Fiji Magistrates Bench Book

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

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CANADA FUND FOR LOCAL INITIATIVES

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 Court. 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 Fiji. I thank the Pacific Judicial Education Committee, AusAID, NZAID and the Canada Fund, and the National Judicial Education Committee for their hard work and dedication in funding and overseeing the project. In particular I would like to mention Ms Laisa Laveti (Resident Magistrate) who worked tirelessly on the project whilst attached to PJEP, and the Consultant Ms Tina Pope, who co-ordinated the project, with assistance from Mr Paul Logan.

This joint effort has resulted in a Bench Book of which we can all be proud of 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.

Daniel Fatiaki
Chief Justice

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PJEP BENCHBOOK PROJECT 2003/2004

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The kind assistance of the New Zealand Institute of Judicial Studies is also acknowledged and appreciated.

1:

THE LAW AND CONSTITUTIONAL FRAMEWORK

1 Introduction

The *Constitution of the Sovereign Democratic Republic of Fiji* is the supreme law of Fiji. The *Constitution* states that Fiji is a democratic state in which all people may, to the full extent of their capacity, take part in the institutions of national life and thereby develop and maintain due deference and respect for each other and the rule of law.

2 The Rule of Law

The purpose and the function of law is often described as the maintenance of order and the punishment and rehabilitation of those who create disorder in the community. In fact, law operates to regulate most aspects of human behaviour and activity, whether economic, social or political.

The scholar Dicey defined the concept of the rule of law as follows:

> "By the rule of law, we mean in the first place that no man is punishable or can be lawfully made to suffer in body or goods; except for distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land.
>
> In the second place, we mean not only that no man is above the law, but that every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals".

This concept is important as it restates that everyone is subject to the law, no matter what his or her station in life, his or her affiliation, his or her beliefs or whatever else.

3 Sources of Law

The sources of law for the Republic of Fiji include:

- the *Constitution*;
- Acts of the Fiji Parliament;
- customary law; and
- the rules and principles of common law and equity.

3.1 The Fiji *Constitution*

The first Fiji *Constitution* was created on 10 October, 1970. It was abrogated in 1987 by the *Constitution Abrogation Decree 1987* and replaced by the *1990 Constitution*. A review of that document created the current *Constitution* which was adopted on 27 July 1998.

The *Constitution* is the supreme law of the State and any law inconsistent with it is invalid to the extent of the inconsistency: *s2 Constitution*.

The *Constitution* details the basic elements of Fiji's system of government by defining:

- the roles, responsibilities and powers of the Executive, Parliament and Judiciary;
- the organiation and structure of the legal system; and
- the requirements of citizenship and details related to finance, land and leadership.

The *Constitution* also states that governance will be based on the democratic principles of equality, social justice, human dignity and communal solidarity.

The *Constitution* is based on and outlines the **Doctrine of the Separation of Powers** which specifies that there should be three distinct and separate branches of government:

1 The Parliament (legislature): makes laws;
2 The Executive: administrator and policy maker;
3 The Judiciary: interprets and applies the law.

Each branch of government checks the roles and functions of the other branches. This process helps maintain the balance of power between the three branches and ensures the Executive not assume too much power.

3.2 Statute Law

Acts of Parliament

Legislation passed by Parliament is the next most important law after the *Constitution*. These laws, in the form of statutes, can only be changed by Parliament and are binding on the Courts.

However, the Courts may, in certain circumstances, recommend changes to the law or they may declare a specific statute law void if it is inconsistent with the *Constitution*: see *State v Audie Pickering* [2001] FJHC 69; HAM0007j.01s (30 July, 2001).

Under the *Magistrates' Courts Act* English common law, rules of equity and statutes of general application which were in force in England on 2 January, 1875 are in force within the jurisdiction of Magistrates' Courts, but only so far as local jurisdiction and local circumstances permit and subject to any existing or future local Act: *ss25, 26 MCA*.

See *Josefa Nata v State* FCA AAAH 0015/02.

3.3 Customary Law

Unless and until Parliament makes provision for the application of customary law, Fijian customary law has effect as part of the laws of Fiji. This is qualified to the extent that any customary law that is inconsistent with the *Constitution*, any statute or is repugnant to the general principles of humanity shall not be part of the law: *Chapter 13 Constitution*.

3.4 Common Law

The principles and rules of the common law and equity shall have effect as part of the law of Fiji as long as they are not inconsistent with the *Constitution* or any Act of Parliament.

The common law is law developed by the Court system through:

- interpreting existing legislation;
- interpreting the *Constitution*; and
- covering matters not dealt with by statute law.

The development of the common law does not mean that the Courts can make arbitrary decisions. They must follow the Doctrine of Judicial Precedent.

Doctrine of judicial precedent

According to Judicial Precedent, Judges and Magistrates in lower Courts are bound to follow like decisions of higher Courts.

Binding Authority

This means that lower Courts **must** apply the legal principles announced in the decision of a higher Court in any cases.

Persuasive Authority

This means that the Court **may** apply the decision of another Court, but is not required to do so. This usually occurs if the decision comes from a Court of the same level in Fiji or from a foreign Court. 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.

There are certain provisions of the law in Fiji which make direct reference to English law. For example, as a general rule of the *Penal Code*, the principles of legal interpretation and expressions used in the *Code* shall be presumed, so far as is consistent with their context, and, except as otherwise expressly provided, to be used with the meaning attached to them in English criminal law: *s3 Penal Code*.

4 The Branches of the State

4.1 The Parliament

The power to make laws for the State vests in a Parliament consisting of:

- the President;
- the House of Representatives; and
- the Senate: *s45 Constitution*.

The President must not refuse to assent to a Bill duly presented for his or her assent: *s46(2) Constitution*.

The House of Representatives

The House of Representatives consists of 71 members elected in accordance with the *Constitution* to represent single-member constituencies: *s50 Constitution*.

A person is not qualified to be nominated as a candidate for election to the House of Representatives if he or she:

- is not a registered voter;
- is an undischarged bankrupt; or
- has an interest or contract with the government of a kind that must not be held by a member of Parliament: *s58(2) Constitution*.

The House of Representatives, unless sooner dissolved, continues for 5 years: *s59 Constitution*.

The Senate

The Senate consists of 32 members appointed by various institutions and offices specified in the *Constitution*: *s64 Constitution*.

The term of the Senate expires on:

- the expiry of the House of Representatives; or
- its earlier dissolution: *s65 Constitution*.

4.2 Executive Government

Cabinet Government

The basis of Cabinet Government is that the President, with few exceptions, only acts on the advice of the Cabinet or a Minister or some other body prescribed by the *Constitution*: *s96 Constitution*. The Cabinet is collectively responsible to the House of Representatives for the governance of the state: *s102 Constitution*.

Governments must have the confidence of the House of Representatives: *s97 Constitution*.

The Attorney-General is the Chief legal adviser to the Government: *s100 Constitution*.

President

The executive authority of the State is vested in the office of the President: *s85 Constitution*.

The President is the Head of State and Commander-in-chief of the military forces: *ss86, 87 Constitution*.

The President must be a citizen with a distinguished career in any aspect of national or international life and be eligible as a candidate for election to Parliament: *s89(1) Constitution*.

The office of the President is for a five year term, unless removed from office by the Bose Levu Vakaturaga for inability to perform the functions of office or for misbehaviour: *ss91, 93(1)(2) Constitution*.

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

- the appointment of the Prime Minister who, in his or her opinion, has the confidence of the House of Representatives: *s98 Constitution*;
- the appointment of two members of the Committee on the Prerogative of Mercy: *s115(2)(b) Constitution*;
- after considering the recommendations of a tribunal, the removal of judges from office: *s138 Constitution*; and
- the appointment of the chair-person of the Electoral Commission: *s78(7) Constitution*.

Vice-President

The *Constitution* also establishes the office of the Vice-President. The Vice-President performs the functions of the President if the President is absent from duty or from Fiji or is from any other reason unable to perform the functions of that office: *s88 Constitution*.

Prime Minister

The Prime Minster must keep the President informed of the general conduct of the government: *s104 Constitution*.

The Prime Minister:

- heads Cabinet;
- advises the President on the appointment of other Ministers of Cabinet: *s99(1) Constitution*;
- must establish a multi-party Cabinet: *s99(3) Constitution*.

Bose Levu Vakaturaga (Great Council of Chiefs)

According to the *Constitution*, the Bose Levu Vakaturaga continues in existence as established under the *Fijian Affairs Act*. Its membership, operations, functions and procedures are prescribed under that Act, in addition to functions conferred by the *Constitution*: *s116(1) Constitution*.

Under the *Constitution*, for example, the Bose Levu Vakaturaga is responsible for appointing the President and Vice President as well as appointing 14 Senators: *s90 Constitution* and *s64(1)(a) Constitution*.

It is the duty of the Great Council of Chiefs also to make such recommendations to the President as it considers are for the benefit, good governance and well-being of the Fijian people.

4.3 The Judiciary

The Judiciary is the third branch of the State. It is comprises the Supreme Court, the Court of Appeal, the High Court and such other Courts as created by law: *s117 Constitution*.

The Judiciary:

- is an independent body which is responsible for interpreting and applying Parliament's laws;
- creates and interprets case law; and
- solves disputes of fact and law between individuals, as well as between individuals and the State.

The making of appointments to judicial office is governed by two principles: first that judges should be of the highest quality and; second, that the composition of the judiciary should, as far as practicable, reflect the ethnic and gender balance of the community: *s134 Constitution*.

The six types of Courts are:

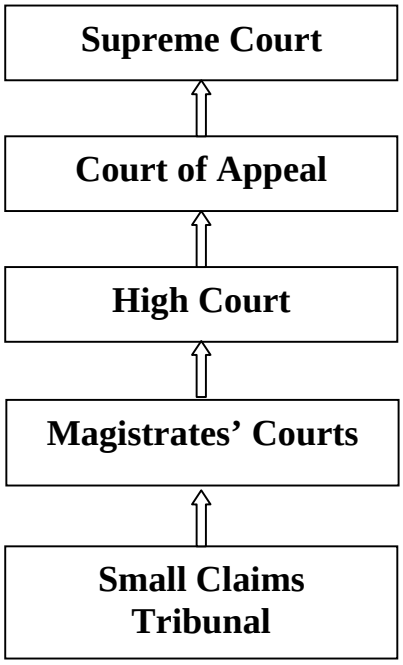
- the Supreme Court;
- the Court of Appeal;
- the High Court;
- the Magistrates' Court;
- the Fijian Court; and
- the Small Claims Tribunal.

The Court system is hierarchical and this is an essential feature of the Doctrine of Judicial Precedent.

The hierarchy provides an appeal system, allowing 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.

The Structure of the Court System in Fiji

Figure 1: Structure of Fiji's Court System



5 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.

Original jurisdiction

This means that a Court is given power to hear certain kinds of cases in the first instance.

Concurrent jurisdiction

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

Territorial jurisdiction

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

Appellate jurisdiction

This is the right of a Court to hear appeals from a lower Court. The Court of Appeal, the High Court and the Magistrates' Courts 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.

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

Civil jurisdiction

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

Advisory jurisdiction

This refers to the power of the Court to provide an opinion in an advisory capacity.

The President has the discretion, in the public interest and on the advice of Cabinet, to refer to the Supreme Court any constitutional issue: *s123 Constitution*.

Supervisory jurisdiction

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

The High Court has jurisdiction to supervise any civil or criminal proceedings before any subordinate Court: *s120(6) Constitution*.

2:

FIJI MAGISTRATE'S COURT

1 Introduction

The Magistrate's Court tends to be the Court where most people come into contact with the country's judicial system. All criminal offences normally start in this Court, although a number of serious cases will be transferred to the High Court for trial.

The *Magistrates' Courts Act Cap 14 (MCA)* establishes Courts of record of summary jurisdiction in Fiji with the following classes of Magistrates:

- Resident Magistrates;
- Second Class Magistrates;
- Third Class Magistrates: *s3(2) MCA*.

Each division has such Magistrates' Courts as the Chief Justice may direct: *s3(3) MCA*.

The MCA confers both criminal and civil jurisdiction on Magistrates' Courts to hear and determine cases that arise in their division: *s4 MCA*.

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.

The language of proceedings in the Magistrate's Court is English, but evidence may be given in Fijian or Hindustani or, with the approval of the Court, in any other language: *s51(1) Magistrates' Courts (Amendment) 12 of 1998*.

2 Governing Legislation

The *MCA* establishes and governs the Magistrates' Courts.

The *Criminal Procedure Code – Cap 21 (CPC)* sets out the procedure of the Magistrates' Courts.

Other relevant legislation includes:

- *Penal Code – Cap 17*;
- *Juvenile Act*;
- *Minor Offences Act*;

- *Probation of Offenders Act*;
- *Mental Health Act*; and
- *Land Transport Act*.

3 Composition of the Court

3.1 Magistrates

Appointment

Magistrates in Fiji are appointed by the Judicial Service Commission, which has the Chief Justice as its Chairperson: *s7 MCA, s3(1) Magistrates' Am. Act 12 of 1998, s133(1)(a) Constitution*.

The Commission may appoint fit and proper persons to be Second Class and Third Class Magistrates: *s7(2) MCA*.

Removal

The Commission may remove a Magistrate from office and take disciplinary action against a Magistrate. This may include:

- requiring or permitting the Magistrate to retire from office;
- terminating the contract on which the Magistrate is employed; or
- not renewing the contract on which the Magistrate is employed: *s7A Magistrates' Am. Act 12 of 1998*.

3.2 Clerk of the Court

A Clerk is:

- appointed by the Chief Registrar;
- attached to each Magistrate's Court; and
- under the immediate control of the Magistrate of that Court: *s13 MCA*.

The duties of the Clerk are to:

- attend to the sittings of the Court as directed by the Magistrate;
- create Court documents and give these to the Magistrate for his or her signature;
- issue civil processes;

- make copies of proceedings and to record the judgments, convictions and orders of the Court;
- receive all monies paid to the Court and keep good records;
- administer oaths when asked to by the Magistrate (who should be present); and
- do whatever else the Magistrate asks: *s14 MCA*.

3.3 Other Officers of the Court

Other officers of the Court include:

- Sheriff officers: *s15MCA*; and
- Bailiff officers: *s3(1) Distress for Rent Act Cap 36*.

4 Jurisdiction

4.1 General Powers

All Magistrates, once appointed, shall have and exercise the powers and jurisdiction conferred upon them by the *Magistrates' Courts Act* or any other Act: *s7(3) MCA*.

The Judicial and Legal Services Commission may, by the terms of its appointment, restrict the powers of a Third Class Magistrate in such manner and extent as they see fit: *s7(3) MCA*.

As prescribed by any Act, the rules of Court, or by any special order of the Chief Justice, every Magistrate shall have power to:

- issue writs of summon for the commencement of actions;
- administer oaths and take affirmations and declarations;
- receive production of books and documents;
- make decrees and orders;
- issue processes; and
- exercise judicial and administrative powers in relation to the administration of justice: *s20 MCA*.

4.2 Territorial Jurisdiction

Subject to any express provisions of the *Magistrates' Courts Act* or any other Act, every Magistrate's Court shall exercise jurisdiction within the limits of the division within which it is situated. When, however, there is more than one Magistrate's Court in the same division, the Chief Justice may direct the distribution of business between such Courts: *s4(1) MCA*.

This jurisdiction extends to any territorial or inland waters within and around the division: *s4(2) MCA*.

Special jurisdiction exists for:

- a Magistrate exercising jurisdiction over the place where a ship, boat or canoe may be at the time of a criminal offence or civil matter arose; or
- a Magistrate exercising jurisdiction over the place where the vessel may call after the offence or civil matter arose: *s18 MCA*.

Actions of, or under the authority of, a Magistrate will not be void or impeachable solely because of an error as to territorial jurisdiction: *s21 MCA*.

Subject to the terms of their appointment, Second and Third Class Magistrates have powers to hear cases within their jurisdiction: *ss8, 9 CPC*.

4.3 Criminal Jurisdiction

In exercising criminal jurisdiction, Magistrates have all the powers and jurisdiction conferred on them by the *Criminal Procedure Code*, the *Magistrates Courts Act*, and any other law in force: *s17 MCA*.

All *Penal Code* offences are tried at the Resident Magistrate's Court unless otherwise stated in:

- the Fifth Column of the First Schedule *CPC*: *s4(1) CPC*; or
- any law other than the *Penal Code*: *s5 CPC*.

Resident Magistrates have power to try all offences.

A High Court Judge may by order invest a Resident Magistrate's Court with jurisdiction to try a particular offence which would otherwise be beyond its jurisdiction. However, the Magistrate may not impose a sentence which exceeds their sentencing jurisdiction: *s4(2) CPC*.

4.4 Sentencing Jurisdiction

Resident Magistrates

A Resident Magistrate has jurisdiction to pass sentence up to:

- a maximum 10 years imprisonment on one charge; or
- a fine not exceeding $15,000; or
- both: *s7 CPC*, as amended by *s3 CPC(Amendment) Act 13 of 2003*.

Second Class Magistrates

Second Class Magistrates have jurisdiction to pass sentence up to:

- a maximum one year imprisonment; or
- a fine of $200; or
- both: *s8 CPC*.

Third Class Magistrates

Third Class Magistrates have jurisdiction to pass sentence up to:

- a maximum six-month imprisonment term not exceeding six months; or
- a fine not exceeding $100; or
- both: *s9 CPC*.

4.5 Exemptions

The Magistrate's Court shall not exercise jurisdiction:

- in suits where the title to any right, duty or office is in question;
- in suits where the validity of any will, testament, or bequest is in question;
- in suits where the legitimacy of any person is in question;
- in suits where the validity or dissolution of any marriage is in question;
- in any action for malicious prosecution, libel, slander, seduction or breach of promise to marry: *s16 proviso MCA as amended by s2 Magistrates' Courts (Civil Jurisdiction) Decree 1998*;
- in the issuing of, or the making of orders pursuant to a writ of habeas corpus: *s5 Magistrates' Courts (Chapter14) Amendment Decree 1987 (no 16)*.

4.6 Civil Jurisdiction

Resident Magistrates

Resident Magistrates, in addition to any jurisdiction under any other Act, have jurisdiction in civil causes:

- in all personal suits arising out of any accident involving a vehicle where the amount, value or damages claimed is not more than $3,000;
- in all other personal suits, whether arising from contract, tort, or both, where the value of the property or debt, or damage claimed is not more than $2,000;
- in all suits between landlord and tenant for possession of any land claimed under any agreement or refused to be delivered up, where the annual value or annual rent does not or did not exceed $2,000;
- in all suits involving trespass to land or for the recovery of land, irrespective of its value where no relationship of landlord and tenant has at any time existed between the parties in respect of the land or any part of the land; and
- in any type of suit covered herein, whatever the value, amount, debt or damages sought, if all the parties or their respective barristers and solicitors consent thereto in writing, provided that where such suit has already been commenced in the High Court, it may only be transferred to a Resident Magistrate's Court with the prior consent of the High Court: *s16(1)(a)(b)(c) MCA*.

