INTRODUCTION TO CRIMINAL LAW

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INTRODUCTION TO CRIMINAL LAW

[1.0] Introduction

Prior to independence on 7th July 1978 the statute law that applied in Solomon Islands came from the United Kingdom. Upon independence the *Constitution* of Solomon Islands became effective and the legality of statute law which applied in Solomon Islands prior to that date was not affected provided it was *not* inconsistent with the *Constitution*, see sections 4 and 5 of *The Solomon Islands Independence Order* 1978 and *Shell Company (Pacific Islands) Limited v Korean Enterprises Limited and the Premier of Guadalcanal (Representing the Guadalcanal Provincial Executive and Assembly)* (Unrep. Civil Case No. 323 of 2000; Muria CJ; at page 38).

Section 75 of the *Constitution* provides that the Parliament of Solomon Islands may enact statute law that should apply in Solomon Islands. That section states:

> '(1) Parliament shall make provision for the application of laws, including customary laws.
>
> (2) In making provision under this section, Parliament shall have particular regard to the customs, values and aspirations of the people of Solomon Islands.'

At this time the Parliament of Solomon Islands has not enacted such law.

Section 76 of the *Constitution* states:

> 'Until Parliament makes other provision under the preceding section, the provisions of Schedule 3 to this Constitution shall have effect for the purpose of determining the operation in Solomon Islands –
>
> (a) of certain Acts of the Parliament of the United Kingdom mentioned therein;
>
> (b) of the principles and rules of the common law and equity;
>
> (c) of customary law; and
>
> (d) of the legal doctrine of judicial precedent.'

Therefore, the sources of criminal law in Solomon Islands currently are as follows:

- the *Constitution*;
- the Acts of the Parliament of Solomon Islands;
- Acts of the Parliament of the United Kingdom of general application which were in force in the United Kingdom on 1st January 1961, as applied under Schedule 3(1) of the *Constitution*;
- The '*Common Law*', as applied under Schedule 3(2) of the *Constitution*; and
- The '*Customary Law*', as applied under Schedule 3(3) of the *Constitution*.

Considering that Solomon Islands was a British colony it inherited an adversarial legal system. In terms of the criminal law the prosecution and defence present their cases to a court for a determination.

In *R v Kwatefena* [1983] SILR 106 Daly CJ commented at page 107:

> 'Courts in Solomon Islands should always bear in mind that we work in an adversary system. This requires that the parties should be permitted to develop the case as they wish with the court intervening only when it is clear the case is taking a wrong turning or is becoming obscure. Sometimes when one side is professionally represented and the other is not, a court may indicate issues or points which it considers important to assist the party at a disadvantage. *However it is wrong for the court to give the impression that it is doing the work of one side*.' (emphasis added)

In *Director of Public Prosecutions v Haikiu* [1984] SILR 155 the Court of Appeal held at pages 159 – 160:

> 'Mr Radclyffe's contention was simply the magistrate by his questions "had given the impression that he was assisting the prosecution". He relied on R v Kwatefena [1983] SILR 106.
>
> […] In the course of his judgment Daly CJ said, "it is wrong for the Court to give the impression that it is doing the work of one side." *That is undoubtedly true if the questioning suggests that the judge is satisfied that the accused is guilty; or that it shows*, as Lord Denning MR said in *Jones v National Council Board* [1957] 2 QB 55, *that the judge has "dropped the mantle of the judge and assumed the role of an advocate*." *Further, a judge must not cross examine an accused when giving his evidence in chief at such length or with such severity that he is assisting the prosecution.*
>
> These references to instances of interference make it clear something far removed from question to elucidate the facts must be revealed. […] Mr. Radclyffe submitted that questions put by a Magistrate should be "neutral" with a view to "clarifying rather than developing points". The word "neutral" was used by Daly CJ in Kwatefena (supra) at p.107 in this context, "such questions should usually be couched in neutral term". If that means "without taking sides", as previously explained, we agree, but *it needs to be made clear that a judge is not expected to refrain from putting a question because the answer may favour one side or the other. Answers to questions so put cannot be relied on as showing that a judge or magistrate was helping one side.*' (emphasis added)

In *R v Niger Pitisopa* (Unrep. Criminal Appeal Case No. 120 of 1999) Kabui J commented at page 10:

> 'I think the fact is that in our present criminal Justice system, the Court is not supposed to conduct a criminal trial on behalf [of] the Crown Prosecutor. Its duty is to be impartial, hear the evidence on both sides, weigh the evidence and decide the case on its facts. It does not descend into the arena of conflict between the Crown Prosecutor and Defence Counsel.' [word in brackets added]

See also: *Loumia v Director of Public Prosecutions* [1985 – 86] SILR 158, per Kapi JA at page 171.

However, the prosecution *always* bears the *onus* of proving all charges '*beyond reasonable doubt*'. The law relating to:

[i] the '*Proof Of Issues*' is examined commencing on page **68**; and

[ii] '*court procedure*' is primarily examined in the chapters titled:

[a] '*Introduction To Court Procedure*' which is examined commencing on page **322**;

[b] '*Examination Of Witnesses*' which is examined commencing on page **338**; and

[c] '*Witnesses*' which is examined commencing on page **274**.

In *R v Yamse Masayuki, Ito Tutomu & Solgreen Enterprises Limited* (Unrep. Criminal Case No. 27 of 1998) Muria CJ held at page 7:

> '[T]here is the basic principle in criminal law that criminal liability accrues as at the date of the commission of the relevant offence. Section 10(4) of the *Constitution* provides:
>
> "No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed."
>
> That provision lays down firmly the principle of law which I have just mentioned, that is that *criminal liability is to be determined by the law in force at the time when the acts constituting the offence were done*.' (emphasis added)

[1.1] Constitution

In *R v John Musuota* (Unrep. Criminal Case No. 41 of 1996) Lungole - Awich J commented at page 21:

> 'It is well known that the province of Constitutional Law is the rules, conventions, practices and customs that provide for organs of government, regulate their relationship to one another, and to the people. A written constitution is a document that states, in general terms, the system of government chosen by a people, what they perceive as their purpose as a state, what their philosophy about rights of persons are and their assumptions about fundamental values. It is usually a political, cultural and social statement as well as statement of laws. The laws of the constitution are meant to be the fundamental guiding laws of a country. They are therefore the important general laws upon which detailed specific laws on particular subjects are based.'

'The Constitution forms the schedule to the Solomon Islands Independence Order 1978 and become the supreme law of the Solomon Islands when, by section 4, that order came into operation on Independence day, 7th July 1978', see *R v Noel Bowie* [1988 – 89] SILR 113.

Section 2 of the *Constitution* states:

> 'This Constitution is the supreme law of Solomon Islands and if any other law is *inconsistent* with this Constitution, that other law shall, to the extent of the inconsistency, be void.' (emphasis added)

In *Director of Public Prosecutions v Sanau & Tanabore v Director of Public Prosecutions* [1987] SILR 1 the Court of Appeal held at page 3:

> '[I]t is clear that by virtue of s. 2 the Constitution is the supreme law of Solomon Islands and all other laws must be read as subject to it.'

In *William Douglas McCluskey v The Attorney – General & others* (Unrep. Civil Case No. 243 of 1993) Palmer J made the following comments at page 4:

> 'The Constitution is the supreme law of the country. It belongs to the people of Solomon Islands who have established a sovereign democratic state of Solomon Islands. That sovereign democratic state is to be ruled by the Constitution and all other laws of application in the country provided that other law is *not* inconsistent with the Constitution.
>
> *The Supreme law of this country by its set up is unique to Solomon Islands. Its application therefore is restricted to the sovereign democratic state of Solomon Islands.* All other laws in force in Solomon Islands therefore must primarily be read as only applying to the sovereign democratic State of Solomon Islands, unless it expressly states otherwise or by necessary implication.' (emphasis added)

See also: *Edward Huniehu v Attorney – General & Speaker of National Parliament* (Unrep. Civil Appeal Case No. 5 of 1996; per Kapi P (Ag); at pages 2 – 3) & *Beti, Bisili & Paia (As Representatives of the Voramali Tribe) v Allardyce Lumber Co Ltd & Attorney – General & Bisili, Roni, Sakiri, Hiele, Sasae, Poza, Hite, Daga & Pato* (Unrep. Civil Case No. 45 of 1992; Muria CJ; at page 7).

Section 3 of the *Constitution* provides:

> 'Whereas every person in Solomon Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: --
>
> (a) life, liberty, security of the person and *the protection of the law*;
>
> (b) freedom of conscience of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation,
>
> the provisions of this Chapter [titled '*Protection of Fundamental Rights and Freedoms of the Individual*'] shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.' (emphasis added)

A number of the '*Fundamental Rights and Freedoms of the Individual*' which are protected under the *Constitution* are examined in the Chapter titled '*Fundamental Rights & Freedoms*' commencing on page **144**.

[1.2] Statute Law

In Solomon Islands there are two types of Acts of Parliament which are applied by the Courts:

1. Acts of the Parliament of Solomon Islands.

By virtue of section 59 of the *Constitution*, the Parliament of Solomon Islands has the power to make laws for 'the peace, order and good governance of Solomon Islands'.

The *Revision of Laws Act* (Ch. 93) is 'An Act to make provision for the preparation and publication of a Revised Edition of an Enactment'. In 1996 the laws of Solomon Islands were revised and are current as at 1 March 1996. Information as regards 'Amendments' to the Acts of the Parliament of Solomon Islands can be obtained from the Office of the Attorney – General.

2. Some Acts of the Parliament of the United Kingdom.

Schedule 3 to the *Constitution* states (in part):

'1. Subject to this Constitution and to any Act of Parliament, the Acts of the Parliament of the United Kingdom of *general application* and in force, on 1st January 1961 shall have effect as part of the law of Solomon Islands, with such changes to names, titles, offices, persons and institutions, and as to such other formal and non – substantive matters, as may be necessary to facilitate their application to the circumstances of Solomon Islands from time to time.' (emphasis added)

In *R v Ngena* [1983] SILR 1 Daly CJ examined the application of the term '*Acts of general application*' and held at page 6:

'[H]aving regard to the statute under consideration as a whole, is it one that regulates conduct or conditions which exist amongst humanity generally and in a way applicable to humanity generally or is it restricted to regulating conduct or conditions peculiar to persons, activities or institutions in the United Kingdom or in a way applicable only to persons activities or institutions in the United Kingdom? *If the former the statute is of general application*.' (emphasis added)

In *William Douglas McCluskey v The Attorney – General & others* (Unrep. Civil Case No. 243 of 1993) Palmer J stated at page 3:

'[B]y Schedule 3 of the Constitution, the laws that are in force in the United Kingdom on 1st January 1961 will have effect as part of the laws of Solomon Islands save where it is inconsistent with the Constitution or any Act of Parliament.'

Those Acts as regards the '*criminal jurisdiction*' *include*:

[i] the *Criminal Procedure Act* 1898 (UK), sections 3, 4 & 5, see *R v Henry Bata & Ken Arasi* (Unrep. Criminal Appeal No. 1 of 1998; Court of Appeal; at page 3); '*Hostile Witnesses*';

[ii] the *Bankers' Book Evidence Act* 1879 (UK), see *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J; at page 3);

[iii] the *Criminal Procedure Act* 1865 (UK), section 8, '*Comparison of a Disputed Writing*';

[iv] the *Criminal Procedure Act* 1865 (UK), section 6, '*Proof of Previous Convictions*'; and

[v] the *Evidence Act* 1851 (UK), sections 1 & 14, '*Admissibility of Copies of Books & Documents of a Public Nature*'.

'Courts are bound by the law as prescribed by Parliament and only Parliament can change such law. That is not to say that Courts cannot recommend changes to the law', see *Lifuasi v Danitofea* (Unrep. Civil Case No. 160 of 1990; Ward CJ; at page 4).

Whilst a Court can recommend changes to statute law in Solomon Islands it can also rule that specific statute law is void if it is inconsistent with the *Constitution*. See for example the case of *R v Noel Bowie* [1988 – 89] SILR 113 in which Ward CJ held that the word 'male' in section 155 of the *Penal Code* (Ch. 26) should be severed in order to ensure that that section was not inconsistent with section 15 of the *Constitution*.

The law relating to the '*Statutory Interpretation*' is examined commencing on page **30**.

[1.3] Judicial Precedent & Common Law

Schedule 3 to the *Constitution* provides (in part):

> '4. (2) Subject to the preceding provisions of this Schedule or any provision in that regard made by Parliament*, the operation in Solomon Islands of the doctrine of judicial precedent shall be regulated by practice directions given by the Chief Justice.*' (emphasis added)

On 4 June 1981 '*Practice Direction No. 1/81*' was issued by Daly CJ as follows:

> 'Judicial Precedent in Solomon Islands shall operate in the following manner:-
>
> 1. All courts other than the Court of Appeal shall regard decisions of the Court of Appeal as of binding authority.
>
> 2. The High Court shall regard earlier decisions of itself as persuasive authority.
>
> 3. A Magistrates' Court shall regard decisions of the High Court, whether on review of proceedings or otherwise, as binding authority.
>
> 4. A Magistrates' Court shall regard decisions of another Magistrates' Court as persuasive authority.'

A '*judicial precedent*' is simply a legal principle which has been decided by an appropriate court that is '*binding*' on other courts in the same hierarchy.

In *Practice Statement (Judicial Precedent)* (1981) 73 CrAppR 266 Lord Gardiner LC stated (in part):

> 'Their Lordships [of the House of Lords] regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.' [words in brackets added]

By virtue of the application of the '*doctrine of stare decisis*' also known as the '*doctrine of precedent*' to the courts in Solomon Islands exercising criminal jurisdiction, the Magistrates' Court is bound by the decisions of the High Court and the Magistrates' Court and the High Court is bound by the decisions of the Court of Appeal. That doctrine operates to secure certainty in the law. Otherwise, the Magistrates' Court and the High Court could continually make decisions, irrespective of any legal precedent set.

In *R v Sethuel Kelly & Gordon Darcy* (Unrep. Criminal Case No. 2 of 1996) Lungole - Awich J commented at page 4:

> 'There is a principle of law in Solomon Islands, that a point of law is decided in a case before the superior courts, binds the lower courts when the lower courts have to consider that point of law in cases before them. That is the principle of stare decisis.'

However, those courts are only bound to follow the '*ratio decidendi*' of the respective judgments. The '*ratio decidendi*' is defined as 'the reason for deciding, [a]ny indispensable factor in the process of reasoning leading to a judicial decision' (*Butterworths Concise Australian Legal Dictionary*, 2nd Edition, page 365). It may also be simply defined as 'the rule of law on which the decision is based'.

When the reasons for a court's decision are contained in multiple judgments, it may be that no clear '*ratio decidendi*' can be discerned. In such a case, lower courts are only bound to apply the outcome of the case when faced with a fact situation not reasonably distinguishable from the case, see *Re Tyler, Ex parte Foley* (1994) 181 CLR 18; (1994) 121 ALR 153 and not the reasoning of any of the judges who constituted the majority, see *Trade Practices Commission v Abbco Ice Works Pty Ltd* (1994) 52 FCR 96; (1994) 123 ALR 503.

During the course of a judgment a Court *may* make judicial comments which *do not* form part of the legal reasoning in the case. Such comments are referred to as '*obiter dictum*' and are *not* binding on other courts.

By virtue of Schedule 3 to the *Constitution* 'no court of Solomon Islands shall be bound by any decision of a foreign court given on or after 7th July 1978'. However, such judgments may be considered in order to develop the common law in Solomon Islands.

In *Price Waterhouse & others v Reef Pacific Trading Limited & another* (Unrep. Civil Appeal No. 5 of 1995) the Court of Appeal stated at page 10:

> 'In view of Sch. 3.2 (4) of the Constitution of the Solomon Islands, the decision of the High Court of Australia is not binding. This Court being the highest court in the land is free to develop the principles of c*ommon law* in the manner it deems just having regard to the circumstances of Solomon Islands. In this regard the decisions of the High Court of Australia or any other country after 7 July 1978 are not binding. *They can only have persuasive value*.' (emphasis added)

When courts make judicial precedents, '*common law*' also referred to as '*judge – made law*' or '*case law*' is developed. The '*common law*':

- outlines the view of the courts regarding the interpretation of the *Constitution*, see section 84 of the *Constitution* in that regard, and statute law;
- outlines the view of the courts regarding the interpretation of statute law; and
- covers those matters which are not dealt with by statute law.

The law relating to '*Statutory Interpretation*' is examined commencing on page **30**.

The term '*Common Law*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as meaning:

> 'so much of the common law, including the doctrines of equity of England as has effect for the time being in Solomon Islands'.

'Common law' therefore fills in the gaps left by the statute law. In *R v Brown* [1995] 1 CrAppR 191 the Court of Appeal made the following observation at page 196:

> 'That the courts do and must make law in the gaps left by Parliament is nowadays accepted as an uncontroversial reality.'

The decision in *R v Brown* (*supra*) was affirmed by the House of Lords in *R v Brown (Winston)* [1998] AC 367; [1997] 3 WLR 447; [1997] 3 AllER 769.

In *R v Hunt* (1987) 84 CrAppR 163; [1987] AC 352; [1987] 1 AllER 1; [1987] CrimLR 263 Lord Griffiths, with whom Lord Keith of Kinkel & Lord Mackay of Clashfern concurred, stated at page 173:

> '[T]he common law adapts itself and evolves to meet the changing patterns and needs of society; it is not static.'

Such law is either reported or unreported. If it is reported it is contained within a law report. The law reports of Solomon Islands are only for the years 1980 to 1990 inclusive. Such reports are cited as '[name of case] [year/s] SILR [page]'.

Some of the 'law reports' from England, Australia, Papua New Guinea and New Zealand, referred to in this book are:

AC	Appeal Cases
ACrimR	Australian Criminal Reports
ALJR	Australian Law Journal Reports
AllER	All England Reports
ALR	Australian Law Reports
CLR	Commonwealth Law Reports
CrAppR	Criminal Appeal Reports
CrimLR	Criminal Law Review
ER	England Reports
FCR	Federal Court Reports
FLR	Federal Law Reports
KB	Kings Bench
LT	Law Times, New Series
MVR	Motor Vehicle Reports
NSWLR	New South Wales Law Reports

NTR	Northern Territory Reports
NZLR	New Zealand Law Reports
P&NGLR	Papau & New Guinea Law Reports
PNGLR	Papua New Guinea Law Reports
QB	Queens Bench
QBD	Queens Bench Division
QdR	Queensland Reports
QL	Queensland Lawyer
QLR	Queensland Lawyer Reports
QWN	Queensland Weekly Notes
RTR	Road Traffic Reports
SASR	South Australian State Reports
SR(NSW)	State Reports New South Wales
StRQd	State Reports Queensland
TasLR	Tasmanian Law Reports
TasSR	Tasmanian State Reports
VLR	Victorian Law Reports
VR	Victorian Reports
WAR	Western Australian Reports
WN(NSW)	Weekly Notes New South Wales
WLR	Weekly Law Reports

However, in *The Prime Minister v The Attorney – General* (Unrep. Civil Case No. 150 of 1998) Muria CJ commented at pages 8 – 9:

> 'I must […] reiterate the point made by this court in *Jane Tozaka –v- Hata Enterprises* CC198/96 (Judgment given on 3 June, 1997). This court stressed the need to build up our own case law in this jurisdiction. So that where a legal principle had been firmly established in cases decided by our Courts, we must build upon them instead of continuing to rely on outside authorities all the time. This Court said in that case:
>
> "I note that both counsel in this case had appeared in some of those cases mentioned and yet either forgot or ignored to cite those authorities. *We must develop and build up our case law in our jurisdiction instead of borrowing authorities from foreign jurisdictions all the time.*
>
> *Once a legal principle had been firmly established in our jurisdiction it serves no point to keep referring to the authorities from foreign jurisdictions. But in order to do this, we in the Courts and counsel appearing before those courts must strive to build up our own body of case law*."
>
> We must all strive to achieve this.' (emphasis added)

Muria CJ also made the same comments in *R v Nelson Keavisi, Julius Palmer, Patrick Mare Kilatu, Keto Hebala & Willie Zomoro* (Unrep. Criminal Case No. 20 of 1995) at page 1.

Schedule 3 to the *Constitution* provides (in part):

> '2. (1) Subject to this paragraph, the *principles and rules of the common law* […] shall have effect as part of the law of Solomon Islands, save in so far as:
>
> (a) they are inconsistent with this Constitution or any Act of Parliament;
>
> (b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time; or

(c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

(2) The *principles and rules of common law* […] shall so have effect notwithstanding any revision of them by any Act of the Parliament of the United Kingdom which does not have effect as part of the law of Solomon Islands.' (emphasis added)

The court system in Solomon Islands is examined commencing on page **14**.

[1.4] Customary Law

Schedule 3 to the *Constitution* provides:

'3. (1) Subject to this paragraph, *customary law* shall have effect as part of the law of Solomon Islands.

(2) The preceding subparagraph shall *not* apply in respect of any *customary law* that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.

(3) An Act of Parliament may:-

(a) provide for the proof and pleading of c*ustomary law* for any purpose;

(b) regulate the manner in which or the purposes for which *customary law* may be recognized; and

(c) provide for the resolution of conflicts of *customary law*.' (emphasis added)

In *Remesis Pusi v James Leni & others* (Unrep. Civil Case No. 218 of 1995) Muria CJ stated at page 8:

'The Constitution itself recognizes customary law as part of the law of Solomon Islands and its authority therefore cannot be disregarded. It has evolved from time immortal and its wisdom has stood the test of time. It is fallacy to view a constitutional principle or a statutory principle contained in customary law. It is the circumstances in which the principles are applied that vary and one cannot be readily substituted for the other.'

In *Sukutaona v Houanihou* [1982] SILR 12 Daly CJ stated at page 13:

'It is quite right to say that custom law is now part of the law of Solomon Islands and courts should strive to apply such law in cases where it is applicable. However it must be done on a proper basis of evidence adduced to show that custom and its applicability to the circumstances. This evidence should be given by unbiased persons knowledgeable in custom law or extracted from authentic works on custom.'

However, in *Loumia v Director of Public Prosecutions* [1985 – 86] SILR 158 Connolly AJ, with whom Wood CJ concurred, stated at pages 163 - 164:

'Clearly custom which calls for action which is a criminal offence by the statute law of Solomon Islands is inconsistent with statute. Thus cl. 3(2) of Schedule 3 to the Constitution has the result that no such custom can have effect as part of the law of Solomon Islands.'

See also: *Michael Buruka v R* (Unrep. Criminal Appeal Case No. 31 of 1991; Muria J; at page 1) & *Veronica Abe'e Edwards v Carol Edwards* (Unrep. Civil Case No. 312 of 1995; Palmer J).

CRIMINAL JURISDICTION OF THE COURTS

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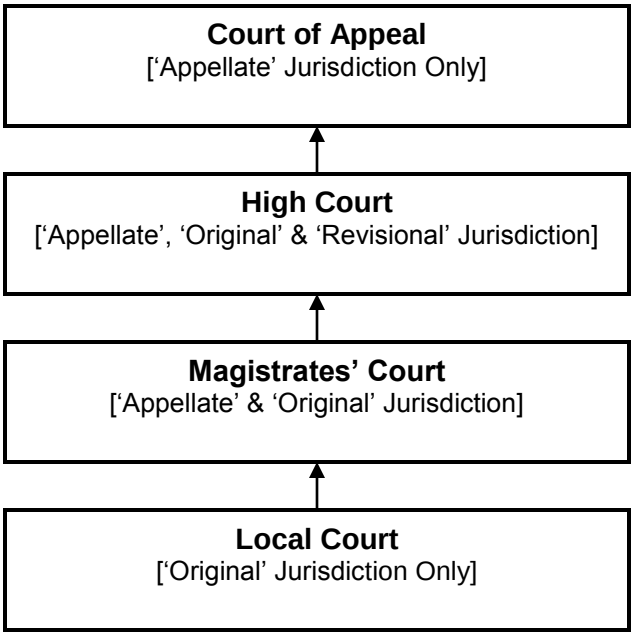
CRIMINAL JURISDICTION OF THE COURTS

[2.0] Introduction

The court hierarchy in Solomon Islands is as follows:



A court exercising:

- '*original jurisdiction'* is able to hear trials; and
- '*appellate jurisdiction'* is able to hear appeals.

In this chapter, the '*criminal jurisdiction*' of those courts will be examined.

By virtue of the application of the '*doctrine of stare decisis*', also know as the '*doctrine of precedent*', to the courts in Solomon Islands exercising criminal jurisdiction, the Magistrates' Court is bound by the decisions of the High Court and the Magistrates' Court and the High Court is bound by the decisions of the Court of Appeal. That doctrine operates to secure certainty in the law. Otherwise, the Magistrates' Court and the High Court could continually make decisions, irrespective of any legal precedent set.

In *R v Sethuel Kelly & Gordon Darcy* (Unrep. Criminal Case No. 2 of 1996) Lungole - Awich J stated at page 4:

> 'There is a principle of law in Solomon Islands, that a point of law is decided in a case before the superior courts, binds the lower courts when the lower courts have to consider that point of law in cases before them. That is the principle of stare decisis.'

Refer also to the section which examines the law relating to '*Judicial Precedent & Common Law*' commencing on page **7**.

CRIMINAL JURISDICTION OF THE COURTS

[2.1] Court Of Appeal

The '*Court of Appeal*' was established by virtue of section 85 of the *Constitution* which states (in part):

> '(1) There shall be a Court of Appeal for Solomon Islands which shall have such jurisdiction and powers to hear and determine *appeals* in […] *criminal matters* as may be conferred on it by this Constitution or by Parliament.
>
> (2) The judges of the Court of Appeal shall be –
>
> (a) a President and such number of other Justices of Appeal, if any, as may be prescribed by Parliament; and
>
> (b) the Chief Justice and the puisne judges of the High Court, who shall be judges of the Court *ex officio*.' (emphasis added)

See also: sections 86 to 89 of the *Constitution*.

Sections 20 to 22 of the *Court of Appeal Act* (Ch. 6) outlines in what circumstances the prosecution or a person convicted may appeal a decision of the High Court.

Section 20 states:

> '*A person convicted on a trial held before the High Court of Solomon Islands* may appeal under this Part of this Act [Part IV -- '*Appeals In Criminal Cases*'] to the Court of Appeal –
>
> (a) against his conviction on any ground of appeal *which involves a question of law alone*;
>
> (b) with the leave of the Court of Appeal or upon the certificate of the judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal *which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal*; and
>
> (c) with the leave of the Court of Appeal *against the sentence passed on his conviction unless the sentence is one fixed by law*.' (emphasis added) [words in brackets added]

An example of a sentence fixed by law is that which *must* be imposed for the offence of 'Murder', see section 200 of the *Penal Code* (Ch. 26).

The law relating to:

- '*Homicidal Offences*' is examined commencing on page **610**; and
- '*Sentencing*' is examined commencing on page **918**.

Section 21(1) states:

> 'Subject to the provisions of this section, the *Director of Public Prosecutions* may appeal under this Part of this Act to the Court of Appeal where –

(a) a person is tried before the High Court in the first instance and acquitted, (whether in respect of the whole or part of the indictment) on any ground of appeal *which involves a question of law only*; or

(b) in the opinion of the Director of Public Prosecutions *the sentence imposed by the High Court is manifestly inadequate*.' (emphasis added)

Section 22 states (in part):

'(1) *Any party to an appeal from a Magistrates' Court to the High Court* may appeal, under this Part of this Act, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal *which involves a question of law only (not including severity of sentence)*:

Provided that *no appeal* shall lie against the confirmation by the High Court of a verdict of acquittal by a Magistrate's Court.

(2) For the purposes of this section, a decision of the High Court in the exercise of its *revisional jurisdiction* or on a case stated, under the provisions of the Criminal Procedure Code, shall be deemed to be a decision of the High Court in such appellate jurisdiction as aforesaid.' (emphasis added)

[2.2] High Court

[2.2.1] Original Jurisdiction

The '*High Court*' was established by virtue of section 77 of the *Constitution* which states (in part):

'(1) There shall be a High Court for Solomon Islands which shall have *unlimited original jurisdiction* to hear and determine any […] *criminal* proceedings under any law and such other jurisdiction and powers as may be conferred on it by this Constitution or by Parliament.

(2) The judges of the High Court shall be the Chief Justice and such number of puisne judges, if any, as may be prescribed by Parliament:

Provided that the office of a judge shall not be abolished while any person is holding that office unless he consents to its abolition.' (emphasis added)

Section 4 of the *Criminal Procedure Code* (Ch. 7) states (in part):

'*Subject to the other provisions of this Code* –

(a) *any* offence may be tried by the High Court.' (emphasis added)

Section 56 of the *Criminal Procedure Code* (Ch. 7) states:

'The High Court may inquire into and try any offence subject to its jurisdiction at any place where it has power to hold sittings:

Provided that no criminal case shall be brought under the cognizance of the High Court unless the same shall have been previously investigated by a Magistrates' Court and the accused person shall have been committed for trial before the High Court.' (emphasis added)

Therefore, a '*Preliminary Investigation / Inquiry*' *must* be held in respect of any offence which is to be tried before the High Court. The law relating to '*Preliminary Investigations / Inquiries*' is examined commencing on page **310**.

Section 53 of the *Criminal Procedure Code* (Ch. 7) states:

'The High Court […] has authority to cause to be brought before it any person who –

(a) is within Solomon Islands and is charged with an offence committed within, or which may be inquired into or tried within, the local limits of its jurisdiction; or

(b) is within the local limits of its jurisdiction and is charged with an offence committed within Solomon Islands, or which according to law may be dealt with as if it had been committed within Solomon Islands,

and to deal with the accused person according to its jurisdiction.'

Section 6 of the *Criminal Procedure Code* (Ch. 7) states:

'The High Court may pass any sentence authorized by law.'

The law relating to '*Sentencing*' is examined commencing on page **918**.

See also: sections 78 to 83 of the *Constitution*, sections 56, 57 & 67 of the *Criminal Procedure Code* (Ch. 7) and sections 34, 46, 47 & 48 of the *Magistrates' Courts Act* (Ch. 20).

[2.2.2] Appellate Jurisdiction

Section 45 of the *Magistrates' Courts Act* (Ch. 20) states:

'*Appeals in criminal cases* shall lie to the High Court from any Magistrates' Court in accordance with any other Act for the time being in force relating to criminal procedure and of any Rules of Court made under the provisions of section 90 of the Constitution.' (emphasis added)

Section 283 of the *Criminal Procedure Code* (Ch. 7) states:

'(1) Save as hereinafter provided, *any person who is dissatisfied with any judgment, sentence or order of a Magistrates' Court* in any *criminal* cause or matter to which he is a party may appeal to the High Court against such judgment, sentence or order:

Provided that no appeal shall lie against an order of acquittal except by, or with the sanction in writing of, the *Director of Public Prosecutions*.

(2) When a person convicted on trial by a Magistrates' Court is not represented by an advocate he shall be informed by the Magistrate of his right of appeal at the time when sentence is passed.

(3) An appeal to the High Court may be a matter of fact as well as a matter of law.

(4) For the purposes of this Part [Part IX -- '*Appeals From Magistrates' Courts and Cases Stated*'] the extent of a sentence shall be deemed to be a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor.' (emphasis added) [words in brackets added]

The law relating to '*Sentencing*' is examined commencing on page **918**.

Section 284 of the *Criminal Procedure Code* (Ch. 7) states:

'(1) *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 Magistrates' Court, *except as to the extent or legality of the sentence*.

(2) Save with the leave of the High Court, *no appeal* shall be allowed in a case in which a Magistrates' Court has passed a sentence of a fine not exceeding ten dollars only, notwithstanding that a sentence of imprisonment has been passed by such court in default of the payment of such fine, if no substantive sentence of imprisonment has also been passed.

(3) No conviction or sentence, which would not otherwise be liable to appeal, shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.' (emphasis added)

Section 298 of the *Criminal Procedure Code* (Ch. 7) states:

'(1) After the hearing and determination by any Magistrates' Court of any summons, charge or complaint, either party to the proceedings before the said Magistrates' Court may, if dissatisfied with the said determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within one month from the date of the said determination, including the day of such date, to the said Magistrates' Court to state and sign a *special case* setting forth the facts and the grounds of such determination for the opinion thereon of the High Court.

(2) Upon receiving any such application the Magistrate shall forthwith draw up the *special case* and transmit the same to the Registrar of the High Court together with a certified copy of the conviction, order or judgment appealed from all documents alluded to in the special case and the provisions of section 289 shall thereupon apply.' (emphasis added)

See also: sections 185 & 285 to 309 & 311 of the *Criminal Procedure Code* (Ch. 7) & sections 46, 47 & 48 of the *Magistrates' Courts Act* (Ch. 20).

[2.2.3] Revisional Jurisdiction

Section 84(1) of the *Constitution* states (in part):

> 'The High Court shall have jurisdiction to supervise any […] *criminal* proceedings before any subordinate court and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court ['*Revisional Jurisdiction*'].' (emphasis added) [words in brackets added]

Section 297 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a case is revised by the High Court in exercise of the *revisional powers* conferred by the Magistrates' Courts Act, it shall certify its decision or order to the court by which the sentence or order so revised was recorded or passed, and the court to which the decision or order is so certified shall thereupon make such orders as are comformable to the decision so certified, and shall take such steps as may be necessary to enforce such decision or order.' (emphasis added)

See also: sections 46 to 48 of the *Magistrates' Courts Act* (Ch. 20).

[2.3] Magistrates' Court

[2.3.1] Introduction

The '*Magistrates' Court*' was established by virtue of section 3 of the *Magistrates' Courts Act* (Ch. 20) which states:

> '(1) There shall be and are hereby constituted throughout Solomon Islands courts of summary jurisdiction, to be known respectively as *Principal Magistrates' Court and Magistrates' Courts of the First Class and of the Second Class* subordinate to the High Court.
>
> (2) There shall be in each district such Magistrates' Courts as the Chief Justice may direct.
>
> (3) Any power, authority, function or discretion vested in a Magistrates' Court by this or any other Act or law shall be possessed as may be exercised by a Magistrate having adequate jurisdiction.
>
> (4) Every Magistrates' Court shall be a Court of Record.' (emphasis added)

There are therefore three classes of Magistrates' Court:

- Principal Magistrates' Court;
- Magistrates' Court of the First Class; and
- Magistrates' Court of the Second Class.

CRIMINAL JURISDICTION OF THE COURTS

The Chief Justice has directed that there shall be a Magistrates' Court in each of the following Districts –

- Central District;
- Malaita District;
- Western District;
- Eastern District; and
- Eastern Outer Islands District', see *Directions By The Chief Justice*' issued on 5th May 1962.

Section 18 of the *Magistrates' Courts Act* (Ch. 20) states (in part):

> 'Subject to any other provision of this Act and to the provisions of any other law for the time being in force in Solomon Islands every Magistrates' Court shall have and exercise jurisdiction in […] *criminal* matters as in this Act provided.' (emphasis added)

Section 54 of the *Magistrates' Courts Act* (Ch. 20) states:

> 'Subject to the provisions of any other law for the time being in force, the jurisdiction vested in Magistrates' Courts shall be exercised (so far as regards practice and procedure) in the manner provided by this Act or by any other Act for the time being in force relating to *criminal* […] procedure, or by Rules of Court, and in default thereof, *in substantial conformity with the law and practice for the time being observed in England in county courts, police courts and courts of summary jurisdiction*.' (emphasis added)

Section 5 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) Any offence under any law for the time being in force in Solomon Islands shall, when any court is mentioned in that behalf in such law, be tried by such court.
>
> For the purposes of this a provision in any law for an offence to be tried summarily shall be construed as a reference to the trial of such offence by a Magistrates' Court.
>
> (2) When no court is mentioned in the manner referred to in subsection (1) in respect of any offence, such offence may be tried in accordance with this Code.'

See however sections 185 & 209 of the *Criminal Procedure Code* (Ch. 7).

A Magistrates' Court *may* 'revise any of the proceedings of a local court, whether civil or criminal', see section 27 of the *Local Courts Act* (Ch. 19).

Furthermore, 'any person aggrieved by any order or decision of a local court may within thirty days from the date of such order or decision *appeal* therefrom to the Magistrates' Court having jurisdiction in the area', see section 28 of the *Local Courts Act* (Ch. 19) (emphasis added)

See also: sections 49 & 50 of the *Magistrates' Courts Act* (Ch. 20).

The law relating to '*Sentencing*' is examined commencing on page **918**.

[2.3.2] Principal Magistrates' Court

Section 27(1) of the *Magistrates' Court Act* (Ch. 20) states:

> 'Subject to the provisions of any other law for the time being in force, a Principal Magistrates' Court shall have jurisdiction to try summarily any criminal offence –
>
> (a) for which the maximum punishment prescribed by law for such offence *does not* exceed -
>
> (i) fourteen years imprisonment; or
>
> (ii) a fine; or
>
> (iii) both such imprisonment and such fine; or
>
> (b) in respect of which jurisdiction is by any law expressly conferred upon a Principal Magistrates' Court or it is expressly provided that such offence may be tried summarily:
>
> Provided that the maximum punishment which a Principal Magistrates' Court may impose *shall not* exceed –
>
> (i) a term of imprisonment for five years; or
>
> (ii) a fine of one thousand dollars; or
>
> (iii) both such imprisonment and such fine.'

See however the proviso as provided for in subsection (3) of that section.

The *Magistrates' Court (Increase In Criminal Jurisdiction) Orders* issued for the years 1963, 1971, 1974, 1975, 1977 & 1991 specify a number of offences which may be dealt with summarily. Those offences are specified commencing on page **22**.

See also: sections 4, 7 & 8 of the *Criminal Procedure Code* (Ch. 7).

[2.3.3] Magistrates' Courts Of The First & Second Class

Section 27(2) of the *Magistrates' Courts Act* (Ch. 20) states:

> 'Subject to the provisions of any other law for the time being in force, a *Magistrates' Court of the First Class or the Second Class shall* have jurisdiction to try summarily any criminal offence –
>
> (a) for which the maximum punishment prescribed by law for such offence *does not* exceed -
>
> (i) imprisonment for a term of one year; or
>
> (ii) a fine of two hundred dollars; or
>
> (iii) both such imprisonment and such fine.'

(b) in respect of which jurisdiction is by any law expressly conferred upon a Magistrates' Court of the First Class or of the Second Class or it is expressly provided that such offence may be tried summarily; or

(c) for which any penalty is expressly provided in respect of a conviction by a Magistrates' Court of the First Class or of the Second Class.' (emphasis added)

See however the proviso as provided for in subsection (3) of that section.

Refer also to: *The Magistrates' Court (Increase In Criminal Jurisdiction) Orders* for the years 1963, 1971, 1974, 1975, 1990, 1991 & 1993.

See also: sections 4, 7 & 8 of the *Criminal Procedure Code* (Ch. 7).

[2.3.4] Magistrates' Court (Increase In Criminal Jurisdiction) Orders

Magistrates' Court (Increase In Criminal Jurisdiction) (1963) Order

Subject to the provisions of section 27(3) of the *Magistrates' Courts Act* (Ch. 20), all Magistrates' Courts within Solomon Islands shall have jurisdiction to try any of the following offences:

Section	Statute	Offence
55	Penal Code	Aiding Soldiers Or Policeman In Acts Of Mutiny
75	Penal Code	Riot
83	Penal Code	Going Armed In Public
85	Penal Code	Forcible Entry
86	Penal Code	Forcible Detainer
88	Penal Code	Challenge To Fight A Duel
89	Penal Code	Threatening Violence
95	Penal Code	False Claims By Officials
106	Penal Code	False Statutory Declarations & Other False Statements Without Oath
114	Penal Code	Deceiving Witness
115	Penal Code	Destroying Evidence
116	Penal Code	Conspiracy To Defeat Justice & Interference With Witnesses
117	Penal Code	Compounding Felonies
118	Penal Code	Compounding Penal Actions
119	Penal Code	Advertisements For Stolen Property
123	Penal Code	Injury, Damage Or Threat
132	Penal Code	Disturbing Religious Assemblies
140	Penal Code	Abduction Of Girl Under Eighteen Years Of Age With Intent To Have Sexual Intercourse
141	Penal Code	Indecent Assault On Females
142(2)	Penal Code	Defilement Of Girls Under Thirteen Years Of Age
144	Penal Code	Procuration
145	Penal Code	Procuring Defilement Of Women By Threats Or Fraud Or Administering Drugs
153	Penal Code	Living On Earnings Of Prostitution Or Aiding Prostitution

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Magistrates' Court (Increase In Criminal Jurisdiction) (1963) Order

154	Penal Code	Suspicious Premises
185	Penal Code	Negligent Act Likely To Spread Infection Of Disease Dangerous To Life
186	Penal Code	Fouling Air
188	Penal Code	Endangering Property With Fire etc
233	Penal Code	Cruelty To Children
237	Penal Code	Reckless & Negligent Acts Endangering Safety Of Persons
240	Penal Code	Travelling By Aircraft, Vehicle Or Vessel
245	Penal Code	Assaults Causing Actual Bodily Harm
247	Penal Code	Assaults Punishable With Two Years Imprisonment
254	Penal Code	Abduction Of Girls Under 15 Years
256	Penal Code	Unlawful Compulsory Labour
261	Penal Code	General Punishment For Theft
264	Penal Code	Larceny Of Electricity
265	Penal Code	Larceny Of Minerals
272(b)	Penal Code	Larceny By Tenant Or Lodger
274	Penal Code	Larceny Of Cattle
275	Penal Code	Larceny Of Dog
279	Penal Code	Larceny Of Trees
280	Penal Code	Larceny Of Fences
281	Penal Code	Larceny Of Fruit & Vegetables
282	Penal Code	Damaging Fixtures, Trees, etc With Intent To Steal
287	Penal Code	Miners Removing Minerals
289	Penal Code	Killing Animals With Intent To Steal
302	Penal Code	Being Found By Night Armed Or In Possession Of Housebreaking Implements
308	Penal Code	False Pretences
310	Penal Code	Pretending To Tell Fortunes
311	Penal Code	Obtaining Registration, etc, by False Pretences
312	Penal Code	False Declaration For Passport
313	Penal Code	Receiving
314	Penal Code	Receiving Goods Stolen Outside Solomon Islands
315(2)	Penal Code	Power Of Minister To Notify Applied Marks For Public Stores
325	Penal Code	Injuring Animals
326(1)	Penal Code	Malicious Injuries In General & In Special Cases
329	Penal Code	Removing Boundary Marks With Intent To Defraud
330	Penal Code	Wilful Damage, etc, To Survey & Boundary Marks
355	Penal Code	Uttering & Possession With Intent To Utter
372	Penal Code	Lending, etc, Testimonial For Impersonation
374	Penal Code	Corrupt Practices
379	Penal Code	Attempts To Commit Offences
5(2)	Firearms & Ammunition Act	Purchasing, etc., Firearms Or Ammunition Without Firearm License

CRIMINAL JURISDICTION OF THE COURTS

Magistrates' Court (Increase In Criminal Jurisdiction) (1971) Order

Subject to the provisions of section 27(3) of the *Magistrates' Courts Act* (Ch. 20), all Magistrates' Courts within Solomon Islands shall have jurisdiction to try any of the following offences:

Section	Statute	Offence
273	Penal Code	Larceny & Embezzlement By Clerks & Servants [In Respect Of Which The Value Of Any Property Does Not Exceed An Aggravate Of $200]
278	Penal Code	Conversion [In Respect Of Which The Value Of Any Property Does Not Exceed An Aggravate Of $200]

Magistrates' Court (Increase In Criminal Jurisdiction) (1974) Order

Subject to the provisions of section 27(3) of the *Magistrates' Courts Act* (Ch. 20), all Magistrates' Courts within Solomon Islands shall have jurisdiction to try the following offence:

Section	Statute	Offence
143(1)a)	Penal Code	Defilement Of A Girl Between 13 & 15 Years

Magistrates' Court (Increase In Criminal Jurisdiction) (1975) Order

Subject to the provisions of section 27(3) of the *Magistrates' Courts Act* (Ch. 20), all Magistrates' Courts within Solomon Islands shall have jurisdiction to try the following offence:

Section	Statute	Offence
271	Penal Code	Larceny From Ship, Dock, etc [In Respect Of Which The Value Of Any Goods Or Other Things Stolen Does Not Exceed An Aggravate Of $200]

Magistrates' Court (Increase In Criminal Jurisdiction) (1977) Order

Subject to the provisions of section 27(3) of the *Magistrates' Courts Act* (Ch. 20), all *Principal Magistrates' Courts* within Solomon Islands shall have jurisdiction to try any of the following offences:

Section	Statute	Offence
224	Penal Code	Acts Intended To Cause Grievous Harm Or Prevent Arrest
293	Penal Code	Robbery
299	Penal Code	Burglary
319	Penal Code	Arson

Magistrates' Court (Increase In Criminal Jurisdiction) (1990) Order

Subject to the provisions of subsections (2) and (3) of section 27 of the *Magistrates' Courts Act* (Ch. 20), all *Magistrates' Courts of the First Class* within Solomon Islands shall have jurisdiction to try any of the following offences:

CRIMINAL JURISDICTION OF THE COURTS

Section	Statute	Offence
84	Penal Code	Possession Of Weapon
269	Penal Code	Larceny In Dwelling – house [Where The Value Of The Property Stolen Does Not Exceed $1000]
270	Penal Code	Larceny From Person [Where The Value Of The Property Stolen Does Not Exceed $1000]
271	Penal Code	Larceny From Ship, Dock, etc [Where The Value Of The Property Stolen Does Not Exceed $1000]
380	Penal Code	Attempt To Commit Such Offences [Where The Value Of The Property Stolen Does Not Exceed $1000]
278	Penal Code	Conversion [Where The Value Of The Property Converted Does Not Exceed $1000]
38	Traffic Act	Causing Death By Reckless Or Dangerous Driving
39	Traffic Act	Reckless Or Dangerous Driving
43	Traffic Act	Driving Or In Charge Unfit To Drive
	Liquor Act	All Offences
40	Solomon Islands National Provident Fund Act	General Offences
9(2)	Firearms & Ammunitions Act	Marking Of Firearms
22	Firearms & Ammunitions Act	Concealing Unlawfully Imported Firearms Or Ammunition
26(2)	Firearms & Ammunitions Act	Certain Weapons Prohibited Without Authority Of Minister
30(3)	Firearms & Ammunitions Act	Search For Firearm Or Ammunition Under Warrant

Magistrates' Court (Increase In Criminal Jurisdiction) (1991) Order

Subject to the provisions of subsections (1) and (3) of section 27 of the *Magistrates' Courts Act* (Ch. 20), all *Principal Magistrates' Courts* within Solomon Islands shall have jurisdiction to try the following offence:

Section	Statute	Offence
4	Firearms & Ammunitions Act	Restriction On The Manufacture Of Firearms Or Ammunition

Magistrates' Court (Increase In Criminal Jurisdiction) (1991) Order

Subject to the provisions of subsections (2) and (3) of section 27 of the *Magistrates' Courts Act* (Ch. 20), all *Magistrates' Courts of the First Class* within Solomon Islands shall have jurisdiction to try any of the following offences:

CRIMINAL JURISDICTION OF THE COURTS

Section	Statute	Offence
6(8)	Firearms & Ammunitions Act	Grant, etc., Of Firearm Licenses
12	Firearms & Ammunitions Act	Obstructing Inspection Of Stock – in - Trade
13	Firearms & Ammunitions Act	Dealer To Maintain Approved Firearms Store
14	Firearms & Ammunitions Act	Shortening & Converting Firearms & Imitation Firearms
20	Firearms & Ammunitions Act	Unlawful Importation Or Exportation
23	Firearms & Ammunitions Act	Minister May Prohibit Importation Or Exportation
25(2)	Firearms & Ammunitions Act	Prohibition Of Arms In Certain Areas
28	Firearms & Ammunitions Act	Taking In Pawn Firearms Or Ammunition
40	Firearms & Ammunitions Act	Loss Of Firearm To Be Reported
41	Firearms & Ammunitions Act	Carrying Firearm While Drunk Or Disorderly
42	Firearms & Ammunitions Act	Threatening Violence With Firearm
45	Firearms & Ammunitions Act	Appeals

Magistrates' Court (Increase In Criminal Jurisdiction) (1993) Order

Subject to the provisions of subsections (2) and (3) of section 27 of the *Magistrates' Courts Act* (Ch. 20), all *Magistrates' Courts of the First Class* within Solomon Islands shall have jurisdiction to try any of the following offences:

Section	Statute	Offence
83	Penal Code	Going Armed In Public
247	Penal Code	Assaults Punishable With 2 Years Imprisonment
295	Penal Code	Demanding Money With Menaces Things Capable Of Being Stolen
325	Penal Code	Injuring Animals
326(1)	Penal Code	Malicious Injuries In General & In Special Cases
43(1)(b)	Traffic Act	Unfit To Drive
43(2)(b)	Traffic Act	Unfit To Drive

[2.3.5] Territorial Limits

Section 4 of the *Magistrates' Courts Act* (Ch. 20) states:

'(1) A Principal Magistrates' Court *shall* exercise jurisdiction throughout Solomon Islands.

(2) Subject to any express provisions of this or any other Act, every Magistrates' Court shall exercise jurisdiction within the limits of the district within which it is situated:

Provided that when there is more than one Magistrates' Court in the same district, the Chief Justice may direct the distribution of business between such Courts.

(3) The jurisdiction of each Magistrates' Court shall extend over any territorial waters adjacent to the district in which it is situated as well as over inland waters whether within or adjacent to such district.'

See also: sections 46 & 50 of the *Magistrates' Courts Act* (Ch. 20) and *The Magistrates' Courts (Districts) Order* issued on 5th May 1962.

Section 53 of the *Criminal Procedure Code* (Ch. 7) states:

'[E]very Magistrates' Court has authority to cause to be brought before it any person who –

(a) is within Solomon Islands and is charged with an offence committed within, or which may be inquired into or tried within, the local limits of its jurisdiction; or

(b) is within the local limits of its jurisdiction and is charged with an offence committed within Solomon Islands, or which according to law may be dealt with as if it had been committed within Solomon Islands,

and to deal with the accused person according to its jurisdiction.'

Section 54 of the *Criminal Procedure Code* (Ch. 7) states:

'*Where a person accused of having committed an offence within Solomon Islands has removed from the district within which the offence was committed and is found within another district, the court within whose jurisdiction he is found may cause him to be brought before it and shall, unless authorized to proceed in the case, send him in custody to the court within whose jurisdiction the offence is alleged to have been committed*, or require him to give security for his surrender to that court there to answer the charge and to be dealt with according to law.' (emphasis added)

See however section 67(1) of the *Criminal Procedure Code* (Ch. 7) which states (in part):

'Whenever it is made to appear to the High Court –

[…]

(d) *that an order under this section will tend to the general convenience of the parties or witnesses*; or

(e) *that such an order is expedient for the ends of justice* or is required by any provision of this Code;

it may order –

(i) that any offence be inquired into or tried by any court not empowered under the proceeding sections of the Part [Part IV -- '*Provisions Relating To All Criminal Investigations And Proceedings*'] but in other respects competent to inquire into or try such offence; or

(ii) that any particular criminal case or class of cases be transferred from a Magistrates' Court to any other Magistrates' Court; or

(iii) that an accused person be committed for trial to itself.' (emphasis added) [words in brackets added]

See also sections 55, 59, 60, 61, 62, 63, 65 & 66 of the *Criminal Procedure Code* (Ch. 7) & sections 9 & 28 of the *Magistrates' Courts Act* (Ch. 20) & section 6 of the *Penal Code* (Ch. 26).

