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DEFENDED HEARINGS

1 Introduction

If an accused pleads not guilty, the case proceeds to a defended hearing, otherwise known as a trial.

1.1 Role of Prosecution

The duty of the person prosecuting (usually the Police) is to the Court. They must not mislead or deceive the Court. They must:

- assist the Court to arrive at a conclusion which is in accordance with truth and justice; and
- place the case impartially before the Court, including all relevant facts.

The Police have two distinct roles, which you must be aware of:

- The duty of Police as prosecutor is to present and argue the case for the prosecution.
- When a Police officer is giving evidence as a witness, they are in no different position from anyone else coming before the Court. Their evidence is judged by the same standards as evidence from other sources – it is no more or less credible.

The prosecution must prove all elements of the offence beyond reasonable doubt.

1.2 Defence Counsel

A defence lawyer has a duty to the Court. They must not mislead or deceive the Court, but remember that their interests are those of the accused, and they are under no duty to be impartial.

2 Proving an Offence

2.1 Innocent Until Proved Guilty

One of the most important principles in criminal law is that the accused is innocent until proved guilty. Unless and until the prosecution proves that the accused is guilty of all the elements of the offence, he or she is innocent in the eyes of the law. You must always remember this.

2.2 Burden and Standard of Proof

The prosecution has the burden, or responsibility, of proving their case. They must prove all the elements of the offence, beyond reasonable doubt.

This is decided first when the prosecution concludes their case. If you decide that the prosecution has not proved all the elements of the offence beyond reasonable doubt, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at that stage, then the defence has a chance to present their case and again you must decide whether the prosecution has proved their case beyond reasonable doubt, taking into account what the defence has shown.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If the defence evidence casts a reasonable doubt on any of the elements, then the prosecution has failed.

Beyond Reasonable Doubt

This means you are sure the accused is guilty of the charge, and there is no doubt in your mind. If you are uncertain in any way, you must find the accused not guilty.

Lawful excuse

In some cases, once the prosecution has established facts to support all the elements, the burden of proof is then on the accused to satisfy the Court that he or she acted with lawful excuse, good reason or lawful justification. Examples are:

- *s140 Penal Code;*
- *s143 Penal Code;*
- *s146 Penal Code;*
- *s348 Penal Code;*
- *s356 Penal Code;*
- *s357 Penal Code;*
- *s358 Penal Code;*
- *s359(1) and (2) Penal Code.*

The standard of proof for the defence to prove this is not as high as the prosecution. They have to prove this "on the balance of probabilities", which means that what the defence is seeking to prove is more likely than not.

3 Defended Hearing Procedure

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

Take care to fully advise the accused of the procedure to be followed and to accurately record the advice given to the accused.

The following steps should be followed:

Confirm plea

Before the hearing begins, it is usual to confirm the plea. Ensure this is recorded on the Court record.

In some cases where advice has been given, the plea may change to guilty. If this happens, convict the accused, enter this on the Court record and sentence (either immediately or adjourn for reports).

Exclude witnesses

Make an order for the exclusion of witnesses and record this.

Prepare accused for prosecution case

Request the accused to be seated at one of Counsel's tables and have your Clerk provide a pen and paper for note taking.

Explain:

- the elements of the charge;
- how the case will proceed;
- the right to cross-examine witnesses.

Prosecution case: *s196 CPC*

The prosecution may make an opening statement.

The Prosecutor calls the witnesses individually to give evidence. If there is more than one, the other witnesses must not be present in Court, nor able to hear what is being said.

You must record this evidence: *s182 CPC*.

Once the prosecution have finished with each witness, invite the accused to ask questions (cross-examination). Record the accused's answer.

The prosecution may re-examine that witness if they feel it necessary to do so.

When the prosecution have called their final witness, that concludes their case.

After each witness has given evidence, excuse the witness from further attendance unless the parties object.

If you ask any questions of a witness after re-examination has concluded, you should ask the prosecution and the accused if there are any further matters raised by your questions, which they wish to put to the witness.

Without overdoing it, you must expect to have to help the accused from time to time during the hearing.

No case to answer: *s197 CPC*

The following applies whether the accused is represented or not.

At the close of the prosecution case, if you consider that a case is not made out against the accused sufficiently to require him or her to make a defence, dismiss the case and acquit the accused, with reasons.

A convenient test is found in the Practice Note at (1962) 1 All ER 448:

> "A submission that there is no case to answer may properly be made and upheld: when there has been no evidence to prove an essential element in the alleged offence, when the evidence adduced by the Prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it ... if a submission is made that there is no case to answer the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer".