Resident Magistrates also have the jurisdiction:

- to issue writs of habeas corpus for the production before the Court of any person alleged upon oath to be wrongfully imprisoned and to make orders thereon;
- to appoint guardians of infants, and to make custody orders for infants;
- to grant in any suit instituted in the Court, injunctions or orders to stay waste or alienation or for the detention and preservation of any property the subject of such suit, or to restrain torts or breaches of contracts;
- to enforce by attachment any order made by the Court;
- to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him, in pursuance of any order or judgment of the Court or any other competent Court, provided that such jurisdiction shall only be exercised where it is proved that the person making default has, or has had since the date of the judgment the means to pay the sum and has refused or neglected to pay; and
- in all other suits and actions in respect of which jurisdiction is given to a Resident Magistrate's Court by the *Magistrates' Courts Act* or any other written law, provided that a Magistrate's Court shall not exercise jurisdiction:
    - in suits where the title to any right, duty or office is in question;

- in suits wherein the validity of any will or testamentary writing or bequest or limitation under any will or settlement is in question;
- except as specifically provided in the *Matrimonial Causes Act* or any other Act in suits wherein the validity or dissolution of marriage is in question; or
- in any action for malicious prosecution, libel, slander, seduction or breach of promise of marriage: *s16(1)(d) - (i) MCA.*

Second and Third Class Magistrates

Second and Third Class Magistrates have jurisdiction:

- in all personal suits arising out of any accident involving a vehicle where damages are claimed;
- in all other personal suits, whether arising from contract, tort, or both, where the value of the property or debt, or damage is claimed;
- to enforce by attachment any order made by the Court;
- to commit to prison for a term not exceeding six weeks, or until payment of the sum due, any person who makes default in payment of any debt or instalment of any debt due from him, in pursuance of any order or judgment of the Court or any other competent Court, provided that such jurisdiction shall only be exercised where it is proved that the person making default has, or has had since the date of the judgment the means to pay the sum and has refused or neglected to pay,

provided that such jurisdiction is limited to the amount of $200 in the case of a Second Class Magistrate and to $50 in the case of a Third Class Magistrate.

4.7 Appellate Jurisdiction

Appellate criminal jurisdiction

The Magistrate's Court has no jurisdiction to hear criminal appeals. All criminal appeals lie to the High Court: *s308 CPC*.

Appellate civil jurisdiction

Appeals from all judgments, decisions, or orders from a Second or Third Class Magistrate lie to a Resident Magistrate: *s40 MCA.*

Magistrates may also consider appeals from small claims tribunals.

5 Transfer of Cases

5.1 Territorial Transfer

A Magistrate has jurisdiction to transfer a case where it appears the offence was committed outside his or her territorial jurisdiction: *s68 CPC*.

Any transfer after trial has commenced, should be by way of a report to the Chief Magistrate: *s69 CPC*.

The Chief Magistrate has the power to change the venue of a proceeding where:

- a fair and impartial enquiry cannot be had in any Magistrate's Court;
- some question of law of unusual difficulty is likely to arise;
- a view of the place in or near the place which any offence maybe required for inquiry;
- an order will be to the convenience of the parties or witnesses;
- an order is for the expedience for the ends of justice: *s70 CPC*.

The application to the Chief Magistrate shall be made by motion with an accompanying affidavit, with notice having being served on the DPP's Office 24 hours prior to hearing: *s70(3)(4) CPC*.

5.2 Transfers to the High Court

Transfer of criminal cases from the Magistrate's Court to the High Court may occur:

- by election of the defendant;
- before the trial on the application of the prosecution;
- before or during trial at the discretion of a Magistrate; or
- for sentencing in the High Court after conviction has been entered.

By election of the defendant

For a number of offences, the defendant may elect to have the matter heard in the High Court: *s3 Electable Offences Decree 1988*. These offences are located in the attached Schedule of the *Decree*.

By application of a Magistrate

Subject to the provisions of the *CPC*, a Magistrate may, of his or her own motion, or on the application of any person concerned, report to the High Court the pendancy of any cause or matter which in his or her opinion ought for any reason to be transferred from his or her Court to any other Magistrate's Court or to the High Court. The High Court shall direct in what mode and where the cause or matter shall be heard and determined: *s32 MCA*.

There are no longer preliminary enquiries. A Resident Magistrate may transfer any charge or proceeding to the High Court, without holding a preliminary enquiry and committal proceedings: *s223, 224 CPC (Amendment) Act 13 of 2003*.

The transfer of cases to the High Court is also governed by Practice Direction No. 1 of 2003. This decree sets out the administrative requirements for such transfers, regarding the calling of the case, and disclosure of prosecution statements and exhibits: *Practice Direction No. 1 of 2003*.

An order for transfer of a charge or proceedings to the High Court requires the appearance of the defendant in the High Court within 28 days: *s227 CPC (Amendment) Act 13 of 2003*.

A Resident Magistrate has jurisdiction to accept a guilty plea and to record a conviction on an electable offence or an offence only triable in the High Court: *s225(1) CPC (Amendment) Act 13 of 2003*.

Transfer for sentencing

Transfer for sentencing takes place under *s222 CPC (Amendment) Act*. It may take place where a Magistrate is of the opinion that the offender should be given greater punishment than is possible under his or her jurisdiction. The decision to inflict greater punishment is based on:

- the nature of the offence;
- the circumstances of the offending; and
- the offender's previous history.

3:

CRIMINAL LAW AND HUMAN RIGHTS

1 Introduction

Chapter 4 of the *Fiji Constitution* sets out the fundamental rights and freedoms that are protected in Fiji. Its application binds all branches of the State and all persons performing the functions of any public office: *s21(1)(a),(b) Constitution*.

You should ensure that all fundamental rights are respected in the administration of justice.

The rights to *secure protection of the law* under the Constitution are particularly important for criminal trials: *ss27, 28, 29 Constitution*.

For general discussion, some of these rights are explained below.

2 Right to a Fair Hearing within a Reasonable Time by an Independent and Impartial Court

The Constitution states that a person charged with an offence has the right to a fair trial within a reasonable time, before an impartial Court of law: *s29(1),(2),(3) Constitution*.

Reasonable time

In *Apatia Seru & Anthony Stevens v The State* Crim App No AAU0041 of 1999S, the Court adopted a list of factors which may be considered when considering whether delay is reasonable or unreasonable. These include:

- the length of the delay;
- waiver of time periods;
- reasons for the delay, including the inherent time requirements of the case;
- the actions of the defendant;
- the actions of the State;
- the limits on institutional resources and other reasons for delay; and
- prejudice to the defendant.

In the above case, the Fiji Court of Appeal held that a delay of 4 years and 10 months from laying of the charges to the end of trial was unreasonable, and upheld the Canadian authority of *R v Morin* (1992) CR (4^{th}) 1, as applicable to Fiji.

Also, see *State v Peniasi Kata* Cr. Action HACOO09 of 1994 and *Sailasa Naba & Ors v State* No.HAC0012 of 2000L.

Bias

On the issue of bias, the case of *Koya v State* (1997) FCA Crim App No. AAU0011 of 1996 is relevant.

Section 9 Magistrates' Courts Act reinforces the principle that the Court should be impartial. It states:

> "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…."

The existence of judicial bias should be determined according to the reasonable bystander test, and the effects of judicial statements should be taken as a whole, see: *Johnson v Johnson* [2000] 5 LRC 223 High Court of Australia.

Other cases: *Rt Ovini Bokini v State* Crim App No. AAU001 of 1999S; *State v Bhawani Prasad* Suva High Court Crim App No. HAA056/2002; *Ramesh Chand v State* Suva High Court Crim App No. 6/2000.

3 Presumption of Innocence

Section 28(1)(a) states:

> "Every person charged with an offence has the right to be presumed innocent until he is proven guilty according to law".

This is an extremely important principle in criminal law.

You must ensure that:

- you do not base your finding of guilt on previous knowledge of the defendant; and
- the prosecution bears the burden of proving the defendant's guilt beyond reasonable doubt.

See *Azzopardi v R* [2001] 4 LRC 385, High Court of Australia.

4 Right to Freedom from Cruel or Degrading Treatment

Section 25(1) states:

> "Every person has the right to freedom from torture of any kind,…and from cruel, inhumane, degrading or disproportionately severe treatment or punishment".

A strong interpretation has been endorsed by the Fijian judiciary. "For the judiciary in Fiji the Constitution sets high standards and high expectations in the promotion and progressive development of human rights and fundamental freedoms. For us there is no luxury of a declaratory theory of law. We need to be dynamic and creative, sensitive to popular expectations and democratic values.": *Sailasa Naba & Ors v State* Criminal Jurisdiction No HAC0012 of 2000L.

In *Taito Rarasea v State* Crim Appeal No.27 of 2000, the High Court considered the appellant's contention that he had been punished twice for the same offence and had been subjected to inhumane treatment. The Court held that the Commissioner of Prisons' power under the *Prisons Act* was contrary to international instruments in the use of food as a means of control, and contravened *s25* as amounting to degrading and inhumane treatment. The Court therefore declared it null and void.

Two other recent cases of significance are *Naushad Ali v State* Crim Appeal No.CCCP0001 of 2000L regarding the use of corporal punishment; and the removal of mandatory minimum custodial imprisonment terms for drug offenders in the case of *Audie Pickering v State* HAM 007/01.

5 Right to an Interpreter

Section 28(1)(b) states:

> "Every person charged with an offence has the right to be given details in legible writing, in a language that he or she understands, of the nature of and reasons for the charge".

A defendant 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.

For the defendant to have a fair trial, interpreters and Court clerks must be:

- impartial;
- fluent in the language(s) being interpreted;
- understand that they need to be accurate.

Note that *s13 Magistrates' Court Act* places the Court clerk/interpreters under your immediate control and direction.

6 Right to Adequate Time and Facilities including Right to Counsel

Section 28 (1)(c) & (d) states:

> "Every person charged with an offence has the right to be given adequate time and facilities to prepare a defence…and the right to defend himself or herself in person or to be represented …by a legal practitioner of his or her choice or,…to be given the services of a legal practitioner under a scheme for legal aid ".

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

In many cases, it will be important for a defendant 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 the defendant time to meet with a legal representative if he or she so chooses.

What constitutes adequate time will depend upon the circumstances of the case.

Note that the right to be given the services of a legal practitioner under a scheme of legal aid exempts foreign nationals detained, arrested or charged in Fiji: see *Reginald Alan Lyndon v The Legal Aid Commission and the State* Misc. Case No. HAM 38 of 2002.

Shameem J sets out a recommended format for informing a defendant of their rights under *s28(1)(d)* and *s29(1)* of the *Constitution* in *Suren Singh & 4 Ors v The State* (unreported) Suva High Court Cr. App. No 79 of 2000.

7 Right to Not Give Evidence in Court

Section 28(1)(f) states:

> "Every person charged with an offence has the right …not to be a compellable witness against himself or herself".

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

The defendant 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 defendant's choice not to give evidence. In such cases you must base your decision solely on the evidence presented by the prosecution and decide whether the prosecution has met the required burden and standard of proof.

8 Right to be Present in Court

Section 28(1)(h) states:

> "Every person charged with an offence has the right not to have the trial take place in his or her absence..."

This provision protects the right of the defendant to be present and hear the proceedings and the evidence against him or her. However, this right is qualified by two limitations. The proceedings may take place in his or her absence if:

- after having being served with summons requiring his or her attendance, he or she chooses not to attend; or
- his or her conduct in Court is such that the continuation of proceedings is impracticable.

Nevertheless, if the offence charged is punishable by a term of imprisonment, then the above qualifications do not apply: *s28(2) Constitution*.

Section 189 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 defendant, or when his personal attendance has been dispensed with, in the presence of his barrister and solicitor".

An exception for the requirement for the defendant to be present during his or her trial is provided for in *s8 CPC*. A Magistrate may dispense with the personal attendance of the defendant in cases where:

- a summons is issued for any offence other than a felony; **and**
- the punishment is only a fine and/or imprisonment not exceeding 3 months; **and**
- the defendant has pleaded guilty, in writing or through a lawyer.

Also note the provision under *s199 CPC*, where the Court may proceed with the hearing in the absence of the defendant in cases where the term of imprisonment does not exceed 6 months and/or a fine not exceeding $100.

9 Right to Not be Found Guilty of a Criminal Offence if, at the Time, it Does Not Constitute an Offence

Section 28(1)(j) states:

> "Every person charged with an offence has the right not to be found guilty… of an offence unless such act or omission ... at the time it occurred … constituted 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.

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.

10 Right to Not be Tried Again for the Same Offence

Section 28(1)(k) states:

> "Every person charged with an offence has the right not to be tried again for an offence of which he or she has previously been convicted or acquitted".

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.

See *Ministry of Labour v Merchant Bank of Fiji* Crim App No. HAA 011 of 2002; and *State v Atish Jeet Ram* Crim App No. AAU004 of 1995S.

4:

JUDICIAL CONDUCT

1 Ethical Principles

On appointment as a Magistrate in Fiji, you have sworn the following oath:

> "I swear by Almighty God that I will well and truly serve the Republic of the Fiji Islands in the office of [Resident] Magistrate. I will in all things uphold the Constitution; and I will do right to all manner of people in accordance with the laws and usages of the Republic, 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 your 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 procedures; and
- prepare well 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. You must be careful to preserve your impartiality and must not take either side or give the appearance of doing so.

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, ethnic background;
- avoid membership in any organisation that you know currently has practices that contravene the law;
- in the course of proceedings before you, disassociate yourself from, and disapprove of, improper 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.

1.4 "The Laws and Usages of the Republic"

Lawfulness
You must always 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. **You** are the decision-maker;
- defend the constitutionally guaranteed rights of the people of Fiji.

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 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 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. You should not sit in any case before the Court where there could reasonably be such a perception.

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 defendant or witness:

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

In Fiji, family relationships can sometimes be a major problem. Decide how closely that person is related to you, then take the option that you think would best preserve a position of impartiality.

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.

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.

Try to have the relevant legislation at hand, otherwise get the parties to provide you with them.

Criminal jurisdiction

- Consider the offences – make sure you know what elements must be proved.
- Be prepared for interlocutory applications that may arise in the course of proceedings.
- Be prepared to deliver rulings at short notice.

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 his or her case; and
- allowing sufficient time to enable the person to collect evidence to support his or her case;
- allowing sufficient time to enable the person to collect evidence to be able 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:

1. 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.
- You will need proof of service of the warrant or summons.
- 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.

2. 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.
- The principle always requires you to ensure you have all the relevant facts and materials before deciding.

3. 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 relevant authorities.
- 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 judiciary.

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 interpretation; 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.
- Take 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 generally 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.

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 understands:

- the criminal charges faced; and
- the procedures of the Court.
- what the Court is doing; and
- why the Court is following that course.

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

- the nature of the charge;
- the legal implications of the allegations, including the possibility of a prison term if he or she is convicted;
- that legal representation is available;
- that he or she has an obligation to put his or her case.

Dealing with language problems

Ideally, an interpreter should be obtained and sworn in when there is a language problem. However, when none is available, you should be able to:

- explain the nature of the charge or issues as slowly, clearly and simply as possible; and
- 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.

5:

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 defendant.

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 *s191 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 *s2 Interpretation Act*, under the *CPC*, or under the *Evidence Act* as a trade or business record.

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: *State v Vincent Lobendhan* (1972) 18 FLK 1.

Carbon copies are admissible as the original: *Durston v Mercuri* (1969) V.R. 507.

See *State v Maika Soqonaivi* Crim Case No 0f 1996; *Wayte* (1982) 76 Cr App R110.

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 persons 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: *s59 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 consider:

- 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 should 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.

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, the defendant and co-defendant;
2. examination of witnesses;
3. leading questions;
4. refreshing memory;
5. lies;
6. corroboration;
7. hostile witnesses;
8. warnings to witnesses against self incrimination;
9. identification evidence by witnesses; and
10. visiting the scene.

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 defendant and co-defendant

The general law rule is the defendant is not a competent witness for the prosecution. This means that a co-defendant cannot be called by the prosecution to give evidence against another, unless certain qualifications are present.

A defendant cannot be compelled to give evidence at his or her own trial: *s10(7) Constitution*.

A co-defendant can only lawfully be called to give evidence for the prosecution when he or she has ceased to be a co-defendant, 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 a competent witness for the defence at every stage of the proceedings provided that:

- he or she does so on his or her own application: *s145(a) CPC*;
- his or her failure to give evidence shall not be commented upon by the prosecution: *s145(b) CPC*;
- his or her spouse gives evidence upon his or her application: *s145(c) CPC*;
- no communication between the defendant and his or her spouse during marriage shall be compelled to be disclosed during the proceedings: *s145(d) CPC*;
- he or she is subject to cross-examination by the prosecution: *s145(e) CPC*;
- he or she is not to be questioned on other offences not charged and of bad character unless exceptions apply: *s145(f) CPC*; and
- he or she gives evidence from the box: *s145(g) CPC*.

Spouses

The spouse of the defendant shall be a competent witness for the prosecution and defence without the consent of the defendant in any case where:

- the law in force at the time specifically provides for a spouse to be called without the consent of the defendant; or
- the defendant is charged with an offence under *Part XVII* (Offences Against Morality) or *s185* (Bigamy) *Penal Code*; or
- the defendant is charged with an act or omission affecting the person or property of their spouse or the children of the either of them: *s138 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.

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): *s136 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: *s135 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: *s137 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: *s139 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 defendant.

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 your discretion.

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 defendant or counsel wishes to see the notes, there is a right to inspect them.

7.5 Lies

If it is established that the defendant 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 defendant is guilty. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

As with a defendant, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

As to proper direction on lies, see *Amina Koya v State* FCA Crim App No. AAU 0011/96.

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 defendant.

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 defendant 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.

As to corroboration warning, see *Mohammed Kasim v Reg* 22FLR 20; *Mark Mutch v State* FJCA Crim App AAU0060/99; *Daniel Azad Ali v State* Crim App AAU 53/99S.

As to whether a corroboration warning in sexual cases is still law, see *R v Gilbert* (2000) 5LRC 606: "the corroboration rule is only a rule of practice and has now outlived it's purpose".

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, the general rules are:

- the party calling the witness may, by leave of the Magistrate, prove a previous inconsistent statement of the witness;
- 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.

See *Armogami Ranjit Singh & Anr v State* FCA Crim App No. AA4032 of 2002.

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 a defendant, where the question relates to the offence being considered by the Court. See *R v Coote* (1873) LR 4PC 599.

7.9 Identification Evidence by Witnesses

The visual identification of the defendant by witnesses needs to be treated with caution. Honest and genuine witnesses have made mistakes regarding the identity of the defendant.

The fundamental principal 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 defendant 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 defendant before?

- How often?
- If only occasionally, had they any special reason for remembering the defendant?
- How long elapsed before the original observation and the subsequent identification to the police?
- Was there any material discrepancy between the description of the defendant given to the police by the witness when first seen by them and his or her actual appearance?

See *Siga v Lesumailau & Anr* Crim App AAU 0023/2000S; *Josefa Tale v State* Crim App HAA0078/2001S.

7.10 Visiting the Scene

A visit to the *locus in quo* must include all the parties.

As to how to conduct a visit, see *State v Luisa Wakeham* HAA40/03.

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*.

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 defendant.

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 defendant, 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 defendant 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 defendant 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 defendant.

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 defendant.

Where the defendant 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 defendant 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. As an example, the judiciary may treat the political events of May 19, 2000 as well-known and dispense with proof of them in each case.

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 defendant 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.

Hearings on the *voir dire*

In some circumstances, a *voir dire* will be required to determine the admissibility of evidence. *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; or
- the admissibility of a confession or some other variety of admissible hearsay such as a dying declaration; or
- the admissibility of a tape recording; or
- the admissibility of a plea of guilty against a defendant who subsequently changes his or her plea to not guilty.

As to how to conduct a *voir dire* in the Magistrate's Court, see *Vinod Kumar v State* FCA Crim App AAU 0024/00, which set out the following procedures:

- Obtain from the defendant at the beginning of the trial the precise nature of the disputed statement.
- The prosecution calls its witnesses regarding the taking of the caution statement.
- The defendant is given the opportunity to give evidence exclusively on the taking of the caution statement.
- The defendant calls his or her witnesses.
- The Court rules on admissibility.
- The prosecution is invited to close its case – no case to answer submission.
- If there is a case to answer, the defendant does not lose the right of election.
- Determine what weight is to be placed on the evidence as a whole, including the interview statement.
- Deliver judgment.

