed for that offence.

The statutory maximum sentence is usually specified in the Penal Code or the relevant legislation.

You may be assisted in finding the suitable tariff by referring to:

guideline judgments from superior Courts;

sentences from other Magistrates' Courts for the same offence;

sentences for similar offences from overseas jurisdictions.

5.2 The Starting Point

Once the tariff has been identified, then choose a starting point.

The starting point is decided according to the seriousness of the offending.

5.3 Aggravating and Mitigating Factors

Next, the sentence is mapped out according to aggravating and mitigating factors.

Aggravating factors include:

the use of violence;

persistent offending;

damage to property;

age and vulnerability of victim;

value of property stolen;

premeditated acts;

danger to the public; and

prevalence.

Mitigating factors include:

guilty plea;

remorse;
reparation;
reconciliation;
young offender;
first offender;
provocation; and
no harm or minimal harm to person or property.

There are also a number of factors that float between these two categories, depending on the circumstances.

In these cases, you need to evaluate the weight to be given to each of them in terms of the appropriate sentence to be considered by the Court.

These include the following:

previous good character;
victim acquiescence;
political instability; and
responsible position.

5.4 Scaling to the Appropriate Sentence

Scaling means increasing the sentence to reflect aggravating circumstances, and decreasing it to reflect mitigating circumstances. This involves your own moral judgement and you may use your own knowledge and experience of affairs in deciding the issue.

Any discounts you give for certain factors are at your discretion, but must be reasonable and justifiable. You may consider reasonable reductions for the following:

time spent in custody; and
punishment meted out by other tribunals;

traditional or customary penalties; and

guilty plea.

5.5 Totality Principle

This is the final analysis stage of sentencing. When you impose a sentence, you must review the aggregate to ensure that the overall effect is just.

The totality principle requires you to look at the overall sentence and ask yourself whether the total sentence reflects the totality of the offending. Some obvious considerations include:

multiple counts;

serving prisoner;

concurrent /consecutive terms;

avoiding excessive lengths; and

suspending the sentence.

Having considered all the relevant mitigating and aggravating factors of the offending and the offender, and after determining the overall sentencing principles that you wish to apply, you will then arrive at what can be considered the proper sentence for both the offence and the offender.

It is good practice to give reasons for all decisions, and this is particularly important if the sentence you arrive at is substantially more or less than the normal sentence.

6 Sentencing Checklist

Sentencing is one of the most difficult areas of judicial discretion, so it is important to develop a systematic method of working. The following checklist provides a working guide and is not exhaustive:

Ensure that you have the fullest information:

full summary of facts;

latest record of previous convictions;

any special reports if applicable (welfare/medical/psychiatrist).

Do not sentence on important disputed facts:

if the dispute is over material issues, arrange a hearing of facts for sentencing purposes;

if the offender declines to have such a hearing, record this before proceeding further.

Analyse the information relating to the offence:

the nature of the charge including the maximum penalty;

the gravity of the particular facts of the case;

aggravating factors;

mitigating factors.

Consider the views of the victims and any public concerns as a reflection of the final decision taken:

Courts should take public opinion into account but not pander to it because it may be wrong or sentimental.

full recovery of complainant/compensation paid.

Account for any specific provisions relevant to the offender (juvenile/elderly/handicapped).

Account for principles or guidelines issued by superior Courts:

guideline judgments;

circular memoranda issued by the Chief Justice.

Determine which sentencing principle(s) apply/ies:

deterrence/prevention/rehabilitation/retribution/other.

Account for any mitigating or aggravating factors in respect of the offender and the offending.

Consider the totality of sentence imposed.

Deliver the sentence, with reasons:

Using the Sentencing Format below will ensure adequate justification for the sentence.

7 Sentencing Format

It is suggested that you use the format on the following page when delivering sentence:

Sentencing Format

The charge

The facts of the particular offending:

If there was a defended hearing, refer to the evidence.

If there was a guilty plea, refer to the prosecution summary of facts.

The defence submissions or comments on the facts of the offending

Comment on the offence, if relevant:

The seriousness of the particular type of offending.

Whether it is a prevalent offence.

Its impact upon the victim.

Note any statutory indications as to the type of penalty to be imposed

Identify the tariff and pick the starting point

The personal circumstances of the offender

Note any prior offending if relevant

How many offences?

How serious?

When committed?

Of the same kind?

Is there a current suspended sentence?

The offender's response to sentences in the past

Defence submission and any evidence called by the defence

The contents of any reports submitted to the Court

Your views summarising the mitigating and aggravating features

Scale, then consider the totality of the sentence

Pronounce sentence

Explain right to appeal

8 Types of Sentences

8.1 Imprisonment

A Court must impose a definite term of imprisonment that must not be more than the maximum term provided for in the statute which creates the offence and not more than the maximum you are empowered to pass: s24 Penal Code.

An offender liable to imprisonment may be sentenced to pay a fine in addition to or instead of imprisonment: s24(3) Penal Code.

Sentences of imprisonment should be served consecutive to existing sentences unless the Court orders the sentences to be concurrent: s24(4) Penal Code.

Ideally, imprisonment should only be considered when no other sentence is appropriate. However, given the limited sentencing options that exist, perhaps it is best to be guided by the following questions:

Is it necessary to impose a custodial sentence?

Is there a viable sentencing alternative available?

Can a shorter sentence be imposed? (remand the offender to consider appropriate sentence).

8.2 Fines

As a penalty, fines are sometimes regarded as:

a sufficient or convenient punishment for less serious offences; or

an appropriate penalty for offences that are criminal more in form than in nature.

The Court has discretion to fix a fine, but such fine cannot be more than the stipulated maximum. Of course, lesser fines than the maximum may be imposed: s25 Penal Code.

You may find there are some offences which impose a fine but do not state expressly the exact amount of that fine. In these situations, you are able to impose an unlimited fine, but the fine should not be excessive (s25(a) Penal Code) and must be within your sentencing jurisdiction.

Where the offender has been ordered to pay money, that money may be levied on his or her real and personal property by distress or sale under warrant: s25(d)(ii) Penal Code.

You may impose a term of imprisonment if an offender defaults on payment of a fine but you cannot exceed the maximum imprisonment period stipulated in the offence: s26(1) Penal Code.

You may commit an offender to prison in lieu of distress where the offender:

has no property whereon to levy the money; or

the property is insufficient to cover the fine: s30 Penal Code.

8.3 Compensation

Any person convicted of an offence may be ordered to make compensation to any person injured by his or her offence. Payment of compensation can be either in addition to or in substitution for any other punishment: s27 Penal Code.

8.4 Suspended Sentences

Any term of imprisonment for a term of not more than 2 years for an offence may be suspended for a period of not less than one year nor more than two years: s44(1) Penal Code. However this rule does not apply to any offence which involved the use or the illegal possession of a weapon: s44(2) Penal Code.

The period for which the sentence is suspended is called the “operational period” and you are obliged to warn the offender that should he or she re-offend with an offence punishable with imprisonment during the operational period, then the suspended term may become effective and the Court has power to intervene, reassess and change the suspended sentence: s45(1) Penal Code.

Although a non-custodial option, the suspended sentence is technically speaking a custodial sentence. Philosophically, you have already decided that the offender deserves a custodial sentence and then suspend the term to avoid sending him or her to prison.

You should not deliberately scale your sentence to result in one less than 2 years in order to suspend it.

8.5 Suspended Sentence Supervision Order

After convicting the offender on a suspended sentence, you may place a suspended supervision order which puts the offender under the supervision of an officer appointed for that purpose by the Court. Usually this is a probation officer. The time period of supervision must be stated in the order but cannot exceed the period of the suspended sentence: s47 Penal Code.

As part of the order, ensure you name the area in which the offender is to reside and the probation officer who is to supervise the offender's probation programme.

Once a suspended sentence supervision order is issued, you must fully explain the order to the offender and specify to him or her that any breach of the order entitles the Court to deal with him or her in any manner which he or she could have been dealt with if the offence had been committed anew.

8.6 Security for Keeping the Peace

An offender may, instead of or in addition to any punishment, be ordered to enter into his own recognisance, with or without sureties, to keep the peace and be of good behaviour for a period not exceeding two years: s32(1) Penal Code.

In cases such as assault, you may bind over both the complainant and the offender, with or without sureties, to keep the peace and be of good behaviour for a period not exceeding one year: s32(2) Penal Code.

8.7 Absolute and Conditional Discharges

You may use your discretion and discharge the offender, either absolutely or with conditions:

- if the person has been found guilty of an offence;
 - if the offence charged does not have a sentence fixed by law;
 - if the circumstances of the offence are of a minor nature;
 - if it is inexpedient to inflict punishment; and
- having regard to the character of the offender: s35 Penal Code.

8.8 Police Supervision

Police supervision may be ordered against the offender where he or she:

- is convicted of an offence punishable for an imprisonment term of three years or more; and

is again convicted of offence punishable with an imprisonment term of three years or more.

Police supervision should not exceed five years and ceases if the conviction is set aside on appeal.

