ROYAL SOLOMON ISLANDS
POLICE

PROSECUTIONS JOURNAL NO. 2

[JANUARY 2006]

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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.

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.

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ABUSE OF PROCESS

The law relating to '*Abuse of Process*' is also examined in section 6.11 commencing on page 138 of '*Criminal Law in Solomon Islands*'.

In *Jeremy Fasi v R* (Unreported Criminal Case No. 489 of 2004; 24 June 2005) Kabui J stated at pages 2 – 3:

> 'The law on abuse of process in this jurisdiction has been stated in the case of **David v Filia**, Criminal Case No. 311 of 2003. I do not need to revisit it. Granting a permanent stay or not however remains a matter for the discretion of the courts. Which way the court exercises its discretion would largely depend upon the facts of each case. In this respect, Lord Steyn, in **R v Latif and Shahzad**, (1996) 2 Cr App 92, at page 6, said –
>
> "… **The law is settled. Weighing countervailing considerations of policy and justice, it is the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed** …"
>
> **The reason for the court's inherent jurisdiction to act to prevent abuse of process.**
>
> The cases have shown that the reason for permanent stay as a remedy that emanates from abuse of process is that the court's process should not be misused by the Crown or anyone else to harass or mistreat individuals in the community. The courts are obliged to protect themselves as institutions of fairness in terms of the proper administration of justice from abuse of process which may result in the courts being ridiculed as instruments of injustice, oppression and harassment if the abuse of process is not jealously guarded against by the courts. Put it in another way, the image of the court system must be safe – guarded against abuse of process. At the same time, the courts must not be seen as stooges of criminals who want to get off the hook by using the court process to achieve their own ends. So there must be a balance between these competing interests, being the public interest verses the need to see justice being done. Expressed in another way, Lord Steyn cited above, again, at page 6 said –
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> "… **If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the courts were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weakness of both extreme positions leaves only one principled solution. The court has discretion: it has to perform a balancing exercise** …".'

BAIL

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

Delay

In *Roddy Seko v R* (Unreported Criminal Case No. 350 of 2005; 1 September 2005) Palmer CJ applied the following factors as specified in the Amnesty International Fair Trials Manual[1] considered to be relevant matters in examining or assessing the reasonableness of a period of pre – trial detention. Those factors are as follows:

- the seriousness of the offence alleged to have been committed;
- the nature and severity of the possible penalties;
- the danger that the accused will abscond if released;
- whether the national authorities have displayed "special diligence" in the conduct of the proceedings, considering the complexity and special characteristics of the investigation; and
- whether continued delays are due to the conduct of the accused (such as refusing to cooperate with the authorities) or the prosecution.

After Conviction

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*'.

In *Simon Ha'arai v R* (Unreported Criminal Case No. 561 of 2004; 28 January 2005) Palmer CJ stated at page 2:

> 'It is very rare for bail to be granted pending hearing of an appeal especially where a conviction has been entered after a guilty plea. I made this very clear at the bail hearing itself. Unless it can be shown there is a manifest error on the face of the record which would have warranted the intervention of this court or that sentence is manifestly excessive on its face, no reasonable tribunal would allow bail more so where the substantive appeal is already listed for hearing in a couple of weeks time and it hasn't been shown that no real prejudice will occur in so far as the rights of this Applicant are concerned.'

[1] Amnesty International Publications, 1 Easton Street, London WC1X8DJ, United Kingdom at Chapter 7.

BAIL

Fresh Applications

The law relating to '*Fresh Applications*' is also examined in section 17.7 commencing on page 387 of '*Criminal Law in Solomon Islands*'.

In *Philip Suiga Kwaimani* (Unreported Criminal Cases No. 318 of 2004; 8 September 2005) Goldsborough J stated at pages 4 – 6:

> 'Taken together these provisions [, referring to the relevant provisions outlined in section 5 of the *Constitution*,] mean that when a person has been remanded in custody for good reason, if the trial does is not to take place within a reasonable time, then, even so, the arrested person must be released.
>
> It is difficult to imagine how the legislature could have impressed the importance of the right to liberty with any greater clarity. […]
>
> It also demonstrates, as has been demonstrated elsewhere, that the effluxion of time in itself can amount to a change in circumstances. *This is relevant if it is determined that a repeated bail application should only be considered by the same court when there are fresh matters to be put before the court.* This procedure was adopted in England and Wales in time past not through legislation but through case law. It came about through R v Nottingham JJs Ex Parte Davies (1981) QB 38. Nottingham magistrates decided that they would not hear the repeat of a bail application made the previous week, after the first and second weekly appearance, if there was nothing new to be said. This was a substantial departure from the norm, and quickly found its way to the High Court on review. In the High Court it was said that this practice was perfectly proper.
>
> In that case the High Court reminded the magistrates' court that repeatedly inquiring into the same subject matter without any fresh circumstances was to be reviewing, almost allowing an appeal against, a matter already decided. That, the High Court said, was wrong as a matter of principle. It was not a question of interpreting the provisions of the legislation then in force, it was an old common law principle that was being abused.
>
> That principle is equally applicable here. *A magistrates' court should not hear a repetition of the same material it has previously heard in circumstances where nothing has changed.* The Nottingham case referred to that in different ways. 'A change in circumstances', 'fresh circumstances', 'matters not previously put before the court', 'new considerations' were phrases variously used by counsel in the proceedings and by the court. *What the court said was that no court should not hear arguments as to fact or law which it has previously heard unless there has been such a change of circumstances as might have affected the earlier decision; to do otherwise would be to act in an appellate capacity*. As can be said from that dictum, it applies to the same court, not to courts of different levels. Thus it would be not appropriate to apply it as between the High Court and the magistrates' court; it applies only to that court of first instance.
>
> The bar referred to above might serve to limit the number of bail applications made in the magistrates' court over a period of time, but it does not serve to remove the jurisdiction of the High Court as outlined above. […]

[…]

Having determined that the magistrates' court should follow the principle set out in Nottingham, it should not be necessary to point out that the High Court will apply the same principle in dealing with bail applications in its jurisdiction'. (emphasis added) [words in brackets added]

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 *Luke Mahoro v R* (Unreported Criminal Appeal No. 17 of 2003; 4 August 2005) the Court of Appeal stated at page 11:

> 'We should correct one aspect of his Lordship's statement of the appropriate test of voluntariness. He said that the onus on the prosecution to establish voluntariness was proof beyond reasonable doubt. It is not contested that the standard of proof is no greater than the balance of probabilities.'