As to the test for admissibility of confessions, see *Simon Mow v State* Crim App 60/2000; *State v Mul Chand* Crim Case 3/99; *Suren Singh & Ors* Crim App 79/2000; *R v Smith* (1991) 1SCR 714; *R v Black* (1989) 2SCR 138.

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.

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: *s29(1) Constitution*. In order to ensure that the defendant 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 defendant.

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.

As to admission of copies, see *Kanito Matanigasau v State* Crim App No. HAA 108 of 2002.

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.

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;
- *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;
- a registered architect giving an opinion about the structure of a building; and
- a qualified motor mechanic giving an opinion about the condition of a motor vehicle.

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, unless they fall under *s19 CPC*, or *s4 Evidence Act*.

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: *s191 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: *s191(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.

For example, 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 defendant in any form.

Therefore, the previous convictions of the defendant 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 defendant 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 defendant puts his or her character in issue, evidence of bad character may be admitted at common law; or
- where the defendant gives evidence, he or she may in certain circumstances face cross-examination on his character.

When the defendant is called as a witness for the defence, the previous convictions and the bad character of the defendant can be admitted as evidence under *s145(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 defendant 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 defendant 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 defendant has given evidence against any other person charged with the same offence.

The cross-examiner may call evidence to prove the conviction if the witness:

- denies having been so convicted; or
- does not admit a conviction; or
- refuses to answer.

See *Josateki Cama v State* Crim App HAA 082/2001S; *Jenkins* 31 Cr App R 1; *Selvey v DPP* (1970) AC 1,Cr App 591.

Note that when the prosecution wishes to adduce evidence of bad character, they should apply to lead the evidence and a ruling should be made.

Admissibility of evidence of good character

A defendant 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 defendant 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 defendant, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the defendant upon conviction of an offence.

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 Fiji 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, a defendant's case will either be that:

- the prosecution has not proved all the elements beyond reasonable doubt; or
- 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 defendant must point to some evidence to support such a defence: *R v Rakaimua* [1996] SBHC 13; Criminal Case No. 24 of 1995 (14 March 1996). Then, it is the **prosecution** that bears the burden of proving that such evidence should be excluded and that the defendant **was** criminally responsible for his or her act(s) or omission(s).

The exception is **insanity**. In this case, it is for the defendant 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 defendant 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 defendant:
    - 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 a defendant 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 defendant and the prosecution is not required to prove the defendant'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 defendant 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 defendant 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: *R v Bernhard* (1938) 26 CrAppR 137.

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

The defendant 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 defendant'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 defendant'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 defendant's acts or omissions be 'willed' or 'voluntary'.

Involuntary Acts

A defendant 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 act that led to the damage of the car.

Automatism

Automatism is when a defendant 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 defendant is at fault for falling into the condition in the first place. The prosecution would have to prove the defendant 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;
- some forms of neurological and physical ailments.

The prosecution bears the legal burden of proving that the actions of the defendant were voluntary and that the defence of automatism does not apply. However, the defendant 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 defendant 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 defendant. 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 was accidental: *R v Rakaimua* [1996] Criminal Case No. 24 of 1995; *Timbu-Kolian v The Queen* (1968) 119 CLR 47.

The event must not have been able to be easily foreseen by the defendant under the circumstances.
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 defendant, 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 proven 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 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 defendant 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 defendant was under an honest, but mistaken, belief is a **subjective** test.

The test to be applied is, from the evidence presented, did the defendant **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 defendant'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 the 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 defendant's action;
- if the defendant 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 defendant was or may have been mistaken as to the facts, it is immaterial that on an objective view, that the mistake was unreasonable: *R v Williams (G.)* [1984] CrimLR. 163, CA.

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*.

It is the defendant 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 the Solomon Islands case of *R v Ephrem Suraihou* (Unrep. Criminal Case No. 33 of 1992) as:

- 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 defendant 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 defendant'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 defendant 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 McNaughten rules from *McNaughten* (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: *R v Quick & Paddison* (1973) 57 CrAppR 722.

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

Expert evidence

In order to plead a defence of insanity, the defendant should have medical evidence which points to his or her mental incapacity. The defendant's evidence alone will rarely be enough to prove this defence: *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.

The evidence from a psychologist with no medical qualification is not sufficient to raise the defence of insanity: *R v Mackenney & Pinfold* (1983) 76 CrAppR 271.

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 defendant 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 defendant: *s12(3) Penal Code*.
   - Involuntary intoxication is not a defence if the defendant forms the necessary *mens rea* of the offence, either because of or despite the intoxication: *R v Kingston* [1994] 3 WLR 519.

2. If at the time of the offence, the defendant 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 defendant 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 defendant'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 Kenneth Iro* (Unrep. Criminal Case No. 66 of 1993).
- See *R v Kauwai* [1980] SILR 108, which considered the identical provision in the Solomon Islands.

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 defendant did know what he or she was doing or that it was wrong: *R v Warren Godfrey Motui* (Unrep. Criminal Case No. 20 of 1997).

2.7 Immature Age: *s14 Penal Code*

A person who is under the age of 10 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 defendant 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. See *R v Rakaimua* [1996] Criminal Case No. 24 of 1995.

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

From *R v Sheldon* [1996] 2 CrAppR 50.

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 defendant 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 defendant 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 threat is when a defendant 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: *R v Baker and Wilkins* [1997] Crim LR, 497.
- Threats of death or grievous bodily harm made to third parties, especially close relatives, may be enough of a threat to give a defence: *R v Oritz* (1986) 83 Cr App R 173.

Reasonableness

- The fact that the defendant 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 defendant 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 defendant 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 defendant had such reasonable belief, has the prosecution proven that a person of reasonable firmness, sharing the characteristics of the defendant, would **not** have responded the same as the defendant 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 a defendant 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 defendant 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 be a good defence that an offence was committed in the presence of **and** under the **coercion** of the defendant'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 Fiji, 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*.

Legislation

The *Constitution*

Section 4 of the *Constitution* sets out, in part, that a person shall not be regarded as having been deprived of his or her life in contravention of *s4* if:

- he or she dies from the use of force; and
- that force is reasonably justifiable for the defence of any person from violence or for the defence of property; and
- in such circumstances as provided by law.

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. See *State v Waisele Tuivuya* HAC 015/02.
- The question to be answered is whether the force used was **reasonable** in all circumstances, which is an objective test: *Rachel Tobo v Commissioner of Police* (Unrep. Criminal Appeal No. 1 of 1993).
- 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 defendant should also be taken into account. This is a subjective test: *R v Zamagita & Others* [1985-86] SILR 223; *R v Whyte* (1987) 85 CrAppR 283; *Jimmny Kwai v R* (Unrep. Criminal Appeal No. 3 of 1991).

- Force may include killing the aggressor, but there must 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 defendant did **not** act in self-defence or in defence of property, once the issue has been raised by the defendant and evidence has been presented: *Billard v R* (1957) 42 CrAppR 1; *R v Moon* [1969] 1 WLR 1705.

4 Parties

According to the law, different people can be held criminally responsible for an offence, as parties.

In Fiji, 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 XLIII Penal Code*; and
- conspirators under *Chapter XLII 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 defendant 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(1)(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(1)(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. See, for example, *R v William Taupa Tovarula & Others* [1973] PNGLR 140; 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.
- The defendant must have done something (or ommitted 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(1)(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(1)(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 principle 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 person for his or her thoughts unaccompanied by any other physical act beyond his or her presence.

See also: *Johnson v Youden* [1950] 1 KB 554, per Lord Goddard; *Gillick v West Norfolk and Wisbeach Area Health Authority* [1986] 1 AC 112; *R v Clarkson* [1971] 3 All ER 344.

Elements for Aiding or Abetting

- An offence must have been committed by the principal.
- The defendant 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(1)(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(1)(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(2) 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.

Counselling does **not** require any causal link. As long as the advice or encouragement of the counsellor comes to the attention of the principal offender, the person who counselled can be convicted of the offence. It does not matter that the principal offender would have committed the offence anyway, even without the encouragement of the counsellor: *Attorney-General v Able* [1984] QB 795.

The defendant 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*.

See *R v Calhaem* [1985] 2 All ER 226.

The Elements for Counselling

- An offence must have been committed by the principal.
- The defendant counselled the principal to commit an offence.
- The principal 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(3) Penal Code*.

The Elements for Procuring

- An offence must have been committed by the principal.
- The defendant procured the principal to commit an offence.
- There is a causal link between the procuring and the commission of the offence.

For other case law on parties see *John v R* (1980) 143 CLR 108; *R v Clarkson* (1971) 55 Cr App R 455; *Ferguson v Weaving* (1951) 1KB 814; *National Coal Board v Gamble* (1958) 3 All ER 203.

See *Bharat Dwaj Duve v The State* Criminal Appeal No HAA0049 of 2001S High Court of Fiji, which discusses how to deal with non-principal offenders procuring an offence: "it is advisable in the interests of fairness for the prosecution to particularise the real case against the defendant in the Particulars of Offence".

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 there 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; and
- 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.

See *R v Becerra and Cooper* (1975) 62 Cr App R 212.

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 Mosese decide to commit a robbery. Steven is inside the store taking the money while Mosese 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 Mosese 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 Mosese will be held liable for killing the shopkeeper, which was not part of the common purpose of robbing the shop, will depend on whether Mosese knew or ought to have known that killing the shopkeeper would be a probable consequence of robbing the shop.

If Mosese 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 Mosese 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 defendant.
- 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 from *R v Peter Fitali* (Unrep. Criminal Case No. 39 of 1992) are:

- there should be a joint enterprise or unlawful purpose; and
- the defendants were all parties to the joint enterprise; and
- the acts of the defendant were done in furtherance of that joint enterprise.

Points to note from *R v Ben Tungale & Others* (Unrep. Criminal Case No. 12 of 1997) are:

- 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; and
- each one is **not** liable if one of them acts beyond what was expressly or tacitly agreed to as part of the joint enterprise.

See also *R v Anderson and Morris* (1966) 1QB 110; *Police v Faisaovale and others (1975) WSLR 118; Chan Wing-sui v R* [1984] 3 All ER 877; *R v Hyde* [1990] 3 All ER 892.

4.3 Accessories After the Fact: *ss388 - 390 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: *s388 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: *s389 Penal Code*.

Any person who becomes an accessory after the fact to a misdemeanour, is guilty of a misdemeanour: *s390 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: *s388 Penal Code*.

The Elements for Accessories After the Fact

- The principal offender was guilty of a felony.
- The defendant knew of the principal offender's guilt.
- The defendant received or assisted the principal offender.
- The defendant 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: *Sykes v Director of Public Prosecutions* (1961) 45 CrAppR 230.

- The Court must be satisfied that the defendant 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: *R v Anthony* (1965) 49 CrAppR.
- An accessory cannot be convicted if the principal offender has been acquitted (*Hui Chi-Ming v R* [1991] 3 All ER 897), so the guilt of the principal offender should be determined before a plea of guilty is taken from an accessory (*R v Rowley* (1948) 32 CrAppR 147).

4.4 Conspiracy: *ss385 – 387 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 Fiji 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: *s385 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 Fiji 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: *s386 Penal Code*.

Other conspiracies

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.

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: *R v Walker* [1962] Crim LR 458.
  - The offence of conspiracy is committed at the moment of agreement: *R v Simmonds & Others* (1967) 51 CrAppR 316.
  - 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: *R v West, Northcott, Weitzman & White* (1948) 32 CrAppR 152.

- At least **two** persons must agree for there to be a conspiracy. However, a single defendant 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: *Yip Chieu-Chung v The Queen* [1995] 1 AC 111.
- Knowledge of the facts is only material, in so far as such knowledge throws light onto what was agreed to by the parties: *Churchill v Walton* [1967] 2 AC 224.
- Knowledge of the relevant law that makes the proposed conduct illegal need not be proved: *R v Broad* [1997] Crim LR 666.

The Elements for Conspiracy

- There must be an agreement between at least two people.
- There must be an intention to carry out an unlawful act.

7:

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 another 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 9.30am.

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 11.30am - 11.45am
  - lunch 1.00pm - 2.15pm
  - afternoon break 3.30pm - 3.45pm
  - finish 4.30pm.

2 The Evidence Sheet

2.1 General

There will be an evidence sheet for each file against the defendant.

The file will have the reference number of the case at the top right hand corner.

The colour of the file may indicate the type of case contained in the file:

- blue for criminal cases;
- brown for civil matters;
- pink for traffic cases; and
- orange for appeal matters.

You must check that the information contained in the charge sheet is duly sworn and that the dates of the offence and appearance are correct.

2.2 Endorsing the Criminal Evidence Sheet

Remember that those who follow you need to know what you have done. You should endorse each evidence sheet with:

- the action you have taken in Court;
- the correct date;
- your signature, at the conclusion of the proceedings.

Do all of the above in Court if that is possible.

Neatness, precision and full information are essential.

Standard information in the evidence sheet includes:

- Election if applicable;
- Right to counsel;
- Plea;
- Name of counsel;
- All remands or adjournments and conditions of such;
- Bail and bail conditions;
- Any amendment to the charge, fresh plea and election;
- Consent to amendment by the defendant;
- Name and evidence suppression and details;
- Service of disclosures;
- Witness numbers and hearing times;
- Interlocutory applications and rulings;
- The final disposal of the case whether it be:
  - the conviction of the defendant;
  - dismissal of the charge;
  - dismissal for want of prosecution;
  - withdrawal of the charge by leave; or
  - acquittal of the defendant;
- The sentence and details;
- Any award of costs, the amount and by whom they are to be paid.

2.3 Common Abbreviations

RTC	Right to counsel
CREU	Charge read, explained and understood
RIC	Remand in custody
F/B	Fresh bail
B/E	Bail extended
F/P	Formal proof
PG	Plead guilty
PNG	Plead not guilty
F/S	Fresh service
N/S	Not served
N/A	No appearance
NPS	No proof of service
Adj	Adjourn
B/W	Bench warrant
BWE	Bench warrant extended
M	Mention
H	Hearing
R	Ruling
S	Sentencing
J	Judgment
S/D	Stood down

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 defendants are in custody to free up police and prison officers.
- Call adjourned cases and those that had defendants 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

Defendants are entitled to know 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: *s28(1)(c) Constitution*.

Early disclosure of the police evidence is essential for the proper working of the case-flow management in criminal proceedings.

5 Adjournments

The power to grant an adjournment is provided for under *s202 CPC*, as amended by *s6 Criminal Procedure Code (Amendment) Act 1998*.

During the hearing of the case, you must not normally allow an adjournment other than from day to day until the trial reaches its conclusion: *s202(1) CPC*.

The party seeking an adjournment must show "good cause" before an application for adjournment is considered. Good cause includes, but is not limited to, the reasonably excusable absence of a party or witness or of a party's legal practitioner: *s202(1)(2) CPC*.

Additionally, counsel making the application for adjournment should be in a position to deal with the consequences if the application is refused: See *Sayed Ahmed Hussin v Resorts Management Ltd* 1990 36 FLR 8.

If a case is adjourned, you may not dismiss it for want of prosecution and must allow the prosecution to call its evidence or offer no evidence before adjudicating on the case: *s202(6) CPC*.

A case must not be adjourned to a date later than 12 months after the summons was served: *s202(7) CPC*.

See *DPP v Vikash Sharma* 40 FLR 234; HAA 0011d.94s; *Robert Tweedie McCahill v R* FCA Crim App No. 43 of 1980; *Rajesh Chand & Shailesh Kumar v State* FCA Crim App No. AAU0056 of 1999S; *State v Preet Singh Verma* FCA Crim App No. 1039 of 2001.

6 The Mentally Ill Defendant

The procedure in cases where the defendant is of unsound mind or otherwise incapacitated is provided for under the *Criminal Procedure Code*.

If at any time after a formal charge has been presented, you have reason to believe that the defendant may be of unsound mind so as to be incapable of making his or her defence, you may adjourn the case and make an order for a medical report or to make other enquiries as you deem necessary: *s148(1) CPC*.

Upon receipt of such medical evidence, if you are of the opinion that the defendant is of unsound mind that he or she is incapable of making a defence, postpone further proceedings and make a report of the case to the President: *s148(2) CPC*.

The President has the discretion to issue a committal warrant for the commitment of the defendant to a mental hospital or other suitable place of custody: *s148(4) CPC*.

Where there is a postponement of proceedings, you may resume proceedings if you consider that the defendant is capable of making his or her defence. A certificate from the medical officer of the mental hospital would be sufficient evidence to confirm the same: *ss151, 152 CPC*.

Where the defendant raises the defence of insanity at trial and the evidence before the Court supports such contention, make a special finding to the effect that the defendant was not guilty by reason of insanity, and report the case to the President for a committal order: *s150 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.

Reconciliation as a means of resolving certain offences is a legislated provision under *s163 CPC*. However for the Fijian "bulubulu" system, a misconception is that every wrong or offence can be settled by such means. The bulubulu should be considered in its context, as a strong mitigating factor, and not a means to evade or escape criminal sanction.

In the unique case of *Reginam v Netani Lati & Ors*, Review No.1 of 1982, the High Court acknowledged a sentence of corporal punishment meted out by village elders. The basis of this decision was the view that the "elders were exercising customary law which though had no legal force … are entitled, in a suitable case to recognition by the Courts in such manner as to uphold their sanctity and moral force within the Fijian society".
.
In the Indo-Fijian custom, respect for the community is of such significance that informal relationships within a settlement are often considered more important than relationship by kin. It would therefore not be unusual to have a defendant naming "aunts" and "uncles" in Court though in reality there are no blood connections.

There are other minority groups that co-exist in Fiji whose cultures and traditions add diversity to the Court procedure. For example, the Asian migrant population have grown in number and regularly appear in Court. The Court structure has had to accommodate this new clientele without any additional resource. As a Magistrate, you may have to use your own initiative in utilising limited resources for this new challenge.

8 Victims

Victims of crime are usually the main prosecution witnesses. There is no specific legislation dealing with victims, but Magistrates are expected to treat them 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, 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, she was drunk, 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; and
- the likelihood that the defendant 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 defendant 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 defendant if there is no defence counsel, which can be a very traumatic experience.

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 defendant. 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 defendant

Unlike some other types of crimes, it is often the case that the victim and defendant 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 defendant 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 victim's view of the defendant. 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

The Constitution provides that arrangements be made if a child is to be called as a witness in a criminal proceeding: *s29(9) Constitution*. It is therefore important to use your discretion to protect the child witness:

- In cases of indecency, the Courtroom must be closed. This is a mandatory requirement of the *Juveniles Act.*

- You must also consider whether a screen should be used to screen the child witness from the defendant. 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 on the Rights of the Child*, the judiciary must give primary consideration to the interests of children.

10 Unrepresented Defendants

Because of the expensive cost of hiring lawyers to conduct proceedings, a significant number of defendants 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, every defendant 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 charge(s);
- that the office of the Legal Aid is available to assist with legal representation; and
- that if found guilty, there is a probability of an imprisonment term.

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; and
- any issues arising out of the evidence.

For an unrepresented defendant, 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.

See *Akuila Kuoutawa & R* Labasa Crim Appeal No. 2/75: "in the case of an unrepresented defendant, any statutory defence should be brought to his attention". See also *Alipate Karikai v State* Labasa Crim Appeal No. 110 of 1999, HC of Fiji.