The Chief Justice may make rules for carrying out the provisions of this section: s40(5) Penal Code.

8.9 General Punishment for Misdemeanours

Where the Penal Code does not specify any punishment for misdemeanours, they shall be punishable with a term not exceeding two years or with a fine or both: s41 Penal Code.

8.10 Obligation to Inform of Right of Appeal

You must inform the offender of the right to appeal at the time you pass sentence: s283(2) CPC.

8.11 Further Sentencing Information

Further information on sentencing and procedure for sentencing can be found at Part VI Penal Code, ss187-209 CPC and s27 MCA.

14: APPEALS AND REVISIONS

1 Appeals from the Magistrate's Court

1.1 Introduction

The Magistrates' Courts Act provides that appeals may lie from the Magistrate's Court to the High Court in both civil and criminal cases.

Civil Cases

All final judgments and decisions and interlocutory orders and decisions can be appealed from the Magistrate's Court to the High Court, as long as the appellant has fulfilled the conditions:

imposed by the Magistrate's Court; or

imposed by the High Court; or

as prescribed by Rules of Court.

The High Court is also given discretionary power to hear an appeals in civil cases if the Court thinks it just.

Criminal Cases

Appeals shall lie to the High Court from the Magistrate's Court in accordance with provisions in the CPC and any Rules of Court made under s90 Constitution.

Part IV of the CPC sets out that appeals from the Magistrate's Court to the High Court can be made by way of:

petition of appeal, under s283; or

case stated, under s298.

No person who has appealed under s283 shall be entitled to have a case stated and no person who has applied to have a case stated shall be entitled to an appeal under s283: s306 CPC.

1.2 Appeals by Petition: s283 CPC

Any party to a criminal matter who is dissatisfied with any judgment, sentence or order of a Magistrate's Court may appeal to the High Court against such judgment, sentence or order.

The appeal may be on a matter of fact as well as a matter of law. For the purposes of appeals, the extent of sentencing is considered a matter of law.

Limitations

In some cases, appeals from the Magistrate's Court to the High Court will be limited. These limitations are:

1. No appeal shall be allowed in cases where the accused has pleaded guilty and has been convicted of such a plea by the Magistrate's Court s284(1). Note that the only exception is that the extent and legality of the sentence imposed by the Magistrate's Court may be appealed in this case.
2. No appeal shall be allowed where the Magistrate's Court has passed a sentence of a fine not exceeding \$10 and with no substantive prison sentence, unless they have the leave of the High Court: s284(2).
3. If a sentence or conviction is not normally open to appeal, it cannot be made appealable merely on the grounds that the person convicted is ordered to find security to keep the peace: s283(4).
4. No appeal shall lie against an order of acquittal by the Magistrate's Court unless the Director of Public Prosecutions sanctions such an appeal: s183.

1.3 Procedure for Appeal by Petition

Every appeal shall be made in the form of a petition in writing signed by the appellant or his or her advocate. The petition shall:

be presented to the Magistrate's Court within 14 days from the date of the decision being appealed against; and

contain the grounds upon which it is alleged that the Magistrate's Court erred: s285 CPC.

In order to prepare a petition of appeal, a person entitled to appeal, or his or her advocate, shall be entitled to look at the original record of proceedings at such time as the Clerk of Court or Magistrate may allow: s286(8) CPC.

Once you have received the petition of appeal, forward the petition and the record of proceedings to the Registrar of the High Court: s287 CPC.

When the High Court has received the petition of appeal and the record of proceedings, it may:

summarily dismiss the appeal because there are not sufficient grounds for an appeal; or

accept the petition to appeal and schedule a hearing: ss288 & 289 CPC.

Upon hearing the appeal, the High Court may:

confirm, reverse or vary the decision of the Magistrate's Court;

remit the matter back to the Magistrate's Court after giving its opinion;

take additional evidence or direct the Magistrate's Court to do so. If additional evidence is taken by a Magistrate's Court, the Court shall certify it to the High Court, who will proceed to dispose of the appeal: s294 CPC;

make such order as it may seem just;

exercise any power which the Magistrate's Court might have exercised;

change a sentence; or

impose a sentence if the appeal is against a conviction alone and no sentence has been passed by the Magistrates Court because the appellant was committed to the High Court for sentencing under s. 208 CPC prior to the presentation of an appeal: s293 CPC.

After the High Court has decided an appeal, it shall:

certify its judgment; or

order it to the Court from which the judgment, sentence or order was appealed from. The Magistrate's Court must then make orders that conform to the judgment set out by the High Court and take steps to enforce the judgment: s297 CPC.

Unrepresented parties

When you convict a person who is not represented by an advocate, you must inform the person of his or her right to appeal at the time sentence is passed: s283(2) CPC.

If an appellant is not represented by an advocate, the petition may be prepared by or under your direction: s286(2) CPC.

If the appellant is in prison custody and not represented by an advocate, the petition may be prepared by the officer in charge of the prison and then forwarded to the Magistrate's Court: s286(3) CPC.

Extending the time to lodge an appeal

The Magistrate's Court or the High Court can extend the period of time to lodge an appeal if there is good cause. Good cause includes:

a case where the advocate engaged by the appellant was not present at the hearing before the Magistrate's Court and therefore requires more time for preparation of the petition;

any case in which a question of law is unusually difficult;

a case where an the sanction of the Director of Public Prosecutions is required for an appeal against an order of acquittal: s285 CPC.

1.4 Appeals by Cases Stated

After the hearing and determination by any Magistrate's Court of any summons, charge or complaint, any party to the proceedings who is dissatisfied with the determination may apply to that Magistrate's Court to state and sign a special case for the opinion of the High Court.

The party must be dissatisfied with the determination because:

they believe it to be erroneous on a point of law; or

they believe it is in excess of the Magistrate's Court's jurisdiction: s298(1) CPC.

In order to have a case stated, the party must apply in writing within one month from the date of the Magistrate's Court's determination: s298(1) CPC.

Upon receiving the application, draw up the special case and give it to the Registrar of the High Court along with:

a certified copy of the conviction, order or judgment appealed from; and
all documents alluded to in the special case: s298(2) CPC.

A case stated by you shall set out:

the charge, summons, information or complaint;

the facts found by the Magistrate's Court to be admitted or proved;

any submission of law made by or on behalf of the complainant during the trial or inquiry;

any submission of law made by or on behalf of the accused during the trial or inquiry;

the finding, or sentence of the Magistrate's Court; and

any question or questions of law which you or any of the parties, or the Director of Public Prosecution, want submitted to the High Court for their opinion: s307 CPC.

Once the Registrar of the High Court receives the stated case, they shall set down the case for hearing and give notice to the parties about when and where the hearing will take place.

The High Court may, if it thinks fit, increase the time limit for the appellant to apply to the Magistrate's Court for a case stated, or increase the time for the appellant to apply to the High Court for a rule after a Magistrate has refused to state a case.

The High Court shall hear and determine the question or questions of law arising on the case stated. They have the power to:

cause the case to be sent back to the Magistrate's Court for amendment or restatement;

remit the case to the Magistrate's Court for rehearing and determination with such directions as it thinks necessary;

reverse, affirm or amend the determination in regards to which the case has been stated;

remit the matter to the Magistrate's Court after giving their opinion in relation to the matter;
and

make an order as to costs.

The orders of the High Court shall be final and binding on the parties.

Refusal to state a case

You may refuse to state a case only if you are of the opinion that the application is frivolous. If you refuse to state a case, you must sign and deliver a certificate of refusal on the request of the appellant: s301 CPC.

You cannot refuse to state a case when the application is made to you by, or under the direction of, the Director of Public Prosecutions, even if the case to be stated is reference to a proceeding where the Director of Public was not a party: s301 CPC.

If you have refused to state a case because you determine the application is merely frivolous, the appellant may apply to the High Court for a rule calling upon you and the respondent to show why the case should not be stated. The appellants must:

apply within one month of such a refusal; and

apply on an affidavit of facts.

The High Court may make such a rule or they may discharge it. If you are served with such a rule, you must state the case accordingly: s302 CPC.

Note that Magistrates who state a case, or refuse to state a case, shall not be liable to any costs with respect to an appeal by case stated: s303 CPC.

2 Appeals to the Magistrate's Court

Any person aggrieved by any order or decision of a Local Court may, within thirty days from the date of such order or decision, appeal to the Magistrate's Court having jurisdiction in that area: s28 Local Courts Act (LCA).

A Magistrate may require the aid of any person or assessor he or she thinks fit in order to hear and determine an appeal: s29 LCA.

In exercising your appellate jurisdiction, you may

make any order or pass any sentence that the Local Court could have in such a matter; or

order the matter to be reheard before the Local Court or before any other Local Court: s29 LCA.

3 Revisions by the High Court

3.1 Monthly List of Criminal Cases

At the end of every month, you must send to the Chief Justice, or to a Judge the Chief Justice has appointed, a complete list of all criminal cases decided by or brought before you during that month: s46 MCA.

The list of criminal cases must set out:

names, sex and age of each defendant;

the offence with which he or she was charged;

the defendant's plea;

whether the defendant was convicted and the date of the conviction; and

the sentence or order in full: s46 MCA.