In *R v Harold Keke, Francis Lela and Ronnie Cawa* (Unreported Criminal Case No. 254 of 2004; 25 February 2005) Kabui J stated at pages 2 – 3:

> '**The Judges' Rules.**
>
> A statement by an accused person is admissible only if that statement was voluntary in that it was not obtained from the accused person as a result of fear of prejudice or hope of some advantage held out by a person in authority. (See **Ibrahim v. R**. [1914] AC 599, cited at page 226 in A practical approach, EVIDENCE, by Peter Murphy, Fourth Edition, 1980). The vital question to be asked is whether or not the confession was obtained by expressed or implicit threat, promise or inducement offered by a person in authority. The Judges' Rules came into practice in England in 1912, promulgated by the judges of the King's Bench Division revised from time to time since then. The Judges' Rules for Solomon Islands were made in 1981/82. These rules concern the arrest, detention and interrogation of suspects. They are rules of practice for the Police; they are not law. But they are important in guiding the Police in the process of interviewing suspects who are arrested or detained by the Police. These rules of practice for the Police are enforceable by the courts in that the courts may exclude from the evidence against the accused any confessions obtained by the Police which are tainted with elements of involuntariness. That is, the confession was not volunteered by the accused. It is a question of fact for the courts to establish whether any confession, when challenged, was obtained under the threat of prejudice, promise or inducement held out to the accused by any person in authority. In Australia, the High Court stated that the test is not to ask whether the police officer concerned had acted improperly, and if so, whether it would be unfair to reject the statement of the accused. But rather to ask whether in the light of the conduct of the police officer concerned and in all the circumstances of the case, it would be unfair to use the statement of the accused against the accused. (See **R. v. Lee** (1950) C L R 133 cited in **Regina v. Moses Haitalemae, Simon Tohubo, Edwin Watenaomae Wahu and Saniel Awa**, Criminal Case No.210 of 2001). Lord Salmon, in **DPP v. Ping Lin** [1976] AC 574 at 606 said that the state of mind of the police officer doing the questioning is irrelevant in terms of controlling the question of whether the statement was made voluntarily or not. Whether the threat was gentle or promise or inducement was slight does not matter. His Lordship said it was the state of mind of the accused that mattered in deciding whether the statement being challenged was voluntary or not. The conduct of the police officer concerned together with the circumstances prevailing in any particular case were the things that would light up

the mind of the trial judge so as to see which way the issue should be decided. The Crown must prove beyond reasonable doubt that the statement being challenged was made out of the accused's free will.'

COURT PROCEDURE

No Case To Answer

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*'.

In *R v Enoch Tara* (Unreported Criminal Case No. 353 of 2004; 18 August 2005) Palmer CJ stated at pages 1 – 2:

> 'At the close of the prosecution case, his lawyer, Mr. Anders has submitted that there is no case to answer under section 197 of the Criminal Procedure Code ("the CPC"). Actually the correct section is 269 of the CPC. Section 197 relates to cases tried in the Magistrates Courts.
>
> […]
>
> The test to be applied in section 269(1) of the CPC is whether or not there is "*no evidence that the accused … committed the offence*". In other words, **if there is some evidence that the accused committed the offence the case must proceed to final determination by the tribunal of fact.**[2] In **R v Tome**[3] the Court of Appeal clarified what test should be applied in a submission of a no case to answer under section 269(1) of the CPC.
>
> "*The court must take the prosecution case 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 is guilty.*
>
> *The distinction is important because rejecting the no case submission leads to the next stage of the trial. The accused may elect to give evidence in which event the final test would be applied in the light of all the evidence then before the court. 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".*
>
> Although the wordings of the relevant section in the CPC for a no case to answer in the High Court, section 269(1) is different from the wording used for the Magistrates Court (section 197), being "*that a case is not made out against the accused person sufficiently to require him to make a defence*" the essential requirements in my respectful view are basically the same. In the Magistrates [C]ourt, the test to be applied is that there is **either no evidence or insufficient evidence to prove the element of the charge**. If the submission of "*no case to answer*" is successful, the defendant will *not* be required to answer the charge or make a defence and shall be entitled to a finding of not guilty.'

[2] *R v Tome* CA – CRAC 4-04 10th November 2004.
[3] ibid

COURT PROCEDURE

In *R v Manessah Somae* (Unreported Criminal Appeal No. 3 of 2004; 4 August 2005) the Court of Appeal stated at pages 7 – 8:

> 'It is important to note that the evidence that is to be considered for the purposes of a no case submission must be capable of proof *beyond reasonable doubt* of the accused's guilt. It is not enough if it is merely capable of proving the *possibility* of guilt. It must be capable, if accepted, of proving guilt beyond a reasonable doubt. As the High Court of Australian said in *Doney* (171 CLR at 215), "To put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty." It follows that it must be such as to permit proof of guilt without inappropriate speculation. Whether it is right to take the evidence at its highest or most favourable to the Crown is, of course, ultimately a matter for the tribunal of fact. But, in order to establish a case to answer, there must be *some* evidence capable of establishing, whether directly or inferentially, every element of the offence charged beyond reasonable doubt.'

Note Taking By The Court

In *R v Farsy* (Unreported Criminal Appeal 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 prejudiced.'