11 Disruption and Misbehaviour

The defendant is entitled to be present in Court during the whole of his or her trial, unless he or she interrupts the proceedings. The defendant's right is protected by the *Constitution*: *s28 (1) (h)& (2)*.

Where a defendant is required to appear in Court, but fails to do so, you may

- issue a warrant for his or her arrest: *s90 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 defendant: *s199 CPC*.

You have power to impose criminal sanctions for offences relating to judicial proceedings: *s136 Penal Code*. Offences under this provision include:

- failure to attend Court after being summoned: *s136(1)(b) PC*;
- refusal to give evidence after being sworn in: *s136(1)(c) PC*;
- refusal to answer question during trial: *s136(1)(d) PC*;
- obstructing or disturbing the proceedings: *s136(1)(g) PC*.

Where the above offences are committed in view of the Court, you may order that the defendant be detained in custody till the rising of the Court on the same day: *s136(2) Penal Code.*

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 *s136 Penal Code*, then refer the matter to the DPP for investigation and prosecution.

For further discussion of contempt of Court proceedings, see *Elizabeth Rice & Ors v S M Shah* [1999] FJCA 57; AAU0007U.97S, (High Court Criminal Action No. HAA002 of 1997).

If you think that someone should be summoned for contempt of Court, then refer the matter to the High Court through the Chief Registrar. Do not attempt to deal with it yourself.

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 from reasonably required for pleadings, discovery and Court events is unacceptable and should be eliminated."

On the question of who controls litigation and judicial involvement 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 once achieved, maintaining a current docket".

To make any case management system work requires judicial commitment.

Goals

The goals of case management are:

- to ensure the just treatment of all litigants by the Court;
- to promote the prompt and economic disposal of cases;
- to improve the quality of the litigation process;
- to maintain public confidence in the Court; and
- to 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 and lawyers are aware of their obligations;
- The system should be orderly, reliable and predictable and ensure certainty;
- Early settlement of disputes is a major aim; and
- Procedures should be as simple and easily comprehensible as possible.

Standards

It will be the Fiji judiciary, in consultation with the Law Society and the Director of Public Prosecutions, to set the standard which 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.

Examples of standards and time for dispositions are as follows:

1 Magistrate's Court: Criminal Summary

The following case-flow standards might apply (from date of charge):

Where the case is defended:

- 3 weeks to plea
- A further 13 weeks to hearing
- A further 3 weeks to sentence (where applicable).

Where the case is undefended:

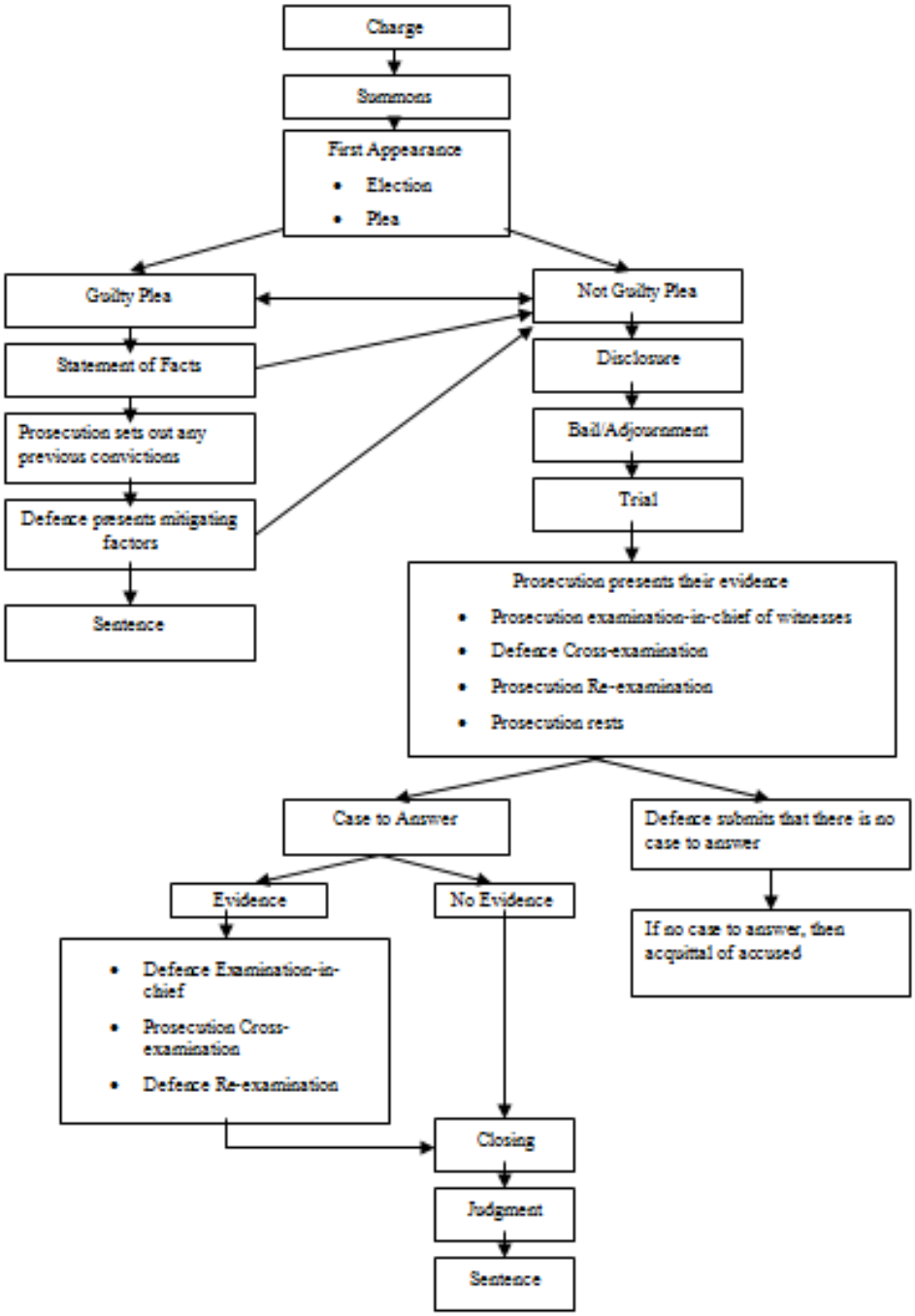
- 3 weeks to plea.
- A further 3 weeks to sentence (where applicable).

8:

PRE-TRIAL MATTERS

1 The Criminal Process

The following diagram shows the general process of a criminal case from when it enters the Court process to its final adjudication.



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: *s78(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: *s78(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: *s78(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 defendant is charged, and sign it: *s78(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: *s78(3) CPC.*

Initial steps

How the defendant is dealt with by the Police will determine the steps that are taken by the Court.

The defendant may be:

- issued with a Police Notice, under *s78 CPC*;
- charged and released on Police bail; or
- in Police custody.

Police notice to attend Court: *s80 CPC*

A Police officer may personally serve a notice upon any person, who is reasonably suspected of having committed an offence, requiring him or her to:

- attend Court at a specified time and place (not being less than 10 days from the date of such service);
- appear by advocate; or
- enter a written plea of guilty.

The notice shall be regarded as a summon and shall be served not later than 14 days from the date which the offence is alleged to have been committed: *s80(1)(2) CPC.*

In the event of a person whom such a notice is served fails to comply with the requirements of the notice, you may issue a warrant of arrest: *s80(2) CPC*.

The summons should:

- be signed by the Police officer preferring the charge;
- be directed to the person summoned; and
- be placed before the Court at least 7 days before the time for hearing.

This section applies to all offences punishable by:

- fine;
- imprisonment, with or without a fine, for a term not exceeding 3 months; and
- disqualification from holding or obtaining a drivers' license.

2 The Charge

2.1 General Requirements

A formal charge is an accusation of the commission of an offence.

The following persons may be joined in one charge and maybe 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 abatement, or of an attempt to commit such offence;
- persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or similar character; and
- persons accused of different offences committed in the course of the same transaction: *s121 CPC*.

A charge should be filed:

- at the Court within the district in which the offence is alleged to have been committed (wholly or partly);
- at the Court within the district in which the defendant was apprehended; or
- at the Court within the district in which the defendant is in custody or has appeared in answer to a summons: *ss56 - 64 CPC.*

Every charge must contain:

- a statement of the specific offence or offences with which the defendant is charged; and
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: *s119 CPC*.

Section 122 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.

For case law on the elements of a charge, see *Mohammed Saiyad v State* Labasa High Court Crim. App. No. 0046 of 1997.

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms, wherever possible.

The charge 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; and
- particulars of the offence, unless specifically not required by enactment.

Any offences may be charged together in the same charge or information if the offences charged:

- are founded on the same facts or form; or
- are part of, a series of offences of the same or similar character.

Where there is more than one offence charged, a description of each offence shall be set out in a separate paragraph of the charge called a count: *s120(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 defendant will be embarrassed in his or her defence by the counts being tried together: *s120(3) CPC*.

2.2 Validity of the Charge

Check that the charge sheet:

- is sworn;
- is within time; and
- sets out the offence, section and particulars of the offence sufficiently.

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 *s219 CPC*, at first appearance, declare that it is out of time and not triable, according to *s219*, and discharge the defendant.

2.3 Duplicity

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.

Note the exception as regards continuous offences where the defendant may be charged for a series of similar offences committed over a period of time: see *Hodgetts v Chiltern District Council* [1983] 2AC 120.

For a brief discussion on duplicity, see *Sailosi Lewai v State* Suva High Court Crim. App. No. HAA0038 of 1997.

For a discussion on procedure in alternative counts, see *Shell Fiji Ltd & Mobil Oil v State* Lautoka High Court Crim. App.No. HAA001/00L.

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: *s122(c)(d) CPC*.

There is a time limit for laying a charge for certain summary offences in the Magistrate's Court. Offences that 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: *s219 CPC*.

3 Processes to Compel the Appearance of Defendants

3.1 Summons

Under *s81 CPC*, every summons issued under the *CPC* must:

- be in writing;
- be in duplicate;
- be signed by the presiding officer of the Court;
- be directed to the person summoned;
- state the place, time and date in which the defendant is required to appear and answer the charge; and
- state the nature of the alleged offence.

Every summons shall, if practicable, be served personally on the person summoned: *s82 CPC*.

Where the person summoned cannot be found, the summons may be served by leaving a copy of it with:

- some adult member of his or her family;
- his or her servant or employee residing with him or her; or
- his or her employer.

Alternatively, the summons can also be served by affixing a copy of it on a conspicuous part of the house in which the person ordinarily resides: *s84 CPC*.

Under *s88(1) CPC*, whenever you issue a summons in respect of any offence, other than a felony, you may dispense with the personal attendance of the defendant, provided that the defendant:

- has pleaded guilty in writing; or
- appears by his or her counsel.

If a fine is imposed on a defendant whose personal attendance has been dispensed with, you may issue a summons to show cause, at the expiry of the prescribed time for payment. If the person disobeys the summons, you may then issue a warrant and commit the person to prison: *s88(4) CPC*.

3.2 Warrant of Arrest

Notwithstanding the issue of a summons, a warrant may be issued at any time before or after the time appointed in the summons for the appearance of the defendant: *s89 CPC*.

A warrant may be issued against a person who has disobeyed a summons from the Court: *s90 CPC*.

Under *s91 CPC*, every warrant shall:

- be under the hand of the Judge or Magistrate;
- state the offence;
- name and describe the person the subject of the warrant
- order the person or persons to whom it is directed to apprehend the person against whom it is issued; and
- be in force until it is executed or it is cancelled by the Court which issued it.

You may direct that security be taken or the defendant executes a bond to ensure his or her attendance before the Court at a specified time. Whenever security is taken, the officer to whom the warrant is directed shall forward the bond to the Court: *s92 CPC*.

A person arrested under warrant shall be brought before the Court without delay: *s95 CPC*.

Where the warrant is executed outside the jurisdiction of the issuing Court, the defendant shall be taken before the nearest Magistrate's Court, which shall direct his or her removal in custody to the issuing Court. If the person is willing to post bail or sufficient security, you may take such bail or security and forward the bond to the Court which issued the warrant: *s97 CPC*.

Irregularities in the warrant either in substance or form shall not affect the validity of any subsequent proceedings unless it has deceived or misled the defendant: *s98 CPC*.

Where the person, the subject of a warrant is in prison, you may issue an order to the officer in charge of such prison requiring him or her to produce the person named in the order before the Court: *s101 CPC*.

Defendant charged and released on bail and/or recognisance

The defendant 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 where:

- a defendant 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.

For a discussion of bail and bail procedures, see the chapter on Bail.

A signed copy of the notice will be kept by the Police and forwarded to the Court on the date on which the offence is to be heard.

When the Clerk receives the charge, he or she will forward it to you for your direction.

Defendant 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 and no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter: *s27(3)(b) Constitution.*

For an extensive description of the rights of arrested or detained persons, see *s27 Constitution*.

The Police should have prepared a charge sheet. Wherever possible, this 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 you.

You should hear the matter at the earliest opportunity.

Occasionally, the charge will be put directly to you.

4 Transfer of Cases

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: *s68 CPC*.

If you think the defendant should remain in custody or be placed in custody, direct that the Police take to the Court having jurisdiction:

- the defendant; and
- the complaint and recognisances taken, if any.

Issue a warrant for that purpose.

If the defendant is not to be held in custody, explain to him or her that you have directed the case be transferred to another Court and bail him or her for appearance at the Court having jurisdiction: *s68(3) CPC*.

If, in the course of trial, the evidence appears to warrant a presumption that the case is one which should be tried by some other Magistrate; you should stay proceedings and submit a report of the case to the Chief Magistrate: *s69 CPC*.

The power to change the venue of any trial rests with the Chief Magistrate: *s70 CPC*.
In exercising the power to change venue, the Chief Magistrate may act:

- on the report of a lower Court;
- on the application of one of the parties; or
- on his or her own initiative.

Every application by an interested party for a change of venue shall be made by motion and supported by affidavit: *s70(3) CPC*.

Every application by a defendant shall give the Director of Public Prosecutions notice in writing of the application and no order shall be made on the merits of the case until 24 hours has elapsed from such notice: *s70(4) CPC*.

9:

FIRST APPEARANCE

1 General

A defendant, 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 warrant;
- legal representation;
- plea, including fitness to plead;
- election;
- remands in custody;
- bail;
- adjournments.

It is your duty to explain the proceedings to the defendant and explain his or her rights to legal representation, **prior** to putting the charge. Where there is a need to obtain reports, then it is also incumbent upon you to explain the same to the defendant.

It is also incumbent to ask the defendant whether they wish to have legal representation. See *Romanu Naceva & Ors v State* Crim App No. AAU0014 of 1998S.

Usually this appearance is fairly quick and informal. There is a need to make the defendant feel at ease, but not to the extent that he or she displays over-familiarity. A firm and steady directive should be the rule for Magistrates at this initial proceeding.

Urge an unrepresented defendant to see a lawyer. This will save time and ensure that he or she understands the charges, knows the penalties, and is aware of his or her rights. It will also help to identify if there is a need to order any relevant reports to assist you in your deliberations of the case.

If legal aid is sought, adjourn the matter to allow the defendant to liaise with the office of the Legal Aid Commission. However, the prosecution should disclose first phase documents to the defendant at this stage in order to assist the Commission's counsel to assess the defendant's application for assistance.

2 Non-Appearance by the Defendant

If the defendant does not appear, either in response to a summons, Police bail or Police notice, ask the prosecutor to provide you with evidence of service or bail bond. Note that an affidavit of service is proof enough, until the contrary is proved: *s87 CPC.*

If service has been effected, you may:

- dispense with the attendance of the defendant in certain cases;
- issue a bench warrant to arrest the defendant; or
- ask the prosecution whether they are in a position to formally prove their case: *s221 CPC*.

3 Dispensing with Attendance of Defendant

Where a summons has been issued, you may dispense with the personal attendance of the defendant 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 defendant has consented to the trial taking place in his or her absence and pleaded guilty in writing or appeared by advocate: *s88 CPC*.

You may direct attendance at any later time.

If the defendant appears by advocate, then continue as if the defendant was present.

If the defendant has pleaded guilty in writing, convict and sentence.

Warrants for arrest

Where the defendant does not appear, and his or her personal attendance has not been dispensed with under *s88 CPC*, you may issue a warrant to apprehend him or her and cause him or her to be brought before the Court: *s90 CPC*.

Some relevant considerations are:

- What effort has the prosecution made to serve the defendant?
- Is the failure to serve the defendant a result of false information by the defendant?
- Does the offence with which the defendant is charged carry a term of imprisonment?

- How long after the alleged offence was the summons issued?

You may endorse the warrant to the effect that, if the defendant 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 defendant from custody. The endorsement will state:

- the number of sureties;
- the amount in which they and the defendant are to be respectively bound; and
- the time at which he or she is to attend before the Court: *s92 CPC.*

This would be useful where the defendant is in a remote place, pending the next tour.

4 Unrepresented Defendant

See the chapter on "Management of Proceedings".

If at all possible, all defendants charged with offences carrying imprisonment as a penalty, should see the Legal Aid Commission. This may require an adjournment to another date for a plea to be taken.

Where the defendant insists on representing him or herself, be careful that you comply with *s28 Constitution*. This section outlines the rights of defendants charged with criminal offences.

It is your duty to see that the hearing is fair.

5 Putting the Charge to the Defendant

Identifying the defendant

When a defendant is brought before you, you must first ascertain who he or she is. Ask for his or her:

- full name;
- occupation; and
- age.

This is very important. More than one person may share the same name. The defendant might be a juvenile and you would need to treat a juvenile defendant differently to adults.

Explaining the charge to the defendant

You must clearly explain the nature of the offence to the defendant. This involves explaining the elements.

Unless the defendant 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 for understanding

Check whether the defendant understands the charge. When you are sure he or she understands the full nature of the offence charged, then asks how he or she pleads to the charge. Never take for granted that the defendant might have understood your explanation without his or her confirmation.

6 Reconciliation

See *s30 MCA.*

In criminal cases, a Magistrate's Court may promote reconciliation and encourage and facilitate the settlement of proceedings in an amicable way for the following offences:

- criminal trespass by day: *s197(1) Penal Code*;
- common assault: *s244 Penal Code*;
- assault causing actual bodily harm: *s245 Penal Code*; and
- wilful and unlawful damage to property: *s324(1) Penal Code*.

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 defendant 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 stayed or terminated.

7 Pleas

7.1 Pleas Generally

A defendant can either plead "guilty" or "not guilty" to a charge: *s206(1) CPC*.

The defendant may, with leave of the Court, change a not guilty plea to guilty at any time.

The defendant may also, with leave of the Court, change a guilty plea to not guilty at any time, but before sentencing.

For pleas generally, see *State v Isaia Saukova* Crim App HAA of 2000L; *LTA v Eroni Volavola* Crim App 066 of 2002S; *Michael Iro v Reg* 12 FLR 104.

7.2 Taking the Plea

After you are sure that the defendant understands the charge, take a plea. See *s206 CPC*.

Ask the defendant whether the charge is true or not. If the defendant says it is true:

- ask the prosecution to read a brief summary of the facts;
- tell the defendant to listen very carefully to this. Explain that he or she will be asked at the end whether the facts are true;
- after the prosecution has read the facts, ask the defendant whether they are true or not.

If the defendant admits the truth of the facts, this will suffice as a plea of **guilty**. 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 defendant admits the truth of the charge, but makes some remarks or comments, listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this if the defendant is unrepresented.

If the defendant 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 defendant may amount to a defence, you must enter a plea of **not guilty** for the defendant.