3.2 Action to be Taken by a Judge

Once the list of criminal cases is received, the Judge receiving them may call for a copy of the record of any case. Either with or without seeing the record of the case, or with or without hearing the case, the Judge may:

impose, reduce, enhance or alter the nature of any sentence provided that:

no sentence shall be imposed which the Magistrate's Court could not have imposed; and

no order shall be made which prejudices a person unless he or she has had an opportunity of being heard, either personally or by counsel or solicitor in his or her defence;

make, set aside, or modify an order;

set aside the conviction, upon which the person convicted will be freed or the fine paid will be refunded;

set aside the conviction of the Magistrate's Court and, on the evidence, convict the accused person of any offence which he or she has not been specifically acquitted and which he or she might have been convicted on, and sentence him or her accordingly;

set aside the conviction and substitute a special finding that the person convicted was guilty of the act or omission charged, but was insane so as not to be criminally responsible for his or her actions. The Judge shall order the person to be confined in a mental hospital, prison or other suitable place of custody;

set aside the conviction and order a new trial or preliminary inquiry before the Magistrate who made the conviction in question, or before any other Magistrate;

order further evidence to be taken, either generally or on some particular point, by the Magistrate who passed the sentence or by any other Magistrate; and

make such order as justice may require and give all necessary directions: s47 MCA.

A Judge may require any Magistrate to give a report of any civil or criminal case, in a manner the Judge prescribes and as he or she thinks fit: s48 MCA.

3.3 Limits to Revision

In cases where a person has appealed their conviction or the sentence passed according to s283 CPC or by way of case stated under s298 CPC, a Judge may not use the power of revision conferred under s47 MCA.

Note that s47 MCA does not allow a Judge or the Chief Justice to convert an acquittal into a conviction.

If no action is taken upon cases on the list for three months after the list is received, the Judge shall no longer have any power to act upon those cases.

4 Revisions by the Magistrate's Court

Every Magistrate shall have access to:

the Local Courts in his or her district at all times;

the records of such Courts: s27 Local Courts Act.

On an application by any person concerned, or on your own motion, you may:

revise any of the proceedings of the Local Court; and

make order or pass sentence that a Local Court itself could have in the same matter; and

order any case to be re-tried, either before the same Local Court or any other Local Court of competent jurisdiction at any stage of the proceedings: s27 LCA.

No sentence of fine or imprisonment or other sentence in criminal proceedings shall be increased without first giving the accused an opportunity to be heard: s27(a) LCA.

If you increase the sentence on revision, there shall be an appeal from your order of to the Chief Justice, who may reduce, remit or increase any such sentence: s27(a) LCA.

15: PRELIMINARY INQUIRIES

1 Introduction

A preliminary inquiry will be held if:

before or during the course of a trial in the Magistrate's Court, it appears to the Magistrate that the case should be before the High Court; or

before the commencement of the trial, the prosecution has made an application that the case be tried in the High Court: s207 CPC.

Purpose of a Preliminary Inquiry

The purpose of the preliminary inquiry is for the Magistrate to determine whether there is a sufficient case, or evidence or grounds, to put the defendant on his or her trial before the High Court. In this respect, the Magistrate's Court acts as a gatekeeper and prevents prosecutions which have insufficient evidence from proceeding to the High Court.

All the rules and procedures in respect to a preliminary inquiry are contained at s56, ss210-232 CPC. This chapter is not intended to replace that legislation and it is important that the rules contained in the CPC relating to preliminary inquiries are followed.

2 Role of the Magistrate

In a preliminary hearing, it is not the function of Magistrates to:

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 the Magistrate is:

“Would a judge, at the trial, convict the defendant on the evidence placed before us, if that evidence were uncontradicted?”

Preliminary Inquiries protect the accused from baseless charges because the Magistrate is required to discharge the accused in cases where there is not sufficient evidence to commit the person to trial by the High Court.

A fundamental principle in the English Common Law system, on which the Solomon Islands is based, is that when an accused is charged with a felony he or she must be made aware of the seriousness of the charge and the facts upon which the charge is based well before the trial starts. This advance knowledge is given to the accused in proceedings known as a preliminary inquiry: *R v Sethuel Kelly & Gordon Darcy* (Unrep. Criminal Case No. 2 of 1996).

3 Forms of Preliminary Inquiry

A preliminary inquiry, in either the long form or short form, will be held where a charge is brought against any person and where:

it is not triable by a Magistrate's Court; or

the Magistrate is of the opinion that it ought be tried by the High Court; or

an application has been made by the public prosecutor that the case be tried by the High Court: s211 CPC

3.1 The Short Form Preliminary Inquiry Process: ss211, 215, 216 CPC

You may commit a person directly to the High Court using the Short Form Preliminary Inquiry where:

you considerate appropriate to do so after looking at the circumstances of the case; and
an application has not been made to the contrary by the accused person, his or her advocate, or by the public prosecutor.

The Process

Reading over the Charge

You shall read over the charge and explain to the accused:

the charge; and

the purpose of the proceedings; and

that he or she will have the opportunity later on in the inquiry to make a statement if he or she chooses to.

Enter a Plea

The accused is then required to enter a plea and you must record the plea.

According to Practice Direction No. 1 of 1991 from Chief Justice Ward, a plea must be entered in a preliminary inquiry except under exceptional circumstances. If you are told that a plea is reserved, you must tell the defence counsel that they must give a plea to the High Court within 28 days.

If during the 28 day period, the defence counsel cannot obtain sufficient instructions from the accused as to a plea, the defence counsel must submit to the High Court, in written form, all the steps taken to obtain a plea and the reasons for not obtaining one.

Statements of Witnesses and Exhibits

After the plea has been entered, notwithstanding that the accused pleads guilty, not guilty or abstains from giving a plea, you shall require the prosecution to:

tender the statement of any witness whom they intend to call in proof at the trial;

tender any exhibit which they intend to produce at trial; and

read every statement of witnesses to the accused's advocate, or if unrepresented, to the accused.

Statement of the Accused

If you have considered the written statements of witnesses tendered by the prosecution and find that the statements disclose sufficient grounds for committing the accused to trial, you must:

ensure that the accused understands the charge;

ask the accused if he or she wishes to make any statement in his or her defence;

ask the accused if he or she wishes to make the statement on oath once they have chosen to make a statement; and

explain to accused that he or she is not bound to make a statement but if he or she choose to do so, the statement will become part of the evidence at trial.

If the defendant is unrepresented, you must address the defendant with words to the following effect:

"Having heard the evidence against you, do you wish to give evidence yourself or to call witnesses? If you give evidence yourself you may be cross-examined. You are not obliged to give or call evidence but if you do that evidence will be taken down and may be given against you at your trial. You should take no notice of any promise or threat that any person may have made to persuade you to say anything. If you do not give evidence in this Court, that fact will not be allowed to be the subject of any comment".

Everything that the accused person says, either by way of a statement or evidence, must be recorded in full and shown or read back to the accused so that he or she can explain or add to the statement if he or she wishes.

Once the accused has declared his statement has been truthfully recorded, you shall attest to and certify that the statement or evidence:

was taken in the presence and hearing of the accused; and

is the accurate and whole statement of the accused.

After you have attested to and certified the statement of the accused, the accused person shall sign or attest to it by signing or marking the record. If the accused refuses to sign, note his or her refusal and the record may be used as if he or she signed and attested to it.

Evidence and Address in Defence of the Accused

After the accused has made a statement or given evidence, ask him or her if he or she wants to call a witness in his or her own defence.

You will take the accused's witnesses evidence in the same manner as for the prosecution.

Each witness for the accused, who is not merely a character witness for the accused, shall be bound by recognisance to appear and give evidence at the trial of the accused person.

You may adjourn a preliminary inquiry and issue process to compel the attendance of witnesses for the accused when the accused states he or she has witnesses but:

they are not in Court;

their absence is not due to any fault or neglect of the accused person; and

the witnesses could give material evidence on behalf of the accused if they were present.

On the attendance of such witnesses for the accused, take their depositions and bind them by recognisance for the trial.

Accused or Accused's Advocate Addressing the Court

In a short form preliminary inquiry, the accused or his or her advocate may address the Court:

after the reading over of the statement of witnesses; or

after the statement or evidence of the accused person if no witnesses for the defence are called.

If the accused or his or her advocate does address the Court, the prosecution will have the right of reply.

Other Witnesses

Ask the accused if he or she intends to call any other witnesses at the trial that have not given statements at the preliminary inquiry. Do this when the accused either:

reserves his or her defence; or

at the conclusion of any statement in answer to the charge or evidence presented in the accused's defence.

Get the names and addresses of the witnesses that the accused wishes to call at the trial so that you can record the details and they can be summoned when the trial begins.

Make an Order on the Retention of Exhibits

See Chapter 7 "Evidence" for how to deal with exhibits.

Make Your Decision

You must decide whether there is enough evidence to commit the accused for trial or whether he or she should be discharged.