Appeals

As regards appeals under section 23(1) of the *Court of Appeal Act* (Ch. 6) conventionally, though not altogether precisely, characterised as whether the conviction was unsafe or unsatisfactory, refer to *Luke Mahoro v R* (Unreported Criminal Appeal No. 17 of 2003; 4 August 2005; Court of Appeal; pages 18 - 21).

In *Elima and others v R* (Unreported Criminal Appeal No. 23 of 2004; 4 August 2005) the Court of Appeal stated at pages 1, 2 and 8:

> 'On the appeal in Elima to this Court on sentence the Prosecution contended that no appeal lay to the Court of Appeal since "This is a severity appeal and if there is an error of law in the appeal process involving the sentence of appeal in the High Court it is not appealable and there is no jurisdiction to hear the appeal." That submission was based on section 22(1) of the Court of Appeal Act […]
>
> […]

> Our initial view was that the words in section 22(1) should not be read as excluding a right of appeal on a question of law (even if the effect was that the sentence imposed was too severe) unless it appeared that the Legislature had intended that there should only be one appeal (ie., to the Court of Appeal) and not two appeals (ie., to the High Court and then to the Court of Appeal).
>
> […]
>
> In our view it is open to the appellants to contend that there has been an error of law albeit this is one which leads to a submission that the sentence is too severe. It may be infrequent for the decision of the Magistrate to be accepted by the High Court and still be appealed further. In our view, however, the Court of Appeal has power to review the decision of the High [C]ourt where it finds that the sentence is the result of an error of law only.'

In *Ben Siru v R* (Unreported Criminal Appeal No. 322 of 2005; 17 August 2005) Kabui J stated at pages 1 – 2 and 5 - 6:

> 'The starting point in this appeal is section 284(1) of the Criminal Procedure Code Act (Cap. 7), "the CPC" which states –
>
> "… **No appeal shall be allowed in the case of an accused 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** …"
>
> As stated above, the Appellant had pleaded guilty in the Magistrate's Court sitting in Honiara and duly sentenced to imprisonment for eighteen months, nine of which the Magistrate's Court suspended for two years. The prohibition in this section appears to be based upon the position at common law that a plea of guilty may be changed to that of not guilty any time before the sentence is passed by the Court. Once a sentence has been imposed, the case is completed and the matter is regarded as being functus officio as far as the jurisdiction of the sentencing court is concerned. (See **John Solo v Regina**, Criminal Appeal No. 089 of 2000 and the cases cited therein, (unreported). The principle applies to both the finding of guilt by the trial court or a plea of guilty followed by sentence. This principle however does not prevent a right of appeal against conviction and sentence created by statute. An appeal however does not lie in cases where guilt was admitted by way of pleading guilty and sentence passed by the trial court. The reason, to my mind, is simple. It does not make sense and a waste of time for a person having willingly admitted the offence for which he or she was being charged by way of pleading guilty and having been sentenced, decided to change his or her plea of guilty after sentence, by appealing the conviction. In other words, section 284(1) of the CPC cited above is the expression of that position. There is however, an exception. Where the accused was not represented by Counsel at the trial and the nature of the charge against the accused had not been adequately explained by the Magistrate so as to enable the accused to understand the charge and its nature he or she was facing or the Magistrate failed to notice that the accused had a defence in law and he or she pleaded guilty all the same, an appeal against conviction can be entertained by the High Court in the interest of justice. (See **John Solo v Regina** cited above). (Also see **Gua v Regina** [1990] SILR 129). In **R v Ford** [1923] All ER Rep 477 at 479, the Criminal Court of Appeal 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: (1) 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** …"

This passage was cited with approval in **R v Stewart** [1960] VR 106 and **R v Phillips** [1982] 1 All ER 245. That clearly is an exception to section 284(1) of the CPC cited above. So, section 284(1) of the CPC is not a blanket and all pervasive provision. Having said that, what then is the position in a case like this case where the appellant having been advised by his Solicitor pleaded guilty and sentenced and then appealed against his conviction? Clearly, the appellant in his appeal letter clearly falls within (i) above in the passage cited from **R v Ford**, cited above. That is, he did not intend to plead guilty to the charge against him. His appeal can therefore be heard.

[…]

In **R v Peace** [1976] Crim LR 119, the appellant had pleaded guilty to arson and conspiracy and was sentenced accordingly. […] The Court of Appeal refused the appellant's application because an ill advised plea of guilty was not an irregularity. The appellant must show that the plea of guilty was a nullity. The Court said that "… **(w)hat had to be shown was that the apparent plea of guilty was no plea at all because it was made under pressure or threats or the like in circumstances in which the defendant had no free choice but was driven to adopt a certain course whether he liked or not** …"'

In *Alfred Singakiki v R* (Unreported Criminal Case No. 202 of 2005; 10 May 2005) Brown PJ stated at page 3:

'This jurisdiction does permit of an appeal on a matter of fact as well in a matter of law but the hearing is not *de nouveau* (*de novo*), (Criminal Procedure Code ss. 283(3), 293, 294) although the High Court may if it thinks additional evidence is necessary either take such evidence itself or direct it to be taken by the Magistrates Court.

[…]

I must say the presiding Magistrate does have the responsibility in deciding who to believe. This appeal court should be very chary and reluctant in reaching a different view of the facts recounted for the Magistrate in the first instance may assess the veracity of the witness and what weight, intuitively, that may be given their stories. […]

But the Magistrate needs to say *what* he believes and *why*.'

COURT PROCEDURE

In *Nick Pitamama v R* (Unreported Criminal Case No. 3 of 2005; 11 March 2005) Palmer CJ stated at page 5:

> 'The requirement for reasons by lower courts when passing judgments and sentences is an essential feature of a court of record. It assists the presiding magistrate as well as an appellate court in the formulation of judgement and sentence. Whilst recognising that much of the work which gets processed through the lower courts does not necessarily entail complicated issues of law, a sentencing court is obliged to record reasons for arriving at a particular sentence especially where the sentence imposed is longer than a commensurate sentence.'