For example, on a charge of malicious damage, one of the elements is actual damage to property. If the defendant pleads guilty but disputes the amount of damage (e.g. the prosecution alleges 10 glasses were damaged and the defendant 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 that the behaviour must be in a public place. If the defendant admits to being drunk and disorderly, but says it was in his friend's backyard, that is relevant and you should enter a plea of **not guilty** for the defendant. It is then up to the prosecution to prove he was in a public place.

Where the defendant refuses to plead, a plea of **not guilty** should be entered: *s206(4) CPC*.

Where the defendant is represented, a plea by counsel is acceptable.

7.3 Fitness to Plead

You will need to be conscious in particular cases whether the defendant is fit to plead. A defendant is under a disability if he or she cannot:

- plead;
- understand the nature of proceedings; or
- instruct counsel.

In these situations, it would be better to ascertain the nature of the problem first than to allow proceedings to continue. Relevant reports may have to ordered, if necessary, and the matter may have to be adjourned to another date.

A finding of disability can result in:

- the defendant's detention in a hospital or psychiatric facility; or
- the defendant's immediate release.

7.4 Guilty Plea

If the defendant admits the truth of the charge, record the admission, convict the defendant and pass sentence or make an order against him or her: *s206(2) CPC*.

Where there is an unequivocal plea, you should ask the following, "Has any person in authority, Police or otherwise, given you any inducement or made any offer or promise of any benefit to you to persuade you to enter a plea of guilty to these charges?" See *Vilikesa Balecala v State* Crim App No. HAA0062 of 1996.

Entering conviction

The defendant's admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her: *s206(2) CPC*.

You should never sentence a person without convicting him or her first.

You may:

- sentence immediately;
- stand down the matter to consider the appropriate sentence; or
- adjourn the matter to allow for relevant reports to be compiled, and remand the defendant.

If you are adjourning, consider bail/remand.

Sentencing

If there is a dispute as to facts, the prosecution should be offered the opportunity to prove them. If the prosecution elects to forfeit this chance, the defendant's version must be accepted for sentencing.

If the defendant disputes the list of previous convictions, the onus is on the prosecution to prove it. If the list is unchallenged, you should note the list accordingly.

Where a person is charged with any offence and can be lawfully be convicted on such charge of some other offence not included in the charge, he or she may plead not guilty of the offence charged, but guilty of the other offence: *s208 CPC*.

See the chapter on "Sentencing".

7.5 Not Guilty Plea

If the defendant 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.

Immediate hearing

If all parties are ready to proceed with a defended hearing (including witnesses), proceed to hear the matter immediately or adjourn the case to later in the day to hear it. See chapter on "Defended Hearings".

Hearing at a later date

You should fix a suitable hearing date after all disclosures have been served and the parties have ample time to summon and get their witnesses to Court.

Remands / bail after plea

If a plea of not guilty is entered you may:

- remand the defendant and obtain an estimate of hearing time (ascertained from the prosecutor, the defendant's counsel and your Court diary); 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.

If bail is granted, the terms, if any, should be noted carefully on the Evidence Sheet.

Reasons must be given for refusing bail. See the chapter on "Bail".

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 defendant is to be kept apart from adult prisoners, a need for medication or risk of self-harm.

Disclosure

Check whether the prosecution are ready to serve any disclosures.

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: *s129 CPC*.

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: *s131 CPC*.

8 Election

There are a number of offences in the schedule to the *Penal Code* which are classified "electable'. These offences are triable by the High Court but may be tried in the Magistrate's Court if the defendant so chooses.

The election should be put to the defendant as early as possible and preferably on the first appearance. However, at times an unrepresented defendant may seek to defer election until he or she has had legal advice. In these situations, it would be better to allow the application and await the presence of counsel before putting the election to the defendant.

On the other hand, if counsel does not appear after the second consecutive adjournment, then perhaps it is upon you to explain the right of election to the defendant and allow the proceedings to move forward. In doing this, it is advisable to take accurate notes of the proceedings.

Where the defendant has elected trial in the High Court, then you must ensure that the transfer procedures under Part 7 of the *CPC (Amendment) Act 2003* are complied with. See *Practice Direction No. 1 of 2003* for these procedures.

10:

DEFENDED HEARINGS

1 Magistrate's Notes

A suggestion is to note each element of the charge on a separate piece of paper. As evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision.

A starting point is the list of common offences in chapter 10. You may peruse the elements of the offence which are the subject of the charge before you, and note the evidence presented to satisfy each of the elements.

2 Hearing Outline and Procedure

2.1 Appearance/ Non-Appearance of Parties

Only the defendant appears: *s198 CPC*
If the complainant has had notice of the time and place appointed for hearing, and does not appear, either in person or by his or her counsel, dismiss the charge unless you think it proper to adjourn the hearing to another date.

You may:

- release the defendant on bail;
- remand him or her in custody; or
- post such security for his or her appearance as you think fit.

Only the complainant appears: *s199 CPC*
Where the defendant was summoned, and the offence charged is punishable with a term of imprisonment for a term not exceeding 6 months and/or a fine not exceeding $100, you may, upon proof of service, proceed with the hearing in the absence of the defendant.

If the offence charged amounts to a felony and you are satisfied that the defendant has failed to obey the summons or breached his or her bail conditions, you may order a warrant for his or her arrest and adjourn the hearing. See the chapter on "Bail".

In a summons case, if there is no proof that the summons has been served at a reasonable time before the hearing, then adjourn for a reasonable time to allow the prosecution to serve, or to prove service.

If a defendant has been arrested and bailed by Police, check the Police bail form to ensure that the defendant signed the bail form and was bailed to the appropriate date before continuing.

Appearance of both parties: *s200 CPC*

If, at the time appointed for hearing the case, both the complainant and the defendant appear, proceed to hear the case.

Non-appearance of parties after adjournment: *s203 CPC*

If the defendant does not appear before the Court after an adjournment, you may, unless the defendant is charged with a felony, proceed with the hearing. If the defendant is charged with a felony, issue a warrant of apprehension.

If the complainant does not appear, you may dismiss the charge, with or without costs.

2.2 Part-Heard Applications

At times there will be applications, first by the prosecution and subsequently by the defence, to have the case heard then adjourned because all the evidence needed for the case is not available on the date of hearing. It is advisable for you to hear the application in full and ask for the other party to respond before ruling.

Some counsel may deliberately make this application in order to prolong or delay matters. Remember that the discretion to grant or not to grant the adjournment rests with you.

Usually hearing dates are fixed by the Court, in consultation with the parties and well in advance. Therefore, unless there are compelling reasons, you should grant adjournments on part-heard applications sparingly.

2.3 Admission of Facts

A defendant, or his or her counsel, may admit any fact or any element of the offence and that admission will constitute sufficient proof of the fact or element: *s192A(1) CPC Amendment Act 1998*.

Every admission is to be in writing and signed by:

- the defendant or his or her counsel; and
- the Magistrate.

2.4 Plea of Guilty to Other Offence

Where a person is charged with any offence and can be lawfully be convicted on that charge, of some other offence not included in the charge, he or she may plead not guilty of the offence charged, but guilty of some other offence: *s208 CPC*.

3 Unrepresented Defendant at Trial

The following outline applies where the defendant is unrepresented. With necessary modifications, however, it also applies when the defendant is represented.

Take care to fully advise the defendant of the procedure to be followed and to accurately record the advice given to the defendant. The following steps should be followed:

- Inform the defendant that proceedings are going to be conducted in English: *s194 CPC*.
- Confirm the defendant's plea and ensure this is recorded on the Evidence Sheet.
- Ask the witnesses to leave the Court room.
- Ask the defendant whether he or she prefers to have the proceedings interpreted and arrange for an interpreter for him or her: *s195 CPC*.
- Provide the defendant with a brief explanation of:
  - the procedure to be followed;
  - the right to cross-examine;
  - the right to give and call evidence; and
  - the obligation to put his or her case to any witness.
- After each witness has given evidence, excuse the witness from further attendance and warn the witness not to discuss the evidence with other witnesses who have yet to give evidence.
- If there are several unrepresented defendants, have them identify themselves to you at the outset.
- If you ask any questions of a witness after re-examination has concluded, you should ask the prosecutor and the defendant if there are any further matters raised by your questions, which they wish to put to the witness.

Without overdoing it, you are expected to help the defendant from time to time during the hearing.

After the prosecution case is concluded, you make a finding whether there is a case to answer.

Next, you may address the defendant on his or her options in the following manner:

> "You have three options. (1) 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 also have the right to call witnesses to give evidence on your behalf. Again, if they give evidence, 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 understand this? (2) You have the right to make a statement from the witness box and will not be cross-examined by the prosecutor. (3) You have the right to remain silent and since you have heard what the prosecution have said against you it is again up to you whether you wish to exercise this right".

You must ensure that the defendant fully understands the choices open to him or her before electing the one that he or she prefers. Once the defendant has indicated his or her preference, record it on the Evidence Sheet.

You may then ask the defendant to give you his or her version of the events. It may be helpful to lead the defendant through the preliminary matters 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 defendant wishes to comment on it.

After the defendant 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?"

A defendant may not make an unsworn statement, but may make submissions on the law at any time.

After hearing all submissions on the law and the evidence, then either deliver your judgment or fix a date to deliver it.

4 No Case to Answer

The following applies whether the defendant is represented or not. Remember that the standard of proof required at this preliminary stage is one of a "prima-facie" case.

At the close of the prosecution case, if there is a submission that there is no case to answer, you should give the prosecution the opportunity to reply.

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 defendant does not feel that the case is already decided against him or her.

If you find that there is no case to answer, you should give a ruling detailing why, dismiss the information and acquit the defendant: *s210 CPC.*

5 Evidential Matters

5.1 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, the answer to which could be self incriminatory, you should:

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

In most cases, it would be wise to stand the witness down to see a lawyer to explain the consequences.

5.2 Identification

There is a need for caution in considering evidence of identity.

It is notorious that honest and genuine witnesses sometimes make mistakes. A convincing witness may nonetheless be a mistaken witness.

In summary hearings, you must bear in mind the need for caution before convicting a defendant in reliance on the correctness of identification evidence and, in particular, the possibility that the witness may be mistaken. See *R v Turnbull & Others* [1976] 3 All ER 549.

You should state and record this.

5.3 Evidence of Defendant and Spouse in Criminal Cases

The defendant and his or her spouse (married) are competent but not compellable witnesses for and against each other. See the chapter on Evidence.

If the spouse of the defendant refuses to give evidence, then there is little you can do.

5.4 Defendants Charged Jointly

Nothing that a defendant says in a statement to the Police or anyone else which incriminates a co-defendant can be evidence against the co-defendant, unless the co-defendant expressly or impliedly accepts what has been said.

5.5 Corroboration

Where corroboration is required as a matter of practice, you must look for it in the prosecution evidence. Where you are unable to find corroboration in the evidence but you were nevertheless satisfied beyond reasonable doubt of the defendant's guilt, you must warn yourself of the danger of convicting on the evidence. You may then convict. You must endorse on your judgment that you have warned yourself of the danger.

An example of a corroboration warning is as follows:

> "The evidence of A requires corroboration as a matter of practice. This means that it is dangerous to convict on his/her evidence alone, without corroboration. Corroboration is any independent evidence which implicates the defendant in respect of the offence charged. Corroboration can come from several pieces of evidence. I have warned myself of the dangers in convicting in the absence of such corroboration. In this case there is/ is not corroboration. The corroborative evidence is that of _____." *Davies v DPP* [1914] AC 338 1 All ER 507.

5.6 Lies

If it is established that the defendant has lied, as opposed to making a genuine error, the fact that the defendant has lied goes to credibility.

A lie does not necessarily mean the defendant is guilty, as a lie can be told for a number of reasons and not always to avoid guilt.

Consider the remaining evidence to ascertain if the prosecution has proved its case.

Only consider a deliberate lie as part of the prosecution case if the lie was clearly stated when an innocent explanation could have been expected to be given.

6 Amending the Charge

6.1 General

The Court has wide powers to alter any charge by substituting a lesser, or indeed a more serious, charge. You may alter the substance or the form of the charge either by way of:

- amendment;
- substitution; or
- the addition of a new charge.

The amendment can be made at any time during the hearing before the close of the case for the prosecution.

If any amendment is made to the charge, the amended charge must be put to the defendant, as he or she is required to plead to the amended charge.

The defendant may also demand that the witnesses be recalled to give fresh evidence and be cross-examined. The prosecution will have the right to re-examination.

6.2 Procedure

The proposed amendment must be stated with clarity. Explain the difference in the essential ingredients of the former charge and the amended charge to the defendant who is unrepresented.

After you have received an application from the prosecution to amend, the following procedure is suggested:

- Ask Counsel for the defence or the defendant (if unrepresented):

  "Do you consent to this application to amend or do you oppose it?"

- If the amendment is not opposed and the defendant is represented, the amendment would ordinarily be granted.
- Hear defence submissions.
- Give the prosecution opportunity to reply.
- Decide whether to grant the application or not.
- Then amend the Evidence Sheet as appropriate and endorse and sign it:

  "Amended as above during the hearing".

  or

  "Amended in Court - defendant present".

- Have your reasons recorded or note them briefly.
- Announce that the amended charge replaces the original charge.
- Put the amended charge to the defendant and take a plea. It is necessary to endorse the Evidence Sheet that the amended charge has been read to the defendant.
- Ensure that everything said in connection with the amendment is recorded.

6.3 Procedure if Amended Charge is to be Heard by You

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

If the defence claims to be embarrassed by the proposed amendment, you may adjourn: *s214(3) CPC*.

If there is no adjournment, ask the parties:

> "Are there any further questions you wish to put to any witness who has already given evidence?"

If so, then the witness or witnesses must be recalled and the hearing continued on the amended or substituted charge: *s214(1)(b) CPC*.

7 Exhibits

7.1 Production

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

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

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

7.2 Marking of Exhibits by Witness

Often parties pass exhibits, such as plans and photos, to witnesses quite indiscriminately and invite them to mark some point, e.g. the impact point in a collision. If such a situation occurs, care must be exercised to ensure clarity.

Ensure that the witness marks all photos (or plans, or maps) with, ideally, a differently coloured pen and your notes should clearly describe it.

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

8 Application for Change of Plea

A defendant may change his or her plea from "not guilty" to "guilty" on application.

Credible grounds for such application must be provided.

The right of the defendant to change or her plea exists until sentence.

Note that there is no special right given to the defendant to apply for a change of election. It is suggested that, if a change by virtue of an amendment reduces a felony to a non-electable offence, then it follows that trial would be conducted summarily. On the other hand, if the amendment changes the nature of the charge to an electable offence, then an election should be put to the defendant before a plea is taken on the amended charge.

9 Withdrawal of Complaint

The prosecutor may withdraw a complaint, with the consent of the Court, before a final order is passed: *s201 CPC*.

Where the withdrawal is made **after** the defence case, acquit the defendant.

Where the withdrawal is made **before** the defence case, you may

- acquit the defendant; or
- discharge the defendant.

An order of discharge is not a bar to subsequent proceedings on account of the same facts.

10 Order of Acquittal Bar to Further Procedure

An order of acquittal shall without other proof, be a bar to any subsequent information or complaint for the same matter against the same defendant: *s218 CPC*.

11:

BAIL

1 Introduction

The *Bail Act 2002* sets out the law relating to bail.

This chapter focuses on the Court's role and all statutory references are to the *Bail Act 2002*, unless stated otherwise.

2 Jurisdiction

A Court may determine an application for bail by an accused person: *s13(1)*.

A Magistrate when not sitting as a Court may at any time grant bail to:

- a person brought or appearing before him or her, who is accused of an offence; and
- a person who is an appellant under *Part X CPC*: *s12*.

An "accused person" and "person accused of an offence" is "a person who has been arrested for, or charged with, an offence and:

(a) who is awaiting summary trial;

(b) who has been committed for trial on indictment;

(c) whose trial has been adjourned;

(d) who has been convicted and –

  (i) who has been committed for sentence;

  (ii) whose case has been adjourned for sentence;

  (iii)who is appealing against conviction or sentence; or

  (iv)whose conviction is stayed;

(e) who is under arrest for a breach of bail; or

(f) who has applied for a writ of habeas corpus".

A Magistrate now has full powers to grant bail, including bail for murder and treason.

The Court may dispense with the requirements for bail: *s6(1)*.

If no specific order or direction is made in respect of bail during the appearance of an accused person, the Court is deemed to have dispensed with any requirement for bail: *s6(2)*.

3 Applications for Bail

An accused person may make any number of applications to Court for bail: *s14(1)*.

An application to a Court for bail must be dealt with as soon as reasonably practicable after it is made: *s14(2)*.

The Act states that a Court may refuse to entertain an application for bail if it is satisfied that the application is frivolous or vexatious: *s14(3)*.

An accused person is entitled to have legal aid for an application for bail, or for review of bail, subject to the provisions of the *Legal Aid Act 1996*. You should explain this to an unrepresented accused person.

4 Considering Bail Applications

4.1 Presumption in Favour of Bail

The *Bail Act 2002* makes it clear that there is a **strong presumption in favour of granting bail**.

Every accused person has a right to be released on bail unless it is not in the interests of justice that bail should be granted: *s3(1)*. The "interests of justice" will vary from case to case.

There is a presumption in favour of granting bail: *s3(3)*. However:

- a person who opposes the granting of bail may seek to rebut the presumption: *s3(3)*; and
- the presumption in favour of the granting of bail is displaced where the accused person:
  - has previously breached a bail undertaking or bail condition; or
  - has been convicted and has appealed against the conviction: *s3(4)*.

4.2 Case Against the Presumption of Bail

A person making submissions against the presumption in favour of bail must deal with:

- the likelihood of the accused person surrendering to custody and appearing in Court;
- the interests of the accused person; and
- the public interest and the protection of the community.

4.3 Primary Consideration

The **primary consideration** in deciding whether to grant bail to a defendant is the likelihood of the defendant appearing in Court to answer the charges laid against him or her: *s17(2)*.

4.4 Other Statutory Considerations

The Court must take into account the time the accused person may have to spend in custody before trial if bail is not granted: *s17(1)*.

An accused person must be granted bail unless in the opinion of the Court:

- the accused person is unlikely to surrender to custody and appear in Court to answer the charges laid;
- the interests of the accused person will not be served through the granting of bail; or
- granting bail would endanger the public interest or make the protection of the community more difficult: *s19(1)*.

You must have regard to all the relevant circumstances. The following particular factors are listed in *s19(2)*:

Likelihood of surrender to custody

- The accused's person's background and community ties (including residence, employment, family situation and previous criminal history).
- Any previous failure by the person to surrender to custody or to observe bail conditions.
- The circumstances, nature and seriousness of the offence.
- The strength of the prosecution case.
- The severity of the likely penalty if the person is found guilty.
- Any specific indications (such as that the person voluntarily surrendered to the Police at the time of arrest or, on the contrary, was arrested trying to flee the country).

The interests of the accused person

- The length of time the accused person is likely to have to remain in custody before the case is heard.
- The conditions of that custody.
- The need for the accused person to obtain legal advice and to prepare a defence.
- The need for the accused person to be at liberty for other lawful purposes (such as employment, education, case for dependants).

- Whether the accused person is under the age of 18 years (see *s3(5)*).
- Whether the accused person is incapacitated by injury or intoxication or otherwise in danger or in need of physical protection.

The public interest and the protection of the community

- Any previous failure by the accused person to surrender to custody or to observe bail conditions.
- The likelihood of the accused person interfering with evidence, witnesses or assessors or any specially affected person.
- The likelihood of the accused person committing an arrestable offence while on bail.

