ROYAL SOLOMON ISLANDS
POLICE

PROSECUTIONS JOURNAL NO. 1

[JULY 2005]

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INTRODUCTION

The purpose of issuing the Prosecutions Journal is to ensure that the book, '*Criminal Law in Solomon Islands*' is kept up – to – date and to raise legal issues in a reasonably timely manner.

Whilst it is intended to research, write and distribute a Prosecutions Journal every three months, the next Prosecutions Journal will be distributed in early October.

In the writing of this Prosecutions Journal:

- all unreported decisions of the Court of Appeal and High Court since the book '*Criminal Law in Solomon Islands*' was written;

  and

- the *Queensland Supreme and District Courts Benchbook*

were considered.

There were no amendments to the legislation referred to in the book, '*Criminal Law in Solomon Islands*'.

If you have any comments in relation to this Prosecutions Journal, please advise Sergeant George Ofu, Constable Patrick Tema or Prosecutions Adviser, Mr. Errol Gibson at the Honiara Police Prosecutions Office on telephone number 21241.

M. TARO
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ATTEMPTS TO COMMIT OFFENCES

In *R v Kennedy Bela* (Unreported Criminal Case No. 100 of 2002; 3 May 2004) Kabui J stated at page 5:

> 'The catch words in the information filed by the DPP are "attempted murder", meaning the accused had taken steps to cause the death of the victim but the victim did not die due to the bullet missing the organs and blood vessels followed by surgery performed by the doctors in Honiara. What then is "attempted" in law? Section 378 of the Code defines "attempt" […].
>
> So "**intent**" is the element in the offence of attempt which begins with the carrying out of that intention by means enabling the fulfilment of that intention by some overt act which falls short of the commission of the offence, in this case, murder. It does not matter that the offender has taken all the steps necessary to complete the offence or the fulfilment of intent has been prevented by a factor independent of his will or has stopped further fulfilment of his intention on his own motion. Also, it does not matter that it is not possible to commit the intended offence due to reasons unknown to the offender. The commentary by the learned authors of Criminal Law and Practice of Papua New Guinea, 2nd Edition, 1985 pages 292 – 293 is relevant in this regard. At page 293, the authors emphasised that –
>
> "… It is sufficient if the act relied upon is consistent with the intention confessed or inferred from all the facts …"'.

The law relating to:

- '*Attempts To Commit Offences*' is also examined in section 19 commencing on page 398 of '*Criminal Law in Solomon Islands*';

  and

- the offence of '*Attempted Murder*' is also examined in subsection 38.3 commencing on page 617 of '*Criminal Law in Solomon Islands*' and on page 39 of this *Prosecutions Journal*.

Based on the opinion of the Director of Public Prosecutions and the Chief Justice, defendants should not be charged under section 224(b) of the *Penal Code* (Ch. 26). In such circumstances defendants should be charged under section 226 '*Grievous Harm*' and section 380 '*Punishment of Attempts to Commit Certain Felonies*' of the *Penal Code* (Ch. 26). The wording for such a charge is as follows:

> '… did attempt to do grievous bodily harm to [name of victim].'

BAIL

The law relating to '*Bail*' is also examined in section 17 commencing on page 378 of '*Criminal Law in Solomon Islands*'.

General Principles

'It is clear that the question should be approached with a presumption in favour of granting bail and that the onus is not on the appellant to establish that he should be granted bail but on the prosecution to show that he should not', see *R v Bartlett, Alex* (Unreported Criminal Appeal Case No. 20 of 2004; Court of Appeal; 8 November 2004) at page 3.

In *Lawrence Kelesiwasi v R* (Unreported Criminal Case No. 24 of 2004; 11 February 2004) Palmer CJ stated at page 1:

> 'Bail is a right protected by the Constitution (section 5(2)). However there is a discretion regarding the granting of bail. It is not automatic. It may be refused in certain situations. It is for the Prosecution to show on sufficient and proper information before the court that the circumstances of the offence and/or the circumstances of the offender warrant the accused's remand in custody'.

See also: *Leslie Kwaigo v R* (Unreported Criminal Case No. 38 of 2004; Palmer CJ; 17 February 2004) at page 1.

In *Leslie Kwaiga v R* (Unreported Criminal Case No. 333 of 2004; 9 August 2004) Palmer CJ stated at pages 1 – 2:

> 'The rights to bail emanate from the right to secure protection of the law, that where a person has been charged with a criminal offence, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law -- section 10(1) of the Constitution. That same section provides in paragraph 10(2)(a) that such person shall be presumed innocent until he is proved or has pleaded guilty. That presumption of innocence correlates to the presumption of liberty enshrined in section 5(1) of the same Constitution that a persons liberty may only be removed save for the various circumstances set out in that section. That presumption tilts in favour of an accused who had been charged with an offence by way of a prima facie right to bail -- see section 5(3)(b) of the Constitution and section 106 of the Criminal Procedure Code ("CPC"); see also the case of *R v Perfili*.
>
> […]
>
> *In considering bail, the court is involved in a risk assessment. This entails assessing how much risk society should bear on one hand by granting bail and how much the accused should bear on the other by being remanded in custody or on conditional bail*. If the risks are high such that society should not be exposed to that risk, then bail normally would be refused and the accused made to bear that risk by having his presumption of innocence and liberty curtailed even in the absence of a lawful conviction in a court of law.

> This risk assessment however is not as easy as it sounds because it entails a prediction of future behaviour, requiring the balancing of and measurement of what the defendant is likely to do in the future; which cannot be 100% accurate. Further much of that prediction is measured by what had happened in the past, which can be quite unreliable and prejudicial against the accused. In many instances as well, much of what is relied on by the prosecution is based on his interpretation of what the police had said had happened. It is important therefore that the courts do not lose sight of the purpose and requirements of bail and what it entails. It is not what the police says which dictates whether bail should or should not be granted. *It is the balancing of the risk assessment by the Court after hearing both sides which determines at the end of the day which way the discretion of the court will fall.*
>
> […]
>
> The mere fact he is charged with very serious offences does not mean what is said on his behalf should now be given lesser weight, in preference to what police have to say. They must be given equal emphasis; in fact the scales of justice have always tilted in favour of the accused from the beginning by virtue of the presumptions of innocence and liberty enshrined in our Constitution and reflected in the criminal law process that this country had adopted from England'. [emphasis added]

As regards the general question that needs to be considered when deciding whether to grant bail, Kabui J in *R v John Ome* (Unreported Criminal Case No. 421 of 2004; 23 September 2004) stated at page 3:

> 'I would ask myself the same basic question that serves as the bottom line in the consideration of bail cases. That is, *is this a case where the interest of the community or in the public interest for that matter, should prevail over the liberty of the accused?*' [emphasis added]

In *Eddily Iro'ota v R* (Unreported Criminal Case No. 104 of 2004; 5 May 2004) Palmer CJ stated at page 2:

> 'An accused is prima facie entitled to bail -- sections 5(3)(a) and 10(2)(a) of the Constitution, section 106(1) of the Criminal Procedure Code (cap. 7); *R v Perfili*. Bail however is discretionary and not to be unreasonably withheld -- *John Mae Jino & John Gwali Ta'ari v R*. In a charge for murder, bail is rarely considered save where exceptional circumstances are shown.
>
> The onus is always on prosecution to show that *substantial grounds* exist for believing that the accused would fail to surrender to custody, commit further offences or interfere with the course of justice or witnesses -- see *Wells Street Magistrates Court; Ex parte Albanese*'. [emphasis added]

The evidence of the prosecution is to be taken at its highest in respect of bail applications, see *Henry Miki v R* (Unreported Criminal Case No. 19 of 2004; Palmer CJ; 25 March 2004) at page 3.

BAIL

As regards the need for statements from witnesses in order to determine the strength of the prosecution case, see *Chris Mae v R* (Unreported Criminal Case No. 27 of 2004; Palmer CJ; 11 February 2004) at page 1.

The information relied upon should prima facie come from reliable sources, see *R v Bartlett, Alex* (Unreported Criminal Appeal Case No. 20 of 2004; Court of Appeal; 8 November 2004) at page 3.

Bail Considerations

Generally

The issue of '*bail considerations*' is also examined in subsection 17.4 commencing on page 382 of '*Criminal Law in Solomon Islands*'.

In *Redley Clement Sisifiu v R* (Unreported Criminal Case No. 128 of 2003; 12 August 2003) Palmer J stated at page 3:

> 'The requirements for bail are primarily to secure the attendance of the defendant at the trial -- *R v Rose*; the test to be applied is whether or not it is probable that the accused will appear in Court at the trial date -- *Karawasi Taisia v Director of Public Prosecutions*; "*the principal consideration in all bail applications is whether the accused will attend his trial*." -- *R v Kong Ming Khoo*. This test is applied by considering factors such as the nature of the accusation against the accused, that nature of the evidence supporting the accusation, the seriousness of the penalty that may be imposed upon conviction and the availability of sureties as the case may be -- see page 71 of Archbold, Criminal Pleading, Evidence & Practice, 36th Edition by Butler and Garsia, quoted in *Karawasi Taisia v Director of Public Prosecutions* (ibid) by Kabui J at page 3'.

In *R v Benedict Idu* (Unreported Criminal Case No. 046 of 2004; 27 February 2004) Kabui ACJ stated at page 2:

> 'In *Perfili v R*, Criminal Case No. 30 of 1992 (unreported), Palmer J regarded the possibility of the accused person interfering with witnesses as being a relevant factor to be borne in mind by the judge. The delay in bringing the accused person to trial is also a relevant factor (per Palmer J in *Perfili's* case cited above and per Muria CJ in *R v Philip Tagea, Amos Teikagei & Damaris Teigakei*, and Criminal Case No. 14 of 1995). The family needs of the accused person are other factors to be considered (per Palmer J in Tagea's case cited above). As recently as in December, 2003, Brown J in *Ronly Oeta and Maelalia v R*, Criminal Case No. 294 of 2003, regarded "ethnicity" and "police culture" as being relevant factors affecting his decision in rejecting bail. However, in *Hou v The Attorney – General* [1990] SILR 88 Ward CJ did point out that *an accused person should not be held in custody if the only person to do so is the need to finalise the investigation*. So, the scope of the court's discretion is fairly wide at common law in terms of the factors influencing the direction in which the discretion is to be exercised by the court'. [emphasis added]

BAIL

In *Leslie Ashley Kakaluae v R* (Unreported Criminal Appeal Case No. 241 of 2003; 1 October 2003) Palmer J stated at page 6:

> 'The three main tests of probability of the accused appearing at his trial have been summarised succinctly in *R v Lythgoe* by Mansfield SPJ as being (a) the nature of the offence charged; (b) the probability of conviction; (c) the severity of the punishment which may be imposed (see also page 71 of Archbold, Criminal Pleading, Evidence and Practice, *Karawasi Taisia v Director of Public Prosecutions* and *Redley Clement Sisufiu v R* in which the same grounds had also been referred to)'.

In *Chris Mae v R* (Unreported Criminal Appeal Case No. 279 of 2003; 5 November 2003) Palmer J stated at pages 2 – 3:

> 'The Appellant has a right to apply for bail which is protected under our laws [see section 5(3) of our Constitution and section 106(1) of the Criminal Procedure Code ("CPC")]. That right however is subject to the discretion of the courts to be exercised judicially. The primary consideration of course being that of securing the attendance of the Defendant at trial (see *R v Rose*).
>
> To assist the courts in the exercise of their discretion, the following considerations should be taken into account (which appear to be relevant) for purposes of determining whether bail should be granted or not (see also page 71 of Archbold, Criminal Pleading, Evidence and Practice, *Karawasi Taisia v Director of Public Prosecutions* and *Redley Clement Sisifu v R*, *Leslie Ashley Kakaluae v R*):
>
> (a) **The nature of seriousness of the offence.** The more serious an offence, the more likely is the temptation to abscond in that if convicted the defendant is likely to receive a long prison sentence. The incentive to abscond and avoid trial therefore is stronger in such instances.
>
> (b) **The character, antecedents and community ties of the defendant.** The character and antecedents of the defendant provide useful guide as to whether bail should be granted or not. For instance, has the defendant abused bail before? Does he have previous convictions of a serious nature? [eg. see the case of *Leslie Ashley Kakaluae v R* (ibid)]. Does he have a fixed abode?
>
> (c) **The probability of a conviction or the strength of the evidence against the defendant.** Where the state of the evidence against the defendant is available this should be considered in conjunction with the seriousness and nature of the offence. […]
>
> (d) **Any other matters which may be relevant.** These include possible interferences with prosecution witnesses, possible actions in perverting the course of justice and where there is a real likelihood of the offence being repeated or some other serious offence being committed whilst on bail'.

BAIL

In *R v Witney Piopiko* (Unreported Criminal Case No. 101 of 2002; 5 May 2003) Muria CJ stated at page 2:

> 'But each of those considerations does not stand alone [, referring to the considerations to consider as to whether to grant bail]. Rather each factor is considered in conjunction with the others, so as to enable the Court hearing the application to properly determine whether bail is appropriate in a given case bearing in mind the circumstances surrounding the case. *An accused may very well attend his trial, but if granted bail, he may very well also present the risk of interfering with prosecution witnesses and investigation, especially where the accused and witnesses come from the same locality*. This is an important consideration in this case, as the accused and witnesses are relatively all from the same area within Bareho, in the Western Province'. [emphasis added]

Likelihood Of Absconding Whilst On Bail

In *R v John Ome* (Unreported Criminal Case No. 421 of 2004; 23 September 2004) Kabui J stated at page 1:

> '*The fear of being convicted and sentenced by the court being the reason for considering absconding really depends upon the strength of the evidence against the accused.* If the evidence is strong, there is the likelihood of absconding being consistent with human nature. The decision to escape or not is a personal one for no one reads the mind of an accused person'. [emphasis added]

Likelihood Of Committing Further Offences

In *Leslie Ashley Kakaluae v R* (Unreported Criminal Appeal Case No. 241 of 2003; 1 October 2003) Palmer J stated at page 6:

> 'Now, there is a case authority for the proposition that bail ought not be given where it is likely that an offence will be repeated. In *R v Phillips* two brothers were refused bail by the Court of Criminal Appeal on the grounds that a number of offences of housebreaking for which they had been previously charged and released on bail were committed whilst they were on bail.
>
> "*The Court feels very strongly that the applicant ought not to have been released on bail. In cases of felony, bail is discretionary, and the matters which ought to be taken into consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Some crimes are not at all likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and housebreaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it. There were three charges against the applicant. With regard to one there was no defence and in the case of another he was actually arrested in the act. Yet in spite of all his previous convictions the applicant was given bail, not once but twice, first pending the hearing before the magistrates and again on committal for*

> *trial. To turn such a man loose on society until he had received his punishment for an undoubted offence, an offence which was not in dispute, was, in the view of the Court, a very inadvisable step.*" (per Atkinson J at page 48)'.

See also: *R v John Raravete* (Unrep. Criminal Case No. 084 of 2005; Palmer CJ; 17 March 2005).

Delay

'On the issue of delay, this is not the only case, there are others as well and delay is inevitable; it happens in all jurisdictions', see *R v John Raravete* (Unrep. Criminal Case No. 084 of 2005; Palmer CJ; 17 March 2005) at page 3.

See also: *Andrew Tonowane v R* (Unrep. Criminal Case No. 055 of 2005; Brown J; 30 March 2005).

Murder Cases -- Exceptional Circumstances

Applications for bail in respect of the charge of '*Murder*' should be made under section 106(3) of the *Criminal Procedure Code* (Ch. 7) which states:

> 'Notwithstanding anything contained in subsection (1), the High Court may in any case direct that any person be admitted to bail […]'.

In *Redley Clement Sisifiu v R* (Unreported Criminal Case No. 128 of 2003; 12 August 2003) Palmer J stated at pages 3 - 4:

> '*It has been held that whilst bail may be considered for murder charges it may be granted only in exceptional circumstances* (*R v Kong Ming Khoo*; see also *R v Dickson Maeni and Karawasi Taisia v Director of Public Prosecutions*). No attempt however has been made in this jurisdiction to define or identify what those possible exceptional scenarios may be when bail may be considered in murder charges. Rather each case had been dealt with on a case by case basis (see *R v Alwin Paul*; *R v Joachim Wale*; *R v John Robu, Henry Faramasi, Lency Maenu'u and Peter Kabe*; *R v Dickson Maeni*; note a very convenient summary of these cases regarding the granting of bail in each case had been provided by Kabui J in *Karawasi v Director of Public Prosecutions* (ibid) at page 4.
>
> […]
>
> *I would agree with learned Counsel's submissions that the exceptional circumstances referred to in the case authorities pertain to the crime alleged and the circumstances of the accused. These must necessarily include the usual considerations the court is required to consider on whether bail should be granted or not.*

> Regrettably it does not include the personal circumstances, including the hardships that his family may be facing as a result of his being on remand. Whilst I sympathise with the hardships this Applicant's family may be going through as a result of his confinement on remand, they do no constitute exceptional reasons for bail to be granted. *Obviously his family will be adversely affected by his confinement in custody. The court may take into account, but that is subservient to the primary matters the court is required to have regard to*'. [emphasis added]

In *Ross Piu v R* (Unreported Criminal Case No. 54 of 2004; 4 March 2004) Palmer CJ stated at page 2:

> 'I have pointed out many times that the decision whether to grant bail is a matter within the discretion of the court. In determining that question court is required to consider whether the circumstances of the offence and offender require that an accused be remanded in custody. Onus is on prosecution to show that substantial grounds exist as to why bail should not be granted. *In murder cases however, defence is required to point to some exceptional circumstance justifying the grant of bail*'. [emphasis added]

See also: *Henry Miki v R* (Unreported Criminal Case No. 19 of 2004; 10 February 2004); *R v Albert Augustine* (Unreported Criminal Case No. 251 of 2004; Kabui J; 23 July 2004); *R v Belden Toata* (Unreported Criminal Case No. 32 of 2004; Palmer CJ; 3 December 2004); *R v John Raravete* (Unrep. Criminal Case No. 084 of 2005; Palmer CJ; 17 March 2005) and *Malcolm Lake v R* (Unrep. Criminal Case No. 430 of 2004; Palmer CJ; 22 February 2005).