See however sections 137 to 140 & 310 of the *Criminal Procedure Code* (Ch. 7).

[2.4] Local Court

Section 2(1) of the *Local Courts Act* (Ch. 19) enables the establishment of '*Local Courts*'. That section states:

'By warrant under his hand the Chief Justice may establish in Solomon Islands such *local courts* as he shall think fit which shall exercise over *Islanders* within such limits as may be defined by such warrant the jurisdiction therein defined and such jurisdiction as may be conferred by any Act on local courts generally.' (emphasis added)

Section 7 of the *Local Courts Act* (Ch. 19) states:

'The *criminal jurisdiction* of a *local court* shall extend, subject to the provisions of this Act, to the hearing, trial and determination of all criminal charges and matters in which any *Islander* is accused of having wholly or in part within the jurisdiction of the court, committed or been accessory to the committing of an offence against an Islander.' (emphasis added)

Section 17(1) of the *Interpretation & General Provisions Act* (Ch. 85) states:

'In every Act, except where it is otherwise expressly provided or by necessary implication otherwise required, "Islander" *means* –

(a) any person both of whose parents are or were members of a group, tribe or line indigenous to Solomon Islands; or

(b) any other person at least one of whose parents or ancestors was a member of a race, group, tribe or line indigenous to any island of Melanesia, Micronesia or Polynesia and who is living in Solomon Islands in the customary mode of life of any such race, group, tribe or line.' (emphasis added)

The '*criminal jurisdiction*' of each Local Court is specified in the Warrant which is issued under section 2 of the *Local Courts Act* (Ch. 19) and the *Local Courts (Criminal Jurisdiction) Order* issued pursuant to section 17 of that Act.

Section 28 of the *Local Courts Act* (Ch. 19) provides that appeals in respect of criminal matters are to be heard in the Magistrates' Court.

[2.5] Juvenile Court

As regards '*Juveniles*' reference should be made to the *Juvenile Offenders Act* (Ch. 14) and section 29 of the *Magistrates' Courts Act* (Ch. 20).

STATUTORY INTERPRETATION

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STATUTORY INTERPRETATION

[3.0] Introduction

Whilst courts interpret statutes, ie., Acts and subsidiary legislation, prosecutors and defence counsel are expected to provide researched sound submissions in that regard. The content of this book is written subject to the principles of '*statutory interpretation*' and will therefore assist in providing such submissions.

Due to its importance, greater emphasis needs to be placed on learning the principles of '*statutory interpretation*' so as to achieve a better understanding of the meaning of statutes. When interpreting statutes consideration *must* be given to:

- the *Constitution*;
- the *Interpretation & General Provisions Act* (Ch. 85);
- any definitions and rules of interpretation in specific Acts under consideration. Section 15 of the *Interpretation & General Provisions Act* (Ch. 85) states:

  > 'Definitions and rules of interpretation in an Act apply to the provisions containing them as well as to the other provisions of the Act'; and

- common law rules or maxims or cannons of '*statutory interpretation or construction*', although *not* all such rules or maxims or cannons will be examined.

[3.1] Constitution

In *Ronald Ziru (on behalf of SIMA Medical Centre) v Attorney – General* (Unrep. Civil Case No. 21 of 1993) Muria CJ stated at page 8:

> 'Unlike in England, we have a written Constitution here which is the Supreme law. All other laws must conform to it. *The starting point must, inevitably, be the Constitution in any construction of legal provisions*.' (emphasis added)

Section 2 of the *Constitution* states:

> 'This Constitution is the supreme law of Solomon Islands and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the *inconsistency*, be void.' (emphasis added)

In *Walter Folotalu v Attorney – General* (Unrep. Civil Case (Constitutional) No. 234 of 2001) Palmer ACJ held that section 2 of the *National Parliament Electoral Provisions (Amendment) Act* 2001 was inconsistent with section 13 of the *Constitution* and by virtue of section 2 of the *Constitution* is void.

In *R v Noel Bowie* [1988 – 89] SILR 113 Ward CJ held that the word 'male' should be severed from section 155 of the *Penal Code* (Ch. 26) in order to ensure that it was not inconsistent with section 15 of the *Constitution*.

[3.2] Long & Short Titles

Section 18 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> '(1) An Act may be cited –
>
> (a) by its short title;
>
> (b) by reference to the year in which it was enacted and its number among the Acts of that year; or
>
> (c) by the Chapter number given to it in any revised edition of the Laws of Solomon Islands.
>
> (2) A reference to an Act in accordance with subsection (1) shall be made according to the short title, number or Chapter number used in copies of the Act printed by the Government Printer.'

Therefore, as regards the *Interpretation & General Provisions Act* (Ch. 85):

- a '*short title*' is '*Interpretation & General Provisions Act* (Ch. 85)'; and
- the '*long title*' is 'An Act to make provision for the interpretation of laws; to make certain general provisions with regard to laws; and to provide for matters connected therewith and incidental thereto' which appears immediately above section 1 of that Act.

Section 9(3) of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Each Act shall be deemed to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the *object of the Act* according to its true intent, meaning and spirit.' (emphasis added)

The '*short'* and '*long*' titles of a statute can be used to interpret and understand its objectives.

In *The State v Danny Sunu, Namarai Walter, Iku Gagoro & Philip Haro* [1983] PNGLR 396 Bredmeyer J, sitting alone, stated at page 402:

> 'To interpret a statute I am entitled to refer to its objectives and I may look at the short and long title to assist in that task. "… it is the plainest of all guides to the general objectives of a statute," *Black – Clawson International Ltd v Papierwerke Waldof – Aschaffenburg A. G.* [1975] AC 591 at 647 per Lord Simon.'

In *Birch v Allen* (1942) 65 CLR 621 Latham CJ, as a member of the High Court of Australia, stated at page 625:

> 'It may be proper to look at the [long] title for the purpose of determining the scope of an Act; it may be referred to, not to contradict any clear and unambiguous language, but if there is any uncertainty it may be referred to for the purpose of resolving the uncertainty.' [word in brackets added]

See also: *Saze v Eicholz* [1919] 2 KB 171 & *Re Boaler* [1915] 1 KB 21.

[3.3] Legislative Intent

A summary of the principles examined in this section is as follows:

- The *purpose* of legislation is to rectify an identified *mischief* [ie., a problem or issue needing or requiring to be addressed] by providing a statutory remedy [ie., solution];
- Legislation *must* be interpreted according to the '*perceived intention*' of the Parliament;
- The *intention* of the Parliament is revealed in the words used in the statute;
- A statute *must* be read as a whole;
- Common law rules or maxims or cannons of statutory interpretation or construction *may* be used to interpret a statute;
- Plain words *must* be interpreted according to their natural and ordinary meaning (ie., *by applying the 'literal' rule*);
- *Generally*, the literal meaning of a statutory provision will give effect to the purpose of the legislation; and
- *If* the literal meaning does not coincide with the perceived purpose of the legislation then a court is entitled to give effect to that purpose by including or excluding words for the purpose of interpreting the legislation (ie., *by applying the 'purposive' rule*).

Section 9 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> '(1) An Act speaks from time to time.
>
> (2) Each Act is intended to be read as a whole.
>
> (3) *Each Act shall be deemed to be remedial and shall receive such fair and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.*' (emphasis added)

In *SCR No. 1 of 1981* [1981] PNGLR 151 the Supreme Court stated at page 155:

> '[T]here is a principle of statutory construction that it is the duty of the court to make such construction of a statute as shall suppress the *mischief* and advance the remedy.' (emphasis added)

In *Associated Newspapers Group Ltd v Fleming (Inspector of Taxes)* [1973] AC 628 Lord Simon of Glaisdale stated at page 646:

> 'It is very much part of the duty of the courts, in their task of statutory interpretation, *to ascertain as best they can what was the mischief as conceived by Parliament for which a statutory remedy was being provided*; nor is it necessary nowadays for courts to affect ignorance of what is notorious.' (emphasis added)

The intention of the Parliament is revealed in the words used in the statute.

STATUTORY INTERPRETATION

In *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 [[1992] 3 WLR 1032; [1993] 1 AllER 42] Lord Browne – Wilkinson commented at page 634:

> 'Statute law consists of the words that Parliament has enacted. It is for the courts to construe those words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of conveying that meaning it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying Parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction.'

In *Chan Ho Cheon v Rok & SI Total Event Limited* (Unrep. Civil Case No. 2 of 1998) Muria CJ stated at page 4:

> '*The starting point in this process must be words used in the provision themselves. The intention of Parliament is expressed in those words which must be given their natural and ordinary meaning in the context they are used unless it can be shown that the words as used do not have a natural and ordinary meaning or that words are ambiguous.* In those situations the Court can resort to one of the "rules of construction" which the courts have developed to give meaning to words used by the draftsman and which have failed to adequately convey the natural and ordinary meaning of the words consistent with the context in which they are used. See *In Re Application by the Minister for Western Provincial Affairs* [1983] SILR 141.' (emphasis added)

In *Mahabir v Chan Wing Motors Limited* [1982] SILR 19 Daly CJ stated at page 21:

> '[T]he statute *must* be read as a whole and effect be given to the intention of the legislature as discernable from that reading. Where the legislature has chosen to use words in the statute which have a natural and clear meaning then effect *must* be given to that meaning. As Lord Justice Scott said in Croxford v Universal Insurance Co. (1936) 2 KB 233 at page 281:
>
> "Where the words of an Act of Parliament are clear, there is no reason for applying any of the principles of interpretation which are merely presumptions in cases of ambiguity in the statute."' (emphasis added)

In *David Maesua v Charles Dausabea & James Delemani, Mathias Pepena v David Sitai, Ronnie To'ofilu v Moon Pin Kwan, Brian Saoba v David Vatamana Vouzer, William Gigini v James Trasel Saliga, Sam Semual Iduri v Stephen Tonafalea & Returning Officer, Francis Ordani v Mesach Maebiru Maetoloa & Joe Timothy Ariaria v Alfred Araha Hairui* (Unrep. Civil Case Nos. 255, 268, 260, 261, 263, 265, 266 & 276 of 1997) Muria CJ stated at page 6:

> 'If the section of an Act is clear and unambiguous a Court should not read words into them to tone down Parliament's intention as clearly demonstrated by those words. The Court may be seen as legislating for itself if it introduces any such qualification in such circumstances.'

STATUTORY INTERPRETATION

In *Eric Fiebig (as Administrator of the Estate of Norleen Liebig deceased) v Solomon Airlines Limited* (Unrep. Civil Case No. 374 of 1995) Palmer J stated at page 5:

> '[T]he court *must* give effect to the plain and clear meaning of the words in the proviso to section 3(2), as intended by Parliament. Those words do not need any elaborate interpretation.' (emphasis added)

In *Re Application by the Minister for Western Provincial Affairs* [1983] SILR 141 Daly CJ stated at pages 143 - 148:

> 'The simple question is, has this court power to remedy that defect on interpretation of the words used? The answer to such suggestion is contained in the words of Lord Simonds in Magor & St. Mellons R.D.C. v. Newport Corporation (1951) 2 All E.R. 839 at p. 841 where he said concerning a proposal that the court should close a gap in an Act:
>
> "It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation. And it is the less justifiable when it is guesswork with what material the legislature would, if it had discovered the gap, have filled it. If the gap is discovered, the remedy lies in an amending Act."
>
> In view of what I say later in this judgment, I should observe that this passage is in the course of criticism of a rather wider view of the functions of the court on interpretation of statutes taken by Denning LJ (as he then was). I accept that there may in certain circumstances be practical difficulties in implementing the terms of section 22(2) of the Act. However, in my judgment, this is not a case in which it has been established that there are inconsistencies and absurdities which flow from giving a literal meaning to the subsection in question. Impracticabilities there maybe but, as Lord Simonds says, "the remedy lies in an amending Act".
>
> *The second group of submissions is that a "purposive" approach rather than a literal one should be adopted to the interpretation of section 22(2). In other words I am asked to seek out the purpose of Parliament and apply what I think that purpose may be and thereafter to give the words of the subsection a different meaning from their literal meaning. But where does one start on this search other than with the words themselves?*
>
> […]
>
> […] *The "purposive approach" does not mean the words are rejected; it means that read in their context they must be given a certain meaning because the draftsmen has omitted something* […].
>
> *The only proper approach to any problem of construction is first to read the words used in their context. If the words have a natural and ordinary meaning then the words should be given that meaning. If that is to be called a "literal approach" I do not consider it to be outdated; the functions of a court in any case of interpretation is to decide the meaning of words. The intent and purpose of the legislature is expressed in words. What other "approach" can there be but "literal"? There may be scope where the words are ambiguous or where the natural and ordinary meaning reveals that something has been omitted (pace Lord Diplock) for a court to apply one or other of what have been called "rules of construction".* But the starting point is always the words themselves and these "rules of construction" are merely common sense and judicial experience (if there is any distinction) applied to the task of giving a meaning to words where the draftsman has, in the view of a court, failed adequately to convey a natural and ordinary meaning that is consistent with the context in which the words are used.' (emphasis added)

STATUTORY INTERPRETATION

In *Anna Wemay & others v Kepas Tumdual* [1978] PNGLR Wilson J, sitting alone, stated at page 176:

> 'The fundamental rule for the interpretation of a statute applies in this case, viz., that the statute should be construed [ie., interpreted] according to the intention expressed in the Act itself.
>
> If the words of the statute are themselves precise and unambiguous, then no more is necessary than to expound those words in their ordinary and natural sense. The words themselves are generally the best declaration of the intention of the legislature.' (emphasis added) [word in brackets added]

If in applying the *literal rule of statutory interpretation* the mischief is *not* properly addressed, the court *may* apply the *purposive rule of statutory interpretation* which is used to promote the general legislative purpose underlying the statute or section because the intention of the Parliament is ambiguous or unclear. Therefore, the '*purposive rule*' is used to interpret the 'true' purpose of the statute or section.

In *John Bare Maetia v R* (Unrep. Criminal Appeal Case No. 2 of 1994) Los JA of the Court of Appeal, sitting alone, stated at pages 2 – 3:

> 'It is desirable in my view to take a purposive approach to the interpretation of the Act here. [… T]his court must give a fair and liberal meaning of the word […] to attain the object of the Act. Such an interpretation is not unknown in Solomon Islands, see R –v- Kauwai (1980/81) SILR 108. for example.'

In *Club Freeway v Honiara Liquor Licensing Board* (Unrep. Civil Case No. 28 of 1998) Kabui J after referring to section 9(3) of the *Interpretation & General Provisions Act* (Ch. 85) stated at page 6:

> '[T]he Act should be interpreted in such a way that the object of the Act is attained. This is what is called the "purpose approach" in the interpretation of statutes.'

In *Honorable Christopher Columbus Abe v Minister of Finance & Attorney – General* (Unrep. Civil Case No. 197 of 1994) Muria CJ stated at pages 9 – 10:

> '*The Court must […] construe the words used so as to ascertain what Parliament had intended. But if in so doing the result is an absurdity, as in this case, then the Court is justified in going outside the words used by the statute in order to ascertain the intention of Parliament particularly here where it is plainly obvious that a drafting omission had been made.* On this approach of statutory interpretation Lord Scarman had this to say in *Stock –v- Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 238; [1978] 1 All E R 948 at 955:
>
> "If the words used by Parliament are plain, there is no room for the 'anomalies' test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake. If words 'have been inadvertently used, 'it is legitimate for the court to substitute what is apt to avoid the intention of the legislature being defeated…. This is an acceptable exception to the general rule that plain language excludes a consideration of anomalies, ie mischievous or absurd consequences … but mere 'manifest absurdity' is not enough: it must be an error (of commission of omission) which in its context defeats the intention of the Act."

> Lord Denning robustly put it this way in *Camden London Borough Council –v- Post Office* [1977] 1 WLR 892 at 897 when construing the words used in paragraph 8(1) of the Schedule to the General Rate Act, 1967:
>
> "*But that gives rise to such an absurd result that there must be some mistake in the drafting. Such mistakes do occur from time to time; and when they occur the courts must do what they can to put things right. I think the courts should correct these words* …."' (emphasis added)

In *Solomon Breweries Limited v Controller of Customs & Excise* (Unrep. Civil Case No. 218 of 1996) Muria CJ stated at page 14:

> 'As such the Court is entitled to prefer the interpretation which grants injustice and avoids anomaly and absurdity since the legislature never intended injustice or absurdity when it made the law in the first place. See Magin –v- Commissioner of Inland Revenue [1971] NZLR 591; Johnson –v- Moreton [1978] 3 WLR 538; Applin –v- Race Relations Board [1974] 2 WLR 541. I need only refer to what Lord Salmon stated in Johnson –v- Moreton where he said:
>
> "If the words of the statute are capable, without being distorted, of more than one meaning, the Court should refer the meaning which leads to a sensible and just result complying with the statutory objective and reject the meaning which leads to absurdity or injustice and is repugnant to the statutory objective."'

In *SCR No. 6 of 1984: Re Provocation* [1985] PNGLR 31 the Supreme Court applied the '*purposive*' rule of statutory interpretation. At pages 38 – 39 Amet J stated:

> 'I consider the expression of Lord Denning referred to and quoted by Wilson J [in *PLAR No. 1 of 1980* [1980] PNGLR 326] applicable and I adopt them also. [… In *Northman v Barnet London Borough Council* [1978] 1 WLR 220] Lord Denning stated at page 228:
>
> "[…] The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'. … In all cases now in interpretation of statutes we adopt such a construction as will 'promote the general legislative purpose' underlying the provision. It is no longer necessary for the judges to wring their hands and say: 'There is nothing we can do about it.' *Whenever the strict interpretation of a statute gives rise to an absurd and unjust situation [by applying the 'literal' rule], the judges can and should use their good sense to remedy it – by reading words in, if necessary – so as to do what Parliament would have done, had they had the situation in mind.*"' (emphasis added) [words in brackets added]

In *SCR No. 1 of 1985; Inakambi Singorom v Klaut* [1985] PNGLR 328 Kidu CJ, as a member of the Supreme Court, stated at page 241:

> 'Rules or maxims of interpretation of statutes are only guides and *must not* be thought of as substantive law. They are not inflexible rules to be applied without question. […]
>
> Whatever the rules or maxims of statutory interpretation say, one thing must not be lost sight of and that is that a clear parliamentary intention in legislation cannot be ignored or overruled by the courts.' (emphasis added)

STATUTORY INTERPRETATION

In *John Bare Maetia v R* (Unrep. Criminal Case No. 2 of 1994) Los JA, sitting as the Court of Appeal, stated at page 2:

> 'The counsel for appellant has also relied on a tool of statutory interpretation *expressio unius exclusio alterius* to submit that because the definition of goods specifically enumerates certain things and not birds, the Act specifically excludes any prohibition of exporting birds. I think with respect the maxim is helpful but it may inhibit expansion of thoughts and may obscure the purpose and a legislative scheme.'

In *R v Perfill, McDougall & John Bare Maetia* (Unrep. Criminal Case No. 32 of 1992) Muria CJ stated at pages 2 – 3:

> 'The maxim "*expressio unius exclusio alterius*" is no more than an aid to construction and must be watched since its application to the two contrasting statutes here concerned may well lead to a misconception of the rule. The rule is, however, a valuable tool but one which must be watched. As Wills J., stated in *Colquhoun -v- Brooks* (1887) 19 QBD 400, at 406:
>
> "I may observe that the method of construction summarized in the maxim 'expressio unius exclusio alterius' is one that certainly to be watched. Perhaps few so – called rules of interpretation have been more frequently misapplied and stretched beyond their due limits. The failure to make the "expressio" complete very often arises from accidents, very often from the act that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind; and the application of this and every other technical rule of construction varies so much under differing circumstances, and is open to so many qualification and exceptions, that is rarely that such rules help one to arrive at what is meant."
>
> On appeal to the Court of Appeal Lopes, LJ, (1888) 21 QBD 52 at p. 65) said:
>
> "The maxim '*expressio unius exclusio alterius*' has been pressed upon us. I agree with what is said in the Court below by Wills J., about the maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident and the maxim ought not to be applied, when its application, having regard to the subject – matter to which it is to be applied, leads to inconsistency or injustice."'

In *Cooper Brookes (Woollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 Gibbs ACJ of the High Court of Australia stated at page 304:

> 'There are cases where the result of giving words their ordinary meaning may be so irrational that the court is forced to the conclusion that the draftsman has made a mistake, and the cannons of construction are not so rigid as to prevent a realistic solution in such a case.'

In *JH Rayner (Mincing Lae) Limited v The Chief Collector of Taxes* [1993] PNGLR 416 Sheehan J, sitting alone, stated at page 422:

> '*When questions arise as to the interpretation of an act, the sole issue for the Court is to ascertain the true construction of a statute. There are, of course, various rules of construction, but these are not rules of law. They are aids only.*
>
> […]

> *All statutes must be construed to give effect to the intention of the legislature.* As that intention is to be gathered from the language employed […], courts will always look for express and clear language in statutes which confer or take away legal rights, impose taxes or charges, or alter clearly established principles of law or, indeed, legislate with regards to the jurisdiction of courts.
>
> The Australian High Court and the English House of Lords have both made very strong statements against interfering with the plain and ordinary meaning of statutory provisions. That injunction is to be held paramount, even if a statutory provision is seen on close examination (and depending on view point) to be "inadequate" or not totally "comprehensive" in some respect or another.
>
> Both courts, however, have left a door open to enable the judge to find solutions where totally irrational or anomalous results will defeat the statute and the perceived intention of Parliament. […] But it must be remembered that the overriding theme of the many decisions throughout the Commonwealth jurisdictions shows the continuing emphasis on the need for courts (and tribunals for that matter) to be wary of supplying "solutions" to supposed statutory deficiencies, and remind them that that is the function of the legislature.
>
> The decision to assign additional words or to interfere with the actual wording of a statute is, of course, never lightly taken. The difficulty facing courts is whether the solution to a perceived error, anomaly, or ambiguity is sufficiently clear to warrant the court supplying a solution to ensure the intent of the act is not frustrated, rather than draw attention to it for correction by legislation.
>
> In the *Cooper Brookes case* cited […], although confirming the general rule of following the words of an act, the decision was taken to correct what was seen as an anomaly in the statute under review. The court was not unanimous. That, perhaps, illustrates the difficulties in determining the point at which courts should refrain from supplying drafting alterations and leave correction to Parliament.
>
> […]
>
> *The central theme of rules of interpretation of statutes, […] remains, that words be given their normal and ordinary sense and that the meaning of statutes and their provisions are to be determined from the actual wording of the legislature. For all that this may be hedged around by decisions which permit courts to endeavour to ascertain the intention of Parliament in cases of anomalous or irrational results, these decisions do not in any way derogate from the principle rule. Departure from the clear and unambiguous wording may only be resorted to in plain and obvious cases where, without correction the objectives of the act itself would be totally defeated*.' (emphasis added)

When applying any rule of '*statutory interpretation*', the principles relating to '*Penal Statutes*' *must* also be considered.

See also: *Tikoro Muller v Attorney – General* [1983] SILR 259; *Joyce Tonawane v Kelly Wanefiolo* (Unrep. Civil Case No. 247 of 1991; Muria J; at page 4); *SCR No. 1 of 1985; Inakambi Singorom v Klaut* [1985] PNGLR 238; *The State v Danny Sanu, Namarai Walter, Iku Gagoro & Philip Haro* [1983] PNGLR 396; *Graeme Rundle v Motor Vehicles Insurance (PNG) Trust* [1978] PNGLR 44; *SCR No. 4 of 1985* [1985] PNGLR 320; *Placer Pty Ltd v The Independent State of Papua New Guinea* [1982] PNGLR 16; *The Minister for Lands v William Robert Frame* [1980] PNGLR 433 & *Saraswati v R* (1990) 172 CLR 1.

[3.4] Penal Statutes

[3.4.1] Principle Of Interpretation

A '*penal statute*' is a statute that includes offences for which a penalty can be imposed.

In *John Bare Maetia v R* (Unrep. Criminal Appeal Case No. 2 of 1994) Los JA, sitting as the Court of Appeal, stated at page 3:

> 'I have directed my mind to another aid to interpretation of statutes especially penal statutes. This rule of interpretation says where a meaning of a statute is ambiguous or at least it is susceptible to other meaning, the court *must* accept the meaning more favourable to the person who is affected.' (emphasis added)

In *William Douglas McCluskey v The Attorney – General & others* (Unrep. Civil Case No. 243 of 1993) Palmer J stated at page 6:

> 'The second aspect of statutory interpretation drawn to my attention relates to the interpretation of penal provisions. In the same book Statutory Interpretation in Australia, at page 164, the learned authors state:
>
> "What has been laid down in the modern cases is that the duty of the court is to interpret Acts according to the intent of the Parliament which passed them. While this statement is undoubtedly correct, the courts do nonetheless adopt a slightly different approach in regard to these types of Acts, particularly when they are confronted with a choice between two tenable views as to the meaning of an Act. *In regard to penal statutes, as is only proper, the courts are very careful to place the liberty of the subject in jeopardy only where the legislature has clearly so ruled.*"' (emphasis added)

In *Director of Public Prosecutions Reference (No. 1 of 1992); Director of Public Prosecutions Reference (No. 1 of 1993)* (1993) 65 ACrimR 197 Malcolm CJ and Walsh J, in their single judgment, stated at pages 203 – 204:

> '*It has long been said that penal statutes must be construed strictly*: see *Tuck & Sons v Priester* [1887] QBD 629 at 638. *Today, however, courts are reluctant to place undue emphasis on this principle of construction although the principle still applies*. In *Craies on Statute Law* (7th ed, 1971) the learned author says (at pp 532 – 533):
>
> "Where an enactment imposes a penalty for a criminal offence, a person charged against whom it is sought to enforce the penalty is entitled to the benefit of any doubt which may arise on the construction of the enactment. '*Where there is an enactment which may entail penal consequences, you ought not to do violence to the language in order to bring people within it who is not brought within it by express language*.' *On the other hand*, as said by A L Smith LJ in *Llewellyn v Vale of Glamorgan Ryl Co* [1898] 1 QB 473: '*when an Act (imposing a penalty) is open to two constructions, that construction ought to be adopted which is more reasonable and the better calculated to give effect to the expressed intention, which in this case is that the penalty shall be paid*'. And *while it is probably true that the principles of construction have been somewhat relaxed in formality nowadays, yet at the same time strictness of statement is still valuable, especially in a case where the result may be highly penal: and the procedure indicated by a penal Act must be closely followed*."

In *Adams* (1935) 53 CLR 563 Rich, Dixon, Evatt and McTiernan JJ said (at 567):

> "[…] No doubt, in determining whether an offence has been created or enlarged, the Court must be guided, as in other questions of interpretation, by the fair meaning of the language of the enactment, but when that language is capable of more than one meaning, or is vague or cloudy so that its denotation is uncertain and no sure conclusion can be reached by a consideration of the provisions and subject matter of the legislation, then it ought not to be construed as extending any penal category."

In *Beckwith* (1976) 135 CLR 569, notwithstanding that Gibbs J acknowledged that the rule had diminished in importance in recent times, he emphasized the significance of it where there is real doubt as to the meaning of the enactment. He specifically said (at 567 – 577):

> "*The rule formerly accepted, that statutes creating offences are to be strictly construed, has lost much of its importance in modern times. In determining the meaning of a penal statute the ordinary rules of construction must be applied, but if the language of the statute remains ambiguous or doubtful the ambiguity or doubt may be resolved in favour of the subject by refusing to extend the category of criminal offences […]. The rule is perhaps of last resort*."' (emphasis added)

See also: *R v Evans* (1964) 49 CrAppR 10 at page 15; *Baiza Tadu Avona v The State* [1986] PNGLR 148; *SCR No. 6 of 1984: Re Provocation* [1985] PNGLR 31, per McDermott J at page 35 & Amet J at page 38; *The State v Danny Sunu, Namarai Walter, Iku Gagoro & Phillip Haro* [1983] PNGLR 396 at pages 407 & 414; *SCR No. 1 of 1981* [1981] PNGLR 151 at page 154; *Kelsey v Hill* [1995] 1 QdR 182; *Carrol v Mijovich* (1991) 58 ACrimR 243, per Handley LA at page 257; *Murphy v Farmer* (1988) 165 CLR 19, per Deane, Dawson & Gaudron JJ at pages 28 - 29; *Waugh v Kippen* (1986) 160 CLR 156; *Davern v Messel* (1984) 155 CLR 21, per Gibbs CJ at page 31 & *Smith v Corrective Services Commission (NSW)* (1980) 147 CLR 134, per Stephen, Mason, Murphy, Aickin & Wilson JJ at page 139.

[3.4.2] Mens Rea -- Intention

In *B (A Minor) v Director of Public Prosecutions* [2000] 2 CrAppR 65 [[2000] 2 AC 428; [2000] 2 WLR 452; [2000] 1 AllER 833; [2000] CrimLR 402] Lord Steyn, with whom Lord Mackay of Clashfern concurred, stated at page 79:

> 'In successive editions of his classic work, Professor Sir Rupert Cross cited as the paradigm of the principle the "presumption" that *mens rea* is required in the case of statutory crimes": *Statutory Interpretation* 3rd ed. (1995), p. 166. Sir Rupert explained that such presumptions are of general application and are not dependent on finding an ambiguity in the text.' (emphasis added)

Lord Nicholls of Birkenhead, with whom Lords Irvine of Lairg LC and Lord Mackay of Clashfern concurred, stated at page 68:

> '[T]he starting point for a court is the established common law presumption that a mental element, traditionally labelled *mens rea*, is an essential ingredient unless Parliament has indicated a contrary intention either expressly or by necessary implication. *The common law presumes that, unless Parliament indicated otherwise, the appropriate mental element is an unexpected ingredient of every statutory offence*. On this I need do no more than refer to Lord Reid's magisterial statement in the leading case of *Sweet v Parsley* (1969) 53 CrAppR 221, 224, [1970] AC 132, 148 – 149:

> "… there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did. That means that whenever a section is silent as to *mens rea* there is a presumption that, in order to give effect to the will of Parliament, we must read in words appropriate to require *mens rea* … it is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that that is not necessary."' (emphasis added)

See also: *John Maetia Kaliue v R* [1990] SILR 23; *R v K* [2001] 1 CrAppR 493; *Harrow London Borough Council v Shah & another* [1999] 2 CrAppR 457; *R v Coles* [1995] 1 CrAppR 157; [1994] CrimLR 820; *R v Bezzina, Codling & Elvin* (1994) 99 CrAppR 356 & *Gammon (Hong Kong) Ltd v Attorney – General of Hong Kong* [1985] AC 1; [1984] 3 WLR 437; [1984] 2 AllER 503; [1984] CrimLR 479.

[3.4.3] Penal Code Specifically

The '*long title*' of the *Penal Code* (Ch. 26) is:

> 'An Act to Establish a Code of Criminal Law.'

Section 3 of that *Code* states:

> 'This Code *shall* be interpreted in accordance with the Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

'The Penal Code is intended to be an exhaustive statement of the law. That is to say, it prescribes not only the elements of offences necessary to find a person guilty, but it also establishes any defences in law', as commented by Kapi JA in *Toritelia v R* [1987] SILR 4 at page 30.

'[T]he Penal Code, together with so much of the Common Law as it incorporates, is a complete statement of the law in relation to the offences with which it deals', held per Connolly AJ, with whom Wood CJ concurred, in *Loumia v Director of Public Prosecutions* [1985 – 86] SILR 158 at page 163.

In *R v Wong Chin Kwee & others* [1983] SILR 78 Daly CJ held at pages 80 – 81:

> '[T]he starting point in Solomon Islands in considering questions of general criminal liability must be our own Penal Code ("the Code"). The time has come when we must grapple with the terms of the Code and not rely upon common law doctrines which may have been replaced by it.
>
> Part IV of the Code deals with General Rules as to Criminal Responsibility. In the codes of Queensland and Western Australia where similar provisions occur, express provision has been made (section 36 in each code) to apply these General Rules "to all persons charged with an offence against the Statute Law". We, in common with Tasmania, have no such provision. However in view of the wide terms of the provisions in Part IV and the fact that the

word "offence" (earlier defined as "an act, attempt or omission punishable by law": see section 4) is used in a number of sections, the only reasonable interpretation is that Part IV applies to all offences against law. Again there is no provision making the Penal Code exclusive such as in contained in section 2 of the Criminal Code Act 1899 of Queensland. However as this Court held in the preliminary Ruling in R v Ngena [… [1983] SILR 1], the Penal Code is a comprehensive statute of Solomon Islands and Schedule 3 of the Constitution provides that received law shall, in the case of received statute be "subject" to a Solomon Islands statute (Para. 1) and, in the case of principles and rules of common law and equity, shall apply –

"Save in so far as

(a) they are inconsistent with … any Act of Parliament; or

(b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time ….." (Para. 2(1)).

In my judgment where there is a comprehensive Code of Solomon Islands dealing with matters such as general rules as to criminal responsibility, even if there is no direct inconsistency, it is incumbent on the Court to apply that Code instead of relying on the common law rules on the basis that the common law rules are "inapplicable or inappropriate" […] in the circumstances of Solomon Islands. Adapting what this Court said in Ngena […], it is the intention of the Constitution that the common law rules should "wither away" when the Solomon Islands legislature has legislated for Solomon Islands in relation to every subject. Parliament so legislated comprehensively in relation to the criminal law when it enacted the Penal Code. *Thus I also find that the Penal Code is exclusive in relation to matters dealt with therein, including general rules as to criminal responsibility*.' (emphasis added)

The law relating to '*Criminal Responsibility*' is examined commencing on page **428**.

[3.5] Extraterritorial Effect

Section 7 of the *Interpretation & General Provisions Act* (Ch. 85) states:

'An Act extends to the whole of Solomon Islands in its application.'

In *William Douglas McCluskey v The Attorney – General & others* (Unrep. Civil Case No. 243 of 1993) Palmer J stated at pages 5 - 6:

'My attention has been drawn to the writings of *D.C. Pearce and R.S. Geddes* in their book titled "*Statutory Interpretation in Australia*" Third Edition, Butterworths, 1988. At chapter 5 of their book they described certain legal assumptions. These are "…. *assumptions based on the expectation that certain tenets of our legal system will be followed by the legislature*." (Ibid at p.97)

One of these is the assumption that parliament will not pass legislation that applies to people in other countries, hence a presumption is adopted by courts that legislation will not have extraterritorial effect. (Ibid at p.97).

A clear statement of this presumption in the Australian jurisdiction can be seen in the judgment of O'Connor J in Jumbunna Coal Mine NL v Victoria Coal Miner's Assoc. (1908) 6 CLR 309 at 363:

"*In the interpretation of general words in a Statute there is always a presumption that the legislature does not intend to exceed its jurisdiction. Most statutes, if their general words were taken literally in their widest sense, would apply to the whole world, but they are always read being prima facie restricted in their operation within territorial limits*."

I do not see why that presumption should not apply in the interpretation of statutes in Solomon Islands especially when the supreme law of the country already has that presumption ingrained in its set – up.' (emphasis added)

See also: *R v Martin & others* (1956) 40 CrAppR 68; *R v Naylor* (1960) 44 CrAppR 69 & sections 5 & 6 of the *Penal Code* (Ch. 26).

[3.6] International Obligations

Section 12 of the *Interpretation & General Provisions Act* (Ch. 85) states:

'A construction of an Act which is inconsistent with the international obligations of the Crown is to be preferred to a construction which is not.'

[3.7] Use of Bills / Hansard / Explanatory Notes / Earlier Enactments

Section 59(1) of the *Constitution* states:

'Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Solomon Islands.'

When an Act is initially written it is called a 'Bill' which contains 'clauses' and not 'sections'. However, the appearance of a 'Bill' is similar to an Act. It is drafted by the Office of the Attorney – General, after the writing of it has been approved by the Cabinet.

During the course of writing a 'Bill' a number of drafts may have been written prior to it receiving the requisite approval for the Cabinet. Such drafts should *not* be used for the purpose of '*statutory interpretation*', see *Commissioner for Prices & Consumer Affairs v Charles Moore (Aust) Pty Ltd* (1977) 139 CLR 449; (1977) 14 ALR 485. See however: *Duggan v Mirror Newspapers Ltd* (1978) 142 CLR 583; (1978) 22 ALR 439. After receiving that approval the Office of the Attorney – General arranges for the printing of the 'Bill' with explanatory notes and distributes such material to the Members of Parliament.

Explanatory notes are issued by the government department responsible for the administration of the 'proposed' Act. Such notes explain what the Minister responsible believes the 'purpose' of the 'proposed' Act. Such notes should *not* be used for the purpose of '*statutory interpretation*', see *Re Jauncey* [1980] QdR 335 at pages 336 - 342. Furthermore, in *Collector of Customs v Savage River Mines* (1988) 79 ALR 258 at page 263, the Full Court of the Federal Court of Australia stated:

> 'Direct evidence from a public servant as to the policy of legislation is unlikely to be helpful in the process of statutory construction. It is difficult to envisage any circumstances in which evidence could rise above the level of one person's opinion on the matter.'

The Minister responsible for the 'Bill' will 'formally 'present' it with the explanatory notes to Parliament, which is referred to as the '*First Reading*'.

The Opposition and interested parties are then *generally* given an opportunity to discuss the 'Bill'. It is then arranged for a suitable time to commence parliamentary debate in respect of the 'Bill'. During the course of such debate the *intention* of the 'proposed' Act 'should' become clear.

The Minister responsible in the course of his/her 'Second Reading Speech' will be expected to explain the provisions of the 'Bill' in some 'limited' detail. Amendments *may* be voted on and passed or rejected at this stage. That process is formally referred to as the '*Second Reading*'.

A '*Second Reading Speech*' should *not generally* be used for the purpose of '*statutory interpretation*', see *R v Secretary of State for the Environment, Transport & the Regions, Ex parte Spath Holme Ltd* [2001] 1 AllER 195; [2001] 2 WLR 15.

During the course of the parliamentary debate a 'Bill' can be referred to a parliamentary committee, or to Parliament as a 'Committee of the Whole', for further discussion. A report from the parliamentary committee is then made to Parliament. Such reports should *not* be used to directly interpret an Act, but *may* be used to ascertain the *mischief*. ie., purpose, of the Act *and* its historical background, see *Wacol Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 & *Totalisator Agency Board v Wagner Cayley* [1963] WAR 180.

During the course of the '*Third Reading*' at some later time:

- debate may continue; and
- the 'Bill' is voted on and either passed or rejected.

Section 59 of the *Constitution* states (in part):

> '(2) [W]hen a Bill has been passed by Parliament it shall be presented to the Governor – General who shall assent to it forthwith on behalf of the Head of State, and when such assent is given the Bill shall become law.
>
> (3) No law shall come into operation until it has been published in the Gazette but Parliament may postpone the coming into operation of any such law and may make laws, subject to section 10(4) of this Constitution with retrospective effect.
>
> (4) All laws made by Parliament shall be styled "Acts of Parliament" and the words of enactment shall be "Enacted by the National Parliament of Solomon Islands".'

See also: sections 60 to 62 of the *Constitution*.

Section 20 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> '(1) Every Act made after this Act shall be published in the Gazette.

(2) A provision of an Act, made after this Act, comes into operation on the date of the publication of the Act in the Gazette or, if it is provided that the Act (including the provision) or the provision is to come into operation on some other date, on that other date.

(3) Any provision of an Act, made after this Act, which makes provision with respect to the coming into operation of all or any of the other provisions of the Act comes into operation on the date of the publication of the Act in the Gazette.

(4) When a provision of an Act comes into operation on a particular day, it is in operation as from the beginning of that day.'

Section 21 of the *Interpretation & General Provisions Act* (Ch. 85) states:

'A copy of an Act printed by the Government Printer which includes a date purporting to be the date on which the Act, or any provision of the Act, came or will come into operation is evidence that the Act or provision came, or will come, into operation on that date.'

Hansard which is kept in bound volumes is the written record of everything said in Parliament, including the '*First, Second and Third Readings*'. Such '*parliamentary material*' *may* be used for the purpose of '*statutory interpretation*'. In *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 [[1992] 3 WLR 1032; [1993] 1 AllER 42] the House of Lords held per Lord Browne – Wilkinson at page 634:

'[P]arliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words.'

As regards the interpretation of '*Subsidiary Legislation*', refer to page **63**.

In *The State v Danny Sunu, Namarai Walter, Iku Gagoro & Philip Haro* [1983] PNGLR 396 Bredmeyer J, sitting alone, stated at page 404:

'I consider the Minister's second reading speech – where the Bill is a government one – may be read and used where the text of the statute is ambiguous and where the Minister's speech clearly discloses the legislative intention. I believe that the use of Hansard by Murphy J in *Sillery v The Queen* (1981) 35 ALR 227 at 232 – 233 was an apt and proper use and one which helped determine the issue in dispute.

I consider it permissible to look at Hansard in this case because the amending Act has created two paradigm ambiguities.'

In *Graeme Rundle v Motor Vehicles Insurance (PNG) Trust* [1987] PNGLR 44 Kapi DepCJ, sitting alone, stated at page 47:

'The intention of the Parliament is revealed in the words used in the statute. It is a well settled principle of interpretation that a court needs only to look at the words and interpret what they mean. A court may not look at *Hansard* and the reasons for these are stated by Lord Reid in *Beswick v Beswick* [1968] AC 58. However, there is an exception to this rule which is also stated by Lord Reid in *Warner Metropolitan Police Commissioner* [1969] 2 AC 256 at 279:

> "And the authorities show that it is generally necessary to go behind the words of the enactment and take other factors into consideration. That being so the layman may well wonder why we do not consult the Parliamentary Debates, for we are much more likely to find the intention of Parliament there than anywhere else … *I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other*."
>
> I followed this proposition in *Minister for Lands v Frame* [1980] PNGLR 433 at 462 and also see Pratt J at 488.' (emphasis added)

In *Balou v Kokosi* [1982] SILR 94 Daly CJ stated at page 95:

> 'As this court said in R v Kauwai (1980/81) SILR 108 at p. 113 the Legislature "must be taken to have known the law at that time and to be using the words in the sense they have at the time (the Act) was enacted".
>
> It is for this reason that it is permissible to look at *earlier enactments* dealing with marriage in order to see what was regarded as the law as to marriage when the Affiliation Act was passed.' (emphasis added)

See also: *Re: E & D* [1984] PNGLR 278; *Owen* (1996) 87 ACrimR 213 at page 217; *Hoare v R* (1989) 86 ALR 361 at pages 369 – 370; *Alexandra Private Geriatric Hospital Pty Ltd v Blewett* (1984) 56 ALR 265; *Kaviridias v Commonwealth Ombudsman* (1984) 54 ALR 285; *FCT v Whitfords Beach Pty Ltd* (1982) 39 ALR 521; *Wacando v Commonwealth* (1981) 148 CLR 1; (1981) 37 ALR 317 & *Duggan v Mirror Newspapers Ltd* (1978) 142 CLR 583; (1978) 22 ALR 439.

[3.8] Meaning of Words & Phrases

[3.8.1] Introduction

The meaning of '*words*' and '*phrases*' used in a statute is a '*question of law*' and *not* a question of fact.

In *Pearlman v Keepers & Governors of Harrow School* [1979] QB 56 Lord Denning MR stated at page 67:

> 'However simple the words, their interpretation is a *matter of law.*' (emphasis added)

In *John Sogabule v Sonny Maezama & SC Tahili* (Unrep. Civil Case No. 383 of 1995) Muria CJ stated at page 3:

> 'Words which are ordinary English words *must* be given their ordinary meaning.' (emphasis added)

A Court may take '*judicial notice*' of the meaning of ordinary words, see *Bendixen v Coleman* (1943) 68 CLR 451.

The law relating to '*Judicial Notice*' is examined commencing on page **333**.

In *Collector of Customs v Agfa – Gevaert Limited* (1995 – 96) 186 CLR 389 the High Court of Australia stated at page 396:

> 'The meaning attributed to individual words in a phrase ultimately dictates the effect or construction that one gives to the phrase when taken as a whole and the approach that one adopts in determining the meaning of the individual words of that purpose is bound up in the syntactical construction of the phrase in question. In *R v Brown* [[1996] 1 AC 543 at page 561], Lord Hoffman said:
>
> "The fallacy in the Crown's argument is, I think, one common among lawyers, namely to treat the words of an English sentence as building blocks whose meaning cannot be affected by the rest of the sentence … This is not the way language works. The unit of communication by means of language is the sentence and not the parts of which it is composed. The significance of individual words is affected by other words and the syntax of the whole."' [words in brackets added]

In *Yager v R* (1977) 139 CLR 28 Barwick CJ of the High Court of Australia commented at page 34:

> 'Once the meaning is assigned, the further question whether some substance or thing in fact falls within the description of the statute properly understood is a matter of fact to be determined by the tribunal of fact.'

[3.8.2] Read In Context

In *Solomon Sunaone Mamaloni v Attorney – General (First Respondent) & the Governor – General (Second Respondent)* (Unrep. Civil Case Nos. 290 & 291 of 1993) Palmer J stated at pages 4 – 5:

> 'A certain word used in a statute may have several meanings. However, when that word is considered within the context in which it is found, in the section or within the scheme of the whole Act, then the true or correct meaning should become apparent. A common phrase often heard is that 'words must be read within their context' or the 'Act must be read as a whole' [see section 9(2) of the *Interpretation & General Provisions Act* (Ch. 85)]. In his book 'Statutory Interpretation', by Donald Gifford at page 61 he made the following statements:
>
> "*No part of an Act can be considered in isolation from its context – the whole must be considered.* 'In the complex task of wrestling and true construction of an Act it cannot be compartmentalized and scrutinized molecularly. An Act is not to be read as though each word and phrase was a watertight compartment, and in such a way as to defeat the manifest purpose of the Act. The various provisions must be harmonized and it may be necessary for this purpose to read down general words – but if so they should not be read down any further than is absolutely necessary to achieve that harmony. The words used must be construed having regard to the quality of the Act revealed by a consideration of all its provisions and the meaning of the provision is to be gathered from the statute as a whole. The rule allows the court to avoid absurdity and anomaly as well as repugnancy and inconsistency."
>
> In Halsbury's Laws of England', 4th Edition Vol. 44 at paragraph 871, the learned author states:

"*Although the words of a statute are normally to be construed in their ordinary meaning, due regard must be had to their subject matter and object, and to the occasion on which and the circumstances with reference to which they are used and they should be construed in the light of their context rather than in what may be either their strict etymological sense or their popular meaning apart from that context.* If the sense of a word can not be so determined, then recourse need not be had to its use in other sections of the statute or in other statutes."

And continuing on para. 872:

"*For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute.*

Thus a statute should be construed as a whole so as, so far as possible, to avoid any inconsistency or repugnancy either within the section to be construed or as between that section and other parts of the statute. The literal meaning of a particular section may in this way be extended or restricted by reference to other sections and to the general purview of the statute."

In *Attorney General –v- Prince Ernest Augustus of Hanover* [1957] AC 436 at 461 quoted in Francis Bennion's book 'Statutory Interpretation' Second Edition at page 430, Viscount Simonds said:

"… *words, and particularly general words, cannot be read in isolation: their colour and context are derived from their context*. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense…. Its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those other legitimate means, discern the statute was intended to remedy …… I must admit to a consciousness of inadequacy if I am invited to interpret any part of any statute without a knowledge of its context in the fullest sense of the word."' (emphasis added)

In *K & S Lake Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509 Mason J of the High Court of Australia commented at page 514:

'[T]o read the section in isolation from the enactment of which it forms a part is to offend against the *cardinal rule of statutory interpretation that requires the words of a statute to be read in their context.*' (emphasis added)

In *Fox v Wade* [1978] VR 362 McInerney J stated at page 366:

'While the maxim *noscitur a sociis* must not be pushed to any great length, it does express a cannon of construction or an aid to construction, namely, that *words may take their colour from their context*.' (emphasis added)

In *Lennon v Gibson & Howe Ltd* [1919] AC 709 Lord Shaw stated at page 771:

'*In the absence of any context indicating a contrary intention* it may be presumed that the Legislature intended to attach the *same meaning to the same words when used in a subsequent statute in a similar connection*.' (emphasis added)

See also: *SCR No. 4 of 1985* [1985] PNGLR 320 at page 324; *The State v Danny Sinu, Namarai Walter, Iku Gagoro & Philip Haro* [1983] PNGLR 396 at page 414; *Taikato v R* (1996) 139 ALR 386 (HCA); *Boughey v R* (1986) 161 CLR 10 per Brennan J at page 30; *Ashcroft* (1987) 38 ACrimR 327 at page 328 & *Attorney – General v Brown* [1920] 1 KB 773.

The importance of ensuring that words and phrases are interpreted according to their context should *not* be underestimated simply because the context of words or phrases may vary from statute to statute. In some instances a word or phrase may be given a 'deemed' meaning and therefore such word or phrase should *not* be given its natural and ordinary meaning. The law relating to '*Deemed Meanings*' is examined commencing on page **56**.

[3.8.3] Defining Words & Phrases

'Attention was drawn to various cases and statutes, but cases *must* be read and statutes *must* be construed with regard to the evils that they are expected to overt', see *R v Collinson* (1931) 23 CrAppR 49 at page 50. (emphasis added)

When trying to define a '*word*' or '*phrase*' the following procedure should be followed:

1. ***Refer to the definition section/s in the statute in question.***

Section 15 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Definitions and rules of interpretation in an Act apply to the provisions containing them as well as to the other provisions of the Act.'

See for example section 4 of the *Penal Code* (Ch. 26).

In *Gibb v Commissioner of Taxation* (1966) 118 CLR 628 [[1967] ALR 527] Barwick CJ & McTiernan & Taylor JJ, in a single judgment, stated at page 634:

> 'The function of a definition clause in a statute is merely to indicate that when particular words or expressions the subject of the definition are found in the statute under consideration, they are to be understood in the defined sense.'

In *Brutus v Cozens* [1973] AC 854 Lord Reid stated at page 861:

> 'No doubt a statute may contain a definition – which incidentally often creates more problems than it solves – but the purpose of [such] a definition is to limit or modify the ordinary meaning of a word […].' [word in bracket added]

See also: *Gini v University of Technology & Pearce & Papua New Guinea University of Technology & Independent State of Papua New Guinea* [1991] PNGLR 201 at page 204.

Refer also to:

- the section which examines '*Acts In Pari Materia*' at page **62**; and
- the section which examines '*Deemed Meanings*' commencing on page **56**.