4.5 Right to Bail for Certain Offences

An accused person has the right to be released on bail, with or without conditions, for the following offences:

- any offence not punishable by a sentence of imprisonment;
- any offence under the *Minor Offences Act Cap 18*; and
- any offence punishable summarily that is of a class or description prescribed by the regulations for the purposes of this section: *ss5(1), 5(2)(b) Electable Offences Decree*.

However, this entitlement to bail is lost if:

- he or she has previously breached bail;
- he or she is incapacitated by intoxication, injury or use of a drug, or is otherwise in need of physical protection;
- he or she stands convicted of the offence; or
- the requirement for bail is dispensed with under *s6*: *s5(2)*.

An accused person is not entitled to bail if he or she is in custody serving a sentence of imprisonment in connection with some other offence: *s5(3)*.

4.6 Young Accused Persons

Bail must be granted to an accused person **under the age of 18 years** unless:

- he or she has a previous conviction;
- he or she has previously breached bail; or
- the offence in question is a serious offence.

A "serious offence" is any offence for which the maximum penalty includes imprisonment for 5 years or more: *s2*.

4.7 Offender Appealing Against Conviction or Sentence

Where the Court is considering granting bail to a person who has appealed against conviction or sentence, the Court must take into account:

- the likelihood of success in the appeal;
- the likely time before the appeal hearing;
- the proportion of the sentence which will have been served, when the appeal is heard: *s17(3)*.

4.8 Accused Person in Custody for 2 Years or More

If an accused person has been custody for 2 years or more and his or her trial has not begun, the Court must release him or her on bail: *s13(4)*.

Note that this is not the case where:

- the trial has begun and the Court has refused bail;
- the accused person is serving a sentence for another offence: *s13(5)*.

The period of 2 years does not include any period of delay caused by the fault of the accused person: *s13(6)*: *Albertimo Shankar* HAM 014/3.

"Trial" means the trial proper of the accused person in respect of the offence which he or she has been charged with and does not include:

- committal proceedings; or
- the determination of any preliminary or interlocutory application: *s13(7)*.

4.9 Case Law

See *Tak Sang Hao v State* Misc. Action No. HAM 003 of 2001S. The Court stated 10 factors to be considered:

- the presumption of innocence under *s28(1)(a)* of the *Constitution*;
- whether the accused person will appear to stand trial;
- whether bail has previously been refused;
- the seriousness of the charge;

- the accused person's character;
- the accused person's right to prepare his or her defence;
- the likelihood of the accused person re-offending while on bail;
- any likelihood of the accused person interfering with witnesses;
- the likelihood of further charges;
- the prosecution's opposition to bail.

See *Bail Act* cases: *Sanjana Devi v State* Misc Action HAM 011 of 2003S; *State v Albertino Slainkar* Cr Action HAM 014.03.

5 Granting Bail

5.1 General

Bail may be granted unconditionally or subject to written conditions: *s22*.

When granting bail, you **must**:

- set bail for a determinate period, ending no later than 60 days after the day on which bail was granted, or on the date of hearing, whichever comes first: *s15(2)*;
- state a time, date and place that the accused person must surrender to the custody of the Court;
- advise the accused person, in a language that he or she understands, of his or her obligation to surrender to the custody of the Court at the time, date and place designated: *s15(6)*;
- explain the procedures for complying with the obligation, that is, that he or she must surrender to the bail officer.

If the hearing date has not been fixed within 60 days, the accused person must be brought before the Court for a continuation of bail, or its reconsideration: *s15(3)*.

What the accused person must do in all cases

The accused person must give a written undertaking, on Form 1B, to appear before the Court on the day and place specified: *ss21(1)(b), 21(2)*.

On the granting of bail, the accused person must:

- provide the Court with details of his or her residential address; and
- reside at that address until the case is heard: *s16*.

If the accused person wishes to reside elsewhere, he or she must notify the bail officer in writing, who will either make a decision or put it before the Court to make a decision whether the bail undertaking should be varied accordingly: *s16(4)*.

5.2 Conditions

Bail must be granted unconditionally unless you consider that conditions should be imposed for the purpose of:

- ensuring the accused person's surrender into custody and appearance in Court;
- protecting the welfare of the community; or
- protecting the welfare of any specially affected person: *s23(1)*.

Conditions must only be imposed if required by the circumstances of the accused person:

- to protect the welfare of the community;
- to protect the welfare of any specially affected person; or
- in the interests of the accused person: *s23(2)*.

Conditions that may be imposed

If conditions are attached, they may only be one or more of the following:

- that the accused person enters into an agreement to observe specified requirements as to his or her conduct while on bail;
- that one or more sureties acknowledges that he or she is acquainted with the accused person and regards the accused person as a responsible person who is likely to comply with a bail undertaking;
- that the accused person enters into an agreement, without security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;
- that one or more sureties enters into an agreement, without security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;
- that the accused person enters into an agreement, and deposits acceptable security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;

- that one or more sureties enters into an agreement, and deposits acceptable security, to forfeit a specified amount of money if the accused person fails to comply with his or her bail undertaking;
- that the accused person deposits with an authorised officer of the Court a specified amount of money in cash and enters into an agreement to forfeit the amount deposited if the accused person fails to comply with his or her bail undertaking;
- that one or more sureties deposits with an authorised officer of the Court a specified amount of money in cash and enters into an agreement to forfeit the amount deposited if the accused person fails to comply with his or her bail undertaking.

Security

If security by an accused person or surety is considered to be a necessary condition of bail, you must:

- ascertain, under oath if necessary, the ability of the accused person or surety to provide the security: *s22(3)*; and
- set the amount with reference to the capacity of the accused person or surety to meet the obligation: s*s22(3) and (4)*.

You must not impose a requirement for security if it amounts to an unreasonable impediment to the granting of bail: *s22(5)*.

An accused person and any person offering hinself or herself as a surety may appeal to the High Court if you refuse to accept him or her as surety or any proposed security: *s22(8)*.

5.3 Continuation of Bail

If a bail undertaking includes an undertaking to appear at any time and place at which proceedings in respect of the offence are continued, whether upon adjournment, committal or otherwise:

- a Court may continue bail already granted in respect of the offence: *s29(1)*;
- the bail undertaking and conditions, including any sureties and any security, continue to apply unless the Court orders otherwise: *s29(2)*;
- if the accused person appears in accordance with the bail undertaking and no specific direction is made by the Court in respect of bail upon adjournment or committal, the Court is taken to have continued bail on the same conditions: *s29(3)*.

If a bail undertaking does not include such an undertaking, and the case is adjourned or the accused person is committed for trial or sentence, the Court must make a fresh bail determination if bail is applied for: *s29(4)*.

6 Refusal of Bail

If bail is refused:

- the hearing of the case must not be adjourned for more than 14 days, except with the accused person's consent; and
- any further adjournment must be for no more than 48 hours and must be to a Court available to deal with the case: *s13(2)*.

However, *s13(2)* does not apply where the accused person is in custody in connection with another offence or if the Court is satisfied that there are reasonable grounds for a longer period of adjournment and that bail should continue to be refused: *s13(3)*.

If bail is refused, you must:

- give a written ruling, with reasons, dealing with the submissions made on:
  - the likelihood of the accused person surrendering to custody and appearing in Court;
  - the interests of the accused person; and
  - the public interest and the protection of the community: *ss18(2) and 20*;
- remand the defendant in custody to re-appear for trial or review of bail within 14 days: *s18(2)*;
- immediately inform the accused person of the procedure for review as set out in *s30*: *s20(3)*.

As soon as practicable, and within 24 hours after the refusal to grant bail, the written reasons must be conveyed to the accused person in a language he or she understands: *s20(2)*.

7 Review

A Magistrate may review any decision in relation to bail made by a Police officer or made by another Magistrate, including a reviewing Magistrate: *ss30 (1) and (2)*.

The power to review a decision may be exercised only at the request of:

- the accused person;
- the Police officer who instituted the proceedings for the offence;
- the Attorney General;
- the DPP; or
- a victim of the offence: *s30(8)*.

If you are not satisfied that there are special facts or circumstances that justify a review or the making of a fresh application, you may refuse to hear it: *s30(7)*.

The review must be by way of a re-hearing: *s30(10)*.

You may confirm, reverse or vary the decision: *s30(9)*.

8 Appeals

The accused person or DPP may appeal to the High Court all:

- grants and refusals of bail; and
- orders, conditions or limitations made or imposed under the Act: *s31*.

9 Breaches and Penalties

You may issue a warrant of arrest if an accused person who has been released on bail:

- fails to surrender to custody or otherwise breaches a condition of bail;
- absents himself or herself from the Court without your leave at any time after he or she has surrendered to custody; or
- is found to have given a false residential address: *s25(1)*.

A defendant who has been released on bail and who fails without reasonable cause to surrender to custody commits an offence and is liable on conviction to a fine of $2000 and 12 months imprisonment: *s26(1)*. The burden is on the accused person to prove that he or she had reasonable cause for failing to surrender to custody: *s26(2)*.

Where the defendant has been released on bail subject to the provision of security fails without reasonable cause to surrender to custody, you may order forfeiture of the whole or any part of the security to the State: *s27(2)*.

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

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 defendant 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 defendant is charged;
- the point or points for determination (the issues);
- the decision on each of those points; and
- the reasons for the decision.

In the case of an **acquittal**, you must direct that the defendant 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 defendant pleads guilty, your judgment need only contain the finding and sentence or other final order.

See *ss154 and 155 CPC.*

See *Suresh Pratap & Premila Wati t/a/ Pratap Stone Crushing & Screening Works v G L John Limited*, Civil Appeal ABU 42 of 2000. Although this is a civil case, it is relevant in that the Court of Appeal set aside an entire judgment of the High Court on the basis that the ends of justice had not been met. Among other things, the Court:

- noted that giving reasons is always good judicial practice and there is an apparent and desirable need for a properly expressed and reasoned judgment;
- found there were deficiencies in the determination of issues – all must be finally determined; and
- questioned the validity of the practice of another judge signing the judgment instead of the trial judge and commented that the dangers surrounding it are apparent and to be avoided.

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.

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: *s28(1)(j) Constitution*.

2 Jurisdiction

Resident Magistrates

A Resident Magistrate has jurisdiction to pass sentence up to:

- a maximum 10 years imprisonment on one charge and a maximum 20 years imprisonment on two or more charges; or
- a fine not exceeding $15,000; or
- both: *s7 CPC, as amended by s3 of the CPC (Amendment) Act 13 of 2003.*

Second Class Magistrates

Second Class Magistrates have jurisdiction to pass sentence up to:

- a maximum one year imprisonment; or
- a fine of $200; or
- both: *s8 CPC.*

Third Class Magistrates

Third Class Magistrates have jurisdiction to pass sentence up to:

- a maximum six-months imprisonment; or
- a fine not exceeding $100; or
- both: *s9 CPC.*

3 Sentencing Principles

There are five basic sentencing principles to be considered by the Court. These are:

- Deterrence;
- Prevention;
- Rehabilitation;
- Punishment; and
- Restoration.

Deterrence
The sentence is designed to deter the offender from breaking the law again and act as a warning to others not to do the same.

Prevention
The sentence is to prevent the offender from doing the same thing again.

Rehabilitation
The sentence is to assist an offender to reform and not offend again.

Punishment
The sentence is to punish the offender for his or her criminal behaviour.

Restoration
The sentence serves to restore or repair the damage done to others by the offender.

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.

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 defendant or counsel may make submissions, but not both. See *R v Wati* (1993) 3 NZLR 475; *Suren Singh & Ors v State* Crim App No. 79 of 2000; *Inoke Cumutanavanua* Crim App HAA086 of 2001.

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.

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:

- time spent in custody;
- 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": *R v Sergeant (1975)Crim LR 173*;
  - "bulubulu"/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 C.J.
- Determine which sentencing principle(s) apply/ies:
  - deterrence/prevention/rehabilitation/punishment/restoration.
- 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 Consideration of Other Offences

When deciding the sentence to be imposed, you may, with the consent of the offender and the prosecution, take into consideration any other **untried** offence of a like character which the defendant admits in writing to have committed: *s216(1) CPC*.

Once sentence is passed in consideration of these other offences, it shall be a bar to subsequent proceedings: *s216(3) CPC*.

8 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

9 Types of Sentences

9.1 Corporal Punishment

A number of offences in the *Penal Code* stipulate corporal punishment as a sentence. Most of the offences are offences against morality under Chapter XVII and include among others:

- rape: *ss149,150*;
- abduction: *s152*;
- defilement: *s155, 156*;
- detention in a brothel: *s161*;
- selling minors for immoral purposes: *s162*;
- buying minors for immoral purposes: *s163*;
- male person living on earnings of prostitution: *s166*;
- conspiracy to defile: *s171*; and
- unnatural offences: *ss175, 176*.

This punishment is provided for under *s34 Penal Code* and has not been repealed from the statute, but the High Court has ruled that it is unconstitutional: *Naushad Ali v State* Crim App No. CCCP0001 of 2000L.

9.2 Imprisonment

Except for murder, 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: *s28 Penal Code*.

The term actually served is reduced by a third upon entry into prison and may be reduced further by remission for good behaviour (EMP system); and for longer sentences, on parole on the recommendation of the Prisons Parole Board.

An offender liable to imprisonment maybe sentenced to pay a fine in addition to or instead of imprisonment: *s28(3) Penal Code*.

Sentences of imprisonment should be served consecutive to existing sentences unless the Court orders the sentences to be concurrent: *s28(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).

9.3 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 three years: *s29(1) 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 becomes effective: *s29(4) Penal Code*.

Although a non-custodial option, the suspended sentence is technically speaking a custodial sentence. Philosophically, the sentencer has already decided that the offender deserves a custodial sentence and then suspends the term to avoid sending him or her to prison.

You should not deliberatley scale your sentence to result in one less than 2 years in order to suspend it.

When dealing with possible activation of a suspended sentence, an offender must be given the opportunity, under oath, to show why it would be unjust to activate a suspended term. See *Saimoni Tucila v State* Crim App No. HAA009 of 1996; *Binesh Pillay v State* Crim App No. 0023 of 1997.

9.4 Probation of Offenders

After convicting the offender, you may, instead of sentencing him or her, place him or her on probation for a period of not less than one year or more than three years.

When considering whether probation is suitable, you must consider:

- the nature of the offence;
- the character of the offender;
- the offender's home surroundings; and
- the expedient disposal of the case.

The probation order is usually used against young offenders, although there are no such restrictions specified in the relevant legislation: *Probation of Offenders Act Cap 22*.

A conviction of an offence for which an probation order is made is not a conviction for any purpose other than the purpose of the proceedings: *s7(1) Probation of Offenders Act*.

9.5 Supervision

As part of the probation order, name the area in which the offender is to reside and the probation officer who is to supervise the offender's probation programme.

Probation orders made in respect of young offenders who are aged 14 years or less must be with the child's consent.

Once a probation 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.

9.6 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 that is not more than the maximum, except for offences where a minimum fine must be imposed: *s35 Penal Code*.

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: *s36 Penal Code*.

You may issue a committal warrant where the offender has defaulted on payment of a fine, on or before the specified date: *s37(1) Penal Code*.

Fines may be paid by instalments at such times and in such amounts that Court deems fit. However, if the offender defaults, the whole of the amount shall be due and payable immediately: *s37(3) Penal Code*.

You must inquire into the offender's means before issuing a committal warrant and may order extension of time for payment if the situation warrants it: *s37(4) Penal Code, s23(2)Constitution*.

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: *s38 Penal Code*.

9.7 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: *s41(1)Penal Code*.

In cases, such as assaults, 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: *s41(2)Penal Code*.

You may order that the offender enter into a bond, with or without sureties, for a period not exceeding two years and to appear and receive sentence, and in the meantime to keep the peace and be of good behaviour: *s42(1) Penal Code*.

9.8 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;
- the offence charged does not have a sentence fixed by law;
- the circumstances of the offence are of a minor nature;
- it is inexpedient to inflict punishment;
- the character of the offender warrants it;
- the circumstances of the offending warrant it and
- an order under the *Probation of Offenders Act* is inappropriate: *s44(1) Penal Code*.

The offender may be liable for the whole or any part of costs incidental to the prosecution, and any compensation: *s44(3) Penal Code*.

9.9 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 when:

- the offender is sentenced to a term of imprisonment;
- the offender is released from prison to serve a term under a compulsory supervision order and until expiry of the compulsory supervision order: *s46 Penal Code*.

9.10 General Punishment for Misdemeanours

Where the *Penal Code* does not specify any punishment for misdemeanours, it shall be punishable with a term not exceeding two years or with a fine or both: *s47 Penal Code*.

9.11 Community Work Orders

Where a person is convicted of an offence punishable by imprisonment, you may, with the consent of the offender, sentence him or her to community work: *s3(1) Community Work Act 1994*.

The prescribed number of hours is as follows:

- not exceeding 6 months between 20 – 50 hours
- 6 – 12 months between 20 – 100 hours
- 12 months – 2 years between 20 – 200 hours
- exceeding 2 years between 20 – 400 hours.

9.12 Costs

Whenever an offender is convicted or discharged, but not in a stay of proceedings, he or she may be ordered to pay Court costs in addition to any other penalty: *s158(1) CPC*. See *State v Ramesh Patel* FCA Crim App No. AAU002 of 2002S.

Likewise, you have a discretion to order costs against the prosecution: *s158(2) CPC*.

The order to pay costs is appealable to the High Court: *s159 CPC.*

9.13 Compensation

You may order the complainant to pay compensation to the defendant after dismissal of proceedings on the grounds that the charge was frivolous and vexatious: *s160(1) CPC*.

An offender convicted of a charge may be ordered to pay compensation to any person who suffers damage to his or her property or loss as a result of the offence: *s160(2) CPC*.

9.14 Restitution

You have powers to make the following restitution orders:

- for the preservation and disposal of property: *s164 CPC*;
- the restoration of stolen property to it's owner: *s165 CPC*;
- the restoration of possession of real property: *s167 CPC*; and
- the preservation and/or restoration of property whose ownership is in doubt in the possession of Police: *s168 CPC*.

14:

APPEALS, REVISIONS AND CASES STATED

1 Appeals

The Magistrates' Courts Act Cap 14 provides that appeal may lie from the Magistrate's Court to the High Court in both civil and criminal cases.

Part X of the *Criminal Procedure Code Cap 21* sets out the appeal options that lie from the Magistrate's Court.

1.1 Appeals by Petition

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: *s308 CPC*.

The appeal may be on a matter of fact as well as a matter of law and sentencing is considered a matter of law. However, there are two specific limitations:

- no appeal shall lie against an order of acquittal except with the sanction in writing of the Director of Public Prosecutions: *s308(1) CPC*; and
- no appeal shall be allowed in the case of a defendant who has pleaded guilty and been convicted by the Magistrate's Court, except as to the extent of appropriateness or legality of the sentence: *s309(1) CPC*.

1.2 Procedure for Appeal by Petition

Petition

Every appeal shall be made in the form of a petition in writing signed by the appellant or his or her counsel. The petition shall:

- be presented to the Magistrate's Court within 28 days from the date of the decision being appealed against: *s310(1) CPC*; and
- contain in a concise form the grounds upon which it is alleged that the Magistrate has erred: *s311(1) CPC*.

Where the appellant is *not* legally represented, the petition may be prepared under the direction of the Magistrate's Court: *s311(2) CPC*.

Where the appellant is in custody, the petition may be prepared by the officer in charge of the prison: *s311(3) CPC*.

Upon receiving the petition, forward the petition together with the record of proceedings to the Chief Registrar of the High Court: *s312 CPC*.