As regards a summary of certain cases of '*Murder*' in which bail was granted, refer to *Karawaisi Taisia v R* (Unreported Criminal Case No. 266 of 2001; Kabui J; 9 October 2001).

Reliance as a church pastor as an exceptional circumstance in cases of '*Murder*', refer to *Amos Teikagei v R* (Unreported Criminal Case No. 14 of 1995; 29 January 1996); *Joshua Bulolo v R* (Unreported Criminal Case No. 47 of 2003; Palmer J; 17 March 2003); *Paisi Miavana and Joseph Miavana and others v R* (Unrep. Criminal Case No. 123 of 2004; Pamer CJ; 28 June 2005) and *Andrew Tonowane v R* (Unrep. Criminal Case No. 055 of 2005; Brown J; 30 March 2005).

The law relating to bail in respect to the offence of '*Murder*' is also examined in subsection 17.8 commencing on page 387 of '*Criminal Law in Solomon Islands*'.

Young Persons

In *R v Albert Augustine* (Unreported Criminal Case No. 251 of 2004; 23 July 2004) Kabui J stated at page 3:

> 'The other matter raised in the accused's favour was that he was a young person under the Juvenile Act (Cap. 14) (the Act) and therefore a different regime would apply to the accused. I would agree that the accused is a young person, though without a birth certificate. Section 5 of the Act does in my view envisage detention of a young person if the charge against that young person concerns a

> grave crime such as murder under the Schedule to the Act. Section 8(1) of the Act however makes it an obligation for the Court, in the case of remand or committing for trial, to commit the young person into a place of detention or to the care or custody of any person named in the commitment to be detained or cared for during the period of remand or until trial. There being no place of detention for young persons in Solomon Islands, the obvious remaining alternative is custody of any suitable person. Section 8 of the Act is in my view not about bail. It is about detention of young person even when bail is refused. The Court in section 8 being a remand or committing court must necessarily mean the Magistrate Court for the purpose of that section. Even if bail is refused by me, the accused may press for detention elsewhere than at Rove Prison on the basis that he is a young person under the Act. The High Court does not seem to have jurisdiction to order detention under this section. His uncle Mr. Sele who resides at Aruligo may well be a suitable person into whose custody the accused will be placed or someone else may qualify for the purpose of section 8. Whilst section 8 of the Act would appear to be bail in disguise, I do not think so because section 8 appears to be mandatory in the case of young persons whereas bail is general and discretionary'.

The law relating to bail in respect to '*Young Persons*' is also examined in subsection 17.3 commencing on page 380 of '*Criminal Law in Solomon Islands*'.

Imposition Of Conditions

In *R v Alex Bartlett* (Unreported Criminal Case No. 411 of 2004; 17 September 2004) Brown J held at page 8:

> 'So conditions are no answer to mitigate a risk, if the Court should accept a real risk to witnesses exists'.

So therefore a Court should not consider granting bail even subject to stringent conditions if it is of the opinion on the balance of probabilities that there is the real risk that a defendant will fail to comply with bail conditions such as interfering with the witnesses to be called by the prosecution. It should be noted that there is no offence for failing to comply with bail conditions.

The law relating to the '*Imposition Of Bail Conditions*' is also examined in subsection 17.5 commencing on page 384 of '*Criminal Law in Solomon Islands*'.

After Conviction

Section 290(1) of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Where a convicted person presents or declares his intention of presenting a petition of appeal, *the High Court or the court which convicted such person may*, if in the circumstances of the case it thinks fit, order that he be released on bail, with or without sureties, or if such person is not released on bail shall, at the request of such person, order that the execution of the sentence or order against which the appeal is pending be suspended pending the determination of the appeal. […]' [emphasis added]

BAIL

In *Rita Bennette and Geoffrey Pasio v R* (Unreported Criminal Appeal Case No. 69 of 2004; 3 May 2004) Brown J stated at page 4:

> 'So the test is not (1) a possibility the conviction will be set aside or (2) that the sentence may be served, rather apparent on the face of the transcript and the Magistrates reasons, there are "*exceptional circumstances*" for there to be every reason to think the appeal is likely to be successful'. [emphasis added]

See also: *R v Tingaria Sosupo* (Unreported Criminal Appeal Case No. 21 of 2004; Kabui J; 13 February 2004).

The law relating to '*Applications For Bail After Conviction*' is also examined in subsection 17.9 commencing on page 388 of '*Criminal Law in Solomon Islands*'.

Jurisdiction

A defendant has no right of appeal to the Court of Appeal in respect of bail, see *R v Bartlett, Alex* (Unreported Criminal Appeal Case No. 20 of 2004; Court of Appeal; 8 November 2004).

CONFESSIONAL EVIDENCE

Voluntariness

The following cases address the issue of '*voluntariness*'. In that regard refer also to subsection 8.14.5C commencing on page 221 of '*Criminal Law in Solomon Islands*'.

In *R v Luke Sape Mahoro* (Unreported Criminal Case No. 68 of 1999; 30 May 2003) Muria CJ stated at page 5:

> 'The law on the admissibility of a confession made by the accused in a criminal case has been well established. Both in this jurisdiction and elsewhere, the authorities have made it clear that an admission or confession made by the accused is not admissible unless it is shown to be voluntary. This means that the accused made the admission or confession in the exercise of a free choice to speak or remain silent. If the accused speaks because of threat, force, inducement or promise of an advantage held out by the person in authority, then the confession or admission cannot be said to be voluntary, and must be excluded. An admission or confession cannot be presumed to be voluntary. The prosecution must establish it beyond reasonable doubt. This common law position has been consistently recognised by the courts in this jurisdiction, and one that is applicable to the circumstances of this country.
>
> In addition to the objection on the voluntariness of an admission or confession, challenge as to the admissibility of the admission or confession may also be made on the ground that it would be unfair to use it against the accused. See the unreported case of *R v Ben Tofola*. The onus is on the prosecution to establish fairness to the required standard in criminal cases. However, the accused who raises the objection on the ground of unfairness must point to some evidence or material before the court that will satisfy the court that admitting the confession or admission would be unfair to him'.

Currently subject of an appeal to the Court of Appeal.

In *R v Moses Haitalemae, Simon Awa, Edwin Wateinaomae Wahu and Saniel Awa* (Unreported Criminal Case No. 210 of 2001; 19 November 2002) Kabui J stated at pages 2 – 3:

> 'The law on this subject is well known in this jurisdiction. The burden of proof is upon the Prosecution to prove beyond reasonable doubt that the caution statement made by the accused, which is challenged, was so made voluntarily by the accused. (See *Regina v Nelson Keaviri, Julius Palmer Mare Kilatu, Keto Hebala and Zomoro*) and the cases cited therein by Muria, CJ and *Regina v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio and John Teti* where Awich, J cited English authorities on the subject). The Court has discretion to reject a caution statement, which falls foul of the Judges' Rules. What the judge should do in cases such as this is to treat the Judges' Rules as doing no more that being Rules prescribing in a general way a standard of propriety (See *R v Lee*). There the High Court of Australia said,

… "As has already been pointed out, the protection afforded by the rule that a statement must be voluntary goes so far that it is only reasonable to require that some substantial reason should be shown to justify a discretionary rejection of a voluntary admission. The rules may be regarded in a general way as prescribing a standard of propriety, and it is in this sense that what may be called the spirit of the rules should be regarded. But it cannot be denied that they do not in every respect afford a very satisfactory standard. Their language is in some cases imperative and in others merely advisory: sometimes the word "must" is used" sometimes the word "should", and the tendency to take them as a standard can easily develop into a tendency to apply rejection of evidence as in some sort a sanction for a failure by a police officer to obey the rules of his own organisation, a matter which is of course entirely for the executive. It is indeed, we think, a mistake to approach the matter by asking as separate questions, first, whether the Police officer concerned has acted improperly, and if he has, then whether it would be unfair to reject the accused's statement. It is better to ask whether, having regard to the conduct of the Police and all the circumstances of the case, it would be unfair to use his own statement against the accused" ….

The Court then cited the judgment by Street, J in *R v Jeffries* (1947) 47 SR (NSW) 284 as the correct exposition of the whole matter. At pages 311 – 312 of that judgment, Street, J said,

… "It is a question of degree in each case, and it is for the presiding Judge to determine, in the light of all the circumstances, whether the statements or admission of the accused have been extracted from him under conditions which render it unjust to allow his own words to be given in evidence against him. The obligation resting upon Police officers is to put all questions fairly and to refrain from anything in the nature of a threat, or any attempt to extort an admission. But it is in the interests of the community that all crimes should be fully investigated with the object of bringing malefactors to justice, and such investigations must not be hampered. The object is to clear the innocent as well as establish the guilt of the offender. They must be aimed at the ascertainment of the truth, and must not be carried out with the idea of manufacturing evidence or extorting some admission and thereby securing a conviction. Upon the particular circumstances of each case depends the answer to the question as to the admissibility of such evidence"'.

See also: *R v Harold Keke, Francis Lela and Ronnie Cawa* (Unrep. Criminal Case No. 254 of 2004; Kabui J; 25 February 2005).

Right to Legal Representation

'There is no "right" to have a lawyer present in this country in the sense of a "right" enshrined in the Constitution ("right to life", "liberty" etc) nor does s.10(2) of the Constitution extend the "right" to "defend himself before the court in person or at his own expense by a legal representative of his own choice" to include a right to a legal representative at the interview stage.

In this case then, the highest that the accused may put the fact of the absence of a lawyer at the interview stage is to suggest the court have regard to it as a consideration on the latter question of discretion to exclude in any event', see *R v Victa Bina* (Unrep. Criminal Case No. 178 of 2004; Brown J; 14 June 2005) at pages 3 - 4.

COURT PROCEDURE

Taking Of Plea

In *R v Ishmael Marawa* (Unreported Criminal Appeal Case No. 476 of 2004; 23 November 2004) Kabui J stated at page 2:

> 'The prisoner was unrepresented in court when he pleaded guilty to the charges laid against him. This issue of entering a **guilty plea** or **not guilty plea** was recently reviewed in *Regina v Elliot Mendana, Cyril Viuru, Cecil Barley and Charles Keke*, Criminal Appeal No. 002 of 2000. I need not go through the cases on this point than to repeat that *where the accused is not represented by Counsel, the trial magistrate must enquire into the case to ensure that nothing exists which will make a guilty plea a misleading one*. (see also *R v Gua* [1990] SILR 129). Although there is a brief reference on the record to the charges having been explained to the prisoner before his arraignment, there is nothing more than that to show that the learned Magistrate did properly and adequately explain them in such a way that such explanation was capable of attracting a denial of guilt or a revelation of a defence. The result was that the defence of possible provocation and specifically self – defence surfaced only at the mitigation stage. At that stage, the learned Magistrate should have vacated the guilty plea and entered a plea of not guilty and continued with the trial. That was not done. At least, the defence of self – defence was recorded by the learned Magistrate at the mitigating stage before passing sentence. The question of the case being functus officio does not arise in this case. (See *S v Recorder of Manchester* [1971] AC 481)'. [emphasis added]

The law relating to '*Taking Of Plea -- Unrepresented Defendants*' is also examined in subsection 59.2.3 commencing on page 925 of '*Criminal Law in Solomon Islands*'.

Right Of The Prosecution To A Final Address

In *R v Tome, Na'asusu* (Unreported Criminal Appeal Case No. 4 of 2004; 10 November 2004) the Court of Appeal stated at page 4:

> '*If the accused does not give evidence the tribunal of fact has the benefit of final addresses during which issues of credibility of witnesses and sufficiency of evidence not relevant to the no case determination will be explored.*
>
> […]
>
> The passages quoted above from the reasoning of the learned trial judge amply demonstrate that he merged the two exercises ['Application of the tests to be applied to a Submission of No Case To Answer and at the conclusion of a criminal trial] and therefore fell into error. *The prosecution was thus deprived of the benefit of a final address which could have affected the court's conclusion on issues of credibility and inconsistency. Thus the prosecution was deprived of a trial according to law*'. [emphasis added] [words in brackets added]

In that case the trial judge upheld the submission of No Case To Answer.

As regards the issue whether the prosecution is entitled to a final address, refer to section 143 of the *Criminal Procedure Code* (Ch. 7).

COURT PROCEDURE

In *R v John Iroi* (Unreported Criminal Case No. 250 of 2003; 7 April 2004) Kabui J stated at pages 9 – 10:

> 'As I have said above, the accused gave evidence on oath but called no witnesses. Should the Prosecution be allowed to sum up its case? The answer is yes but summing up is not a must but if summing up is thought necessary, it need not be long. This is where section 143 of the CPC comes into play in that the fact that the accused gives evidence on oath and calls no witnesses does not automatically entitle the Prosecution to make a reply. If, there is one, it should be brief otherwise there need not be one. *The ultimate decision to make a reply or not is one of exercising, I might say, a sense of some wisdom on the part of the Prosecution*'. [emphasis added]

The law relating to '*Final Addresses*' is also examined in subsection 13.6 commencing on page 329 of '*Criminal Law in Solomon Islands*'.

Right Of The Prosecution To Rebuttal

In *R v Kennedy Bela* (Unreported Criminal Case No. 100 of 2002; 3 May 2004) Kabui J stated at pages 1 – 3:

> 'After the closing address by defence counsel, leading counsel for the Prosecution, Mr Cauchi, stood up and expressed his wish to comment on what he called new matters that emerged from the closing address by the defence counsel. I asked him whether he had the right to do so and he replied in the affirmative though without citing any authority. Miss Garo, for the defence did not object to Mr. Cauchi and so I allowed Mr. Cauchi to rebut. This is most unusual in terms of section 273 of the Criminal Procedure Code Act (Cap. 7) "the CPC" as representing the practice in this jurisdiction. […]
>
> […]
>
> I have thought about section 273 of the CPC and its implications in this regard. This section represents the rule of practice in this jurisdiction and obviously assumes that proper practice is adhered to at all times by practitioners and the courts. Where this rule of proper practice under this section is abused, misapplied or misunderstood with the result that unfairness may occur disadvantaging the Prosecution, the Prosecution, in my view, may rebut after reply. I end with these words –
>
> "… The last word, in a criminal trial, leaving aside the judge's summing up, belongs to the defence. After the prosecution closing speech, defence counsel sums up his case to the jury. He has a broad discretion to say anything he considers desirable on the whole case, but he should not allege as facts matters of which no evidence has been given. As it was put in *R v Bateson* (1991) The Times, 10 April 1991, he should not 'conjure explanations out of the air', but he is entitled to suggest, for example, that there might be an innocent explanation for his client's lies if there was evidence in the case on which to base such an explanation. The rule applies equally to prosecuting counsel, but defence counsel may be more tempted to transgress it …". "(See Emmisson on Criminal Procedure, by John Sprack, 5th Edition, 1992 at 143)".

Transgress as it may be, this sort of rebuttal can only be very rarely resorted to'.

Whilst section 273 of the *Criminal Procedure Code* (Ch. 7) outlines the '*Right of the Prosecution to Rebuttal*' in the High Court, the identical procedure in the Magistrates' Court is provided for by section 200(2) of that Code.

Prosecution's Discretion To Call Witnesses

In *Redley Clement Sisifiu v R* (Unreported Criminal Case No. 128 of 2003; 12 August 2003) Palmer J stated at pages 6 - 7:

> 'It must be borne in mind also that the decision whether to call a witness present at the scene to give evidence is a matter within his discretion to determine [, referring to Director of Public Prosecutions and prosecutors generally]. If he declines, nothing untoward should be inferred. *Any decision to call a witness or not obviously will be dependent upon the question whether any of those persons will give material evidence or not.* The only requirement imposed upon him is to make available to the Defence on request any statements of witnesses that he does not call and which the Defence on the other hand may wish to call'. [emphasis added] [words in brackets added]

A court is not entitled to infer that the evidence of a witness who was not called would not have assisted the prosecution, provided that the prosecution's failure to call the witness was not in breach of the prosecution's duty to call all material witnesses, see *R v Dyers* (Unreported Appeal No. 45; High Court of Australia; 2002).