OPINION EVIDENCE

In *R v Henry Miki* (Unreported Criminal Case No. 14 of 2004; 16 March 2005) Brown J stated at page 25:

> 'Mr. Averre relied on Davie v Edinburgh Magistrates [1953] SC 34 where Lord President Cooper at 40 stated the principle function of the expert witness in assisting the court.
>
> "The (duty of the expert witness) is to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the judge or jury to for their own independent judgment by the application of these criteria to the facts proved by the evidence. The scientific opinion evidence, if intelligible, convincing and tested, becomes a factor (and often an important factor) for consideration along with the whole other evidence in the case."'

PARTIES TO OFFENCES

Aiding And Abetting -- Section 21, Penal Code

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*'.

In *R v Harold Keke, Ronnie Cawa and Francis Lela* (Unreported Criminal Case No. 254 of 2004; 18 March 2005) Kabui J stated at pages 29 – 32:

> 'In Cases and Materials in Criminal Law by Brett and Waller, 1962, the learned authors, at pages 401 – 402, say –
>
> **"… A man may be principal in an offence in two degrees. A principal, in the first degree, is he that is the actor, or absolute perpetrator of the crime; and, in the second degree, he is who is present, aiding and abetting the fact to be done. Which presence need not always be an actual immediate standing by; but there may be also a constructive presence as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance …"**
>
> On the issue of presence at the scene of the crime, Cave, J. being in the majority judgment in **The Queen v Coney** (1881 – 1882) 8 QBD 534 at page 541 agreed with the statement cited above, apart from saying that mere presence alone is not sufficient a case for principal of the second degree. To constitute a case for a principal of the second degree, there must be evidence of conduct pointing to assisting or abetting the principal of the first degree. That is, where presence is entirely innocent or accidental, there can be no evidence of aiding and abetting. Where presence is on the fact of it is not accidental, it is no more than evidence for the jury or court.
>
> At pages 557 – 558, Hawkins J. said –
>
> **"… In my opinion, to constitute an aider and abettor some active steps must be taken by word, or action, with the intent to instigate the principal or principals. Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may, unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, on non – interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not. It is no criminal offence to stand by, a mere passive spectator of a crime, even of a murder. Non – interference to prevent a crime is not itself a crime. But the fact that a person was voluntarily and purposely present witnessing the commission of a crime, and offered no opposition to it, though he might reasonably be expected to prevent and had the power so to do, or at least to express his dissent, might under some circumstances afford cogent evidence upon which a jury would be justified in finding that he wilfully encouraged and so aided and abetted. But it would be purely a question for the jury whether he did so or not …"**

Cave and Hawkins, JJ. were speaking in the context of a prize fight but the principles remain, in the main, accurate to this day. As to what is aiding and abetting under section 21(c) of the Code, White, ACJ in **The Queen v Peter Loumia and Others**, Criminal Case No. 7 of 1984 (unreported) said at page 5 in his summing up to the assessors –

"…Some of the words need to be restated in perhaps ordinary language-aids, and it is important to keep in mind just what it means-aids means actively helps. Abets means encourages. It is not sufficient to show that a person has done any of these things, aiding, abetting, counseling or procuring, unless it is also shown that the person knew what it was the other person intended to do. To know what was intended, however, does not mean that he had to know precisely what was going to be done, but that he knew generally what it was the other person was going to do. For example, as in this case, that lethal weapons were likely to be used…".

Clearly, to be guilty of being a principal of the second degree, the aider and abettor must have had at least some general knowledge of what the principal in the first degree intended to do in the first place. Because the Crown also relied on the application of section 22 of the Code in the alternative, I also need to restate His Lordship's summing up above at pages 5 -6 as to the meaning of section 22 of the Code-

"…Put shortly, that means that where two or more people form a common intention or plan to prosecute, that is, to carry out some unlawful enterprise take for example, a burglary, and to assist each other in carrying it out then each of them is a party to, and equally guilty of any crime that one of them does when carrying out that common plan. The words a "probable consequence" mean a consequence, a result. The important thing to keep in mind is that a person taking part knows what did happen could well happen-that a person taking part knows that. That does not mean that those involved sat down and considered the matter as to what might well happen, but it does mean that the prosecution must prove beyond reasonable doubt that the other persons concerned knew that in carrying out the plan it could well happen that one or more of them could do what in fact took place. As I said, a common intention to carry out a common purpose or plan, as I have explained it, can be inferred from the evidence of what happened, so that it is for the Assessors to decide whether the evidence did prove beyond reasonable doubt that a common purpose and agreement to help each other, knowing what could well happen, was the situation in this case. The question is whether the person concerned knew what in fact happened, that is, in this case, the use of knives, bows and arrows, on other persons causing death was a probable consequence outcome of the common purpose. If the person or persons knew what happened was a probable consequence then the law is that the person or persons are guilty of the crime the other person committed. But if that is not proved beyond reasonable doubt then such persons are not guilty under that section…".

The most recent case in which sections 21(c) and 22 of the Code had been revisited is **R v. Ronny Oeta and Allen Maelalia,** Criminal Case No. 173 of 2003.'

SENTENCING

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

Generally

In *R v Niulifia* (Unreported Criminal Appeal No. 26 of 2004; 4 August 2005) the Court of Appeal stated at page 3:

> 'Where the presence of an aggravating feature or features is found, a sentencing judge may well depart from a notional starting point in an upward direction, just as where mitigating features found will direct him in the opposite direction.'