Enlargement of time

The Magistrate's Court or the High Court may at any time for "good cause" enlarge the 28 day limitation period for appeal. Good cause includes:

- where the appellant who had previously appeared in person is legally represented and his or her counsel requires further time to prepare the petition: *s310(2)(a) CPC*;
- where there is a question of law of unusual difficulty involved: *s310(2)(b) CPC*;
- where there is an order for an acquittal: *s310(2)(c) CPC*; and
- where the appellant or his or her counsel are unable to get a copy of the record within a reasonable time: *s310(2)(d) CPC*.

Powers of the High Court

When the High Court has received the petition and the record of proceedings, it may:

- summarily dismiss the appeal: *s313 CPC*; or
- accept the appeal and schedule a hearing date: *s314 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 their opinion;
- order a new trial;
- order a trial by a Court of competent jurisdiction;
- make such order as it may deem just; or
- exercise any power which the Magistrate's Court might have exercised: *s319(1) CPC*.

The High Court also has power to:

- 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: *s320 CPC*; and
- make an order as to costs: *s317 CPC*.

After the High Court has decided an appeal, it shall:

- certify its judgment; or
- order the Court by which the judgment, sentence or order appealed against was recorded or passed to make such orders to conform with the High Court judgment.

Supplementing the record

In cases where there is a dispute as to the content of the Court record and there are filed sworn affidavits by either party in a criminal proceeding, you may be required to file an affidavit in response justifying the contents of the record. These are very rare situations but they do occur from time to time.

2 Revision

After the hearing and determination by of any criminal proceeding by the Magistrate's Court, the High Court may call for and examine the Magistrate's Court record to determine the following:

- the correctness of the decision taken;
- the legality or propriety of any finding, sentence or order recorded or passed; and/or
- the regularity of the proceedings undertaken: *s323 CPC*.

The Magistrate's Court may also call for records of inferior Courts and report the same to the High Court for exercise of the Court's powers on revision: *s324 CPC*.

2.1 Powers of the High Court on Revision

Upon revising the Magistrate's Court record, the High Court may impose, confirm, reduce, enhance or alter the nature of any sentence, provided that:

- no order shall be made which prejudices a person unless that person has had an opportunity of being heard, either personally or by counsel in defence: *s325(2) CPC*; and
- no sentence shall be imposed which the Magistrate's Court could not have passed: s*325(3) CPC*.

2.2 Limits to Revision

The powers of revision of the High Court do not allow the Judge to convert an acquittal into a conviction: *s325(4) CPC*.

Where an appeal is the appropriate means to access the High Court jurisdiction and no appeal is brought, no proceeding by way of revision shall be entertained: *s325(5) CPC*.

No party has any right of appearance before the High Court when exercising such powers of revision: *s326 CPC*.

3 Cases Stated

After a Magistrate's Court has heard and determined any summons, charge or complaint, any party to the proceedings who is dissatisfied with the determination may apply to the 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 in excess of the Magistrate's jurisdiction: *s329(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 determination: *s329(1) CPC*.

Upon receiving an application, draw up the special case and forward it to the Chief 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: *s329(2) CPC*.

A case stated by a Magistrate should 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 defendant during the trial or inquiry;
- the finding, or sentence of the Magistrate's Court; and
- any question or questions of law which the Magistrate or any of the parties, or the Director of Public Prosecution, want submitted to the High Court for their opinion: *s338 CPC*.

Once the Registrar of the High Court receives the stated case, they will set down the case for hearing and give notice to the parties about when and where the hearing will take place: *s331 CPC*.

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: *s340 CPC.*

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: *s335(a) CPC*;
- remit the case to the Magistrate's Court for rehearing and determination with such directions as it thinks necessary: *s335(b) CPC*;
- reverse, affirm or amend the determination in regards to which the case has been stated: *s334(1) CPC*;
- remit the matter to the Magistrate's Court after giving their opinion in relation to the matter: *s334(1) CPC*;
- make an order as to costs. 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: *s334(1) CPC*.

The orders of the High Court shall be final and binding on the parties: *s334(1) CPC*.

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: *s332 CPC*.

You must **not** 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: *s332 CPC*.

If you have refused to state a case because you determine the application is 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 appellant 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: *s333 CPC*.

15:

JUVENILE JUSTICE

1 Introduction

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 children and young people should be given be given a second chance at being 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.

The Court **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.

2 Definitions

These are words commonly used in relation to proceedings involving children and young persons (*s2 Juvenile Act* (*JA*)):

- "child" means a person who has not attained the age of 14 years;
- "juvenile" means a person who has not attained the age of 17 years; and includes a child and a young person; and
- "young person" means a person who has attained the age of 14 years but who has not attained the age of 17 years.

3 Criminal Responsibility of Juveniles

Section 29 JA and *s14 Penal Code* state:

- no child under the age of 10 years can be guilty of any offence;
- a child under 12 years of age is not criminally responsible for an offence, unless it is proved that he or she had capacity to know that he or she ought not to do the act or make the omission, at the time of the act or omission;
- a male person under the age of 12 years is presumed to be incapable of carnal knowledge.

Evidence of age

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

The defendant 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. See *R v Rakaimua* [1996] Criminal Case No. 24 of 1995.

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

From *R v Sheldon* [1996] 2 CrAppR 50.

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 defendant 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 defendant 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?

4 A Separate Court

So far as practicable, when hearing charges against juveniles, unless they are jointly charged with adults:

- carry out the proceedings in a room or building separate from where proceedings are normally held and exclude the public; or
- 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: *s17 JA.*

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: *s17(2) JA.*

4.1 The Media

Accredited news reporters are entitled to be present but require leave to publish any report of the case. It may be advisable for you to specify what should not be published,. i.e:

- the name of the young person or child;
- the identity of his or her parents;
- his or her school; and
- his or her photograph: *s12 Juveniles Act*.

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.

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 the above provision is guilty of an offence and liable on conviction to a fine not exceeding $100 in respect of each offence of publishing or broadcasting: *s12(2) JA.*

5 Procedure in Juvenile Courts

When a case is ready to proceed, begin by:

- identifying the defendant; and
- confirming the defendant's personal details: age, name and address.

When a juvenile is brought before the 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: *s21(2) JA.*

In every case, you must be satisfied that:

- the defendant 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 juvenile understands the charge. Unless he or she 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.

Check whether parents or guardians are available to be in support of the juvenile and to provide surety for him or her: *s7(1) JA.*

In many cases, it is a good idea to have the parents or guardians present because:

- parents can give useful advice to juveniles; and
- parents usually have valuable information on the juvenile's position.

If parents or guardians are not available, then ensure that an officer from the Social Welfare Department is present as "guardian ad litem".

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, unless the offence is homicide, ask the juvenile whether he or she admits the offence: *s21(2) JA.*

Even if you are satisfied that the juvenile understands the nature of the alleged offence, you may still hear the evidence of the witnesses in support of the complaint or information: *s21(3) JA.*

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: *s21(4) JA*.

Guilty plea

If the juvenile admits the offence, ask if he or she wishes to say anything that might mitigate his or her sentence or provide for anything that explains the circumstances of the offence.

Not guilty plea

Go to a defended hearing.

5.2 Bail

Bail must be granted to a defendant **under the age of 18 years** unless:

- he or she has a previous conviction;
- he or she has previously breached bail; or
- the offence in question is a serious offence.

A "serious offence" is any offence for which the maximum penalty includes imprisonment for 5 years or more: *s2 Bail Act 2002*.

As a rule of practice, bail pending appeal is only granted in exceptional circumstances (*Apisai Vuniyayawa Tora & Ors v Reginan* 24 FLR 28 applied). These circumstances include the likelihood of the appeal succeeding and whether bail would be rendered nugatory by delays in determination of the appeal: *Nilesh Prakash v State* High Court Fiji, 13 April 2000.

5.3 Defended Hearing

See *ss21, 22, 23* and *24 JA*.

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.

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. Order a report from the Social Welfare Department as early as possible. This will assist in considering sentencing options for the young offender.

Once the report is submitted, you may ask the juvenile any questions regarding the report.

You Court may also remand the juvenile or place him or her in detention in order to:

- obtain information for the report;
- obtain a special medical examination or observation; or
- consider how to deal with the case in the bests interests of the juvenile.

Note that the statutory provisions have abolished the use of the terms "conviction" and "sentence" in relation to juveniles, and instead there is a finding of guilt and an order made on such finding: *s20 JA*.

6.2 Sentencing Options

Once you are satisfied that a juvenile is guilty, you may do one or more of the following:

- discharge the juvenile offender under *s44 Penal Code*;
- order the juvenile offender to pay a fine, compensation or costs;
- order the parent or guardian of the juvenile offender to pay a fine, compensation or costs;
- order the parent or guardian of the juvenile offender to give security for the good behaviour of the juvenile offender;
- make a care order in respect of the juvenile offender;

- make a probation order in respect of the juvenile offender;
- where the juvenile offender is a young person, make an order for imprisonment; and/or
- deal with the case in any other lawful manner: *s32(1) JA*.

6.3 Mental Treatment

The Court may, on the evidence of a medical practitioner, order that as a condition of probation, the offender undergo treatment for a period not exceeding 12 months and subject to review by the Court at any time: *s33 JA*.

6.4 Fines

An order against a juvenile offender for payment of a fine, compensation or costs may, and in any case shall if the offender is a child, be an order against the juvenile offender's parent or guardian for payment of the same. However, the parent or guardian has the right to be heard before such orders are made against him or her: *s34 JA*.

6.5 Restorative Justice

Restorative justice is a response to crime that emphasises healing the wounds of victims, offenders and the community. It 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; and
  - take responsibility for their actions by having a say in their sentencing; and
  - change their behaviour without the stigma of being a criminal for the rest of their life;
- the possibility of reconciliation between the victim and the juvenile.

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.

6.6 Special Considerations Regarding Detention of Juveniles

Take note that:

- a child shall not be ordered to be imprisoned for any offence: *s30(1) JA*; and
- a young person shall not be imprisoned for more than 2 years for any offence: *s30(3) JA*.

Where a juvenile is found guilty of a grave crime (murder, attempted murder or wounding), the Court may order that he or she be detained for a specified period and at such place and on such conditions as the Minister may direct: *s31(1) JA*.

A juvenile offender in detention for a grave crime may at any time be discharged by the Minister, on his or her discretion, or by license: *s31(3) JA*.

6.7 Selecting a Place of Detention

In selecting a place of detention for a juvenile, when there is more than one choice, you must consider:

- whether the place is suitable for the reception of convicted or unconvicted persons; and
- whether the place is suitable for a juvenile charged with a serious or minor offence; and
- the religious persuasion of the juvenile; and
- 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.

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 *Juvenile Act* shall be provided or appointed by the Minister.

7 Rights of the Juvenile Defendant

In addition to rights provided under the Constitution, juveniles charged with offences have further rights and protection under International Conventions.

These rights and protections include:

- the right to be presumed innocent until proven guilty according to law: *Art 40(i) CRC*;
- the right not to be compelled to give evidence or to confess to guilt: *Art 40(iv) CRC*;
- right to bail absolutely unless any of the adverse qualifications apply: *s3(5) Bail Act*;
- the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment: *Art 37(a) CRC*;
- the right to have his or her privacy fully respected at all stages of the proceedings in order to avoid harm being caused to him or her by undue publicity or by process of labelling: *Art 8 Beijing Rules*;
- the right not to be deprived of his or her liberty unlawfully or arbitrarily: *Art 37(b) CRC*;
- the right not to be detained or deprived of personal liberty except with the consent of his or her parents or guardians, or upon an order made by the Court: *Principle 16(3) Protection of All Persons under any form of Detention 1988*;
- right not to have capital punishment or life imprisonment imposed on children/juveniles without possibility of release for offences committed by them: *Art 37(a) CRC*;
- the arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time: *Art 37(b) CRC*;
- every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so: *Art 37(c) CRC*;
- every child deprived of his/her liberty shall have the right to prompt access to legal and other assistance: *Art 37(d) CRC*;
- when making decisions concerning children, the best interest of the child shall be a primary consideration: *Art 3(1) CRC*;
- whenever appropriate and desirable, other measures will be taken for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected: *Art 40(b) CRC*;
- where juvenile offenders are concerned, the procedure shall be such so as to take account of their age and the desirability of promoting their rehabilitation: *Art 14(4) ICCPR*; and
- a variety of dispositions, such as care, guidance and supervision orders; counselling; probation foster care; education and vocational training programs; community work and other alternatives to institutional care should be considered by the Courts to ensure that children are dealt with in a manner appropriate to their well being and proportionate both to their circumstances and the offence: *Art 40(4) CRC*.

References:
CRC- UN Convention on the Rights of the Child
Beijing Rules – UN Standard Minimum Rules for the Administration of Juvenile Justice
ICCPR – International Covenant on Civil and Political Rights

16:

COMMON OFFENCES

False Pretences Under *s309(a)*

Section

s309(a) Penal Code (Cap. 17)

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

- The person named in the charge is the same person who is appearing in Court;
- The defendant falsely promised;
- The defendant him or herself, or through another either:
  - 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;
- The property was for the use or benefit of the defendant or some other person;
- The defendant did this with an intention to defraud.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant 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": *s308 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 a defendant 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.

Obtains
"Obtains" means an obtaining of the property in the chattel and not merely possession of it. See *Mohammed v R* [1975] FJCA 1; [1975] 21 FLR 32 (20th March, 1975)

Money
See definition in *Chapter II* of the *Penal Code*.

Valuable security
See definition in *Chapter II* of the *Penal Code*.

Use or benefit of
The prosecution must show that the defendant took the property for him or herself or for someone else.

Induces any other person
The false pretence must induce the victim to part with his or her property.

Case law
See *Panjubol v DPP* [1985] SILR 122,
Fred Reynolds v R [1986] Fj Cr App. 26/86.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant 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 *s309(b)*

Section

s309(b) Penal Code (Cap. 17)

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

- The person named in the charge is the same person who is appearing in Court;
- The defendant falsely promised;
- The defendant 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.
- The defendant 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. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who 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": *s308 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 a defendant 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.

Use or benefit of
The prosecution must show that the defendant took the property for him or herself or for someone else.

Induces any other person
The false pretence must induce the victim to part with his or her property.

Case law
See *Panjubol v DPP* [1985] SILR 122,
Fred Reynolds v R [1986] Fj Cr App. 26/86.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant 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.

Simple Larceny (Theft)

Section

s259(1) Penal Code (Cap. 17)

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 the intention (at the time of such taking) to permanently to deprive the owner of the thing.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant took and carried away anything capable of being stolen;
- The defendant did this without the consent of the owner;
- The defendant did this fraudulently and without a claim of right made in good faith;
- The defendant, at the time of such taking, intended to permanently deprive the owner thereof.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who stole the property.

Capable of being stolen

Section 258 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: *s259(2)(a)*.

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: *s259(2)(b)*.

Owner
Under *s259(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. See *Inoke Rainima* [1985] Fj Cr App. 62/85.

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: *s259(1) Penal Code*.

Without Claim of right made in good faith
See definition of bona fide claim of right in *s8* of the *Penal Code*. An defendant 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* of the *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: See *Lloyd's Case* [1985] 3 WLR 30 and *Ilai Derenalagi v R* (1970) 16 FLR 130.

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 defendant 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 defendant may still have a legal defence.

The defendant 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 a 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: *s262 Penal Code*.

Conversion Under *s279(1)(a)*

Section

s279(1)(a) Penal Code (Cap. 17)

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

- The person named in the charge is the same person who is appearing in Court;
- The defendant was solely or jointly entrusted with power of attorney to sell or transfer any property;
- The defendant sold, transferred, or otherwise converted any part of the property;
- This was done fraudulently;
- 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. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who sold, transferred or converted the property.

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* of the *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 defendant 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.

Useful case law
State v Isimeli Drodroveivali Suva High Court HAC007.025.
Barrick (1985) 81 Cr. App. R. 78.
Panniker v State Suva High Court Crim. App. No 28 of 2000S.
State v Mahendra Prasad Suva High Court Cr. Action HAC000.025.

"it is essential that three things should be proved to the satisfaction of the jury; first the money was entrusted to the defendant 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." See *R v Boyce* 40 Cr. App. R 62, 63.

State v Anthony Frederick Stephens Suva High Court Case No 3 of 1992.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant 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.

Conversion Under *s279(1)(b)*

Section

s279(1)(b) Penal Code (Cap. 17)

Description

Any person is guilty of a misdemeanour who:

- is a director, member or officer of any body incorporated under the provisions of any Act; and
- fraudulently takes or applies for his or her own use or benefit or for any use or purpose other than the use of purpose of the incorporated body, any part of the property of such body.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant is a director, member, or officer, of any body incorporated under any Act;
- The defendant took or applied property of the incorporated body for his or her own benefit or for any purpose other than the purpose of that body;
- The defendant did this fraudulently.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who took or applied the property.

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 defendant 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.

Useful case law
State v Isimeli Drodroveivali Suva High Court HAC007.025.
Barrick (1985) 81 Cr. App. R. 78.
Panniker v State Suva High Court Crim. App. No 28 of 2000S.
State v Mahendra Prasad Suva High Court Cr. Action HAC000.025.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant 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.

Conversion Under *s279(1)(c)*

Section

s279(1)(c) s279(2) Penal Code (Cap. 17)

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;
- having 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

- The person named in the charge is the same person who is appearing in Court;
- The defendant 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;
- The defendant fraudulently 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.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who converted the property to his or her benefit or the benefit of another.

Non-application to trustees
Section 279(2) Subsection (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.

Being entrusted
See *Enesi Yavala v The State* [1996] Fj Cr App. 40J/96B.

Useful case law
State v Isimeli Drodroveivali Suva High Court HAC007.025.
Barrick (1985) 81 Cr. App. R. 78.
Panniker v State Suva High Court Crim. App. No 28 of 2000S.
State v Mahendra Prasad Suva High Court Cr. Action HAC000.025.

See *Chapter IV* of the *Penal Code*, which sets out the general rules of criminal responsibility and defences.

The defendant 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.

Burglary

Section

s299 Penal Code (Cap. 17)

Description

Every person is guilty of a felony, who in the night;

(a) breaks and enters the dwelling-house of another with intent to commit any felony in there; or

(b) breaks out of the dwelling-house of another, having either:

- entered the dwelling-house with intent to commit any felony in there; or
- committed any felony in the dwelling-house.

Elements

- The person named in the charge is the same person who is appearing in Court;

(a):

- The defendant broke and entered the dwelling-house of another; and
- The defendant intended to commit any felony in there.

(b):

- The defendant broke out of the dwelling-house of another, having either:
  - entered the dwelling-house with intent to commit any felony; or
  - committed any felony in the dwelling-house

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who broke and entered the dwelling-house of another with intent to commit a felony or having committed a felony therein.

(a):
Night
See definition in *Chapter II* of the *Penal Code*.

Breaks and Enters
Minimum interference with the building constitutes breaking. See the definition of "breaking and entering" in *s297* of the *Penal Code*.

Dwelling-House
See definition in *Chapter II* of *Penal Code*.

Intent to commit felony
Defendant need not have actually committed a felony: See *Mohammed Sahid v The State* [1997] Fj Cr App 46/97.

It has been held that this offence requires the *mens rea* of specific intent: See *DPP v Solomone Tui* (1975) 21 FLR 4.

(b):
Entered with intent
See *Mohammed Sahid v The State* [1997] Fj Cr App 46/97.

Felony
See definition in *Chapter II* of the *Penal Code*.

Useful case law
See *R v Collins* [1973] QB 100.

Sentence

Maximum life imprisonment.

Abuse of Office

Section

s111 Penal Code (Cap. 17)

Description

Any person is guilty of an offence who, while employed in the public service, does or directs to be done any arbitrary act prejudicial to rights of another, in abuse of the authority of his or her office.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant was employed in the public service;
- The defendant did or directed to be done any arbitrary act;
- The act was in abuse of the authority of his or her office;
- The act was prejudicial to the rights of another.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who did or directed the arbitrary act.