In *R v RPS* (2000) 199 CLR 620 Gaudron CJ, Gummow, Kirby and Hayne JJ stated at page 633:

> '… if the question concerns the failure of the prosecution to call a witness whom it might have been expected to call, the issue is not whether the jury may properly reach conclusions about issues of fact but whether, in the circumstances, the jury should entertain a reasonable doubt about the guilt of the accused'.

The evidence of material witnesses who may be considered to be 'in the camp of the prosecution' should not necessarily be considered to be unreliable, see *MFA v R* (Unreported Appeal No. 53; High Court of Australia; McHugh, Gummow and Kirby JJ; 14 November 2002).

The law relating to the '*Prosecution's Discretion to Call Witnesses*' is also examined in subsection 6.4 commencing on page 120 of '*Criminal Law in Solomon Islands*'.

Defence's Discretion To Call Witnesses

In *R v Farsy, Didier Marie Edmond* (Unreported Criminal Appeal Case No. 13 of 2004; 10 November 2004) the Court of Appeal stated at pages 2 - 3:

> 'Another argument advanced in this Court by counsel for the appellant was based on the following passage in the Magistrate's reasons for convicting:

> "As for count 1 the evidence on its own of Loyad Wanefelea which despite me warning the defence that if they did not put to this witness all matters in his evidence that they disputed I would be left with the only conclusion that was possible namely that the defence were not in dispute with the unchallenged evidence and that I may accordingly take it as fact. The defence other than saying he may be lying on everything did not challenge any of his detailed evidence. As for the general allegation that all his evidence was a lie the defence were told by me this was too general to answer and specific allegations had to be put. The contradiction in evidence does not alter the power of this evidence on the essential facts he gave it really is in periphery or omission not contradiction of his main points that were not challenged in detail by the defence."
>
> […]
>
> *In a case such as this the tribunal of fact is entitled to have regard to the way in which the defence is conducted when considering issues of credibility.* Here, notwithstanding evidence from the witnesses tending to support the evidence of the complainants, the cross – examination of the complainants appeared to be in general terms. *Merely putting to a complainant that all relevant evidence was a lie in those circumstances does not seriously challenge the prosecution case*. In the court's view that is all the Magistrate was really saying in the passage quoted above'. [emphasis added]

The law relating to:

- the '*Defence's Discretion to Call Witnesses*' is also examined in subsection 11.1.2 on page 275 of '*Criminal Law in Solomon Islands*';

  and

- the '*Evaluation of Evidence by a Court*' is also examined in subsection 13.7.2 commencing on page 331 of '*Criminal Law in Solomon Islands*'.

Prosecutor As A Witness

A prosecutor should not be a witness in a case that he/she is prosecuting, see *R v Secretary of State for India in Council and others; Ex parte Ezekiel* [1941] 2 All ER 446.

See also: *Jackson Qalo v Shakespere Qloboe, Simone Kebaku, Maeka Leokana, Jimmy Pitakaji and Bosepoqe* (Unreported Civil Appeal Case No. 004 of 2003; Kabui J; Court of Appeal; 16 May 2003).

The law relating to a '*Prosecutor Giving Evidence As A Witness*' is also examined in subsection 11.5 on page 280 of '*Criminal Law in Solomon Islands*'.

COURT PROCEDURE

Disclosure

In *R v Sisifiu, Clement and Daefa, Peter* (Unreported Criminal Appeal Case No. 16 of 2003; 11 November 2004) the Court of Appeal stated at page 2:

> 'Both Goreta and Fa'alu had been interviewed by investigating police and their statements were in the possession of the prosecution. Those statements had not been disclosed to the defence. In fact the non – disclosure extended to other important statements but it is not necessary to particularise them. This non – disclosure was a serious breach of duty by the prosecution. *The law with respect to disclosure is clearly laid down by the House of Lords in R v Mills and Poole* [1998] 1 Cr App R 44 *and should be observed by all prosecutors within the Solomon Islands*'. [emphasis added]

The case of *R v Mills v Poole* (supra) is outlined on page 137 of '*Criminal Law in Solomon Islands*'.

See also: *Redley Clement Sisifiu v R* (Unreported Criminal Case No. 128 of 2003; Palmer J; 12 August 2003) at pages 6 – 7 and *R v John Tana, Augustine Namona, Homas Talikanga and Naphtili Napiabo* (Unreported Criminal Case No. 175 of 2002; Kabui J; 5 September 2003) at page 3.

In *Fred Tua v R & Ben Bitiai v R* (Unrep. Criminal Cases Nos. 569 of 2004 & 515 of 2004; 6 July 2005) Palmer CJ held at page 3:

> 'The issue for determination on this appeal point is whether the direction of the learned Magistrate traverses the presumption of innocence by shifting the burden of proof to the Appellant? In so far as the direction was issued for the purpose of assisting the court and the parties in the efficient conduct of the trial, I find nothing wrong or illegal about those directions. Any court is entitled to conduct a pre – trial conference for the purpose of maximising court time, resources and facilities and securing the efficient conduct of a trial. To that extent the actions of the court in asking defence to disclose the nature of defence in that pre – trial conference was not unlawful. **Where the court over – stepped its mark was in imposing sanctions/penalties on the defence if they did not disclose their defence and other particulars at that particular point of time.** The most that can be done is to request disclosures for purposes of assisting the efficient conduct of the trial but without prejudice to the right of the accused to remain silent or reserve his defence till close of prosecution case. If the accused chooses to remain silent and reserve his defence, and require prosecution to prove its case, then there is nothing further the court can do. No adverse inference can be drawn against the accused even if after close of prosecution case he then elects to give evidence and run a defence which had not been disclosed earlier on. It may draw some appropriate comment from the presiding Magistrate, but it cannot be used as the basis to prevent him from calling witnesses and running defence, which was the effect of the order of the presiding Magistrate in this case and possibly in the other case as well'.

COURT PROCEDURE

Charge Selection

Defendants should be charged with the most serious offence, subject to the availability of evidence, see *R v Tony Ferris* (Unreported Criminal Case No. 308 of 2003; Palmer CJ; 22 December 2004) at page 1.

The law relating to '*Charges Generally*' is examined in section 5 commencing on page 75 of '*Criminal Law in Solomon Islands*'.

Conviction For A Lesser Offence

In *David Filia v R* (Unrep. Criminal Case No. 311 of 2003; 9 May 2003) Kabui J states at pages 6 – 7:

> 'In Solomon Islands, the judge sits in a trial both as a judge of the law as well as of facts. Section 159(2) of the CPC states –
>
> "… When a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it …"
>
> [… I]f at the end of the case, the evidence does not sustain the charge borne out in the indictment but proves a lesser offence *under the same category of offences*, the trial judge must convict the accused of that lesser offence although the accused had not been charged with that lesser offence in the first place'. (emphasis added)

No Case To Answer

In *R v Tome, Na'asusu* (Unreported Criminal Appeal Case No. 4 of 2004; 10 November 2004) the Court of Appeal stated at pages 2 - 4:

> 'Section 269(1) of the Criminal Procedure Code provides for a trial in the High Court that when "the evidence of the witnesses for the prosecution has been concluded … the court, it if considers that there is no evidence that the accused … committed the offence, shall … record a finding of not guilty." The wording is significant given the different phraseology in s. 197 which deals with the no case situation in the Magistrates Court.
>
> […]
>
> As is made clear by cases such as Doney inconsistencies in evidence (whether within the testimony of a witness or as between witnesses) are not relevant at the no case stage. The court must take the prosecution evidence at its highest and that means accepting the evidence most favourable to the prosecution when determining whether an accused has a case to answer. *The test then is not whether the prosecution has proved its case beyond reasonable doubt but rather whether there is evidence capable of supporting a conclusion beyond reasonable doubt that the accused i[s] guilty'.* [emphasis added]

COURT PROCEDURE

The law relating to a '*Submission of No Case to Answer*' in the Magistrates' Court is examined in section 16 commencing on page 372 of '*Criminal Law in Solomon Islands*'.

Note Taking By The Court

In *R v Farsy, Didier Marie Edmond* (Unreported Criminal Appeal Case No. 13 of 2004; 10 November 2004) the Court of Appeal stated at page 2:

> 'The Chief Justice said in his reasons: "Again there is nothing unusual or unlawful about Magistrates or Judges reading from a pre – typed sheet and adding to, amending, deleting etc any thing from that pre – typed sheet as trial progresses and reading from it at the conclusion of trial. Some Judges and Magistrates actually do that as the trial progresses, typing up or writing parts of the Judgment as they consider appropriate." *That statement is unobjectionable, but care must always be taken to ensure that the matter is not prejudged'.* [emphasis added]

The law relating to '*Judgments -- Generally*' is examined in subsection 13.7.3 commencing on page 332 of '*Criminal Law in Solomon Islands*'.

Rule In Brown v Dunn

In *R v Farsy, Didier Marie Edmond* (Unreported Criminal Appeal Case No. 13 of 2004; 10 November 2004) the Court of Appeal stated at page 3:

> 'The rule in *Browne v Dunn* is primarily intended to ensure that, if a party is to give evidence which contradicts evidence given by a witness, such contradictory evidence is put to the witness during cross – examination. *That was not the situation here because the appellant did not give evidence*'. [emphasis added]

However, considerable caution is required in applying the '*Rule in Brown v Dunn*' in criminal trials since there may be any number of reasons for oversight, including counsel's error, see *R v Birks* (1990) 19 NSWLR 677 and *R v Manunta* (1990) 54 SASR 17.

The law relating to the '*Rule in Brown v Dunn*' is also examined in subsection 14.2.6 commencing on page 363 of '*Criminal Law in Solomon Islands*'.

Evidence Of Children Or Young Persons

In *Didier Marie Edmond Farsy v R* (Unreported Criminal Appeal Case No. 63 of 2004; 24 June 2004) Palmer CJ stated at page 8:

> 'This alleges that the learned Magistrate did not apply the warning regarding the evidence of young witnesses to the circumstances of the case and was too ready to accept in its entirety the evidence of the complainants?

> This ground must be dismissed as having no basis. The requirement that warnings be given in respect of evidence of children or young witnesses was obligatory where there was a jury. A Judge was required to tell a jury that the evidence of a child or young person must be scrutinized with particular care, meaning that where possible, corroboration must be sought. The law in England regarding the unsworn evidence of a child of tender years prior to 1988 was that corroboration was required by statute: see section 38(i) of the Children and Young Persons Act 1933. Where the evidence is sworn, although corroboration is not required as a matter of law, a jury should be warned of the danger of acting on uncorroborated evidence. This means they may act on such evidence if nonetheless they are convinced that the witness is telling the truth -- see *R v Campbell*; *R v Sawyer*.
>
> The situation in Solomon Islands is different where the magistrate or judge presiding is judge both of fact and law. The requirements of a warning to that extent can be relaxed as a judge or magistrate in most instances would be legally qualified in any event and cognizant of the requirements of law on corroboration. *As a rule of thumb however, magistrates and judges do make a point of saying in their judgments that they do bear such warnings in mind*'. [emphasis added]

The law relating to the '*Evidence Of Children Or Young Persons*' is also examined in subsection 11.8.3 commencing on page 284 of '*Criminal Law in Solomon Islands*'.

CRIMINAL JURISDICTION

Practice Direction

The full '*Practice Direction*' is outlined in subsection 1.3 on page 7 of '*Criminal Law in Solomon Islands*'.

As regards an interpretation of paragraph 3 of the Practice Direction issued by Daly CJ on 4 June 1981 that states:

> 'The High Court shall regard earlier decisions of itself as persuasive authority',

refer to *In the Estate of Felix Panjuboe* (Unreported Civil Case No. 241 of 2002; Kabui J; 12 November 2002).

Jurisdiction Of A Magistrate Of The Second Class

In *R v Simon Jafaalu Nobeni* (Unreported Criminal Review Case No. 105 of 2004; 29 October 2004) Kabui J stated at page 2:

> 'Section 27(2) of the Magistrates' Courts Act (Cap. 20) stipulates that a Magistrate of the Second Class shall have jurisdiction to summarily try any criminal offence for which the maximum penalty does not exceed a term of one year imprisonment or a fine of two hundred dollars or both such imprisonment and fine etc. By subsection 3 of section 27 above, the Chief Justice is empowered to increase the jurisdiction of any Magistrate Court beyond its jurisdiction provided the sentence passed by that Magistrate Court whose jurisdiction has been increased does not exceed the maximum punishment prescribed in subsection 2 (a) of section 27 above. In the case of a Magistrate of the Second Class, the sentence must not exceed one year imprisonment or a fine of two hundred dollars or both such imprisonment or such fine'.

The law relating to the '*Jurisdiction of a Magistrate of the Second Class*' is also examined in subsection 2.3.3 commencing on page 21 of '*Criminal Law in Solomon Islands*'.

Appeals

The statutory provisions which provide for:

- '*Appeals*' from the Magistrates' Court to the High Court are specified in Part IX of the *Criminal Procedure Code* (Ch. 7). Refer also to section 45 of the *Magistrates Courts Act* (Ch. 20);

- the High Court exercising appellate jurisdiction is examined in subsection 2.2.2 commencing on page 17 of '*Criminal Law in Solomon Islands*';

- '*Appeals*' from the High Court to the Court of Appeal are specified in Part IV of the *Court of Appeal Act* (Ch. 6);

  and

- the Court of Appeal is examined in subsection 2.1 commencing on page 15 of '*Criminal Law in Solomon Islands*'.

In *Jean Betty Maenua, Baddeley Au, Jack Akao, John Meke and Pat Tom v R* (Unreported Criminal Appeal Case Nos. 121, 300, 305, 374 and 375 of 2003; 8 December 2004) Palmer CJ commented at page 1:

> 'Court Staff and Judicial Officers are required to process appeals expeditiously. Court records of proceedings should be forwarded to this court as soon as possible after an appeal has been filed. Prolonged delays can work injustice and unfairness to Appellants, not only in this case but in others as well'.

In *Leslie Ashley Kakaluae v R* (Unreported Criminal Appeal Case No. 241 of 2003; 1 October 2003) Palmer J stated at page 4:

> 'The petition of appeal was filed on 23 September 2003 pursuant to section 283 of the Criminal Procedure Code [cap. 7] […]. Section 285(1) requires the appeal to be in the form of a petition and **to be presented to the Magistrate's Court from whom the decision of which the appeal is lodged**. Section 287 in turn requires the Magistrate, **upon receipt of the petition of appeal, to forthwith forward the petition of appeal together with the record of proceedings** to the Registrar of the High Court'.

'An appellate court would only interfere in a case that depended on the Magistrates assessment of witnesses and evidence where it was satisfied there was a real likelihood he reached the wrong conclusion', see *Gouwadi v R* [1990] SILR 168 as referred to in *David Angitalo, Kenneth Ongainao, Henry Satini and Patrick Basifako v R* (Unreported Criminal Case No. 36 of 2004; Brown J; 10 November 2004) at page 11.

See also: *Didier Marie Edmond Farsy v R* (Unreported Criminal Appeal Case No. 63 of 2004; Palmer CJ; 24 June 2004).

As regards the issue of lodging an appeal in time, refer to *R v Rose Kenekene* (Unreported Criminal Appeal No. 290 of 2003; Kabui J; 24 November 2004) and *Samson Kunua v R* (Unreported Criminal Appeal No. 437 of 2004; Mwanesalua J; 29 October 2004).

As regards delays in having an appeal heard, refer to *R v Daniel Dala* (Unreported Criminal Appeal No. 244 of 2004; 25 November 2004). In that case Kabui J stated at page 2:

> 'If a prisoner is convicted and appeals against conviction or sentence let him or her be imprisoned no longer than is necessary to prepare his or her appeal for hearing and determination. Inordinate delay due to loss of the file or oversight or inattention by Magistrate Court officials is no excuse. Justice must be seen to be done and not just talking, apologies or silence. "Justice delayed is justice denied" as often quoted'.

CRIMINAL JURISDICTION

In *R v Elliot Mendana, Cyril Viuru Cecil Barley and Charles Kere* (Unreported Criminal Appeal Case No. 002 of 2004; 13 February 2004) Kabui J stated at pages 1 – 2:

> 'Section 284(1) of the Criminal Procedure Act (Cap. 7), "the CPC" states –
> "… No appeal shall be allowed in the case of an accused person who has pleaded guilty and has been convicted of such plea by a Magistrate's Court, except as to the extent or legality of the sentence …
> […]"
>
> This subsection obviously assumes that the guilty plea had been unequivocal and intended to be so by the accused upon being arraigned whether represented by counsel or not at the hearing in the Magistrate Court in accordance with section 195 of the CPC. What if the accused for some reason did plead guilty but such plea did not represent his or her true intention. In this regard, Avory J in *R v Forde* [1923] All ER (reprint) 477 at 479 said –
>
> "… The first question that arises is whether this court can entertain the appeal. A plea of Guilty having been recorded, this court can only entertain an appeal against conviction if it appears: (i) That the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or (ii) that upon the admitted facts he could not in law have been convicted of the offence charged …"
>
> There is another situation which can result in a guilty plea being regarded a nullity by the court. In *R v Terry Michael Inns* (1975) volume 60 Criminal Appeal Reports 231 at 233, Lawton, JL, said –
>
> "… When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and the trial starts without there being a proper plea at all. All that follows thereafter is, in our judgment, a nullity …"'.