2. ***Refer to section 16 of the Interpretation & General Provisions Act (Ch. 85).***

That section provides the definitions of a number of words and phrases. ie., '*Deemed Definitions*' and commences with the words, 'In an Act --'

Section 2 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> '(1) This Act applies to the interpretation of and otherwise in relation to:
>
> (a) *this Act*;
>
> (b) *any other Act made before the commencement of this Act, except in so far as a contrary intention appears in this Act or the other Act*; and
>
> (c) *any other Act made after the commencement of this Act, except in so far as a contrary intention appears in the other Act.*'
>
> (2) Part X applies to subsidiary legislation, whether made before or after the commencement of this Act, except in so far as a contrary intention appears in this Act or in the Act under which the subsidiary legislation is or was made.
>
> (3) *The reference in subsection (1)(b) to "other Act" and in subsection (2) to "the Act" includes a reference to an Ordinance* which may, by virtue of section 3 of the Citation of Ordinances Act 1978, be cited as an Act.' (emphasis added)

3. *Refer to any relevant Solomon Islands case law which may have assigned a definition for the word or phrase in question.*

In *R v Chard* [1984] AC 279 Lord Scarman stated at page 294:

> 'I respectively agree with my noble and learned friend that it would be wrong to extract from the speeches of their Lordships in *Barras v Aberdeen Steam Trawling and Fishing Co Ltd* [1933] AC 402 an inflexible rule of construction to the effect that where once certain words in an Act of Parliament have received a *judicial construction* in one of the superior courts and the legislature has repeated them without alteration in a *subsequent statute*, the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given them.' (emphasis added)

See also: *SCR No. 6 of 1984; Re Provocation* [1985] PNGLR 31, per Los J at page 42; *Maxwell Arthur Schliebs v H Singh* [1981] PNGLR 364, per Miles J at page 369 & *The Geelong Harbour Trust Commissioner v Gibbs, Bright & Co* (1970) 122 CLR 504, per Barwick CJ at page 514.

Therefore, it should *not* be assumed that the meaning assigned to words and phrases in one statute by courts can be applied to other statutes with the same words or phrases, without caution.

Refer also to:

- the section which is titled '*Judicial Precedent & Common Law*' commencing on page **7**;
- the subsection which examines the need for words & phrases to be '*Read In Context*' commencing on page **47**; and
- the section which examines '*Acts In Pari Materia*' commencing on page **62**.

4. ***Refer to overseas case law with caution. In that regards reference can be made to a 'legal' dictionary and legal textbooks.***

In *R v Lennard* [1984] 1 QdR 1 Macrossan J commented at page 9:

> 'It is, of course, not a permissible exercise in statutory interpretation to look at *differently constructed statutes in other jurisdictions* and assume that they necessarily provide a guide to the interpretation of our own legislation which may well differ in some of its aims.' (emphasis added)

That principle obviously applies to Solomon Islands.

However, as regards the interpretation of the *Penal Code* (Ch. 26), section 3 of that *Code* specifically states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in England criminal law and shall be construed in accordance therewith.' (emphasis added)

5. ***Refer to a 'respected' dictionary' and / or 'legal dictionary' and / or 'legal textbook', with caution.***

The following rules however apply to the use of a 'dictionary', 'legal dictionary' or 'legal textbook' as an aid in the interpretation of words or phrases:

- Caution *must* always be observed when defining a phrase because the interpretation of separate words of a phrase may *not* result in achieving its correct meaning, see *Lee v The Showmen's Guild of Great Britain* [1952] 2 QB 329;

- Dictionaries and textbooks which are 'respected' should only be used. As there is *no* 'official' dictionary or textbook a court will resort to a dictionary and / or textbook which it respects.

  In *Gini v University of Technology & Pearce New Guinea University of Technology & Independent State of Papua New Guinea* [1991] PNGLR 201 Doherty J, sitting alone, stated at page 204:

  > '[Since the word …] is not defined in the *Papua New Guinea University of Technology Act* itself nor in the *Interpretation Act*, it should be given its normal meaning […] from the *Penguin English Dictionary* […].' (emphasis added) [words in brackets added]

  See also: *Stone v Ross; Ex parte Stone* [1976] QdR 219; *Falconer v Pederson* [1974] VR 185 at pages 185 – 189 & *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287; and

- Synonyms, ie., words of a similar meaning, should *not* be interpreted.

In *Brutus v Cozens* [1973] AC 854 Lord Reid stated at page 861:

> 'When considering the meaning of a word one often goes to a dictionary. There one finds other words set out. And if one wants to pursue the matter and find the meaning of those other words the dictionary will give the meaning of those other words in still further words which often include the word for which meaning one is searching.
>
> No doubt the court could act as a dictionary. It could direct the tribunal to take some word or phrase other than the word in the statute and consider whether that word or phrase applied to or covered the facts proved.
>
> *But we have been warned time and again not to substitute other words for the words of a statute. And there is very good reason for that. Few words have exact synonyms. The overtones are almost always different.*
>
> Or the court could frame a definition. But they again the tribunal would be left with words to consider. No doubt a statute may contain a definition – which incidentally often creates more problems than it solves – but the purpose of a definition is to limit or modify the ordinary meaning of a word […].' (emphasis added)

See also: *The State v Alan Bekau* [1982] PNGLR 119 at page 121 & *Traders Prudent Insurance Co Ltd v The Register of the Worker's Compensation Commission of New South Wales* [1971] 2 NSWLR 513 at pages 515 – 516 & 519 – 522.

It therefore follows by virtue of the abovementioned process that reference should only be made to a 'respected' dictionary, legal dictionary or legal textbook, if:

- the particular word or phrase is *not* defined in the statute in question or a statute that can be read '*in pari materia*' with it. In that regard refer to page **62**;
- the particular word or phrase is *not* defined in the *Interpretation & General Provisions Act* (Ch. 85);
- there is *no* appropriate Solomon Islands case law which has interpreted the particular word or phrase; and
- there is *no* other case law which has interpreted the particular word or phrase that was considered appropriate.

[3.8.4] Current Meaning & Present Context

Section 9(1) of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'An Act speaks from time to time.'

The modern approach to statutory interpretation is to give words and phrases their current meaning, the so – called '*Act Is Always Speaking*' approach.

In *R v Ireland & R v Burstow* [1998] 1 CrAppR 177 [[1998] AC 147] Lord Slynn of Hadley, with whom the other Lordships concurred, stated at page 186:

> 'Bearing in mind that statutes are usually intended to operate for many years it would be most inconvenient if courts could never rely in difficult cases on the current meaning of statutes. Recognising the problem Lord Thring, the great Victorian draftsman of the second half of the last century, exhorted draftsman to draft so that "An Act of Parliament should be deemed to be always speaking": *Practical Legislation* (1902), p. 83; see also *Cross*, *Statutory Interpretation* (3rd ed., 1995), p. 51; *Pearce and Geddes*, *Statutory Interpretation in Australia* (4th ed., 1996), pp. 90 – 93. In cases where the problem arises it is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions. Statutes dealing with a particular grievance or problem may sometimes require to be historically interpreted. But the drafting technique of Lord Thring and his successors have brought about the situation that statutes will generally be found to be of the "always speaking" variety: see *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1982] AC 800 for an example of an "always speaking" construction in the House of Lords.'

[3.8.5] Consistent Meaning

Section 11 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Where a word or an expression is defined in an Act for any purpose then for that purpose all grammatical variations and cognate and related expressions are to be understood in the same sense.'

The general rule is that where the same word or phrase appears at different places in a statute its meaning is presumed to be the same, see *Khan v Attorney – General & Island Enterprises Limited v Attorney – General* [1984] SILR 105 & *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450.

However, in *R v Lynsey* [1995] 2 CrAppR 667 [[1995] 3 AllER 654] the Court of Appeal stated at page 672:

> 'Draftsmen after all sometimes make mistakes. In Benion *Statutory Interpretation* (2nd ed., 1992) at p. 417 the following passage occurs:
>
> "*Failure to keep to the definition*. The interpreter needs to remember that drafters are fallible. Richard Robertson (*Definition* (1992) p. 64) said:
>
> 'In stipulating a meaning for a word a writer demands that his read shall understand the word in that sense whenever it occurs in that work. The writer thereby lays upon himself the duty of using the word only in that sense and tacitly promises to do so and tacitly prophesies that he will do so. But sometimes a writer does not use the word only in the sense he has stipulated, then his stipulation implied a false promise and a false prediction.'
>
> *Where it is clear that the drafter has forgotten the definition in a particular place where the defined term occurs, the court may need to give the term its ordinary meaning*."' (emphasis added)

See also: *Scott v Commercial Hotel Merbein Pty Ltd* [1930] VR 25 & *Murphy v Farmer* (1988) 79 ALR 1.

[3.8.6] Shall & Must

In *Re Griffiths* [1991] 2 QdR 29 Bryne J commented at page 33:

> 'In legislation, "shall" ordinarily signifies *must*. But like all words, its meaning takes colour from its *context*. A general disposition in favour of construing "shall" as obligatory cannot prevail over other considerations plainly evidencing a contrary legislative intent.' (emphasis added)

See also: *Ex parte Hinds & others, Re Penboss & others* [1972] 2 NSWLR 542, per Stanley J at page 552 & *Tasker v Fullwood* [1978] 1 NSWLR 20 at page 23.

[3.8.7] May & May Not

In *Mobil Oil Australia Pty Ltd v Ronnie Kwaeria* (Unrep. Civil Appeal Case No. 68 of 2001) Palmer J stated at pages 1 – 2:

> '*Whilst it is accepted that the word "may" denotes the exercise of discretionary power there may be circumstances or situations in which that discretionary element is removed*. Earl Cairns LC pointed this out in Frederic Guilder Julius v The right Rev. The Lord Bishop of Oxford (1880) 5 App. Cas. 214 at pages 222, 223:
>
> "But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed, to exercise that power when called upon to do so."
>
> See also [the] statement of Lopes LJ [in] In re Baker, Nichols v Baker (1890) 44 Ch. D. 262 at p. 273:
>
> "… *the word "may" is beyond all question potential, it implies a power; but, if it is coupled with a duty on the Court or the person to whom it is given to use that power in a certain particular way, it then no doubt becomes imperative*."
>
> The word "may" in subsection 6(3) cannot be considered in isolation to the word "not". The use of the word "not" which follows immediately the word "may" in my respectful view, removes any discretionary element associated with the word "may". When used together they denote the denial of a power or permission which otherwise would have been available had the word "not" been added. […] In Black's Law Dictionary, sixth edition, *the phrase "may not" is defined as:*
>
> "*A phrase used to indicate that a person is not permitted to do or to perform some act*."' (emphasis added) [word in brackets added]

[3.8.8] And & Or

Words joined by 'and' are regarded as being '*cumulatives*', whereas words joined by 'or' are regarded as '*alternatives*', *unless* there is an obvious *mistake* when interpreting the legislation.

Therefore,

- if the word 'or' appears in a section as follows:

  '(a) […];

  (b) […]; or

  (c) […]',

the *prima facie* assumption is that the section will be satisfied if either subsections (a), (b) or (c) is satisfied; and

- if the word 'and' appears in a section as follows:

  '(a) […];

  (b) […]; and

  (c) […]',

the *prima facie* assumption is that the section will be satisfied only if all subsections are satisfied.

See: *Jennings v Pryce* (1984) 30 NTR 39 at pages 39 – 42.

However, mistakes are recognized by the courts and statutes with mistakes are generally interpreted so as to rectify the mistake if possible, thereby applying the '*purposive rule*'.

In *Allardyce Lumber Company Limited, Bisili, Roni, Sakiri, Hieli, Sasae, Poza & Zongahite v Attorney – General, Commissioner of Forest Resources, Premier of the Western Province & Paia* [1988 – 89] SILR 78 Ward CJ stated at pages 95 – 96:

> 'Alternatively, it is suggested this is a case where the word "and" at the end of paragraph (a) should be read as "or". As with all rules of statutory interpretation, it only comes into play if the wording of the act is not clear but it is a clearly accepted rule that in order to carry out the intention of the Legislature, it may be necessary to read one for the other.
>
> In Green v Premier Glynrhonwy State Co [1928] 1 KB 561, Sumner LJ said at page 568:
>
> "*You do sometimes read 'or' as 'and' in a statute … but you do not do it unless you are obliged because 'or' does not generally mean 'and' and 'and' does not generally mean 'or'*."' (emphasis added)

See also: *ET & CT v Director of Child Welfare* [1984] PNGLR 25 at page 32; *Gillespie v Ford* (1978) 19 ALR 102 at pages 106 – 108; *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616; *Ex parte Melvin* [1980] QdR 391 at page 393 & *Re The Licensing Ordinance* (1968) 13 FLR 143, per Blackburn J at page 146.

[3.8.9] Deemed Meanings

[A] Introduction

When a statute specifically defines the meaning of words or phrases, it applies a '*deemed*' meaning because such words and phrases are '*deemed*' to have the meaning assigned. Therefore, the *natural and ordinary* meaning of such words or phrases *can not* be applied.

The 'definition' section of a statute applies to the statute as a whole, *unless the contrary intention appears*. Section 16 of the *Interpretation & General Provisions Act* (Ch. 85) applies to that Act and all other Acts, *unless the contrary intention appears*, by virtue of section 2 of that Act.

In *Davinia Boso v Blue Shield (Solomons) Insurance Ltd* (Unrep. Civil Case No. 181 of 1996) Palmer J stated at pages 2 – 3:

> 'The phrase "unless the contrary intention appears" really means 'except where, and to the extent that, a different intention appears.'

[B] Means & Includes

The interpretation of the words '*means*' and '*includes*' which are used in '*deemed*' definitions has caused difficulties for the courts over the years. Clearly the word '*means*' as regards a definition indicates an '*exhaustive*' or '*restrictive*' definition, ie., the word or phrase has no other meaning. However, whilst the word '*includes*' is prima facie '*inclusive*', it *may* be interpreted as '*exhaustive*' *depending on the context of the statute in question*. Therefore, a great deal of care is necessary if a definition uses the word '*includes*'.

In *R v Harris* [1973] PNGLR 382 Prentice J, sitting alone, stated at page 385:

> '[The section] proceeds to provide that "the term 'lottery' shall include [….]". […] the meaning of the word "include" in such a definition as is given in this Act seems to be this. The word interpreted has its ordinary meaning. That meaning it still has in the Act. *But then there are other meanings that the legislature wishes it to have in the Act. So the definition is used to enlarge the meaning of the term beyond its ordinary meaning and make it include matters which the ordinary meaning would not include. But this enlargement of meaning is confined to the matters expressly mentioned in such definition.* […] In other words such a "definition" section may be not an exhaustive definition – but enlarging one.' (emphasis added) [words in brackets added]

In *Dilworth v Commissioner of Stamps* [1899] AC 99 Lord Watson stated at page 105:

> 'The word "include" is very generally used in interpretation clauses in order to enlarge the meaning of words and phrases occurring in the body of the statute, and when it is so used these words and phrases must be construed as comprehending not only such things as they signify according to their natural import, but also those things which the interpretation clause declares that they shall include.

> *But "include" is susceptible of another construction which may become imperative if the context of the Act is sufficient to show that it was not merely employed for the purpose of adding to the natural significance of the words or expressions defined. It may be equivalent to "mean and include", and in that case it may afford an exhaustive explanation of the meaning which, for the purposes of the Act, must invariably be attached to those words or expressions.*' (emphasis added)

See also: *Khan v Attorney General & Island Enterprises Limited v Attorney – General* [1984] SILR 95 at page 106; *Mesulam Tomalana v Drug House of Papua New Guinea* [1991] PNGLR 45; *Chern Jin Fa v Naniura* [1990] PNGLR 506 at page 508; *Re Collins, Ex parte Official Trustee in Bankruptcy & Bracher* (1986) 65 ALR 338 at pages 339 – 342; *R v Billick & Starke* (1984) 36 SASR 321 at page 328; *Mac Farlane v Burke, Ex parte Burke* [1983] QdR 584, per Macrossan J at page 594; *Cohns Industries Pty Ltd v Deputy Federal Commissioner of Taxation* (1979) 24 ALR 658 at page 660; *Mattinson v Multiple Incubators Pty Ltd* [1977] 1 NSWLR 368 at page 373; *Stewart v Lizars* [1965] VR 26 at pages 210 – 212; *HZ Finance Co Pty Ltd v Cummings* (1964) 109 CLR 395 at pages 398 – 400; *Hughes v Winter* [1955] SASR 238 at pages 239 – 240; *St Aubyn v Attorney – General* [1952] AC 15, per Lord Radcliffe at page 53; *Attorney – General v Brown* [1920] 1 KB 773 at pages 787, 789 – 791 & 797 – 800 & *Muller v Dalgety & Co Ltd* (1909) 9 CLR 693, per Griffith CJ at pages 695 – 699.

[C] Class Rule

In *Dean v Attorney – General of Queensland* [1971] QdR 391 Stable J outlined the '*ejusdem generis*' or '*class rule*' as follows at page 403:

> 'As a rule, where in a statute there are general words following particular and specific words, the general words *must* be confined to things of the same kind as those specified, although this, as a rule of construction, *must be applied with caution*, and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the *ejusdem generis* rule to apply, the specific words *must* constitute a category, class of genus; if they do constitute such a category, class or genus, then only things which belong to that category, class or genus fall within the general words; for example a superior thing will *not* be held with a class of inferior things.' (emphasis added)

For example, if a statute provides:

> 'The term "motor vehicle" *includes* motor cars, motor bikes *and other vehicles'*,

by virtue of this rule, the words 'and other vehicles' would *not* apply to any other vehicle which did *not* have a motor.

[D] Words Of Inclusion & Exclusion

Some definitions have both '*inclusionary*' and '*exclusionary*' elements. For example, if a statute provides:

> 'The term "motor vehicle" *includes* motor cars, motor bikes and other vehicles, *but does not include* motor boats',

the 'words of exclusion' are 'but does not include motor boats'. Therefore, a motor boat although it has a motor has been excluded from the definition of that term.

Such words may however *not* assist in the interpretation of such terms, see *Corporate Affairs Commission v Australian Central Credit Union* (1985) 157 CLR 201; (1985) 61 ALR 236 at pages 204 – 206 & 237 – 239 & 242 – 243 respectively.

[3.8.10] Notwithstanding

In *Keith Edward Garland Douglas v The Attorney – General* (Unrep. Civil Case No. 284 of 1999) Palmer J held at page 5:

> 'The word "notwithstanding" in common parlance means "in spite of" or "irrespective". In *Re Bread Carters (Cumberland) Board* [1922] AR (NSW) 73 it was explained "the purport of a notwithstanding phrase in a statute is to mark and remove an obstacle to the intended legislation". In my respectful view, the phrase "notwithstanding the provisions of any other law to the contrary" has the same effect as a suspension clause.'

[3.9] Punctuation

The failure to take account of punctuation disregards the reality that literate people punctuate using grammatical principles and therefore, punctuation should be used in interpretation of statutes, see *Hanlon v The Law Society* [1981] AC 124; *Royal South Australian Yacht Squadron v Attorney – General* [1938] SASR 430 at page 432 & *Davidson v Board of the Territory Insurance Office* (1981) 13 NTR 1.

Nevertheless, in order to achieve an interpretation according to the perceived intention of the Parliament, punctuation may need to be ignored, therefore, applying the '*purposive rule*'.

In *Committee of Direction of Fruit Marketing v Collins* (1925) 36 CLR 410 Isaacs J stated at page 421:

> 'A comma is one means of expressing intention in a writing, and a Court is entitled to have regard to it, though of course *not* to be controlled by it if the *context* nevertheless requires otherwise.' (emphasis added)

[3.10] Schedules & Tables

Section 6 of the *Interpretation & General Provisions Act* (Ch. 85) states (in part):

> '(1) A Schedule to or table in an Act *is* part of the Act.
>
> (2) Notes to a Schedule to or table in an Act *are* part of the Act.' (emphasis added)

See also: sections 13 and 14 of the *Interpretation & General Provisions Act* (Ch. 85).

If however a passage in a schedule is inconsistent to one in the body of the statute the latter would prevail, see *Evo v Supa & Returning Officer* [1985 – 86] SILR 1 at page 13.

[3.11] Gender & Number

Section 10 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'In an Act –
>
> (a) words imparting the masculine gender *include* females; and
>
> (b) words in the singular include the plural and words in the plural *include* the singular.' (emphasis added)

[3.12] Marginal Notes & Headings

Marginal notes and headings in an Act and references to other Acts in the margin of or at the end of an Act are *not* part of the Act', see section 6(3) of the *Interpretation & General Provisions Act* (Ch. 85), and therefore, can *not* be used to try to interpret the section even if its meaning is unclear or ambiguous. (emphasis added)

In *Rachel Tabo v Commissioner of Police* (Unrep. Criminal Appeal No. 1 of 1993) the Court of Appeal held at page 1:

> 'That offence seems to be commonly referred to as "affray", undoubtedly because that word is used in the marginal note to section 81. However, section 6(3) of the Interpretation and General Provisions Act 1978 provides that a marginal note does not form part of the Act, and in consequence that use of the term affray cannot affect the definition.'

[3.13] Repeal Of Statutes

[3.13.1] Introduction

A *later* statute may either:

- *expressly*, ie., as outlined in the statute in question, in that regard refer to sections 22 to 25 & 68 of the *Interpretation & General Provisions Act* (Ch. 85); or
- *impliedly*, ie., by implication,

repeal another statute or sections of another statute.

The term '*Repeal*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *including* 'rescinding, revoking, cancelling and replacing'.

In *Baiza Tadu Avona v The State* [1986] PNGLR 148 the Supreme Court stated at page 152:

> 'We take the view that particularly in view of the title of the Act and the use of terminology throughout the Act in relation to the changing of the penalty, ie., that the provision is amended by repealing particular words and replacing those words with other words, amounts to an amendment rather than a repeal. We note the concession by the Acting Public Prosecutor on his interpretation of the law on this question that he adopted the test set out at the end of p. 121 in the 2nd ed. of *Statutory Interpretation in Australia* (1981) by Pearce where the learned author says as follows:

> "*It seems probable that in determining whether a provision should be regarded as 'amending' or 'repealing'; the Courts will continue to have followed the approach* in *Beaumont v Yeomans* (1934) 34 SR (NSW) 562 *of looking to the substance of the provision rather than its form*."
>
> In applying this test to the amending Act – it is clear that the provisions that amend the penalty provisions in substance are amendments although the word repeal is one of the words that is used the word amend and replacement are also used.
>
> *It is also appropriate in circumstances such as this to give consideration to what was the intention of the legislature.* There was little information or argument put to the Court on this question. However, the terms of the amending Act itself provide us with a clear indication of the Parliament's intention.' (emphasis added)

See also: *R v Yamse Masayuki, Ito Tutomu & Solgreen Enterprises* (Unrep. Criminal Case No. 27 of 1999; Muria CJ; at page 7) & *Allardyce Lumber Company Limited; Kalena Timber Company Limited; Sylvania Products Limited v The Premier of the Western Province (representing the Western Provincial Executive of the Western Provincial Assembly)* (Unrep. Civil Appeal Nos. 10 & 12 of 1996; Court of Appeal; at page 12).

[3.13.2] Expressly

In *SCR No. 4 of 1985* [1985] PNGLR 320 the Supreme Court held:

> A law which has been repealed by statute, ie., expressly, is to be treated as never having existed.

Therefore, repealed legislation should *not* be used to interpret a current statute.

However, in *Balou v Kokosi* [1982] SILR 94 Daly CJ held at page 95:

> 'As this court said in R v Kauwai (1980/81) SILR 108 at p. 113 the Legislature "must be taken to have known the law at that time and to be using the words in the sense they have at the time (the Act) was enacted".
>
> *It is for this reason that it is permissible to look at earlier enactments dealing with marriage in order to see what was regarded as the law as to marriage when the Affiliation Act was passed*.' (emphasis added)

See also: *Commissioner of Police for the Metropolis v Sieneon* (1982) 75 CrAppR 359.

[3.13.3] Impliedly

A later statute *may* impliedly repeal another statute or sections of another statute, if such statute/s or section/s deal with the same issue or mischief.

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In *Laho Kerekere v Robin Miria* [1983] PNGLR 277 Amet J, sitting alone, stated at page 280:

> 'It was submitted that the maximum penalty provision in s 20 of the *Summary Offences Act*, being a later statute repeals the earlier s 206(2) of the *District Courts Act* by implication. The approach is summed up in the maxim – *lages posteriors priores contrarias abrogant*, later Acts repeal earlier inconsistent Acts.
>
> However, the application of this approach is not automatic.
>
> "*The court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment, ie., the repeal must, if not express, flow from necessary implication*"
>
> per Barton J in *Goodwin v Phillips* (1908) 7 CLR 1 at 10 referred to in *Pearce on Statutory Interpretation* at 94 par. 142.
>
> *Whether a later act has taken away a discretionary power given by an earlier act must depend upon a comparison of the actual language of each, to see whether they do not stand together or whether the latter has, impliedly (to that extent) abrogated the former.* […]
>
> It is settled law that a later affirmative enactment does not repeal an earlier affirmative enactment unless the words of the later are "such as by their necessity to import a contradiction.' (emphasis added)

In *The State v Natpalau Tulong* [1995] PNGLR 329 Doherty J, sitting alone, stated at page 331:

> 'It was argued that the Arrest Act, being a later act than the Criminal Code, impliedly repealed the provisions of the Code relating to arrest with warrant.
>
> It has held that rules of statutory interpretation usually consider where the later of two statutes makes provision that is inconsistent with earlier legislation, the later is to be taken to have impliedly repealed the former. *It was considered that the Arrest Act was intended to cover all aspects of arrest and so by implication would repeal the Criminal Code.* The Arrest Act makes no reference to repeal of any provisions in any other legislation and limits its provisions to Common Law powers and duties at section 31.
>
> *The general rules of interpretation are that two pieces of legislation should be able to stand together. There might be an implied amendment only if collision between the two laws cannot otherwise be avoided*. […]
>
> It is also considered [at page 191 of the text, *Maxwell On Interpretation*] that any rule of interpretation providing for "implied repeal" is to be avoided where possible. […] "If therefore earlier and later statutes can reasonably be constructed in such a way that both can be given effect to, this must be done. […] If the later Act contains a list of earlier enactments which expressly repeals then an omission of a particular statute from that list will be a strong indication of an intention not to repeal that statute.
>
> When a later Act is worded in purely affirmative language, without any negative expressed or implied it is even less likely that it is intended to repeal the earlier law.' (emphasis added) [words in brackets added]

See also: *The State v Danny Sunu, Namarai Walter, Iku Gagoro & Phillip Haro* [1983] PNGLR 396, per Bredmeyer J at page 404, McDermott J at pages 411 – 412 & Amet J at page 415 & *Laho Kerekere v Robin Miria* [1983] PNGLR 227 at page 281.

The following procedure should be applied in order to determine whether an Act, has been '*impliedly repealed*':

- determine the dates of commencement of the statutes in question by seeking advice from the Office of the Attorney – General;
- determine whether the statutes are either general or specific in comparison to each other;
- determine the extent of the inconsistency between the statutes or provisions; and
- determine the intent of the Parliament in respective of the *latter* legislation.

In applying that procedure the following questions should be asked:

- "Are the statutes *inconsistent* with each other?"
- "Does either of the statutes show *plainly* an intention that the other shall not operate?"
- "Can it be *implied* from the language of either statute that the other is not to operate?"; and
- "Does it appear that the *latter* statute was enacted with any purpose in view of which cannot be carried out consistently with the other?"

[3.14] Acts In Pari Materia

An Act is '*in pari materia*' if it:

- *expressly* is; or
- *impliedly* should be

read with another statute.

The *Interpretation & General Provisions Act* (Ch. 85) is an Act which is read *expressly* '*in pari materia*' with all other Acts, *unless* the contrary intention appears, see section 2 of that Act.

As explained by Lockhart J in *Amalgamated Television Services Pty Ltd v Australian Broadcasting Tribunal* (1984) 54 ALR 57 at page 62:

> 'It is not uncommon to find in an Act a provision that an earlier Act is incorporated and shall be read as one with the later Act. The effect of such a provision is to transpose the earlier into the later Act or to write every provision of the earlier Act into the later Act as if they had been actually printed into it. It is a rule of construction of statutes. […] *Sometimes an Act provides that it is incorporated and shall be read as one with an earlier Act. The effect is the same, namely, to transpose the later into the earlier Act*.' (emphasis added)

Refer also to the law relating to the interpretation of the *Penal Code* (Ch. 26) as examined commencing on page **39**.

See also: *Wui – Wapi & seventeen others v Ludwick Kembu* [1984] PNGLR 7; *Constitutional Reference No 3 of 1978* [1978] PNGLR 421; *Agiru Aieni & twelve others v Paul T Tahain* [1978] PNGLR 37 & *Maxwell Arthur Schliebs v H Singh* [1981] PNGLR 364 at page 369.

[3.15] Subsidiary Legislation

The term '*Subsidiary Legislation*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as meaning:

> 'any legislative provision (including a delegation of powers or duties) made in exercise of any power in that behalf conferred by any Act, by way of by – law, notice, order, proclamation, regulation [defined in section 16], rule, rule of court [defined in section 16] or other instrument.' [words in brackets added]

As regards '*subsidiary legislation*' generally refer to sections 61 to 68 of the *Interpretation & General Provisions Act* (Ch. 85).

In *NTN Pty Limited & NBN Limited v The State* [1986] PNGLR 167 Kidu CJ, sitting alone, stated at page 178:

> 'When an Act of Parliament authorizes an authority to make regulations or rules or bylaws then the authority *must* act within the powers given to it. If it goes beyond those powers then it exercises powers that are not given to it by the relevant Act or Parliament.' (emphasis added)

Therefore, '*subsidiary legislation*' *must* be interpreted according to the relevant Act and if the '*subsidiary legislation*' is inconsistent with the relevant Act, the latter *must* prevail.

See also: *Chambers v Mayos* [1969 – 70] P&NGLR 46.

[3.16] Retrospectivity

Section 59(3) of the *Constitution* states:

> '*No law* shall come into operation until it has been published in the Gazette but Parliament may postpone the coming into operation of any such law and *may make laws, subject to section 10(4) of the Constitution with retrospective effect.*' (emphasis added)

Section 10(4) of the *Constitution* states:

> '*No person* shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.' (emphasis added)

Therefore, by virtue of section 10(4) of the *Constitution* the Parliament of Solomon Islands *can not* validly enact '*penal statutes*' that have '*retrospective effect*'.

In *Club Freeway v Honiara Liquor Licensing Board* (Unrep. Civil Case No. 28 of 1998) Kabui J after referring to section 9 of the *Interpretation & General Provisions Act* (Ch. 85) stated at page 6:

> '[A]n Act is always speaking in the present tense. It does speak retrospectively per se or by validation unless by expressed or implicit terms in the Act itself.'

In *Mark Ourusu & another v Attorney – General & others* (Unrep. Civil Case No. 4 of 1993) Palmer J stated at pages 6 – 7:

> 'On the submissions of the presumption against retrospective operation by Mr. Lavery, I find that they do not apply here. Mr. Lavery did refer to the works of Francis Bennlous on 'Statutory Interpretation', a code, second edition, Butterworths 1992 at page 215. I will quote that passage because it does point out the exception that applies in this case:
>
> "So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted (sovereignty of Parliament). The general presumption, which therefore applies only unless the contrary intention appears, is stated in 'Maxwell on the Interpretation of Statutes' in the following terms: *It is a fundamental rule of English law that no statute shall be construed to have retrospective operation unless a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implications*."
>
> *There are several important points to note from this quotation. First, the presumption against retrospective operation is a general one. Secondly, it does not deny the power of Parliament to enact legislation that will have that effect. And thirdly, where the construction of the terms of one Act make it clear and distinct.*' (emphasis added)

However, there is a further exception to the assumption against retrospectivity.

In *Rodway v R* (1990) 169 CLR 515 the High Court of Australia stated at page 518:

> 'The rule at common law is that a statute ought not be given a retrospective operation where to do so would effect an existing right or obligation unless the language of the statute expressly or by necessary implication requires such construction. It is said that statutes dealing with procedure are an exception to the rule and that they should be given a retrospective operation. It would, we think, be more accurate to say that there is no presumption against retrospectivity in the case of statutes which affect mere matters of procedure. Indeed, strictly speaking where procedure alone is involved, a statute will invariably operate prospectively because it will prescribe the manner in which something may or must be done in the future, even if what is to be done relates to, or is based upon past events.'

In *Milne Bay Provincial Government v The Honourable Roy Evara MP Minister for Primary Industry & The Independent State of PNG* [1981] PNGLR 63 Andrew J, sitting alone, stated at page 66:

> 'It is true that there is a presumption against a statute having retrospective operation and no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct application […]. *But that presumption has no application to enactments which effect only procedure and practice and no person has a vested right in any course of procedure* […].' (emphasis added)

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See also: *R v Austin* (1913) 8 CrAppR 169 at 170; *Supreme Court Review No. 5 of 1987: Re Central Banking (Foreign Exchange & Gold) Regulations (Ch. No. 138)* [1987] PNGLR 433; *The Director – Division of District Administration & others v The Sacred Heart Mission (New Britain) Property Trust* [1974] PNGLR 312; *Polyukhovich v Commonwealth of Australia* (1990 – 91) 172 CLR 500; (1990 – 91) 101 ALR 545; *La Machia v Minister for Primary Industry* (1986) 72 ALR 23; *Ex parte Lawrence* (1972) 3 SASR 361; *Brown Pty Ltd v Metropolitan Meat Industry Board* (1971) 92 WN (NSW) 823; *Maxwell v Murphy* (1957) 96 CLR 261; *Taylor v Anstis* [1940] VLR 300; *Re Gardiner* [1938] SASR 6; *Worrall v Commercial Banking of Sydney Ltd* (1917) 24 CLR 28 at page 32 & *R v Kidman* (1915) 20 CLR 425.

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[4.0] Onus & Standard Of Proof

[4.0.1] Introduction

In *Woolmington v Director of Public Prosecutions* (1935) 25 CrAppR 72; [1935] AC 462 Viscount Sankey LC stated at pages 95 and 481 – 482 respectively:

> 'Throughout the web of the English criminal law one golden thread is always to be seen, that it is *the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception*. *If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given be either the prosecution or the prisoner*, as to whether the prisoner killed the deceased with a malicious intention, *the prosecution has not made out the case and the prisoner is entitled to an acquittal*. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.' (emphasis added)

In *Mancini v Director of Public Prosecutions* (1941) 28 CrAppR 65; [1942] AC 1 Viscount Simon LC stated at pages 76 and 11 respectively:

> '*Woolmington's* case is concerned with explaining and reinforcing the rule that the prosecution must prove the charge it makes beyond reasonable doubt, and, consequently, that if, on the material before the jury, there is a reasonable doubt, the prisoner should have the benefit of it. *The rule is of general application in all charges under the criminal law. The only exceptions arise, as explained in Woolmington's case, in the defence of insanity and in offences where onus of proof is specially dealt with by statute*.' (emphasis added)

In *Jayasena v R* [1970] AC 618 the Privy Council in commenting upon *Woolmington's* case stated at page 623:

> 'The House laid it down that, save in the case of insanity or of a statutory defence, there was no burden laid on the prisoner to prove his innocence and that it was sufficient for him to raise a doubt as to his guilt.'

In *R v Hunt* (1987) 84 CrAppR 163 [[1987] AC 352; [1987] 1 AllER1; [1987] CrimLR 263] Lord Griffiths, with whom Lord Keith of Kinkel & Lord Mackay of Clashfern concurred, stated at page 174:

> 'I would summarise the position thus far by saying that *Woolmington v DPP* (*supra*) did not lay down a rule that the burden of proving a statutory defence only lay upon the defendant if the statute specifically so provided; that *a statute can, on its true construction, place a burden of proof on the defendant although it does not do so expressly; that if a burden of proof is placed on the defendant it is the same burden whether the case be tried summarily or on indictment, namely, a burden that has to be discharged on the balance of probabilities*.' (emphasis added)

Whilst there is no rule of law or practice that a Court *must* specifically direct itself as to the onus and standard of proof of either the prosecution or defence, it is helpful and desirable that it does, see *Director of Public Prosecutions v Haikui* [1984] SILR 155 at pages 157 – 158.

In *R v Badash* (1917) 13 CrAppR 17 Darling J, delivering the judgment of the Court, stated at pages 19 – 20:

> 'The truth is that it is always for the prosecution to satisfy the jury by proof that the prisoner is guilty. It is never (with certain statutory exceptions) for the prisoner to prove that he is innocent; the onus of proof remains on the prosecution. The prisoner may often in setting up a defence fail to convince the jury, and the jury may even think that his story is wholly untrue; if that is so, it is a great prejudice to him; but it will not do to tell the jury that if they do not believe the prisoner they must convict him, because that leaves out of account the question of the burden of proof.'

As regards the term '*reasonable doubt*', see *R v Summers* (1952) 36 CrAppR 14, per Lord Goddard at page 15; *R v Head & Warren* (1961) 45 CrAppR 225 & *R v Ching* (1976) 63 CrAppR 7.

See also: *R v Oliver* (1962) 46 CrAppR 241; *R v Attfield* (1961) 45 CrAppR 309; *R v Bradbury* (1969) 53 CrAppR 217; *R v Slinger* (1962) 46 CrAppR 244 & *R v Sparrow & Friend* (1962) 46 CrAppR 288.

[4.0.2] Prosecution

The prosecution bears:

[i] ***the 'onus' of proving each and every element of a charge to the 'standard of proof' which is 'beyond reasonable doubt'.***

In *R v Wilson Iroi* (Unrep. Criminal Case No. 17 of 1991) Muria J stated at page 3:

> 'I remind myself that the burden is on the prosecution throughout to satisfy the Court beyond reasonable doubt of the guilt of the accused. If there is doubt, slight though it might be, the accused must be given the benefit of that doubt. The overriding guiding principle in all criminal trials must be that a person charged with a criminal offence must be presumed to be innocent until proved guilty or has pleaded guilty. That principle is enshrined in section 10(2)(a) of the Constitution […].'

In *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999) Muria CJ stated at page 1:

> 'I remind myself that the onus is on the prosecution to prove its guilt of the accused beyond reasonable doubt on the evidence presented to the Court. If there is doubt as to his guilt, slight though it may be, the accused must be given the benefit of that doubt and he must be acquitted. The accused need not prove anything, in particular, he is never required to prove his innocence.'

Upon reviewing all the evidence, the prosecution *does not* have to make the Court feel certain of the defendant's guilt, see *Miller v Minister of Pensions* [1947] 2 AllER 372, per Denning J at pages 373 – 374.

In *SCR No. 1A of 1981; Re Motor Traffic Act* [1982] PNGLR 122 Grenville Smith J stated at page 136:

> 'To 'prove' a person to be guilty means to establish or demonstrate the actuality of his guilt of the offence charged. This may be done either upon the person's own plea of guilty or upon evidence from which his guilt may be inferred to the requisite degree of persuasion.'

Mere suspicion *cannot* establish proof '*beyond reasonable doubt*' in a criminal case, see *R v Bartlett, Bradbury & Green* (1920) 14 CrAppR 157 at page 158 & *Eiserman v Nanatsi* [1978] PNGLR 457.

See also: *R v Ellison Trinasikwa* (Unrep. Criminal Case No. 18 of 1998; Muria CJ); *R v John Flyn* (Unrep. Criminal Case No. 19 of 1997; Muria CJ; at page 1); *R v William Tebounapa* (Unrep. Criminal Case No. 33 of 1997; Kubui J); *R v Martin Sutarake* (Unrep. Criminal Case No. 59 of 1993; Muria CJ; at page 1); *R v Gere* [1980 - 81] SILR 145 at page 145; *R v Head & Warrener* (1961) 45 CrAppR 225 & *The State v Misari Warun* [1988 – 89] PNGLR 327.

In *Namana & Namona v R* (Unrep. Criminal Appeal Case No. 1 of 1991) Ward CJ stated at page 2:

> 'In order to convict, the learned magistrate had to find the case proved beyond all reasonable doubt. To have reached the stage that "on balance" he believed the police evidence, does not discharge the burden on the prosecution. Neither is it a correct test of the defence case to see whether it can cause any doubts about the police evidence. That suggests the court may be looking to the accused to disprove the prosecution case rather than for the prosecution to prove it.'

See also: *Gouwadi v R* [1990] SILR 118.

In *John Cornish v Kwago Like* [1978] PNGLR Kearney DepCJ, sitting alone, held:

> 1. In the trial in all criminal cases in inferior courts, the standard of proof required is that of proof beyond reasonable doubt; in no circumstances is that standard to be lowered because of a poor standard of prosecution, whether through inexperience or other causes.
>
> 2. All such cases should be tried on their own merits.

and

[ii] *the onus* of negativing any defence raised to the *standard of proof* which is '*beyond reasonable doubt*', irrespective whether the defence is raised:

[a] '*on the balance of probabilities*'; or

[b] '*fairly*'.

See also: *R v Bone* (1968) 52 CrAppR 546.

[4.0.3] Defence

The only *onus* which a defendant bears is in respect to:

[i] the defence of '*Insanity*' as outlined in the *Penal Code* (Ch. 26) and the *Criminal Procedure Code* (Ch. 7) which is to the '*standard of proof*' of on the '*balance of probabilities*'; and

[ii] '*negative averments*' as referred to in section 202 of the *Criminal Procedure Code* (Ch. 7) to the '*standard of proof*' of on the '*balance of probabilities*', see *R v Carr – Briant* (1943) 29 CrAppR 76, but only after the prosecution having proven that the specified act/s occurred '*beyond reasonable doubt*'. The law relating to '*Negative Averments*' is examined commencing on page **83**.

If, however, a defendant wishes to raise any other defences then such defences *must* be '*fairly*' raised, ie., a prima facie case, see *R v Bonnick* (1978) 66 CrAppR 266 at page 269. For a defence to be '*fairly*' raised, the prosecution *must* be made aware of the defence to such a degree which would require it to negative it '*beyond reasonable doubt*'. Such defences may be raised:

- in a record of interview by the defendant; or
- in the course of cross – examination of prosecution witnesses.

See also: *Ipao v R* [1982] SILR 128 at page 130 & *Jimmy Kwai v R* (Unrep. Criminal Appeal Case No. 3 of 1991; Court of Appeal; at page 3).

The law relating to the defence of '*Insanity*' is examined commencing on page **441**.

[4.1] Presumption Of Innocence

Section 10(2)(a) of the *Constitution* states:

> 'Every person who is charged with a criminal offence shall be *presumed to be innocent* until he is proved or has pleaded guilty.' (emphasis added)

[4.2] Right To Silence

In *R v Sang* (1979) 69 CrAppR 282; [1980] AC 402 [[1979] 3 WLR 263; [1979] 2 AllER 1222; [1979] CrimLR 282] Lord Scarman stated at pages 308 & 455 respectively:

> '[The "right to silence" means] '"No man is to be compelled to incriminate himself; *nemo tenetur se ipsum prodere*."' [words in brackets added]

See also: *R v Brophy* (1981) 73 CrAppR 287, per Lord Fraser at page 291.

In *Kim Kae Jun & the Crew of the Vessel No. 1 New Star v The Director of Public Prosecutions and the Commissioner of Police* (Unrep. Civil Case No. 423 of 1999) Palmer J stated at page 4:

> 'The right to remain silent is a constitutional right to which everyone in this country is entitled, citizens and non – citizens alike. Section 3 of the *Constitution* guarantees the protection of the right to life, liberty, security of the person and protection of the law. Although not specifically mentioned, that provision, in its broad application, must accord a right to silence to an accused, detained person or a suspected person who is under investigation. Once such person exercised his or her constitutional right to remain silent he or she cannot be compelled to give his statement to anyone unless otherwise ordered by the Court.'

In *Awoda v The State* [1984] PNGLR 165 the Supreme Court held:

> In criminal proceedings the court may request but cannot order counsel to disclose his/her defence.

The law relating to the '*Right To Silence*' is also examined at page **71** and commencing on page **163**.

[4.3] Proof Of Elements

[4.3.1] General Principles

The prosecution *must* prove each and every element in order to prove its case '*beyond reasonable doubt*', see *John Solo v R* (Unrep. Criminal Appeal Case No. 89 of 2000; Kabui J; at page 8).

The failure to elementise every charge *will* result in charges not being proven to that standard of proof.

Clearly the prosecution is duty bound to present the *strongest possible case* and any defence raised *must* be negatived '*beyond reasonable doubt*'.

Statements *must* therefore be obtained from all possible witnesses who are able to give evidence capable of proving any of the elements of the offence/s charged. Such statements should include those from witnesses who are able to negative any defence/s raised by the defendant. For example, in an assault case if a defendant claims that he/she was acting in self - defence and there were witnesses who are able to say otherwise then statements from those witnesses must be obtained. Statements of witnesses should be taken as soon as possible after the commission of the offence/s charged because memories of people do obviously fade over time.

Refer also to the chapters which examine:

- '*Criminal Responsibility*' commencing on page **428**;
- '*Witnesses*' commencing on page **274**; and
- '*Admissibility Of Evidence'* commencing on page **171**.

[4.3.2] Elementising Charges

For example, if the defendant, Edmon Taro, is charged under the provisions of section 302(b) of the *Penal Code* (Ch. 26),

> 'That Edmon Taro of Kwaibala Village, Malaita Province at Honiara in the Guadalcanal Province on 7th July 2001 was found by night having in his possession without lawful excuse a jack',

the '*elements*' are as follows:

[i] **Edmon Taro**

The prosecution *must* prove '*beyond reasonable doubt*' that Edmon Taro committed the offence.

[ii] **Honiara in the Guadalcanal Province**

The prosecution *must* prove '*beyond reasonable doubt*' that the offence occurred in Honiara.

[iii] **7th July 2001**

The prosecution *must* prove '*beyond reasonable doubt*' that the offence occurred on 7th July 2001.

[iv] **Found**

The prosecution *must* prove '*beyond reasonable doubt*' that the defendant was found in possession of the jack.

[v] **Night**

The prosecution *must* prove *beyond reasonable doubt* that the defendant found in the night in possession of the jack.

[vi] **Possession**

The prosecution *must* prove *beyond reasonable doubt* that the defendant was in possession of the jack.

[vii] **Without Lawful Excuse**

The defendant must prove on the '*balance of probabilities*' that he had a '*lawful excuse*' for being in possession of the jack.

[viii] **Jack**

The prosecution *must* prove *beyond reasonable doubt* that the defendant found in the night in possession of the jack.

The law relating to '*Wording Of Charges*' is examined commencing on page **76**.

PROOF OF ISSUES

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CHARGES

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[5.0] Introduction

Section 10(4) of the *Constitution* states:

> '*No* person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.' (emphasis added)

Therefore, the prosecution should ensure that proceedings are *not* instituted against any person *unless* at the time of the incident it did constitute an '*offence*'.

The term '*Offence*' is defined in the *Interpretation and General Provisions Act* (Ch. 85) as meaning 'any crime, felony, misdemeanour or contravention or breach of, or failure to comply with, any written law, *for which a penalty is provided'*. (emphasis added)

Therefore, unless a penalty is provided it is *not* an '*offence*', see for example Part IV of the *Traffic Regulations* (Ch. 131). Whilst section 82(1)(w) of the *Traffic Act* (Ch. 131) specifies the maximum penalty which may be imposed, none of the sections in Part IV of the *Traffic Regulations* (Ch. 131) specifies any penalty that can be imposed for contravening such sections.

Refer also to the law relating to the interpretation of '*Subsidiary Legislation*' commencing on page **63**.

It is the responsibility of prosecutors to check the '*wordings of charges*' to ensure that such wordings comply with the relevant statute.

If the defence considers that the wording of a charge is defective, '[t]he proper course of action is to state in sufficient detail which particulars are defective, and how they have been considered to be defective', see *R v Austin Yam* (Unrep. Criminal Appeal Case No. 33 of 1994; Palmer J; at page 20).

In *R v Sethuel Kelly & Gordon Darcy* (Unrep. Criminal Case No. 2 of 1996) Lungole - Awich J stated at page 2:

> 'It is the duty of the court, before putting charges to accused, to ensure that the charges have been filed in court according to the requirement of the law. It is also its duty to ensure that the charges are clearly stated in a way that accused do understand the charges they face. If amendments are required to correct ambiguity, duplicity or other defects, the court is authorized to do so by section 250 [now section 201] of the Criminal Procedure Code.
>
> Accused, of course, would be afforded opportunity to object to any formal defect apparent from the charges, before they plead.' [words in brackets added]

The law relating to '*Amendments*' is examined commencing on page **88**.

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In *R v Musuota* (Unrep. Criminal Case No. 41 of 1996) Lungole - Awich J stated at page 9:

> 'The power of the court to control proceedings before it includes ensuring that accused understanding the offence he is charged with before he is asked to plead and evidence is led. That necessarily requires court to check for defects such as ambiguity, non disclosure of offence, duplicity, wrong reference to statutes, lack of consent of DPP where required and any other impropriety in the charge before it. A useful list of circumstances in which the court may decline to put charge to accused would be something like this:
>
> 1. that the court has no jurisdiction to try the offence charged.
>
> 2. that a matter is a bar such as a plea of *autrefois convict* or *autrefois acquit* is confirmed by the court.
>
> 3. that a defect in substance such as duplicity, non – disclosure of offence has been confirmed.
>
> 4. that a *nolle prosequi* is entered by the DPP, and
>
> 5. that the charge or charges amount to oppression or are prejudicial to the accused.' (emphasis added)

The law relating to:

- the '*Criminal Jurisdiction Of The Courts*' is examined commencing on page **14**;
- '*Double Jeopardy*' is examined commencing on page **105**;
- '*Duplicity*' is examined commencing on page **86**;
- '*Withdrawal Of Charges*' is examined commencing on page **101**; and
- '*Abuse Of Process*' is examined commencing on page **138**.

[5.1] Responsibility To Prefer All Charges

In *R v Lloyd Bennett* (Unrep. Criminal Review Case No. 433 of 1999) Palmer J stated at page 2:

> 'The Police and Prosecution have a duty to ensure that an accused person is charged with the offences he has been alleged to have committed, especially where the offences are classed as very serious offences.'

Therefore, the prosecution has a duty to ensure that defendants are charged with all of the offences which they have committed, and not just a selection of such offences.

Furthermore, all charges should be instituted against a defendant at or about the same time, where possible.

See however, the section which examines the law relating to the '*Discretion To Prosecute*' commencing on page **115**.

[5.2] Wording Of Charges

[5.2.1] Introduction

In *Paroke & Kuper v R* (Unrep. Criminal Case No. 21 of 1992) Muria ACJ commented at page 2:

> 'The principle of *fair hearing* embodies the requirement that an accused person *must know with certainty* what has been alleged against him.' (emphasis added)

In compliance with sections 117 and 120 of the *Criminal Procedure Code* (Ch. 7), each charge *must* contain:

[i] a **'*statement of the offence*'** which *shall*:

[a] describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms; and

[b] include a reference to:

1. the section of the statute that defines the offence; and

2. the section which provides the punishment, ie., creates the offence.

The wording of a charge should follow the words of the statute creating the offence and words which go further than that should *not* be used, see *R v Johnson* (1945) 30 CrAppR 159 at page 167.