Disparity

In *R v Wesley, Katalaena, Kili Bejili and others* (Unreported Criminal Appeal No. 1 of 2005; 4 August 2005) the Court of Appeal stated at page 4:

> 'The prosecution submits that, there being no significant differences between the respondents in point either of their involvement in the offence or their subjective circumstances, the learned sentencing judge's sentences were contrived and arbitrary.
>
> We do not consider that the argument based on parity is valid. There may well be cases where disparity of sentences between offenders might give rise to a justifiable sense of grievance in the offender subjected to the heavier sentence. *But disparity alone does not indicate that a sentence is either too heavy or too lenient.* Each sentence must be looked at, from the point of manifest inadequacy, on its [own] merits.' (emphasis added)

Prison Conditions

In *R v Wesley, Katalaena, Kili Bejili and others* (Unreported Criminal Appeal No. 1 of 2005; 4 August 2005) the Court of Appeal stated at pages 5 - 6:

> 'The second point taken by the Crown is that his Lordship took into account "that state of the prison at Gizo, unsanitary and overcrowded," when there was no evidence before the Court about this matter. We do not think that a Judge could not give judicial notice to and take into account in a general and contextual way information about adverse conditions in prisons that came to him or her in the course of exercising his or her judicial functions or was otherwise in the public domain. Often, the facts will be notorious. Matters of particular relevant to the offenders out of the ordinary run or unusual conditions fall into a different category and it will usually be necessary to adduce these facts in the sentence proceeding. The general conditions in prison will always form part of the context in which a sentence of imprisonment is served and we see no error in a Court taking them into account in this way.'

SENTENCING

Remissions

In *R v Wesley, Katalaena, Kili Bejili and others* (Unreported Criminal Appeal No. 1 of 2005; 4 August 2005) the Court of Appeal stated at page 7:

> 'So far as the sentences themselves are concerned, it is important to note the effect of remissions under the *Prisons Act.* Usually, this will be irrelevant but, where an offender is being sentenced after having spent a substantial time in prison on remand, it is important to calculate the likely time in prison that would have been served had a sentence been imposed at the outset in order to make an appropriate allowance for the time served and ensure that the effect of the sentence will not be unduly harsh having regard to the time already spent in goal.'

The law relating to '*Remissions*' is also examined in section 59.7.5 commencing on page 943 of '*Criminal Law in Solomon Islands*'.

Imposition Of Maximum Penalties

In *John Gerea v R* (Unreported Criminal Appeal No. 4 of 2005) the Court of Appeal stated at pages 6 – 7:

> 'It is submitted that the maximum penalty available should only be imposed in rare cases and that this is not such a case. There is no rule of law or practice to the effect contended for. It may occur that that maximum penalty is rarely imposed but that it is mere reflection of the frequency with which cases meriting the maximum occur. The proper test has been variously stated. It is sufficient for present purposes to cite *Veen v The Queen (No. 2)* (1988) 164 CLR 465 478 --
>
> "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".'

SENTENCING

Committing Charges For Sentence

In *R v John Leveti Randy* (Unreported Criminal Case No. 1 of 2005; 13 April 2005) Palmer CJ stated at pages 1 – 2:

> 'It is important to bear in mind that the powers of the Magistrate's Court to commit sentence to the High Court is **where having regard to the character and antecedents of the defendant** the Magistrate's Court is of the opinion that they are such that greater punishment should be inflicted than that court has power to inflict, only then should a matter be committed to the High Court, bearing in mind that a Principal Magistrate has power to inflict punishment in each offence to a maximum of five years[4] and 10 years[5] where there are more than two charges in consecutive.'

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 *Jimmy Ahi v R* (Unreported Criminal Appeal No. 124 of 2005; 29 March 2005) Kabui J stated at page 2:

> 'According to D.A. Smith in his book, Principles of Sentencing, 2nd Edition, reprinted in 1982 at 4, a mitigating factor is not considered a right of the offender (See **Regina v Kennedy Bela**, Criminal Case No. 100 of 2002). That then is the status of any mitigating factor.'

In *Angitalo and others v R* (Unreported Criminal Appeal No. 24 of 2004; 4 August 2005) the Court of Appeal stated at page 11

> 'The correct way of dealing with mitigation is to consider whether, all matters of mitigation having been taken into consideration, the case nevertheless falls within the most serious class of case justifying the imposition of the maximum penalty or, when applying the totality test, the arithmetical aggregate should be reduced. […]
>
> It might well have been open to the learned Magistrate to conclude, *after* considering all the matters urged in mitigation, that the offences involving violence or implicit threats of violence were, nevertheless, in the most serious class of case and that the total should was not excessive. But, with respect, it was a serious error of law to decline to consider any matters of mitigation as *in principle* irrelevant at the outset.'

[4] section 27(1)(b)(i) of the *Magistrate's Courts Act* (Ch. 20).
[5] ibid, section 27(4).

SENTENCING

Plea Of Guilty

In *John Gerea v R* (Unreported Criminal Appeal Case No. 243 of 2004; 4 February 2005) Palmer CJ stated at pages 2 - 4:

> 'A number of useful sentencing guidelines have been pronounced by the English Courts and followed in this jurisdiction in similar circumstances. One of those guidelines provides, that a defendant who has pleaded guilty may be granted some reduction in what would otherwise have been the proper sentence for the offence – see **R v Meade**[6]. […]
>
> […]
>
> A second useful sentencing guideline states that where a defendant is granted a reduction of sentence on account of a plea of guilty, the extent of the reduction may be between one quarter and one third of what would otherwise have been the sentence, at the discretion of the sentencer.
>
> […]
>
> The guilty pleas entered have saved the court and the public time and money. I re-echo the words of Lawton L.J.[7] referred to in **R. v. Fraser** above, that criminals should be encouraged, so far as it is possible, not to indulge in the sort of tactics which do result in the unnecessary and unreasonable prolongation of trials and consequent expenditure of public money. In this context where a culture had grown during the period of upheaval and lawlessness this country went through resulting in the commission of many offences through use of guns, violence, threats and intimidation with the consequent result in the courts being flooded with such cases as witnesses come forward, guilty pleas must be given due discounts. This will encourage criminals to avoid tactics which cause unnecessary delay and expense. Also not only does it save or avoid victims from having to relive such traumatic incidents in some cases but that it also can be said to demonstrate true remorse on the part of the criminals concerned.
>
> […]
>
> A third sentencing guideline is that a sentencer may make no allowance for a plea of guilty, or a lesser allowance than would be usual, if there are reasons for departing from the normal course. […]
>
> In **R. v. Davis and Others**[8], six appellants pleaded guilty to robbery. They were armed with various weapons and had attacked a bank but were confronted by Police and arrested after some resistance. The court reiterated the position that criminals should be encouraged as far as is possible not to indulge in tactics which could only result in unnecessary or unreasonable prolonged and expensive trials at public expense. Lawton L.J. said:

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[6] [1982] 4 CrAppR (S) 193 per Lord Lane CJ and Skinner J.
[7] [1982] 4 CrAppR (S) 254 per May LJ and Robert J.
[8] [1980] 2 Cr. App. R. 168, per Lawton L.J, Michael Davies and Balcombe JJ.