CRIMINAL RESPONSIBILITY

Insanity

In *R v David Runi Haro* (Unreported Criminal Case No. 99 of 2002; 11 June 2003) Muria CJ examined the defence of '*Insanity*' as to applies to offence of '*Murder*'. His Honour stated at page 4:

> 'The law places the onus on the defence to show on the balance of probabilities that the accused was suffering from abnormality of the mind such that he ought not to be convicted of murder: *R v Sipiriano Haroroanimae*. In considering this, defence the court is entitled and indeed bound to take into account the whole facts and circumstances of the case, including medical evidence, the nature of the killing, the conduct of the accused before, during and after the incident. The burden of excluding the defence rests with the prosecution and must do so beyond reasonable doubt'.

The law relating to the defence of '*Insanity*' is also examined in subsection 21.5 commencing on page 441 of '*Criminal Law in Solomon Islands*'.

Duress

In *R v Ronny Oeta and Allen Maelalia* (Unreported Criminal Case No. 173 of 2003; 3 June 2004) Palmer CJ stated at page 8:

> 'Although under English law the defence of duress for murder is not available -- see *Regina v Howe* [[1987] 1 All ER 777], it is available under our Criminal Law as a statutory defence -- see section 16 of the Penal Code'.

The law relating to the defence of '*Compulsion/Necessity*' is also examined in subsection 21.8 commencing on page 449 of '*Criminal Law in Solomon Islands*'.

Intoxication

In *R v Stanley Kinda Surilamo* (Unreported Criminal Case No. 171 of 2002; 28 February 2003) Palmer J stated at pages 2 – 3:

> 'Section 13(2) of the Penal Code Act recognises that intoxication can be a defence to any criminal charge on two grounds; where the person charged did not know that such act was wrong or did not know what he was doing (a) where the state of intoxication was caused by another person without his consent or (b) where such person was temporarily insane by reason of intoxication. Sub - section 13(4) provides:
>
> > "*Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.*"

CRIMINAL RESPONSIBILITY

It has been established as early as 1980 in *R v Kauwai* (1980/1981) SILR 108, and affirmed in *R v Kenneth Iro* (Unrep. Criminal Case No. 66 of 1993) Muria CJ at pages 2 – 3 that intoxication is available as a defence in murder cases whether intoxication was self – induced or not. His Lordship Muria CJ had succinctly summarised the test as:

> "*The question is whether the accused's mind was so affected by alcohol that he could not have formed the intention to do what he did or that his mind was so affected by alcohol that he did not know what he was doing at the time."*

This test had been propounded in earlier English cases cited by the learned authors in Archbold, Pleading, Evidence and Practice in Criminal Cases, forty – third edition, at paragraph 17-50 (f) page 1371:

> 'Where, however, the prosecution has to prove any other mental element, such as intent or knowledge, …, the jury must consider any evidence of intoxication in determining whether the necessary mental element has been proved. "*In cases where drunkenness and its possible effect upon the defendant's mens rea are in issue, the proper direction to a jury is first to warn them that the mere fact that the defendant's mind was affected by drink to that he acted in a way which he would not have done had he been sober did not assist him at all, provided that the necessary intention was here. A drunken intent was nevertheless an intent. Secondly, subject to that, the jury should merely be told to have regard to all the evidence, including that relating to drink, to draw such inferences as they thought proper from the evidence, and on that basis to ask themselves whether they felt such that at the material time the defendant had the requisite mind*." *R v Sheehan and Moore* (1975) 60 Cr App R 308, CA. See also *R v Pordage* [1975] Crim Lr 575. When the question of drunkenness arises, it is not a question of the capacity of the defendant to form the particular intent which is in issue, what is in issue is simply whether he did form such an intent: *R v Garlick*, (1980) 72 Cr App R 291, CA" [Emphasis added]

Learned Counsel Mr. Hou for the Defence has usefully cited authorities in other jurisdiction in which similar sentiments have been expressed. In Australia, this is set out clearly in *Viro v The Queen* [1976 – 78] 141 CLR 88 at 111 per Gibbs J:

> "*In the case of such a crime the issue is not whether the accused was incapable of forming the requisite intent, but whether he had in-fact formed it. The crown must prove beyond reasonable doubt that the accused actually formed the special intent necessary to constitute the crime.*"

In New Zealand, this was addressed in *R v Kamipeli* [1975] 2 NZLR 610 by the Court of Appeal as follows:

> "*Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether an accused has the intention or recklessness required by the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances. It is the fact of intent rather than capacity for intent, which must be the subject matter of the inquiry*."

The same test had been applied by Sir Leslie Herron, Chief Justice of New South Wales in *R v Farrel* [1964] NSWLR 1143 quoted in *R v Kamipeli* (supra at page 616) and approved by the Court of Criminal Appeal of New South Wales in *R v Gordon* [1963] SR (NSW) 631:

> "*The question is whether he had in fact, formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming or did not in fact formed the intent required, he could not be convicted of a crime which is committed only if the intent is proved.*"'

The law relating to the defence of '*Intoxication*' is also examined in subsection 21.6 commencing on page 444 of '*Criminal Law in Solomon Islands*'.

DANGEROUS DRUGS

The relating to the *Dangerous Drugs Act* (Ch. 98) is also examined in section 49 commencing on page 754 of '*Criminal Law in Solomon Islands*'.

Authority To Prosecute

In *Delilah Tango v R* (Unreported Criminal Appeal Case No. 174 of 2004; 7 May 2004) Kabui J stated at page 2:

> '**The DPP's sanction under subsection (3) and certification under subsection (6) of section 39 of the Dangerous Drugs Act (Cap. 98) "the Act".**
>
> The DPP had sanctioned the prosecution of the appellant under section 39(3) of the Act. Section 39(6) of the Act further requires the DPP to sign a certificate to confirm the date he received evidence justifying the prosecution of the offence for the purpose of section 39(6) of the Act. The purpose of subsection (6) is that prosecution must take place within 3 months from the date on which the DPP received evidence justifying, in his opinion, to prosecute the offence upon that evidence coming to his knowledge on that certified date. There is no certification of that sort in this case under subsection (6) above.
>
> The omission by the DPP to certify the date he decided to proceed against the appellant makes it impossible to compute the 3 months period within which he was expected to act on the evidence before him. The completion of the trial resulting in conviction and sentence shows that the DPP did decide to prosecute on sufficient evidence but the question is on what date did he make up his mind to act? This fact is important to establish that the DPP had acted within the prescribed period of 3 months there being no other specified time period under any other law for the purpose of the Act. In my view, to proceed against any person under the Act is to lay a charge against him or her. The charge against the appellant was laid on 8th April 2004 well within the 3 months period prescribed in section 39(6) of the Act assuming the DPP's sanction was also the certificate certifying the date on the evidence before him he decided to proceed against the appellant. The sanction of the DPP is specific in that it recites section 39(3) of the Act. Section 39(6) is also specific in its intention. In my view, these two subsections cannot be reconciled to render a sanction under subsection (3) a certificate under subsection (6) of section 39 of the Act or both are the same thing'.

Proof Of A Dangerous Drug

In *Delilah Tango v R* (Unreported Criminal Appeal Case No. 174 of 2004; 7 May 2004) Kabui J stated at pages 2 - 3:

> 'At this juncture, I wish to raise another point. The content of the packet the appellant gave to the Police was sent to Honiara for testing. The test had been carried out by one Siapu, a Police Officer, of the Drugs Unit in Honiara. The Police Officer having done the test, made a report. At the trial of the appellant, that Police Officer was not called by the Prosecution to tender the result of the test carried out by him nor was his report tendered by agreement under section 180 of the CPC. At the trial, the Prosecution, the Defence and the Magistrate all

seemed to have assumed that the content of the packet was marijuana. There was no positive proof that the content of the packet was marijuana. Whilst it was the case that the appellant produced the packet to the Police containing suspected marijuana, the Police were not so sure and so they sent the packet with its content for testing in Honiara. Another point is that whilst there is a Drugs Unit in Honiara, section 42 of the Act does seem to recognise a certificate by a Government Pharmacist in terms of certifying anything in any proceedings under the Act. The end result is that there was no evidence to show that the substance inside the packet found on the body of the appellant was indeed marijuana. It was for the Prosecution to prove its case beyond reasonable doubt. The Magistrate could not and should not take judicial notice of the fact that it was marijuana that was in the packet. *The Prosecution must prove that it was marijuana so as to leave no doubt in the mind of the Magistrate that an offence had been committed by the appellant being in possession of it on the relevant date*'. [emphasis added]

DISCLOSURE OF DETAILS OF A CRIMINAL INVESTIGATION TO MEDIA

The disclosure and publication of details of a criminal investigation to the media must not have the potential of compromising the administration of justice or the likelihood thereof, see *Solomons Mutual Insurance Limited v Controller of Insurance and Director of Public Prosecutions* (Unreported Civil Case No. 114 of 1999; Palmer J; 31 July 2003) at page 46.

FUNDAMENTAL RIGHTS

Issue Of Delay

'Delay always carries the risk of prejudice -- witnesses die or disappear and memories will fade', see *South Pacific Marketing (NZ Limited v Maile)* [1987] SILR 81, per Ward CJ at page 87.

In *R v Kennedy Bela* (Unreported Criminal Case No. 100 of 2002; 3 May 2004) Kabui J stated at page 10:

> 'Delay by the Police is read by members of the public as lack of enforcement of the law which leads to loss of confidence in the Police and eventually disregard for the law and order. Delay in the prosecution of criminal offences has unfortunately been the hallmark of the Police and that must be reversed to gain respect and confidence by the community'.

The law relating to '*Right to a Fair Hearing Within a Reasonable Time*' is also examined in subsection 7.6 commencing on page 148 of '*Criminal Law in Solomon Islands*'.

Right To Legal Representation

In *Boti Ghele v R* (Unreported Criminal Appeal Case No. 169 of 2004; 6 May 2004) Kabui J stated at page 4:

> '[… S]ection 10(2)(c) of the Constitution is very clear as to the need to give an accused person adequate time and facilities for the preparation of his defence. This is a fundamental right of every person who is charged with a criminal offence. I find it rather odd for the Magistrate Court to sit on a Sunday to hear this case without any evidence of urgency for hearing. Having said that, I do not think the non-compliance with section 10(2)(c) of the Constitution would have an effect on the legality of the sentences passed by the Magistrate because the relief for contravention of any fundamental rights is to be obtained under section 18 of the Constitution. The legality of the sentences is therefore beyond question'.

The law relating to the '*Right of a Defendant to Legal Representation*' is also examined in subsection 7.12 commencing on page 161 of '*Criminal Law in Solomon Islands*'.

Legal Professional Privilege

In *Benedict Idu, Joseph Sangu, Alfred Fa'aramoa and Didier Marie Edmond Farsy v Attorney – General (representing the Controller of Prisons)* (Unreported Civil Case No. 37 of 2004; 4 August 2004) Palmer CJ stated at page 9:

> 'Legal professional privilege is a substantive principle of the common law, that a person is entitled to preserve the confidentiality of statements and other materials which have been made or brought into existence for the sole purpose of seeking

> or being furnished with legal advice by a lawyer, or for the sole purpose of preparing for existing or contemplated judicial or quasi – judicial proceedings. It is commonly referred to as legal communications between solicitor and client.
>
> The existence of this rule is fundamental to the effective operation of the accusatorial or adversary system itself. It furthers and promotes the administration of justice and effective judiciary system. This rule or doctrine fosters openness/frankness and trust in the solicitor/client relationship and protects the information of each party to adjudication from disclosure to the other side. It has been said that the existence of this rule is crucial to the proper functioning of the common law system and any abolition would be detrimental to the existence of the accusatorial system'.

The law relating to '*Legal Professional Privilege*' is also examined in subsection 7.12.3 commencing on page 162 of '*Criminal Law in Solomon Islands*'.

HOMICIDAL OFFENCES

Malice Aforethought

In *R v John Tana, Augustine Namona, Homas Talikanga and Naphtili Napiabo* (Unreported Criminal Case No. 175 of 2002; 5 September 2003) Kabui J stated at page 9:

> 'So, the term "malice aforethought" is a state of mind expressed or implied and exists before or at the same time the act or omission occurs which causes death to occur. The term can also mean a state of mind where the act that caused death is not intentional in the first place but by its nature was reckless knowingly or that the act was done with disregard to the risk of death occurring not caring whether death would occur or not or wishing that death would not occur'.

Currently subject of an appeal to the Court of Appeal.

In *R v Uriel Deramo Buarafi* (Unreported Criminal Case No. 335 of 2001; 2 December 2002) Muria CJ stated at page 2:

> 'There are two states of mind, either of which, if proved, would establish the necessary *mens rea* required to be proved under that section [, referring to section 202 of the *Penal Code* (Ch. 26)]. The first is, an intention to cause the death of or grievous bodily harm to a person, and the second is, the knowledge that the act which caused death will probably cause the death or grievous bodily harm to, a person whether such person is the person actually killed or not. The onus is on the prosecution to prove either of these states of mind of the accused, although in the light of the admission by the accused that he caused the death of the deceased, that task is a less onerous one for the prosecution'.

See also: *R v Willie Waneburi* (Unreported Criminal Case No. 321 of 2004; Palmer CJ; 18 November 2004).

The law relating to '*Malice Aforethought*' is also examined in subsection 38.1.4 commencing on page 611 of '*Criminal Law in Solomon Islands*'.

Provocation

In *R v Awa and Others* (Unreported Criminal Appeal Case; 10 November 2004) Williams JA, with whom the other judges agreed, stated at pages 3 – 4:

> 'It is clear from a reading of s 204 and 205 of the Penal Code that, when provocation is raised, the court must consider the response of a reasonable man having the characteristics of the accused to that provocation. […] It is not sufficient to say that there was an overreaction because that is an element on every occasion when provocation is raised in a criminal trial. The question is whether that overreaction is consistent with the conduct of a reasonable man having the characteristics of the accused.
>
> […]

> The test for provocation in the Solomon Islands laid down in *Loumia v DPP* adopted the test laid down by the House of Lords in *DPP v Camplin* [1978] AC 705'.

See also: *R v Uriel Deramo Buarafi* (Unreported Criminal Case No. 335 of 2001; Muria CJ; 2 December 2002) at pages 2 – 3.

The law relating to '*Provocation*' is also examined in subsection 38.7.2 commencing on page 622 of '*Criminal Law in Solomon Islands*'.

Need For A Dead Body

In *R v Moses Haitalemae, Simon Tohubo, Edwin Watenaomae Wahu and Saniel Awa* (Unreported Criminal Case No. 210 of 2001; 6 December 2002) Kabui J stated at page 2:

> 'Can there be a conviction without the dead body? The answer is yes, provided there is evidence to suggest that the death was not due to natural causes. (See *R v Onufrejczyk* [1955] 1 All ER 247 cited at page 918 in Archbold, Criminal Pleading, Evidence and Practice, 36th Edition, by Butler and Garsia, 1966). In *R v Peter Loumia and Others*, Criminal Case No. 7 of 1984, and dead bodies had been buried and had not been exhumed for post – mortem and yet conviction was secured by the Prosecution evidence. In *R v Peter Fitali and Others*, Criminal Case No. 39 of 1992, the dead body was never recovered as it had been sunk by the accused at sea'.

The law relating to the '*Need for a Dead Body in order to prove a Homicidal Offence*' is also examined in subsection 38.4 commencing on page 619 of '*Criminal Law in Solomon Islands*'.

Attempted Murder

In *R v Kennedy Bela* (Unreported Criminal Case No. 100 of 2002; 3 May 2004) Kabui J stated at page 6:

> 'As put by the Court of Appeal in Whybrow (1951), 35 Criminal Appeal Rep. 141 cited in Smith and Hogan, Criminal Law, 3rd Edition 1973 at page 192 and was cited by Palmer J *R v Nelson Funifaka and Others*, Criminal Case No. 33 of 1996, also cited by Miss Garo, intent is the principal ingredient of attempted murder. It seems to be the case that intent as the principal ingredient of attempted murder can be implied based on the facts in the case as evident from the part of the commentary cited above on the definition of 'attempt' in section 4 of the Criminal Code of Papua New Guinea similar in wording to our section 378 of our Code cited above. In *Regina v David O'ofania*, Criminal Case No. 14 of 1975 (unreported), Bodily, CJ of the High Court of the Western Pacific sitting in Honiara delivering the judgment in an attempted murder case at page 3 said –

> "… I am satisfied that the accused fully intended to kill his wife; but if he had not specifically formulated that intention, then we must look at the natural and probable consequence of his acts, which as a reasonable being he is presumed in law to know. One does not need to look further than the medical evidence. If a man thrusts a bayonet into another person's stomach in the way in which the accused did he must be well aware that without prompt medical attention that person will die …"'.