2.2 Long Form Preliminary Inquiry Process: ss212, 215, 216 CPC

The Process

Reading over the Charge

You shall read over the charge and explain to the accused:

the charge; and

the purpose of the proceedings; and

that he or she will have the opportunity later on in the inquiry to make a statement if he or she chooses to.

Enter a Plea

The accused is then required to enter a plea and you must record the plea.

According to Practice Direction No. 1 of 1991 from Chief Justice Ward, a plea must be entered in a preliminary inquiry except under exceptional circumstances. If you are told that a plea is reserved, you must tell the defence counsel that they must give a plea to the High Court within 28 days.

If during the 28 day period, the defence counsel cannot obtain sufficient instructions from the accused as to a plea, the defence counsel must submit to the High Court, in written form, all the steps taken to obtain a plea and the reasons for not obtaining one.

Statements on Oath of Witnesses (Depositions)

After reading over the charge and explaining the purpose of the preliminary inquiry, take down in writing the statements, on oath, of those who know the facts and circumstances of the case. Also have exhibits tendered by the prosecution at this point.

These statements on oath will be called depositions.

After each of the prosecution's witnesses give their statements on oath, the accused or his or her advocate may put questions to that witness.

If the accused does not have an advocate, you must ask the accused person if he or she wants to put any questions to the witness after the prosecution has examined him or her.

The witness's answers to the accused's questions will become part of the witness's deposition, so you should ensure that the answers are recorded.

After each statement of a witness is completed, it must be read back to him or her in the presence of the accused and corrected if necessary.

You must ensure that the statement is interpreted into a language the witness understands when it has been written down in a language different than how it was given and if the witness does not understand that language.

If any witness denies the correctness of any part of his or her statement when it is read back, do not correct the statement of evidence, but:

make a memoranda of the objection; and

add any remarks you think necessary.

Once the deposition of a particular witness is completed, you should ensure that it is signed and dated by the witness.

Statement of the Accused

If you have considered the examination of the witnesses called on behalf of the prosecution and find that the evidence discloses sufficient grounds for committing the accused to trial, you must:

ensure that the accused understands the charge;

ask the accused if he or she wishes to make any statement in his or her defence;

ask the accused if he or she wishes to make the statement on oath once they have chosen to make a statement; and

explain to accused that he or she is not bound to make a statement but if he or she choose to do so, the statement will become part of the evidence at trial.

If the defendant is unrepresented, you must address the defendant with words to the following effect:

“Having heard the evidence against you, do you wish to give evidence yourself or to call witnesses? If you give evidence yourself you may be cross-examined. You are not obliged to give or call evidence but if you do, that evidence will be taken down and may be given against you at your trial. You should take no notice of any promise or threat that any person may have made to persuade you to say anything. If you do not give evidence in this Court, that fact will not be allowed to be the subject of any comment”.

Everything that the accused person says, either by way of a statement or evidence, must be recorded in full and shown or read back to the accused so that he or she can explain or add to the statement if he or she wishes.

Once the accused has declared his statement has been truthfully recorded, you shall attest to and certify that the statement or evidence:

was taken in the presence and hearing of the accused; and
is the accurate and whole statement of the accused.

After you have attested to and certified the statement of the accused, the accused person shall sign or attest to it by signing or marking the record. If the accused refuses to sign, note his or her refusal and the record may be used as if he or she signed and attested to it.

Evidence and Address in Defence of the Accused

After the accused has made a statement or given evidence, ask him or her if he or she wants to call a witness in his or her own defence.

You will take the accused's witnesses evidence in the same manner as for the prosecution.

Each witness for the accused, who is not merely a character witness for the accused, shall be bound by recognisance to appear and give evidence at the trial of the accused person.

You may adjourn a preliminary inquiry and issue process to compel the attendance of witnesses for the accused when the accused states he or she has witnesses but:

they are not in Court;

their absence is not due to any fault or neglect of the accused person; and

the witnesses could give material evidence on behalf of the accused if they were present.

On the attendance of such witnesses for the accused, take their depositions and bind them by recognisance for the trial.

Accused or Accused's Advocate Addressing the Court

In a long form preliminary inquiry, the accused or his or her advocate may address the Court:

after the examination of witnesses on behalf of the prosecution; or

after the statement or evidence of the accused person if no witnesses for the defence are called.

If the accused or his or her advocate does address the Court, the prosecution will have the right of reply.

Other Witnesses

Ask the accused if he or she intends to call witnesses at the trial, other than those whose evidence has been taken under the above provisions, when the accused either:

reserves his defence; or

at the conclusion of any statement in answer to the charge or evidence presented in the accused's defence.

Get the names and addresses of the witnesses that the accused wishes to call at the trial so that you can record the details and they can be summoned when the trial begins.

Make an Order on the Retention of Exhibits

See Chapter 7 "Evidence" for how to deal with exhibits.

Make Your Decision

You must decide whether there is enough evidence to commit the accused for trial or whether he or she should be discharged.

4 Whether or Not There is a Case to Answer

A submission that there is no case to answer may be successfully made where:

no evidence has been presented to support an essential elements of the offence; or

the evidence presented is insufficient for a reasonable jury to find beyond a reasonable doubt that the defendant committed the offence.

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.

5 The Form of the Decision

5.1 Discharging the Defendant: s217 CPC

After considering the statement (short form) or examination (long form) of witnesses for the prosecution, and after hearing the evidence for the defence, if any, you may find that the case against the accused is not sufficient to put him or her to trial.

If the case is not sufficient to put the accused to trial, you must order him or her discharged on the particular charge. You must record the reasons for discharging the accused.

By discharging the accused, you do not bar any subsequent charge being brought against the accused on the same set of facts.

On dismissal of one charge, the Court may investigate any other charge that the accused person would have been summoned for, or is alleged to have committed, if:

if it is expedient to the interests of justice; and

nothing in the CPC prevents you from proceeding

DPP applying for committal after a discharge

In any case where you have discharged the accused in a preliminary inquiry, the DPP can require you to transmit to him or her the record of the proceedings.

If the DPP is of the opinion that the accused person should not have been discharged, he or she can apply to a Judge for a warrant of arrest and committal for trial of the accused.

If the Judge is of the opinion that the case that was presented to you was sufficient to put the accused on trial, it shall be lawful for the Judge to issue the arrest warrant and commit the accused to prison for his or her trial: s218(1) CPC.

An application by the DPP under this provision of the CPC cannot be made after 6 months has passed from the date of the discharge: s218(2) CPC.

5.2 Committing the Defendant for Trial

If you decide that the case against the accused is sufficient to put him or her to trial:

commit him or her to trial to the High Court; and

either admit him or her to bail or send him or her to prison: s219(1) CPC.

When the accused is committed for trial, you must inform him or her that he or she is entitled to a free copy of the statements of witnesses from a short form preliminary inquiry, or to the depositions of witnesses in a long form preliminary inquiry, at any time before the trial: s223.

Committing Corporations for Trial

If the accused is a corporation and you find there is a sufficient case to put to trial, you may make an order authorising the DPP to file an information against the corporation which will be deemed a committal for trial: s219(2) CPC.

Transmission of records to the High Court

Once the accused is committed for trial, you must transmit to the Registrar of the High Court the:

written charge;

statements or depositions of witnesses;

statement of the accused (if any);

summonses or recognisances of witnesses and the complainant;

recognisances of bail (if any); and

documents or things which have been produced as exhibits: s229 CPC.

Binding over Witnesses and Complainants to the High Court

Short Form Preliminary Inquiry

When the accused has been committed for trial upon a short form preliminary inquiry:

summon the witnesses whose statements were read over to the accused at the preliminary inquiry; and

bind the witnesses by recognisance to appear at the trial or any further examination relating to the charge, with or without sureties: s221(1)(a) CPC.

If the accused person has pleaded guilty to the charge against him or her in a short form preliminary inquiry., it will not be necessary to summon or bind witnesses unless the DPP or the Trial Judge requests that you do so: s221(1)(a) CPC.

However, nothing in this section will prevent an accused person who has pleaded “guilty” under s211(1)(b) from altering their plea to “not guilty” once he or she appears before the High Court: s221(2) CPC.

Long Form Preliminary Inquiry

When the accused has been committed for trial upon a long form P.I., bind every witness by recognisance to appear at trial or any further examination relating to the charge, with or without sureties: s221(1)(b) CPC.

Refusal to be bound over

If a person refuses to enter into a recognisance when he or she is required to do so under s221, you may commit him or her to prison or into the custody of any officer of the Court until:

after the trial; or

he or she decides to enter into a recognisance: s222 CPC.

Summoning and conditionally binding Over a witness

Short Form Preliminary Inquiry

When the accused is committed for trial and it appears unnecessary that a witness be bound over for trial after the reading of his or her statements to the Court, you may, notwithstanding s221 CPC,

refrain from summoning the witness; and

transmit to the High Court a statement in writing of the name, address and occupation of the witness who has not been summoned: s224(1)(a) , (c) CPC.