In *R v Jacob Waipage* (Unrep. Criminal Case No. 46 of 1996) Lungole – Awich J stated:

> 'If it is born in mind that the purpose of a charge is to state the offence so that an accused understands clearly the offence he faces, and if it is born in mind that a charge is the statement of offence together with the particulars of offence, *then both the section that defines the offence and the section that states the punishment must be stated in the statement of the offence.* That way the full extent of what accused faces is laid before the court, and accused is enabled to understand whether his actions or omissions fit in the definition of the offence.' (emphasis added)

and

[ii] **'*particulars*'** of such offence which *shall* be set out in ordinary language in which the use of technical terms should be avoided and which *shall* contain:

[a] the forename and surname of the defendant, see section 120(d) of the *Criminal Procedure Code* (Ch. 7) on page **81**;

[b] the location of the offence, see section 120(f) of the *Criminal Procedure Code* (Ch. 7) on page **81**;

Whilst it was held in *R v Wallwork* (1958) 42 CrAppR 153 that there is no necessity to particularise the 'location' of an offence, *unless* it is material to the charge, it is better practice to always particularise the location of an offence;

[c] the date of the offence. The law relating to the '*Date Of Offences*' is examined commencing on page **85**; and

[d] *sufficient* details so that the defendant understands the charge. It is for that reason that such '*particulars*' *must* be set out in ordinary language and technical terms are to be avoided, if possible. Therefore, for example such terms as 'Due Care and Attention' are to be avoided, see *Ben Donga v R* (Unrep. Criminal Appeal Case No. 16 of 1994; Palmer J; at pages 1 – 2).

[5.2.2] Statutory Provisions

The term '*Offence*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as meaning:

> 'any crime, felony, misdemeanour or contravention or breach of, or failure to comply with, any written law, *for which a penalty is provided*'. (emphasis added)

Therefore, unless a penalty is provided it is *not* an '*offence*'.

Section 117 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Every charge or information *shall* contain, and *shall* be sufficient if it contains, a *statement of the specific offence or offences* with which the accused person is charged, together with such *particulars* as may be necessary for giving *reasonable information* as to the nature of the offence charged.' (emphasis added)

Section 120 of the *Criminal Procedure Code* (Ch. 7) states:

> 'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –
>
> (a)(i) a count of a charge or information *shall commence with a statement of the offence*;
>
> (ii) the statement of offence *shall describe the offence shortly in ordinary language avoiding as far as possible the use of technical terms*, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment *shall contain a reference to the section of the enactment creating the offence*;
>
> (iii) *after the statement of the offence, particulars of such offence shall be set out in ordinary language*, in which the use of technical terms shall not be necessary;
>
> Provided that where any rule of law or any Act limits the particulars of an offence which are required to be given in a charge or information, nothing in this paragraph *shall* require any more particulars to be given than those required;
>
> (iv) Where a charge or information contains *more than one count* the counts *shall* be numbered consecutively;
>
> [Therefore, if there is more that one charge or count, each charge or count is to be numbered consecutively on separate 'Notice Of Offences Charged' forms.]

(b)(i) where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the *alternative*, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or states any part of the offence in the *alternative*, the acts, omissions, capacities or intentions, or other matters stated in the *alternative* in the enactment, *may* be stated in the *alternative* in the count charging the offence;

[Refer to the section which examines the law relating to '*Alternative Charges*' at page **100**.]

(ii) it *shall not* be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or proviso or qualification to, the operation of the enactment creating the offence;

[Refer also to the section which examines the law relating to '*Negative Averments*' commencing on page **83**.]

(c)(i) *the description of property in a charge or information shall* be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, *if the property is so described, it shall not be necessary* (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person *to whom the property belongs or the value of the property*;

[Therefore, provided the property in question has been described with as much detail as possible, it is *not* necessary to state the name of the owner of the property or its value, unless such details are required to prove a specific offence. See for example, the offence of '*Simple Larceny / Stealing*', section 261(2) of the *Penal Code* (Ch. 26).

See: *R v Gill* (1963) 47 CrAppR 166.]

(ii) *where the property is vested in more than one person*, and the owners of the property are referred to in a charge or information, it shall be sufficient to describe the property as owned by one of those persons by name and others, and if the person owning the property are a body of persons with a collective name, such as a joint stock company or "Inhabitants", "Trustees", "Commissioners", or "Club" or other such name, it *shall* be sufficient to use the collective name without naming any individual;

[Therefore, if the property in question is owned by more than one person it is sufficient to specify 'the name of one of the owners and others'. For example, '… the property of Edmon Peters and others'.

If the property in question is owned by a 'body of persons' with a collective name it is sufficient to specify the name of that 'body of persons'.]

(iii) property belonging to or provided for the use of any public establishment, service or department *may* be described as the property of *Her Majesty the Queen*;

(iv) *coin and bank notes may be described as money; and any allegation as to money, so far as regards the description of the property*, *shall* be sustained by proof of any amount of coin or of any bank or currency note (although the particular species of coin of which such amount was composed or the particular nature of the bank or currency note, shall not be provided); and in cases of stealing, embezzling and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note, or any portion of the value thereof, although such coin or bank or currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person and such part shall have been returned accordingly;

(d) *the description or designation in a charge or information of the accused person*, or of any other person to whom reference is made therein, *shall* be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "*a person unknown*";

(e) where it is necessary to refer to any *document or instrument* in a charge or information, it *shall* be sufficient to describe it by name or designation by which it is usually known, or by the purport thereof, *without setting out any copy thereof*;

(f) subject to any other provisions of this section, it *shall* be sufficient to describe *any place, time, thing, matter, act or omission whatsoever* to which it is necessary to refer in any charge or information in ordinary language in such a manner as to indicate with *reasonable clearness* the place, time, thing, matter, act or omission referred to;

(g) it *shall not* be necessary in stating *any intent to defraud, deceive or injure to state an intent to defraud, deceive or injure any particular person*, where the enactment creating the offence *does not* make an intent to defraud, deceive or injure a particular person an essential ingredient of the offence;

(h) *where a previous conviction of an offence is charged in a charge or information*, it *shall* be charged at the end of the charge or information by means of a statement that the accused person has been previously convicted of that offence at a certain time and place without stating the particulars of the offence;

[For example, 'and it is alleged that [name of the defendant] has been previously convicted of [specify the 'statement of the offence' in question, for example, 'Simple Larceny, section 261(2) of the *Penal Code* (Ch. 26)] at [specify the name of the court and date, for example, 'the Magistrate's Court at Gizo on 27th March 2001].']

(i) *figures and abbreviations may* be used for expressing anything which is commonly expressed thereby;

(j) when a person is charged with any offence under sections 259 ['*Stealing and Embezzlement by Co – Partners, Etc*'], 273 ['*Larceny and Embezzlement by Clerks Or Servants*'] or 278 ['*Conversion*'] of the Penal Code it *shall* be sufficient to specify the *gross amount of property in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular times or exact dates*.' (emphasis added) [words in brackets added]

See also: sections 159 & 311 of the *Criminal Procedure Code* (Ch. 7).

[5.2.3] General Principles

In *Pointon v Cox* (1926) 136 LT 506 the Court held at page 510:

> 'An accused person is entitled to information in two respects:
>
> (1) He is entitled first of all to be told what law, statutory or other, he alleged to have broken; and in addition,
>
> (2) He is entitled to be told with *reasonable particularity* [ie., clearness], how he is alleged to have broken the law.' (emphasis added) [word in brackets added]

In *Ex parte Grinham: Re Sneddon* (1961) 78 WNNSW 203 Herron J, with whom the other members of the Court concurred, stated:

> 'But the defendant is entitled not only to know with what offence he is being charged but to be supplied with such particulars of the alleged offence as are *reasonably necessary* to enable him to defend himself. […]
>
> The question as to what are *reasonable* particulars creates at times substantial difficulty and must depend largely on the circumstances of each case. […] The defendant is *not entitled* to be told the detailed evidence by which the informant hopes to prove his case.' (emphasis added)

In *S v R* (1989) 64 ALJR 126 Toohey J, as a member of the High Court of Australia, stated at page 133:

> 'But the problem of uncertainty in knowing the charge to be met still remains. This issue was considered by Dixon J in *Johnson v Miller* (1937) 59 CLR 467 at 489, when his Honour said:
>
> "[…] the question is whether the prosecutor should be required to identify one of a number of sets of facts, each amounting to the commission of the same offence as that on which the charge is based. In my opinion he clearly should be required to identify the transaction on which he relies and he should be so required as soon as it appears that his complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. *For a defendant is entitled to be appraised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing as the foundation of the charge.*' (emphasis added)

In *Ben Donga v R* (Unrep. Criminal Appeal Case No. 16 of 1994) Palmer J stated at pages 1 – 2:

> 'The particulars of the charge read: "*Mr Ben Donga on the 14th day of January 1994 at Honiara in the Guadalcanal Province, drove motor vehicle No.8567 on a road without due care and attention."*
>
> The records of the Magistrate's Court reveal that the accused was unrepresented, and that the charge was read over and explained. What this Court does not know is, what was explained, and how the charge was explained*. The particulars simply stated that the accused drove without due care and attention. The words "due care and attention" are technical terms. Had the accused been represented, then it could possible be acceptable.* However, in the case of this accused, how would he know that what he was being accused of

fell below the minimum requirements that the law imposes upon a reasonable, prudent driver? The only way he could understand that is, if it is sufficiently made clear in the particulars of the offence, in what way his driving was careless, or without due care and attention. *As worded, the particulars of the offence are inadequate and therefore bad.*

Magistrates should be cautious in ensuring that there are sufficient particulars in the information to enable him to put the charge to the accused, and if necessary, to explain it to the accused. Where the particulars are inadequate, then the prosecutor should be required to amend the information and insert the necessary details. It is good practice too to ask the accused if he understood the charge before taking his plea.' (emphasis added)

See also: *R v Carr* [2000] 2 CrAppR 149; *Jemmison v Priddle* [1972] 1 QB 489; (1972) 56 CrAppR 229; [1972] 2 WLR 293; [1972] 1 AllER 539; *R v Jones & others* (1974) 59 CrAppR 120; *Heaton v Costello* [1984] CrimLR 485; *R v Fyffe* [1992] CrimLR 442; *R v Savage & Director of Public Prosecutions v Parameter* [1992] 1 AC 699 at page 737 & *R v Warburton – Pitt* (1991) 92 CrAppR 136.

The law relating to:

- '*Duplicity*' is examined commencing on page **86**; and
- '*Drive Without Due Care & Attention*' is examined commencing on page **726**.

[5.3] Negative Averments

Section 10(11) of the *Constitution* states (in part):

'Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of –

(a) subsection (2)(a) of this section to the extent that the law in question *imposes upon any person charged with a criminal offence the burden of proving particular facts*.' (emphasis added)

Section 10(2)(a) of the *Constitution* states:

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

The following sections of the *Criminal Procedure Code* (Ch. 7) also refer to '*Negative Averments*':

Section 120 states (in part):

'The following provisions shall apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information shall, subject to the provisions of this Code, not be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –

(b)(ii) it shall *not* be necessary, in any count charging an offence constituted by an enactment, to negative any exception or exemption from, or proviso or qualification to, the operation of the enactment creating the offence.' (emphasis added)

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Section 202 states:

> 'Any exception, exemption, proviso, excuse or qualification, whether it does or does not accompany in the same section the description of the offence in the law creating the offence, and whether or not specified or negatived in the charge or complaint, may be proved by the defendant, *but no proof in relation thereto shall be required on the part of the complainant*.' (emphasis added)

In *R v Edwards* (1974) 59 CrAppR 213 [[1975] QB 27] Lawton LJ, delivering the judgment of the Court, held at page 221:

> 'In our judgment this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal law that the prosecution must prove every element of the offence charged. This exception, like so much else in the common law, was hammered out on the anvil of pleading. It is limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by person of specified classes or with specified qualifications or with the license or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception.
>
> *In our judgment its application does not depend upon either the fact, or the presumption, that the defendant has peculiar knowledge enabling him to prove the positive of any negative averment*. […]
>
> *Two consequences follow from the view we have taken as to the evolution and nature of this exception. First, as it comes into operation upon enactment being construed in a particular way, there is no need for the prosecution to prove a prima facie case of lack of excuse, qualification or the like; and secondly, what shifts is the onus: it is for the defendant to prove that he was entitled to do the prohibited act. What rests on him is the legal or, as it is sometimes called, the persuasive burden of proof. It is not the evidential burden*.' (emphasis added)

In *John v Humphreys* [1955] 1 AllER 793 the Court held that the onus was on the defendant to prove that he/she had a license because that fact was peculiarly in his/her knowledge.

See also: *R v Hunt* (1987) 84 CrAppR 163 [[1987] AC 352], per Lord Griffiths at page 175; *Davey v Towle* [1973] CrimLR 360 at page 361; *Williams v Russell* (1933) 149 LT 190 at page 191; *R v Oliver* (1943) 29 CrAppR 137 at page 146 & *R v Ewens* (1966) 50 CrAppR 171.

Therefore, when the prosecution avers in a charge that a defendant did not have an 'exception', 'exemption', 'proviso', 'excuse' or 'qualification' in respect of an offence, the onus is on the defendant on the '*balance of probabilities*' to prove otherwise. However, before such an onus is on the defendant the prosecution *must* prove '*beyond reasonable doubt*' the other elements of the preferred charge.

There is *no* onus on the prosecution to prove that the defendant did not have an 'exception', 'exemption', 'proviso', 'excuse' or 'qualification' in relation to such an offence.

Section 175(e) of the *Penal Code* (Ch. 26) is an example. That section states:

> '[A]ny person who *without lawful excuse* publicly does any indecent act is deemed to be an idle and disorderly person.' (emphasis added)

In respect of such an offence the prosecution must firstly prove '*beyond reasonable doubt*' that the defendant did an indecent act before the defendant bears the onus of proving on the balance of probabilities that he/she had a lawful excuse for doing so.

Refer also to the chapter which examines the '*Proof Of Issues*' commencing on page **68**.

[5.4] Date Of The Offence

[5.4.1] General Principles

Section 201 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '(2) *Variance between the charge and the evidence adduced in support of it with respect to the day upon which the alleged offence was committed is not material and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof*.
>
> (3) Where an alteration of a charge is made under subsection (1) or *there is a variance between the charge and the evidence as described in subsection (2)*, the court *shall*, if it is of the opinion that *the accused has been thereby misled or deceived*, adjourn the trial for such period as may be reasonably necessary. ' (emphasis added)

The prosecution is expected however to particularize the date of the offence, ie., by specifying the day of the month, the month and the year when the offence is alleged to have been committed, as accurately as possible for the purpose of giving a defendant every fair opportunity to prepare his/her defence to what is charged, per Stanley J in *R v Phil Maria* [1957] StRQd 512 at page 523. Therefore, if the prosecution is able to prove the specific date of an offence then it should do so, rather than relying on the wording, 'On or about …'.

In *The State v Titeva Fineko* [1978] PNGLR 262 Prentice CJ, sitting alone, held:

> Where the words 'on or about (the date)' are used in a charge, proof that the offence was committed within some period which has a *reasonable approximation* to that specified date will suffice.

What a '*reasonable approximation*' of the date alleged will depend on the circumstances of the case.

See also: *R v Hartley* [1972] 2 QB 1; [1972] 56 CrAppR 189; [1972] 2 WLR 105; [1972] 1 AllER 599; [1972] CrimLR 309; *R v Dossi* (1918) 13 CrAppR 158; *Wright v Nicholson* [1970] 1 WLR 142; [1970] 1 AllER 12; (1970) 54 CrAppR 38 & *R v Jacobs* [1993] 2 QdR 541.

The law relating to '*Limitation Of Time*' is examined commencing on page **100**.

[5.4.2] Between Dates

The use of the words 'Between … and …' signifies prima facie a continuing offence between those specified dates, see *Ex parte Bignall* (1915) 32 NSWWN 91.

Therefore, to charge a defendant with 'Between the second day of March 1994 and the sixth day of March 1994 …' signifies that the offence was committed on the third, fourth and fifth days of March 1994. It should be noted that the offence is alleged to have *not* occurred on any of the dates specified in the charge.

If the offence is *not* a continuing offence in nature and it is *unknown* on which date the offence was committed, but the dates on either side of the offence can be proven, then the following wording should be used:

> 'That on a date unknown between … and …'.

An example of such an offence would be a 'break and enter' offence whereby it is unknown on which day the property was stolen, but the complainant can give evidence to substantiate when he/she:

[i] left the 'dwelling – house'; and

[ii] returned.

See also: *Anderson v Cooper* (1981) 72 CrAppR 232 & *Chiltern Divisional Court v Hodgetts* [1983] AC 120; [1983] 2 WLR 577; [1983] 1 AllER 1057.

See however section 120(j) of the *Criminal Procedure Code* (Ch. 7).

[5.5] Duplicity

The rule against '*duplicity*' relates to the charging of a defendant with committing more than one offence in a single charge.

If a court is of the opinion that a charge is bad for '*duplicity*', the prosecution is expected to apply to amend the charge, see *R v Radley* (1974) 58 CrAppR 394; [1974] CrimLR 312. In some instances it may be necessary to prefer an additional charge.

In *R v Stanley Bade* [1988 – 89] SILR 121 Ward CJ stated at page 123:

> 'Whilst the English authorities on this point have tended recently to present a rather inconsistent approach, *I feel the general principle has not been questioned, namely, that a charge should not be double in the sense of charging the accused with more than one offence*. This is a matter to be taken on the wording of the charge itself although in some circumstances, the duplicity may only be revealed by reference to the evidence as well in order to show the significance of the suggested duplicity.' (emphasis added)

In *Director of Public Prosecutions v Dunn* [2001] 1 CrAppR 352 Bell J, with whom Pill LJ concurred, stated at page 357:

'[In *Director of Public Prosecutions v Merriman* (1972) 56 CrAppR 766; [1973] AC 584 Lord Morris or Borth – y – Gest at pages 775 and 793 and Lord Diplock at pages 796 and 607] make it clear that the rule against duplicity, that only one offence should be charged in any one count, information or summons, has always been applied in a practical rather than a strictly analytical way for the purpose of determining what constituted one offence.

The question of whether someone has committed one offence or more than one offence is best answered by applying common sense in deciding what is fair in the circumstances. It will often by legitimate to bring a single charge in respect of what may be called one activity, even though it may involve more than one act.' (emphasis added) [words in brackets added]

In *R v T* [1993] 1 QdR 454 the Court of Criminal Appeal had to consider whether a number of acts committed on a complainant constituted more than one offence. Thomas J stated at page 455:

'Useful guidance is afforded by Lord Morris's remarks in *R v Merriman* [1973] AC 584, 593:

"The question arises – what is an offence? If A attacks B, and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling house of B steals ten different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. *In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances*. No precise formula can usefully be laid down but that clear and helpful guidance given by Lord Widgery in a case where it was considered whether an information was bad for duplicity: see *Jemmison v Priddle* [1972] 1 QB 489, 495. I agree respectfully with Lord Widgery CJ that it will often be called one activity even though that activity may involve more than one act. *It must, of course, depend upon the circumstances.*"

The need to identify particular acts and omissions with precision will usually be more acute in the case of an indictment of *two or more persons*. There may be a series of offences some of which involve one person and non the others. A person may be criminally liable under s.7 of the Code with respect to one and not with respect to others. These difficulties are discussed in *R v Baynes* [1989] 2 QdR 431.

However for the purposes of the present case there was a series of acts by one person. The question is whether the series of acts may *reasonably* be regarded as one transaction or as comprising one offence. In *R v Morrow and Flynn* [CA 120 and 122 of 1990 CCA unreported 30th August 1990] Connolly J observed:

"It is obvious that a knifing attack by one man who delivers a number of blows may properly be charged as a series of woundings, but one must ask oneself whether this would be an application of *common sense* in terms of Lord Morris's speech.'" (emphasis added)

A charge that alleges separate offences on different days is bad for '*duplicity*', irrespective whether the offences alleged are the same, see *R v Robertson* (1936) 25 CrAppR 208 *&* *R v Thompson* (1914) 9 CrAppR 252; [1914] 2 KB 99.

In *R v Calos Galofia* (Unrep. Criminal Review Case No. 1293 of 1991) Muria J stated at page 1:

'I refer to my Review Judgments in Criminal Case No. 1245/91 given on 10 January 1992 and Criminal Case No. 1167/91 given on 13 January 1992 in which I said that a count alleging that the accused "broke and entered ….. with intent to steal and did steal therein ….." is bad for duplicity. It is clear that the charge against the accused is bad for duplicity.'

Such a charge is bad for 'duplicity' because it alleges two separate offences, ie., 'break and enter with intent' under section 299(a) of the *Penal Code* (Ch. 26) and 'break and enter and commit' under section 300(a) of the *Penal Code* (Ch. 26).

See also: *Paroke & Kuper v R* (Unrep. Criminal Case No. 21 of 1992; Muria ACJ; at pages 1 – 2); *R v Greenfield* [1973] 3 AllER 1050; [1973] 1 WLR 1151; (1973) 57 CrAppR 849; [1973] CrimLR 798; *R v West* [1948] 1 KB 709; (1948) 32 CrAppR 152; [1948] 1 AllER 718; *R v Davey & Davey* [1960] 1 WLR 1287; (1961) 45 CrAppR 11; [1960] 3 AllER 533; *R v Griffith* [1966] 1 QB 589; (1965) 49 CrAppR 279; [1965] 2 AllER 448; [1965] 3 WLR 405; *R v Asif* (1986) 82 CrAppR 123; [1985] CrimLR 679; *R v Nicholls* (1960) 44 CrAppR 188; *R v Disney* (1933) 24 CrAppR 49; *R v Wilmot* (1933) CoxCC 652; (1933) 24 CrAppR 63; *R v Johnson* (1945) 30 CrAppR 159; *Director of Public Prosecutions v Shah* (1984) 79 CrAppR 162 & *R v Perry* (1945) 31 CrAppR 16.

[5.6] Amendments

[5.6.1] General Principles

It is responsibilities of prosecutors to:

[i] check the wording of all charges prior to attending court; and

[ii] apply for an amendment to a charge, if required, as soon as possible after the opening of the court and the calling – on of the relevant defendant. All applications to amend *must* be made '***before the close of the case for the prosecution'***, see section 201(1) of the *Criminal Procedure Code* (Ch. 7).

A charge may be amended on a date after the expiration of a period of statutory limitation in respect of that charge, provided the date amended to is within the period of statutory limitation, see *R v Wakeley* [1920] 1 KB 688; (1919) 14 CrAppR 121.

Section 201 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) Where, at any stage of a trial *before the close of the case for the prosecution*, it appears to the court that the *charge is defective*, *either in substance or in form*, the court *may* make such order for the alteration of the charge, either by way of *amendment of the charge or by the substitution or addition of a new charge*, as the court thinks necessary to meet the circumstances of the case.
>
> *Provided* that where a charge is altered as aforesaid, the court shall thereupon call upon the accused person to plead to the altered charge:
>
> *Provided further* that where a charge is altered under this subsection the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross – examined by the accused or his advocate and, in such last – mentioned event, the prosecution shall have the right to re - examine any such witness on matters arising out of such further cross – examination.
>
> (2) *Variance between the charge and the evidence adduced in support of it with respect to the day upon which the alleged offence was committed is not material* and the charge need not be amended for such variance if it is proved that the proceedings were in fact instituted within the time (if any) limited by law for the institution thereof.

(3) Where an alteration of a charge is made under subsection (1) or there is a variance between the charge and the evidence as described in subsection (2), the court shall, if it is of the opinion that the accused has been thereby misled or deceived, adjourn the trial for such period as may be reasonably necessary. ' (emphasis added)

A charge is defective in '*substance*', if there is essential information *not* included in the charge; whereas, a charge is defective in '*form*', if the wording of the charge requires '*amendment*'.

In *R v Calos Galofia* (Unrep. Criminal Review Case No. 1293 of 1991) Muria J held at page 1:

'The charge in this case is clearly defective and should have been amended before the accused pleaded to the charge or before the prosecution closed its case. In cases where a police officer is conducting the prosecution, very often defects in the charges are not picked up as they are not qualified lawyers. *It is therefore incumbent on the Court to exercise its power under section 200(1)* [now section 201] *and amend the charges bearing in mind the proviso which requires the Court to call upon the accused to plead to the amended charge*.' (emphasis added) [words in brackets added]

If a court is deciding whether to exercise its discretion to amend a charge, although such an application had *not* been made by the prosecution, it should seek submissions from the prosecution and the defence, see *R v West & others* [1948] 1 KB 709; [1948] 1 AllER 718; (1948) 32 CrAppR 152 & *R v Gregory* [1972] 1 WLR 991; (1972) 56 CrAppR 441; [1972] 2 AllER 861; [1972] CrimLR 509.

See also: *R v Robert Maebinua* (Unrep. Criminal Review Case No. 160 of 1999; Kabui J) & *R v Yamse Masayuki, Ito Tutomu, Solgreen Enterprises Limited* (Unrep. Criminal Case No. 27 of 1998) Muria CJ; at page 9).

[5.6.2] Offence Not Known To Law

In *Andrias Nan Ganta v Lewis Nandi* [1973] PNGLR 61 Frost SPJ, sitting alone, stated at page 62:

'Counsel for the appellant relied on the statement of the law by Jordan CJ in *Ex parte Lovell; Re Buckley* (1938) SR (NSW) 153 at p. 173 as follows:

"If the Magistrate convicts upon an information or charge which discloses no offence, or for an offence with which the accused has not been duly charged, the conviction is bad."'

In *Broome v Chenoveth* (1946) 73 CLR 583 Dixon J of the High Court of Australia stated at page 601:

'Whether an information disclosing no offence can be amended has been the subject of some difference of judicial opinion. […] Probably it is necessary to deal with the question as a matter of degree and not by firmly logical distinction. An offence may be clearly indicated in an information, but, in its statement, there may be some *slip or clumsiness* which upon a strict analysis results in an ingredient of the offence being the subject of no proper averment. *Logically it may be said in such a case that no offence is disclosed and yet it would seem a fit case for amendment, if justice is not to be defeated. By contrast, at the other extreme, an information may contain nothing which can identify the charge with an offence known to law. Such a case may not be covered by the power of amendment.*' (emphasis added)

However, whilst a charge alleging an '*offence not know to law*' *may* not be amended, section 201(1) of the *Criminal Procedure Code* (Ch. 7) provides that 'a court *may* make such order for the alteration of the charge […] by the substitution or addition of a new charge, as the court thinks necessary to meet the circumstances of the case'. (emphasis added) Therefore, it is at the discretion of the court in such circumstances. However, provided prosecutors check the wording of charges, the charging of a defendant with a charge alleging an '*offence not know to law*' should *not* arise.

[5.6.3] Wrong Name Of Defendant

In *Pearcey v Chianta* (1987) 6 MVR 10 the case involved a defendant who was stopped by the police for allegedly exceeding the speed limit. Whilst he gave the police the name of his brother, he gave his correct address. He was charged under the name of his brother with exceeding the speed limit. The prosecutor applied to amend the information to the correct name.

The Court held:

> The defect created no injustice to the defendant; he knew the error; he was not mislead or deceived; he admitted that he was the driver of the motor vehicle at the time of the offence and he knew that the information was intended for him. An amendment was therefore appropriate.

See also: section 120(d) of the *Criminal Procedure Code* (Ch. 7) on page **81**.

[5.6.4] No Reference To Section

In *Gordon v Crabbe, Ex parte Gorman* [1957] QWN 43 the case involved a hearing of a complaint alleging that the defendant had carried on unlawful bookmaking but which did not state the particular Act under which it was laid.

The Court of Criminal Appeal held:

> The defect was one in *substance* which should have been amended.

Section 201 of the *Criminal Procedure Code* (Ch. 7) refers to charges which are 'defective' either in '*substance*' or in '*form*'.

See also: *R v McLaughlin* (1983) 76 CrAppR 42.

[5.6.5] Absence Of The Defendant

Subject to section 10(2)(f) of the *Constitution* and section 179 of the *Criminal Procedure Code* (Ch. 7), it is permissible to amend charges in the absence of a defendant.

If a defendant does *not* appear by his/her own volition, it is permissible to amend a charge, provided the nature of the offence is *not* altered. Such amendments would obviously have to be *minor* in nature, see *R v Wilson & Scott, Ex parte Browne* [1940] StRQd 93; *R v Police Magistrate at Roma & Warneminde; Ex parte Rowland* [1939] QdR 184; *Foreman v Crabbe, Ex parte Gorman* [1957] QWN 43 & *Pearcey v Chianta* (1987) 6 MVR 10.

If it is necessary to amend the nature of the charge and the defendant does not appear, then the defendant should be advised by the Court in writing that the prosecution is making an application to amend the charge.

If the defendant then does not appear the charge can be amended. Subject to complying with section 188 of the *Criminal Procedure Code* (Ch. 7), the Court *may* deal with 'any offence punishable with imprisonment for a term not exceeding six months or a fine not exceeding one hundred dollars, or both such imprisonment and fine'.

The law relating to:

- the '*Defendant's Right To Be Present In Court*' is examined commencing on page **154**; and
- '*Sentencing*' is examined commencing on page **918**.

[5.7] Joinder

[5.7.1] General Principles

Section 120(a) of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '(iv) Where a charge or information contains *more than one count* the counts *shall* be numbered consecutively.' (emphasis added)

Section 118 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) Any offences, whether *felonies or misdemeanours*, *may* be charged together in the same charge or information if the offences charged *are founded on the same facts or form, or are part of, a series of offences of the same or a similar character*.
>
> (2) *Where more than one offence is charged in a charge or information, a description of each offence so charged shall be set out in a separate paragraph of the charge or information called a count.*
>
> (3) Where, before trial, *or* at any stage of a trial, the court is of opinion that a person accused *may* be embarrassed in his defence by reason of being charged with more than one offence in the same charge or information, *or* that for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information the court *may* order a separate trial of any count or counts of such charge or information.' (emphasis added)

The evidence in respect of each charge *must* however be considered separately, see *R v Fisher* (1965) 49 CrAppR 116.

In *Collins* (1994) 76 ACrimR 204 McPherson JA and Lee J, in their joint judgment, stated at pages 206 – 211:

> 'Section 567(1) sets up a general prohibition in relation to the joinder of multiple counts in the one indictment. Section 567(2), however, sets up an exception. Relevantly, it provides that multiple counts may be joined on the one indictment if they:

'are founded on the same facts or are, or form part, of a series of offences of the same or similar character or a series of offences committed in the prosecution of a single purpose*."*

It has long been accepted that the basic criteria for the joinder of counts under subs (2) is the existence of some connection or nexus between them, each limb of the subsection being illustrative of the circumstances giving rise to that nexus: *Ludlow v Metropolitan Police Commissioner* [1971] AC 29 at 39; (1970) 54 CrAppR 233 at 242; *Kray* [1970] 1 QB 125 at 130 – 131; (1969) 53 CrAppR 569 at 573 – 575; *Clayton v Wright* [1948] 2 AllER 763 at 765; *Cranston* [1988] 1 QdR 159 at 164.

In defining in broad terms what connection is sufficient for this purpose, an examination of the cases demonstrates that an appropriately liberal reading be given to the text of the section, consistent with its underlying policy. That policy, it was stated in Kray at 131; 575, *is to enable the joinder of charges which may be "properly and conveniently" dealt with together*; see also *Ludlow* at 38; 241.

It is obviously desirable both in the interests of the due and expedient administration of criminal justice and in the interests of finality of litigation in relation to the particular accused, that there be a single and final inquiry into matters which arise out of or which essentially involve common issues of fact or law. Any injustice which such a course has the potential to produce is adequately catered for by the discretion to sever provided for in s.597A. If nothing else, consistency in decision making would dictate that the one tribunal resolve such questions, little being gained from a fragmented approach.

The simple means which the legislature has provided for giving effect to this policy is to allow the joinder of multiple counts in the same indictment in an appropriate case so that the whole of the facts can be adjudicated upon be one jury"; *Bellman* [1989] AC 836 at 850; (1989) 88 CrAppR 252 at 260.

Indeed so extensively has this policy been recognized, that the courts have laid down the general rule that matters which can be joined without prejudice to the accused ought generally to be: *Connelly v DPP* [1964] AC 1254; (1964) 48 CrAppR 183; *Bargenquast* (1981) 5 ACrimR 126. The counts in the present indictment plainly display the requisite nexus. If nothing else, all of the offences charges had their genesis in the events of 13 June 1993 and in that sense attract the operation of the first limb of the subsection. *For offences to be "founded on the same facts" they must have a common factual origin"*; *Barrell and Wilson* (1979) 69 CrAppR 250; *Bellman* at 850; 260; *Cranston* at 162. *But that is a phrase which is not to be narrowly construed. In particular, it is not necessary for the offences to have arisen contemporaneously or to involve precisely the same facts. All that is necessary is for them to be traceable, either in time, place or circumstance, to common events.*

Moreover, the admissibility of the accused's recent possession of the stolen items on the charges of arson and breaking, entering and stealing, as a circumstance tending to connect him with the scene of those crimes (*Loughlin* (1951) 35 CrAppR 24), establishes them as part of a series of offences as that phrase is understood. It is both the fact of that possession and the circumstances attending its acquisition that provides the necessary link. *The mere fact that the counts are mutually exclusive in the sense that they are based on contradictory explanations as to the circumstances surrounding the offences is not to the point*: *Bellman*. *It is the existence of some common link between them that justifies the joinder.*' (emphasis added)

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In *R v Baird* (1993) 97 CrAppR 308 the Court of Appeal stated at pages 313 – 315:

'*It seems to us that a coincidence in point of time, like a coincidence in point of location, may be an important factor in determining whether or not particular offences can be regarded as being or forming part of a series, but every case must depend upon its own facts*. *This, we think, explains why there is no authority suggesting that, for the purposes of Rule 9, the components of any particular series of alleged offences must have been committed within a definite time span.* As the authorities plainly show, the correct approach is to discover whether the alleged offences claimed by the prosecution to form part of a series are linked by a sufficiently close nexus to bring them within the Rule. It is not an approach by way of the dictionary definition of the word. This appears from the comments of Widgery LJ (as he then was) upon rule 3 of Schedule I to the Indictments Act 1915, the forerunner of rule 9, in *Kray* (1969) 53 CrAppR 569, [1970] 1 QB 125 at pp. 574 and 130 where he said:

"Counsel for Ronald Kray contended that two murders cannot amount to a 'series' of offences since a series, involves at least three components. Mr. Wrightson (for Reginald Kray) did not support this argument, but he contended that rule 3 was no more than a consolidation of earlier rules of practice which did not sanction the joinder of offences unless they arise out of the same facts or were part of a system of conduct, which was not here alleged.

The Court does not accept either of these arguments. *It may be true that the word 'series' is not wholly apt to describe less than three components, but so to limit its meaning in the present context would produce the perverse result that whereas three murders could be charged in the same indictment, two could not.* The construction of the rule has not been restricted in this way in practice during the 50 years which have followed the passage of the Act and it is too late now to take a different view.

On the other hand, offences cannot be regarded as of a similar character for the purposes of joinder unless some sufficient nexus exists between them. Such nexus is certainly established if the offences are so connected that evidence of one would be admissible on the trial of the other, but it is clear that the rule is not restricted to such cases.

Widgery LJ added at pp. 575 and 131:

"*It is not desirable, in the view of this Court, that rule 3 should be given an unduly restricted meaning, since any risk of injustice can be avoided by the exercise of the judge's discretion to sever the indictment. All that is necessary to satisfy the rule is that the offences should exhibit such similar features as to establish a prima facie case that they can properly and conveniently be tried together*."

These passages from the judgment of Widgery LJ were approved by the House of Lords in *Ludlow v Metropolitan Police Comr*. (1970) 54 CrAppR 233, [1971] AC 29, where again it was held that two offences could constitute a "series" within the meaning of the rule. Lord Pearson, with whom the other members of the House agreed, added at pp. 242 and 39 of the respective reports:

"In my opinion, however, it is important to notice that there has to be a *series* of offences of a similar character. *For this purpose there has to be some nexus between the offences … Nexus is a feature of similarity which in all the circumstances of the case enables the offences to be described as a series*."

It was held that a sufficient nexus existed in that case because the two offences "were similar both in law and in fact". More recently, in *Marsh* (1986) 83 CrAppR 165 this court rejected an argument by the appellant that, for the purposes of joinder, the two offences must have both a legal and factual similarity. At p. 171 of the report Mustill LJ (as he then was) referred to Lord Pearson's approval of the last sentence quoted above from the judgment of Widgery LJ in the *Kray* case, and added:

"*It seems to us, therefore, that those faced with the question of joinder should approach the matter by seeking to ascertain whether or not the counts have similar or dissimilar legal characteristics, whether or not they have similar or dissimilar factual characteristics, and whether or not in all the circumstances such features of similarity as are found enable the offences to be properly described as a series*."

It will be seen from these authorities that the answer to the question whether the counts in the present case were properly joined as a "series" largely depends, upon whether or not the evidence in relation to one set of alleged offences was admissible in relation to the other and vice versa.' (emphasis added)

In *Chief Constable of Norfolk v Clayton* [1983] 2 AC 473 [(1983) 77 CrAppR 24] Lord Roskill stated at pages 491 – 492:

'Where a defendant is charged on several informations and the facts are connected, for example motoring offences, or several charges of shoplifting, I can see no reason why those informations should not, if the justices think fit, be heard together. […] Of course, when this question arises, as from time to time it will arise, justices will be *well advised* to inquire both of the prosecution and of the defence whether either side has any objection to all the informations being heard together. […] Absence of consent, either express where the defendant is present or represented, *should no longer* in practice be regarded as a complete and automatic bar to hearing more than one information at the same time or informations against more than one defendant charged on separate informations at the same time when in the justice's view the facts are *sufficiently closely connected* to justify this course and there is no risk of injustice to defendants by its adoption. *Accordingly, the justices should always ask themselves whether it would be fair and just to the defendant or defendants to allow a joint trial.* Only if the answer is clearly in the affirmative should they order joint trial in the absence of consent by or on behalf of the defendant.' (emphasis added)

See also: *R v Marsh* (1986) 83 CrAppR 165; [1966] CrimLR 120; *R v Assim* [1966] 3 WLR 55; [1966] 2 QB 249; [1966] 2 AllER 881; (1966) 50 CrAppR 224; *R v Youth* [1945] WN 27; *R v Grondkowski & Malinowski* (1946) 31 CrAppR 116 [[1946] KB 369] at pages 119 – 121; *R v Clayton – Wright* [1949] 2 AllER 7632; (1948) 33 CrAppR 22 & *R v Anderson* [1994] 2 QdR 409.

In *R v John Musuota* (Unrep. Criminal Case No. 41 of 1996) Lungole - Awich J stated at pages 7 – 9:

'The DPP, by charging the one overt act in five different counts is saying that the one act is technically five different offences so accused, by the one act committed crime five times, he is to be charged for the five times. That legalism may be attractive to those of us who are trained in Law; what about to an ordinary, but intelligent person, and is it not desirable that however technical an offence may be, it must be put to an accused in a way he understands the charge against him? Does excessive multiplicity in counts not leave an accused lost in the maze? After all it is the accused's liberty in danger.

I raised the question, with the DPP, as to whether he would insist on proceeding with the multiple counts all based on the one overt act. His response was that the DPP was authorized to decide to charge and to prosecute for any charges he chooses. What I had in mind was not to question that constitutional authority of the DPP which must be all too obvious to any lawyer of the Common Law tradition. My inquiry was meant to find out whether the DPP had considered exercising his constitutional discretion to elect to proceed on only one or some of the counts since all the counts were based on one overt act. That is normal practice – See *Regina v Riebold and Another* [1967] 1 WLR 674 where the prosecutor elected to proceed only on a count of conspiracy and 28 other counts of larceny and obtaining by false pretences remained on the court file not to be proceeded with without leave of court. The 29 counts were based on the same overt acts. Of course the prosecutor, in deciding to have some counts stayed must be careful to consider that should it be necessary to return to seek leave to proceed with the counts stayed, circumstances do not exist in which it may be said that he will be merely seeking a retrial of the whole case. Indeed the prosecution could, on the same overt act charge one key count and one or two as alternative counts. The court, for its part, has to ensure that the multiplicity of counts will not amount to oppression or prejudice to the accused.'

In *R v King* [1897] 1 QB 214 [(1897) 18 CoxCC 447] Hawkins J commented at page 216:

'The defendant was tried for obtaining and attempting to obtain goods by false pretences upon an indictment containing no fewer than forty counts; and I pause here to express my decided opinion that it is a scandal that an accused person should be put to answer such an array of counts containing, as these do, several distinct charges. Though not illegal, it is hardly fair to put a man upon his trial on such an indictment, for it is almost impossible that he should not be grievously prejudiced as regards each of the charges by the evidence which is being given upon the others. In such a case it would not be unreasonable for the defendant to make an application that each count, or each set of counts, should be taken separately.'

See also: *R v Bailey* (1924) 18 CrAppR 42; [1924] 2 KB 300; (1924) 27 Cox CC 692; *R v Carless & Stapley* (1934) 25 CrAppR 43 at pages 44 – 45; *R v Shaw & Agard* (1942) 28 CrAppR 138 & *R v Hudson & Hagan* (1952) 36 CrAppR 94 at page 95.

The law relating to '*Abuse Of Process*' is examined commencing on page **138**.

[5.7.2] Joint Trials

[A] Criminal Procedure Code

Section 119 of the *Criminal Procedure Code* (Ch. 7) states:

'The following persons *may* be joined in one charge or information and *may* be tried together, namely –

(a) person accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of different offences committed in the course of the same transaction;

(d) persons accused of different offences provided that all offences *are founded on the same facts, or form or are part of a series of offences of the same or a similar character*.' (emphasis added)

[B] General Principles

In *R v Gibbins & Proctor* (1918) 13 CrAppR 134 Darling J, delivering the judgment of the Court, stated at page 136:

> 'The rule is, that it is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately. But the judge must exercise his discretion judicially.'

See also: *R v Youth* [1945] WN 27; *R v Assim* [1966] 3 WLR 55; [1966] 2 QB 249; [1966] 2 AllER 881; (1966) 50 CrAppR 224 & *R v Grondkowski & Malinowski* (1946) 31 CrAppR 116; [1946] KB 369.

In *Bannon v R* (1995) 132 ALR 87 Deane J, as a member of the High Court of Australia, made the following observation at page 93:

> 'The joint criminal trial of two persons either on the basis that both were jointly involved in criminal conduct or on the basis that one or other of them is alone guilty of the charged criminal offence has long been rightly seen as representing one of the most difficult facets of the administration of criminal justice.'

In *Zebedee Lolety v R* (Unrep. Criminal Appeal Case No. 4 of 1981) Daly CJ stated at page 2:

> 'I should add that having seen the full proceedings of this trial I have given serious consideration as to whether the course adopted of having a joint trial of twenty four persons could be said to be in the interests of justice. There appears to be an increasing practice of bringing large number of accused before courts at one time. It is not a practice of which I approve particularly when there are issues of identification before the court in relation to serious offences as was the case in this trial. The better course would have been for those persons accused of assault to be tried separately from those against whom unlawful assembly was laid by itself. Even so it would still in my view be better if the disputed unlawful assembly cases were tried in smaller groups. The learned Magistrate went to great trouble to make sure that all accused were given a full opportunity to place their cases before the court. His task would have been much easier if he was dealing with manageable numbers.
>
> Having a number of separate trials involving the same evidence may, I appreciate, cause administrative difficulties and the loss of time to courts, witnesses and advocates. But, if the interest of justice require it, then the sacrifice must be made. Justice is for the individual not the group and courts must be seen to be dealing fully and carefully with every individual appearing in front of them. This may not be apparent to a bystander where a court is considering the cases against a large number of accused at one time. I hope, therefore, that joint trials of large numbers of accused will discontinue.' (emphasis added)

In *R v Myers* [1996] 2 CrAppR 335 Russell LJ, delivering the judgment of the Court of Appeal, stated at pages 338 – 339:

> 'Predictably we were referred to the statements of principle to be found in *Lake* (1977) 64 CrAppR 172, 175:

> "*It has been accepted for a very long time in English practice that there are powerful public reasons why joint offences should be tried jointly. The importance is not merely one of saving time and money. It also affects the desirability that the same verdict and the same treatment shall be returned against all those concerned in the same offence. If joint offences were widely to be treated as separate offences, all sorts of inconsistencies might arise. Accordingly it is accepted practice, from which we certainly should not depart in this court today, that a joint offence can properly be tried jointly, even though this will involve inadmissible evidence being given before the jury and the possible prejudice which may result from that* […]. […]"
> […]
>
> Subject to questions of admissibility […], we cannot fault the exercise of the trial judge's discretion. He had to place in the balance the interests of both defendants. Prejudice to one could be an advantage to the other. In a difficult situation, he had to look at the overall fairness of the situation that might develop in a joint trial.' (emphasis added)

In *Webb & Hay v R* (1994) 68 ALJR 582 Toohey J of the High Court of Australia, with whom Mason CJ and McHugh J concurred, stated at page 606:

> 'King CJ [in *Webb & Hay* (1992) 59 SASR 563 at 585 pointed …] out that there are "strong reasons of principle and policy why persons charged with committing an offence jointly ought to be tried together. That is particularly so where each seeks to cast the blame on the other". What King CJ referred to as "strong reasons of principle and policy" were discussed by his Honour in *R v Collie* [(1991) 56 SASR 302 at 307 – 311]. I respectively agree with that discussion which emphasizes that when accused are charged with committing a crime jointly, *prima facie* there should be a joint trial.' (emphasis added) [words in brackets added]

In *Wemp Mapa & three others v The State* [1979] PNGLR 135 Andrew J, with whom the other members of the Supreme Court concurred, stated at page 139:

> 'The power of a court to order separate trials (or to refuse to do so) for persons jointly indicted, where required by the interests of justice, has long been recognized by the common law of England.'

In *Smith, Turner & Altintas* (1994) 75 ACrimR 327 Perry J of the South Australian Supreme Court examined the law relating to the joinder of charges as regards '*accessories after the fact*' at pages 340 – 341:

> '*I would have thought that it is ordinarily in the interests of an alleged accessory after the fact to have his or her charge dealt with at the same time as the hearing of the substantive offence.* If separate trials were to be contemplated, the conviction of the principal offender or offenders is only *prima facie* evidence of the commission of the offence as to which accessorial liability is sought to be established […]. If the alleged accessory sought to offer evidence going to the question whether or not a principal offence had been committed, the accessory would, in the context of separate trials, inevitably have to call much evidence again. If the accessory is tried with the alleged principal offenders, he or she has the opportunity of participating in the presentation of evidence going to the commission of the principal offence, and may be cross – examination or otherwise have an opportunity of playing a part in the defence to the allegations going to the establishment of the principal offence which it would be difficult in the context of a separate trial.' (emphasis added)

See also: *R v Buggy* (1961) 45 CrAppR 298.

The law relating to '*Accessories After The Fact*' is examined commencing on page **421**.

'The case must be rare in which fellow – conspirators can properly in the interests of justice be granted a separate trial', see *R v Miller & others* (1952) 36 CrAppR 169 [[1952] 2 AllER 667] at page 174.

Separate trials should *not* be ordered solely on the basis that a defendant intends to question the credibility of a co – defendant, see *R v Johnson (A.)* [1995] 2 CrAppR 1; *R v O'Boyle* (1991) 92 CrAppR 202; [1991] CrimLR 67 & *R v Grondkowski & Malinowski* [1946] KB 369; (1946) 31 CrAppR 164.

The law relating to '*Questioning The Credibility Of Defendants*' is examined commencing on page **352**.

Some of the considerations which should be considered by a court are:

[i] the proper administration of justice; and

[ii] the interests of the witnesses, see *R v Edwards & Lake (deceased)* [1998] CrimLR 756.

A Court *may* refuse to order separate trials and furthermore, exercise its discretion to limit the extent of cross – examination as to credibility taking into account such considerations, see *R v Murdoch & Taylor* [1965] AC 574.

In a joint trial evidence against each defendant *must* be considered separately, see *Foster & others v R* (Unrep. Criminal Appeal Case No. 8 of 1994; Court of Appeal; at page 4); *R v Graham* (1919) 13 CrAppR 220; (1919) 14 CrAppR 7; *R v Matthews* (1919) 14 CrAppR 23; *R v Twigg* (1919) 14 CrAppR 71; *R v Lovett & Flint* (1921) 16 CrAppR 41 & *R v Rhodes* (1959) 43 CrAppR 23.

If the prosecution is unable to satisfy the Court '*beyond reasonable doubt*' that either or both defendants committed the offence, then the appropriate verdict is not guilty, see *Swallow v Director of Public Prosecutions* [1991] CrimLR 610; *Collins & Fox v Chief Constable of Merseyside* [1988] CrimLR 247; *R v Abott* [1955] 3 WLR 369; [1955] 2 QB 497; [1955] 2 AllER 889; (1955) 39 CrAppR 141; *R v Grondkowski & Malinowski* (1946) 31 CrAppR 116 [[1946] KB 369] at pages 119 – 121; *R v Lane & Lane* (1986) 82 CrAppR 5; [1985] CrimLR 789; *R v Russell & Russell* (1987) 85 CrAppR 388; [1987] CrimLR 494; *R v Aston & Mason* (1992) 94 CrAppR 180; *R v Strudwick & Merry* (1994) 99 CrAppR 326; *R v Rowlands* (1972) 56 CrAppR 169 & *R v Gibson & Gibson* (1985) 80 CrAppR 24; [1984] CrimLR 615.

Where two or more persons are indicted jointly, the wife or husband of any such defendant is *not* an available witness against any co – defendant, see *R v Mount & Metcalfe* (1934) 24 CrAppR 135 at page 137.

The law relating to the '*Competence of Spouses*' is examined commencing on page **282**.

See also: *R v Moghal* (1977) 65 CrAppR 56; [1977] CrimLR 373; *R v Josephs & Christie* (1977) 65 CrAppR 253; *R v Hoggins & others* [1967] 1 WLR 1223; [1967] 3 AllER 334; (1967) 51 CrAppR 444; *R v Pieterson & Holloway* [1995] 1 WLR 293; [1995] 2 CrAppR 11; *R v Eriemo* [1995] 2 CrAppR 206; *R v Miller* [1957] 2 AllER 667; (1952) 36 CrAppR 169; *R v Shaw & Agard* [1942] 2 AllER 342; (1943) 28 CrAppR 138; *John Rul Nabil v The State* [1979] PNGLR 88 at pages 88 – 90 & *The State v Leo Nimo* [1980] PNGLR 129.

[C] Evidence Of Co - Defendants

In *R v Kempster* (1990) 90 CrAppR 14 Staughton LJ, delivering the judgment of the Court, stated at page 18:

> 'At common law it was established long ago that a plea of guilty by one of two co-accused is not evidence against the other.'

See also: *R v Moore* (1956) 40 CrAppR 50.

In *R v Peter Fitali & others* (Unrep. Criminal Case No. 39 of 1992) Muria CJ stated at page 8:

> 'The general rule is that the statements made by one accused either to the police or to others are not evidence against a co – accused unless the co – accused either expressly or by implication adopts the statements as his. See *R –v- Rudd* (1948) 32 CrAppR 138 and *R –v- Gunewardene* (1951) 35 CrAppR 80.'

In *Foster & others v R* (Unrep. Criminal Appeal Case No. 8 of 1994) the Court of Appeal stated at pages 4 – 5

> 'The appellant Foster's other grounds of appeal were, first, that the learned Chief Justice took into account against him statements contained in the caution statements of the other two appellants. We do not think this is so. In his general summary of events the learned Chief Justice referred to the evidence generally including the caution statements of all three accused. The appellant submitted that it should be implied that because he used them in his general summary he used them also in considering the individual accused's cases. We do not think any such implication follows. *In our view he clearly considered each accused's case separately and in this appellant's case he plainly did not take into account matters contained in the statements made by the appellants Loea and Dusu*. […]
>
> […]
>
> It appears to us that the learned Chief Justice has inadvertently used Loea's caution statement in reaching the conclusion that both appellants heard Foster calling out, when in fact only Loea admitted that, and both had pulled the deceased over to him which again was only admitted by Loea. […]
>
> *It is of course, not permissible to take one accused's statement into account when considering the case against another accused* […].' (emphasis added)

Nor is it permissible to use the statement of a '*co - defendant*' who is called as a witness for either the prosecution or defence, even if it is necessary to have that witness declared 'hostile', see *R v O'Neill* [1969] CrimLR 260 & *R v Dibble* (1909) 1 CrAppR 155.