Currently subject of an appeal to the Court of Appeal.

The law relating to '*Attempted Murder*' is also examined in subsection 38.3 commencing on page 617 of '*Criminal Law in Solomon Islands*'.

JUDICIAL NOTICE

'The general break down of law and order since 1998 until the arrival of RAMSI in 2003 is the reason for a lot of offences committed not being reported to the Police. I take judicial notice of this fact', see *Jimmy Ahi v R* (Unrep. Criminal Appeal Case No. 124 of 2005; Kabui J; 29 March 2005) at page 6.

PARTIES TO OFFENCES

Aiding And Abetting -- Section 21, Penal Code

In *R v Ronny Oeta and Allen Maelalia* (Unreported Criminal Case No. 173 of 2003; 3 June 2004) Palmer CJ stated at page 6:

> 'The crucial elements of aiding and abetting gleaned from the case authorities cited can be summarised as follows:
>
> (i) That the Defendants were present (actual or constructive);
>
> (ii) That there was a concerted design to commit the offence, or knowledge of the facts constituting the offence; that is, it must be shown that the Defendants knew what the principal was doing; and
>
> (iii) That there was participation or some form of participation; encouragement in one form or another, that is the Defendants intended to encourage and wilfully encouraged the commission of the crime (see Archbold Criminal Pleadings Evidence and Practice); actively assisting and encouraging the commission of the offence -- see also *Churchill v Walton*, *Maxwell v DPP for Northern Ireland*, *Mok Wei Tak v R*; that he is a confederate and not a mere bystander or spectator.
>
> The mental element required in an aiding and abetting case is encapsulated in the second limb -- that of participating in a concerted design or joint venture to commit the offence or having the necessary knowledge of the facts constituting the offence and giving assistance or participating therein'.

Currently subject of an appeal to the Court of Appeal.

See also: *R v Ronny Oeta and Allen Maelalia* (Unreported Criminal Case No. 173 of 2003; Palmer CJ; 17 May 2004).

Currently subject of an appeal to the Court of Appeal.

The circumstances in which words are used *must* be taken into account in determining whether a person is a '*Party to an Offence*', see *R v John Tana, Augustine Namona, Homas Talikanga and Naphtili Napiabo* (Unreported Criminal Case No. 175 of 2002; Kabui J; 5 September 2003) at pages 7 – 8.

Currently subject of an appeal to the Court of Appeal.

The law relating to section 21 of the *Penal Code* (Ch. 26) is also examined in subsection 20.1 commencing on page 412 of '*Criminal Law in Solomon Islands*'.

PARTIES TO OFFENCES

Statements Of A Co - defendant

The law relating to:

- '*Evidence of Co-Defendants*' is examined in subsection 5.7.2[C] commencing on page 99 of '*Criminal Law in Solomon Islands*';

  and

- the '*Evidence of Accomplices*' is examined in subsection 11.12 commencing on page 298 of '*Criminal Law in Solomon Islands*'.

In *R v Ronny Oeta and Allen Maelalia* (Unreported Criminal Case No. 173 of 2003; 3 June 2004) Palmer CJ stated at pages 7 - 8:

> 'It is a fundamental rule of evidence that statements made by one defendant either to the police or to others are not evidence against a co – defendant unless the co – defendant either expressly or by implication adopts the statements and thereby makes them his own -- see Archbold, *R v Rudd*, *R v Gunewardene*, *R v Rhodes*. There is an exception however to this rule for statements made in the course and pursuance of a joint criminal enterprise to which the co – defendant was a party -- see Archbold in which the learned Author states: "*The acts and declarations of any conspirator is furtherance of the common design are admissible against any other conspirator, provided there is independent evidence to prove the existence of the conspiracy and that the persons concerned are parties to it.*" At paragraph 33 – 60c, the learned Author sets out the three essential requirements which the court must be satisfied with before any such act or declaration should be admissible as proof against the participation of another: "*that the act or declaration (i) was made by a conspirator; (ii) that it was reasonably open to the interpretation that it was made in furtherance of the alleged agreement, and (iii) that there is some further evidence beyond the document or utterance itself to prove that the other was a party to the agreement*" -- see also *R v Davenport and Pirano*, *R v Blake*, *Tripodi v R*'.

Currently subject of an appeal to the Court of Appeal.

POWER TO ARREST

In *R v John Tana, Augustine Namona, Homas Talikanga and Naphtili Napiabo* (Unreported Criminal Case No. 175 of 2002; 5 September 2003) Kabui J stated at page 2:

> 'Any breach of any constitutional rights under Part 2 of the Constitution can be vindicated under section 18 of the Constitution by claiming damages against the Police. I do not think a breach of section 5(1)(f) as read with section (2) of the Constitution is intended to halt any criminal trial of any accused being tried for the offence of murder such as this trial. Section 5 of the Constitution protects personal freedom of the individual from unlawful arrest and detention by the Police on behalf of the State. The Police as the law enforcement agency of the State must also follow the law in respecting the freedom of the individual and that is why the Police are expected to do the right thing. They must follow the correct procedure in effecting arrest and placing an arrested person in custody. However, the freedom of the individual from arrest and detention by the Police as a fundamental right is no bar to the prosecution of any person who has committed a crime. Any person who feels that his or her personal freedom has been breached by the Police is entitled to claim damages under section 18 of the Constitution. The accused are at liberty to do that but cannot use such a breach as a sword to halt the wheels of justice rolling against them for the offence of murder as alleged by the Prosecution'.

Currently subject of an appeal to the Court of Appeal.

The law relating to the '*Power To Arrest*' is also examined in section 9 commencing on page 242 of '*Criminal Law in Solomon Islands*'.

RECEIVING

In *R v Watkins* (Unreported Appeal Case; Court of Criminal Appeal NSW; 5 April 1995) Gleeson CJ stated:

> 'In my belief the common direction that is presently given on the issue of guilty knowledge in cases of receiving is as follows:
>
> The Crown must prove and prove beyond reasonable doubt at the time when an accused received the goods he knew that they were stolen or obtained in circumstances amounting to felony. The receipt of stolen goods in circumstances where the person receiving them did not know that the goods wer stolen or obtained feloniously does not constitute the crime of receiving. It is an essential feature of the offence that the person receiving the goods knew that they were stolen or feloniously obtained. But if a person believes the goods to be stolen or feloniously obtained at the time when he receives them, that is sufficient to constitute the requisite guilty knowledge since belief without actual knowledge is sufficient. The knowledge required to constitute the offence need not be such as would be required if the accused had actually seen the property stolen.
>
> Indeed, it is not necessary that the accused knew when or by whom the property was stolen. In order to prove the required knowledge of the accused it is sufficient if you as judges of the facts think that the circumstances accompanying his receipt of the goods were such that they made the accused believe the goods were stolen goods. Mere negligence or carelessness or even recklessnessis not realising that the goods were stolen does not create guilt. *The test is not "Ought he to have realised that they were stolen?" It is "Did he realise that they were stolen?"*
>
> However, if you think that the facts know to him would have put a reasonable man on inquiry, that would be a relevant factor when you are considering whether he did not know it. *It must be kept in mind that the issue finally for you to determine and the Crown to prove beyond reasonable doubt is "What did the accused believe?" not "What would the ordinary man have believed?"*' [emphasis added]

The law relating to the offence of '*Receiving*' is also examined in section 23 commencing on page 482 of '*Criminal Law in Solomon Islands*'.

SEARCH WARRANTS

The law relating to '*Search Warrants*' is also examined in subsection 10.4 commencing on page 259 of '*Criminal Law in Solomon Islands*'.

In *Solomons Mutual Insurance Limited v Controller of Insurance and Director of Public Prosecutions* (Unreported Civil Case No. 114 of 1999; 31 July 2003) Palmer J stated at pages 5 – 10:

> '**(c) -- failed to name or describe the building or place to be searched (it is unclear in the context of its usage whether "SMI Office" is a person or place).**
>
> Section 101 of the CPC requires the building or place to be searched, to be named or described in the warrant. In this instance, the description of the building provided in the search warrant was "**SMI Office**". The Plaintiff says this is inadequate as it is unclear whether it referred to a person or a place.
>
> Respectfully the question whether the description is adequate or not must necessarily turn on the question whether it was so vague so as to cause confusion and difficulty in identifying the building or place to be searched. The question must be asked whether there was confusion or misunderstanding regarding the said description. Unfortunately this question must be answered in the negative. There is no evidence to suggest that there was confusion at any time in the mind of the Magistrate issuing the warrant, nor confusion in the mind of any executing officer or in the mind of the person in charge of the office of SMI, as to which office and building was referred to. At no time has it ever been contended that the search had been conducted in the wrong office, building or place and that this caused confusion or embarrassment. In the circumstances I am not satisfied the description was inadequate.
>
> **(d) -- failed to identify (adequately if not correctly) the thing or object being searched: "Excess of Loss Insurance Ltd" (whether in its original or copy form) is more likely to be a corporate body than a corporeal thing or document (!).**
>
> Section 101 also requires the thing or object, which was to be the subject of the search to be adequately described. In this instance, the document was described as "*the Original Copy of the Excess of Loss Insurance Ltd*". In the affidavit in support of Detective Station Sergeant Mamu dated 1st February 1999, the document was described in paragraphs 3 and 4 as "*the Original of the Excess of Loss Insurance Contract*". None of those descriptions however correctly described the document that was required. The document required was the original copy of "***the Excess of Loss Reinsurance Contract between Solomons Mutual Insurance Limited and Luxenbourg European Reinsurance SA***" executed on 5th June 1997.
>
> The question for determination must be whether the various descriptions given above adequate? Did they cause confusion? Were they inadequate to identify the document, which was the subject of the search? Regrettably this must be answered in the affirmative. The descriptions were so inadequate, confused and inaccurate as to be capable of being identifiable. To that extent the warrant must be regarded as defective and insufficient.

(e) -- failed to disclose the offence or offences allegedly committed or being investigated and the connection of the searched object therewith.

Section 101 requires a Magistrate to be satisfied on oath that either an offence had been committed or that according to reasonable suspicion an offence had been committed. The affidavit filed in support and the Information grounding a search warrant should disclose sufficient material which would entitle a Magistrate to have at least a reasonable suspicion that an offence had been committed and that it was necessary for a search warrant to be issued to enable investigators pursue the matter further. The relevant parts of section 101 read as follows:

> "Where it is proved on oath to a Magistrate or a justice of the peace **that in fact or according to reasonable suspicion any thing upon, by or in respect of which an offence has been committed or anything which is necessary to the conduct of an investigation into any offence** is in any building, ship, vehicle, box, receptacle or place, …".

[…]

Regrettably no mention was made [in the affidavit of Detective Station Sergeant Mamu] of the offence or alleged offence for which the investigation was being conducted.

[…]

In his submissions, learned Counsel Moti also pointed out that the factual preconditions regulating the issue of the search warrant were never complied with and that the learned Magistrate thereby could not have been satisfied pursuant to the requirements of section 101 of the CPC. Learned Counsel pointed out first that the "Information to Ground Search Warrant" was defective in that the informant did not sign it. The prescribed form set out as Form 14 in the Magistrates' Courts Act, [Cap. 20] at page 762 of Volume II of the Revised Edition 1996, requires the information provided to be given under oath. The "Information To Ground Search Warrant" in support of this Second Warrant was never signed before any Magistrate. To that extent it is fundamentally defective.

[…]

[… I]n the case of *Solomon Islands National Provident Fund Board v Attorney – General*, Kabui J had already ruled on the validity of the said search warrant of 1st February 1999 to be struck out as null and void. At page 10 – 11 his Lordship said:

> "*In my view, section 101 … can be invoked only after the commission of an offence has occurred. It cannot be used to fish for evidence. As to the Search Warrant itself …, it contains exactly the same information contained in the Information provided by Sergeant Balaga based upon his affidavit … It must be necessarily defective as also for the same reason that it also discloses no offence having been committed by the Plaintiff … It is also bad in law on the face of the record.*"

His Lordship continued at page 12:

> "… *in this case, the only link the Plaintiff was the ambiguous allegation that it had refused access to certain documents in its possession regarding the alleged unprocedural establishment of SMI. There was nothing else before the Magistrate to satisfy him that there was reasonable suspicion that an offence had been committed and that the documents associated with the commission of that offence were in the possession of the Plaintiff. There is therefore an error of law on the fact of the record … In my view, the Magistrate did not have the jurisdiction to issue the Search Warrant issued on 1st February 1999. The Search Warrant is null and void. The Search Warrant is therefore removed to this Court and quashed accordingly*."

The omission from the record of any reference to the commission of an offence and any links between the object sought and the investigations undertaken has also been held to be fatal to the validity of a search warrant. This was held in *Zalao v Attorney General and Commissioner of Police* (hereinafter referred to as "Maleli's Case") by the Solomon Islands Court of Appeal. The Court held that a search warrant was irregularly issued when it was obvious from the Information and supporting affidavit provided to ground the search warrant that there was insufficient information provided which would satisfy a Magistrate that there was reasonable cause for suspicion that an offence had been committed and that the object sought was linked to the investigations being undertaken. I quote:

> "*The principal point argued by counsel for the appellant was that no offence known to Solomon Islands law was alleged against the appellant and there were no, or insufficient grounds, alleged which could support a conclusion that Sgt. Taro had 'reasonable cause to suspect' that the appellant (or somebody else) had committed an offence and property associated with the commission of that offence was in a building or at a place under the appellant's control …*
>
> *It is not necessary that the statement of the offence suspected to have been committed be as precise as would be required in an indictment. But there must be reasonable suspicion that an offence known to law has been committed.*
>
> *… … There was nothing before the magistrate which would have entitled him to conclude that there was reasonable cause to suspect that the appellant had committed an offence under Solomon Islands law. It is not for this court to speculate whether or not there might have been further material which the enforcement could have placed before the magistrate.*
>
> *The respondents can get no comfort from that part of s. 101 which speaks of the 'conduct of an investigation into any offence' because the information does not state the offence with sufficient particularity nor does it refer sufficiently to the detail of the investigation. …*

In all the circumstances the clear conclusion is that the warrant did not comply with s. 101 of the Criminal Procedure Code and there should be a declaration that it was unlawful and void. There should be a further order quashing the warrant and ordering the immediate return of all property seized thereunder."'

SELF DEFENCE

In *R v Abuofa Fataga, David Kiusi and Paul Niudenga* (Unreported Criminal Case No. 12 of 2003; 18 June 2003) Palmer J stated at page 10:

> 'The purpose of a person attacked when he acts in self – defence is not the enforcement of the law but his own self preservation -- *Devlin v Armstrong*. The burden of proof when self – defence is raised lies with the prosecution to disprove it. The case authorities make clear that the degree of force permissible in self – defence is that which is reasonably necessary in order to defend oneself, any other person or one's property. It is permissible to use force, not merely to counter an attack, but to ward off an attack honestly and reasonably believed to be imminent'.

In *R v Kennedy Bela* (Unreported Criminal Case No. 100 of 2002; 3 May 2004) Kabui J stated at page 7:

> 'In my view, self – defence does not arise in this case. There is no evidence upon which this defence can be based. There is no evidence to show that the victim had attacked the accused or any member of his family. The evidence points instead to a pre – emptive strike against the victim. The victim had not yet entered the accused's house when the accused shot him. The allegation by the accused that the victim had a bush knife and was using it to smash the louvers of his house which was denied by the victim is also of no consequence for the same reason that the victim did not attack him when the accused shot him or was destroying his house when shot. Even if that were the case, shooting with a gun was not using reasonable force against the victim in protecting his house. The accused is not entitled to claim self – defence in this case'.

Currently subject of an appeal to the Court of Appeal.

As to the burden of proof to be applied in respect to self – defence, see *Whitney Pio Piko v R* (Unrep. Criminal Appeal Case No. 15 of 2005; Palmer CJ; 23 June 2005).

The law relating to the '*Defence of Person or Property*' is also examined in subsection 21.9 commencing on page 451 of '*Criminal Law in Solomon Islands*'.

SENTENCING

The law relating to '*Sentencing*' is also examined in section 59 commencing on page 918 of '*Criminal Law in Solomon Islands*'.

Generally

The facts relied on by the prosecution must be read out to the court, rather than handing up the written facts and no relevant facts should be omitted, see *Billy Nanai v R* (Unrep. Criminal Case No. 324 of 2004; Kabui J; 21 June 2005) at page 4.

'In any appeal against sentence, the onus is on the Appellant to point to an error in the exercise of the sentencing discretion. […] It is for the Appellant to demonstrate that the sentence imposed was manifestly excessive or too heavy and warranted the intervention of this court. […] The crucial point to note is that a sentence will not be reduced merely because it was on the severe or heavy side; an appeal will only succeed if the sentence was excessive in the sense of being outside the permitted range for the circumstances of the case', see *Jimmy Dekamana v R* (Unrep. Criminal Case No. 170 of 2005; Palmer CJ; 23 June 2005) at page 2.