Long Form Preliminary Inquiry

When the accused is committed for trial and it appears unnecessary that a witness be bound over for trial after they have been examined, you may:

bind him or her over conditionally upon notice given to him or her if they have not already been bound over; or

direct that he or she will be treated as having been bound over conditionally, if the witnesses has been bound over already; and

transmit to the High Court a statement in writing of the name, address and occupation of the witness who is being treated as bound over conditionally: s224(1)(b) , (c) CPC.

Even though a witness may not be summoned or is conditionally bound under this section, you must inform the accused of his or her right to require the attendance at the trial of any witness, and of the steps the accused must take to enforce the attendance: s224(2) CPC.

Exhibits

Any documents or articles produced as exhibits by any witness whose attendance is deemed unnecessary under s224 CPC shall be:

marked as produced by such a witness;

retained by the Magistrates Court; and

forwarded to the High Court along with the statements or depositions of such witnesses: s224(3) CPC.

5.3 Summary Adjudication

If you decide, at the end or during the preliminary inquiry, that the offence is of such a nature that it falls within your jurisdiction, you may, subject to the other provisions of the CPC, hear the matter and either convict the accused or dismiss him or her.

If you have conducted a short form preliminary inquiry and found that the offence is in your jurisdiction, the witnesses for the prosecution must be called and evidence taken by them according to Part 5 CPC and the accused must be allowed to cross-examine them.

If you have conducted a long form preliminary inquiry and found that the offence is in your jurisdiction to determine, the accused shall be entitled to have the witnesses for the prosecution recalled for cross-examination or further cross-examination: s220 CPC.

6 Adjournments

You may adjourn the inquiry and warrant the remand of the accused to prison or other place of security for not more than 15 days at any one time, for:

absence of witnesses; or

any other reasonable cause.

If the remand is less than 3 days, order the officer or person who has custody of accused to keep him or her in their custody and then bring him or her to the Court for the continuation of the inquiry.

During a remand, you may order the accused to come before the Court at any time.

You may admit the accused to bail on a remand: s214 CPC.

7 Taking Depositions of Dangerously Ill Persons

You may take in writing, on oath or affirmation, the statement of any person who is:

dangerously ill or hurt;

not likely to recover; and

willing to give evidence relating to any offence triable by the High Court and when it is not practicable to take the deposition according to the way set out in other sections of the CPC.

You must then:

certify that the statement made by the dangerously ill person is accurate;

provide a statement of your own for why you have taken such a statement;

give the date and place of when and where the statement was taken and sign it; and

preserve the statement and file it for record: s225 CPC.

16: JUVENILE OFFENDERS

1 Introduction

The juvenile Offenders Act is an act which:

sets out special provisions to deal with children and young people who are alleged to have committed offences other than homicide; and

creates a separate Court in which Magistrates deal with juvenile offenders.

2 Who is a Juvenile?

The JOA deals with both children and young persons.

Child

A person who is under 14 years.

Young person

A person who is 14 years or more and under 18 years.

In this chapter, when the provisions are dealing with both 'child' and 'young person', they will be referred to as 'juveniles'. When the provisions deal with only a child, the word 'child' will be used and when the provisions deal with young persons, the word 'young person' will be used.

3 A Separate Court

When hearing charges against juveniles, unless they are jointly charged with adults, a Magistrate shall:

carry out the proceedings in a room or building separate from where proceedings are normally held and exclude the public; o

carry out proceedings on a different day or at a different time than ordinary proceedings and exclude the public.

These proceedings will be referred to as the Juvenile Court.

All people not directly connected with the case must vacate the Courtroom, unless they have special leave of the Court. The only people who should be left are Court officers, parties to the case and their advocates, and any other person directly concerned with the case: s4(4) JOA.

3.1 The Media

Bona fide representatives of any news agency or information service shall not be excluded from the Juvenile Court, except by special order of the Court.

Except with the permission of the Court, no person (whether they are media or someone else) shall publish:

the name; and

address; and

school; and

photograph; or

anything likely to lead to the identification of the child or young person who is before the Juvenile Court: s4(4)(b) JOA.

Usually the media will be allowed to report on a case before the Juvenile Court, provided that they do not publish any of the items set out above.

Any person who acts in contravention of s4(4)(b) JOA is guilty of an offence and liable to:

a fine of \$50; or

imprisonment for three months; or

both fine and imprisonment: s4(4)(b) JOA.

4 Pre-trial Matters

4.1 Recognisance

When a person who is apparently under the age of 18 years is apprehended, with or without a warrant, a Police inspector or officer in charge of the Police station shall release that person on a recognisance with or without sureties: s5 JOA.

The officer shall not release the juvenile on a recognisance if:

the case concerns a grave crime; or

it is necessary in the interests of the juvenile to remove him or her from association with any undesirable person; or

the officer has reason to believe that the juvenile's release would defeat the ends of justice: s5 JOA.

When a juvenile is not released under s5, he or she will be detained in a place of detention until he or she can be brought before a Juvenile Court, unless the officer certifies that:

it is not practicable to detain him or her; or

he or she is so unruly or of depraved character that he or she cannot be safely detained; or

by reason of his or her physical or mental health, it is not proper to detain him or her: s. 6 JOA.

4.2 Committing for Trial

When the Court remands or commits a juvenile for trial and does not release him or her on bail, the Court shall not commit him or her to prison, but instead:

commit the juvenile to custody in a place of detention; or

commit the juvenile to the care or custody of any person named in the commitment: s8(1) JOA.

The juvenile will be committed for the period during which he or she is remanded or until he or she is delivered in due course of the law. At any time, the Court may vary the commitment: s8(1) JOA.

Committal of a young person

The Court does not have an obligation to commit a young person if the Court certifies that:

he or she is so unruly a character that he or she cannot be safely committed; or

he or she is so of depraved a character that he or she is not a fit person to be so detained or cared for: s8(1) JOA.

If a commitment of a young person is made under s8(1) JOA, it can be revoked and the young person committed to prison only if:

the young person is found to be of so unruly a character that he or she cannot be safely detained in such custody or cared for; or

the young person is found to be of so depraved a character that he or she is not a fit person to be detained or cared for: s8(2) JOA.

5 Procedure in Juvenile Courts

When a case is ready to proceed, begin by:

identifying the accused; and

confirming the accused's personal details: name and address.

When a juvenile is brought before the Juvenile Court for any offence, it is your duty to explain to the person, as soon as possible and in simple language, the substance of the alleged offence: s9(1) JOA.

In every case, you must be satisfied that:

the accused understands what has been read; and

he or she knows what is meant by guilty or not guilty. Although the facts may be true, the law may give a defence. Explain this to avoid any misunderstanding.

Never take for granted that the accused understands the charge. Unless the accused clearly understands the nature of the offence, he or she will not be able to work out if there is a defence and what to plead. If you are not satisfied that the accused understands, explain it in a way that he or she will.

When a juvenile is charged with any offence and brought before the Court, you may in your discretion require the attendance of the juvenile's parents or guardians: s10(1) JOA.

In many cases, it is a good idea to have the parents or guardians present because:

parents can give useful advice to juveniles;

parents usually have valuable information on the juvenile's position such as:

whether they are attending school;

whether they have been in trouble with the Police previously; or

whether they are they living at home.

It may be a good idea to ask the juvenile where his or her parents are, if they are not present.

The fact that the parents are not present and that the young person is offending may indicate that all is not well at home.

It would be helpful for a child or young person to see a lawyer prior to giving their plea, particularly if the charge is serious. A lawyer can explain the charge and give advice as to a plea.

If a lawyer is not available, it may be helpful for a juvenile to talk with someone such as a parent, other relative, social worker or some other official to discuss their situation and their options.

5.1 Accepting a Plea

If you are satisfied that the juvenile understands the nature of the alleged offence, ask the juvenile whether he or she admits the offence, unless the offence is homicide.

If you are not satisfied that the juvenile understands the nature of the alleged offence, then hear the evidence of the witnesses in support of the complaint or information: s9 JOA, i.e. continue as if a "not guilty" plea has been entered.

Once the evidence-in-chief has been given, ask the juvenile, or the person speaking on his or her behalf, whether he or she wishes to:

ask the witnesses any questions; or

make a statement.

Guilty plea

If the juvenile admits the offence, he or she will be asked if they wish to say anything that might mitigate their sentence or provide for anything that explains the circumstances of the offence.

Not guilty plea

Go to a defended hearing.

5.2 Defended Hearing

See s9 JOA.

If the juvenile does not admit the offence, evidence will be given in support of the complaint or information.

You should ensure that everyone in the Courtroom uses simple language so that the juvenile will understand what is going on.

Once the evidence in support of the complaint or information has been given the juvenile, or his or her parents or guardians or advocate, will then be able to cross-examine any witnesses of the complainant's. The juvenile may also make a statement instead of asking questions.

If it appears that a prima facie case is made out against the juvenile, he or she will be able to present evidence and witnesses in his or her defence, or make any statement he or she wishes to.

You may put questions to the juvenile, but only for the purposes of:

assisting the juvenile in his or her defence; or

clarifying anything in the juvenile's statement.

Keep your question simple and straightforward, for example:

What happened?

What happened next?

Why do you say that?