If you decide that there is a case to answer announce:

> "I find that there is a case to answer".

Sometimes brief reasons are appropriate. Care should be taken to ensure that the accused does not feel that the case is already decided against him or her.

Defence case: *s198 CPC*

If the prosecution have made their case, the defence may or may not:

- make an opening address;
- call evidence and make submissions;
- make a closing address.

Tell the accused:

> " You have three options:
>
> 1. You have the right to remain silent, but you have heard what the prosecution have said against you; or
> 2. You may make a statement from the witness box and will not be cross-examined by the prosecutor. However whatever you say will not be as worthy of belief as if it is made under oath because you have not promised to tell the truth and the truth about it has not been tested under cross-examination; or
> 3. You have the right to give evidence yourself by giving evidence on oath, in the witness box. If you do, you may be cross-examined by the Prosecutor. It is entirely a matter for you to decide. You are not obliged to give evidence, if you do not wish to do so.
>
> Do you fully understand what I have said?
>
> You also have the right to produce other evidence or call witnesses to give evidence on your behalf. Again, if they give evidence on oath in the witness box, they may be cross-examined by the Prosecutor. You are not obliged to call witnesses - it is entirely a matter for you to decide. Do you fully understand this?"

Record the fact that you have given this advice and that the accused has understood.

If the accused decides to give evidence, after she or he is sworn, say:

> "State your full name, occupation and where you live. Now, slowly and clearly, tell the Court the evidence that you wish to give relevant to the charges you are facing".

It is often helpful to lead the accused through the preliminary matters in order to help provide confidence for him or her to give their own account of the crucial event.

If reference to damaging evidence given by the prosecution is omitted, draw attention to it and enquire if the accused wishes to comment on it.

After the accused has been cross examined, ask:

> "Is there any further evidence you wish to give arising out of the questions just put to you by the Prosecutor?"

Witnesses may be cross-examined and re-examined.

Evidence in reply: *s199 CPC*
If the accused adduces evidence introducing new matter which the prosecution could not have foreseen, you may allow the prosecution to adduce evidence in reply to rebut it.

Closing addresses: *s200 CPC*
If the defence has adduced evidence, the prosecution may address the Court: *s200(2).*

Then ask the accused:

> "Are there any comments or submissions you wish to make on the evidence?"

Decision
After hearing all submissions on the law and the evidence:

- give your judgment immediately, if straightforward; or
- adjourn briefly to consider the matter or structure your decision and deliver it the same day; or
- reserve your decision, adjourn the matter to a later date for delivery.

See Chapter 12 "Judgment".

4 Minor Offences Procedure

Section 209 CPC provides a 'short' procedure for hearing minor offences.

A minor offence is one which has a maximum penalty of no more than $100 fine, 6 months imprisonment, or both.

If the prosecution requests, you may deal with the offence in the following way (so long as the accused is at least 16 years old). The maximum penalty that you may impose under this procedure is a fine of $10 (or one month imprisonment in default of payment).

Basically, the procedure is the same, except certain "shortcuts" may be made, as follows:

Recording evidence
It is enough for you to record the names of witnesses and take notes as you consider desirable.

Plea

Where the accused makes a statement admitting the truth of the charge, it is enough to simply enter a plea of guilty in the record.

Judgment

It is enough to record your finding and sentence or other final order. You do not have to record the points for determination and reasons.

However, it is a good idea to note your reasons briefly on the file because:

- if requested by either party, you must record a sufficient note of any question of law and of any relevant evidence relating to it; and
- you may be required by a Judge to give reasons in writing.

5 Non –Appearance

5.1 Accused Does Not Appear

Where the accused was summoned, check whether the accused has been served a reasonable time before the hearing. There should be proof of service. If there is no proof that the summons has been served a reasonable time before the hearing, then adjourn for a reasonable time to allow the prosecution to serve, or to prove service.

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

If the offence charged amounts to a felony and you are satisfied that the accused has failed to obey summons or breach his bail conditions, you may order a warrant for his arrest and adjourn the hearing: *s192 CPC*.

If:

- the offence charged does not amount to a felony; and
- you are satisfied that the accused has failed to obey a summons or breached bail conditions; and
- his or her personal attendance has not be dispensed with under *s86 CPC*,

you may proceed to hear and determine the case in the absence of the accused, **provided he or she has consented to it**: *s188 CPC*.