As regards the term '*manifestly excessive*', refer to *Jimmy Ahi v R* (Unrep. Criminal Appeal Case No. 124 of 2005; Kabui J; 29 March 2005) at page 2.

In *R v Patteson Tutala, Mesach Pitakaka* (Unreported Criminal Case No. 022 of 2000; 5 May 2004) Kabui J commented at pages 3 – 4:

> '*The system of punishment under our criminal law justice system is sometimes seen as prisoner biased in that it places to much emphasis on mitigating factors in favour of the prisoner and nothing is said about the sorrow suffered by the victim if alive or the relatives and families of the victims if he or she is dead in homicidal cases.* I suppose, all crimes are committed against the Queen, the State or Government if you like to call it that for simplicity's sake because the Police being the law enforcement agent and other agencies of the government are the prosecutors of all offenders against the law though there is room for private prosecution in a limited way. Because of that, the system becomes one of applying the criminal law and its practice against the rights of the prisoner as a human being and an individual facing the might of the Police and other associated government law enforcement agencies. I suppose human rights are protected in both ways in that the victim of a crime is protected by prosecuting the offender and the offender is also protected by the law if he or she is convicted and sentenced to serve his punishment for the crime he or she committed. The criminal law system in custom is individual or tribe biased in that the strongest survives. I think that is the general distinction between the two systems and this is why ordinary Solomon Islanders are mystified about the operation of the criminal law system in Solomon Islands. In custom, there were only three methods of punishment, namely, death, compensation, or banishment. There were no niceties at play. Compensation has survived the other two methods to this present day'. [emphasis added]

The prosecution should seek to tender Victim Impact Statements, in appropriate circumstances. A Victim Impact Statement can be from:

- the victim to explain how the commission of the offence has affected them;

  and

- a family member of a victim to explain how the commission of the offence has affected the victim and his/her family.

In *R v Roland Timo* (Unrep. Criminal Case No. 465 of 2004; 23 March 2005) Brown J at page 6 adopted the reasoning of the NZ Court of Appeal in *R v Radich* [1954] NZLR 86 at page 87 as follows:

> 'We should say at once that this last argument omits one of the main purposes of punishment, which is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with sever punishment. In all civilised countries, in ll ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment or with only a light punishment. If a Court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment'.

Pre – sentencing Order

A court has no authority to make an pre – sentencing order, see *R v Jimmy Pua Tepaika* (Unrep. Criminal Review Case No. 1393 of 2004; Kabui J; 14 January 2004).

Duty Of Prosecution And Defence

In *Billy Emilio Foli v R* (Unreported Criminal Appeal Case No. 51 of 2004; 3 May 2004) Palmer CJ stated at page 3:

> 'There is no formula to sentencing. It always entails a balancing exercising by a Magistrate or Judge and so Prosecuting and Defence Counsels should assist as much as possible in the sentencing process by providing such details and case authorities as is appropriate to each case. Circumstances of the case and offender vary from case to case and although useful guidelines can be obtained in the process each case has to be considered on its merits (see *Joel Likilua and Allen Kokolobu v R* at page 149, his Lordship Ward CJ states: "*Sentencing is not a process that follows exact mathematical rules. Circumstances and people vary and it is undesirable to consider such comparisons as more than a very imprecise guide*.")'.

SENTENCING

The law relating to the '*Duty of the Prosecution and the Defence in respect to Sentencing*' is also examined in subsection 59.1 commencing on page 920 of '*Criminal Law in Solomon Islands*'.

Sentencing Procedure -- High Court

As regards the procedure to be adopted prior to sentencing in the High Court, refer to *R v Henry Suumania* (Unreported Criminal Case No. 313 of 2003; Kabui J; 1 November 2004) at page 2.

Previous Convictions

Aggravating Factor

As regards the use of previous convictions as an aggravating factor it was held in *Baumer v R* (1988) 166 CLR 51; (1988) 83 ALR 8; (1988) A Crim R 340 (at pages 57 and 345):

> 'We have already referred to his Honour's observation that 'the literally appalling record' of the applicant increased the seriousness of the offence. If this means no more than that such a record would make it difficult to view the circumstances of the offence or of the offender with any degree of leniency then, of course, such a remark would be understandable and unobjectionable. It would clearly be wrong if, because of the record, His Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence'.

[As quoted in *David Angitalo, Kenneth Ongainao, Henry Satini and Patrick Basifako v R* (Unreported Criminal Case No. 36 of 2004; Brown J; 10 November 2004) at page 14.]

The law relating to the '*Use of Previous Conviction in Sentencing*' is also examined in subsection 59.22.7 commencing on page 968 of '*Criminal Law in Solomon Islands*'.

Proof

The proper practice in proving previous convictions is as specified in section 125 of the *Criminal Procedure Code* (Ch. 7), see *R v Henry Suumania* (Unrep. Criminal Case No. 313 of 2003; Kabui J; 11 November 2004) and *Billy Nanai v R* (Unrep. Criminal Case No. 324 of 2004; Kabui J; 21 June 2005) at page 3.

SENTENCING

Imposition Of Maximum Penalties

As regards the imposition of the maximum penalty for an offence in *Veen v R (No. 2)* (1988) 164 CLR 465 the majority said at page 478:

> 'The maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: *Ibb v R* [(1987) 163 CLR 447]. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case: ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognisable outside the worst category'.

[As quoted in *David Angitalo, Kenneth Ongainao, Henry Satini and Patrick Basifako v R* (Unreported Criminal Case No. 36 of 2004; Brown J; 10 November 2004) at page 14.]

Mitigating Factors

Generally

The law relating to the '*Use of Mitigating Factors in Sentencing*' is also examined in subsection 59.23 commencing on page 970 of '*Criminal Law in Solomon Islands*'.

In *Boti Ghele v R* (Unreported Criminal Appeal Case No. 169 of 2004; 6 May 2004) Kabui J stated at page 5:

> 'As I said in sentencing in *R v Kennedy Bella*, Criminal Case No. 174 of 2002, mitigating factors are not considered as rights of offenders. They are matters to be considered only in favour of the prisoner in order to influence the trial judge or magistrate to pass a lesser sentence in a particular set of facts in a particular case'.

Plea Of Guilty

See: *Jonathan Qoloni v R* (Unrep. Criminal Appeal Case No. 76 of 2005; Palmer CJ; 21 June 2005).

Age

As far as mature age as a mitigating factor, it should be given weight in a Court's discretion (for old age is a material matter when sentencing), see *David Angitalo, Kenneth Ongainao, Henry Satini and Patrick Basifako v R* (Unreported Criminal Case No. 36 of 2004; Brown J; 10 November 2004) at page 15.

SENTENCING

Inordinate Delay

In *Frank Kyio v R* (Unreported Criminal Appeal Case No. 259 of 2004; 27 July 2004) Palmer CJ stated at pages 1 - 5:

> 'The Appellant, Frank Kyio was sentenced by the Magistrates Court sitting at Lata on 15 May 2004 to a term of imprisonment for four years on a guilty plea, to a charge of incest by a male, contrary to section 163(1) of the Penal Code. The offence was committed sometime in April 1992. The facts revealed that the victim who was his daughter refused his advances but gave in as a result of a threat of violence made to her. She fell pregnant to this act or incest not long after in October 1992.
>
> According to the very brief facts presented to the court, the Appellant was not charged until 1995. It should be pointed out that the brief facts presented to the Magistrates Court were unsatisfactory. If the issue of delay was to be addressed properly, it si the duty of **both** the prosecution and defence to ensure that all the correct and true facts pertaining to the delay are produced if not before the Magistrates Court then before this court, on appeal. Objecting on material which may be relevant for purposes of consideration by the court to assist it in arriving at the truth about delay without producing alternative details is not satisfactory.
>
> Even at this point of time there is no explanation or information as to the true state of affairs regarding the delay factor. I do not think those details would be too difficult to find out if sought for. Having made those observations, it does not stop there because the presiding Magistrate should also have sought explanations, from the prosecution in particular.
>
> […]
>
> The second ground relied on in this appeal is the element of delay in the prosecution of this case. From 1992 date of commission of offence to the time he was first charged of the offence was in 1995. There is no record to account for any reason for the delay. I think Counsels owe a duty to the court to provide as much detail where possible of the sequence of events and any explanations for the delay. […]
>
> […]
>
> […] I accept delay is a relevant factor in mitigation. In *Patterson Runikera v DPP* his Lordship Ward CJ was very critical of a delay of five years describing it as scandalous and likely to cause injustice. In *Dalo v R* where there was delay of 3 years and no reasonable explanation provided his Lordship Ward CJ pointed out that magistrates should consider reducing the sentence substantially because of the aggravating effect of a sentence imposed long after commission of the offence.

> Section 10(1) of the Constitution provides that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. It may be argued that the rights of the defendant may have been compromised through the delay in the prompt prosecution of his case. That has not been pursued on his behalf, though that was an alternative open to him.
>
> Delay does not eliminate or annul the penalty. The most that can be given to it is to recognise that it must result in a substantial reduction of the sentence which would have been imposed'.

See also: *R v Tibon Oge* (Unreported Criminal Case No. 396 of 1999; Kabui J; 21 September 2004) at page 1 and *Billy Emilio Foli v R* (Unreported Criminal Appeal Case No. 51 of 2004; Palmer CJ; 3 May 2004).

The law relating to the '*Issue of Inordinate Delay in Sentencing*' is also examined in subsection 59.23.9 commencing on page 975 of '*Criminal Law in Solomon Islands*'.

Concurrent Or Cumulative Sentences

As regards the imposition of concurrent or cumulative sentences, refer to *Rinaldo Lauta v R* (Unreported Criminal Case No. 384 of 2004; Brown J; 8 October 2004) in which it was held:

> In deciding whether to make sentences concurrent or cumulative, the courts should be guided by the following principles:
>
> - Where two or more offences are committed in the course of a single transaction all sentences in respect of the offences should be concurrent.
>
> - Where the offences are different in character or in relation to different victims, the sentences should normally be cumulative.
>
> - When a court has arrived at appropriate sentences and decided whether they should be concurrent or cumulative, it must then look at the total sentence to see if it is just and appropriate. If it is not, it must vary one or more sentences to get a just total.

In *Daniel Fa'afunua v R* (Unreported Criminal Appeal Case No. 296 of 2004; 10 September 2004) Palmer CJ stated at pages 4 – 6:

> 'The totality principle can arise from two situations. (i) Where a number of offences arise from the same transaction; and (ii) where an offender serving a term of imprisonment is being sentenced for other separate offences. In both instances the court is required to look at the totality of the sentence to be imposed and to ensure that an appropriate sentence is imposed for the criminality of the offender.
>
> […]

> When applying the totality principle to the single transaction test, it is incumbent upon the court to ensure that the gravity of the offence is properly represented by the sentence for the principle offence'.

See also: *David Angitalo, Kenneth Ongainao, Henry Satini and Patrick Basifako v R* (Unreported Criminal Case No. 36 of 2004; Brown J; 10 November 2004) at page 16.

Currently subject of an appeal to the Court of Appeal.

The law relating to '*Concurrent Or Cumulative Sentences*' is also examined in subsection 59.7.4 commencing on page 940 of '*Criminal Law in Solomon Islands*'.

Attacks On Police Officers

In *Daniel Fa'afunua v R* (Unreported Criminal Appeal Case No. 296 of 2004; 10 September 2004) Palmer CJ stated at page 7:

> 'An immediate custodial sentence must be expected when any police officer is attacked. The length of sentence will depend on the existence of any aggravating features or the lack of it'.

Custodial Sentences

'In deciding to impose a custodial sentence, the first task of the learned Magistrate would have been to ask oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence -- see Regina v Body [(1980) 2 CrAppR (S.) 234)]', see *Selwyn Maeke v R* (Unrep. Criminal Case No. 127 of 2005; Palmer CJ; 17 March 2005) at page 2. See also: *Jonathan Qoloni v R* (Unrep. Criminal Appeal Case No. 76 of 2005; Palmer CJ; 21 June 2005) at page 1.

'The practice has been to make allowance for periods spend in custody leading up to conviction and sentence.

There is discretion in a sentencing court, a discretion recognised by s. 282 of the Criminal Code.

[…]

A considerable body of law has arisen in regard to matters proper to be taken into consideration over sentence. Normally the time spent in custody awaiting trial, (since incarceration), would be taken into account on sentence. Where, however, the accused while in remand has behaved badly, that fact may for instance be a matter disenabling the exercise of discretion in the prisoner's favour', see *Alfred Singakiki v R* (Unrep. Criminal Case No. 202 of 2005; Brown J; 10 May 2005) at page 7.

SENTENCING

In *Mary Kenilaua v R* (Unreported Criminal Appeal Case No. 264 of 2004; 5 August 2004) Palmer CJ stated at page 2:

> 'Before a custodial sentence is imposed the court must satisfy itself that no other method of dealing with the defendant is appropriate'.

The law relating to '*Custodial Sentences*' is also examined in subsection 59.7.2 commencing on page 935 of '*Criminal Law in Solomon Islands*'.

Suspended Sentence

'Where a considerable part of the suspended sentence has passed while awaiting the appeal hearing, English Court of Appeal cases illustrate the need to find some special reason to now incarcerate this man. I agree that his long period of uncertain suspense over the outcome of this appeal must be taken into account in my deliberation', see *R v Robert Madeo* (Unrep. Criminal Case No. 492 of 2004; Brown J; 8 March 2005) at page 5.

Circumstances Of Aggravation

In *R v Eddie Funabana, Wilson Iro, (Fred Fale), Peter Dani, Seni Fuguomea, Joe Aidiana* (Unreported Criminal Case No. 297 of 2003; 29 June 2004) Brown J stated at page 4:

> 'The court has warned that the particulars of the offence of burglary alleged intent to commit a felony, to wit: steal. In those circumstances on the strength of common law principles expressed in *R v De Simoni* (1981) 147 CLR 383 at 389 "circumstances of aggravation not alleged in the indictment cannot be relied upon for purposes of sentence if those circumstances could have been made the subject of a distinct charge."
>
> So in this case the common law principles exclude, when dealing with the burglary charges, the evidence of the aggravated assault. That is so, for the burglary charge asserts the intent to commit the felony of "stealing"'.

Reconciliation

In *Roland Timo v R* (Unreported Criminal Case No, 189 of 2004; 19 May 2004) Palmer CJ stated at pages 2 – 3:

> 'Reconciliation is provided for under our laws -- see section 35(1) of the Magistrates Courts Act. However, its scope is limited to cases of common assault and any offence of a personal nature or private nature not amounting to felony and not aggravated in degree. The purpose of section 35(1) is that it gives the Magistrates Court power to determine on the facts and circumstances before it whether it can order the proceedings to be stayed or terminated.

> Where the offence is a felony as is the case with the Applicant, the Magistrates Court do not have power in any event, even if the Complainant or the Prosecution were to bring this to the attention of the Court, the Court would not be able to consider whether to stay or terminate the proceedings. The decision whether to proceed or not with the charge of demanding with menaces is taken out of the responsibility of the Complainant, the Prosecution or the Applicant. Any attempts therefore to seed or get Prosecution to withdraw charges against the Applicant have been fruitless attempts in any event. Prosecution or the Police do not have power to facilitate any withdrawals of the charge and in so far they have affirmed refusal to withdraw charges through reconciliation they are correct. However, that does not mean that reconciliation does not have a place in Solomon Islands jurisprudence. Whether a matter is a felony or not, it is not unlawful for parties to a dispute to arrange and make a customary settlement or reconciliation ceremony between themselves and or their families or tribes. Reconciliation ceremonies before, during and after the ethnic troubles have been taking place throughout the country. Reconciliation ceremonies are entrenched in our culture but also within the context of our civil society whose laws are based on Christian principles. Reconciliation does have a place in our society. It looks to the future so that even an accused had been punished by the courts under the law, it enables that accused to be able to re – settle back into a community after serving his/her time in prison.
>
> In the case of a felony, whether Prosecution mentions that fact to the Magistrate or court or not, it is always open to the Defence to raise it as a mitigating factor. How much reliance and what weight a court will place on it is a matter for the court to decide in its discretion. It can place much weight and reduce sentence etc. or it may completely ignore it and deal with the accused on the facts before it'.

The law relating to the '*Reconciliation*' is also examined in subsection 59.16 commencing on page 952 of '*Criminal Law in Solomon Islands*'.

Compensation

In *Roland Timo v R* (Unreported Criminal Case No, 189 of 2004; 19 May 2004) Palmer CJ stated at page 3:

> 'The fact a compensation payment may have been made prior to conviction and sentence is a relevant factor which the court would consider at sentence. Again how much weight the court will attach to it is a matter for the court to determine'.

In *Jean Betty Maenua, Baddeley Au, Jack Akao, John Meke and Pat Tom v R* (Unreported Criminal Appeal Case Nos. 121, 300, 305, 374 and 375 of 2003; 8 December 2004) Palmer CJ stated at pages 2 - 5:

> 'The power of the Magistrates Court to order payment of money by an accused person for compensation is derived from sections 27 and 28(1) of the Penal Code. […]

The crucial words used in section 27 are "*any person injured by his offence*". The Appellants submit compensation payments referred to in section 27 are to be confined only to personal injury claims and not claims for other types of loss.