It is also your duty to put questions to witnesses when it is necessary and proper for determining what is in the best interests of the juvenile.

If you are satisfied that the offence is proved, ask the juvenile he or she wishes to say anything to explain the circumstances or to mitigate the penalty: s9(7) JOA.

Acquit or convict the juvenile.

Best Interests of the Juvenile

In criminal law, juvenile offenders are treated differently than adult offenders because of:

their age;

society's belief that juvenile offenders can be more easily rehabilitated; and

the idea that they children and young people should be given be given a second chance to be productive members of society.

The difference between juvenile offenders and adult offenders should be reflected in the way juvenile offenders are treated by the Courts.

You must consider what is best for a juvenile offender, during the course of the trial and during sentencing. The "best interests" of adult offenders are never a consideration for the Court, except perhaps in sentencing.

6 Sentencing of Juvenile Offenders

6.1 Pre-sentencing Matters

Before deciding how to deal with the convicted juvenile, you should obtain any information related to the juvenile's:

general conduct;

home surroundings;

school record; and/or

medical history.

This information will help you deal with the case in the best interests of the juvenile.

You may direct a probation officer to prepare and submit the report.

Once the report is submitted, you may ask the juvenile any questions regarding the report.

You may also remand the juvenile on bail or place him or her in detention in order to:

obtain information for the report; or

obtain a special medical examination or observation; or

consider how to deal with the case in the best interests of the juvenile.

If you decide that remand is necessary for inquiry or observation, make an entry in the Court register stating that:

the charge is proved; and

the juvenile has been remanded.

6.2 Sentencing Options

Once you are satisfied that a juvenile is guilty, you may do one or more of the following:

dismiss the case;

discharge the juvenile offender on entering into a recognisance, with or without sureties;

deal with the juvenile offender under the provisions of the Probation of Offenders Act – Cap. 28, which allows those convicted of an offence to be under the supervision of a probation officer for between 1 and 3 years;

commit the juvenile offender to the care of a relative or other fit person;

order the juvenile offender to pay a fine, damages, or costs but not include a default sentence of imprisonment;

order the juvenile offender's parents or guardians to pay:

a fine, damages, or cost; and/or

give security for his or her good behaviour;

direct release upon entering into a bond which states that the juvenile offender will appear and receive sentence when called upon;

commit the juvenile offender to custody in a place of detention;

where the juvenile offender is a young person, sentence him or her to imprisonment; and/or

deal with the case in any other manner legally allowed: s16 JOA.

6.3 Diversion

Remember that all of us make mistakes, and probably we make more when we are young. To enter a conviction and formal sentence may mark out a young person as a criminal forever.

You may want to put the case off for a couple of months and give the juvenile an informal sentence such as:

voluntary community work;

giving money to a charity;

giving money to the victim; or

something similar

In this way you avoid a formal sentence, and give the young person another chance.

If you choose an informal sentence, make sure that you give enough time for it to be carried out and then recall the case later to ensure the work has been done or the money paid.

If the work is not done, or the money not paid, you may give a formal sentence as set out in s16 JOA or give them more time.

If the work is done or the money paid, then you may indicate that the sentence is served and discharge the juvenile offender.

You may not feel that diversion is appropriate, if you have tried it previously with the young person and it has failed. They may have already been given this chance. Also, if the charge is quite serious, the Police may want a formal conviction and sentence.

6.4 Restorative Justice

Restorative justice is a response to crime that emphasises healing the wounds of victims, offenders and the community.

Restorative justice allows you to involve both the juvenile offender and the victim in the sentencing process.

By involving the victim and juvenile offender in the sentencing process, you provide:

the victim with a chance to explain how the juvenile has harmed them; and

the juvenile with a chance to:

hear and see the damage and pain they have caused to the victim;

take responsibility for their actions by having a say in their sentencing; and

change their behavior without the stigma of being a criminal for the rest of their life; and

the possibility of reconciliation between the victim and the young offender.

Before applying a restorative justice approach to sentencing a juvenile offender, you should consider:

the nature of the crime;

how serious the crime is;

whether the juvenile and victim are open to this approach; and

whether the prosecution is in favour of this approach

6.5 Payment of Fines by Parents or Guardians

Young Person

You may order that a fine, damages or costs be paid by a young person's parent or guardian instead of by the young person, unless you are satisfied that the parent or guardian:

cannot be found; or

has not conducted to the commission of the offence by neglecting to exercise due care of the young person: s11(1) JOA.

Child

You shall order that a fine, damages or costs be paid by a child's parent or guardian instead of by the child, unless you are satisfied that the parent or guardian:

cannot be found; or

has not conducted to the commission of the offence by neglecting to exercise due care of the child: s11(1) JOA.

You may also order the parent or guardian of a juvenile who is charged with an offence to pay security for the juvenile's good behaviour: s11(2) JOA.

If you are satisfied that the charge against the juvenile is proved, you may make an order for the parent or guardian to pay fines, damages, costs or security for good behaviour, without convicting the juvenile: s11(3) JOA.

If the parents have been ordered to attend the hearing and have failed to do so, you may make an order to pay fines, damages, costs or security.

However, you may make no such order without giving the parent or guardian an opportunity to be heard: s11(4) JOA.

If a parent is ordered to pay a sum under s11 JOA, or there is a forfeiture of security, the amount may be recovered:

in the manner provided by s28 Penal Code; and

as if the order had been made on the conviction of the parent or guardian for the offence rather than the juvenile: s11(5) JOA.

A parent or guardian may appeal an order made under s11 JOA for the payment of fines, damages or costs, or security. To appeal, they must follow the procedure set out in s45 MCA.

6.6 Special Considerations Regarding Detention of Juveniles

Children

No child shall be sentenced to imprisonment or be committed to prison for default of a fine, damages or costs: s12(1) JOA.

You may order a child to be committed to custody in a place of detention, for not more than six months if:

the child is convicted of an offence which would sentence an adult to imprisonment, or would sentence an adult to imprisonment for default of a fine; and

the Court considers that no other method of punishment is suitable.

Young persons

No young person shall be sentenced to imprisonment if he or she can suitably be dealt with any other way under s16 JOA (see list above): s12(2) JOA.

If a young person is sentenced to imprisonment, he or she shall not be allowed to associate with prisoners who are not juveniles, so far as it is practicable: s12(3) JOA.

6.7 Grave Crimes

Notwithstanding anything else in the JOA, when a juvenile is convicted of a grave crime, the Court may sentence him or her to be detained for a period of time to be specified in the sentence: s13 JOA.

Notwithstanding anything in the JOA to the contrary, when such a sentence is passed, the juvenile shall be:

liable to be detained in such place and on such conditions as the Minister may, in his or her discretion, direct; and

deemed to be in legal custody: s13 JOA.

A grave crime is:

murder;

attempted murder;

manslaughter;

unlawful wounding;

unlawful poisoning;

causing grievous harm; or

any crime the Minister may from time to time add to the schedule: s2 & Schedule to the JOA.

A person in detention for a grave crime may at any time be discharged by the Minister, on his or her discretion, or by license: s14 JOA.

6.8 Selecting a Place of Detention

In selecting a place of detention for a juvenile, when there is more than one choice, you shall consider:

whether the place is suitable for the reception of convicted or unconvicted persons;

whether the place is suitable for a juvenile charged with a serious or minor offence;

the religious persuasion of the juvenile;

whether the juvenile is female or male; and

that the person in charge of the place of detention has sufficient authority to be charge of such a place: s17(3) JOA.

The juvenile who is committed to custody in a place of detention shall be delivered to the person in charge of the place of detention.

Places of detention that are required for the purposes of the JOA shall be provided or appointed by the Minister.

17: COMMON OFFENCES

Unlawful Assembly

Section s73 Penal Code (Cap. 26)

Description Three or more people assemble together are defined as an “unlawful assembly” and are in breach of the Penal Code where, with intent to commit an offence or assemble with intent to carry out a common purpose, they conduct themselves in such a manner as to cause people in the neighbourhood to reasonably fear that they will commit a breach of peace or will needlessly and without reason provoke others to breach the peace.

Elements Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused was among three or more assembled persons; and
5. There was a intention to commit an offence or carry out a common purpose; and
6. The accused's conduct caused another to reasonably believe that the accused or another of the assembled group would either:

cause a breach of the peace; or

needlessly or without good reason, provoke others to breach the peace.

Commentary Burden and standard of proofThe prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

IdentificationIn 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 accused who was among three or more assembled people.

It is irrelevant to this offence if the original assembling was lawful if, once assembled, they conducted themselves with a common purpose in such a manner as contained in the description section above.

Neighbour's belief

The neighbours belief is a subjective test.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence The sentence for this offence is set out in s74as one year imprisonment.

Going Armed in Public

Section s83 Penal Code (Cap. 26)

Description Every person is guilty of a misdemeanour who, without lawful occasion, goes armed in public in a manner so as to cause fear to any person.

Elements Every element (i.e. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused carried arms in a public place; and
5. The manner in which the accused carried the arms caused another person to have fear; and
6. The occasion in which the accused carried arms was one where it was not lawful to carry arms.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who carried the arms.