If, after an adjournment, the accused does not appear before the Court which made the order of adjournment, the Court may proceed with the hearing if the offence charged does not amount to a felony.

5.2 Prosecution Does Not Appear

If the prosecution does not appear, you may:

- dismiss the charge (which is not a bar to further proceedings); or
- adjourn the hearing on conditions as you think fit: *s187 CPC.*

If you adjourn the hearing:

- release the accused on bail; or
- remand him or her in custody; or
- take such security for his or her appearance as you think fit: *s187(1) CPC*.

The issue of costs in favour of the accused may also be considered: *ss153 and 192(1) CPC*.

5.3 Witness Does Not Appear

If a witness has been summons and fails to appear, without a satisfactory excuse, he or she is guilty of contempt of Court and you may issue a warrant of arrest to compel his or her attendance: *s61 CPC*.

6 Amending the Charge

If. at any stage before the close of the prosecution case, it appears that the charge is defective in substance or form, you may make an order for the alteration of the charge, either by:

- amending it;
- substituting one charge for another; or
- adding a new charge: *s201 CPC*.

You must:

- clearly explain the difference in the essential ingredients of the former charge and the altered charge;
- put the amended charge to the accused and take a plea;
- allow the accused to recall witnesses to give their evidence afresh or be further cross-examined (and be re-examined by the prosecution).

You may adjourn the hearing if:

- you think the accused has been misled or deceived; or
- either party requests more time to prepare a case on the altered charge.

Make sure you record the amendment of the charge and the plea.

If the amended charge is heard by you, evidence already given on the original charge is deemed to have been given for the purposes of the amended or substituted charge, but with rights for further examination, cross examination or re-examination if the amendment has substituted one charge for another.

Check whether the new charge falls within the time limits in *s206 CPC*.

Note that if the defect in the charge relates to the day on which the alleged offence was committed, this is immaterial and does not require an amendment.

7 Withdrawal of Complaint

The prosecutor may apply to withdraw the charge at any time before the final order is passed.

It is your duty to ascertain whether the grounds for the application to withdraw are reasonable. If not, you may exercise your discretion to refuse the application.

The time that the charge is withdrawn is important:

- If it is withdrawn after the accused is called upon to make his or her defence, then you **must** acquit the accused. The doctrine of *autrefois acquit or autrefois convict* applies. This means that the accused may not be brought back to Court on the same set of facts under which he has been previously acquitted or convicted.
- If it is withdrawn before the accused is called upon to make his or her defence, then you **may** either:
  - acquit the accused; or
  - discharge the accused. This means that the prosecution may recharge the accused at some later date.

Note that, if you find that there is no case to answer, *s197 CPC* requires that you acquit the accused.

In *DPP v Clement Tom* (1988/89) SILR 118, Ward CJ held:

> "When the Magistrate is satisfied there should be withdrawal and it is before the accused has been called upon to make his defence, he must decide the appropriate order under subsection (2)(b). Where there is no evidence, or the wrong charge has been laid or the wrong person charged, the order should be one of acquittal. In all other cases, the appropriate order is one of discharge under (2)(b)(ii)."

If there us an outstanding warrant of arrest ordered pending execution the Magistrate ought to address the warrant of arrest first before proceeding to withdraw the complaint: *R v Solo Sade* Cr. App. Case No 253/2001, Judgment 19 September 2001.

8 Adjournments

Before or during the hearing of any case, you have the discretion to adjourn the hearing to a certain time and place. You must state the time and place in the presence of the parties or their advocates.

In the meantime, the accused may:

- go at large;
- committed to prison; or
- released upon entering into a recognisance, with or without sureties.

No adjournment shall be for more than:

- 30 days, if the accused is at large; or
- 15 days, if the accused is remanded in custody.

See *s191 CPC*.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

- the interests of the accused to a fair trial;
- the interests of the public in ensuring efficient prosecutions;
- the reasons for the adjournment;
- any fault.

Palmer J stated in *Tatau v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 289 of 1992), that "discretionary power must be exercised in such a way as to ensure that the accused has a fair trial according to law".

Cases offering guidance include:

- *Carryer v Kelly* (1969-1970) 90 WN (Part 1) NSW 566;
- *R v Maher* [1987] 1 QdR 171;
- *Appleton v Tomasetti* (1983) 5 ALR 428;
- *R v Swansea Justices & Davies, Ex parte DPP* (1990) 154 JPR 709: "The power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the Court shall have the best opportunity of giving the fairest available hearing to the parties".