[…]

The ambit of section 27 is to be derived from the words *any person injured by his offence.* In the absence of any express limitation to the use of the word "injured" it is to be liberally interpreted and not restrictively defined. Secondly it should be given its meaning as used in common parlance. The Australian Little Oxford Dictionary defines the word "injure" as "hurt, harm, impair, do wrong to" and "injury" as "wrong, damage, harm". The word "injured" accordingly should not be confined to personal injury claims but to include other losses. This must naturally include financial losses incurred by the victims arising from the offence of the Defendants. I am satisfied the learned Magistrate correctly extended the meaning to include financial injury in that the crucial issue in compensation is the loss to the victim(s).

Secondly before considering whether to impose a compensation order or not, it is important to establish by evidence the amount of the victim's loss, if not agreed by the Defendants (see the case of *R v Vivian*). In *R v Swan* the Court of Appeal commented that a trial judge should not when considering compensation simply pluck a figure out of the air. In *Horsham Justices, ex parte Richards* Neill LJ said at p. 93:

> "… *in my judgment the court has no jurisdiction to make a compensation order without receiving any evidence where there are real issues raised as to whether the claimants have suffered any, and if so what, loss*".

The learned Authors in Blackstone's Criminal Practice 1992 however pointed out that the court should be hesitant to embark on a complex inquiry into the scale of loss, since compensation orders are designed to be used only in **clear, straightforward cases**.

[…]

[…] A compensation order is only useful where the victims are identifiable and the amount of the loss clear. […]

[…]

[…] The percentages of culpability in my respectful view should reflect the amount each defendant should be liable. […]

[…]

There was submission that the learned Magistrate had no power to impose any compensation order beyond the maximum fine which a principal magistrate had jurisdiction to impose being $1,000.00. The relevant sections however do not impose any limits as to the amount of compensation which the court could order. In the circumstances it would not be appropriate to impose any limits. A compensation order is different from a fine.

> On the submission that there is no power to impose an order for compensation where the charge is one of conspiracy to obtain by false pretence that must also be dismissed. There is no limit as to the power of a court to impose such orders. The only limit lies in the identification of *any person injured by his offence.* Where there is evidence of injury having been sustained, from any offence, compensation may be considered'.

The law relating to '*Compensation*' is also examined in subsection 59.12 commencing on page 948 of '*Criminal Law in Solomon Islands*'.

Compensation Related Demanding Cases

In *R v Chris Saeniorea, John Kwaeota and William Anifisari* (Unrep. Criminal Case No. 36 of 2004; 15 February 2005) Palmer CJ stated at pages 1 – 2:

> 'The facts disclose another of those compensation related demanding cases which inevitably resulted in a fight and sadly a death. The courts in this country have repeated often that people must learn to resort to peaceful means of settlement of customary disputes breaches or problems and not resort to resolving them in a way which will merely provoke trouble or disturbance. The way of demanding compensation must be tailored to the way the law allows, not the way it used to be done in days gone by where demands are presented or made with threats usual accompanying that trouble would be caused, whether blood shed or property damaged. Today that approach is unlawful and wrong. If there is a grievance or offence whether in custom or otherwise, the law provides ways of dealing with them. In this instance, it is not in issue that there was some swearing or abusive words used which provoked the Deceased naturally to require that compensation be paid. Whether he had right to demand compensation to be paid or not is not in issue before this court. It must be understood though that the most one can do is to request that compensation be paid. If refused that does not give the person making the demand right to resort to threats of violence. That kind of behaviour in turn is an unlawful, a crime and punishable under our laws.
>
> Chiefs elders even church pastors can be requested and should be used to assist in the settlement of such disputes or customary offences. Individuals directly affected should not make the approaches themselves because quite often these lead to further trouble being caused especially where the request is refused. It must be borne in mind that whilst a demand for compensation is not illegal or unlawful per se, it becomes an offence when accompanied by threats or force'.

Domestic Violence Related Cases

In *John Kunia v R* (Unrep. Criminal Case No. 599 of 2004; 21 February 2005) Palmer CJ stated at page 1 – 2:

'It is important to bear in mind the circumstances of this offence and the relationship between the victim and the Appellant. This is what can be described as a domestic incident, an assault occurring between a husband and wife. That does not minimise the seriousness of the offence(s) committed but requires the court to look closely at the mitigating factors and to impose a sentence which not only reflects seriousness with which the law views such offences but also the interests of the community and the parties themselves (the victim and the offender). In particular the court should look at the prospects of rehabilitation, reconciliation and any hardships which a custodial sentence may have in their relationship.

[…]

In domestic violence cases the courts should be mindful of the effect of a custodial sentence and should always bear in mind that in some cases a short sharp sentence may be as effective in rehabilitating the Appellant and deterring others. Where a desire for reconciliation has been expressed and or the parties have reconciled and are living together again that should have bearing on the length of sentence to be imposed. An overly lengthy sentence may do more harm to their marriage relationship in the long run.

On the other hand, there have been instances in which such assaults have resulted in the death of the opposite spouse and a more serious charge including that of manslaughter or murder imposed. As a weaker vessel, women victims are especially vulnerable and the courts have readily come to their protection by imposing immediate custodial sentences as in this case. The fact the incident occurs in a domestic relationship does not justify or minimise its significance. No spouse should be physically abused or attacked for offences caused within the marriage relationship and parties should as much as possible seek to iron out their differences/disputes in a peaceful or controlled manner without having recourse to physical violence and harm to each other. In such situations, nobody wins and more often than not, both become the loser. Where there are children they can be traumatised or affected by such incidents'.

Comparative Sentences

'[C]omparative sentences are but a very imprecise guide, for that the circumstances of each case fall to be determined on their own facts and should reflect the views of the community, not only previous judges sentence awards', see *R v Roland Timo* (Unrep. Criminal Case No. 465 of 2004; Brown J; 23 March 2005) at page 3.

The law relating to:

- '*Comparative Sentences -- Genearlly*' is also examined in subsection 59.24 commencing on page 979 of '*Criminal Law in Solomon Islands*';

  and

- the '*Sentencing of Juveniles*' is also examined in subsection 59.12 commencing on page 963 of '*Criminal Law in Solomon Islands*'.

SENTENCING

Arson [by a juvenile]

Refer also to: *R v Jimmy Mouala, Jonathan Ilana, Samuel Riasi, Jackson Siau and Silas Barnabus* (Unreported Criminal Case No. 187 of 2002; Palmer CJ; 29 September 2004).

Attempted Murder

Refer also to: *R v Kennedy Bela* (Unreported Criminal Case No. 100 of 2002; Kabui J; 4 May 2004).

Currently subject of an appeal to the Court of Appeal.

Bodily Harm

Refer also to:

- *John Kunia v R* (Unrep. Criminal Case No. 599 of 2004; Palmer CJ; 21 February 2005);

  and

- *R v Chris Saeniorea, John Kwaeota and William Anifisari* (Unrep. Criminal Case No. 36 of 2004; Palmer CJ; 15 February 2005).

Buggery

Refer also to: *Didier Marie Edmond Farsy v R* (Unreported Criminal Appeal Case No. 63 of 2004; Palmer CJ; 24 June 2004).

Burglary

Refer also to: *R v Eddie Funabana, Wilson Iro, (Fred Fale), Peter Dani, Seni Fuguomea and Joe Aidiana* (Unreported Criminal Case No. 297 of 2003; Brown J; 29 June 2004).

Common Assault [by a juvenile]

Refer also to: *R v Patteson Tutala and Mesach Pitakala* (Unreported Criminal Case No. 22 of 2000; Kabui J; 5 May 2004).

Concealment Of Birth

In *R v Gula Hong* (Unreported Criminal Case No. 174 of 2003; 28 April 2004) Kabui J stated at page 2:

'The reason for the reduction of the charge from infanticide to concealment of birth is obviously that the death of your child could not be directly attributed to any deliberate act on your part in terms of section 206 of the Code'.

Conspiracy

In *Jean Betty Maenua, Baddeley Au, Jack Akao, John Meke and Pat Tom v R* (Unreported Criminal Appeal Case Nos. 121, 300, 305, 374 and 375 of 2003; 8 December 2004) Palmer CJ stated at page 2:

'The offence in section 384 of the Penal Code refers to the offence of Conspiracy as a misdemeanour without defining particulars of sentence or penalty. Recourse accordingly must be made to section 41 of the Penal Code which sets out general punishment for misdemeanours as inter alia, not exceeding two years.

The presiding Magistrate unfortunately confused the penalties prescribed under the substantive offences stipulated under section 308 being five years, with that prescribed under section 384, which did not prescribe any particular penalty, only a misdemeanour. The sentences of more than two years imposed on all the Appellants accordingly were made in excess of jurisdiction and ought to be corrected'.

Defilement

Refer also to:

- *Moffat Pasikale v R* (Unreported Criminal Case No. 090 of 2003; Kabui J; 17 June 2003);

  and

- *R v Tony Ferris* (Unreported Criminal Case No. 308 of 2003; Palmer CJ; 22 December 2004).

Demanding Money With Menaces

In *Simon Ha'arai v R* (Unrep. Criminal Case No. 561 of 2004; 21 February 2005) Palmer CJ stated at page 2:

''The prevalence of this type of practice [demanding compensation whilst committing offences] can only be explained by the period of lawlessness this country went through and the resurgence of such unlawful activities. Our local communities need to realise that with the resumption of the law and order through the assistance provided by the Regional Assistance Mission to Solomon Islands ("RAMSI") this type of behaviour will no longer be tolerated. People must realise that if they have any claims in custom including compensation, they must

settle these by peaceful customary means through their local chiefs, elders or other leaders. Demanding money with menaces is a crime and those who refuse to heed the warning will expect to be punished by the law if convicted'.

Refer also to:

- *Daniel Fa'afunua v R* (Unreported Criminal Appeal Case No. 296 of 2004; Palmer CJ; 10 September 2004);

  and

- *Jimmy Dekamana v R* (Unrep. Criminal Case No. 170 of 2005; Palmer CJ; 23 June 2005).

Desertion

See: *Selwyn Maeke v R* (Unrep. Criminal Case No. 127 of 2005; Palmer CJ; 17 March 2005).

Fraudulent Conversion

Refer also to: *Billy Emilio Foli v R* (Unreported Criminal Appeal Case No. 51 of 2004; Palmer CJ; 3 May 2004).

Going Armed In Public

Refer to:

- *Samson Kunua v R* (Unreported Criminal Appeal Case No. 437 of 2004; Mwanesalua J; 29 October 2004);

  and

- *Jonathan Qoloni v R* (Unrep. Criminal Appeal Case No. 76 of 2005; Palmer CJ; 21 June 2005).

Grievous Harm

Refer also to: *R v Clarence Kilibijili, Charlton Katalaena, Esilyn Wesley, Katalaena Kitu and Armstrong Katalaena* (Unrep. Criminal Case No. 029 of 2004; Brown J; 11 February 2005).

Currently subject of an appeal to the Court of Appeal.

SENTENCING

Harbouring An Escaped Prisoner

Refer also to: *R v Dennis Thanton Misi, Harry Maetua and Nelson Tolo Busuakolo* (Unrep. Criminal Case No. 589 of 2004; Palmer CJ; 12 April 2005).

Illegal Possession Of A Firearm

Refer also to: *R v Francis Abuofa Fataga, David Kuisi and Paul Niudenga* (Unreported Criminal Case No. 12 of 2003; Palmer J; 18 June 2003).

Incest By Male

Refer also to:

- *Frank Kyio v R* (Unreported Criminal Appeal Case No. 259 of 2004; Palmer CJ; 27 July 2004);

  and

- *Billy Nanai v R* (Unrep. Criminal Case No. 324 of 2004; Kabui J; 21 June 2005).

Indecent Practice

Refer to: *Didier Marie Edmond Farsy v R* (Unreported Criminal Appeal Case No. 63 of 2004; Palmer CJ; 24 June 2004).

Making Liquor [Kwaso] Without A License

In *Mary Kenilaua v R* (Unreported Criminal Appeal Case No. 264 of 2004; 5 August 2004) Palmer CJ stated at pages 1 – 2:

> 'The offence for which this defendant had been convicted of and sentenced to imprisonment was for making or assisting to make liquor without a permit from the Minister -- section 50(2)(c) of the Liquor Act. The making of liquor in the country is regulated to ensure that the product sold meets safety and health standards when it is sold in the open market. No one in the country is permitted to brew or distil liquor for commercial purposes or gain without a permit of approval from the Minister. If not controlled, it can become dangerous and harmful. Those who consume such drinks need to understand as well that they are putting their lives and health at risk through the purchase of such cheap drinks. This is why the law does not allow the brewing of liquor without a permit.

> It is clear the activity was carried out by the defendant for monetary gain. Whether she has been able to make any profit out of it or not is not clear on the evidence. Equally it needs to be borne in mind that there was a market demand available for such product which has given rise to the illegal making of such drinks. It is the fact there is a ready market or demand for such drinks that is at the root of the problem in the community and which needs to be addressed, giving opportunity for such illegal activities to spring up for quick and easy money.
>
> The learned Magistrate was correct in describing it as a curse causing risk to lives and social problems. Quite recently this has been highlighted in the media by the police and concerned people. The task of stamping out this illegal activity however is not a matter for the police or the courts alone. The community must get involved and cooperate with police by discouraging members of their community from getting involved in this type of activity or reporting them to police. It is time the community starts thinking, acting and behaving responsively in terms of the enforcement of law and order in the city and the country by coming forward and reporting those who are engaged in such illegal activities, whether they are wantoks or friends. To clean up our community it must begin with each and everyone in the country eagerly joining hands with the police and other law enforcement agencies to ensure that the laws are being complied with. This must not be seen as disloyalty to ones family or friends but their good and the good of others as such activities can be very destructive if left unarrested.
>
> […]
>
> Whilst the consequences of consumption of kwaso have been quite destructive, it must be borne in mind that those are separate from the offence which the defendant has been charged with. Those who consume kwaso and misbehave are responsible and accountable for their own actions and whatever offences they have committed. The defendant however cannot be punished for their misdeeds. If they exercise their independent will and refuse to but and drink kwaso then no destructive behaviour will occur'.

In *Timothy Tafulaga v R* (Unreported Criminal Appeal Case No. 397 of 2004; 1 September 2004) Palmer CJ stated at page 1:

> 'A short sharp sentence in my respectful view in this type of offence should be more than effective to drive home the point that this type of activity apart from its criminality, is fruitless and that it does not pay to continue with it. It should be sufficient to send out a strong message to the community that those who engage in this type of activity if caught must expect to go to prison'.

Malicious Damage

In *Boti Ghele v R* (Unreported Criminal Appeal Case No. 169 of 2004; 6 May 2004) Kabui J stated at pages 3 - 5:

'There has been a tendency in our communities these days for persons being made angry by someone else or being upset about something else taking that anger out on others' properties who are totally unconnected with the source of anger or disappointment. Very often such properties damaged are expensive in value and those who own them are the victims of this sort of behaviour. For Solomon Islanders who do not often insure their properties or anyone else in that category such behaviour resulting in damage or even destruction of their properties, for some of them, such properties representing their life time savings, is most wicked and destructive indeed. The courts should therefore reflect this undesirable evil in their sentences. Those who think that they can damage other people's properties at will must think again, because the courts will not tolerate that sort of behaviour.

[…]

It is time Solomon Islands do respect the property rights of others'.

Manslaughter

Refer also to:

- *R v Patterson Tutula and Mesach Pitakaka* (Unreported Criminal Case No. 22 of 2000; Kabui J; 5 May 2004);

  and

- *R v Simon Tohubo Awa, Edwin Waiteinaomae Wahu and Saniel Awa* (Unrep. Criminal Case No. 001 of 2003; Palmer CJ; 14 April 2005).

Rape

Refer also to:

- *R v Henry Suumania* (Unreported Criminal Case No. 313 of 2003; Kabui J; 1 November 2004);

  Currently subject of an appeal to the Court of Appeal.

- *R v Niulifia and Idu* (Unreported Criminal Case No. 318 of 2003; Kabui J; 18 November 2004);

  Currently subject of an appeal to the Court of Appeal.

- *R v John Iroi* (Unreported Criminal Case No. 250 of 2003; Kabui J; 7 April 2004);

  and

- *R v Fuisi Alualu and Susui Bakeloa* (Unrep. Criminal Case Nos. 214 and 215 of 2004; Kabui J; 22 April 2005). [by a juvenile]

SENTENCING

Receiving

Refer also to: *R v Elliot Mendana, Cyril Viuru Cecil Barley and Charles Kere* (Unreported Criminal Appeal Case No. 002 of 2004; Kabui J; 13 February 2004).

Simple Larceny

Refer also to:

- *Simon Peter v R* (Unreported Criminal Appeal Case No. 312 of 2003; Palmer J; 5 December 2003);

- *Timothy Inifiri v R* (Unrep. Criminal Appeal Case No. 496 of 2005; Kabui J; 31 March 2005);

  and

- *R v Patteson Tutala and Mesach Pitakaka* (Unreported Criminal Case No. 022 of 2000; Kabui J; 5 May 2004) [by a juvenile].