Public place

'Public place' is defined at s4 Penal Code.

Fear

The test of a person being in fear is a subjective one. There must be someone present at the time of the offence who was in fear when he or she saw the manner in which the arms were carried.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence 2 years imprisonment or a fine, (s41 Penal Code) or both. You may also make an order to have the arms forfeited.

Advertisements for Stolen Property

Section s119 Penal Code (Cap.26)

Description Every person is guilty of a misdemeanour who publicly offers, or prints or publishes an offer of, a reward for the return of any property which has been stolen or lost, and in the offer uses any words which purport that no questions will be asked or that the person producing the property will not be seized or molested.

Elements Every element (i.e. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused publicly made an offer of reward for the return of stolen or lost property; and
5. The accused used word in the offer purporting that no questions would be asked or that the person producing such property will not be seized or molested.

OR

4. The accused printed and published an offer of reward for the return of lost or stolen property; and
5. The offer used words purporting that no questions would be asked or that the person producing such property will not be seized or molested.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who offered or advertised the offer.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence 2 years imprisonment or a fine (s41 Penal Code) or both.

Bribe or Attempt to Bribe

Section s122 Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour who, in relation to any offence, bribes or attempts to bribe or makes any promise to any other person, with the intent to either: obstruct, defeat or pervert the course of justice in the Court; or dissuade any person from doing his or her duty in connection with the course of justice in the Court.

Elements Every element (i.e. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused either:

bribed or attempted to bribe another person; or
made a promise to another person; and

5. The accused did this in relation to an offence; and

6. The accused did this with the intention of either:

obstructing, defeating or perverting the course of justice in the Court; or
dissuading any person from doing his or her duty in connection with the course of justice in the Court.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who bribed or attempted to bribe.

Intention

Intention is an important element of this offence. Intention may be inferred from the surrounding circumstances before, during or after the offence has been committed.

Bribe

It is important to remember that the bribe or attempt to bribe must be in relation to any offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence 2 years imprisonment or a fine (s41 Penal Code) or both.

Resisting Arrest and Escape

Section s125 Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour who, on being arrested for an offence, violently resists any police officer arresting him or her, or being in lawful custody, escapes from such custody.

Elements Every element (i.e. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused was being arrested for an offence; and
5. The accused violently resisted any police officer arresting him or her.

OR

4. The accused was in lawful custody; and
5. The accused escaped from that custody.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who resisted or escaped.

Arrest

s11 CPC provides that any person or police officer may arrest another person acting under a warrant of arrest.

s18 CPC provides that a police officer may, without a warrant, arrest any person whom he or she suspects upon reasonable grounds of having committed an offence.

Escapes

The accused must escape from lawful custody, i.e. escape from lawful arrest whilst in the custody of the arresting police officer, or from prison custody.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence The general penalty for misdemeanour is at s41 Penal Code, that is, 2 years imprisonment or a fine or both.

Indecently Insulting or Annoying a Female

Section s141(3) Penal Code (Cap. 26)

Description Every person is guilty of a misdemeanour, who:

intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl; or

intrudes upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty.

Elements Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused uttered a word, made a sound gesture or exhibited an object; and
5. The accused intended the act to be heard or seen by the woman; and
6. The accused intended to insult the modesty of the woman or girl.

OR

4. The person named in the charge is the same person who is appearing in Court; and
5. The accused intruded upon the privacy of a woman by doing an act; and

6. The act was of a nature likely to offend her modesty.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who uttered any word, made any sound or gesture, or exhibited any object, or intruded upon the privacy of a woman or girl.

Act of a nature likely to offend modesty

The test for this element is objective, i.e. would most woman or girls regard the act of a nature likely to offend the modesty of a woman or girl.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum one year imprisonment.

Criminal Trespass

Section s189(1) Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour, who:

enters another person's property with intent to commit an offence, or intimidate or annoy that person; or

having lawfully entered another person's property, unlawfully remains there with intent to intimidate, insult or annoy that person or commit an offence; or

unlawfully persists in coming or remaining upon another person's property after being warned not to come on to leave the property.

Elements Every element (i.e. numbers 1- 6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date and/or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence is alleged to have been committed; and

Specific under s189(1)(a)

4. The accused entered in or onto property; and
5. The property was in lawful possession of another; and
6. The accused entered with the intention of either:

committing an offence; or

intimidating or annoying the other person.

Specific under s189(1)(b)

4. The accused lawfully entered in or onto a property; and

5. The property was in lawful possession of another; and

6. The accused then unlawfully remained there with the intention of:

intimidating or annoying the other person; or

committing an offence.

Specific under s189(1)(c)

4. The accused continued to come onto property after being warned not to; and

5. The property was in lawful possession of another; and

6. The accused did not have a lawful right to come onto the property.

OR

4. The accused remained upon property after being warned to leave; and

5. The property was in lawful possession of another; and

6. The accused did not have a lawful right to remain on the property.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who committed the offence i.e. it was the accused who unlawfully trespassed.

Property in the possession of another

This will include ownership and lease and any other kind of possession. The possession must be lawful. You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

Charges under s189(1)(a)

Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused's intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person - intention to do so is enough.

Charges under s189(1)(b)

Lawful entering

The accused must have entered the property for a lawful purpose. This includes being invited onto the property by the other person, entering to deliver something or other good reason.

Unlawfully remaining

The prosecution must prove that there was no lawful reason for remaining. If the other person asks the accused to leave and he or she does not, the accused is unlawfully remaining. If the lawful entering was something like making a delivery, as soon as that has been done, the accused should leave the property, otherwise he or she is unlawfully remaining.

Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused's intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person - intention to do so is enough.

Charges under s189(1)(c)

Unlawfully persists or remains

The prosecution must prove that:

the accused was warned not to come onto, or to leave, the property; and

there was no lawful reason for coming onto or remaining on the property.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence 3 months imprisonment, except where the property in which the offence is committed is a building, tent or structure used as a human dwelling, or as a place of worship, or a place for the custody of property, then the offender shall be liable to 1 year imprisonment.

Drunk and Incapable

Section s179 Penal Code (Cap. 26)

Description Any person is guilty of an offence if found in a public place drunk and incapable of taking care of himself or herself.

Elements Every element (i.e. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused must have been found in a public place; and
5. The accused must have been drunk at the time he or she was found; and

6. The accused must be drunk to the extent that he or she was incapable of taking care of him or herself.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who was drunk and incapable.

Drunk and incapable

To merely say that a person was drunk is to express an opinion. The Court needs to hear evidence of drunkenness such as unsteady walk, slurring of words, strong smell of liquor or sleepy and unable to walk. In addition, the prosecution must show that the accused was incapable of taking care of himself or herself.

Public place

The accused must have been found in a public place in that state. Public place is defined in s4 Penal Code.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence \$20 fine.

Causing Death by Reckless or Dangerous Driving

Section s238(1) Penal Code (Cap. 26)

Description Every person is guilty of a misdemeanour, who causes the death of another person by driving a motor vehicle on a road:recklessly; or at a speed or manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road.

Elements Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused caused the death of another person by driving a motor vehicle on a road; and
5. The accused was driving either:

recklessly; or

at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic actually on the road or reasonably expected to be on the road.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who caused the death of another by driving that was either reckless or dangerous to the public.

Motor Vehicle

See the Land Transport Act for definitions.

Recklessly

Reckless driving is when a person is aware of that there is a risk in their driving in a certain manner and it is, in the circumstances known to him or her, unreasonable to take that risk.

Speed or manner dangerous to the public

See definition of "public" in Chapter II Penal Code.

Nature, condition or use of the road

The prosecution will have to provide evidence to show the particular nature, conditions or use of the road, if the charge is based on this ground.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum five years imprisonment. The provisions of s30, 31, 32 and 42 of the Traffic Act relating to disqualifications from holding or obtaining a driving licence; the endorsement of holding driving licences and restrictions on prosecution shall apply to prosecutions under s238(1) of the Penal Code.

Common Assault

Section s244 Penal Code (Cap. 26)

Description Every person is guilty of a misdemeanour who unlawfully assaults another.

Elements Every element (i.e. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused used physical force on another person; and
5. There was no legal excuse for the force being used.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who assaulted another.

Assault

Assault includes actual physical contact. The accused must have some hostile intention.

The accused must be in a position capable of causing violence so that the complainant would apprehend imminent danger to him or herself.

Physical force

The physical force used by the accused against the complainant must be without the complainant's consent.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence 1 years imprisonment if the assault is not committed in circumstances for which a greater punishment is provided in the Penal Code.

Simple Larceny (Theft)

Section s261 Penal Code (Cap. 26)

Description A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent at the time of such taking to permanently to deprive the owner of the thing.

Elements Every element (i.e. numbers 1-7) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused took and carried away anything capable of being stolen; and
5. The accused did this without the consent of the owner; and
6. The accused did this fraudulently and without a claim of right made in good faith; and
7. The accused, at the time of such taking, intended to permanently deprive the owner of the thing.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who stole the property.