The law relating to '*Hostile Witnesses*' is examined commencing on page **288**.

However, if a defendant gives 'evidence' then such 'evidence' may be used against a '*co – defendant*', see *Mawaz & Khan v R* [1967] 1 AllER 80; [1967] 1 AC 454; [1966] 3 WLR 1275 & *R v Rudd* (1948) 32 CrAppR 138.

Refer also to the law relating to '*Questioning The Credibility Of Co – Defendants*' commencing on page **352**.

When a defendant called in his/her own defence gives evidence against a co – defendant the full warning, as regards '*corroboration*', which is appropriate in respect of a witness for the prosecution who may be an accomplice need *not* be considered, see *R v Bagley* [1980] CrimLR 572; *R v Loveridge & Loveridge* (1983) 76 CrAppR 125 & *R v Knowlden & Knowlden* (1983) 77 CrAppR 94.

The law relating to '*Corroboration*' as regards '*Accomplices*' is examined commencing on page **303**.

See also: *Burnett* (1994) 76 ACrimR 148.

[D] Defective Joinder

Upon a court ruling that counts or charges have been improperly joined, the *only* option available for the prosecution is to seek leave to have the counts or charges withdrawn and institute fresh proceedings against the defendants. Such a defect can *not* be cured by a direction for separate trials, see *R v O'Reilly* (1990) 90 CrAppR 40 & *R v Newland* [1988] QB 402; (1988) 87 CrAppR 118.

The law relating to the '*Withdrawal Of Charges*' is examined commencing on page **101**.

[5.7.3] Alternative Charges

Subsection 120(b)(i) of the *Criminal Procedure Code* (Ch. 7) permits the joinder of alternative charges. That subsection states:

> '[W]here an enactment constituting an offence states the offence to be the doing or the omission to do any one of *any different acts in the alternative*, or the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions, or *states any part of the offence in the alternative, the acts, omissions, capacities or intentions, or other matters stated in the alternative in the enactment, may be stated in the alternative in the count charging the offence*.' (emphasis added)

The prosecution is required to advise the court whenever it is relying on charges in the '*alternative*', '*Practice Note*' issued by Davis CJ in *David Kio v R* (Unrep. Criminal Appeal Case No. 11 of 1977).

[5.8] Limitation Of Time

Section 206 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Except where a longer time is specially allowed by law, no offence, the maximum punishment for which does not exceed imprisonment for six months or a fine of one hundred dollars or both such imprisonment and fine shall be triable by a Magistrate's Court, *unless the charge or complaint relating to it is laid within six months from the time when the matter of such charge or complaint arose*.' (emphasis added)

The '*laying of the charge or complaint*' refers to the time when it was laid before the Court. As regards '*Institution Of Proceedings*' refer to section **[6.0]** commencing on page **110**.

The '*time when the matter of such charge or complaint arose*' refers to the date on which the offence is alleged to have been committed.

See also: *R v Kennett L JJ, Ex parte Humphrey & Wyatt* [1993] CrimLR 787; *R v Pain, Jory & Hawkins* (1986) 82 CrAppR 141 & *R v Pontypridd Juvenile Magistrates' Court, Ex parte B & others* [1988] CrimLR 842.

[5.9] Authority To Withdraw Charges

Section 10(1) of the *Constitution* states:

> 'If any person is charged with a criminal offence, then, *unless the charge is withdrawn*, that person shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.' (emphasis added)

By virtue of section 91(4) of the *Constitution*, the 'Director of Public Prosecutions has the power in any case in which he considers it desirable to do so –

(a) to institute and undertake criminal proceedings against any person before any court […] in respect of any offence alleged to have been committed by that person;

(b) to take over and continue any such criminal proceedings that have been instituted or undertaken by any other person or authority; or

(c) to discontinue at any stage before judgement is delivered any such criminal proceedings instituted or undertaken by himself or any other person or authority.'

'The powers conferred on the Director of Public Prosecutions by paragraphs (b) and (c) of subsection (4) of [… section 91] shall be vested in him to the exclusion of any other person or authority:

Provided that where any other person or authority has instituted criminal proceedings, nothing in this subsection shall prevent the withdrawal of those proceedings by or at the instance of that person or authority and with the leave of the court', see section 91(6) of the *Constitution*.

The prosecution is responsible for determining who is prosecuted. A prosecutor upon receiving the requisite authority to withdraw a charge based on the below – mentioned tests should advise the Court that it is the intention of the prosecution to seek leave of the court to withdraw the charge. Whilst the prosecutor should always consider any comments made by the Court, the ultimate decision is that of the prosecution and not the Court as to whether a prosecution proceeds, see *R v Jenkins* (1986) 83 CrAppR 152.

The Director Prosecutions and Provincial Police Commanders have the authority in respect of charges dealt with summarily in a Magistrates' Court or a Local Court to determine whether an offender is prosecuted, subject to:

[i] both the '*Sufficiency Of Evidence*' and '*Public Interest*' tests as outlined commencing on page **115**; and

[ii] the express directions of the Director of Public Prosecutions, see section 74 of the *Criminal Procedure Code* (Ch. 7).

CHARGES

Section 68(1) of the *Criminal Procedure Code* (Ch. 7) states:

> 'In *any criminal case* and at any stage thereof before verdict or judgment, as the case may be, the Director of Public Prosecutions may enter a *nolle prosequi*, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be once discharged in respect of the charge for which the *nolle prosequi* is entered, and if he has been committed to prison shall be released, or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.' (emphasis added)

See also: sections 69 & 70 of the *Criminal Procedure Code* (Ch. 7).

Section 190 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) The prosecutor may with the consent of the court at any time before a final order is passed in any case under this Part ['*Procedure in Trials Before Magistrates' Courts – Part VI*'] withdraw the complaint.
>
> (2) On any withdrawal as aforesaid –
>
> (a) where the withdrawal is made after the accused person is called upon to make his defence, the court shall acquit the accused;
>
> (b) where the withdrawal is made before the accused person is called upon to make his defence, the court shall subject to the provisions of section 197 in its discretion make one or other of the following orders --
>
> (i) an order acquitting the accused;
>
> (ii) an order discharging the accused.
>
> (3) An order discharging the accused under paragraph (*b*) (ii) of subsection (2) shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts.' [words in brackets added]

An order acquitting a defendant under paragraph (b)(ii) of section 190(2) of the *Criminal Procedure Code* (Ch. 7) shall operate as a bar to subsequent proceedings against the same defendant on account of the same facts, see the law relating to *'Double Jeopardy'* which is examined commencing on page **105**.

Section 190 however only applies to charges being dealt with summarily and *not* '*Preliminary Investigations / Inquiries*' because it refers to Part VI of the *Criminal Procedure Code* (Ch. 7).

In *Tatau v Director of Public Prosecutions* (Unrep. Civil Case No. 289 of 1992) Palmer J stated at pages 2 – 12:

> 'The first matter I will consider is the powers of the learned Director of Public Prosecutions under section 68 of the Criminal Procedure Code and under section 91(4)(c) of the Constitution.
>
> [His Lordship then referred to section 68 of the *Criminal Procedure Code* (Ch. 7).]

The following points can be noted.

(i) The powers under section 68 may be exercised at any state of the trial before verdict or judgment.

(ii) They are discretionary.

(iii) Nolle may be entered either in Court or by writing to the court.

[…]

[His Lordship then referred to section 91 of the *Constitution*.]

There are certain points to note about section 91(4)(c).

(1) The powers of the Director of Public Prosecutions is restricted to what he considers "*desirable*"; and

(2) He may discontinue criminal proceedings at any stage before judgment [is] delivered.

The power to discontinue would seem to run right up until before judgment is delivered ie., even right up until after defence have stated their case! However, one would need to be extremely cautious about giving such powers or interpreting such sections so widely.

Some guidelines as to the limits of the exercise of such a widely worded power can be gleaned from the provisions of section 189 of the Criminal Procedure Code [now section 190].

Section 189(2)(a) for instance provides that if a withdrawal is made in the Magistrates Court after the accused person is called upon to make a defence, then the Court shall acquit him. The basis of this provision stems from the common law principles of a right to a fair hearing and the inherent jurisdiction of the court to safeguard an accused person from oppression or prejudice […]. If a nolle is entered in such circumstances then the accused is entitled to be acquitted.

Another limit can naturally be seen also from section 196 of the Criminal Procedure Code [now section 197] which covers the situation that arose in the case of Regina –v- Abia Tambule & Others [1974] PNGLR 250.

Section 196 states in essence that where prosecution has closed its case then the presiding magistrate must decide if there is a sufficient case for the accused to deny. If he finds that there is insufficient evidence to put the accused on his defence, then he must be acquitted.

[…]

In broad terms, [… the learned Director of Public Prosecutions] is concerned with the pursuit of justice, the lawful apprehension of offenders, collection of evidence and successful prosecution at trial. In his pursuit of justice, his actions are barricaded in by what is lawful and according to general rules of practice evolved by the Court over many years.

The decision to initiate a prosecution or to stop or discontinue criminal proceedings belongs to him alone to exercise.

> If for instance, having commenced a hearing, the Director of Public Prosecutions realizes that there is insufficient evidence available and therefore rather than waste everybody's time he decides to discontinue proceedings, that is a perfectly valid thing to do. If in reconsidering the evidence he comes to the conclusion that no successful prosecution will ever be made and he simply decides not to resume criminal proceedings, then that is perfectly valid, and that is the end of the matter. Although the effect of discontinuing the proceedings is to discharge the accused, in this particular example, it will have the same indirect effect of an acquittal or can be regarded as a permanent discharge.
>
> […]
>
> I do not think it was intended that the courts should delve into how a particular decision is arrived at in the exercise of the Director of Public Prosecution's power under section 91(4)(c).
>
> […]
>
> I will now address briefly the submission of Mr Talasasa on the question of the interpretation to be accorded to the word "withdraw" as used in section 10(1) of the Constitution.
>
> The word "withdraw" is not defined in the Constitution, as submitted.
>
> […]
>
> *The ordinary meaning as applied to the word "withdraw" in section 10(1) of the Constitution would mean a "cancellation", a "washing out" of the case resulting in an acquittal. However, when used in the context of section 189 of the Criminal Procedure Code it would also mean a discharge. The context of the use of the word withdrawn, in my opinion is important to look at to determine the extent of the power used when a withdrawal is made i.e., when the case was withdrawn, was there an acquittal made or a discharge?*' (emphasis added) [words in brackets added]

In *R v Soho Sade* (Unrep. Criminal Appeal Case No. 253 of 2001) Palmer ACJ dealt which a case in which the police prosecutor made an application to have a charge withdrawn under section 190(2)(b)(ii) of the *Criminal Procedure Code* (Ch. 7) on the basis that: (i) there was a lack of transport for the police; and (ii) the un – cooperativeness of the defendant. The presiding Magistrate accepted the application and discharged the defendant.

His Lordship held at pages 1 - 2:

> '[In *Director of Public Prosecutions v Clement Tom* [1988 - 89] SILR 118 Ward CJ stated at page 119:]
>
> "*Whenever a prosecutor seeks to withdraw a charge under section 189 he requires the consent of the court. Normally that will be given but only after enquiry by the court as to the reasons for the withdrawal. If there is any doubt about the propriety of the application, the court should refuse and require the prosecution to proceed. If necessary, the court can require evidence of the reasons*.
>
> Where the magistrate is satisfied there should be withdrawal and it is before the accused has been called upon to make his defence, he must decide the appropriate order under subsection 2(b). *Where there is no evidence or the wrong charge has been laid or the wrong person charged, the order should be one of acquittal. In all other cases, the appropriate order is one of discharge under 2(b)(ii)."*

> […], I find the reasons […] given to be inadequate to justify an application for withdrawal. If there are no police vehicles, there are taxis available and if taxis are too expensive there are public buses to use. If all else fails walk.
>
> If an accused is un – cooperative then there are avenues available to police officers to deal with such persons. I don't really see how such excuse can be accepted when the accused is under a warrant of arrest anyway. If an accused is evasive, then it is part of police work to locate and arrest him.' (emphasis added)

In *R v Dao & Dao* [1988 – 89] SILR 142 Ward CJ stated at page 144:

> '*The complaint of the prosecution in ground one relates to the order of acquittal following the magistrate's consent to withdraw the charge. The reason for that withdrawal was, as the prosecutor told the lower court, so that he would be free to bring the case back once essential evidence became available.* That was the same reason that he had raised in seeking an adjournment. He was attempting to use withdrawal under section 189 to achieve the very adjournment the magistrate had refused and for the same reason.
>
> *I feel that was a clear case of seeking to withdraw for improper reasons* and the learned Magistrate should have refused his consent to the withdrawal. Instead, what he did was to step, as it were, straight into sub-section (2) and decide whether the order should be under (2)(b)(i) or 2(b)(ii). There is nothing to suggest he considered the matter properly under subsection one in allowing the withdrawal. On the contrary, having said that he felt it was wrong to leave, the case hanging over the defendant's heads "for exactly the same reason as for refusing the adjournment", he should clearly not have passed to subsection 2 at all.
>
> Having refused his consent, the prosecution would have had to proceed. Whether they offered no evidence or tried to succeed on the evidence they had would have been a matter for them. Counsel for the appellants has made it clear that they could not have succeeded and so an acquittal would have been inevitable.' (emphasis added)

See also: *R v Alwyn Salau & Silas Atu* (Unrep. Criminal Case No. 45 of 2000; Lungole - Awich J) *& Job Tuhaika & another v Attorney – General & Controller of Prisons* (Unrep. Civil Case No. 383 of 1992; Palmer J; at page 2).

[5.10] Double Jeopardy

No person should be prosecuted for an offence for which he/she has been previously either convicted or acquitted, *unless* such conviction or acquittal has been reversed or set aside.

Section 10(5) of the *Constitution* states:

> '*No* person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, *save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal*.' (emphasis added)

Refer also to the chapter which examines the '*Criminal Jurisdiction Of The Courts*' commencing on page **14**.

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Section 121 of the *Criminal Procedure Code* (Ch. 7) states:

> 'A person who has been once tried by a court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal has not been reversed or set aside, not be liable to be tried again on the same facts for the same offence.'

Section 3 of the *Traffic Regulations* (Ch. 131) states:

> 'Where any act or omission is an offence under the Act and these Regulations, nothing in these Regulations shall be deemed to affect the liability of any person to be prosecuted under the Act:
>
> *Provided that no person shall be prosecuted twice for the same act or omission*.' (emphasis added)

In *Connelly v Director of Public Prosecutions* [1964] AC 1254 [(1964) 48 CrAppR 183; [1964] 2 WLR 1145; [1964] 2 AllER 401] Lord Devlin stated at pages 1339 – 1340:

> 'For the doctrine of *autrefois* to apply it is necessary that the accused should have been put in peril of conviction for the same offence as that with which he is then charged. The word "offence" embraces both the facts which constitute the crime and the legal characteristics which make it an offence. For the doctrine to apply it must be the same offence both in fact and in law.' (emphasis added)

In *Director of Public Prosecutions v Porthouse* (1989) 89 CrAppR 21 May LJ, delivering the judgment of the Court, stated at page 24:

> 'The rules of *autrefois convict* and *acquit* are rooted in *nemo debet bis vexari*. A defendant is twice – vexed only when he was in peril of a valid conviction upon his first trial. Accordingly *autrefois convict* is not available unless the first trial was before a lawfully constituted court, having jurisdiction in the matter, and trying an offence known to the law in accordance with the law. An acquitted defendant has been at peril if he has been at risk of such a conviction.
>
> There can be no difference in principle whether the first proceedings result in an acquittal or a conviction: either the defendant was at risk of a valid conviction or he was not.'

In *R v Z* [2000] 2 CrAppR 281 [[2000] 2 AC 483; [2000] 3 WLR 117; [2000] 3 AllER 385; [2001] CrimLR 222] the House of Lords held per Lord Hutton at page 302:

> 'A consideration of the authorities and of the textbook writers and commentators leads me to the following conclusions:
>
> (1) The principle of double jeopardy operates to cause a criminal court in the exercise of its discretion, and subject to the qualification as to special circumstances stated by Lord Devlin in *Connelly* at pp. 274 and 1360, to stop a prosecution where the defendant is being prosecuted on the same facts or substantially the same facts as gave rise to an earlier prosecution which resulted in his acquittal (or conviction) […];
>
> (2) Provided that a defendant is not placed in double jeopardy as described in (1) above, evidence which is relevant on a subsequent prosecution is not inadmissible because it shows or tends to show that the defendant was, in fact, guilty of an offence of which he had earlier been acquitted.

(3) It follows from (2) above that a distinction should not be drawn between evidence which shows guilt of an earlier offence of which the defendant had been acquitted and evidence which tends to show guilt of such an offence or which appears to relate to one distinct issue rather that to the use of guilt of such an offence […].'

A plea to *autrefois convict or acquit* should be in writing, see *R v Walker* (1843) 2 M & Rob 446. The onus is on the defendant to prove on the '*balance of probabilities*' that he/she has been previously convicted or acquitted of the offence charged, see *R v Coughlan & Young* (1976) 63 CrAppR 33. In that regard the defendant may call evidence, see *Connolly v Director of Public Prosecutions* (*supra*) at pages 1305 – 1306.

See also: section 48 of the *Interpretation & General Provisions Act* (Ch. 85); sections 165, 205 & 217 of the *Criminal Procedure Code* (Ch. 7); sections 2 & 20 of the *Penal Code* (Ch. 26); *Tatau v Director of Public Prosecutions* (Unrep. Civil Case No. 289 of 1992; Palmer J; at pages 7 – 10); *R v Robinson* [1975] 1 AllER 360; [1975] QB 508; [1975] 2 WLR 117; (1975) 60 CrAppR 108 & *Tapopwa Thomas v The State* [1979] PNGLR 140.

See however section 123 of the *Criminal Procedure Code* (Ch. 7) which states:

'A person convicted or acquitted of any act causing consequences which together with such act constitute a different offence from that for which such person was convicted or acquitted may be afterwards tried for such last – mentioned offence, if the consequences had not happened or were not known to the court to have happened at the time when he was acquitted or convicted.'

See also section 20 of the *Penal Code* (Ch. 26) which states:

'A person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof he causes the death of another person, in which case he may be convicted of the offence of which he is guilty by reason of causing such death, notwithstanding that he has already been convicted of some other offence constituted by the act or omission.'

Considering that those sections are inconsistent with section 10(5) of the *Constitution* it may be argued that such sections void by virtue of section 2 of the *Constitution*.

See also: sections 122 & 124 of the *Criminal Procedure Code* (Ch. 7).

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GENERAL DUTIES OF THE PROSECUTION

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GENERAL DUTIES OF THE PROSECUTION

[6.0] Institution Of Proceedings

[6.0.1] Introduction

In *Rubin v Director of Public Prosecutions* (1989) 89 Cr AppR 44 Watkins LJ, with whom Potter J concurred, stated at pages 47 – 48:

> 'It is, I […] believe, […] well established that, generally speaking, any member of the public may lay an information. There are statutory exceptions to that right and in some instances consent to prosecute has to be obtained from a specified authority. But in the vast majority of cases it is a member of the public who informs and with rare exceptions that member of the public is a constable.
>
> Obviously a constable is no ordinary member of the public. A member of a police force, though he be of the rank of sergeant or above, including chief constable [ie., Commissioner], is nevertheless a constable – see Halsbury's Laws of England (4th ed.), vol. 36, paragraph 201 where it is stated:
>
> "*The common law constable*. The history of the police is the history of the office of constable and, notwithstanding that present day police forces are the creation of statute and that the police have numerous statutory powers and duties, in essence a police force is neither more nor less than a number of individual constables, whose status derives from the common law, organised together in the interests of efficiency."
>
> […]
>
> And at paragraph 32:
>
> "*General functions of constables*. The primary function of the constable remains, as in the seventeenth century, the preservation of the Queen's peace. From this general function stems a number of particular duties additional to those conferred by statute and including those mentioned hereafter. The first duty of a constable is always to prevent the commission of a crime. If a constable reasonably apprehends that the action of any person may result in a breach of the peace it is his duty to prevent that action. It is his general duty to protect life and property. The general function of controlling traffic on the roads is derived from this duty."
>
> Furthermore, it cannot I think be doubted that it is the duty of every chief constable of police (the chief constable) to enforce the law of the land. It is for him to decide, subject to certain exceptions, whether or not there should be a criminal prosecution following apprehension of a suspected offender in the circumstances of any particular case or in accordance with a policy adopted or devised or formulated by him.
>
> So the constable's duty is to strive to keep the peace, to enforce the law and to prosecute suspected offenders. It needs hardly to be said that the chief constable delegates much of his power to decide whether there shall be a prosecution to other constables in his force of lower rank. But the power so delegated remains his power. Hence, there can be no denying his right to lay an information no matter who is the actual informant from within his force; likewise the right of any of his officers to perform that act who have the requisite delegated power from him. Such a person may be of any rank from constable upwards.' [words in brackets added]

GENERAL DUTIES OF THE PROSECUTION

In *Johnson v Phillips* [1975] 3 AllER 682 [[1976] 1 WLR 65; [1975] CrimLR 580] Wein J, delivering the judgment of the Court, stated at page 685:

> '*The first function of a constable has for centuries been the preservation of the peace.* His powers and obligations derive from the common law and from statute. It is his general duty to protect life and property: see *Glasbrook Brothers Ltd v Glamorgan County Council* [1925] AC 270 where Viscount Finlay said, at page 285: "There is no doubt that it is the duty of the police to give adequate protection to all persons and their property". […]
>
> The powers and obligations of a constable under the common have never been exhaustively defined and no attempt to do so has ever been made: see, for example, *R v Waterfield* [1964] 1 QB 164 where Ainsworth J, who delivered the judgment of the court, said at page 170: "… it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the general terms in which the duties of police constables have been expressed". Also there is the case of *Rice v Connolly* [1966] 2 QB 414, where Lord Parker CJ said at page 419:
>
> "It is also my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for *keeping the peace, for preventing crime or for protecting property from criminal injury*. There is no exhaustive definition of the powers and obligations of the police, but they are at least those […]."' (emphasis added)

See also: *Hickman v O'Dwyer* [1979] CrimLR 309; *King v Hedges* [1974] CrimLR 424; *Coffin & another v Smith & another* (1980) 71 CrAppR 221 & *R v Reid, Vickers & Forbutt (No. 2)* (1981) 2 ACrimR 28.

Upon the determination of the identity of a person who has committed an offence, police officers *must* then decide whether to institute proceedings against such a person.

A prosecution is commenced with the '*institution of proceedings*' in accordance with section 70 of the *Criminal Procedure Code* (Ch. 7).

See also: *R v O'Connor* [1913] 1 KB 557; (1913) 8 CrAppR 167; *Thorpe v Priestnall* [1897] 1 QB 159 & *R v West* [1898] 1 QB 174.

If proceedings are instituted against a defendant without first deciding whether to prosecute, then any further proceedings against such a defendant *may* amount to an '*abuse of process*', see *R v Newcastle upon Tyne JJ, Ex parte Hindle* [1984] 1 AllER 770 & *R v Brentford J, Ex parte Wong* (1981) 73 CrAppR 65.

In *Mills v Cooper* [1967] 2 QB 459 Lord Parker CJ stated at page 467 and in *Director of Public Prosecutions v Humphrys* (1976) 63 CrAppR 95; [1977] 1 AC 1 [[1976] 2 WLR 857; [1976] 2 AllER 497] Lord Salmon stated at pages 122 and 46 respectively:

> '[A] judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of process of the court and is oppressive and vexatious that the judge has the power to intervene.'

The law relating to an '*Abuse Of Process*' is examined commencing on page **138**.

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Section 76 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) *Proceedings may be instituted either by the making of a complaint or by the bringing before a Magistrate of a person who has been arrested without warrant*.
>
> (2) Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint thereof to a Magistrate having jurisdiction to cause such person to be brought before him.
>
> (3) A complaint may be made orally or in writing, but, if made orally, shall be reduced to writing by the Magistrate, and, in either case, shall be signed by the complainant and the Magistrate:
>
> Provided that where proceedings are instituted by a police or other public officer acting in the course of his duty, a formal charge duly signed by such officer may be presented to the Magistrate and shall, for the purposes of this Code, be deemed to be a complaint.
>
> (4) The Magistrate, upon receiving any such complaint, shall, unless such complaint has been laid in the form of a formal charge under the preceding subsection, draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged.
>
> (5) When an accused person who has been arrested without warrant is brought before a Magistrate, a formal charge, containing a statement of offence with which the accused is charged, shall be signed and presented by the police officer preferring the charge.' (emphasis added)

The term '*Complaint*' is defined in section 2 of the *Criminal Procedure Code* (Ch. 7) as meaning 'an allegation that some person known or unknown has committed an offence'.

The decision to institute proceedings should *never* be taken lightly.

Section 155 of the *Criminal Procedure Code* (Ch. 7) states:

> 'If on the dismissal of any case any court shall be of opinion that the charge was frivolous or vexatious, such court *may* order the complainant to pay to the accused person a reasonable sum as compensation for the trouble and expense to which such person may have been put by reason of such charge.' (emphasis added)

The law relating to the '*Proof Of Issues*' is examined commencing on page **68**.

[6.0.2] Decision To Institute Proceedings

Section 5(1) of the *Constitution* states (in part):

> '*No person shall* be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say –
>
> (f) upon *reasonable suspicion* of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands.' (emphasis added)

GENERAL DUTIES OF THE PROSECUTION

Section 10 of the *Constitution* states (in part):

> '(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.
>
> (6) No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence.'

The law relating to '*Double Jeopardy*' is examined commencing on page **105**.

Section 23 of the *Police Act* (Ch. 110) states:

> 'It shall be lawful for any police officer to make a complaint or charge any person before a Magistrate and to apply for a summonses, warrant, search warrant or such other legal process as may by law issue against any person.'

When considering prosecutions under the *Traffic Act* (Ch. 131), section 75 of that Act *must* be considered. That section states:

> 'Where a person is prosecuted for an offence under any of the sections of this Act relating respectively to the maximum speed at which motor vehicles may be driven, to reckless or dangerous driving or to careless driving, he shall not be convicted *unless* –
>
> (a) he was warned at the time the offence was committed that the *question of prosecuting* him for an offence under some or other of the sections aforesaid would be considered; or
>
> (b) within fourteen days of the commission of the offence a *summons for the offence was served* on him; or
>
> (c) within the said fourteen days a *notice* of the *intended prosecution*, specifying the nature of the alleged offence and the time and place where it is alleged to have been committed, was *served on or sent by registered post* to him or to the person registered as the owner of the vehicle at the time of the commission of the offence:
>
> *Provided* that –
>
> (i) failure to comply with this requirement shall not be a bar to the conviction of the accused in any case where the court is satisfied that –
>
> (a) neither the name and address of the accused nor the name and address of the registered owner of the vehicle could with reasonable diligence have been ascertained in time for a summons to be served or for a notice to be served or sent as aforesaid; or
>
> (b) the accused by his own conduct contributed to the failure;
>
> (ii) the requirement of this section shall in every case be deemed to have been complied with unless and until the contrary is proved.' (emphasis added)

Refer also to the chapter which examines '*Power Of Arrest*' commencing on page **242**.

GENERAL DUTIES OF THE PROSECUTION

Prior to instituting proceedings, a police officer should be satisfied on *reasonable suspicion* that:

[i] **an offence has been committed**;

[ii] **each and every element of intended charge/s can be proven**, see for example *John Solo v R* (Unrep. Criminal Appeal Case No. 89 of 2000; Kabui J; at page 8). Refer also to the section titled '*Elementising Charges*' on page **73**;

[iii] **the person against whom prosecution is proposed has committed the offence/s**.

Section 10(2)(a) of the *Constitution* states:

> 'Every person who is charged with a criminal offence *shall be presumed to be innocent* until he is proved or has pleaded guilty.' (emphasis added);

[iv] **consent of the Director of Public Prosecutions to prosecute has been obtained, if required**, see *R v Bull* (1994) 99 CrAppR 193. See for example, section 126 of the *Criminal Procedure Code* (Ch. 7), section 39(3) of the *Dangerous Drugs Act* (Ch. 98) [*R v Robert Maebinua* (Unrep. Criminal Review Case No. 160 of 1999; Kubui J; at page 7) & *R v Fofei Fiuwane* (Unrep. Criminal Review Case No. 355 of 1999; Kabui J; at page 1)] & section 126 of the *Criminal Procedure Code* (Ch. 7).

However, the consent need *not* be in writing, unless specified in a specific statute, see *R v Jackson* [1997] CrimLR 293 and see for example, section 44 of the *Liquor Act* (Ch. 144). Upon consent being given it can be assumed that all necessary and proper inquiries were made prior to giving that consent, see *R v Cain & Schollick* [1976] QB 496; (1975) 61 CrAppR 186 [[1975] 3 WLR 131; [1975] 2 AllER 900; [1976] CrimLR 464], per Lord Widgery CJ at pages 502 – 503 and 190 respectively.

Section 44 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Where the consent of an authority is necessary before any proceedings, whether civil or criminal, are commenced, a document giving the consent and purporting to be signed by the authority is evidence that the consent has been given, without proof that the signature to the document is that of the authority.'

See also: *R v Angel* [1968] 2 AllER 607; [1968] 1 WLR 669; (1968) 52 CrAppR 280;

and

[v] **there is no statutory limitation on such proceedings**. The law relating to the '*Limitation of Time*' is examined commencing on page **100**.

When the circumstances of a particular case indicate that two or more alternative charges are supportable, the offence carrying the greater penalty should be preferred, subject to any express directions of the Director of Public Prosecutions, see section 74 of the *Criminal Procedure Code* (Ch. 7).

Care should be taken to select an offence that accurately reflects the nature and extent of the criminal behaviour under investigation, thereby providing the court with the option of imposing a penalty commensurate with the criminal conduct.

GENERAL DUTIES OF THE PROSECUTION

In *Michael Buruka v R* (Unrep. Criminal Appeal Case No. 31 of 1991) Muria J commented at page 3:

> 'The prosecution must never allow themselves to be too ready to make concessions for lesser charges simply because evidence, such as in this case, […], are not readily available. Such a practice is a breading ground for injustice.'

Refer also to the section which examines the law relating to the '*Responsibility Of The Prosecution To Prefer All Charges*' on page **77**.

When arresting officers are making a decision to institute proceedings they are to ensure that their decision is *not* influenced by matters such as:

[i] the race, religion, gender, ethnicity or political affiliations of the offender, the complainant or any other person involved;

[ii] any personal feelings or bias towards the offender or the victim;

[iii] a possible political advantage or disadvantage to the Government or any interest group; or

[iv] a fear of career or personal disadvantage or any career advantage on the part of the person making the prosecution decision.

[6.1] Discretion To Prosecute

[6.1.1] Introduction

Section 10(4) of the *Constitution* states:

> '*No* person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.' (emphasis added)

The exercise of the discretion to prosecute involves applying two distinct tests in relation to the matter under consideration. Those two tests are:

[i] '*Sufficiency of Evidence Test*'; and

[ii] '*Public Interest Test*'.

Refer also to the law relating to '*Abuse Of Process*' commencing on page **138**.

[6.1.2] Sufficiency Of Evidence Test

The '*primary test*' is that of **'***Sufficiency of Evidence***'.** This test will be satisfied if there is a reasonable prospect of the defendant being found guilty. A prima facie case is essential but is not the only matter of consideration for instituting a prosecution. The decision to prosecute requires a careful and detailed evaluation of how strong the case will be when presented in court.

In evaluating the sufficiency of evidence in respect of any matter, it is necessary to consider all aspects of the evidence to be presented, *including*:

[i] admissibility of evidence. That legal issue is examined commencing on page **171**;

[ii] reliability of evidence, including identification;

[iii] possible defences. The law relating to '*Criminal Responsibility*' is examined commencing on page **428**;

[iv] the extent of any conflicts in evidence between witnesses;

[v] competency of witnesses. That legal issue is examined commencing on page **281**;

[vi] if there is a lack of conflict between witnesses, does anything else effect the credibility of the witnesses;

[vii] the availability of witnesses. The law relating to '*Securing The Attendance Of Witnesses*' is examined commencing on page **276**; and

[viii] whether witnesses will be hostile, adverse, or uncooperative. That legal issue is examined commencing on page **288**.

Section 23 of the *Criminal Procedure Code* (Ch. 7) states:

> '[A]n officer of or above the rank of sergeant may release a person arrested on suspicion on a charge of committing any offence, when, after due inquiry, *insufficient evidence*, is in his opinion, disclosed on which to proceed with the charge.' (emphasis added)

If an officer authorized under section 23 of that *Code* is considering releasing a defendant, he/she is to:

[a] consider the '*Sufficiency of Evidence*' test. Under no circumstances are such officers to release a defendant based on a '*Public Interest*' consideration as outlined in the '*Public Interest Test*' commencing on this page; and

[b] report as soon as it is reasonably possible the release to:

  [i] the Officer – in – Charge of their respective Prosecutions Office; and

  [ii] the nearest Magistrate, in compliance with section 24 of the *Criminal Procedure Code* (Ch. 7).

See also: section 22 of the *Criminal Procedure Code* (Ch. 7).

[6.1.3] Public Interest Test

Once the '*Sufficiency of Evidence*' test has been satisfied, the next test to be applied is that of the **'***Public Interest***'**.

This test simply involves determining whether, in light of the probable facts and the whole of the surrounding circumstances of the case, the '*public interest*' will be served in pursuing a prosecution. It is *not* the rule that all offences brought to the attention of the Royal Solomon Islands Police Force must be prosecuted.

The factors which can properly be taken into account in deciding whether the '*public interest*' requires a prosecution will vary from case to case. While many public interest factors mitigate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution, such as for example, the seriousness of the offence and the need for deterrence. *In this regard, generally, the more serious the offence the more likely it will be that the matter of public interest will require a prosecution to be pursued.*

Factors which may alone or in conjunction arise for consideration in determining whether the public interest requires a prosecution *include*:

[i] the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;

[ii] any mitigating or aggravating circumstances;

[iii] the youth, advanced age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or a victim;

[iv] the alleged offender's antecedents and background, including culture and ability to understand the language;

[v] the degree of culpability of the alleged offender in connection with the offence;

[vi] whether the prosecution would be perceived as counter – productive to the interests of justice;

[vii] the availability and efficacy of any alternatives to prosecution such as '*Reconciliation*'. The law relating to '*Reconciliation*' is examined commencing on page **952**;

[viii] the prevalence of the alleged offence and the need for deterrence either personal or general;

[ix] whether or not the alleged offence is of minimal public concern;

[x] any entitlement of the victim or other person or body to criminal compensation, reparation or forfeiture, if prosecution action is taken;

[xi] the attitude of the victim of the alleged offence to a prosecution with regard to the seriousness of the alleged offence and whether the complainant's change of attitude has been activated by fear or intimidation. The law relating to '*Hostile Witnesses*' is examined commencing on page **288**;

[xii] the cost of the prosecution relative to the seriousness of the alleged offence;

[xiii] whether the alleged offender is willing to co - operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so, particularly those dealing with indemnity from prosecution;

[xiv] the necessity to maintain public confidence in such institutions as the Parliament and the courts;

[xv] the outcome of any other prosecution from the same circumstances, including in a civil jurisdiction;

[xvi] whether the prosecution for that class or type of offence has been discouraged by the courts in the course of judicial comment;

[xvii] whether the prosecution will result in hardship to any witness, particularly children;

[xviii] vexatious, oppressive or malicious complaints; and

[xix] whether the prosecution would amount to an 'abuse of process'. The law relating to an '*Abuse Of Process*' is examined commencing on page **138**.

[6.2] Authority To Prosecute

The following provisions of the *Criminal Procedure Code* (Ch. 7) deal with the authority of a police officer to prosecute cases:

Section 71 states (in part):

> 'The Director of Public Prosecutions may appoint any […] police officer to be a *public prosecutor* either generally or for the purposes of a particular case.' (emphasis added)

Section 73 states:

> 'In any trial or inquiry before a Magistrates Court, if the proceedings have been instituted by a police officer, any police officer may appear and conduct the prosecution notwithstanding the fact that he is not the officer who made the complaint or charge.'

Section 74 states:

> 'Every police officer conducting a prosecution under the provisions of section 73, and every public prosecutor, shall be subject to the express directions of the Director of Public Prosecutions.'

[6.3] General Prosecution Responsibilities

Prosecutors as representatives of the Royal Solomon Islands Police Force are expected to act professionally and ethically at all times in the performance of their duties.

Prosecutors are expected to:

[i] abide by the law when prosecuting cases;

[ii] obey the 'directions of a Magistrate in the exercise of his/her criminal jurisdiction' in compliance with section 58 of the *Magistrates' Courts Act* (Ch. 20). See also: section 21(3) of the *Police Act* (Ch. 110);

[iii] be punctual at court. The law relating to '*Punctuality At Court*' is examined commencing on page **126**;

[iv] be prepared, ie., understanding the evidence to be presented and the legal issues to be considered;

[v] show respect, and not just to the Court and witnesses, but also defendants;

[vi] ensure that all appropriate action is being undertaken to secure the attendance of all known and reliable witnesses, irrespective of whether or not all such witnesses will be called by the prosecution.

The law relating to:

- '*Securing The Attendance Of Witnesses*' is examined commencing on page **276**; and
- the '*Discretion Of The Prosecution To Call Witnesses*' is examined commencing on page **120**;

[vii] present their case fairly, impartially and professionally and therefore, in *strict* compliance with the law;

[viii] assist the Court in arriving at the truth by producing all the relevant facts to the Court as 'Officers of the Court', see *R v Kelly Dennie, Kenazo Maeka & Teddy Weba (Waiba)* (Unrep. Criminal Appeal Case No. 12 of 1998; Kabui J; at page 5) & *R v Guerin* (1931) 23 CrAppR 39;

[ix] not obtain a conviction by all means, but fairly and impartially endeavour to ensure that the Court has before it all the relevant facts in an intelligible form;

[x] ensure that the Court is informed of all known relevant law whether the effect is favourable or unfavourable towards the prosecution case;

[xi] be prepared to correct any error or misstatement by the defence;

[xii] generally assist the Court to avoid any appealable error; and

[xiii] 'assist [… the Court] in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defence case so far as it appears to require it' as stated by Kapi J in *Acting Public Prosecutor v Uname Aumane & others* [1980] PNGLR 510 at page 544. [words in brackets added]

The law relating to *'Sentencing'* is examined commencing on page **918**.

In *R v Niger Pitisopa* (Unrep. Criminal Appeal Case No. 120 of 1999) Kabui J commented at pages 8 – 9:

> 'It is in the public interest that criminal charges against accused persons be dealt with by the Courts as soon as possible. *It is the duty of the Crown to ensure that the process of criminal law justice is activated in a manner that is consistent with the provisions of section 10 of the Constitution*. In the court room situation, it means the Crown Prosecutor [*and all police prosecutors*] must ensure that the accused is brought to the Court as soon as possible to plead to the charge laid against him. Once that process is set into motion, the Crown Prosecutor is completely in charge of the conduct and progress of the case until the trial is completed. It means the attendance of the Crown Prosecutor during the course of the trial is maintained at all times subject to adjournments. It means the Crown Prosecutor must ensure that the criminal trials under his charge are paramount in his mind. He attributes nothing to the Court or Counsel for the Defence for the progress or lack of progress of his case. He must not allow the Court to wait on him at all times. He must get to the Court house in good time before the Court sits. He must [not] stay up [late] at night or engage in any activity that is likely to interfere with Court appointed time. He must be self – disciplined and efficient in his work. The good Crown Prosecutor is a man of integrity and honour in the community. His words are laced with truth and sincerity. He sets an example to others. He never fails the Court unless he falls dead. That is the kind of standard I would expect from a good Crown Prosecutor in Solomon Islands.' (emphasis added) [words in brackets added]

In *R v Banks* [1916] 2 KB 612; (1917) 12 CrAppR 74 Avory J, delivering the judgment of the Court of Criminal Appeal, commented at pages 623 and 76 respectively:

> 'Counsel for the prosecution throughout a case ought not to struggle for the verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting in the administration of justice.'

In *R v Sugarman* (1985) 25 CrAppR 109 Lord Hewart CJ, delivering the judgment of the Court, stated at pages 114 – 115:

> 'It cannot be too often made plain that the business of counsel for the Crown is fairly and impartially to exhibit all facts to the jury. The Crown has no interest in procuring a conviction. Its only interest is that the right person should be convicted, that the truth should be known, and that justice should be done. It would be deplorable if any counsel for the Crown should refuse to stand on the real strength of his case and think that he can strengthen and support it by things collateral in a manner contrary to the letter and spirit of English law. By doing so he can only weaken his case and may prevent a verdict which ought otherwise to be obtained.'

Refer also to the Chapter which examines '*Fundamental Rights & Freedoms*' commencing on page **144**.

[6.4] Discretion To Call Witnesses

In *R v Brown (Winston)* [1997] 3 AllER 769; [1998] 1 CrAppR 66 [[1998] AC 367; [1997] 3 WLR 447 Lord Hope of Craighead, with whom their Lordships concurred, commented at page 778 and 76 respectively:

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> 'To repeat the words of Lord Diplock in *Dallison v. Caffrey* [1965] 1 QB 348 at 375, the duty of the prosecutor is to prosecute, not to defend. The important developments in the prosecutor's duty of disclosure since he wrote these words have not altered the essential point that there is a difference between the functions of the prosecutor and those of the defence. *The prosecutor's duty is to prosecute the case fairly and openly in the public interest. It is not part of his duty to conduct the case for the defence*.' (emphasis added)

When deciding whether to call a particular witness the paramount consideration is that the prosecution is expected to present its case with fairness to the defendant. The prosecutor, however, determines which witness/es he/she intends to call, and not the Court or the defence.

But, the Court may either:

[i] make adverse findings that a particular witness should have been called by the prosecution, see *R v Apostilidies* (1984) 53 ALR 445; and / or

[ii] call the witness itself, see *R v Dora Harris* [1927] 2 KB 587; *R v Cleghorn* (1967) 51 CrAppR 291; [1967] 2 QB 584; [1967] 2 WLR 1421; [1967] 1 AllER 996 & *R v Roberts (JM)* (1985) 80 CrAppR 89.

Section 133 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Any court *may*, at any stage of any inquiry, *trial* or other proceeding under this Code, summon or *call any person as a witness, or examine any person in attendance though not summonsed as a witness*, or *recall* and re – examine any person already examined, and the court shall summon and examine or *recall* and re – examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross – examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable such cross – examination to be adequately prepared, if, in its opinion, either party may be prejudiced by the calling of any such person as a witness.' (emphasis added)

If a Court considers that in the interests of justice it is necessary to *call* a particular witness, it may do so without the consent of either the prosecution or defence, see *R v Wallwork* (1958) 42 CrAppR 153.

In *R v Kwatefena* [1983] SILR 106 Daly CJ held at pages 107 – 108 that the power of the Court to call a witness should be 'used sparingly and rarely exercised […] particularly when the witness gives the evidence in support of the prosecution case'.

Furthermore, the discretion to recall a witness by a Court should only be exercised if no injustice will result, see *R v McKenna* (1956) 40 CrAppR 65 & *R v Sullivan* [1923] 1 KB 47; (1922) 16 CrAppR 121.

The discretion to call a particular witness by the prosecution will invariably depend on a number of considerations, *including* whether:

[i] the evidence of the witness is essential to the unfolding of the prosecution case;

[ii] the evidence of the witness will be credible and truthful. The law relating to '*Hostile Witnesses*' is examined commencing on page **288**;

[iii] in the interests of justice that evidence should be subject to cross – examination by the prosecution; or

[iv] the evidence of the witness will be repetitious such as corroborating police officers in some instances.

The prosecution however has *no duty*:

[i] to call any particular witness; or

[ii] to give reasons as to why a particular witness was not called, see *Lanamua v R* (Unrep. Criminal Case No. 27 of 1992; Palmer J), but should do so as a matter of course by asking the appropriate questions of the Arresting / Investigating Officer.

Prior to making a decision *not* to call a particular witness, prosecutors are to:

[i] consult with the Arresting / Investigating Officer; and

[ii] seek advice if there is still doubt as to whether to call the particular witness. However, the benefit of any such doubt should be given to the defendant.

The prosecution should advise the defence *prior* to court of the identity and whereabouts of any witness who can give '*material evidence*' and who will *not* be called. Evidence is material if it is relevant to an issue in the case, see *R v Reading JJ, Ex parte Bershire County Council* [1996] 1 CrAppR 239.

Furthermore, as regards those witnesses who are considered reliable by the prosecution, all reasonable steps should be taken by the prosecution in an attempt to secure their attendance, if the defence intends to call those witnesses. If such witnesses are still unavailable to give evidence at trial, the Court *may* either:

[i] grant an adjournment so that a further attempt can be made to secure their attendance.

The law relating to '*Securing The Attendance Of Witnesses*' is examined commencing on page **276**;

[ii] issue a warrant for the arrest of those witnesses *in appropriate circumstances*; or

[iii] direct that the trial proceed provided that no injustice would be done, see *R v Ondhia* [1998] 2 CrAppR 150; *R v Gundem* [1997] CrimLR 903 *&* *R v Cavanagh* [1972] 56 CrAppR 407.

Refer also to the law in relation to the '*Disclosure Of Prosecution Evidence To Defence*' which is examined commencing on page **134**.

In *Lanemua v R* (Unrep. Criminal Case No. 27 of 1992) Palmer J commented at pages 5 - 6:

> 'The starting point must be to recognise that Prosecution has the discretion whether to call its witnesses or not.
>
> […]

In the case of Horace Henry Bryant v Reginam [1946] 31 CrAppR 146, it recognises that prosecution has a duty to make a person who can give material evidence available to defence to call as a witness if they decide not to call him. But that is as far as that duty goes. They are not under a duty to supply a copy of that witness statement. Defence can ascertain from that witness his/her evidence themselves. Prosecution is not under a duty to give a reason as to why they decided not to call their witness. There is a duty however, to make that witness available to the defence.'

In *R v Russell – Jones* [1995] 1 CrAppR 538 [[1995] 3 AllER 239] the Court of Appeal held at pages 544 – 545:

'(1) […];

(2) The prosecution enjoy a discretion whether to call, or tender, any witness it requires to attend, but the discretion is not unfettered.

(3) *The first principle which limits this discretion is that it must be exercised in the interests of justice, so as to promote a fair trial*. […]

See also per Fullagar J in *Ziems v the Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279, 292:

"The present case, however, seems to me to call for a reminder that the discretion should be exercised with due regard to traditional considerations of fairness."

The dictum of Lord Thankerton in the *Palestine* case "the court will not interfere with the exercise of that discretion, unless, perhaps, it can be shown that the prosecutor has been influenced by some oblique motive" does not mean that the Court will only interfere if the prosecutor has acted out of malice; it means that the prosecutor must call his mind to his overall duty of fairness, as a minister of justice. Were he not to do so, he would have been moved by a consideration not relevant to his proper task – in that sense, an oblique motive.

Clearly, however, to say merely that the prosecutor must act fairly gives little guidance as to how the discretion should be exercised in practice; and there are further limiting principles:

(4) *The next principle is that the prosecution normally ought to call or offer to call the witness who give direct evidence of the primary facts of the case, unless for good reason, in any instance, the prosecutor regards the witness's evidence as unworthy of belief*. In most cases the jury should have available all of that evidence as to what actually happened, which the prosecution, when serving statements, considered to be material, even if there are inconsistencies between one witness and another. The defence cannot always be expected to call for themselves witnesses of the primary facts whom the prosecution has discarded. For example, the evidence they may give, albeit at variance with other evidence called by the Crown, may well be detrimental to the defence case. If what a witness of the primary facts has to say is properly regarded by the prosecution as being incapable of belief, or as some of the authorities say "incredible", then his evidence cannot help the jury assess the overall picture of the crucial events; hence, it is not unfair that he should not be called.

[…]

(5) *It is for the prosecution to decide which witnesses give direct evidence of the primary facts of the case*. A prosecutor may reasonably take the view that what a particular witness has to say is at best marginal.

(6) *The prosecutor is also, as we have said, the primary judge of whether or not a witness to the material events is incredible, or unworthy of belief*. It goes without saying that he could not properly condemn a witness as incredible merely because, for example, he gives an account at variance with that of a larger number of witnesses, and one which is less favourable to the prosecution case than that of the others.

(7) *A prosecutor properly exercising his discretion will not therefore be obliged to proffer a witness merely in order to give the defence material with which to attack the credit of other witnesses on whom the Crown relies.* To hold otherwise would, in truth, be to assert that the prosecution are obliged to call a witness for no purpose other than to assist the defence in its endeavour to destroy the Crown's own case. No sensible rule of justice could require such a stance to be taken.

Plainly, what we have said should not be regarded as a lexicon or rule book to cover all cases in which a prosecutor is called upon to exercise this discretion. There may be special situations to which we have not adverted; and in every case, it is important to emphasise, the judgment to be made is primarily that of the prosecutor, and, in general, the court will only interfere with it if he has gone wrong in principle.' (emphasis added)

In *Whitehorn v R* (1983) 9 ACrimR 107; [(1983) 57 ALJR 809] Deane J stated at pages 110 – 111:

'Prosecuting counsel in a criminal trial represents the State. The accused, the Court and the community are entitled to expect that, in performing his function of presenting the case against an accused, he will act with fairness and detachment and always with the objectives of establishing the whole truth in accordance with the procedures and standards which the law requires to be observed and of helping to ensure that the accused's trial is a fair one. […]

[..]

The observance of traditional considerations of fairness requires that prosecuting counsel refrain from deciding whether to call a material witness by reference to tactical considerations.' (emphasis added)

At page 199, Dawson J stated:

'*Nevertheless, there is good guidance in the cases for what constitutes a material witness*. All available witnesses should be called whose evidence is necessary to unfold the narrative and give a complete account of the events upon which the prosecution is based. In general, these witnesses will include the eyewitnesses of any events which go to prove the elements of the crime charged and will include witnesses notwithstanding that they give accounts inconsistent with the Crown case. However, a prosecutor is not bound to call a witness, even an eyewitness, who evidence he judges to be unreliable, untrustworthy or otherwise incapable of belief. And if the number of witnesses available for the proof of some matter is such that in the circumstances it would be unnecessarily repetitious to call them all, then a selection may be made.

It will be seen from the above citations that the responsibility of prosecuting counsel at the trial would by no means be discharged by calling the minimum number of witnesses required to establish the charge. He would be expected to call all the material witnesses unless there were good reasons of the kind discussed in the cases for not calling any of them.' (emphasis added)

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See also: *R v Haringey Justices, Ex parte Director of Public Prosecutions* [1996] 1 AllER 828; [1996] 2 CrAppR 119; *R v Apostilidies* (1984) 53 ALR 445; *Richardson v R* (1974) 131 CLR 116 & *Harry, Ex parte Eastway* (1986) 20 ACrimR 63.