"*It is a principle of sentencing that whenever possible the court should take into account as a mitigating factor the fact that the accused have pleaded guilty. The extent to which it is a mitigating factor must depend on the facts of each case. In this case it cannot be a very powerful mitigating factor because, with the exception of George Davis, it is difficult to see how any of them could have run a defence, although it is easy to see that by commenting and giving evidence about the informer, who was alleged to have been with them, they might have wasted a great deal of court time and made some members of a jury think that they had been treated unfairly.*

The problem, therefore arises as to what sort of allowance, if any, should be made for that fact that they all pleaded guilty and the whole case was dealt with within one day."'

Payment of Compensation

Compensation that had been paid in accordance with customary practice at an early stage would reduce a sentence substantially, see *R v Wesley, Katalaena, Kili Bejili and others* (Unreported Criminal Appeal No. 1 of 2005; 4 August 2005; Court of Appeal; page 5).

Previous Convictions

In *Nick Pitamama v R* (Unreported Criminal Case No. 3 of 2005; 11 March 2005) Palmer CJ stated at pages 3 – 4:

'It is important to bear in mind the words of caution echoed by Ward CJ when quoting Spreight JA in **Kaboa v. R**, that the court should be mindful of the fact that when sentencing a man with a string of previous convictions that whilst protection of the public is its principal consideration, it guards against the tendency to sentence for past convictions. To ensure that the line is not crossed the court should ensure that the sentence imposed is one that would not be inappropriate for the offence. In considering the principles which should be applied when deciding the length of a longer than normal sentence, in **R. v. Mansell**[9] and **R. v. Crow**; **R. v. Pennington**[10]**,** Lord Taylor C.J. said that **some allowance should usually be made, even in the worst of cases, for a plea of guilty.** Such a sentence whilst long enough to give necessary protection to the public should still bear a reasonable relationship to the offence for which it was imposed.'

The law relating to '*Remissions*' is also examined in section 59.7.5 commencing on page 943 of '*Criminal Law in Solomon Islands*'.

[9] 15 CrAppR (S.) 771, CA.
[10] 16 CrAppR (S.) 409, CA.

SENTENCING

Concurrent Or Cumulative Sentences

In *Jeffrey Hou v R* (Unreported Criminal Appeal No. 7 of 2005; 4 August 2005) the Court of Appeal stated at pages 2 – 3:

> 'He [Brown J] sentenced the Appellant to 2 months in each of the first three charges [Simple Larceny and two counts of Common Assault] to 18 months on the fourth each to be consecutive. That made a total sentence of 2 years. The maximum sentence for the first and fourth charges was 5 years on each; on the second and third charges 12 months on each.
>
> The learned Judge on 9 March 2005 dismissed the appeal. The appellant submits to this court, first, that all these sentences should have been concurrent and alternatively some of them should have been made concurrent. They should be treated as a single transaction. He relies on what was said by Ward CJ in Stanley Bade v R 1988-89 SILR 121 and in Augustine Laui v DPP unrep. Criminal Case No. 11 of 1987 per Ward CJ at p 2 and in particular in the later case on the following passage,
>
> "The test of a singe transaction is not just a matter of time but whether the offences form part of a single attack on some other person's right. … the sentences for a series of assaults on the same person, even though spread over a lengthy period of time should properly be made concurrent".
>
> *The fact that all offences occur within a few hours is not necessarily enough to make them a single transaction. They have to be read as having connection which makes it just to regard them as one transaction*.' (emphasis added)

In *Angitalo and others v R* (Unreported Criminal Appeal No. 24 of 2004; 4 August 2005) the Court of Appeal stated at pages 5 – 8:

> 'The first ground of appeal is that the learned Judge erred in law in ruling that the imposition of consecutive rather than concurrent sentences was the correct application of sentencing principles.
>
> The relevant principles were succinctly stated by Ward CJ in Bade –v- The Queen (unreported, HCSI 21 December 1988) as follows –
>
> "When considering sentence for a number of offences, the general rule *must* be that separate and consecutive sentences should be passed for the separate offence. However, there are two modifications, namely –
>
> (a) where a number of offences arises out of the same single transaction and cause harm to the same person there *may* be grounds for concurrent sentences; and
>
> (b) where the aggregate of the sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case." [Emphasis added.]
>
> […]

Where the arithmetical total of consecutive sentences results in an effective sentence that is inappropriately harsh, the sentencing court can properly make the necessary adjustment by reducing one or more of the accumulated sentences so that the total term is not excessive.

In some cases, for example, thefts that occur over an extended period of time, where each theft is a distinct crime (so that they do not form part of a single transaction) but where giving a consecutive sentence for each offence would lead to an aggregate sentence that is too harsh having regard to the total criminality, the Court might well think it appropriate to pass a number of consecutive sentences but order that the sentences imposed for the remainder should be served concurrently. *Again the crucial question will be whether, looking at the criminality of the offender as a whole, the overall sentence that is imposed is not appropriately heavy or lenient.*

It has been suggested that, where concurrent sentences have been imposed in circumstances where the effective sentence does not reflect the overall criminality involved in the offences, the "conventional" sentence for one or more of the offences committed can be increased to ensure that inappropriate leniency is avoided. The fundamental problem with this approach was pointed out by the High Court of Australia in *Pearce v The Queen* (1998) 194 CLR 610, namely that it necessarily involves double punishment and infringes the rule against double jeopardy: since *ex hypothesi*, the offender has already been punished by one of the concurrent sentences for the other criminal conduct, that conduct cannot be taken into account for the purpose of punishing him for one of the other offences.