Capable of being stolen

Section 257 Penal Code defines what things are capable of being stolen.

Takes

The expression "takes" includes obtaining possession:

by any trick;

by intimidation;

under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or

by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps: s258(2)(a) Penal Code.

Carries away

The expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached: s258(2)(b) Penal Code.

Owner

See definition in s4 Penal Code at "Person" and "Owner".

Under s258(2)(c), the expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence.

Bailee / part-owner

Such person may be guilty of stealing any such thing notwithstanding that he or she has lawful possession of the thing, if, being a bailee or part-owner of the thing, he or she fraudulently converts the thing to his or her own use or the use of a person other than the owner: s258(1) Penal Code.

Without claim of right made in good faith

See definition of bona fide claim of right in s8 Penal Code. An accused may have a valid defence where he or she has an honest belief that he or she has a legal right to take the goods in question.

Intent at the time of taking to permanently deprive

See general rules regarding intent in s9 Penal Code.

There must be a coincidence of actus reus and mens rea for this element to stand, although issues of continuing trespass against the owner's property may arise.

The requirement of permanent deprivation disqualifies situations of borrowing or temporary possession.

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See Denning [1962] NSWLR 175.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

For instance, the defence may raise a belief of honest claim of right which the prosecution must rebut.

Sentence Stealing for which no special punishment is provided under the Penal Code or any other Act is simple larceny and a felony punishable with a maximum imprisonment of five years. If any person has been previously convicted of felony, the offence of simple larceny is liable to maximum imprisonment of 10 years. If previously convicted of a misdemeanour under Chapter XXVII or under Chapter XXXV, the offence of simple larceny is punishable by a maximum imprisonment of seven years: s261 Penal Code. Note the limits to your sentencing jurisdiction.

Conversion Under s278(1)(a)

Section s278(1)(a) Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour, who:

is entrusted solely or jointly with another person with power of attorney to sell or transfer any property; and

fraudulently sells, transfers or otherwise converts any part of the property to his or her own use or benefit or to the use or benefit of a person other than the person by whom he or she was entrusted.

Elements Every element (i.e. numbers 1-7) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused was solely or jointly entrusted with power of attorney to sell or transfer any property; and
5. The accused sold, or transferred, or otherwise converted, any part of the property; and
6. This was done fraudulently; and
7. This was done for his or her own benefit or the benefit of a person other than the one by whom he or she was entrusted.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who sold, transferred or converted the property.

See *R v Boyce* 40 Cr. App. R 62, 63:

“it is essential that three things should be proved to the satisfaction of the jury; first the money was entrusted to the accused person for a particular purpose, secondly that he used it for some other purpose and thirdly that the misuse of money was fraudulent and dishonest.”

Entrusted with power of attorney

“Entrusted” requires a fiduciary element. See *Stephens v The Queen* (1978) 139 CLR, 315.

Property

See definition in Chapter II Penal Code.

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum seven years imprisonment. Note the limits to your sentencing jurisdiction.

Conversion Under s278(1)(c)

Section s278(1)(c), s278(2) Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour, who:being entrusted solely or jointly with another person with any property in order that he or she may retain in safe custody, apply, pay or deliver to another any part of the property or proceeds from the property; orhaving solely or jointly received any property for or on account of any other person,fraudulently converts to his or her own use or benefit or the use or benefit of any other person, any part of the property or proceeds.

Elements Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused was entrusted solely or jointly to, either:

retain, apply, pay, or deliver any part of the property or proceeds to another; or receive property on the account of another; and

5. The accused converted to his or her own use or benefit or to the use or benefit of any other person any part of the property or proceeds from the property; and
6. This was done fraudulently.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who converted the property to his or her benefit or the benefit of another.

Non-application to trustees

Section 278(2) states ss(1)(c) does not apply to or affect any trustee under any express trust created by a deed or will, or any mortgage of any real or personal property, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See Denning [1962] NSWLR 175.

Entrusted with power of attorney

“Entrusted” requires a fiduciary element. See *Stephens v The Queen* (1978) 139 CLR, 315.

Property

See definition in Chapter II Penal Code.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum seven years imprisonment. Note the limits to your sentencing jurisdiction.

Miners Removing Minerals

Section s287 Penal Code (Cap. 26)

Description Every person is guilty of a felony who, when employed in or about any mine, takes, removes or conceals any mineral found in such a mine, with the intent to defraud any owner or adventurer in such mine or any workman or miner employed there or the holder of any mining licence or prospecting licence.

Elements Every element (i.e. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and

2. There is a date or period of time when the offence charged is alleged to have taken place; and

3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused was employed in or about the mine; and

5. The accused took, removed, or concealed any minerals found or contained in the mine; and

6. The accused did this with the intention to defraud:

any proprietor of the mine; or

any adventurer of the mine; or

any workman or miner employed in the mine; or

the holder of any mining licence prospecting licence.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who removed the mineral.

Minerals

Minerals are defined under s3 Mines and Mineral Act (Cap. 42) as any substance found naturally in or on the earth formed by or subject to a natural geological process, but does not include petroleum as defined in s3(1) Petroleum (Exploration) Act.

Intention

Intention is an important element of this offence. Intention may be inferred from the surrounding circumstances before, during and after the commission of the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence 2 years imprisonment. All Magistrates are able to try this offence, however First and Second Class Magistrates may only pass sentence up to their sentencing limit.

False Pretences Under s308(a)

Section s308(a) Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour, who, by false pretence and with intent to defraud, either obtains from any other person any chattel, money, or valuable security; or causes or procures any money, chattel or valuable security to be delivered to him or herself or to any other person, for the use, benefit or on account of him or herself or any other person.

Elements Every element (i.e. numbers 1-7) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused falsely promised; and

5. The accused either:

him or herself, or through another, obtained any chattel, any money, or valuable security; or caused or procured any money to be paid, or any chattel or valuable security to be delivered to him or herself or another; and

6. The property was for the use or benefit of the accused or some other person; and

7. The accused did this with the intent to defraud.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who falsely pretended.

False pretence

False pretence is defined as any “representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows it to be false, or does not believe to be true”: s307 Penal Code.

Intent to defraud

See general rules on intent in s9 of the Penal Code.

The intent to defraud may be inferred from the facts of the case.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See Denning (1962) NSWLR 175.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum five years imprisonment.

False Pretences Under s308(b)

Section s308(b) Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour who, by false pretences, with intent to defraud or injure any other person, fraudulently causes or induces any other person to, either:

execute, make, accept, endorse or destroy the whole or any part of any valuable security; or write, impress, or affix upon any paper or parchment:

his or her name;

the name of any other person; or

the seal of any body corporate or society,

in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security.

Elements Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused falsely promised; and
5. The accused fraudulently caused or induced any other person to:

execute, make, accept, endorse or destroy any part of any valuable security; or

write, impress, or affix upon paper or parchment, his or her name or the name of any other person or the seal of any body corporate or society, in order to be made, converted into, or used or dealt with as a valuable security; and

6. The accused did this with intent to defraud or injure any person.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who falsely pretended.

False pretence

False pretence is defined in the Penal Code as any “representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows it to be false, or does not believe to be true”: s307 Penal Code.

Intent to defraud

See general rules on intent in s9 of the Penal Code.

The intent to defraud may be inferred from the facts of the case.

A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See Denning [1962] NSWLR 175.

Induces any other person

The false pretence must induce the victim to part with his or her property.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence Maximum five years imprisonment.

False Declarations on Passports

Section s312 Penal Code (Cap. 26)

Description Any person is guilty of a misdemeanour who makes a statement which is to his or her knowledge untrue, for the purpose of procuring a passport, whether for himself or herself or any other person.

Elements Every element (i.e. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused made a statement; and

5. The accused knew the statement to be untrue; and

6. The statement was made for the purpose of obtaining a passport either for the accused or for another person.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who made the false declaration.

Truth of the statement

It is no defence that the alleged untrue statement made by the accused is in fact true.

It is sufficient that, to the knowledge of the accused, the statement was untrue at the time he or she made it.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence 2 years imprisonment or a fine (s41 Penal Code) or both.

Removing Boundary Marks

Section s329 Penal Code (Cap. 26)

Description Any person is guilty of a felony who, wilfully and unlawfully and with intent to defraud, removes or defaces any object or mark which has been lawfully erected or made as an indication of the boundary of any land.

Elements Every element (i.e. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; and
2. There is a date or period of time when the offence charged is alleged to have taken place; and
3. There must be a place where the offence was alleged to have been committed; and

Specific

4. The accused removed or defaced any object or mark lawfully erected or which indicated the boundary of any land; and
5. The accused did so wilfully and unlawfully and with an intent to defraud another.

Commentary Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however 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 accused who removed or defaced the object or mark.

Wilful

This is an important part of the offence. The prosecution needs to prove the accused removed or defaced the object or mark wilfully, and not by accident or mistake.

Intention to defraud

Intention to defraud may be inferred from the surrounding circumstances before, during and after the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence 3 years imprisonment. All Magistrates are able to try this offence: See s27(3) Magistrates' Courts Act.

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