SEXUAL OFFENCES

Rape

Issue Of Consent

As regards the issue of consent to sexual intercourse as regards the charge of Rape, refer to *R v Henry Suumania* (Unreported Criminal Case No. 313 of 2003; 26 October 2004). In that case Kabui J stated at pages 6 - 7:

> 'This is a difficult part in this case being the law. The accused had used no force at all against the Complainant. She sustained no injuries at all. Section 136 of the Code defines what conduct constitutes rape. Force, threats or intimidation of any kind or fear of bodily harm need not be present in all cases of rape. There can be rape by the accused if he makes false representations as to the nature of the act. See *R v Selwyn Sisiolo*, Criminal Case No. 5 of 1998 (unreported) and *R v William Tepounapa*, Criminal Case No. 33 of 1997 (unreported). However, section 136 of the Code uses the term, "if consent is obtained … by means of threats or intimidation of any kind", that is rape. This means that the categories of the kinds of "threats or intimidation" that an accused applies to the victim of rape are not fixed. The threat in this case was a threat of Police arrest and detention in a Police Station if the complainant did not agree to have sex with the accused. Although the threat was a fact was an empty threat, the complainant believed it as being true and it affect her mind. The complainant said in her evidence that the day she was raped was a RAMSI field day in Honiara. So mention of RAMSI and its army element was a fact at the time. I do take judicial notice of the fact that at that time many special constables who joined the Police were not in uniform although they carried out Police duties. So the mention of the fact that the accused was a police officer and was on security duty at the Botanical Garden was a believable fact by the complainant and her boyfriend, Fred (PW2). In my view, the accused lied to the complainant and her boyfriend about his status as a police officer and the fact that they were trespassers in the Botanical Garden. In fact, the accused himself was a trespasser himself for that matter. What made him interested in Fred (PW2), and the complainant was the fact that he saw them making love when he was relieving himself in the bush. He saw them separating and took the opportunity to isolate the complainant from Fred, (PW2), so that he could have sex with her also. The fact that she submitted to having sexual intercourse with him does not necessarily mean that she consented because that submission was a direct result of the events and threat preceding the act of sexual intercourse. She had been placed in a situation where submission was but inevitable on her part but not consent on her part. (See *R v Olugboja* [1981] 3 All ER 443 cited in *R v John Iroi*, Criminal Case No. 250 of 2003 and *R v Tibon Oge*, Criminal Case No. 396 of 1999). Whether consent is given grudgingly, tearfully or hesitantly is immaterial in rape cases. (See *The State v Michael Rave, James Maien & Phillip Baule* [1993] PNGLR 85 and *The State v Stuart Hamilton Merriam* [1994] PNGLR 104)'.

See also *R v Tibon Oge* (Unreported Criminal Case No. 396 of 1999; Kabui J; 20 September 2004) at pages 4 – 5 and *R v Fiasi Alualu and Susui Bakeloa* (Unrep. Criminal Case Nos. 214 and 215 of 2004; Kabui J; 22 April 2005).

The law relating to the '*Issue of Consent in respect to the Offence of Rape*' is also examined in subsection 39.1.6 commencing on page 632 of '*Criminal Law in Solomon Islands*'.

SEXUAL OFFENCES

Need For Corroboration

In *R v Henry Suumania* (Unreported Criminal Case No. 313 of 2003; 26 October 2004) Kabui J stated at pages 6 - 7:

> 'Even if these facts do not amount to corroboration, I can still convict the accused of rape if I believe her evidence as being the truth of what happened to her on 22nd August 2003 having warned myself of the need for corroboration of the complainant's evidence. That is, it is unsafe to convict the accused without some evidence corroborating the evidence of the complainant. However, the Court can convict on the evidence of the complainant alone if the Court believes the truthfulness of the complainant's evidence having been aware of the existence of the risk of conviction without corroboration. She did not agree to have sexual intercourse with the accused'.

See also *R v Tibon Oge* (Unreported Criminal Case No. 396 of 1999; Kabui J; 20 September 2004) at page 7.

The law relating to the '*Need for Corroboration in respect to the Offence of Rape*' is also examined in subsection 39.4 commencing on page 638 of '*Criminal Law in Solomon Islands*'.

Corroboration Generally

In *R v Henry Suumania* (Unreported Criminal Case No. 313 of 2003; 26 October 2004) Kabui J stated at page 5:

> 'The fact that the complainant did not tell Angela whom she met first according to her evidence of what had happened to her is of no significance in a Melanesian society like Solomon Islands. Hue and cry at the first opportunity in sexual cases is irrelevant in Solomon Islands because of cultural mores about the subject of sex. In *Birch v R* [1979] PNGLR 75 at 82, Prentice CJ expressed the same view that … "such a principle of the common law (if it be such) is totally unsuited to the conditions of the present organisation of Papua New Guinea society …" Reports made several years later after the event may however have to be investigated to verify its value in terms of the principle of hue and cry in sexual cases'.

The law relating to the '*Issue of Corroboration in respect to Sexual Offences Generally*' is also examined in subsection 44.2 commencing on page 668 of '*Criminal Law in Solomon Islands*'.

Proof of Sexual Intercourse

Refer also to: *R v George Raha* (Unrep. Criminal Case No. 124 of 2004; Palmer CJ; 31 May 2005) at page 6.

SPECIAL PROPERTY

In circumstances where a person fails to pay for work undertaken in respect to property, such as a motor vehicle, the person who undertook the work, such as a mechanic, may seize or hold the property until the debt has been paid for.

In *Vunuha Traders Limited v Fox Tango* (Unreported Civil Case No. 120 of 2003; 1 August 2003) Palmer J stated at page 1:

> 'Now there is a remedy in law called a **lien**, that a person who had been instructed to do work, but has not been paid for it, such as a mechanic that has been requested to carry out repairs on a vehicle but is not paid at the end of the day, may take by seizing or holding the property of another as security until his debts or services had been paid for'.

The law relating to '*Special Property*' is also examined in subsection 22.5.7C commencing on page 468 of '*Criminal Law in Solomon Islands*'.

STATUTORY INTERPRETATION

Interpretation Of The Word 'May'

In *Robert Wales Feratalia (as representative of the Peoples' Power Action Group) v Attorney – General (as representative of the Deputy Commissioner of Police (Operations) and the Police Commander, Honiara City)* (Unreported Civil Case No. 202 of 2002; 2 October 2002) Muria J stated at page 10:

> '*"May" -- Discretionary or Mandatory?*
>
> Counsel cited a number of authorities to support his argument that in the present case, the word "*may*" as used in rule 3, must be construed as mandatory. I agree that there are cases in which the word "*may*" have been interpreted as mandatory or imperative. In such cases, however, regards are usually paid to the purpose of the legislation, the nature of the power and the context in which the word is used: see *Cole v Esanda Ltd*; see also *Oxford University v Registrar of Trade Marks*. But as Lord Parker CJ in *Re Shuter* pointed out that this should be done so "*in the absence of sufficient cause being shown to the contrary*", the onus being upon the person alleging mandatory use of the word "*may*": *Re Dunsborough Districts Country Club Inc.* Again it had also been reiterated that while the subject matter and context of a legal provision may support an interpretation of such provision as mandatory, other considerations which may "positively suggest that a discretionary power was really intended" must be taken into account as well: *Ward v Williams.* In the case of *Cooper v Metropolitan Taxi Cab Board*, Prior J pointed out that the word "may" should primarily be construed as discretionary. It is also worth noting the remarks by Cotton, LJ in the case of *In re Baker, Nichols v Baker*:
>
> > "I think that a great misconception is caused by saying that in some cases "may" means "must". It never can mean "must", so long as the English language retains its meaning; but it gives a power, and then it may be a question in what cases, where a judge has a power given him by the word "may", it becomes his duty to exercise it."'

The law relating to the '*Interpretation of the word "May"*' is also examined in subsection 3.8.7 commencing on page 54 of '*Criminal Law in Solomon Islands*'.

Use Of Hansard

In *Solomon Breweries Limited v The Commissioner Of Inland Revenue* (Unreported Civil Case No. 98 of 2003; 23 September 2003) Palmer J stated at pages 8 – 9:

> 'The most common way of determining Parliament's intention is by looking at the words of the Act. Where there is ambiguity, sometimes a consideration of the enacting history, which includes Hansard Reports may assist to clarify what that intention was.
>
> There is no law which restricts judicial use of Hansard Reports. In a reported speech, Lord Hailsham LC said:

> "*I always look at Hansard, I always look at the Blue Books, I always look at everything I can in order to see what is meant … The idea that [the Law Lords] do not read these things is quite rubbish …*"

Lord Denning in *Hadmor Productions Ltd v Hamilton* confirmed such view:

> "*Having sat there for five years, I would only say: I entirely agree and have nothing to add*."

In *Govindan Sellappah Nayar Kodakan Pillai v Punchi Banda Mundanyake* the court said:

> "*In most of the cases in the courts, it is undesirable for the Bar to cite Hansard or for the judges to read it. But in cases of extreme difficulty, I have often dared to do my own research. I have read Hansard just as if I had been present in the House during a debate on the Bill. And I am not the only one to do so.*"

I have taken the liberty in this instance to have a peek at the Hansard Report on this amendment. I do so, on the principle of judicial notice enunciated above, that a court or other adjudicating authority will in certain circumstances accept the existence of a law or fact relevant to the interpretation of an enactment without the necessity of proof'.

The law relating to the '*Use of Hansard in the interpretation of statute law*' is also examined in subsection 3.7 commencing on page 43 of '*Criminal Law in Solomon Islands*'.

Subsidiary/Delegated Legislation

See: *David Quan and others v Minister of Finance and Treasury (Represented by Attorney General)* (Unrep. Civil Case No. 151 of 2005; Palmer CJ; 27 April 2005) at page 3.

UTTERING

In *R v Solomons Mutual Insurance Limited and Subramanian Sivanantham* (Unreported Criminal Case No. 92 of 2000; 14 October 2002) Palmer J stated at pages 2 - 14:

'In *R v Solomon Islands National Provident Fund Board and Others* Judgment delivered 28th November 2001, I set out at page 4 of the judgment, the elements, which Prosecution is required to prove. I set these out again for convenience:

(1) there must be a forged document -- section 343(1);

(2) the offending document (Reinsurance Contract) is a false document in that the whole or a material part thereof purports to be made by a person who did not make it nor authorise its making or that the whole or a material part thereof purports to have been made by a "fictitious person" -- section 333(1);

(3) the offending document was made in order that it may used as genuine -- section 333(1);

(4) the Defendant uttered or used it be dealing with or using it -- section 343(1);

(5) the Defendant did so knowing that the document was a forged document -- section 343(1); and

(6) the Defendant did so with intent to defraud -- section 343(1).

[…]

In Archbold Criminal Pleading Evidence & Practice, the learned authors state:

> "*The falsity must be of the purport of the document, not of its contents. In other words, the document must tell a lie about itself.*"

Also in Kenny, Outlines of Criminal Law, the learned author says:

> "*A writing is not a forgery when it merely contains statements which are false, but only when it falsely purports to be itself that which it is not (R v Ritson (1860) 1 CCR 200 (T.A.C.)). The simplest and the most effective phrase by which to express this rule is to state that for the purposes of the law of forgery the writing must tell a lie about itself.*"

The Reinsurance Contract did not tell a lie about itself. What was false, wrong or incorrect was the use made of it by SMI as its own document when it was not.

But even if I am wrong on that, Prosecution still has the difficult task of proving to the requisite standard that the Defendants **knowingly and with intent to defraud** uttered the said 'forged document'.

It is for Prosecution to prove beyond reasonable doubt that there was an intent to defraud. In Archbold Criminal Pleading Evidence & Practice, the learned authors state:

UTTERING

> "*For forgery to constitute an offence there must be an intent to defraud or deceive.*"

This was further expounded upon at paragraph 2186 quoting *Re London Globe Finance Corporation*:

> "*To deceive is to induce a man to believe that a thing is true which is false, and which the person practicing the deceit knows or believes to be false. To Defraud is to deprive by deceit; it is by deceit to induce a man to act to his injury. More tersely it may be put, that to deceive is by falsehood to induce a state of mind; to defraud is by deceit to induce a course of action.*"

The learned authors went on to explain the decision of the House of Lords in *Welham v DPP* as follows:

> "*The 'intent to defraud' referred to in this subsection (section 4(1) of the Forgery Act, 1913) and other places in the Act is an intent to practice a fraud on someone, it being sufficient if anyone may be prejudiced by the fraud. If therefore there is an intent to deprive another person of a right, or to cause him to act in any way to his detriment or prejudice or contrary to what otherwise would be his duty, an intent to defraud is established, notwithstanding that there is no intention to cause pecuniary or economic loss. … It is sufficient to prove generally an intent to defraud or deceive without proving intent to defraud a particular person.*" [Words in bracket added]

In Black's Law Dictionary, the word "defraud" is defined as:

> "*To make a misrepresentation of an existing material fact, knowing it to be false or making it recklessly without regard to whether it is true or false, intending one to rely and under circumstances in which such person does rely to his damage. To practice fraud; to cheat or trick. To deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice.*"

> "*Intent to defraud means an intention to deceive another person, and to induce such other person, in reliance upon such deception, to assume, create, transfer, alter or terminate a right, obligation or power with reference to property.*"

It must be borne in minds at all times that the elements of knowledge and intention to be proved to the requisite standard are those of the Defendants; that they intended to deceive and thereby defraud the Controller into issuing the licence sought.

I have listened carefully to the evidence adduced by Prosecution. The case for the Prosecution essentially as I can gather was that the Defendants knew or ought to have known that the Reinsurance Contract was invalid and unenforceable and accordingly ought not to have lodged the said document as part of the application for a composite licence. To the extent that they have done that, it was deceitful and fraudulent. Ignorance is no defence.

UTTERING

Unfortunately, the Defendants do not have to prove their innocence in this case. It is for the [Prosecution] to prove beyond reasonable doubt that the Defendants had the requisite intent. If they fail, then the Defendants must be acquitted. The Defendants are entitled in law to adduce such evidence in their favour as to their state of mind which may raise a reasonable doubt in the mind of the court. This is exactly what they have done in this case. They have adduced evidence which show that the Defendants believed, albeit mistakenly that the said document was a valid document in company law and that it was presented on that basis. They have produced unchallenged evidence in which they have showed to this court what their state of mind was based on the legal advice of their lawyer.

Such evidence is capable of displacing any elements of doubt as to their state of mind (see Criminal Defences, and the case of *R v Dodsworth* cited by Mr. Moti for the Defence. Prosecution has not adduced evidence which displaces that state of mind to the point where I am satisfied that they have the necessary intent. The offence of uttering is not a strict liability offence.

[…]

Section 4 of the Penal Code defines "knowingly" as:

> "*used in connection with any term denoting uttering or using, implies knowledge of the character of the thing uttered or used.*"

In the context of the offence of uttering a forged document, Prosecution is required to prove beyond reasonable doubt that each Defendant had the requisite knowledge of its forged character.

I have considered carefully the unchallenged evidence of Teama, Kama, Sibisopere, Apaniai and Sivanantham and can only come to one conclusion. That at all material time, they denied knowledge of the fact that the document they were carting around was a forgery or that it was a false document. They may have been mistaken in law as to its legal status, but that in my respectful view is not evidence of knowledge that the document was forged. They did not even know that they were mistaken. This was the same view adhered to by Apaniai and Kama. They were always under the impression that SMI could ratify the Reinsurance Contract after incorporation and thereby become legally bound by it from date of commencement. A person may be mistaken about something in law but that does not necessarily impute guilty knowledge or mind about the thing uttered. That mistaken view however did not result in the document amounting to a false document. I have found that the document nevertheless was a valid document. In applying the element of knowledge to the context of this case, it must necessarily relate to knowledge of the falsity of the document; that the Defendants knew that the document was a false document. Unfortunately, I am not satisfied Prosecution has also proved this element to the required standard'. [word in bracket added]

The law relating to the '*Offence of Uttering*' is also examined in section 30 commencing on page 557 of '*Criminal Law in Solomon Islands*'.

VIEW OF A CRIME SCENE

In *R v Charles Max Niulifia and John Mark Idu* (Unreported Criminal Case No. 318 of 2003; 10 October 2004) Kabui J stated at page 10:

> 'The practice in this jurisdiction is that a trial judge in a criminal trial may visit the scene of the offence in the presence of the accused and relevant witnesses. This practice is consistent with the views expressed by Lord Denning in *Tamshwar v R* [1957] AC 479 which was followed by Boreham J in *R v Hunter* [1985] 1 WLR 613. Peter Murphy in his book, A practical approach to EVIDENCE, Fourth Edition, 1992 discusses the same matter at pages 550 to 551. I feel it is fitting to restate the position authoritatively in this jurisdiction'.

The law relating to the '*View of Crime Scenes by a Court*' is also examined in subsection 13.9 commencing on page 335 of '*Criminal Law in Solomon Islands*'.