The fundamental underlying principle is that a sentence should reflect the true criminality involved in the offences, without on the one hand punishing the offender more than once for the same or essentially the same criminal conduct or, on the other hand, failing to punish the offender for committing a crime. This will almost always be a matter of fact and degree, requiring the exercise of judicial discretion. The fundamental rule is the Court should ensure that both the end result does not exceed what is the appropriate punishment for the offender's criminal conduct, considered as a whole, and that result adequately punishes the offender for the crimes actually committed. It should be observed, moreover, that the language adopted by Ward CJ is indicatory rather than mandatory.' (emphasis added)

In *John Gerea v R* (Unreported Criminal Appeal Case No. 243 of 2004; 4 February 2005) Palmer CJ stated at page 5:

'Under section 9(1) of the Criminal Procedure Code [Cap. 7] ("**CPC**"), where convictions have been entered for several offences in a trial, the court may order that they be served consecutively or to run concurrently.

> The general rule on this has been well stated by Ward CJ in **Stanley Bade v. Reginam**[11] that separate and consecutive sentences should be passed for the separate offences. There are two situations however where this rule may be modified. The first is where a number of offences arise out of the same single transaction and cause harm to the same person. In such situations the sentences should be made concurrent. The second situation is where the aggregate sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case. His Lordship Ward CJ said: "*Thus, once the court has decided what is the appropriate sentence for each offence, it should stand back and look at the total. If that is substantially over the normal level of sentence appropriate to the most serious offence for which accused is being sentenced, the total should be reduced to a level that is "just and appropriate" to use the test suggested in Smith v. R. [1972] Crim. L. R. 124.*"[12],

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*'.

Custodial Sentences

The law relating to '*Period In Custody Prior To Sentencing*' is also examined in subsection 59.23.15 commencing on page 979 of '*Criminal Law in Solomon Islands*'.

In *Alfred Singakiki v R* (Unreported Criminal Case No. 202 of 2005; 10 May 2005) Brown PJ stated at page 7:

> '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.
>
> "**s. 282 -- The court may before passing sentence, receive such evidence as it thinks fit, in order to inform itself as to the proper sentence to be passed**".
>
> 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 failure. There may be other reasons for refusing discretion.'

[11] [1988/89] SILR 121 at page 125
[12] ibid, at 125.

SENTENCING

Appeals

In *Nick Pitamama v R* (Unreported Criminal Case No. 3 of 2005; 11 March 2005) Palmer CJ stated at page 5:

> 'For an appellate court to interfere with a trial judge's discretion in passing sentence it must be shown that the sentence imposed was manifestly excessive, or manifestly insufficient because, for instance a judge has acted on a wrong principle or has clearly overlooked or understated or overstated or misunderstood some salient feature of the evidence.[13]'

In *Jimmy Dekamana v R* (Unreported Criminal Case No. 170 of 2005; 23 June 2005) Palmer CJ stated at page 2:

> 'It is for the Appellant to demonstrate that the sentence imposed was manifestly excessive or too heavy and warranted the intervention of the court. Even if it may be slightly on the higher scale, or a sentence which another Magistrate, or I as a Judge, would not have imposed, this court will not interfere if it falls within the appropriate "range" or "bracket" of sentences. It is for the Appellant to show that the way he was dealt with resulted in a sentence imposed which was outside the broad range of penalties which could have been imposed. In **Nuttal**[14], this principle was referred to by Channell J when he said: "*This court will be reluctant to interfere with sentences which do not seem to it to be wrong in principle, **though they may appear heavy to individual judges***" (emphasis added). Similarly, in **Gumbs**[15], Lord Hewitt CJ stated:
>
> "… *this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence: for this court to revise a sentence there must be some error in principle*."
>
> *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*."' (emphasis added)

In *Jimmy Ahi v R* (Unreported Criminal Appeal No. 124 of 2005; 29 March 2005) Kabui J stated at pages 3 - 4:

> 'One of the grounds for attacking the term of any sentence passed is to allege that the sentence is manifestly excessive. The phrase **"manifestly excessive",** always used by appellants in their appeals against sentence has very little meaning unless it is used to point to the sentencing Magistrate proceeding on the wrong principle of sentencing or that there is a glaring disparity between the facts and the sentence. Prentice, J. in a dissenting judgment, made this point, in **Regina v. Roger Vincent McGrath,** [1971-72] PNGLR 247. His Honour cited Barton, A.C.J. of the High Court of Australia in **Skinner v. The King** (1913) 16 CLR 336 at 340 where Barton, A.C.J. said-

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[13] See *Berekame v DPP* [1985/86] SILR CA, applied the approach in *Skinner v R* (1913) 16 CLR 336 and also adopted in *Saukoroa v R* [1983] SILR 275.
[14] (1908) 1 CrAppR 180
[15] (1926) 19 CrAppR 74

"…It follows that a Court of Criminal Appeal is not prone to interfere with the Judge's exercise of his discretion in apportioning the sentence, and will not interfere unless it is seen that the sentence is manifestly excessive or manifestly inadequate. If the sentence is not merely arguably insufficient or excessive, but obviously so because, for instance, the Judge has acted on a wrong principle, or has clearly overlooked, or undervalued, or overstated ,or misunderstood, some salient feature of the evidence, the Court of Criminal Appeal will review the sentence; but, short of such reasons, I think it will not…".

So, for the sentence to be regarded as being manifestly excessive, it must be obvious on the record in that regard and not just be a matter of argument. Prentice, J. also referred to the principles as stated by the High Court of Australia in **House v. The King** (1936) 55 CLR 499 where the Court said at 504-505-

"…The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course…".