DPP sanction required to bring prosecution
A prosecution for this offence may only be brought with the sanction of the Director of Public Prosecutions.

Person employed in the public service
See definition in *Chapter II* of the *Penal Code*.
See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s (8th January, 1999).

Arbitrary act
See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s (8th January, 1999).

Abuse of authority
See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s (8th January, 1999).

For the purpose of gain
See *Naiveli v State* [1995] FJSC 2; CAV0001u.94s.

Prejudicial to rights
See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s.
Naiveli v State [1995] FJSC 2; CAV0001u.94s.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

If act was not done for the purpose of gain, it is a misdemeanour punishable by maximum two years imprisonment.

If the act was done for the purpose of gain, it is a felony with maximum three years imprisonment.

Acts Intended to Cause Grievous Harm or Prevent Arrest

Section

s224 Penal Code (Cap. 17)

Description

Every person is guilty of a felony who, with intent to maim, disfigure or disable any person or to do some grievous harm to any person or to resist or prevent the lawful arrest or detention of any person:

- unlawfully wounds or does any grievous harm to any person by any means whatsoever; or
- unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife, or other dangerous or offensive weapon; or
- unlawfully causes any explosive substance to explode; or
- sends or delivers any explosive substance or other dangerous or noxious thing to any person; or
- causes any such substance or thing to be taken or received by any person; or
- puts any corrosive fluid or any destructive or explosive substance in any place; or
- unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies such fluid or substance to the person of any person.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant had the intent to:
  - maim, disfigure or disable any person; or
  - do some grievous harm to any person; or
  - resist or prevent the lawful arrest or detention of any person;
- The defendant:
  - unlawfully wounded or grievously harmed any person by any means whatsoever; or

- unlawfully attempted in any manner to strike any person with any kind of projectile or other dangerous or offensive weapon; or
- unlawfully caused an explosion of some explosive substance; or
- sent or delivered an explosive, dangerous or noxious thing to any person; or
- caused any explosive, dangerous or noxious thing to be taken or received by any person; or
- put any corrosive, destructive or explosive substance in any place; or
- unlawfully cast, threw or otherwise applied any such fluid or substance upon or to the person of any person.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who committed any of the prohibited acts mentioned.

Maim
See definition in *Chapter II* of the *Penal Code*.

Wound
See definition in *Chapter II* of the *Penal Code*.

Offensive or Dangerous Weapon
An offensive weapon means any article made or adapted for use for causing injury to the person, or intended by the person having it with him or her for such use: *s96(3) Penal Code*.

Grievous Harm
See definition in *Chapter II* of *Penal Code*.
See *DPP v Smith* (1961) AC 290.

Caselaw
Derek Anthony Legge (1988) Cr. App. R. (S) 208.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum life imprisonment.

Robbery

Section

s293(1)(a) Penal Code (Cap. 17)

Description

Any person is guilty of a felony who robs or assaults with intent to rob any person while:

- armed with any offensive weapon or instrument; or
- together with one other person or more.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant was:
  - armed with any offensive weapon or instrument, or was together with one or more persons;
- The defendant either:
  - robbed a person; or
  - assaulted a person, with intent to rob.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who robbed or assaulted with intent to rob any person.

Offensive weapon or instrument

An offensive weapon means any article made or adapted for use for causing injury to the person, or intended by the person having it with him or her for such use: *s96(3) Penal Code*.

Robs

Robbery combines the offences of assault and larceny.

Intent to rob

The defendant need not actually rob the victim if the intent to rob is present.

The *mens rea* for robbery is the intent to obtain property by violence or the threat of violence, at the time of the violence of threat: See *Pollock* [1967] 2 QB 195.

The victim need not actually feel threatened by the violence of threat of violence. It is only required that the defendant intended to do so.

Sentence

Maximum five years imprisonment for assault with intent to rob.

Maximum 14 years imprisonment for actual robbery.

Practice Direction No. 2 of 2003 offers starting point sentences depending on the type of robbery which can be reduced or increased.

- Large-scale organised robberies, sentences should start at 8 years imprisonment;
- Robberies involving the threat or use of firearms and other lethal weapons, sentences should start at 8 years imprisonment;
- Robberies involving financial institutions or where a large sum of money has been stolen (>$10000), sentences should start at 8 years imprisonment;
- Robbery of taxi drivers, service stations and small business premises, sentences should start at 8 years imprisonment;
- Street muggings and opportunist robberies of householders, sentences should start at 6 years imprisonment.

Robbery (with Violence)

Section

s293(1)(b) Penal Code (Cap. 17)

Description

Any person is guilty of a felony who robs any person and, at the time of or immediately before or immediately after such robbery, uses or threatens to use any personal violence to any person.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant robbed any person;
- The defendant used or threatened to use personal violence on any person immediately before or immediately after such robbery.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who used or threatened to use personal violence immediately before or after a robbery.

Robs

Robbery combines the offences of assault and larceny. It is essential that the person assaulted is also the person robbed and that the party or parties committing the assault are the same as those committing the robbery.

The *mens rea* for robbery is the intent to obtain property by violence or the threat of violence, at the time of the violence of threat: See *Pollock* [1967] 2 QB 195.

Uses or threatens personal violence

The victim need not actually feel threatened by the violence of threat of violence. It is only required that the defendant intended to do so.

Case law
R v Moananui (1983) NZLR 537.
Josefa Lui v State Cr. App. AAV 005/975.
State v Cava [2001] FJHC 19; Hac0007j.00s (19th April, 2001)

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum life imprisonment.

Practice Direction No. 2 of 2003 offers starting point sentences depending on the type of robbery which may be reduced or increased.

- Large-scale organised robberies, sentences should start at 8 years imprisonment;
- Robberies involving the threat or use of firearms and other lethal weapons, sentences should start at 8 years imprisonment;
- Robberies involving financial institutions or where a large sum of money has been stolen (>$10000), sentences should start at 8 years imprisonment;
- Robbery of taxi drivers, service stations and small business premises, sentences should start at 8 years imprisonment;
- Street muggings and opportunist robberies of householders, sentences should start at 6 years imprisonment.

Rape

Section

s149 Penal Code (Cap. 17)

Description

Every person is guilty of a felony who has unlawful carnal knowledge of a woman or girl:

- without her consent; or
- with her consent if the consent is obtained by force, threats or intimidation of any kind, by fear of bodily harm, by false representations as to the nature of the act, or in the case of a married woman, by personating her husband.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant had unlawful carnal knowledge of a woman or girl without her consent, or with her consent if that consent is obtained by:
  - force, threats or intimidation;
  - fear of bodily harm;
  - false representations as to the nature of the act; or
  - personating her husband in the case of a married woman.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who had unlawful carnal knowledge of a woman or girl.

Unlawful carnal knowledge
Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

"Two main elements are required for rape: proof of penetration of the vagina by the penis, and lack of consent. Presently, if a woman is unable to establish penetration, or if the assailant only ejaculated near her vagina, the offence of rape is **not** proved and the activity constitutes attempted rape and/or indecent assault both carrying lesser sentences" *Fiji Law Reform Commission, Sexual Offences Report, 1999 at 12*.

Consent and *mens rea*
The defendant must not only the basic intent to have carnal knowledge of the woman but must also know or be reckless of the woman's lack of consent to the act: See *Iliatia Koroiciri v R* [1979] Fj Cr App. 43/79. See *S v Bechu*, Magistrates' Court, Levuka, 2 Dec, 1999.

Consent
The current law does not clearly define "consent" or "lack of consent": *Fiji Law Reform Commission Sexual Offences Report, 1999 at 19.*

"It is sometimes felt that rape is the only crime where the onus of proof appears to shift to the victim; ie. the victim must prove that she did not give her consent." *Sexual Offences Report* at 18. Therefore, when ascertaining whether consent was obtained, it is important to maintain focus on the acts of the defendant and not on the level of resistance offered by the victim.

Consent obtained by force, threats, intimidation
See *R v Olugboja* (1981) 73 Cr App. 344.

False representations
See *R v Case* (1885) DEN 580.

Impersonating woman's husband
See *R v Papadimitropoulos* (1957) 98 CLR 249 and *R v Leonard Laule* (1976) SI Crim Case 29/76.

Corroboration

In all sexual offences a corroboration warning must be given. This is not part of the statutory provisions, but has developed as a requirement under the rules of common law. It requires that the judge when directing the jury, instruct them that it is dangerous to convict the defendant on the uncorroborated evidence of the complainant: See *Mark Lawrence Mutch* Crim. App. AAV0060 of 1999, and *Waisake Navunigasail v The State* FCA AA0012/1996S.

It is important, however to remember that due to the often private nature of the act, corroboration for sexual offences are much more difficult to secure than for other offences: *Sexual Offences Report, Fiji Women's Rights Movement Draft Sexual Offences Legislation at 12.*

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Mistake of fact re consent

See general rules regarding mistakes of fact in *s10* of the *Penal Code*.

In *DPP v Apimileki Madraitabua* (1982) Fiji, at page 13, the Fiji Court of Appeal confirmed that *s10* of the *Penal Code* added the requirement of "reasonable" to "honest belief". In Fiji, therefore, the defendant's belief must not only be genuine (honest), but also reasonable: *Sexual Offences Report* at 23.

Sentence

Maximum life imprisonment.

The penalty for attempted rape is maximum seven years.

Indecent Assault on a Female

Section

s154 Penal Code (Cap. 17)

Description

Every person is guilty of a felony who unlawfully and indecently assaults any woman or girl.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant assaulted a woman or girl;
- The assault was unlawful and indecent.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the defendant who indecently assaulted a woman or girl.

Indecent

The term indecent is not defined in legislation, but it has generally been taken to mean "offensive to the contemporary standards of modesty and privacy": See *R v Court* [1988] 2 All ER 221.

Mens rea

The *mens rea* necessary for indecent assault is that the defendant intended to commit an assault which is indecent by the community standards.

Corroboration

In all sexual offences a corroboration warning must be given. This is not part of the statutory provisions, but has developed as a requirement under the rules of common law. It requires that the judge when directing the jury, instruct them that it is dangerous to convict the defendant on the uncorroborated evidence of the complainant.

See *Mark Lawrence Muteh* Crim. App. AAV0060 of 1999, and *Waisake Navunigasail v The State* FCA AA0012/1996S.

It is important, however to remember that due to the often private nature of the act, corroboration for sexual offences are much more difficult to secure than for other crimes: *Sexual Offences Report, Fiji Women's Rights Movement Draft Sexual Offences Legislation at 12.*

Case law
See *DPP v Saviriano Radovu* Crim. App. No 0006 of 1996, *Ratu Penioni Rokota v The State* Crim. App. HAA 068 of 2002.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Proof of consent to the act of indecency is no defence to the charge if the girl is under sixteen years: *s154(2) Penal Code*.

It shall be a sufficient defence for the charge of indecent assault on a girl under sixteen years to prove that she consented to the act of indecency and the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above sixteen years: *s154(3) Penal Code*.

Sentence

Maximum five years imprisonment.

Indecently Insulting or Annoying a Female

Section

s154(4) Penal Code (Cap. 17)

Description

Every person is guilty of a misdemeanour who:

- intending to insult the modesty or 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

- The person named in the charge is the same person who is appearing in Court;
- The defendant uttered a word, made a sound gesture or exhibited an object;
- The defendant intended the act to be heard or seen by the woman;
- The defendant intended to insult the modesty of the woman or girl.

OR

- The person named in the charge is the same person who is appearing in Court;
- The defendant intruded upon the privacy of a woman;
- 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. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who uttered any word, made any sound or gesture, or exhibited any object, or intruded upon the privacy of a woman or girl.

Utter
See definition in *Chapter II* of the *Penal Code*.

Case law
See *State v PC Uttesh Chandra and Others* Crim. App. 018/03.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant 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.

Defilement of Girl under Thirteen Years

Section

s155 Penal Code (Cap. 17)

Description

Every person is guilty of a felony who unlawfully and carnally knows any girl under the age of thirteen years.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant had unlawful carnal knowledge of the girl;
- The girl was under thirteen years of age.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the defendant who had carnal knowledge of the girl.

Carnal knowledge

Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Maximum life imprisonment.

The attempt is a misdemeanour with maximum five years imprisonment.

Defilement of Girl between Thirteen and Sixteen Years

Section

s156(1)(a) Penal Code (Cap. 17)

Description

Every person is guilty of a misdemeanour who has, or attempts to have, unlawful carnal knowledge of any girl above the age of thirteen and below the age of sixteen.

Elements

- The person named in the charge is the same person who is appearing in court;
- The defendant had, or attempted to have, unlawful carnal knowledge of a girl;
- The girl was above the age of thirteen and below the age of sixteen.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who had or attempted to have carnal knowledge of the girl.

It shall be a sufficient defence to any charge under subsection (a) if it shall be made to appear to the Court that the person so charged had reasonable cause to believe and did in fact believe that the girl was or above the age of sixteen: *s156 Penal Code*.

No prosecution for this offence shall be commenced more than twelve months after the commission of the offence: *s156(2) Penal Code*.

It is no defence to prove that the girl consented to the act: *s156(3) Penal Code*.

Carnal knowledge
Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

Case law
See *Elia Donumainasuva v The State* Crim. App. HAA 032 of 2001, *R v Taylor and Others* 64 Cr. App. R. 182, *State v Meli Roqica and Others* Crim. App. HAA 037 of 2002S.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant may claim honest and reasonable belief as to the complainant being above the age of 16 years.

The defendant will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Reasonable cause to believe
This may arise on the basis of evidence that the complainant told the defendant that she was over the age of 16 years.

Did in fact believe
Such evidence may arise if the defendant believed the complainant when she told him she was over the age of 16 years, or that she looked over the age of 16 years. This is a matter of credibility.

Sentence

Maximum five years imprisonment.

Defilement of Female Under Severe Abnormality

Section

s156(1)(b) Penal Code (Cap. 17)

Description

Every person is guilty of a misdemeanour who has, or attempts to have, unlawful carnal knowledge of any female person suffering from severe subnormality under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was suffering from severe abnormality.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant had or attempted to have unlawful carnal knowledge or attempted to, of the female person;
- The female suffered from severe subnormality;
- The circumstances do not amount to rape;
- The circumstances prove that the defendant knew of the female's subnormality.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who had carnal knowledge or attempted to have carnal knowledge of the female.

Carnal knowledge

Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

Severe subnormality
See definition in *Chapter II* of the *Penal Code*.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant 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.

Dangerous Drugs

Section

s8(b), 41(2) of the Dangerous Drugs Act (Cap. 114) as amended by *Decree No 4 of 1990* and *Amendment Decree No 1 of 1991*

Description

Any person is guilty of an offence who:

- is found in possession of or selling; or
- has given or sold to any person,

any substance to which *Part II* applies.

Elements

- The person named in the charge is the same person appearing in Court;
- The defendant:
  - was found in possession of any substance to which *Part II* of the *Dangerous Drugs Act* applies; or
  - was found selling any substance to which *Part II* of the *Dangerous Drugs Act* applies; or
  - gave or sold any substance to which *Part II* of the *Dangerous Drugs Act* to any person.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who had possession of, was selling, or had given or sold any prohibited substance under *Part II*.

Possession

See *Luisa Wakeham v State* Crim App No. HAA040 of 2003S.
Warner v Metropolitan Police Commissioner (1969) 2 AC 256.

Substances
The offences of Part II apply to raw opium, coca leaf, and Indian hemp, and resins obtained from Indian hemp and preparations of which such resins form the base: *s4(1) Dangerous Drugs Act*.

Raw opium
Raw opium means the product of raw opium obtained by a series of special operations, especially by dissolving, boiling, roasting and fermentation, designed to transform it into an extract suitable for consumption, and includes dross and all other residues remaining after opium has been smoked: *s2 Dangerous Drugs Act*

Coca leaf
Coca leaf means the leaf of the *Erythroxylon coca* Lamarck and the *Erythroxylon novo-granatense* (Morris) *Hieronymus* and their varieties belonging to the family *Erythroxylaceoe* and the leaf of other species of this genus from which it may be found possible to extract cocaine either directly or by chemical transformation: *s2 Dangerous Drugs Act.*

Indian hemp
Indian hemp means either of the plants *Cannabis sativa* or *Cannabis indica* or any portion thereof: *s2 Dangerous Drugs Act*.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

No minimum mandatory sentence. Mandatory minimum terms for minor possession of dangerous drugs was declared unconstitutional. See *Harris Ramswaroof* HAA 014, 2003. *State v Pickering* Misc Act No. HAM 007 of 2001S.

Maximum sentence as per Schedule.

Causing Death by Reckless or Dangerous Driving

Section

s238(1) Penal Code

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

- The person named in the charge is the same person appearing in Court;
- The defendant caused the death of another person by driving a motor vehicle on a road:
- The defendant was driving on a road:
- recklessly; or
- at a speed or in a manner which was 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. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who 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.

Speed or manner dangerous to the public
See definition of "public" in *Chapter II* of the *Penal Code*.

Relation to the *Traffic Act*
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*.

Case law
See *Nand Kumar v The State* Crim. App. No HAA 115/2002L,
Ajanesh Kumar v The State Crim. App. No AAV 0014 of 2002S,
Semisi Lasike v The State Crim. App. No HAA 058 of 2002,
Sefanaia Narau v The State Crim. App. No 79 of 1990,
R v Guilfoyle (1973) 57 Cr. App. R. 549.
For dangerous driving generally, see *Eroni Turagatautoka v The State* Crim App No. HAM058.03S

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant 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.

Receiving Stolen Property

Section

s313(1) Penal Code

Description

Every person is guilty of an offence, who receives any property knowing it had been:

- stolen; or
- obtained in any way whatsoever under circumstances which amount to felony or misdemeanour.

Elements

- The person named in the charge is the same person who is appearing in Court;
- The defendant received any property;
- The property was stolen or obtained in circumstances amounting to felony or misdemeanour;
- The defendant knew of this.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the defendant who received the property.

Possession
See definition in *Chapter II* of the *Penal Code*.
Receiving must be into the possession of the defendant.

Mens rea
The *mens rea* for receiving stolen property is the intent to receive. The defendant must also know the that the goods were stolen or otherwise obtained by criminal circumstances.

Proceedings despite no action against principal offender
A prosecution may be proceeded with and an defendant may be convicted on this charge whether or not the principal offender has or has not been convicted, or is or is not amenable to justice: *s313(3) Penal Code*.

Evidence of similar fact
For the charges of receiving property knowing it to have been stolen or for having possession of stolen property, for the purposes of proving guilty knowledge, evidence may be given at any stage of the proceedings:

- of the fact that other property stolen within the period of 12 months preceding the date of the offence charged was found or had been in the defendant's possession; and
- of the fact that within the five years preceding the date of the offence charged the defendant was convicted of any offence involving fraud or dishonesty, if:
  - seven days notice in writing has been given to the offender that proof of such previous conviction is intended to be given; and
  - evidence has been given that the property in respect of which the offender being tried was found or had been in his possession: *s315 Penal Code*.

Felony
See definition in *Chapter II* of the *Penal Code*.

Misdemeanour
See definition in *Chapter II* of the *Penal Code*.

Useful case law
See *Griffiths Case* (1974) 60 Cr App R 40.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence.

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Sentence

Like Degree

The conviction for this offence is of the like degree as the means in which the property was obtained, whether by felony or misdemeanour: *s313 Penal Code*.

Maximum 14 years imprisonment for conviction on felony.
Maximum seven years imprisonment for conviction on misdemeanour.