In *R v Cavanagh & Shaw* (1972) 56 CrAppR 407 Lane J, delivering the judgment of the Court, held at page 411:

> 'The prosecution must take all reasonable steps to secure the attendance of any of their witnesses who are not the subject of a conditional witness order or whom the defence might reasonably expect to be present. […]
>
> If, however, it proves impossible, despite such steps, to have the witnesses present, the court may in its discretion permit the trial to proceed provided that no injustice will be done thereby. What considerations will affect the exercise of the court's discretion will vary infinitely from case to case. Would the defence wish to call the witness if the prosecution did not? What are the chances of securing the witness's attendance within a reasonable time? Are the prosecution prepared to proceed in his absence? If so, to what extent would the evidence of the absent witness have been likely to assist the defendant? If the absent witness can be procured, will other witnesses by then have become unavailable? There will be many other matters which may have to be considered.'

In *Steven Lolo v Michael Hambindua* [1985] PNGLR 286 Pratt J, sitting alone, held:

> Although there is no rule of practice which requires a prosecutor or a court to assist a defendant to present his/her case, there is however a duty on the prosecutor to bring out all the facts whether they be in favour of or against the prosecution case and especially where:
>
> (a) the defendant is unrepresented;
>
> (b) the legislation casts a specific onus on the defendant; and
>
> (c) the defendant gives evidence on oath.

The law relating to:

- '*Negative Averments*' is examined commencing on page **83**; and
- '*Witnesses Generally*' is examined commencing on page **274**.

The law relating to '*The Duty Of The Prosecution To Call Witnesses At Preliminary Investigations / Inquiries*' is examined commencing on page **310**.

[6.5] Order To Call Witnesses

Prior to determining the '*order*' in which to call witnesses, there should be consultation between the assigned prosecutor and the Arresting / Investigating Officer.

Essentially witnesses should be presented in a logical sequence. This can be achieved by calling the Arresting / Investigating Officer first in order to:

[i] outline any admission made or defence raised by the defendant; and

[ii] produce exhibits relevant to the charge/s,

followed by the other witnesses in chronological order.

It *must* never be forgotten that the Court generally will have no idea about the prosecution case.

In *Saffron v R* (1988) 17 NSWLR 396 the Court held at page 457:

> 'There is no rule of law, absent some relevant statutory provision, that requires a judge (even if he has the power) to reject evidence tendered by the Crown because of the order in which the witnesses are called.'

There is no such statutory provision applicable to Solomon Islands.

The law relating to:

- the '*Prosecution's Discretion To Call Witnesses*' is examined commencing on page **120**; and
- '*Exhibits*' is examined commencing on page **237**.

[6.6] Punctuality At Court

[6.6.1] Section 187 -- Criminal Procedure Code

Section 187 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) If, in any case which a Magistrate's Court has jurisdiction to hear and determine, the accused person appears in obedience of the summons served upon him at the time and place appointed in the summons for the hearing of the case, or is brought before the court under arrest, then, *if the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear by himself or by his advocate, the court shall dismiss the charge, unless for some reason it shall think it proper to adjourn the hearing of the case* until some other date, upon such terms as it shall think fit, in which event it may, pending such adjourned hearing, either admit the accused to bail or remand him to prison, or take such security for his appearance as the court shall think fit.
>
> (2) The expression "advocate" in this section […] shall in relation to a complainant *include* a public prosecutor.' (emphasis added)

In *Hudson Maenu & others v R* (Unrep. Criminal Appeal Case No. 23 of 1998) Palmer J stated at pages 2 – 5:

> 'Of-course if a prosecutor or complainant does not turn up, no reason can be given or submitted to the court. I do not think the accused person or his advocate would seek to provide any reason either. Yet, the legislation includes the phrase, "*unless for some reason it shall think it proper to adjourn*". Either that phrase is superfluous and unnecessary or it had been included for a purpose. In my respectful view, if the phrase is read with some care, it will be seen that the answer or explanation is contained within the phrase itself. It is for the court to determine whether there is some reason it considers proper to have the case adjourned: "*unless for some reason it (the court) shall think it proper to adjourn the hearing*

of the case …". Whether any reasons are given or not (of course if the prosecutor or complainant has not turned up, then no reasons can be given) make no difference to the power of the court to decide whether for some reason it considers it proper to adjourn the case. *It does not matter that the prosecutor or complainant is not present to make submissions and the accused person or his advocate refuses to give any reasons. If the court for some reason shall think it proper to adjourn the hearing of the case then it may do so upon such terms as it thinks fit.* The meaning of this phrase is crystal clear and should not unnecessarily restricted.

[…]

I might add that the mere fact a prosecutor does not turn up in court does not necessarily imply that a Magistrate must dismiss the charge before him when an application is made or in the exercise of his own discretion. A Magistrate must appreciate that his discretion is to be exercised judicially. *Under section 186(1)* [now section 187] *he is required to look at the circumstances of the case and to weigh the balance of justice before dismissing a charge. At the back of his mind he must bear in mind the possibility that a prosecutor may be deliberately turning up late or not turning up, so that the case is dismissed under the said section.* In such situations, the answer lies not in activating section 186(1) but in *disciplinary actions* against the particular prosecutor. This can be done in a number of ways. Either a warning is issued or the prosecutor charged for contempt of court, or a complaint is lodged with his head of section. For police prosecutors it can be with the Commissioner of Police, and Crown Counsels with the Director of Public Prosecution. If nothing is done then perhaps the matter can be taken further with other authorities; the Honourable Chief Justice for instance.

Also I must add a caution here that acquittals under this section must be exercised with great care. There must be a very good reason or reasons for acquittals and the Magistrate must state his reasons on record when acquitting the accused person rather than the more usual order of discharge. *In other words, acquittals must be made only in exceptional cases*.

In the facts of this case, even if the learned Magistrate were to give his ruling on the application that morning, the proper order in any event in my respectful view would have been a straight refusal. The facts evident in that case do not warrant a dismissal for non – appearance. *The case had been adjourned for mention only*. The court could easily have adjourned the case further to a later date and require [… prosecutor] to turn up and explain his non – appearance. *The Appellants would not have been prejudiced in any way. They had been on bail with conditions. If the bail terms were unsatisfactory then they could easily have instructed Counsel to apply for a variation.* The case cannot be classes as coming within the expression "*Justice delayed is justice denied*". That phrase with respect must be qualified. *Justice is denied only when delay is inordinate or excessive. Sometimes delay is inevitable, or justifiable*. We live in a time zone where delay is part and parcel of our daily experience. Even when I am speaking right now, time passes and delay is already experienced. By far, it cannot be ever seriously contended that inordinate delay or excessive delay had been experienced in this case. *It wasn't the case where Mr Tulasasa had consistently been late or had not been turning up for this case*. *The case was only in its initial stages. There had only been two previous appearances by police prosecutors and this was to be the first time for an Officer from the DPP's Office to turn up. There had been no previous absences by the police prosecutors or […complainants] of lateness or slackness*. Mistakes and oversights are bound to happen. I ask should such a mere oversight justify the dismissal and acquittal of the accused persons. In my respectful view a resounding no. Anything to the contrary would have worked injustice than anything else.

Further, *the facts of the case are very serious*. […]

> Finally, *courts must be wary of not sacrificing the substance and merits of a case for mere procedural blunders and oversights.*' (emphasis added) [words in brackets added]

Howewer, in *R v Elizah D Muala* (Unrep. Criminal Appeal Case No. 17 of 1994) Muria CJ stated at pages 3 – 4:

> '[The Court referred to section 186 of the *Criminal Procedure Code* (Ch. 7), now section 187.]
>
> It will be observed that subsection (1) contains a language of a mandatory nature. The reason for such language to be used is not difficult to see since an accused person does not come to court on his own initiative or at the court's instigation. He is brought before the Court as a result of a complaint made against him. In consequences of that complaint, the accused is summonsed to appear in Court and if he appears in Court at the time, place and date fixed for the hearing and determination of that complaint and *the complainant does not appear*, then it is only a matter of good sense and justice that the complaint be thrown out and the accused be given his liberty and allowed to go free.
>
> […]
>
> The words "*unless for some reason*" in section 186 must be given their natural meaning and as such they simply mean unless there is some reason. Under that section therefore, the Court should dismiss a charge brought against an accused if the complainant does not appear unless there are some reason why the Court thinks it fit not to do so and instead to adjourn the matter.
>
> The words mentioned also bear an additional connotation. They connote the notion that the Court must be told of the "*reason*" so as to be able to decide whether to adjourn the matter or not when the charge is called on and the accused appears but not the prosecution. If the "*reason*" is not before the Court, there is nothing before the Court to see it fit to adjourn the case and the only course open to the Court to take is to dismiss the charge.
>
> *Mr. Faga's argument that the Court should adjourn the case in order to give the prosecution the chance to explain what it decided to do with the case cannot be accepted.* The Court cannot wait for the prosecution while it goes about hunting for 'some reason' to ask for an adjournment of a charge. Section 186 CPC requires the prosecution to furnish the Court with "*some reason*" as to why the case should be adjourned when it is called on and the accused appears in obedience to that charge. *That reason must be placed before the Court at the hearing or furnished with the Court before the hearing for its consideration at the time of hearing. It is after considering the reason furnished for the adjournment that the Court then proceeds to adjourn the case*.' (emphasis added) [words in brackets added]

The law relating to:

- an '*Abuse Of Process*' is examined commencing on page **138**;
- '*Double Jeopardy*' is examined commencing on page **105**; and
- '*Adjournments Generally*' is examined commencing on page **392**.

[6.6.2] Section 192(1) -- Criminal Procedure Code

Section 192(1) of the *Criminal Procedure Code* (Ch. 7) states:

> 'If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which has made the order of adjournment, *such court may*, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present, *and if the complainant does not appear the court may dismiss the charge with or without costs as the court shall think fit*.' (emphasis added)

In *R v Gordon Volo* (Unrep. Criminal Review Case No. 40 of 2000) Palmer J stated at pages 1 – 2:

> 'The rationale behind section 192(1) is that when the police prosecutor fails to turn up after case had been adjourned, without explanation, the court may conclude that no evidence or further evidence is being proffered against an accused. The court is then in position to decide whether the charges against the accused can be dismissed or not. Where no evidence had been proffered to date, that is a simple exercise. Where some evidence had been heard, that would require a bit more thought.
>
> *Where however a guilty plea had been entered, it would not be open to have the charge against an accused dismissed for mere non-appearance by the police prosecutor. A guilty plea signifies an acceptance of the charge as read to the court, as true and correct and entitles the court to proceed to hear the facts, antecedents and mitigation. The Court can then proceed to consider whether conviction should be entered and sentence.*
>
> *If police prosecutor fails to turn up for decision, a presiding magistrate has two options. She can either adjourn case further to allow the police prosecutor to turn up in court and explain why he did not turn up at the last hearing, or simply proceed on with the case before her to pass decision*. She did neither. It is always discourteous of any police prosecutor not to turn up in court without explanation.' (emphasis added)

In *R v Robert Belo & others* (Unrep. Criminal Appeal Case No. 126 of 1999) Palmer J stated at pages 3 – 4:

> 'The power of the court to dismiss the charge [under section 192 of the *Criminal Procedure Code* (Ch. 7)] is activated when no appearance is entered by the Public Prosecutor and the decision whether to dismiss the charge or not in the circumstances, can only be exercised by the presiding Magistrate in his deliberate judgment. *The mere fact a prosecutor does not appear in court, does not necessarily mean the power must be exercised in favour of the accused. The court has a clear discretion to exercise*, "… *the court may dismiss the charge*…." It should consider inter alia, the circumstances of the case carefully, the history of events, whether there has been delay, the seriousness of the charge(s) and the balance of justice, before deciding where its discretion would fall. The court must bear in mind the consequences of its order, which indirectly, might be contributing to the delay of justice and thereby denying justice, in cases where it is open to Prosecution to have the accused re-charged for the same offence. It is vital therefore for the court to exercise its discretion with care and not to rush to uphold an application to have the charge dismissed for want of prosecution straight – away.' (emphasis added) [words in brackets added]

See also: *R v Paul Maenu'u & Augustine Tuita* (Unrep. Criminal Appeal Case No. 11 of 1998; Lungole - Awich J) & *R v Christopher Tagaraniana* (Unrep. Civil Case No. 342 of 1993; Muria CJ; at page 4).

The law relating to '*Adjournments Generally*' is examined commencing on page **392**.

[6.7] Protection Of Identity Of Informers

[6.7.1] Who Is An Informer?

There is a rule of law that the identity of '*police informers*' may *not* be disclosed in most legal proceedings. An '*informer*' is a person who is not a member of the RSIP who informs police officers of facts relating to the proposed commission of offences and the criminals involved or of the identity of persons involved in the commission of criminal offences already committed', see *Re Gibson* (1991) 57 ACrimR 322, per Ambrose J at page 331.

'Individuals give information they know but it will be hearsay and inadmissible in a court. It may well lead to the obtaining of other evidence which can be used. Some will be able to give information which will be admissible evidence but choose not to, and merely give sufficient information that leads the police to make other inquiries which does produce admissible evidence. Information in either of these categories may be given willingly and openly. Some will be given anonymously. Some will give it on condition that they are not identified. Many, as in this case, will give information where nothing is explicitly stated about any condition of or desire for confidentiality of the identity of the informer', see *Mason* (2000) 12 ACrimR 266, per Belby J, with whom the other judges concurred, commented at page 271.

The law relating to '*Search Warrants*' is examined commencing on page **259**.

[6.7.2] Use Of Informers

An informer should never be asked to encourage a defendant to commit an offence which would not have otherwise been committed, see *R v Birtles* (1969) 53 CrAppR 469.

[6.7.3] Identity Of Informers

In *D v National Society for the Prevention of Cruelty in Children* [1978] AC 171 [[1977] 1 AllER 589; [1977] 2 WLR 201] Lord Diplock stated at page 218:

> '*The rationale of the rule as it applies to police informers is plain, if their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal*.

> By the uniform practice of the judges which by the time of *Marks v Beyfus* (1890) 25 QBD 494 had already hardened into a rule of law, *the balance has fallen upon the side of non – disclosure except where upon the trial of a defendant for a criminal offence disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure.*' (emphasis added)

See also: *R v Agar* [1990] 2 AllER 442; (1990) 90 CrAppR 319; [1990] CrimLR 183 & *R v Johnson* (1989) 88 CrAppR 131; [1988] 1 WLR 1377; [1988] 1 AllER 121; [1989] CrimLR 831.

[6.7.4] Onus On Defence

The '*general rule*' is that a witness may *not* be asked and will irrespective *not* be allowed to disclose the identity of an '*informer*' or the channels through which information has been obtained, *unless* the Court considers that such disclosure is necessary to show the innocence of the defendant, see *R v Hennessey* (1979) 68 CrAppR 419; *Marks v Befus* (1890) 25 QBD 494; *R v National Society for the Prevention of Cruelty in Children* [1977] 1 AllER 589 [[1978] AC 171; [1977] 2 WLR 201], per Lord Diplock at page 595 and Lord Simon at page 607; *Rogers v Secretary of State for Home Affairs* [1973] AC 388; *Signorotto v Nicholson* [1982] VR 413; *Johnson & another v Nicholson & another* [1985] ACLD 742; *R v Slater* (1939) 34 TasLR 16; *O'Garey v King* [1972] TasSR 136; *Weston v Smith* [1936] TasSR 27 at page 39 & *Chambers v Parisotto, Ex parte Parisotto* [1957] StRQd 405 at page 409.

In *Mason* (2000) 12 ACrimR 266 Belby J, with whom the other judges concurred, stated at page 275:

> '[In *Sankey v Whitlam* (1978) 142 CLR 1 Gibbs ACJ states at page 42:]
>
> "But, while the court will no doubt allow the identity of an informer to be disclosed only after the most anxious consideration, the expressions I have cited, and other similar words, were in my view not intended to convey that disclosure is warranted only where it is clear that the result must be to demonstrate that the accused is not guilty. So in *Cerrah* (unreported, Court of Criminal Appeal, NSW, No. 46 of 1988, 6 October 1988) Vincent J, speaking in effect of the court, said:
>
> '*It is, in my view, clear that before what appears to be a legitimate claim against the disclosure of the name of a police informer is rejected, the accused must demonstrate that the evidence is at the very least capable of being, if not likely to be, of some real assistance to him in answering the case made out against him. A speculative possibility of the kind for which the present applicant contends would certainly not suffice*.'"
>
> […] I would respectively suggest that the words 'is at the very least capable of being, if not likely to be, of some real assistance to him' should be understood 'as requiring it to be demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the defendant in answering the case against him.' (emphasis added) [words in brackets added]

In *R v Turner* [1995] 2 CrAppR 94 the Taylor CJ, delivering the judgment of the Court of Appeal, stated at page 98:

> '*We wish to alert judges to the need to scrutinize applications for disclosure of details about informants with very great care*. They will need to astute to see that assertions of a need to know such details, because they are essential in running of the defence, are justified. If they are not so justified, then the judge will need to adopt a robust approach in declining to order disclosure. Clearly, there is a distinction between cases in which the circumstances raise no reasonable possibility that information about the informant will bear upon the issues and cases where it will. Again, there will be cases where he may have participated in the events constituting, surrounding, or following the crime. Even when the informant has participated, the judge will need to consider whether his role so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary.' (emphasis added)

Therefore, no police officer is to disclose the identity of an '*informer*', *unless* ordered by a court. Such orders should only be made if it is demonstrated that there is good reason to think that disclosure of the informer's identity may be of substantial assistance to the defendant in answering the charge/s against him/her.

[6.7.5] Waive Privilege By Informers

Considering that a '*informer's privilege*' is conceived in the '*public interest*' to enable the police to investigate offences, an '*informer*' can *not* waive it if public policy demands secrecy. It is *not* a choice for any witness to make, but rather the Court, see *Marks v Befus* (1890) 25 QBD 494 at page 500; *Rogers v Secretary of State for the Home Department* [1972] AC 388 & *R v Lewes Justice, Ex parte Home Secretary* [1973] AC 388 at page 407.

[6.7.6] Documentary Records Disclosing Identity Of Informers

When a police officer is preparing any document associated with an investigation, he/she should *not* include any information that may later be used in court, see *Mather v Morgan* [1971] TasSR 192 at pages 207 – 208.

[6.8] Public Interest Immunity

[6.8.1] Introduction

A recipient of a 'Summons to Witness' *may* object to the production of material which *may*, at the discretion of the Court, be classed as having '*public interest immunity*', see *R v W (G.) & W (E.)* [1992] 1 CrAppR 166; *R v K (Trevor Douglas)* (1993) 97 CrAppR 342; *R v Clowes* [1992] 3 AllER 440; (1992) 95 CrAppR 440 & *R v Cheltenham JJ, Ex parte Secretary of State for Trade* [1977] 1 AllER 460; [1977] 1 WLR 95.

A Court has the power to decide whether the public interest in non – disclosure was outweighed by the public interest in ensuring that justice was not frustrated. A Court *should* inspect the material in order to determine whether to order its disclosure, see *R v K (Trevor Douglas)* (*supra*); *Conway v Rimmer* [1968] AC 910; *Sankey v Whitlam* (1978) 142 CLR 1; *Liddle v Owen* (1978) 21 ALR 286; *R v Salter* (1939) 34 TasLR 16 & *Seeney v Seeney & Laycock* [1945] QWN 21.

In determining whether material is subject to '*public interest immunity*', a Court *must* balance the public interest in the material not being disclosed against the interest of the defendant in the particular case in it being disclosed. If the material is capable of:

[i] assisting the defence in proving the defendant's innocence; or

[ii] avoiding a miscarriage of justice,

then the material should be disclosed, see *R v Keane* [1994] 1 WLR 746; (1994) 99 CrAppR 1 & *R v Agar* [1990] 2 AllER 442; (1990) 90 CrAppR 318; [1990] CrimLR 183.

A defendant should be supplied with a copy of police reports relating to him/her such as an entry in a station diary, if applied for and subject to a determination of '*public interest immunity*', see *R v Brown* (1910) 4 CrAppR 104 at 107.

[6.8.2] Categories

Examples of material which has been held to be covered by '*public interest immunity*' have *included* 'information' relating to:

[i] Prevention, Detection & Investigation Of Crime;

[ii] State Interests, such as National Security;

[iii] Children; and

[iv] Judicial Process.

However, that list is certainly *not* exhaustive, see *R v Grimes* [1994] CrimLR 213; *Blake & Austin v Director of Public Prosecutions* (1993) 97 CrAppR 131; [1993] CrimLR 283; *R v Rankine* [1986] QB 861; (1986) 83 CrAppR 18; *Johnson (Kenneth)* [1988] 1 WLR 1377; [1988] 1 AllER 121; (1989) 88 CrAppR 131; [1989] CrimLR 831; *R v Clarke* (1930) 22 CrAppR 58 & *R v Hallett & others* [1986] CrimLR 462 & *R v National Society for the Prevention of Cruelty in Children* [1977] 1 AllER 589; [1978] AC 171; [1977] 2 WLR 201.

[6.8.3] Prevention, Detection & Investigation Of Crime

The identity of a person who permits his/her premises to be used for surveillance *should* be protected by '*public interest immunity*'. Therefore, the location of such '*observation posts*' should also *not* be disclosed, see *R v Rankine* [1986] QB 861; (1986) 83 CrAppR 18.

Information relating to specific police techniques *may* be the subject of '*public interest immunity*', see *R v Brown & Daley* (1988) 87 CrAppR 52.

The law relating to the '*Disclosure Of The Identity Of Informers*' is examined commencing on page **130**.

[6.8.4] Ministerial Objection

A Court is *not* bound by a '*ministerial objection*' to production and *may* overrule that objection, see *Lopez v Attorney – General* [1983] SILR 232; *Conway v Rimmer* [1968] AC 910; *Corbett v Social Security Commission* [1962] NZLR 878; *Tipene v Apperley* [1978] 1 NZLR 761; *Robinson v State of South Australia (No. 2)* [1931] AC 704 & *Konia v Morley & another* & *Cullen v Attorney – General (NZ)* [1976] 1 NZLR 455.

[6.9] Disclosure Of Prosecution Evidence To Defence

[6.9.1] Introduction

Considering that there is *no* statutory requirement for the prosecution to disclose its evidence to the defence the common law duty of disclosure *must* be considered.

The principle of fairness lies at the heart of all the rules of the common law concerning the disclosure of material by the prosecution whilst taking into account the public interest in the detection and punishment of offenders.

A 'Summons to Witness' should *not* be used in an attempt to compel production of evidence of the prosecution for the purpose of disclosure, see *R v H (L.)* (1997) 1 CrAppR 176.

[6.9.2] Summary Trials

[A] RSIP Policy

As regards '*summary trials*', the policy of the RSIP regarding the '*disclosure of prosecution evidence*' is as follows:

[i] The prosecution *is obliged* to disclose to the defence material in its possession which may:

[a] undermine the prosecution case, such as *any* evidence from an expert witness which may be in favour of the defence, see *R v Ward* [1993] 1 WLR 619; [1993] 2 AllER 577; (1993) 96 CrAppR 1; [1993] CrimLR 312 & *R v Casey* (1947) 32 CrAppR 91; and

[b] cast doubt on the credibility of witnesses who may potentially be called by the prosecution, although there is *no* duty upon the prosecution to call such witnesses. That duty is examined commencing on page **120**.

In such cases the prosecution is to provide a copy of the statement/s of the witness/es to the defence and that duty is *not* limited to furnishing only the name and address of such witness/es;

[ii] The prosecution *is obliged* to disclose to the defence material in its possession which provides a '*description of a defendant*', if '*identification*' will be an issue at trial. The law relating to such disclosure is examined on page **198**;

[iii] The prosecution is obliged to disclose to the defence the caution statement / record of interview of the defendant. The law relating to '*Confessional Evidence*' is examined commencing on page **211**; and

[iv] The prosecution *is not obliged* to disclose to the defence issues which may impact on the credibility of potential defence witnesses.

[B] General Principles

In *Lanemua v R* (Unrep. Criminal Case No. 27 of 1992) Palmer J commented at pages 5 - 6:

> 'The starting point must be to recognise that Prosecution has the discretion whether to call its witnesses or not.
>
> […]
>
> In the case of Horace Henry Bryant v Reginam [1946] 31 CrAppR 146, it recognises that prosecution has a duty to make a person who can give material evidence available to defence to call as a witness if they decide not to call him. But that is as far as that duty goes. *They are not under a duty to supply a copy of that witness statement*. Defence can ascertain from that witness his/her evidence themselves. Prosecution is not under a duty to give a reason as to why they decided not to call their witness. There is a duty however, to make that witness available to the defence.' (emphasis added)

In *R v Brown (Winston)* [1997] 3 AllER 769; [1998] 1 CrAppR 66 [[1998] AC 367; [1997] 3 WLR 447] Lord Hope of Craighead, with whom their Lordships concurred, stated at pages 773 – 779 and 70 – 77 respectively:

> 'The rules of disclosure which have been developed by the common law owe their origin to the elementary right of every defendant to a fair trial. If a defendant is to have a fair trial he must have adequate notice of the case which is to be made against him. Fairness also requires that the rules of natural justice must be observed. In this context, as Lord Taylor of Gosforth CJ observed in *Keane* (1994) 99 CrAppR 1, 3, [1994] 1 WLR 746, 750G, the great principle is that of open justice. […]
>
> […]
>
> […] But the common law rules are concerned essentially with the disclosure of material which has been gathered by the police and the prosecution in the course of the investigation process for use in the case to be made for the Crown. In the course of that process issues of fact will have been identified which may assist or undermine the Crown case. *The prosecution is not obliged to lead evidence which may undermine the Crown case, but fairness requires that material in its possession which may undermine the Crown case is disclosed to the defence. The investigation process will also require an inquiry into material which may affect the credibility of potential Crown witnesses. Here again, the prosecution is not obliged to lead the evidence of witnesses who are likely in its opinion to be regarded by the judge or jury as incredible or unreliable. Yet fairness requires that material in its possession which may cast doubt on the credibility of those witnesses whom it chooses to lead must be disclosed.* The question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important "issues" in the case […].
>
> But what of material relating only to the credibility of the defence witnesses? […]
>
> Two questions must therefore be addressed: (1) Is it reasonable to distinguish material which may assist the defence case from material which relates only to the credibility of the defence witnesses?; and (2) Is it consistent with the general principle of fairness to say that the Crown is not under a legal duty to disclose material which is relevant only to a defence witness's credibility? It should be understood that, in posing these questions, I am concerned not with the defendant but only with the defence witnesses.

[…] The fact that a witness has previous convictions especially for crimes which imply dishonesty or disrespect for the law, may be of great significance in regard to issues of credibility. But it has nothing to do with the question whether the offence with which the defendant is charged was committed or whether it was the defendant who committed the offence. If the witness is not called on to give evidence, evidence of his previous convictions will be irrelevant and inadmissible. It will have no bearing whatever on the facts of the case. Other facts or circumstances may be used which are entirely irrelevant to the issues of fact as to the defendant's guilt or innocence, such as things done or said by the witness which may be said of material regarding the capacity of the witness to observe or recall the events spoken to in his evidence. Here again if the witness is not called to give evidence this material will be irrelevant.

There are, of course, cases where the question of credibility is so ultimately bound up with the facts that the two cannot reasonably by separated. A good example of this is where an account is given by the witness of his recollection of events which contains within it contradictions or inconsistencies which cast doubt on his reliability. Another is where his account is contradicted by other witnesses, so that the issues of credibility and reliability have to be decided by assessing the weight of the evidence. So it is not possible to say that material relating to the credibility of defence witnesses will always be distinguishable from the issues of fact relating to the defendant's guilt or innocence. But it is enough for an affirmative answer to the first question to say that much of the material which is regularly used in practice to test a witness's credibility is entirely irrelevant to the question whether the defendant is guilty or innocent of the offence with which he is charged. In the case of the defence witnesses in particular, the issues of fact raised by the defence case do not exhaust the material which may be used by the prosecutor to test their credibility.

As to the second question, the principle of fairness lies at the heart of all the rules of the common law about the disclosure of material by the prosecutor. But that principle has to be seen in the context of the public interest in the detection and punishment of crime. A defendant is entitled to a fair trial, but fairness does not require that his witnesses should be immune from challenge as to their credibility. *Nor does it require that he be provided with assistance from the Crown in the investigation of the defence case or the selection, on grounds of credibility, of the defence witnesses.* The legal representation to which he is entitled, usually with the benefit of legal aid, has the responsibility of performing these functions on his behalf. To repeat the words of Lord Diplock in *Dallison v Caffrey* [1965] 1 QB 348 at 375, the duty of the prosecutor is to prosecute, not to defend. The important developments in the prosecutor's duty of disclosure since he wrote these words have not altered the essential point that there is a difference between the functions of the prosecutor and those of the defence. The prosecutor's duty is to prosecute the case fairly and openly in the public interest. It is not part of his duty to conduct the case for the defence.

The common law rules which I have described are designed to ensure the disclosure of material in the hands of the prosecutor which may assist the defence case. But, once that duty has been satisfied, the investigation and preparation of the defence case is a matter for the defence. That includes the tracing, interviewing and assessment of possible defence witnesses. And material which may assist the defence case can be distinguished from material which may undermine it or may expose its weaknesses. The adversarial system under which trials in this country are conducted applies to the examination of witnesses in support of the defence case in the same way as it does to the examination of witnesses for the Crown. No witness enters the witness box with a certificate which guarantees his credibility. Every witness can expect to be cross – examined upon the veracity and reliability of his evidence. Cross – examination which is directed only to credibility may lose must of its force if the line is disclosed in advance. This weakens the opportunity for the assessment of

> credibility by the jury or, in a summary case, by the justices. To insist on such disclosure would, sooner or later, undermine the process of trial itself. It would protect from challenge those who were disposed to give false evidence in support of a defence which had been fabricated. That would be to tip the scales too far. Justice would not have been done.
>
> […] If fairness demands disclosure, then a way of ensuring that disclosure will be made must be found. But it is a fact that in many cases, other than those to which the special rules apply relating to alibi, the defence does not disclose the identity of its witnesses until a late stage. It would place a substantial burden on the Crown for it to be expected to retain, and be ready to disclose at short notice, material which might possibly relate to the credibility only of those whom the defence might possibly wish to call as its witnesses. It would also be unreasonable to expect the prosecutor to reveal information relating to the credibility of defence witnesses previously unknown to the Crown whose credibility did not require to be investigated until their identity was made known to the prosecutor. Yet, if there is a legal duty which required the disclosure of information relating to the credibility of the defence witnesses, there would be no answer to such demand.
>
> […]
>
> Fairness, so far as the preparation of the defence case and the selection of the defence witnesses are concerned, is preserved by the existing rules of disclosure and by ensuring that the defendant has adequate time and facilities for the preparation of his defence. […] The investigation for which the defence are responsible extends to all matters which may affect the credibility of the defence witnesses. The preparation of the defence case is not complete until this has been done. Once it has been completed, the defence can be assumed to be in possession of all that is needed to decide which witnesses to lead and which to reject on grounds of credibility. It is unnecessary to extend the duty of disclosure by the prosecutor any further to ensure that the defendant has a fair trial.' (emphasis added)

In *R v Mills & Poole* [1998] 1 CrAppR 43 [[1998] AC 382; [1997] 3 WLR 458; [1997] 3 AllER 298] the House of Lords examined the prosecution duty of disclosure of the statements of prosecution witnesses who are regarded as unreliable and whom the prosecution do not intend to call.

Lord Hope of Craighead, with whom the other Lordships concurred, stated at pages 53 – 65:

> 'The point of law of general public importance certified by the Court of Appeal was as follows:
>
> "Where prosecuting counsel has reasonably decided that the maker of the statement is not a witness of truth and will seek to depart from or contrive an explanation for that statement if the witness is called, is the prosecution's duty limited to furnishing the name and address of the witness only, or must counsel provide copies of the statement to the defence?"
>
> […] I am of the opinion that in the circumstances specified in the certified question the answer to it should be that it is the duty of prosecuting counsel to provide a copy of the statement of the witness to the defence and that the duty is not limited to furnishing only the name and address of the witness.'

See also: *R v Derby Magistrates' Court, Ex parte B*; *Same v Same*, *Ex parte Same* [1996] 1 CrAppR 385.

Refer also to the law relating to '*Hostile Witnesses*' commencing on page **288**.

[6.9.3] Preliminary Investigations / Inquiries

In determining what evidence should be disclosed *prior* to a '*Preliminary Investigation / Inquiry*', a prosecutor *must* always consider his/her duty as an 'officer of the court' to be fair to the defendant, see *R v Mills & Poole* (*supra*); *R v Ward* (*supra*); *R v Brown (Winston)* (*supra*); *Dallison v Caffery* [1965] 1 QB 348; [1964] 3 WLR 385; [1964] 2 AllER 610 & *R v Banks* [1916] 2 KB 621; (1917) 12 CrAppR 74.

The *Director of Public Prosecutions* is responsible for the disclosure of evidence in respect of '*preliminary investigations / inquiries*'.

The law relating to '*Preliminary Investigations / Inquiries*' is examined commencing on page **310**.

[6.10] Disclosure Of Convictions Of Prosecution Witnesses

In *R v Collister & Warhurst* (1955) 39 CrAppR 100 the Court of Criminal Appeal held:

> It is the duty of the prosecution to inform the defence of any *known* convictions, ie., bad character, of the witnesses to be called by the prosecution, but there is *no* duty to examine the criminal records in order to determine whether any witnesses to be called has a criminal history.

In *R v Carey & Williams* (1968) 52 CrAppR 305 the Court of Appeal held:

> Where the bad character of a witness called by the prosecution has been made known to the defence, but the defence has elected *not* to cross – examine the witnesses on that character;
>
> [i] the prosecution is under *no duty* to disclose the criminal convictions to the Court; and further
>
> [ii] the Court is under *no duty* to question the witness as regards his/her character.

See also: *R v Matthews* (1970) 65 CrAppR 292; *R v Paraskeva* (1983) 76 CrAppR 162 at page 164 & *R v Thompson* [1971] 2 NSWLR 213.

The law relating to:

- '*Witnesses With Criminal Histories*' is examined commencing on page **305**; and
- '*Cross – examining Defendants As To Credit*' commencing on page **352**.

[6.11] Abuse Of Process

[6.11.1] Defined

An '*abuse of process*' is 'something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding', see *Hui Chin – Ming v R* [1991] 3 WLR 495; [1992] 1 AC 34; [1991] 3 AllER 897; (1992) 94 CrAppR 236; [1992] CrimLR 446.

In *The State v Peter Painke* [1976] PNGLR 210 O'Leary AJ, sitting alone, stated at page 213:

> '[An a]buse of process of the court is an expression used to describe any use of the process or procedures of the court for an improper purpose or in an improper way. It encompasses a wide range of situations. […] The steps which the court may and will take to prevent an abuse of its process must vary from one situation to another. The most usual ones are those staying or dismissing proceedings […].' [word in brackets added]

In *Jago v District Court (NSW)* (1989) 168 CLR 23 Brennan J, as a member of the High Court of Australia, commented at page 47:

> '*An abuse of process occurs when the process of the court is put in motion for a purpose which, in the eye of the law, it is not intended to serve.* […] Although it is not possible to state exhaustively all the categories of abuse of process it will generally be found in the use of criminal process inconsistently with some aspect of its true purpose, whether relating to the hearing and determination, its finality, the reason for examining the accused's conduct or exoneration of the accused from liability to punishment for the conduct alleged against him.' (emphasis added)

[6.11.2] General Principles

In *Connelly v Director of Public Prosecutions* [1964] 2 AllER 401 [[1964] AC 1254; [1964] WLR 1145; (1964) 48 CrAppR 183] Lord Morris stated at page 409:

> 'There can be no doubt that a court which is endowed with a particular jurisdiction has [common law] powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. *A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process*.' (emphasis added) [words in brackets added]

In *Mills v Cooper* [1967] 2 QB 459 Lord Parker CJ stated at page 467 and in *Director of Public Prosecutions v Humphrys* (1976) 63 CrAppR 95; [1977] 1 AC 1 [[1976] 2 WLR 857; [1976] 2 AllER 497] Lord Salmon stated at pages 122 and 46 respectively:

> '[A] judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of process of the court and is oppressive and vexatious that the judge has the power to intervene.'

A defendant who seeks a *permanent stay must* be able to show on the '*balance of probabilities*', see *Attorney – General's Reference (No. 1 of 1990)* [1992] 3 AllER 169; [1992] QB 630; [1992] 3 WLR 9; (1992) 95 CrAppR 296; [1992] CrimLR 37, that he/she will suffer serious prejudice to the extent that no fair trial can be held. In other words, the continuance of the proceedings amounts to an '*abuse of the process*' of the court. In discharging that onus evidence *may* be called, see *R v Clerkenwell Magistrates' Court, Ex parte Bell* [1991] CrimLR 468. The judgment of the Court should include a brief summary of the law and the factors taken into consideration as whether an '*abuse of process*' had occurred, see *R v Manchester Crown Court, Ex parte Cunningham* [1992] COD 23.

The granting of a *stay* simply means that the prosecution is prevented from further proceeding with the charge, protecting the defendant from being prosecuted in circumstances in which it would be unjust to do so, see *Attorney – General of Trinadad & Tobago v Phillip* [1994] 3 WLR 1134; [1995] 1 AllER 93; [1995] 1 AC 396. When a *stay* is granted a Court essentially rules that there has been an *'abuse of the process' of the court* by the prosecution.

In *R (on the application of Ebrahim) v Feltham Magistrates' Court & another & Mouat v Director of Public Prosecutions* [2001] 1 AllER 831 Brooke LJ, delivering the judgment of the Divisional Court, commented at page 834:

> 'We think it may be helpful to restate the principles underlying this jurisdiction. The Crown is usually responsible for bringing prosecutions and, prima facie, it is the duty of a court to try persons who are charged before it with offences which it has power to try. None the less the courts retain an inherent jurisdiction to restrain what they perceive to be an abuse of their process. This power is 'of great constitutional importance and should be … preserved' (per Lord Salmon in *DPP v Humphrys* [1976] 2 AllER 497 at 527 – 528, [1977] AC 1 at 46). It is the policy of the courts, however, to ensure that criminal proceedings are not subject to unnecessary delays through collateral challenges, and in most cases any alleged unfairness can be cured in the trial process itself. *We must therefore stress from the outset that this residual (and discretionary) power of any court to stay criminal proceedings as an abuse of its process is one which ought only to be employed in exceptional circumstances, whatever the reasons submitted for invoking it.* […]
>
> The two categories of cases in which the power to stay proceedings for abuse of process may be invoked in this area of the court's jurisdiction are; (i) *cases where the court concludes that the defendant cannot receive a fair trial, and (ii) cases where it concludes that it would be unfair for the defendant to be tried.* […] I]n some cases these categories may overlap. […]' (emphasis added)

See also: *R v Yamse Masayuki, Ito Tutomu, Solgreen Enterprises Ltd* (Unrep. Criminal Case No. 27 of 1998; Muria CJ at page 10); *R v John Musuota* (Unrep. Criminal Case No. 41 of 1996; Lungole - Awich J); *R v Sawoniuk* [2000] 2 CrAppR 221; [2000] CrimLR 506; *R v Piggott & Litwin* [1999] 2 CrApprR 320; *R v Liverpool Magistrates' Court, Ex parte Slade* [1998] 1 CrAppR 147; [1988] 1 WLR 531; *R v Bloomfield* [1997] 1 CrAppR 135; *R v Latif & Shahzad* [1996] 1 WLR 104; [1996] 2 CrAppR 92; *R v Telford JJ, Ex parte Badham* [1991] 2 AllER 854; [1991] 2 WLR 866; [1991] 2 QB 78; (1991) 93 CrAppR 171; [1991] CrimLR 526; *R v Horsham JJ, Ex parte Reeves* (1982) 75 CrAppR 236; [1981] CrimLR 566; *R v Oxford City JJ, Ex parte Smith* (1982) 75 CrAppR 200; *R v Bow Street Metropolitan Stipendiary Magistrate, Ex parte Director of Public Prosecutions* (1992) 95 CrAppR 9; [1992] CrimLR 790; *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1993] 3 WLR 90; [1993] 3 AllER 138; (1994) 98 CrAppR 114; [1994] 1 AC 42; *LPB* (1990) 91 CrAppR 359; *Director of Public Prosecutions v Humphrys* (1976) 63 CrAppR 95; [1976] 2 WLR 857; [1977] AC 1; [1976] 2 AllER 497; *R v Brentford Justices, Ex parte Wong* (1981) 73 CrAppR 67; *Holmden v Bitar* (1987) 47 SASR 509 at 517; 27 ACrimR 255; *Vuckov & Romeo* (1986) 40 SASR 498; (1986) 22 ACrimR 10; *Smith, Ferguson, Coburn & others* (1994) 73 ACrimR 384; *Grassby v R* (1989) 87 ALR 618; *R v Abia Tumbule & others* [1974] PNGLR 250; *The State v Peter Painke (No. 2)* [1977] PNGLR 141 & *The State v Aigal & another* [1990] PNGLR 318.

[6.11.3] Presentment Of A Nolle Prosequi

The authority of the Director of Public Prosecutions to enter a '*nolle prosequi*' is provided for by section 63 of the *Criminal Procedure Code* (Ch. 7).

In *Tatau v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 289 of 1992) Palmer J held at page 15:

> 'The reason given by the learned prosecutor was that he felt that the learned Magistrate had not given due consideration to his applications for adjournment to call his last witness. The proper action to be taken is to inform the Court immediately that he disagreed with the decision of the Court and that he would file an appeal against the ruling of the Magistrate. This would have the effect to suspending proceedings whilst he challenges the ruling of the Magistrates' Court. There would have been no prejudice and no oppression, no abuse of process and no unfairness involved.
>
> The nolle had the effect of circumventing the ruling of the Magistrate without having to challenge it on appeal.
>
> It was in my view done for an improper purpose, after a valid exercise of a discretionary power of the Magistrate in the interests of justice to have the case proceeded with. The proper course of action when the adjournment was denied at that particular point of time was to lodge an appeal against the ruling of the Magistrate.
>
> Accordingly I find that the presentment of the nolle prosequi was also an abuse of process.'

The law relating to '*Adjournments*' is examined commencing on page **392**.

[7.9.4] Unavailability Of Evidence

In *R (on the application of Ebrahim) v Feltham Magistrates' Court & another & Mouat v Director of Public Prosecutions* [2001] 1 AllER 831 [[2001] 1 WLR 1293] Brooke LJ, delivering the judgment of the Divisional Court, stated at page 836:

> 'It must be remembered that it is a commonplace in criminal trials for a defendant to rely on "holes" in the prosecution case, for example, a failure to take fingerprints or a failure to submit evidential material to forensic examination. If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his. Often the absence of a video film or fingerprints or DNA material is likely to hamper the prosecution as much as the defence.
>
> *In relation to this type* of case Lord Lane CJ said in *A-G's Reference (No. 1 of 1990)* that no stay should be imposed –
>
> "unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuance of the prosecutions amounts to a misuse of the process of the court. […]".'

The law relating to '*Missing Exhibits*' is examined on page **238**.

[6.11.5] Discretion To Prosecute

In *R v Croydon Justices, Ex parte Dean* [1993] 3 AllER 129 [1993] QB 769; [1993] 3 WLR 198; (1994) 98 CrAppR 76; [1993] CrimLR 759] Staughton LJ, with whom Buckley J concurred, held at page 137:

> 'In my judgment the prosecution of a person who had received a promise, undertaking or representation from the police that he will not be prosecuted is capable of being an abuse of process.'

In determining whether to grant a stay based on a representation by a police officer or the Director of Public Prosecutions that a defendant or potential defendant would *not* be prosecuted, a Court should consider:

[i] the length in time between the date of such representation and subsequent court proceedings, see *R v Townsend and others* [1997] 2 CrAppR 540 & *Attorney – General of Trinidad & Tobago v Phillip* [1994] 3 WLR 1134; [1995] 1 AC 396; [1995] 1 AllER 93;

[ii] what prejudice, if any, would result to the defendant if the proceedings were pursued, see *R v Horseferry Road Magistrates' Court, Ex parte Director of Public Prosecutions* [1999] COD 441; and

[iii] any special circumstances such as the defendant's youthfulness and assistance provided to the police subsequent to the subject representation, see *R v Croydon Justices, Ex parte Dean* (*supra*).

The law relating to the '*Discretion To Prosecute Generally*' is examined commencing on page **112**.

FUNDAMENTAL RIGHTS & FREEDOMS

Table Of Contents

FUNDAMENTAL RIGHTS & FREEDOMS

[7.0] Introduction

This chapter examines the following '*Fundamental Rights And Freedoms*' of all persons:

- '*Fundamental Rights & Freedoms Of The Individual Generally*';
- '*Protection Of Right To Life*';
- '*Protection Of Right To Personal Liberty*';
- '*Protection From Inhumane Treatment*';
- '*Protection From Privacy Of Home & Other Property*';
- '*Right To A Fair Hearing Within A Reasonable Time*';
- '*Right To A Fair Trial By An Independent & Impartial Court*';
- '*Right To Be Present In Court*';
- '*Right To Be Heard In Open Court*';
- '*Right To An Interpreter*';
- '*Right To Assistance To Unable To Understand Proceedings*';
- '*Right To Legal Representation*';
- '*Right To Silence*';
- '*Right To Testify*'; and
- '*Right To A Copy Of The Judgment*'.

As regards the following rights and freedoms:

- '*Protection From Slavery & Forced Labour*', see section 6 of the *Constitution*;
- '*Protection From Deprivation Of Property*', see section 8 of the *Constitution*;
- '*Protection Of Freedom Of Conscience*', see section 11 of the *Constitution*;
- '*Protection Of Freedom Of Expression*', see section 12 of the *Constitution*;
- '*Protection Of Freedom Of Assembly & Association*'; see section 13 of the *Constitution*;
- '*Protection Of Freedom Of Movement*'; see section 14 of the *Constitution*; and
- '*Protection From Discrimination On Grounds Of Race, etc*', see section 15 of the *Constitution*.

[7.1] Fundamental Rights & Freedoms Of The Individual Generally

Section 3 of the *Constitution* states:

> 'Whereas every person in Solomon Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: --
>
> (a) life, liberty, security of the person and the protection of the law;
>
> (b) freedom of conscience of expression and of assembly and association; and
>
> (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

[7.2] Protection Of Right To Life

Section 4 of the *Constitution* states:

'(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Solomon Islands of which he has been convicted.

(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable –

(a) for the defence of any person from violence or for the defence of property;

(b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;

(c) for the purpose of suppressing a riot, insurrection or mutiny; or

(d) in order to prevent the commission by that person of a criminal offence,

or if he dies as the result of a lawful act of war.'

Refer also to:

- the law relating to the '*Defence Of Person & Property*' which is examined commencing on page **451**; and
- the law relating to '*Homicidal Offences*' which is examined commencing on page **610**.

[7.3] Protection Of Rights To Personal Liberty

Section 5 of the *Constitution* states:

'(1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say –

(a) in consequence of his unfitness to plead to a criminal charge;

(b) in execution of the sentence or order of a court, whether established for Solomon Islands or some other country, in respect of a criminal offence of which he has been convicted;

(c) in execution of the order of a court of record punishing him for contempt of that court inferior to it;

(d) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;

(e) for the purpose of bringing him before a court in execution of the order of a court;

(f) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands;

(g) in the case of a person who has not attained the age of eighteen years, under the order of a court or with the consent of his parent or guardian, for the purpose of his eduction or welfare;

(h) for the purpose of preventing the spread of an infectious or contagious disease;

(i) in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(j) for the purpose of preventing the unlawful entry of that person into Solomon Islands, or for the purpose of effecting the expulsion, extradition or other lawful removal of that person from Solomon Islands or for the purpose of restricting that person while he is being conveyed through Solomon Islands in the course of his extradition or removal as a convicted person from one country to another; or

(k) to such extent as may be necessary in the execution of a lawful order of a court requiring that person to remain within a specified area within Solomon Islands or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against that person relating to the making of any such order, or to such extent as may be reasonably justifiable for restraining that person during any visit that he is permitted to make to any part of Solomon Islands in which, in consequence of any such order, his presence would otherwise be unlawful.

(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, and in a language that he understands, of the reasons for his arrest or detention.

(3) Any person who is arrested or detained –

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands,

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either conditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.'

Refer also to the law relating to:

- the '*Power To Arrest*' which is examined commencing on page **242**;
- '*Bail*' which is examined commencing on page **378**;
- '*Abuse Of Process*' which is examined commencing on page **138**; and
- '*Preliminary Investigations / Inquiries*' which is examined commencing on page **310**.

[7.4] Protection From Inhumane Treatment

Section 7 of the *Constitution* states:

> 'No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.'

[7.5] Protection For Privacy Of Home & Other Property

Section 9 of the *Constitution* states:

> '(1) Except with his consent, no person shall be subject to the search of his person or his property or the entry by others on his premises.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision --
>
> (a) in the interests of defence, public safety, public order, the prevention and investigation of breaches of law, public morality, public health, town or country planning, the development and utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit;
>
> (b) for the purpose of protecting the rights or freedoms of other persons;
>
> (c) for the purpose of authorising an officer or agent of the Government, an authority of the government of Honiara city or of a provincial government or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or duty or in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, that authority or that body corporate, as the case may be;
>
> (d) for the purpose of authorising the entry upon any premises in pursuance of an order of a court for the purpose of enforcing the judgment or order of a court in any proceedings; or
>
> (e) for the purpose of authorising the entry upon any premises for the purpose of preventing or detecting criminal offences,
>
> and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

Refer also to the law relating to the '*Power To Enter & Search*' commencing on page **256**.

[7.6] Right To A Fair Hearing Within A Reasonable Time

[7.6.1] Constitution

Section 10(1) of the *Constitution* states:

> 'If any person is charged with a criminal offence, then, *unless* the charge is withdrawn, that person *shall* be afforded a *fair hearing within a reasonable time* by an independent and impartial court established by law.' (emphasis added)

[7.6.2] General Principles

Both the prosecution and the defendant have the '*right to a fair hearing within a reasonable time*'.

The four factors in determining whether a defendant had been afforded a fair hearing '*within a reasonable time*' are:

[i] the length of the delay;

[ii] the reason for the delay;

[iii] the defendant's assertion of his/her right; and

[iv] any prejudice to the defendant.

In *Director of Public Prosecutions v Rolland Kimisi* (Unrep. Civil Case No. 67 of 1990) the Court of Appeal stated at pages 3 – 4:

> 'The learned Chief Justice in his judgment first considered the requirement contained in S.10 for a hearing within a reasonable time. A similar provision to S.10 appears in a number of constitutions and the Chief Justice referred to *Bell –v- DPP* (1986) LRC (Constitutional) 392 in which the Privy Council considered such a provision in the Constitution of Jamaica. Lord Templeman, in giving the opinion of the Board, said some guidance was provided by the judgments of the Supreme Court of the United States in *Barker –v- Wingo* 407 US 514 (1952) and he referred to the judgment of Powell J where he pointed out that:-
>
> "……the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot say how long is too long in a system where justice is supposed to be swift but deliberate ….."
>
> "A speedy trial" is the formula contained in the sixth amendment to the Constitution of the United States. Mr. Justice Powell had then gone on to identify four factors which in his view the Court would assess in determining whether a particular defendant had been deprived of his right to a speedy trial. *Those factors were the length of the delay, the reason for the delay, the defendant's assertion of his right and any prejudice to the defendant.* Lord Templeman referred to the adoption of the four factors by McDonald J sitting in the Alberta Queens Bench Court in *R –v- Cameron* (1982) 6 WWR 270 and acknowledged the relevance and importance of the four factors and the desirability of applying the same or similar criteria

to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings.' (emphasis added)

See also: *R v Paul Maenu'u & Augustine Tuita* (Unrep. Criminal Appeal Case No. 11 of 1998; Awich J; at page 3) & *R v Robert Tumulima & Richard Meke* (Unrep. Criminal Appeal Case No. 54 of 2000).