This statement clearly shows the danger of the temptation for any appellate court for that matter to act too easily on the argument that the trial judge or the Magistrate for that matter did not place enough weight on the mitigating factors before passing sentence. The Court then stated the circumstances in which the trial judge might have made errors. The Court continued-

"…It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so...".

The above statement clearly extends beyond acting on the wrong principle in sentencing as referred to by His Honour, Prentice J. cited above as a ground for saying that a sentence is manifestly excessive. There are other grounds as well like in the Skinner's case cited above provided there is some material to sustain them. If after a proper analysis of the facts, the court is of the view that injustice has occurred, then it is entitled to review the discretion being challenged and rule accordingly. Again, the Court continued-

"…It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable, or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred…".'

SENTENCING

Comparative Sentences

Introduction

In *Jimmy Ahi v R* (Unreported Criminal Appeal No. 124 of 2005; 29 March 2005) Kabui J stated at page 5:

> '[The appellant …] takes one step further and says that the sentence imposed is inconsistent with the range of sentences passed for the same offence in the past years. In **Paulus Mandatititip v. The State** [1978] PNGLR 128, Prentice, C.J. and Pritchard, J. at 130 said-
>
> **"…It has been pointed out on numerous occasions that citation of other individual cases is of little assistance on appeal, each case being decided on its own merits…".**
>
> The same has been echoed in this jurisdiction as pointed out by Brown, J. in **Regina v. Timo**, Criminal Case No. 465 of 2004 where His Lordship reviewed previous judicial statements on the same matter.'

The law relating to *Comparative Sentences -- Genearlly*' is also examined in subsection 59.24 commencing on page 979 of '*Criminal Law in Solomon Islands*'.

Burglary

In *R v Dani and Another; R v Funubana and Others* (Unreported Criminal Appeal Nos. 11 and 12 of 2004; 11 November 2004) the Court of Appeal stated at page 4:

> 'Careful consideration of the authorities suggests an appropriate starting point to be six years imprisonment for the burglary and the offence relating to the injury caused to the householder during the course of that offence.'

Refer also to *Nick Pitamama v R* (Unreported Criminal Case No. 3 of 2005; 11 March 2005; Palmer CJ).

Defilement

Refer to *Jacob Hudson Zale v R* (Unreported Criminal Case No. 495 of 2004; 30 March 2005; Mwanesalua J).

Demanding Money With Menaces

Refer to *Jimmy Ahi v R* (Unreported Criminal Appeal No. 124 of 2005; 29 March 2005; Kabui J).

SENTENCING

Fraudulent Conversion

Refer to *Jimmy Dekamana v R* (Unreported Criminal Case No. 170 of 2005; 23 June 2005; Palmer CJ).

Grievous Harm

Refer to *R v Willie Tongana and Rolling Ramo* (Unreported Criminal Case No. 594 of 2004; 30 August 2005; Palmer CJ).

Intimidation

Refer to *Lawrence Kelesiwasi v R* (Unreported Criminal Case No. 326 of 2004; 15 July 2005; Kabui J).

Larceny By A Clerk

Refer to *Elima v R* (Unreported Criminal Appeal No. 23 of 2004; 4 August 2005; Court of Appeal).

Making Liquor

Refer to *Alick Sisione and Zacchariah Avelea v R and Frank Laubasi v R* (Unreported Criminal Appeal Case Nos. 385 and 394 of 2004; 1 September 2004; Palmer CJ).

Manslaughter

Refer to *R v Calisto Pasirivo* (Unreported Criminal Case No. 114 of 2004; 8 December 2005; Brown J).

Rape

Refer to:

- *R v Niulifia* (Unreported Criminal Appeal No. 26 of 2004; 4 August 2005; Court of Appeal);
- *R v Su'umania* (Unreported Criminal Appeal No. 29 of 2004; 4 August 2005; Court of Appeal);
- *R v George Raha* (Unreported Criminal Case No. 124 of 2004; 31 May 2005; Palmer CJ); and
- *R v Tibon Oge* (Unreported Criminal Case No. 396 of 1999; 21 September 2004; Kabui J).

SENTENCING

Resisting A Police Officer

Refer to *Alfred Singakiki v R* (Unreported Criminal Case No. 202 of 2005; 10 May 2005; Brown J).

STATUTORY INTERPRETATION

Interpretation Of The Phrase 'Subject To'

In *Auditor – General v Attorney – General (representing the Accountant – General)* (Unreported Civil Case No. 540 of 2004; 22 April 2005) Palmer CJ stated at page 5:

> 'The phrase "subject to" has been the subject of court decision in this country. In **Bjanner Pty Limited and Roberts v. The Comptroller of Customs and Excise**[16] this court considered a similar phrase "Subject to the provisions of sections 195 and 196", in section 221 of the Customs and Excise Act. At page 3 the court referred to two English cases **Smith v. London Transport Executive**[17] and **C & J Clark Ltd v. Inland Revenue Commissioner**[18] in which the words "s*ubject to the provisions of this Act*" were considered. In the former, Lord Simons said:
>
> "The words "*subject to the provisions of this Act*" … are naturally words of restriction. They assume an authority immediately given and give a warning that elsewhere a limitation upon that authority will be found."
>
> At p. 577 Lord MacDermot was quoted as follows:
>
> "*That is an expression commonly used to avoid conflict between one part of an enactment and another, and I have difficulty in reading into it more than it says*."
>
> In the second case, Megarry J. said at p. 520:
>
> "*In any judgment, the phrase "subject to" is a simple provision which merely subjects the provisions of one subject subsections to the provisions of the master subsections. Where there is no clash, the phrase does nothing: if there is a collision, the phrase shows what is to prevail. The phrase provides no warranty of universal collision.*"'

[16] HCSI-CC 279-92 29th September 1992
[17] [1951] A.C. 555
[18] [1973] 2 All E.R. 513