If a defendant seeks a *permanent stay* on the grounds of 'inordinate' delay, he/she *must* be able to show that he/she will suffer serious prejudice to the extent that no fair trial can be held. In other words, the continuance of the proceedings amounts to an '*abuse of the process*' of the court. The granting of a *stay* simply means that the prosecution is prevented from further proceeding with the charge. When a *stay* is granted a Court essentially rules that there has been an '*abuse of the process of the court*' by the prosecution.

The law relating to an '*Abuse Of Process*' is also examined commencing on page **138**.

In *R v Sawoniuk* [2000] 2 CrAppR 220 [[2000] CrimLR 506] Lord Bingham CJ, delivering the judgment of the Court of Appeal, held at pages 230 – 231:

'The judge directed himself in accordance with the principles laid down in *Attorney – General's Reference (No. 1 of 1990)* (1992) 95 CrAppR 296, [1992] QB 630 […]. From that decision he derived the following principles:

"*(1) that generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment and, where either demands a verdict, a judge has no jurisdiction to stand in the way of it and therefore the jurisdiction to stay proceedings is exceptional;*

(2) a stay should never be imposed where the delay has been caused by the complexity of the proceedings;

(3) it would be rare for a stay to be imposed in the absence of fault on the part of the prosecutor or complainant;

(4) delay contributed to by the actions of the defendant should not found the basis of a stay;

(5) the defendant needs to show on a balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. In other words, the continuance of the proceedings amounts to an abuse of the process of the court."

The judge went on to cite the passage in the judgment of the Court (at pp. 303 and 644) in which it was made plain that the prejudice which a defendant would have to show to justify the grant of a stay is prejudice which could not be cured by an appropriate ruling in the course of a trial, or by a judicial exclusion of evidence, or by an appropriate direction to the jury.

Attention was drawn to *Tan v Cameron* (1993) 96 CrAppR 172, [1992] 2 AC 205, at pp. 184 – 185 and 225, but *the effect of that passage is in our judgment simply to emphasise the burden on a defendant seeking a stay to satisfy the court that if the trial goes ahead it will be unfair to the defendant*. We were also referred to *Central Criminal Court, ex p. Randle and Pottle* (1991) 92 CrAppR 323, [1991] 1 WLR 1087, a decision given before *Attorney – General's Reference (No. 1 of 1999).* Reliance was placed on the passage in the judgment of the court at pp. 343 and 1111, where it was suggested that the strength of the prosecution

case may be a relevant consideration. Even if that be so, it does not undermine *the overriding principle, which is that the judge must be persuaded, before granting a stay, that continuance of the proceedings will cause serious prejudice to the defendant by denying him a fair trial.* In our judgment the judge directed himself in strict accordance with the law.' (emphasis added)

See also: *R v Henworth* [2001] 2 CrAppR 4; [2001] CrimLR 505; *Charles & others v The State* [2000] 1 WLR 384; *R v Central Criminal Court, Ex parte Randle & Pottle* [1992] 1 AllER 370; [1991] 1 WLR 1087; (1991) 92 Cr AppR 323; [1991] CrimLR 551; *R v West London Magistrate, Ex parte Anderson* (1985) 80 CrAppR 143; *R v Wilkinson* [1996] 1 CrAppR 8; *Attorney – General of Hong Kong v Wai – bun* [1993] 3 WLR 242; [1993] 2 AllER 510; (1994) 98 CrAppR 17; [1994] 1 AC 1; *R v Derby Crown Court, Ex parte Brooks* (1985) 80 CrAppR 164; [1985] CrimLR 754; *R v Bow Street Stipendiary Magistrate, Ex parte Director of Public Prosecutions & R v Same, Ex parte Cherry* (1990) 91 CrAppR 283; *Jago v District Court of New South Wales* (1989) 168 CLR 23 & *Lillico v McKenna & others* (1995) 77 ACrimR 396.

[7.7] Right To A Fair Trial By An Independent & Impartial Court

[7.7.1] Introduction

Section 10(1) of the *Constitution* states:

'If any person is charged with a criminal offence, then, *unless* the charge is withdrawn, that person *shall* be afforded a fair hearing within a reasonable time by an *independent and impartial court* established by law.' (emphasis added)

Section 9 of the *Magistrates' Courts Act* (Ch. 20) states:

'Where a Magistrate is a party to any cause or matter, or *is unable, from personal interest or any other sufficient reason*, to adjudicate on any cause or matter, the Chief Justice shall direct some other Magistrate to act instead of such aforesaid Magistrate for the hearing and determination of such particular cause or matter, or shall direct that such cause or matter shall be heard and determined in a Magistrates' Court in any other district.' (emphasis added)

Section 67(1) of the *Criminal Procedure Code* (Ch. 7) states (in part):

'Whenever it is made to appear to the High Court –

(a) that a *fair and impartial inquiry or trial* cannot be held in any Magistrates' Court; [...]

it *may* order –

(i) that any offence be inquired into or tried by any court not empowered under the preceding sections of this Part [Part IV -- '*Provisions Relating To All Criminal Investigations & Proceedings*'] but in other respects competent to inquire into or try such offence; or

(ii) that any particular criminal case or class of cases be transferred from a Magistrates' Court to any other Magistrates' Court; or

(iii) that an accused person be committed for trial to itself.' (emphasis added)

[7.7.2] General Principles

In *Ngina v R* [1987] SILR 35 Ward CJ held at page 39:

> 'Of course, if a magistrate is aware of bias in his attitude to a particular defendant, he should always disqualify himself but I cannot accept that he must consider whether the sensitiveness of the accused man are such that he may possibly feel bias from some unspoken fear. […]
>
> Passing the main allegation of bias, Lord Denning's test of whether right minded people would think there was a real likelihood of bias has been more recently stated by Daly CJ in the unreported case of Kamai v Aldo, CLAC No. 17 of 1982 as "*would a reasonable bystander conclude, having observed the proceedings, that justice has clearly been done*."
>
> *Magistrates in communities as small as those in this country are frequently faced with a man whom they have tried before. They may have tried him more than once, they may have disbelieved him on oath and they may well have sentenced him before with words that suggest a strong view of his previous misdeeds and his honesty.*
>
> *None of these matters of itself should be considered reason to disqualify the magistrate from trying the same man on another charge.* Of course, if the magistrate did harbour malice or a grudge against the accused he should disqualify himself and this court will be sensitive where any impression of malice or bias has been displayed by a magistrate.' (emphasis added)

In *Talasasa v Paia & another* [1980 – 81] SILR 93 Daly CJ commented at page 106:

> '[T]he locus classicus is Metropolitan Properties v Lennon & others (1968) 3 AllER 304 in which Lord Denning said at page 310:
>
> "The court looks at the impression which would be given to other people. Even if he was impartial as could be, nevertheless, if right – minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit. And if he does not sit, his decision cannot stand. Nevertheless, there must appear to be a real likelihood of bias. Surmise or conjecture is not enough."'

In *R v Liverpool City Justices, Ex parte Topping* (1983) 76 CrAppR 170 [[1983] 1 WLR 119] Ackner LJ delivering the judgment of the Divisional Court held at pages 174 - 175:

> 'More recently Lord Denning MR has preferred the test of the appearance of bias to that of actual bias. In METROPOLITAN PROPERTIES CO (FGC) LITD v. LANNON [1969] 1 QB 577, 599 he said: "… in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could be, nevertheless if right – minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then he should not sit …. There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other; the court will not inquire whether he did, in fact, favour one side unfairly. Suffice that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right – minded people go away thinking" 'The judge was biased'.

> *In our view, therefore, the correct test to apply is whether there is the appearance of bias, rather than whether there is actual bias.*
>
> […]
>
> *We conclude that the test to be applied […* *is]: Would a reasonable and fair-minded person sitting in court and knowing all the relevant facts have a reasonable suspicion that a fair trial for the applicant was not possible?*' (emphasis added) [word in brackets added]

In *Boateng v The State* [1990] PNGLR 342 the Supreme Court adopted the test that was stated in *R v Liverpool City Justices, Ex parte Topping* (*supra*) and held:

> The test to be applied in determining whether an accused had been denied a fair trial was whether a reasonable and fair – minded person sitting in a court and knowing all the relevant facts would have a reasonable suspicion that a fair trial for the accused was not possible.

At page 346 the Court stated:

> 'Justice requires that there be complete absence of any interference or impression that a judge or his family have, by personal association with parties or witnesses, influenced the outcome of the case. However impeccable a judgment or decision of a judge might be the appearance created by such association in the mind of a reasonable man that justice might not have been done to a party cannot be remedied by denials, however true, that such association had no effect on the outcome of the case.'

In *The State v Sari* [1990] PNGLR 48 Jalina AJ, sitting alone, held:

> Where a judge is asked to disqualify himself/herself for bias, whether or not it has been shown that there is a real likelihood of bias or a reasonable suspicion of bias and provided the objection is not unprincipled, frivolous or futile, the judge ought to disqualify himself/herself.

In *PNG Pipes Pty Limited & Sankaran Venugopal & Mujo Sefa; Globes Pty Limited & Romy Macasaet* (Unrep. SC 592; 23 May 1997; 26 October 1998 & 26 November 1998) the Supreme Court of Papua New Guinea stated at pages 6 – 8:

> 'The Full Court [of the Australian Federal Court] in *Trustees of Christian Brothers v Cardone* (1995) 130 ALR 345] dismissing the appeal on the issue of disqualification for apprehended bias said:
>
> "*The apprehension of bias must be reasonably and not fancifully entertained. The appellate court must be satisfied upon examination of the surrounding facts, that an objective observer would be left with an apprehension, not a conviction, that the judicial officer was predisposed, by matters extraneous to a proper adjudication, to reach a particular conclusion."*
>
> Gallop J, in dissent outlined some useful principles from the Australian High Court and other cases to be applied in cases of imputed judicial bias. He said:
>
> "On the one hand there are the repeated assertions of the courts that:
>
> (a) *Judges by their training and experience are able to bring a detached mind to the task*: *R v Lockie; Ex parte Felman* (1977) 18 ALR 93; 52 ALJR 155 at 160;

(b) *Judges should not too readily accede to applications for disqualification whereby parties may effectively influence the choice of a judge in their cause*: *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352; 66 ALR 239;

(c) *Judges should resist being driven from their courts by the conduct or assertion of parties*;

(d) *Judges should be disqualified because of the vigour with which they conduct proceedings*;

(e) *Judges should perform the duties of their office, which, of their nature, will often be painful and unrewarding. They should do so with courage and decisiveness, avoiding the relinquishment of such duties which will necessarily than fall to another judicial officer for whom the task may be no more congenial*: *Raybos Australia Pty Ltd v Tectran Corp. Pty Ltd (No. 9)* (unreported).

[…]

The test as formulated by the High Court in determining whether a judicial officer (a judge) is disqualified by reason of appearance of bias as distinct from proved actual bias is whether in all the circumstances a fair minded, lay observer with knowledge of the material objective facts "might entertain a reasonable apprehension that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question" in issue. Livesy v New South Wales Bar Association, supra, at CLR 293 – 4.

In the Court of Appeal of the Supreme Court of the Northern Territory in *Limbo v Little* (1989) 65 NTR 19, Martin J said at 27:

"Judges are capable of putting aside personal predilections arising from life's experiences. We all, I suspect, have views, opinions and attitudes moulded by a variety of factors. Rigorous training in the discipline of the law and in particular the requirement of objectivity, together with public insistence upon judicial integrity, mean that unless some material matter is raised by a litigant, or voluntarily disclosed by the judge, it is accepted that there can be no suggestion of reasonable apprehension of bias. Edmund Burke spoke of "the cold neutrality of an impartial judge". That is what is expected. *If impartiality is lacking, or could be fairly thought to be lacking, it may well become evident sooner or later; but it is nor for the litigant to pry into the judge's background.'"* (emphasis added) [words in brackets added]

See also: *Solomon Islands Medical Association v The Ministry of Health & Medical Services* (Unrep. Civil Case No. 30 of 1979; Cooke CJ; at pages 10 – 11); *R v Edmond Andresen* (Unrep. Criminal Case No. 37 of 1996; Lungole - Awich J; at page 1); *Billy Gatu v R* (Unrep. Criminal Case No. 93 of 1993; Palmer J; at pages 9 – 10); *The Director of Public Prosecutions v John Jackson* (Unrep. Criminal Appeal Case No. 5 of 1991; Court of Appeal; at page 3); *R v Gough* [1993] AC 646; [1993] 2 WLR 883; [1993] 2 AllER 724; (1993) 97 CrAppR 188; *R v Weston – Super-Mare Justices, Ex parte Shaw* (1987) 84 CrAppR 305; *R v Mulvihill* (1990) 90 CrAppR 372; *R v Eccles Justice, Ex parte Fitzpatrick* (1989) 89 CrAppR 324; *The State v Joe Ivoro & Gemora Yavura* [1980] PNGLR 1; *Thomas Kavali v Thomas Hoihoi* [1986] PNGLR 329; *Fidelis Angai v Buckley Yarume* [1987] PNGLR 124; *Eastman* (1994) 76 ACrimR 9; *Ellis & others* (1993) 69 ACrimR 193; *Winningham v R* (1995) 69 ALJR 775; *R v Judge Leckie, Ex parte Felman* (1977) 52 ALJR 155 at page 158; *Livesey v New South Wales Bar Association* (1983) 151 CLR 288 at pages 293 – 294; *Grassby v R* (1989) 168 CLR 1 at page 20; *Laws v Australian Broadcasting Tribunal* (1989) 85 ALR 659 & *Vakauta v Kelly* (1989) 167 CLR 568.

[7.8] Right To Be Present In Court

Section 10(2) of the *Constitution* states (in part):

> 'Every person who is charged with a criminal offence ---
>
> (f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,
>
> *and, except with his own consent, a trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.*' (emphasis added)

Section 179 of the *Criminal Procedure Code* (Ch. 7) states:

> '*Except as otherwise expressly provided* [see sections 86 ('*Power to dispose with personal attendance of accused*'), 188 ('*Court may proceed with hearing in absence of accused in certain cases*'), 189 ('*Appearance of both parties*') of the *Criminal Procedure Code* (Ch. 7) and section 10(2) of the *Constitution*], all evidence taken in any inquiry or trial under this Code shall be taken in the presence of the accused, or, when his personal attendance has been dispensed with, in the presence of his advocate (if any).' (emphasis added) [words in brackets added]

See however section 192(1) of the *Criminal Procedure Code* (Ch. 7) which is inconsistent with section 10(2) of the *Constitution.* To the extent of the consistency it could be argued that section 192(1) of the *Criminal Procedure Code* (Ch. 7), see section 2 of the *Constitution*.

In *R v Tuto* [1980 – 81] SILR 19 Daly CJ held at page 21:

> '[D]espite the absence of the accused, the same rules of evidence apply in all cases. Thus, unless it can be brought within one of the statutory exceptions, evidence must be given on oath. Indeed to some extent there is a greater burden on the magistrate proceeding in the absence of an accused to satisfy himself that all is in order. It is always for the prosecution to prove their case even if an accused declines to be present.'

As regards the '*proof of previous convictions*' when a defendant is *not* present, that Court further held that great caution needs to be applied and that there should be strict proof of the '*previous convictions*' because there will not be a '*formal admission*' in those circumstances.

The 'judgment in every trial in any criminal court in the exercise of its original jurisdiction *shall* be pronounced, or the substance of such judgment *shall* be explained in open court', irrespective of the presence of the defendant, see section 10(9) of the *Constitution* and section 150 of the *Criminal Procedure Code* (Ch. 7). (emphasis added)

Section 193 of the *Criminal Procedure Code* (Ch. 7) states:

> 'If the court convicts the accused person in his absence, it may set aside such conviction upon being satisfied that his absence was from causes over which he had no control, and that he had a probable defence on the merits.'

See also: *R v Howson* (1982) 74 CrAppR 172; [1982] CrimLR 720 & *R v Shaw* [1980] 2 AllER 433; [1980] 1 WLR 1526; (1980) 70 CrAppR 313; [1980] CrimLR 443.

Refer also to the law relating to:

- the '*Constitution*' which is examined commencing on page **4**;
- '*Formal Admissions*' which is examined commencing on page **325**;
- '*Witnesses With Criminal Histories*' which is examined commencing on page **305**; and
- the section titled '*Decision*' commencing on page **330**.

[7.9] Right To Be Heard In Open Court

[7.9.1] Constitution

Section 10 of the *Constitution* states (in part):

> '(9) *Except with the agreement of all the parties thereto*, all proceedings of every court […], including the announcement of the decision of the court […], *shall* be held in public.
>
> (10) *Nothing in the preceding subsection* shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority --
>
> (a) may by law be empowered so to do and may consider necessary or expedient in circumstances *where publicity would prejudice the interests of justice* or in interlocutory proceedings *or in the interests of decency, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings*; or
>
> (b) may by law be empowered or required so to do in the *interests of defence, public safety or public order*.' (emphasis added)

[7.9.2] Statutory Provisions

Section 64 of the *Criminal Procedure Code* (Ch. 7) states:

> 'The place in which any criminal court is held for the purpose of inquiring into or trying any offence shall be deemed an *open court* to which the public generally may have access, so far as the same can conveniently contain them:
>
> Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of the inquiry into or trial of any particular case that the public generally or any particular person shall not have access to or be or remain in the room or building used by the court.' (emphasis added)

Section 4(4) of the *Juvenile Offenders Act* (Ch. 14) states:

> 'In a *juvenile court* no person other than the members and officers of the court and the parties to the case, their advocates or authorized representatives and other persons directly concerned in the case, shall, except by leave of the court, be allowed to attend:
>
> *Provided* that –
>
> (a) bona fide representatives of any news agency or information service *shall not* be excluded, except by special order of the court; *and*
>
> (b) *no person* shall publish the name, address, school, photograph, or anything likely to lead to the identification of the child or young person before the juvenile court, save with the permission of the court or in so far as required by the provisions of this Act, and any person who acts in contravention of this paragraph shall be guilty of an offence […].' (emphasis added)

Section 20 of the *Juvenile Offenders Act* (Ch. 14) states:

> 'In addition and without prejudice to any powers which a court may possess to hear proceedings in camera the court may, *where a person who in the opinion of the court is a child or young person is called as a witness in any proceedings in relation to an offence against, or any conduct contrary to, decency or morality*, direct all or any persons, not being members or officers of the court or parties to the case, their advocates or authorized representatives, or persons otherwise directly concerned in the case, be excluded from the court during the taking of the evidence of the child or young person:
>
> Provided that nothing in this section shall authorize the exclusion of bona fide representatives of any new agency or information service.' (emphasis added)

[7.9.3] General Principles

In *Re Crook* [1992] 2 AllER 687 [(1991) 93 Cr AppR 17] Lord Lane CJ, delivering the judgment of the Court of Appeal, stated at pages 691 – 695:

> 'In *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745 at 749 – 750, [1979] AC 440 at 449 – 450 Lord Diplock stated:
>
> "*As a general rule the English system of administering justice does require that it be done in public*: *Scott v Scott* [1913] AC 417, [1911 – 13] All ER Rep. 1. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the Press and public are admitted and that, *in criminal cases at any rate, all evidence communicated to the court is communicated publicly*. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this. However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some

statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. […]"

In *R v Ealing Justices, ex p Weafer* (1981) 74 CrAppR 204 at 205 Donaldson LJ cited the statement of Viscount Reading CJ in *R v Governor of Lewes Prison, ex p Doyle* [1917] 2 KB 254 at 271:

"… there is inherent jurisdiction in every Court … to exclude the public if it becomes necessary for the administration of justice …"

Donaldson LJ added:

"… it is a very exceptional step to take and it is one which should be avoided if there is any other way of serving the interests of justice."

As to the role of journalists, Watkins LJ in *R v Felixstowe Justices, ex p Leigh* [1987] 1 All ER 551 at 558, [1987] QB 582 at 591 stated:

"No one nowadays surely can doubt that his [the journalist's] presence in court for the purpose of reporting proceedings conducted therein is indispensable. Without him, how is the public to be informed of how justice is being administered in our court?"

Watkins LJ referred to the vital importance of the work of the journalist in reporting on court proceedings and within the bounds of impartiality and fairness, commenting upon the decisions of judges and their behaviour in and conduct of proceedings […].

[…] *From the cases it is clear that the public can be excluded only when and to the extent that is strictly necessary, and also that each application must be considered on its own merits. It is not sufficient that a public hearing will cause embarrassment for some or all of those concerned* […].

[…]

[W]hile giving full recognition to the importance of the role of the press, it would not be right as a general rule to distinguish between excluding the press and other members of the public. If exclusion of the public is necessary, applying the strict standard required to justify it, it would not usually be right to make an exception in favour of the press.

There will often be other members of the public, such as the family of a defendant, victims of the alleged crime and others having a direct concern in the case with as much interest in the proceedings and as good a claim to be present as the press. It could cause a real sense of grievance if they were excluded while representatives of the press were allowed to be present.' (emphasis added) [words in brackets added]

In *The Attorney – General v The Solomon Islands Broadcasting Corporation* [1980 – 81] SILR 1 Davis CJ stated at page 2:

'It is well – established that it is a serious contempt to publish details of the previous criminal record of an accused person prior to his trial.'

In *R v Pitman* [1991] 1 AllER 468 [[1991] RTR 70] Lord Lane CJ, delivering the judgment of the Court of Appeal, stated at pages 470 – 471:

> '[…] There is it seems a steady flow of appeals to this court arising from visits by counsel to the judge in his private room. No amount of criticism and no amount of warnings and no amount of exhortation seems to be able to prevent this happening. In this case it was an invitation from the judge which caused counsel to visit him in his room.
>
> The dangers of such visits scarcely need emphasising. They are set out in *R v Harper – Taylor and Bakker* (1988) 138 NJL 80 at 80 – 81, decided in this court on 19 February 1988, in which Mustill LJ delivered this passage which is worthy of note:
>
> "*A first principle of criminal law is that justice is done in public, for all to see and hear. By this standard, a meeting in the judge's room is anomalous: the essence, and indeed the purpose, being that neither the defendant nor the jury nor the public are there to hear what is going on.* Undeniably, there are circumstances where the public must be excluded. Equally, the jury cannot always be kept in court throughout. *The withdrawal of the proceedings into private, without even the defendant being there, is another matter*. It is true, as this court stated in *R v Turner (Frank)* [1970] 2 All ER 281 at 285, [1970] 2 QB 321 at 326, that there must be freedom of access between counsel and the judge when there are matters calling for communications or discussions of such a nature that counsel cannot in the interests of his client mention them in open court. *Criminal trials are so various that a list of situations where an approach to the judge is permissible would only mislead; but it must be clear that communications should never take place unless there is no alternative.* Apart from the question of principle, seeing the judge in private creates risks of more than one kind, as the present case has shown. The need to solve an immediate practical problem may combine with the more relaxed atmosphere of the private room to blur the formal outlines of the trial. Again, if the object of withdrawing the case from open court is to maintain a degree of confidence, as it plainly must be, there is room for misunderstanding about how far the confidence is to extend; and in particular, there is a risk that counsel and solicitors for the other parties may hear something said to the judge which they would rather not hear, putting them into a state of conflict between their duties to their clients, and their obligation to maintain the confidentiality of the private room. The absence of the defendant is also a potential source of trouble. He has to learn what the judge has said at second hand and may afterwards complain (rightly or not) that he was not given an accurate account.
>
> Equally, he cannot hear what his counsel has said to the judge, and hence cannot intervene to correct a mis-statement or an excess of authority: a factor which may not only be a source of unfairness to the defendant, but which may also deprive the prosecution of the opportunity to contend that admissions made in open court in the presence of the client and not repudiated by him be taken to have been made with his authority […].' (emphasis added)

See also: *Director of Public Prosecutions v Sanau & Hou Tanabose v Director of Public Prosecutions* [1987] SILR 1 at page 3.

[7.10] Right To An Interpreter

[7.10.1] Introduction

Section 10(2) of the *Constitution* states (in part):

> 'Every person who is charged with a criminal offence ---
>
> […]
>
> (b) *shall be informed as soon as reasonably practicable, in detail and in a language that he understands, of the nature of the offence charged*;
>
> […]
>
> shall be permitted to have without payment the *assistance of an interpreter* if he cannot understand the language used at the trial of the charge,
>
> […]' (emphasis added)

Section 183 of the *Criminal Procedure Code* (Ch. 7):

> 'The language of the court in the case of both the High Court and the Magistrates' Courts *shall* be English.' (emphasis added)

Section 59 of the *Magistrates' Courts Act* (Ch. 20) states:

> '(1) The language of the Magistrates' Courts *shall* be English.
>
> (2) In any proceedings in any Magistrates' Court in which the language spoken by any witness or party requires to be *interpreted* into English, the Magistrate having jurisdiction in the proceedings *may* appoint suitable persons as *interpreters*.' (emphasis added)

Section 184 of the *Criminal Procedure Code* (Ch. 7):

> '(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it *shall* be *interpreted* to him in open court in a language which he understands.
>
> (2) When documents are put in for the purpose of formal proof it shall be in the discretion of the court to *interpret* as much thereof as appears necessary.' (emphasis added)

[7.10.2] General Principles

A proper plea is *not* rendered in court, *unless* a defendant:

[i] fully understands the charge/s which he/she faces;

[ii] fully understands the full implications of such charge/s; and

[iii] is able to provide full instructions to his/her legal representative, if applicable.

Unless such requirements have been met, any 'trial' is a '*nullity*', see *R v Iqbal Begum* (1991) 93 CrAppR 96.

Therefore, if a defendant does *not* understand the proceedings the services of an interpreter' *must* be provided, see *R v Lee Kum* [1914 – 15] AllER Rep 603; [1916] I KB 337; (1916) 11 CrAppR 293.

Refer also to the chapter which examines the law relating to '*Sentencing*' commencing on page **918**.

Interpreters need to be:

[i] wholly impartial;

[ii] suitably skilled in the interpretation of the language in question; and

[iii] fluent in the language in question, see *R v West London Youth Court, Ex parte N* [2000] 1 WLR 2368 & *R v Mitchell* [1970] CrimLR 153.

'*Interpreters*', however, are only to be considered as 'translating machines' and their translations *must* be accurate and the evidence of the defendant, like any other witness whose evidence requires the services of an interpreter, must be interpreted faithfully, see *Gaio v R* (1960) 104 CLR 419.

The '*Interpreter's Oath*' is as follows:

> 'I swear by Almighty God that I will well and faithfully interpret and true explanation make all such matters and things as shall be required of me according to the best of my skill and understanding', see *Archbold Criminal Pleadings, Evidence and Practice*, 2002 ed., at page 325.

[7.11] Right To Assistance To Understand Proceedings

Section 149 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '(1) If the accused, *though not insane*, cannot be made to understand the proceedings –
>
> (a) *in cases tried by a Magistrate's Court*, the court shall proceed to hear the evidence, and, if at the close of the evidence for the prosecution, and, if the defence has been called upon, of any evidence for the defence, the court is of the opinion that the evidence which it has heard would not justify a conviction, it shall acquit and discharge the accused, but if the court is of the opinion that the evidence which it has heard would justify a conviction it shall order the accused to be detained during the Governor – General's pleasure; but every such case shall be subject to confirmation by the High Court;
>
> (b) *in cases which are subject of a preliminary investigation by a Magistrate's Court and of trial by the High Court* –
>
> (i) the Magistrate's Court shall hear the evidence for the prosecution, and if satisfied that a prima facie case has been proved shall commit the accused for trial by the High Court, and either admit him to bail or commit him to prison for safe keeping;' (emphasis added)

[7.12] Right To Legal Representation

[7.12.1] Constitution

Section 10(2) of the *Constitution* states (in part):

> 'Every person who is charged with a criminal offence –
>
> […]
>
> (c) shall be given adequate time and facilities for the preparation of his defence;
>
> (d) shall be permitted to defend himself before the court in person or, at his own expense, by a *legal representative of his own choice*;
>
> (e) shall be afforded facilities to examine in person or by his *legal representative* the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.' (emphasis added)

[7.12.2] General Principles

In *R v Lemsatef* [1977] 1 WLR 812 Lawton LJ, delivering the judgment of the Court, stated at page 815:

> 'It is one of the principles of practice that if a man in custody wants to consult a solicitor he can do so. He is entitled to do at an early stage of the investigation. The only qualification is that he cannot delay the investigation by asking to see a solicitor if the effect of so – asking would be – and I use the words of the rules – to cause "unreasonable delay or hindrance … to the process of investigation or the administration of justice.'

Section 178 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Any person accused of an offence before any criminal court, or against whom proceedings are instituted under this code in any such court, may be defended by an advocate.'

A defendant is entitled to be represented by the lawyer of his/her choice, subject to that person's availability, the availability of witnesses and the interests of justice generally, see *R v De Oliveira* [1997] CrimLR 600.

See also: *R v Harris* [1985] CrimLR 244 & *R v Kingston* (1948) 32 CrAppR 183.

The duty of a legal representative to his/her client, ie., the defendant, was restated by the Chairman of the Bar Council at (1976) 62 CrAppR 193 as follows:

> 'It is the duty of counsel when defending an accused on a criminal charge to present to the court, fearlessly and without regard to his personal interests, the defence of that accused. It is not his function to determine the truth or falsity of that defence, nor should he permit his personal opinion of that defence to influence his conduct of it. No counsel may refuse to defend because of his opinion of the character of the accused nor of the crime charged. That

> is a cardinal rule of the Bar […] Counsel also has a duty to the court and to the public. This duty includes the clear presentation of the issues and the avoidance of waste of time, repetition and prolixity. In the conduct of every case counsel must be mindful of this public responsibility.'

Furthermore, it is the duty of defence counsel 'to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else', see *R v Miller & others* (1952) 36 CrAppR 169 [[1952] 2 AllER 667] at page 171.

[7.12.3] Legal Professional Privilege

In *Bullivant v Attorney – General (Vict.)* [1901] AC 196 Earl of Halsbury LC referred to the concept of '*legal professional privilege*' when his Lordship stated at pages 200 – 201:

> '[F]or the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy that those confidential communications shall *not* be subject to production.' (emphasis added)

In *R v Derby Magistrates' Court, Ex parte B & Same v Same, Ex parte Same* [1996] 1 CrAppR 385 Lord Taylor, with whom the other Lordships of the House of Lords concurred, commented at page 401:

> 'The principle […] is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back hold the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.'

In *AM & S Europe Ltd v Commissioner of the European Communities* [1983] QB 878 Advocate General Warner stated at page 913:

> 'Whether it is described as the right of the client or the duty of the lawyer, this principle has nothing to do with the protection or privilege of the lawyer. It springs essentially from the basic need of a man in a civilised society to be able to turn to his lawyer for advice and help, and if proceedings begin, for representation; it springs no less from the advantages to a society which evolves complex law reaching into all the business affairs of persons, real and legal, that they should be able to know what they can do under the law, what is forbidden, where they must tread circumspectly, where they run risks.'

However, as held by the High Court of Australia in *Grant v Downes* (1976) 135 CLR 674:

> Legal professional privilege is confined to documents which are brought into existence for the sole purpose of their being submitted to legal advisers for advice or use in legal proceedings. *A document which would in any event have been brought into existence for another purpose is not privileged from production after discovery on that ground.*

Therefore, in determining whether '*legal professional privilege*' exists the purpose for which the document was brought into existence and not the purpose for which it was given to the lawyer is the fundamental consideration. Mere delivery of the documents to a lawyer is *not* sufficient to confer immunity where the documents are *not* of a privileged nature.

However, '*legal professional privilege*' does not apply to communication as regards the commission of possible future offences, see *R v Central Criminal Court, Ex parte Francis & Francis (a Firm)* [1988] 3 WLR 989; [1989] AC 346; (1989) 88 CrAppR 213; [1989] CrimLR 444 & *R v Smith* (1915) 11 CrAppR 229 at page 238.

As regards *waiving* the privilege, refer to: *Burnall v British Transport Commission* [1956] 1 QB 187 & *Carter v The Managing Partner, Northmore, Hale, Davy & Leake & others* [1995] 183 CLR 121.

See also: *R v Smith* (1915) 11 CrAppR 229 at page 238; *R v King* (1983) 77 CrAppR 1; [1983] 1 AllER 929; [1983] 1 WLR 411; [1983] CrimLR 326; *R v Ataou* (1988) 87 CrAppR 210; *R v Justice of the Peace for Peterborough, Ex parte Hicks & others* [1978] 1 AllER 225; *Baker v Campbell* (1983) 153 CLR 52; *Trade Practices Commission v Sterling* (1978) 36 FLR 244; *R v Braham & Mason* [1976] VR 547; *Aydin v Australian Iron & Steal Pty Ltd* [1984] 3 NSWLR 684; *Packer v Deputy Commissioner of Taxation (Qld)* (1984) 55 ALR 242 & *Nickmar Pty Ltd v Preservative Standia Insurance Ltd* [1985] 3 NSWLR 44.

As regards the execution of a '*Search Warrant*' on the business premises of a lawyer refer to page **267**.

[7.13] Right To Silence

In *R v Sang* (1979) 69 CrAppR 282; [1980] AC 402 [[1979] 3 WLR 263; [1979] 2 AllER 1222; [1979] CrimLR 282] Lord Scarman stated at pages 308 & 455 respectively:

> '[The "right to silence" means] '"No man is to be compelled to incriminate himself; *nemo tenetur se ipsum prodere*."' [words in brackets added]

See also: *R v Brophy* (1981) 73 CrAppR 287, per Lord Fraser at page 291.

In *Kim Kae Jun & the Crew of the Vessel No. 1 New Star v The Director of Public Prosecutions & the Commissioner of Police* (Unrep. Civil Case No. 423 of 1999) Palmer J stated at page 4:

> '*The right to remain silent is a constitutional right to which everyone in this country is entitled, citizens or non – citizens alike*. Section 3 of the *Constitution* guarantees the protection of the right to life, liberty, security of the person and the protection of the law. Although not specifically mentioned, that provision, in its broad application, must accord a right to silence to an accused, detained person or a suspected person who is under investigation. Once such person exercised his or her constitutional right to remain silent he or she cannot be compelled to give his statement to anyone unless otherwise ordered by the Court. Thus to obtain a statement from an accused person or from the others (such as the crew members in this case) who may be "suspected persons" for the purpose of interrogation in respect of the indicted person, after exercising their right to silence would be a breach of the *Constitution*. The relief granted by the Court for any breach of the Constitution is available against both the State and individual in this country.' (emphasis added)

In *David Kio v R* (Unrep. Criminal Appeal Case No. 11 of 1977) Davis CJ stated at page 4:

> '*Every case must be tried only on the evidence in that case, and in every case the accused person must be treated as innocent until the contrary is proved on the evidence*. It is quite wrong for a Magistrate to base his finding of the accused's guilt on his own previous knowledge of the accused. The burden of proving the accused's guilt is always on the prosecution whose duty it is to satisfy the court of the accused's guilt. It is not for the accused to prove his innocence and in every case, no matter what his record, the accused must be considered by the court as innocent until he has been proved guilty.' (emphasis added)

In *Robinson v R [No. 2]* (1991) 65 ALJR 644 the High Court of Australia held at page 646:

> 'If [the presumption of innocence] is have any real effect in a criminal trial, the jury must act on the basis that the accused is presumed innocent of the acts which are subject of the indictment until they are satisfied beyond reasonable doubt that he or she is guilty of those acts. *To hold that, despite the plea of not guilty, any evidence of the accused denying those acts is to be the subject of close scrutiny because of his or her interest in the outcome of the case is to undermine the benefit which that presumption gives to an accused person*.' (emphasis added) [words in brackets added]

The law relating to a '*Right To Silence*' is also examined commencing on page **71**.

[7.14] Right To Testify

[7.14.1] General Principles

Section 10(7) of the *Constitution* states:

> '*No person who is tried for a criminal offence shall be compelled* to give evidence at the trial.' (emphasis added)

Section 198(1) of the *Criminal Procedure Code* (Ch. 7) states:

> 'At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and *shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross – examination, or to make a statement not on oath from the dock*, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any),' (emphasis added)

The law relating to a '*Submission Of No Case To Answer*' is examined commencing on page **372**.

Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence […] shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:

Provided –

(a) a person so charged *shall not* be called as a witness in pursuance of this section except upon his own application;

(b) the failure of any person charged with an offence, […], *to give evidence shall not* be made the subject of any comment by the prosecution;

(c) […]

(d) […]

(e) a person charged and being a witness in pursuance of this section may be asked any question in cross – examination notwithstanding that it would tend to incriminate him as to the offence charged;

(f) […]

(g) every person called as a witness in pursuance of this section shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses have given their evidence; and

(h) *nothing in this section shall affect* the provisions of section 215 ['*Provisions as to taking statement or evidence of accused person in a preliminary investigation'*] or any right of the person charged to make a statement without being sworn. [see section 198(1) of the *Criminal Procedure Code* (Ch. 7)]' (emphasis added) [words in brackets added]

Section 142 of the *Criminal Procedure Code* (Ch. 7) states:

'Where the only witness to the facts of the case called by the defence is the person charged, he *shall* be called as a witness immediately after the close of the evidence for the prosecution.' (emphasis added)

In *R v Martinez – Tobon* [1994] 2 AllER 90; (1994) 98 CrAppR 375 Lord Taylor of Gosforth CJ, delivering the judgment of the Court of Appeal, held at pages 98 and 382 – 383 respectively:

'[W]e consider for the present that the following principles apply where a *defendant does not testify*.

(1) The judge should give the jury a direction along the lines of the Judicial Studies Board specimen direction based on *Bathurst.* [(1968) 52 CrAppR 251; [1968] 2 QB 99; [1968] 1 AllER 1175; [1968] 2 WLR 1092]

["The defendant does not have to give evidence. He is entitled to sit in the dock and require the prosecution to prove its case. You must not assume that he is guilty because he has not given evidence. The fact that he has not given evidence proves nothing one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict, or explain the evidence put before you by the prosecution."]

(2) The essentials of that direction are that the defendant is under no obligation to testify and the jury should not assume he is guilty because he has not given evidence.

(3) Provided those essentials are complied with, the judge may think it appropriate to make a stronger comment where the defence case involves alleged facts which (a) are at variance with prosecution evidence or additional to it and exculpatory, and (b) must, if true, be within the knowledge of the defendant.

[…].' (emphasis added)

Whilst a prosecutor is *not* permitted to make any comment regarding the failure of a defendant to give evidence, in compliance with section 141(b) of the *Criminal Procedure Code* (Ch. 7), the Court *may* take into account the principles enunciated in *R v Martinez – Tobon* (*supra*).

See also: *R v Anderson (M.)* [1988] QB 678; [1988] 2 AllER 549; (1988) 87 CrAppR 349; *Maxwell v Director of Public Prosecutions* (1934) 24 CrAppR 152; [1935] AC 309; *Jones v Director of Public Prosecutions* [1962] 1 AllER 569; (1962) 46 CrAppR 129; [1962] 2 WLR 575; [1962] AC 635; *Weissensteiner v R* (1993) 178 CLR 217; (1993) 68 ALJR 23 & *Kanaveilomani* (1994) 72 ACrimR 492.

[7.14.2] Unsworn Statements

Prosecutors *must* be mindful of the law if a defendant fails to give sworn evidence. An unsworn statement is a statement made by a defendant in court, but whilst *not* in the witness box: *The State v Nagiri Topoma* [1980] PNGLR 18, (Kapi J; sitting alone).

Considering that the making of an '*unsworn statement*' is *not* the '*giving of evidence*' and therefore, a prosecutor is *not* permitted to make any comment regarding the failure of the defendant to '*give evidence*', in compliance with section 141(b) of the *Criminal Procedure Code* (Ch. 7).

In *R v Ulel* [1973] PNGLR 254 Clarkson J, sitting alone, held:

(1) That when an accused makes an unsworn statement, it should be taken as prima facie a possible version of facts, and should be considered with the sworn evidence, giving it such weight as it appears to be entitled to in comparison with the facts clearly established by the evidence; and

(2) A defence may be raised when a defendant makes an unsworn statement.

In *Paulus Pawa v The State* [1981] PNGLR 498 the Supreme Court held at page 504:

'1. The failure of an accused person to testify is not an admission of guilt and no inference of guilt may be drawn from such failure to testify;

2. Failure to testify may, however, tell against an accused person in that it may strengthen the State case by leaving it uncontradicted or unexplained on vital matters;

3. Failure to testify only becomes a relevant consideration when the Crown has established a prima facie case;

4. The weight to be attached to failure to testify depends on the circumstances of the case.

Significant circumstances include:

(a) whether the truth is not easily ascertainable by the Crown but probably well known to the accused;

(b) whether the evidence implicating the accused is direct or circumstantial;

(c) whether the accused is legally represented;

(d) whether the accused has before trial given an explanation which the Crown has adduced in evidence.'

See also: *The State v Michael Rave, James Maien & Philip Baule* [1993] PNGLR 85 at page 86.

[7.15] Right To A Copy Of A Judgment

Section 10(3) of the *Constitution* states:

'When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court.'

Whilst a defendant is entitled to a copy of the judgment upon application by virtue of section 153 of the *Criminal Procedure Code* (Ch. 7),

'[n]o person shall be entitled, as of right, at any time or for any purpose, to inspection of the record of evidence given in any case before any Magistrate's Court, or to a copy of the notes of such Court, save as may be expressly provided by any Rules of Court, or, in the absence of such Rules, unless the leave of a Magistrate to make such inspection or receive such copy, has been first had and obtained', see section 68 of the *Magistrates' Courts Act* (Ch. 20).

Refer also to the law relating to '*Judgments*' which is examined commencing on page **332**.

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[8.0] Introduction

In *R v Osbourne & Virtue* (1973) 57 CrAppR 297 [[1973] 2 WLR 209; [1973] 1 AllER 649; [1973] 1 QB 678; [1973] CrimLR 178] Lawton LJ, delivering the judgment of the Court, made the following comments as to what is '*evidence*' at page 307:

> 'In police experience evidence means information which can be put before a Court; and it means that not only to police officers but to the general public, as is shown clearly by one of the meanings given to the word "evidence" in the Shorter Oxford English Dictionary, which under the sub-heading "Law" defines "evidence" in these terms: "Information that is given in a legal investigation, to establish the fact or point in question." [… In *Phipson on Evidence*, 11th edition the term "evidence" is defined as follows:] "Evidence, as used in judicial proceedings, has several meanings. The two main senses of the word are: first, the means, apart from argument and inference, whereby the court is informed as to the issues of fact as ascertained by the pleadings; secondly, the subject – matter of such means."' [words in brackets added]

In *Thompson v R* [1918] AC 221 [(1918) 13 CrAppR 61] Lord Dunedin commented at page 226:

> 'The law of evidence in criminal cases is really nothing more than a set of practical rules which experience has shown to be best fitted to elicit the truth about guilt without causing undue prejudice to the prisoner.'

In *R v Christie* (1914) 10 CrAppR 141 [[1914] AC 545] Lord Reading commented at page 164:

> 'The principles of the law of evidence are the same whether applied at civil or criminal trials, but they are not enforced with the same rigidity against a person accused of a criminal offences as against a party to a civil action. There are exceptions to the law regulating the admissibility of evidence which only apply to the criminal trials, and which have acquired their force by the constant and invariable practice of judges when presiding at criminal trials. They are rules of prudence and discretion, and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law.'

In *The State v Warunm* [1988 – 89] PNGLR 327 Brunton AJ, sitting alone, stated at pages 332 – 333:

> 'The accused's right to protection of the law means that the State must prove its case in conformity with the rules of evidence. […]
>
> When is said that the State must prove its case, the State must bring witnesses who give testimony, generally on oath. The witnesses may identify and prove a document which may be used because of its contents in testimonial manner, or as either circumstantial or real evidence: *Cross*, par. 1.26 at 14 – 15. The witness may give testimony to identify things put in evidence, like an axe, or a knife, as real evidence. In all these cases a witness is required to get the evidence properly before the court.'

In conformity with the rules of evidence, neither the prosecution or the defence are permitted to give evidence from the bar table. Therefore, all evidence *must* be given by witnesses on oath, with the exception of the defendant who is permitted to give an '*unsworn statement*' from the bar table.

The law relating to '*Unsworn Statements*' is examined on page **166**.

In *Lobban v R* [1995] 2 CrAppR 573 [[1995] 1 WLR 877; [1995] 2 AllER 602] the Privy Council commented at pages 583 - 584:

> '*[A] trial judge in a criminal trial always has a discretion to refuse to admit evidence, which is tendered by the prosecution, if in his opinion its prejudicial effect outweighs its probative value. […] The power is based on a judges' duty in a criminal trial to ensure that a defendant receives a fair trial*.
>
> [… It] is wide enough to allow a trial judge to exclude evidence, which is tendered by the prosecution in a joint trial and is probative of the case against one co – defendant, on the ground that it is unduly prejudicial against another co – defendant. [see for example, *Rogers & Tarran* [1971] CrimLR 413.]' (emphasis added) [words in brackets added]

'It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross – examination', see *R v Treacy* (1944) 30 CrAppR 93 at page 96.

In *R v Apicella* (1986) 82 CrAppR 295 [[1986] CrimLR 238] Lawton LJ, delivering the judgment of the Court, held at page 299:

> 'We know of no rule of law which says that evidence of anything taken from a suspect, be it a bodily fluid, a hair, or an article hidden in an orifice of the body, cannot be admitted unless the suspect consented to the taking.'

The '*admissibility*' of evidence *may* be the subject of a '*Voir Dire Proceedings*'. The law in that regard specifically in relation to '*Confessional Evidence*' is examined commencing on page **211**.

See also: *Billy Gatu v R* (Unrep. Criminal Case No. 93 of 1993; Palmer J; at page 5) & *R v Sing; R v Mangan* [1979] 2 AllER 46.

[8.1] Relevance

The main general rule relating to the admissibility of evidence is that all evidence which is '*relevant*' in determining the guilt of a defendant is admissible, subject to the discretion of the Court.

In *R v Apicella* (1986) 82 CrAppR 295 [[1986] CrimLR 238] Lawton LJ, delivering the judgment of the Court, stated at page 299:

> 'A basic principle of the law of evidence is that evidence which is relevant should be admitted, unless there is a rule of law which says that it should not be.'

In *R v Funderburk* (1990) 90 CrAppR 466 [[1990] 2 AllER 482; [1990] 1 WLR 587; [1990] CrimLR 405] Henry J, delivering the judgment of the Court, stated at page 469:

> 'One starts with the obvious proposition that in a trial relevant evidence should be admitted and irrelevant evidence excluded. "Relevant" means relevant according to the ordinary common law rules of evidence and relevant to the case as it is being put, as Lord Lane CJ put in the case of *Viola* (1982) 75 CrAppR 125, 128,130, [1982] 3 AllER 73,76, 77.
>
> But as relevance is a matter or degree in each case, the question in reality is whether or not the evidence is or is not sufficiently relevant.'

In *Pollitt v R* (1991 – 1992) 174 CLR 558 Brennan J, as a member of the High Court of Australia, commented at page 571:

> 'The first condition of admissibility of evidence is *relevance*; apart from questions relating to the credit of a witness, a fact which evidence is tendered to prove (a "fact to be proved") must be a fact in issue or a fact relevant to a fact in issue. Where a fact to be proved is a fact in issue, admissibility of evidence tendered to prove it depends solely on the manner in which that evidence tends to establish the fact to be proved. Where a fact to be proved is a fact relevant to a fact in issue, admissibility depends first on the manner in which that evidence tends to establish the fact to be proved, and, secondly, on the relevance of the fact to be proved to a fact in issue.'

'*Facts in issue*' are those facts upon which the guilt of the defendant is determined.

[8.2] Weight

Upon evidence being ruled admissible the Court *must* determine what '*weight*' the evidence should be given, ie., amount of importance. A Court is entitled to put what '*weight*' it wishes to the evidence of each witness.

In *Samuel Dalu v R* (Unrep. Criminal Case No. 43 of 1992) Palmer J stated at page 1:

> 'It is trite law that matters on weight of evidence are matters for the Magistrate (as judge of both law and fact) to decide upon. Questions on the weight of evidence are not determined by arbitrary rules, but by common sense, logic and experience. (*See Phipson on Evidence 10th Edition, paragraph 2011*)
>
> In the same paragraph the statement of Birch J in the case of R v Madhub Chunder (1874) 21 WRCr 13 at p.19 were quoted by the learned author as follows:
>
> "*For weighing evidence and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited*.' (emphasis added)

See also: *DPP v Hester* [1972] 2 WLR 910; [1972] 3 AllER 440; (1973) 57 CrAppR 212; [1973] AC 296.

Refer also to the law relating to the '*Evaluation Of Evidence*' commencing on page **331**.

[8.3] Best Evidence Rule

In *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993) Palmer J stated at pages 1 – 2:

> '*The general rule in common law on the issue of proof of the contents of a document is that the party seeking to rely on the contents of a document must adduce primary evidence of those contents. An example of this would be where a party has in his hands the original document. In those circumstances he must produce it and he cannot give secondary evidence by producing a copy* (see *Kajala –v- Noble* (1982) 75 CrAppR 149 at p. 152). *This is known as the Best Evidence Rule. To this general rule, there are a number of common law and statutory exceptions.*

> One of the statutory exceptions and this was referred to by Mr. Lavery, is the Bankers' Books Evidence Act 1879. This Act provides for the proof of the contents of what are described as bankers' books by the production of examined copies. The expression "*bankers books*" have been defined to include ledgers, day books, cash books, account books and all other books used in the ordinary business of the bank. […]
>
> […]
>
> The crucial issue before this Court can be summarised as follows: first, whether it has been proved that the copy (*referred to hereinafter as "first copy"*) made, has been examined or compared with the original and is thereby correct, and secondly, whether it has been proved that the second copy made from the "first copy" had been examined and compared with the "first copy" and found to be correct?
>
> […]
>
> It seems too (*and what I am going to say is merely obiter*) that the correct persons who should be called to give evidence to identify and verify the copies of those bank documents are the person(s) who directly dealt with those original documents in the first place.' (emphasis added)

The law relating to the '*Banker's Book Evidence Act* 1879 (UK)' is examined commencing on page **234**.

In *R v Governor of Pontville Prison & another, Ex parte Osman* [1989] 3 AllER 701 [(1990) 90 CrAppR 281; [1990] 1 WLR 277] Lloyd LJ, delivering the judgment of the Divisional Court, held at page 728:

> 'But although the little loved best evidence rule has been dying for some time, the recent authorities suggest that it is still not quite dead. Thus in *Kajala v Noble* (1982) 75 CrAppR 149 Ackner LJ stated at page 152:
>
> "The old rule, that a party must produce the best evidence that the nature of the case will allow, and that any less good evidence is to be excluded, has gone by the board long ago. The only remaining instance of it is that, if an original document is available in one's hands, one must produce it; that one cannot give secondary evidence by producing a copy."
>
> In *R v Wayte* (1982) 76 CrAppR 110 Beldam J stated at page 116:
>
> "First, there are no degrees of secondary evidence. The mere fact that it is easy to construct a false document by photocopying techniques does not render the photocopy inadmissible. Moreover, it is now well established that any application of the best evidence rule is confined to cases in which it can be shown that the party has the original and could produce it but does not."
>
> What is meant by a party having a document available in his hands? We would say that it means a party who has the original of the document with him in court, or could have it in court without any difficulty. In such a case, if he refuses to produce the original and can give no explanation, the court would infer the worst. The copy should be excluded. If, in taking that view, we are cutting down still further what remains of the best evidence rule, we are content.'

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In *R v Uxbridge Justices, Ex parte Sofaer & another* (1987) 85 CrAppR 367 Croom – Johnson LJ, with whom Peter Pain J concurred, commented at page 376:

> '[In *Lushington, ex parte Otto* [1894] 1 QB 420 Wright J stated:]
>
> "… it is undoubted law that it is within the power of, and is the duty of, "constables" […] to retain for use in Court things which may be evidence of crime, and which have come into the possession of the constables without wrong on their part. I think it is also undoubted true that when articles have once been produced in Court by witnesses it is right and necessary for the Court … to preserve and retain them, so that they may be always available for the purposes of justice until the trial is concluded."
>
> That indeed is a general and very desirable standard which should be maintained and almost always is maintained. Unfortunately it is not always possible to apply it. Exhibits which are part of the evidence do go astray. Sometimes they are tested to destruction. In some cases it is only by testing them to destruction that you obtain the evidence in the first place and the modern scientific techniques which we read about nowadays are examples of that, but where you cannot produce the original you rely upon secondary evidence and here there are the photographs which are good photographs and fairly detailed.' [words in brackets added]

See also: *R v Stipendiary Magistrate at Lambeth & another, Ex parte McComb* [1983] 1 AllER 321.

Therefore, it is an expectation of the Courts that '*original*' evidence will be tendered by the prosecution, and defence, whenever possible.

If exhibits *are not* able to be tendered then an explanation *must* be given for their non – production, ie., lost or unable to be located during the course of the investigation. Evidence may be given by person/s who saw the exhibit before it went missing of what the exhibit was and just as importantly, what was done to locate it, see *Butera v Director of Public Prosecutions* (1987) 62 ALJR 7 & *Birch v The State* [1979] PNGLR 75.

Furthermore, if exhibits are available and therefore not missing they should be produced to the court, see *R v Peter Sade Kwaimanisi* (Unrep. Criminal Case No. 42 of 1994; Palmer J; at page 4).

The law relating to whether an '*Abuse Of Process*' could be argued due to the '*Unavailability Of Evidence*' is examined commencing on page **141**.

The law relating to:

- the admissibility of '*Documentary Evidence*' is examined commencing on page **231**; and
- '*Missing Exhibits*' is examined on page **238**.

See also: *R v Nowaz (alias Karim)* (1976) 63 CrAppR 178; [1976] 3 AllER 5; [1976] 1 WLR 830.

[8.4] Hearsay Evidence

[8.4.1] Defined

In *Pollitt v R* (1991 – 92) 174 CLR 572 the High Court of Australia examined the admissibility of '*hearsay evidence*'. At page 572 Brennan J commented:

> 'The distinction between hearsay and original evidence was stated by Lord Wilberforce in *Ratten v R* [[1972] AC 378 at page 387; (1972) 56 CrAppR 18]:
>
> "The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called, is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a *relevant fact*, a witness may give evidence that they were spoken. *A question of hearsay only arises when the words spoken are relied on 'testimonially', ie., as establishing some fact narrated by the words.* Authority is hardly needed for this proposition, but their Lordships will restate what was said in the judgment of the Board in *Subramanian v Public Prosecutor* [[1956] 1 WLR 965 at p.970 …]."' (emphasis added)

In *R v Kearley* [1992] 2 AllER 344; (1992) 95 CrAppR 88 [[1992] AC 228; [1992] 2 WLR 656; [1992] CrimLR 797] Lord Ackner, with whom Lord Bridge of Harwich concurred, commented at pages 363 and 104 – 105 respectively:

> 'Because the precise scope of the rule against hearsay is in some respects a matter of controversy, there are a variety of formulations of the rule. In the current edition of *Cross on Evidence* (7th edn, 1990) p 42 the rule is thus stated:
>
> "an assertion other than one made by a person while giving oral evidence in the proceedings is inadmissible *as evidence of any fact asserted*.' (Cross's emphasis)
>
> This formulation was approved in your Lordship's House in *R v Sharp* [1988] 1 AllER 65 at 68, [1988] 1 WLR 7 at 11.
>
> In the Privy Council case of *Teper v R* [1952] 2 AllER 447 at 449, [1952] AC 480 at 468 Lord Normand giving the advice of the Judicial Committee described the rule as 'fundamental'. He said:
>
> "*It [the hearsay evidence] is not the best evidence and it is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross examination, and the light which his demeanour would throw on his testimony is lost. Nevertheless, the rule admits of certain carefully safeguarded and limited exceptions.*'
>
> In deciding whether the rule is being breached, it is essential to examine the purpose for which the evidence is tendered. Lord Radcliffe in giving the opinion of the Privy Council in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965 at 970 said:
>
> "*Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made*."' (emphasis added) [words in brackets added]

[8.4.2] Test To Be Applied

The belief that anything said outside the hearing of a defendant is *hearsay* and inadmissible is an incorrect interpretation of the law relating to the admissibility of '*hearsay evidence*'. The test to be applied when considering the admissibility of any conversation is as follows:

> '*In determining whether evidence is 'hearsay', it is necessary to determine the purpose for which the evidence is sought to be admitted.*
>
> *If the prosecution relies on the evidence as being the truth of what is contained in the statement, it is 'hearsay' if the witness who gives the evidence in the witness box does not have direct knowledge of the evidence contained in the statement*.'

Direct knowledge refers to the reception of evidence through the witness's own senses. For example, 'A' observes a murder being conducted. 'A' then goes and tells 'B' what happened. Any account given by 'B' to a Court about the conversation would be 'hearsay' because 'B' is unable to be cross – examined on the truth of the conversation, ie., what actually occurred.

In *Sam Salafilamo v R* (Unrep. Criminal Appeal No. 10 of 1994) the Court of Appeal stated at page 4:

> 'The last ground of the appeal was one of law and related to some hearsay evidence given by three of the witnesses. There undoubtedly was some hearsay evidence given, though some of the complained of hearsay was in fact *original evidence given not to prove the truth of what another had said but to show why the witness had acted in the way he did*.' (emphasis added)

In order for a sketch plan to be admissible the person seeking to tender it *must* have direct knowledge of all information contained in the plan, see *Frank Norman Hiki v R* (Unrep. Criminal Appeal Case No. 9 of 1979; Davis CJ; at page 2).

[8.4.3] Application Of The Rule

[A] Fresh Complaint

In *R v Lillyman* [1896] 2 QB 167; [1895 – 9] AllER Rep 586 the Court held:

> An early complaint is admissible to prove that the complainant's behaviour was consistent with her story and also to prove that she did not consent. *The complaint does not prove the truth of her story.*

The evidence of a '*fresh complaint*' is therefore an example of the application of the hearsay rule because the purpose of such complaints is to *not* to prove the truth of the complaint, ie., that the defendant committed the offence, but to corroborate the evidence of the complainant that he/she was 'sexually assaulted', see *The State v Michael Rave, James Maien & Phillip Baule* [1983] PNGLR 85; *The State v Stuart Hamilton Merriam* [1994] PNGLR 104; *Peter Townsend v George Oika* [1981] PNGLR 12; *Jones v R* (1997) 143 ALR 52; *Suresh v R* (1996) 16 WAR 23 & *R v Robertson, Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408.

The law relating to the admissibility of a '*Fresh Complaint*' is examined commencing on page **673**.

[B] Medical Evidence

In *Ramsay v Watson* (1961) 108 CLR 642 the High Court of Australia held at page 649:

> 'Statements made to anyone concerning present symptoms and sensations [*are admissible if those symptoms and sensations are the foundation, or part of the foundation of the expert opinion to which the doctor testifies, but*] such statements are not evidence in fact of past sensations, experiences and symptoms of the patient.
>
> *Hearsay evidence does not become admissible to prove facts because the person who proposes to give it is a physician.* And if the man whom the physician examined refuses to confirm in the witness box, what he said in the consulting room, then the physician's opinion may have little or no value, for the past basis of which it has gone.' (emphasis added) [words in brackets added]

Medical practitioners are able to give evidence of what the complainant said during the course of an examination. However, the purpose of any such conversation is *not* to prove the truth of what the complainant said happened, but to indicate the reason why the medical practitioner examined particular parts of the complainant's body.

See also: *R v Thomson* [1912] 3 KB 19; (1912) 7 CrAppR 276; *R v Blastland* [1986] AC 41; [1985] 3 WLR 345; [1985] 2 AllER 1095; (1985) 81 CrAppR 266; [1985] CrimLR 727; *R v Bradshaw* (1986) 82 CrAppR 79; *R v Schafferius* [1977] QdR 213 & *R v Tonkin & Montgomery* [1975] QdR 1.

Refer also to:

- section 180 of the *Criminal Procedure Code* (Ch. 7), '*Plans & Reports By Surveyors, Government Analysts & Geologists & Medical Practitioners*' which is outlined on page **235**; and
- the law relating to '*Opinion Evidence – Expert Witnesses*' which is examined commencing on page **202**.

[8.4.4] Exceptions To The Rule

[A] Introduction

In *Pollit v R* (1991 – 92) 174 CLR 572 Brennan J commented at page 573:

> 'As the Privy Council pointed out in *Lejzor Teper v R* [[1952] AC 480 at page 486]:
>
> "The truthfulness and accuracy of the person whose words are spoken to by another witness cannot be tested by cross – examination, and the light which his demeanour would throw on his testimony is lost."
>
> The justification, if justification be needed, of the rule against the admission of hearsay is that a jury – especially an accused in a criminal case – is not to be faced with evidence of an assertion made in circumstances in which the credibility of the assertion cannot be adequately tested. Whatever its origin and whatever its justification, the rule against hearsay is "fundamental", though it is qualified by numerous exceptions.'

The following are *some* of the '*exceptions to the hearsay rule*' because the conversations are led so as to prove the truthfulness as to what is said.

[B] Confession

In *Slatterie v Pooley* (1840) 151 ER 579 it was held per Parke V at page 581:

> 'What a party himself admits to be true may reasonably be presumed to be.'

In *Pollit v R* (1991 – 92) 174 CLR 572 Brennan J commented at page 578:

> 'The most obvious exception to the hearsay rule is an admission by a party against the party's interests (in criminal cases, a confession by the person charged) [*because what a defendant admits is generally accepted as being truthful*].' (emphasis added) [words in brackets added]

See also: *Bannon v R* (1995) 132 ALR 87.

The law relating to '*Confessional Evidence*' is examined commencing on page **211**.

[C] Res Gestae

In *Pollit v R* (1991 – 92) 174 CLR 572 Brennan J commented at pages 579 – 582:

> 'A further exception to the hearsay rule admits evidence of certain statements made in the course of, or approximately contemporaneously with, a transaction that is the subject of the court's inquiry [ie., *commission of the offence*]: the res gestae exception.
>
> […]
>
> Once it is accepted that the res gestae principle represents an exception to the hearsay rule and *admits statements which may be used to prove the truth of the facts asserted therein, it is understandable that admissibility should be made to depend, inter alia, on the judge's satisfaction that the conditions in which the statement was made were such as "to exclude possibility of concoction or distortion*". But, as Barwick CJ pointed out, non constat that any hearsay statement is admissible if the judge is so satisfied. *The statement must be made in conditions "of approximately [if] not exact contemporaneously" and the impossibility of concoction or distortion must arise from the "spontaneity or involvement in the event" by the maker of the statement.*' (emphasis added) [words in brackets added]

In *R v Andrews* [1987] 1 AllER 513; (1987) 84 CrAppR 382 [[1987] AC 281; [1987] 2 WLR 413; [1987] CrimLR 487] the House of Lords applied *Ratten v R* [1971] 3 AllER 801; [1972] AC 378. In that case Lord Ackner, with whom the other Lordships concurred, stated at pages 517 – 521 and 387 – 392 respectively:

> 'Lord Wilberforce said [… in *Ratten v R*]:

"The mere fact that evidence of a witness includes evidence as to words spoken by another person who is not called is no objection to its admissibility. Words spoken are facts just as much as any other action by a human being. If the speaking of the words is a relevant fact, a witness may give evidence that they were spoken. A question of hearsay only arises when the words spoken are relied on 'testimonially', ie., as establishing some fact narrated by the words. Authority is hardly needed for this proposition but their Lordships will restate what was said in the judgment of the Board in *Subramanian v Public Prosecutor* [1956] 1 WLR 965 at 970 […]"

Lord Wilberforce then proceeded to deal with the appellant's submission, on the assumption that the words were hearsay in that they involved an assertion of truth of some facts stated in them and that they may have been so understood by the jury. He said […]:

"The expression 'res gestae', like many other Latin phrases, is often used to cover situations insufficiently analysed in clear English terms. In the context of the law of evidence it may be used in at least three different ways:

1. When a situation of fact (eg. a killing) is being considered, the question may arise when does the situation begin and when does it end. It may be arbitrary and artificial to confine the evidence to the firing of the gun or the insertion of the knife, without knowing, in a broader sense, what was happening. Thus in *O'Leary v Regem* (1946) 73 CLR 566 evidence was admitted of assaults, prior to a killing, committed by the accused during what was said to be a continuous orgy. As Dixon J said (at 577): 'Without evidence of what, during that time, was done by those men who took any significant part in the matter and specifically evidence of the behaviour of the prisoner, the transaction of which the alleged murder formed an integral part could not be truly understood and, isolated from it, could only be presented as an unreal and not very intelligible event.'

2. The evidence may be concerned with spoken words as such (part from the truth of what they convey). The words are then themselves the res gestae or part of the res gestae, ie are the relevant facts or part of them.

3. A hearsay statement is made either by the victim of an attack or by a bystander -- indicating directly or indirectly the identity of the attacker. The admissibility of the statement is then said to depend on whether it was made as part of the res gestae. […]"

Lord Wilberforce then reviewed a number of cases in England, in Scotland, in Australia and America and concluded that those authorities –

"*show that there is ample support for the principle that hearsay evidence may be admitted if the statement providing it is made in such circumstances (always being those of approximate but not exact contemporaneity) of involvement or pressure as to exclude the possibility of concoction or distortion to the advantage of the maker or the disadvantage of the accused*."

[…]

My Lords, may I therefore summarise the position which confronts the trial judge when faced in a criminal case with an application under the *re gestae* doctrine to admit evidence of statements, with a view to establishing the truth of some fact thus narrated, such evidence being truly categorised as "hearsay evidence":

1. The primary question which the judge must ask himself is – can the possibility of concoction or distortion be disregarded?

2. To answer that question the judge must first consider the circumstances in which the particular statement was made, in order to satisfy himself that the event was so unusual or startling or dramatic as to dominate the thoughts of the victim, so that his utterance was an instinctive reaction to that event, thus giving no real opportunity for reasoned reflection. In such a situation the judge would be entitled to conclude that the involvement or the pressure of the event would exclude the possibility of concoction or distortion, providing that the statement was made in conditions of approximate but not exact contemporaneity.

3. In order for the statement to be sufficiently "spontaneous" it must be so closely associated with the event which has excited the statement, that it can be fairly stated that the mind of the declarant was still dominated by the event. Thus the judge must be satisfied that the event, which provided the trigger mechanism for the statement, was still operative. The fact that the statement was made in answer to a question is but one factor to consider under this heading.

4. Quite apart from the time factor, there may be special features in the case, which relate to the possibility of concoction or distortion. […] The judge must be satisfied that the circumstances were such that having regard to the special feature of malice, there was no possibility of any concoction or distortion to the advantage of the maker or the disadvantage of the accused.

5. As to the possibility of error in the facts narrated in the statement, if only the ordinary fallibility of human recollection is relied upon, this goes to the weight to be attached to and not to the admissibility of the statement […]. However, here again there may be special features that may give rise to the possibility of error. In such circumstances the trial judge must consider whether he can exclude the possibility of error.' (emphasis added)

In *Mills and others v R* [1995] 3 AllER 865 the Privy Council held, per Lord Steyn, at page 876:

'[I]t is self – evident that the deceased's last words were admissible under another exception to the hearsay rule, namely the res gestae rule.

In the present case the deceased's last words were closely associated with the attack which triggered his statement. It was made in conditions of approximate contemporaneity. The dramatic occurrence, and the victim's grave wounds, would have dominated his thoughts. The inference was irresistible that the possibility of concoction or distortion could be disregarded.'

Refer also to the law relating to '*Dying Declarations*' which is examined on page **182**.

See also: *R v Benz & another* (1989) 168 CLR 111, per Dawson J at page 135.

[D] Telephone Conversation

In *Pollit v R* (1991 – 92) 174 CLR 572 the High Court of Australia held, per Mason CJ, at pages 566 – 567:

> '*The case for relaxing the hearsay rule should in my view prevail so as to permit, at least, the reception in evidence of statements during the course of a telephone conversation made by a party to that conversation when they form part of that conversation and identify the other party to the conversation.* […]
>
> […]
>
> Once it is accepted that evidence by the witness of that reference is admissible, it seems to me that a statement or reference by the first party to the identity of the other party made immediately after the termination of the telephone call is also admissible. [..] So long as it is made immediately after the telephone conversation concludes it is likely to have a high degree of spontaneity, to be free from the possibility of concoction and thus to have a high degree of reliability.' (emphasis added)

A simplistic example would be if a deceased speaks to a defendant on the phone. The deceased then tells another person at that time that he/she is going to a location as arranged by the defendant. That witness who was with the complainant can give evidence that the complainant spoke to the defendant on the phone immediately prior to leaving for a location as arranged by the defendant. The *purpose* of that evidence would be to prove that the deceased spoke to the defendant and that the deceased left to see the defendant.

Refer also to the section which examines '*Voice Identification*' on page **200**.

[E] Dying Declaration

The evidence of a declarant / deceased is admitted to prove who committed the offence. Considering that the declarant / deceased obviously can *not* be cross – examined as to the truth of his/her dying declaration, ie., whether the defendant actually committed the offence, such a declaration can be told to a Court by another person who heard it. The *purpose* of such a declaration is to prove that the defendant committed the offence. Therefore, a '*dying declaration*' is an exception to the '*hearsay rule*'.

In *Nembhard v R* (1982) 74 CrAppR 144 [[1981] 1 WLR 1515; [1982] 1 AllER 183; [1982] CrimLR 41] Sir Owen Woodhouse, delivering the judgment of the Privy Council, held at pages 146 – 148:

> '*It is not difficult to understand why dying declarations are admitted in evidence at a trial for murder or manslaughter and as a striking exception to the general rule against hearsay.* For example, any sanction of the oath in the case of a living witness is thought to be balanced at least by the final conscience of the dying man. Nobody, it has been said, would wish to die with a lie on his lips. *So it is considered quite unlikely that a deliberate untruth would be told, let alone a false accusation of homicide, by a man who believed that he was face to face with his own impending death.* There is the further consideration that it is important in the interests of justice that a person implicated in a killing should be obliged to meet in Court the dying accusation of the victim – always provided that fair and proper precautions have been associated with the admission of the evidence and its subsequent assessment, by the jury. In that regard it will always be necessary for the jury to scrutinize with care the necessarily hearsay evidence of what the deceased was alleged to have said both because they have the problem of deciding whether the deponent who has provided the evidence can be relied upon and also because they will have been denied the opportunity of forming a direct impression against the test of cross – examination of the deceased's own reliability.
>
> […]

> But it is important to notice that in the countries concerned the admissibility of a dying declaration does not depend upon the common law test: *upon the deceased having at the time a settled hopeless expectation of impending death.*' (emphasis added)

In *Mills and others v R* [1995] 3 AllER 865 Lord Steyn, delivering the judgment of the Privy Council, at pages 875 – 876 whilst examining the admissibility of a '*dying declaration*' commented:

> 'Their Lordships accept that the modern approach in the law is different: the emphasis is on the probative value of the evidence. That approach is illustrated by the admirable judgments of Lord Wilberforce in the Privy Council in *Ratten v R* [1971] 3 All ER 801, [1972] AC 378 and Lord Ackner in the House of Lords in *R v Andrews* [1987] 1 All ER 513, [1987] AC 281 and notably by the approach in the context of the so – called res gestae rule that the focus should be on the probative value of the statement rather than on the question whether it falls within an artificial and rigid category such as being part of a transaction. […]
>
> […]
>
> But such a development would only be prudent in the light of a detailed analysis of the merits and demerits of such a course than was afforded by the argument in the present case. It is also unnecessary to embark on such a course in order to dispose of the present appeal since it is self – evident that the deceased's last words were admissible under another exception to the hearsay rule, namely the so – called res gestae rule.'

The law in relation to the '*Res Gestae Rule*' is examined commencing on page **179**.

[8.5] Circumstantial Evidence

[8.5.1] Introduction

The prosecution does *not* have to prove every '*fact*', ie., piece of evidence, '*beyond reasonable doubt*'.

In *Shepherd v R* (1990) 170 CLR 573 [(1990) 51 ACrimR 181; (1990) 65 ALJR 132] the High Court of Australia examined the admissibility of '*circumstantial evidence*' and held:

Per McHugh J at pages 592 – 593:

> 'Ordinarily, in a circumstantial evidence case, guilt is inferred from a number of circumstances – often numerous – which taken as a whole eliminate the hypothesis of innocence. The cogency of the inference of guilt is derived from the cumulative weight of circumstances, not the quality of proof of each circumstance.'

Per Dawson J at pages 579 – 580:

> '[T]he prosecution bears the burden of proving all the elements of the crime beyond reasonable doubt. That means that the essential ingredients of each element must be so proved. It *does not* mean that every fact – every piece of evidence – relied upon to prove an element by inference must itself be proved beyond reasonable doubt.' (emphasis added)

'*Circumstantial evidence*' *includes*:

- '*Defendant's Lies*', the law relating to which is examined commencing on page **185**;
- '*Evidence Of Flight*', the law relating to which is examined commencing on page **187**; and
- '*Similar Fact Or Propensity Evidence*', the law relating to which is examined commencing on page **188**.

[8.5.2] General Principles

In *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999) Muria CJ stated at pages 5 – 22:

> 'The prosecution case is substantially based on circumstantial evidence. As such the Court must be very cautious when considering the case as presented against the accused. It is the duty of the Court in such a case to consider all the evidence together at the conclusion of the case, ensuring that it can only draw an inference of guilty from the totality of the facts which are proved beyond reasonable doubt (see *Reg –v- Van Beelen* (1973) 4 SASR 353 and *Chamberlain –v- The Queen (No. 2)* (1983 – 84) 153 CLR 521).
>
> […]
>
> I bear in mind the principles referred to by Mr. Nori and stated in *Barca* (1975) 133 CLR 82 where at 104 – 105, Gibbs, Stephen and Mason JJ said:
>
> "When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused': *Peacock* (1911) 13 CLR 619 at 634. *To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw'*: *Plomp* (1963) 110 CLR 234 at 252; see also *Thomas* (1960) 102 CLR 584 at 605 – 606. *However 'an inference to be reasonable must rest upon something more than mere conjecture.* The bare possibility of innocence should not present a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence': *Peacock* (1911) 13 CLR at 661)."
>
> The case for the prosecution in the present case rests substantially upon circumstantial evidence. *As such the jury (in our case, the judge) must be satisfied beyond reasonable doubt that the circumstances as found to exist are not consistent with any reasonable hypothesis other than guilt of the accused. In other words, the guilt of the accused must be the only rational inference open to the Court to find in the light of the evidence*.' (emphasis added)

In *Martin Sutarake v R* (Unrep. Criminal Appeal No. 6 of 1994) the Court of Appeal held at page 7:

> '[I]t was necessary for the prosecution to show beyond reasonable doubt that there was on the evidence no reasonable hypothesis consistent with innocence.'

See also**:** *Director of Public Prosecutions v Togiabae* (Criminal Appeal No. 6 of 1994; Court of Appeal); *R v Alwin Paul & Pye Roberts* (Unrep. Criminal Case No. 27 of 1997; Muria CJ; at page 6); *R v David Kwaoga* (Unrep. Criminal Case No. 22 of 1998; Palmer J; at page 12); *McGreevy v Director of Public Prosecutions* (1973) 57 CrAppR 424; *Allan Oa Koroka & Mariano Wani Simon v The State* [1988 – 89] PNGLR 131; *The State v Morris* [1981] PNGLR 493 & *Paulus Pawa v The State* [1981] PNGLR 498.

[8.5.3] Defendant's Lies

In *R v Wang Tian Fa* (Unrep. Criminal Case No. 27 of 1994) Palmer J held at page 9:

> 'Prosecution have jumped on this blatant lie and submitted to the Court that he [the defendant] had impeached his credibility, and that accordingly, what he says in court should not be trusted. […] The mere fact that he has admitted to a blatant lie does not necessarily render the rest of his evidence in court unreliable. The rest of his evidence *must* be weighed in the usual manner and ruled upon accordingly.' (emphasis added) [words in brackets added]

In *R v Baldwin & Chapman* (1973) 57 CrAppR 511 Roskill LJ, delivering the judgment of the Court, held at pages 520 – 521:

> '*There is no doubt that a lie told out of Court is capable in some circumstances of constituting corroboration, though it may not necessarily do so. There may be an explanation of the lie which will clearly prevent it being corroboration*; see, for example, CLYNES (1960) 44 CrAppR, pp. 163 – 164. *But, in the view of this Court, there is a clear distinction in principle between a lie told out of Court and evidence given in the witness – box which the jury rejects as incapable of belief or as otherwise unreliable.* Proof of a lie told out of Court is capable of being direct evidence, admissible at the trial, amounting to affirmative proof of the untruth of the defendant's denial of guilt. This in turn may tend to confirm the evidence against him and to implicate him in the offence charged. But a denial in the witness – box which is untruthful or otherwise incapable of belief is not positive proof of anything. It leads only to the rejection of the evidence given, which then has to be treated as if it had not been given. Mere rejection of evidence is not of itself affirmative or confirmatory proof of the truth of other evidence to the contrary.' (emphasis added)

Whilst the evidence of a '*lie*' told by a defendant out of court can support a prosecution case, such evidence alone can *not* prove a case '*beyond reasonable doubt*', see *R v Strudwick & Merry* (1994) 99 CrAppR 326.

A lie told by a defendant may amount to evidence of corroboration provided:

- it *must* have been deliberate;
- it *must* have related to a material issue;
- the motive for the lie *must* have been a realisation of guilt; and
- the statement *must* clearly be shown to have been a lie by evidence, other than the witness whose evidence is to be corroborated, see *R v Lucas* [1981] 1 QB 720; [1981] 3 WLR 120; [1981] 2 AllER 1008; (1981) 73 CrAppR 159; [1981] CrimLR 624.

In *Director of Public Prosecutions v John Fufue & Nelson Fafeloa v R* (Unrep. Criminal Appeal Nos. 3 & 4 of 1988) Connolly P stated at page 3:

> '*It is well established that, to be capable of amounting to corroboration, a lie told in Court must answer four tests – it must have been deliberate, it must have related to a material issue, the motive for the lie must have been a realisation of guilt and lastly, the statement must clearly be shown to have been a lie by evidence other than that of the witness whose evidence is to be corroborated*: Reg. v. Lucas [1981] 1 QB 720. […]
>
> The Courts have emphasized that the natural tendency to think that, if an accused is lying it must be because he is guilty, is one which a careful direction to the jury in jurisdictions in which criminal cases are tried by jury. *Accordingly it has been said that in appropriate cases the jury should be reminded that people lie for a variety of reasons and that a person should not be convicted merely because they think that he is telling lies*.' (emphasis added)

The lie *must* also be either admitted or proven '*beyond reasonable doubt*', see *R v Burge & Pegg* [1996] 1 CrAppR 163 at page 174.

In *Edwards v R* (1993) 68 ALJR 40 the High Court of Australia analysed the principle enunciated in *R v Lucas* (*supra*). At pages 48 – 50 Deane, Dawson and Gaudron JJ, in their single judgment, stated:

> '*There is a difference between the mere conjection of a person's account of events and a finding that a person has lied. A lie is a deliberate untruth. To conclude that a statement is a lie is to conclude that the truth lies elsewhere. In some circumstances, a finding that a person lied will necessarily involve acceptance of the contrary. However, the fact that a person has lied does not of itself establish a specific contrary proposition.*
>
> Ordinarily, the telling of a lie will merely affect the credit of the witness who tells it. *A lie told by an accused may go further and, in limited circumstances, amount to conduct which is inconsistent with innocence, and amount therefore to an implied admission of guilt. In this way the telling of a lie may constitute evidence.* When it does not, it may amount to corroboration provided that it is not necessary to rely upon the evidence to be corroborated to establish the lie. […] When the telling of a lie by an accused amounts to an implied admission, the prosecution may rely upon it as independent evidence to "convert what would otherwise have been insufficient into sufficient evidence of guilt, or as corroborative evidence".
>
> *But not every lie told by an accused provides evidence probative of guilt.* It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of the lie may constitute evidence against him. *In other words, in telling the lie the accused must be acting as if he was guilty. It must be a lie which an innocent person would not tell. That is why the lie must be deliberate. Telling an untruth inadvertently cannot be indicative of guilt. And the lie must relate to a material issue because the telling of it must be explicate only on the basis that the truth would implicate the accused in the offence with which he is charged. It must be for that reason that he tells the lie. To say that the lie must spring from a realization or consciousness of guilt is really another way of saying the same thing. It is to say that the accused must be lying because he is conscious that "if he tells the truth, the truth will convict him".*
>
> There is, however, a difficulty with the bare requirements in *R v Lucas (Ruth)* that a lie must be material and that it must be told from a consciousness of guilt. Again it is convenient to confine ourselves to that last requirement. A bare requirement that consciousness of guilt is required does not provide sufficient guidance as to what matters indicate its presence. […]

> *A lie can constitute an admission against interest only if it is concerned with some circumstance or event associated with the offence (ie. it relates to a material issue) and if was told be the accused in circumstances in which the explanation for the lie is that he knew that the truth would implicate him in the offence.* Thus, in any case where a lie is relied upon to prove guilt, the lie should be precisely identified, as should the circumstances and events that are said to indicate that it constitutes an admission against interest. And the jury should be instructed that they may take the lie into account only if they are satisfied, having regard to those circumstances and events, that it reveals a knowledge of the offence or some aspect of it and the truth of the matter about which he lied would implicate him in the offence, or, as was said in *R v Lucas (Ruth)*, because of "a realization of guilt and fear of the truth".
>
> *Moreover, the jury should be instructed that there may be reasons for the telling of a lie apart from the realization of guilt.* A lie may be told out of panic, to escape an unjust accusation, to protect some other person or to avoid a consequence extraneous to the offence. […I]n many cases where there appears to be a departure from the truth it may not be possible to say that a deliberate lie has been told. The accused may be confused. He may not recollect something which, upon his memory being jolted in cross – examination, he subsequently does not recollect.' (emphasis added)

See also: *R v Harron* [1996] CrimLR 581; *R v Richens* (1994) 98 CrAppR 43; [1993] 4 AllER 877; *R v Sharp* (1994) 98 CrAppR 144; [1993] 3 AllER 225; *R v Keeton* [1995] 2 CrAppR 241; *R v Durbin* [1995] 2 CrAppR 84; *R v Goodway* [1993] 4 AllER 894; (1994) 98 CrAppR 11; *R v Ensor* [1989] 2 AllER 586; [1989] 1 WLR 497; [1989] CrimLR 563; (1989) 89 CrAppR 139; *R v Rahmoun* (1986) 82 CrAppR 217 at page 222; *R v West* (1984) 79 CrAppR 45 at pages 47 – 48; *Credland v Knowles* (1951) 35 CrAppR 46 at page 57; *Zoneff v R* (2000) 112 ACrimR 114; *Hytch* (2000) 114 ACrimR 573; *ST* (1997) 92 ACrimR 390; *Appleby* (1996) 88 ACrimR 456 at page 485; *Power & Power* (1996) 87 ACrimR 407 at pages 412 – 413; *Mason v R* (1995) 15 WAR 165 at page 174; *Hunt* (1994) 76 ACrimR 363; *Bey* (1994) 98 ACrimR 158; *R v El Adl* [1993] 2 QdR 195; *H* (1990) 49 ACrimR 396; *The State v Dickson Wape* [1994] PNGLR 558; *The State v Angaun Kalas & others* [1994] PNGLR 20; *Allan Oa Koroka & Mariano Wani Simon v The State* [1989 – 90] PNGLR 131; *John Jaminan v The State (No. 2)* [1983] PNGLR 318, per Amet J at page 336 & *The State v Vargi* [1991] PNGLR 54.

[8.5.4] Evidence Of Flight

The '*evidence of flight*' refers to the sudden departure of a defendant from where he/she normally resides for no apparent reason. Such behaviour *may* provide evidence to prove the guilt of a defendant provided that *guilt* was the *only reasonable explanation for that departure or 'flight'*. However, to prove a charge '*beyond reasonable doubt*' more evidence than that of 'flight' is obviously required.

In *R v Melrose* [1989] 1 QdR 572 it was held:

> That evidence of flight, and the appellant's statements in relation thereto might give rise to an inference of guilt and might provide corroboration of the evidence of the complainant.

Shepherdson J stated at pages 577 – 579:

> '*Wigmor on Evidence, 3rd ed. Para 276* being part of a section headed "Conduct as evidence of guilt" says:

"*It is universally conceded today that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself*."

[…] There remain only a few details that can be open to comment:

(a) It is occasionally required that the accused should have been aware that he was charged or suspected. This is unnecessary; it is the act of departure that is itself evidential; ignorance of the charge is merely a circumstance that tends to explain away the guilty significance of the conduct.

[…]

(b) It has sometimes been said that an unexplained flight is the admissible evidence. But this is obviously unsound. The prosecution cannot be expected to negative beforehand all conceivable innocent explanation. The fact of flight is of itself significant; it becomes most significant when after all no explanation is forthcoming.

(c) The flight of another person is relevant so far only as the accused has connived at it; and may then also become relevant as an act of suppression of testimony.

(d) Whether the fact of flight raises a presumption of law is a question of the rules of presumption.

(e) [T]he accused may always endeavour to destroy the adverse significance of his conduct by facts which indicate it to be equally or more consistent with such other hypothesis than that of consciousness of guilt. […]

(f) An attempt at suicide may be construed as an attempt to flee and escape forever from the temporal consequences of one's misdeed. That it is evidential has been usually conceded.' (emphasis added)

In *R v Ed Adl* [1993] 2 QdR 195 the principles enunciated in *R v Melrose* (*supra*) were examined by the Court of Appeal. At page 198 that Court held:

'A sudden departure by a person who ordinarily stays close to home may give rise to quite different inferences from those which could be drawn from a journey by one who commonly moves about the country. The nature of the reasons, if any, given for the journey may also bear upon the proper conclusion to be drawn. *[… T]he judge said that flight can be an indication of guilt. That statement is correct and is plainly inconsistent with the notion that the appellant's flight was conclusive of guilt.*' (emphasis added)

[8.6] Similar Fact Or Propensity Evidence

[8.6.1] Procedure

It is proper practice for the prosecution to advise the Court during the '*Opening Address*' if the prosecution intends to call '*similar fact or propensity evidence*', see *Director of Public Prosecutions v Boardman* [1975] AC 421 [[1974] 3 WLR 673; [1974] 3 AllER 887; (1975) 60 CrAppR 165; [1975] CrimLR 36], per Lord Cross at page 459.

The law relating to '*Opening Addresses'* is examined commencing on page **324**.

The prosecutor *must* state precisely:

[i] what evidence is sought to be adduced, ie., the '*similar fact or propensity evidence*';

[ii] what is the relationship between that evidence and the other evidence sought to be admitted; and

[iii] how the law relating to such '*similar fact or propensity evidence*' should be applied, see *R v Clarke (R.L.)* [1995] 2 CrAppR 425, per Steyn LJ at page 435.

The prosecution can *not* rely on offences for which a defendant has been already acquitted, see *R v Davis & Murphy* (1972) 56 CrAppR 249 & *G (An Infant) v Coltart* [1967] 1 QB 432.

Whether charges or counts should be severed on the basis of the leading of '*similar fact or propensity evidence*' and the admissibility of such evidence are two distinct issues, see *R v Scarrott* [1977] 3 WLR 629; [1978] 1 AllER 672; [1978] QB 1016; (1977) 65 CrAppR 125; [1977] CrimLR 745.

If the Court concludes that such evidence is admissible, then severance should be unlikely, see *R v Christou* [1996] 2 WLR 620; [1996] 2 AllER 927; [1997] AC 117.

See also: *R v Wilmot* (1989) 89 CrAppR 341.

The law relating to '*Joinder Of Charges*' is examined commencing on **91**.

The Court *must* decide whether the prejudicial effect of such evidence outweighs its probative value, see *Broadman v Director of Public Prosecutions* (*supra*).

However, subsequent courts have argued questions of degree as to whether the prejudicial effect of such evidence:

[i] '*far*' outweighs its probative value, see *Director of Public Prosecutions v P* [1991] 2 AC 447; [1991] 3 WLR 161; [1991] 3 AllER 337; (1991) 93 CrAppR 267; [1992] CrimLR 41 & *R v Lewis (P.A.)* (1983) 76 CrAppR 33; or

[ii] '*totally*' outweighs its probative value, see *R v H* [1995] 2 AC 596 & *R v Yalman* [1998] CrimLR 569.

[8.6.2] Basis For Admission

In *Martin Sutarake v R* (Unrep. Criminal Appeal No. 6 of 1994) the Court of Appeal stated at page 9:

> 'It is only exceptionally that evidence of other criminal acts or discreditable behaviour on other occasions may be introduced at the trial of a person charged with a quite separate criminal offence involving a different victim. That is the common law rule. See Makin v Attorney – General for New South Wales [1894] AC 57. The underlying reason is that it tends to prejudice the fair trial of an accused person.'

The law relating to '*Questioning Credibility Of Defendants*' is examined commencing on page **352**.

In *Makin v Attorney – General for New South Wales* (*supra*) the Court held at page 65:

> '*It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other that those covered by the indictment*, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried.
>
> *On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged […] were designed or accidental, or to rebut a defence which would otherwise be open to the accused*.' (emphasis added)

Subsequent offences may also be relied upon, see *R v Hurren* (1962) 46 CrAppR 323 at page 326; *R v Rodley* [1911 – 13] AllER Rep 688; [1913] 3 KB 468; (1914) 9 CrAppR 688 & *R v Smith* [1914 – 15] AllER Rep 262; (1916) 11 CrAppR 229.

Such evidence *may* be introduced as part of the prosecution case. Its admissibility is *not* dependent on a specific defence being raised, see *Harris v Director of Public Prosecutions* [1952] 1 AllER 1044; (1952) 36 CrAppR 235; [1952] AC 694 & *R v Anderson (M.)* [1988] 2 AllER 549; [1988] QB 678; (1988) 87 CrAppR 349.

[8.6.3] Subsequent Developments Since Makin

In *Pfennig v R* (1995) 182 CLR 461 [(1995) 69 ALJR 147; (1995) 127 ALR 99; (1995) 77 ACrimR 149] the High Court of Australia examined the law relating to '*similar fact or propensity evidence*'.

Mason CJ, Deane and Dawson JJ, in their single judgment, stated at pages 475 – 484:

> 'Contemporary discussion of the problems attending the reception of similar fact evidence and propensity evidence has its origins in the statements of principles by Lord Herschell LC in *Makin v Attorney – General (NSW).*
>
> […]
>
> [I]n *Director of Public Prosecutions v P* [[1991] 2 AC 447] the House of Lords *rejected the proposition that "striking similarity" was an essential prerequisite of admissibility of similar fact evidence in all cases, holding that the essential feature of the evidence to be admitted is that its probative force is sufficiently great to make it just to admit despite its prejudicial effect.* In *Director of Public Prosecutions v P*, the accused was charged with rape and incest against two of his daughters. The trial judge refused an application that the counts relating to each girl should be tried separately and admitted evidence of an offence against one victim in connexion with an alleged offence against another. The House of Lords held that the evidence was properly admitted on the ground that its probative force was so great as to make it just to admit it notwithstanding that it was prejudicial to the accused.
>
> Lord Mackay of Clashfern LC (with whom the other Law Lords agreed) rejected the notion that "striking similarity" is an essential element in every case in allowing evidence of an offence against one victim to be heard in connexion with an allegation against another, though his Lordship acknowledged that, in cases of identity, "evidence of a character sufficiently special reasonably to identify the perpetrator is required".

[…]

The Lord Chancellor regarded the relationship between the evidence relating to one victim and the evidence relating to another victim as critical. In this respect, his Lordship said [at page 462]:

"*This relationship from which is derived may take many forms and while these forms may include 'striking similarity' in the manner in which the crime is committed, consisting of unusual characteristics. Relationships in time and circumstances other than these may well be important relationships in this connexion. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connexion, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle."*

The exposition of the principles in *Director of Public Prosecutions v P* represents an authoritative statement of the relevant law as it presently stands in England.

[Those principles are still currently being applied, see for example *R v John W* [1998] 2 CrAppR 289; *R v H(A)* [1995] 2 CrAppR 437; [1995] 2 AC 596; *R v Johnson* [1995] 2 CrAppR 41; *R v Downey* [1995] 1 CrAppR 546; *R v W(C)* (1994) 99 CrAppR 185; *R v H(A)* (1994) 99 CrAppR 178; [1994] CrimLR 205; *R v Simpson* (1994) 99 CrAppR 48 & *R v Ryder* (1994) 98 CrAppR 242.]

In this Court, in conformity with earlier English authorities, it was accepted that propensity evidence is not admissible if it shows only that the accused has a propensity or disposition to commit a crime or that he or she was the sort of person likely to commit the crime charged. But it was accepted that it is admissible if it is relevant in some other way, that is, if it tends to show that the accused is guilty of the offence charged for some reason other than that he or she has committed crimes in the past or has a criminal disposition. It was also accepted that, in order to be admissible, propensity evidence must possess "a strong degree of probative force" or the probative force of the evidence must clearly transcend the prejudicial effect of mere criminality or propensity. Very often, propensity evidence is received when there is striking similarity between different offences or between the evidence of different witnesses. In particular, it was recognized that the existence of such striking similarity is necessary in cases such as *Sutton* [(1984) 152 CLR 528] where the prosecution seeks to lead the evidence on the basis that the similarity between different offences founds a conclusion that evidence that they must have been committed by one person with the consequence that evidence which would be admissible to prove that he or she committed another or the others of them.

[… It was] recognized by Mason CJ, Wilson and Gaudron JJ in *Hoch v R* [(1988) 165 CLR 292 at 294] where their Honours stated that the basis for the admission of similar fact evidence lies in its possessing a particular probative value or cogency such that, if accepted, it bears no reasonable explanation other than the inculpation of the accused in the offence charged. *In other words, for propensity or similar fact evidence to be admissible, the objective improbability of its having some innocent explanation is such that there is no reasonable view of it other than as supporting an inference that the accused is guilty of the offence charged.* Mason CJ, Wilson and Gaudron JJ said [at pages 294 – 295]:

"*Assuming similar fact evidence to be relevant to some issue in the trial, the criterion of its admissibility is the strength of its probative force … That strength lies in fact that the evidence reveals 'striking similarities', 'unusual features', 'underlying unity', 'system' or 'pattern' such that it raises, as a matter of common sense and experience, the objective improbability of some event having occurred other than as alleged by the prosecution.*"

This passage should not be understood as asserting that "striking similarities" or the other characteristics mentioned in relation to propensity or similar fact evidence are essential prerequisites of its admissibility in every case.

[…]

[…] *Because propensity evidence is a special class of circumstantial evidence, its probative force is to be gauged in the light of its character as such. But because it has a prejudicial capacity of a high order, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence and ask whether there is a rational view of the evidence that is consistent with the innocence of the co – accused. Here "rational" must be taken to mean "reasonable" and the trial judge must ask himself or herself the question in the context of the prosecution case; that is to say, he or she must regard the evidence as a step in the proof of that case. Only if there is no such view can one safely conclude that the probative force of the evidence outweighs its prejudicial effect.*' (emphasis added) [words in brackets added]

In *R v Clarke* [1995] 2 CrAppR 425 the Court of Appeal stated at pages 434 – 435:

'The next point which we need to emphasis is that it is always essential for the Court, in considering a disputed issue as to the admissibility of similar fact evidence, to consider the question not in the abstract but in the light of all the other evidence and the particular issue in respect of which the evidence is tendered. Thus in *Broadman*, Lord Cross said […]:

"*The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra – cautious jury, if they accepted it as true, would acquit in the face of it.*"' (emphasis added)

In *R v T, PM, PAM & MB* [2000] 2 CrAppR 266 Kennedy LJ, delivering the judgment of the Court of Appeal, held at pages 271 - 272:

'As Professor Birch pointed out in a useful note in [1995] CrimLR 651, it is important to distinguish evidence of background, which is normally admissible, from "similar facts" evidence. Her note continues:

"Similar fact evidence is employed as evidence which tends strongly to prove a particular fact (identity, intent, causal connection or whatever) which could be proved by other means but which the prosecution has chosen to establish by reference to other misconduct of the accused. As such, the evidence may need to be possessed of a high degree of probative value in order to but its ticket to admissibility, for it involves 'dragging up' material which is by definition prejudicial and which might have been left out thus it has been said that such evidence should be admitted in circumstances where it would be an 'affront to common sense' to exclude it (*per* Lord Cross in *Director of Public Prosecutions v Broadman* [1975] AC 421 at 456).

Background evidence, on the other hand, has a far less dramatic but no less important claim to be received. It is admitted in order to put to the jury in the general picture about the characters involved in the action and the run – up to the alleged offence. It may or may not involve prior offences; if it does so this is because the account would be, as Purchas LJ says (in *Pettman,* May 2, 1985, unreported) *"incomplete or incoherent" without them. It is not so much that it would be an affront to common sense to exclude the evidence, rather that is helpful to have it and difficult for the jury to do their job if events are viewed on total isolation from their history."*

The passage from the decision in *Pettman* which Professor Birch had in mind reads:

"Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury would be incomplete or incomprehensible, then the fact that the whole account involves evidence establishing the commission of an offence with which the accused is not charged is not of itself a ground for excluding the evidence."

We accept and gratefully adopt that definition of and approach to background evidence.' (emphasis added)

[8.5.4] Examples

In *R v Ball & Ball* (1910) 5 CrAppR 238 Darling J, delivering the judgment of the Court, stated at pages 246 – 247:

'It is a clear principle of law that you cannot give evidence of former offences or acts committed by the accused in order merely to shew that the accused is likely to have committed the offence or act charged in the indictment. *On the other hand, you may give such evidence in order to shew intent, guilty knowledge, design, system, or to rebut the defence of accident, mistake or reasonable or honest motive and the like. Or where several transactions are so connected as to form one transaction, the others may be proved in order to shew the character of the transaction impeached.*' (emphasis added)

'*Similar fact evidence*' has been held to be relevant to:

[i] '*prove identity*' where the only other evidence is that the defendant had the opportunity to commit the offence, see *R v W (John)* [1998] 2 CrAppR 289; [1998] CrimLR 668; *R v Williams* (1987) 84 CrAppR 299; [1987] CrimLR 198; *R v Grovannone* (1960) 44 CrAppR 31; *R v Morris* (1970) 54 CrAppR 69; *R v Straffen* [1952] 2 QB 911; [1952] 2 AllER 657; (1952) 36 CrAppR 132; *Perkins v Jeffrey* [1915] 2 KB 702; [1914 – 15] AllER Rep 172 & *Thompson v Director of Public Prosecutions* [1918] AC 221; (1917) 13 CrAppR 61;

[ii] '*prove a system or course of conduct*', see *Director of Public Prosecutions v Broadman* [1974] 3 AllER 887; [1974] 3 WLR 673; [1975] AC 421; (1974) 60 CrAppR 165; [1975] CrimLR 36; *R v H* [1995] 2 AC 596; *R v Sims* [1946] KB 531; (1946) 31 CrAppR 158; *R v Lewis (PA)* (1983) 76 CrAppR 33; *R v Le Vard* [1955] NZLR 266; *R v Gill* (1906) 8 WALR 96; *R v Hurren* (1962) 46 CrAppR 323; *R v Rhodes* [1899] 1 QB 77; (1899) 19 CoxCC 182; *R v Ollis* [1900] 2 QB 758; *R v Boyle & Merchant* (1914) 10 CrAppR 180; *R v Mansfield* [1978] 1 AllER 134 & *R v Slender* (1938) 26 CrAppR 155; *R v Porter* (1935) 25 CrAppR 59 & *R v Fisher* [1910] 1 KB 149;

[iii] '*prove sexual intent or guilty passion*', see *R v Hewitt* (1925) 19 CrAppR 64; *R v Shellaker* [1914] 1 KB 414; (1914) 9 CrAppR 240; *R v Marsh* (1949) 33 CrAppR 185; *Hoch v R* (1988) 165 CLR 292; *R v B* [1989] 2 QdR 343 & *R v Witham* [1962] QdR 49;

[iv] '*rebut a defence of accident or mistake*', see *R v Lewis* (1983) 76 CrAppR 33; *R v Butler* (1987) 84 CrAppR 12; *R v Fisher* [1910] 1 KB 149; *R v Chandler* (1956) 73 WN (NSW) 605; *R v Mortimer* (1936) 25 CrAppR 150 & *R v Smith* (1915) 11 CrAppR 229;

[v] '*to prove knowledge by the defendant of some fact*', see *R v Mason* (1914) 10 CrAppR 169; and

[vi] '*to rebut a defence of innocent association*', see *Kilbourne v R* (1973) 57 CrAppR 381; [1973] 2 WLR 254; *Broadman v Director of Public Prosecutions* [1975] AC 421 [[1974] 3 WLR 673; [1974] 3 AllER 887; (1975) 60 CrAppR 165; [1975] CrimLR 36]; *R v Lewis* (1983) 76 CrAppR 33 *R v Chandor* (1958) 43 CrAppR 74 & *R v Lunt* (1987) 85 CrAppR 241.

[8.6.5] Simplistic Example

Suppose Janet Siapu decides to destroy the front windscreen of motor vehicles with bricks. On 15 May 2001 she approaches such a motor vehicle and she destroys the front windscreen by throwing a brick through it. At the time of the offence there are no witnesses, however, she leaves the brick inside the motor vehicle.

On 19 May 2001 she again approaches another such motor vehicle and she is seen by a police officer to throw a brick at the front windscreen. As a consequence the windscreen is destroyed. When approached by the police officer, she stated that she intended to throw the brick over the motor vehicle and that the brick struck the motor vehicle accidentally. No admissions are made in respect to both offences.

In such a situation the prosecution should charge Siapu with both offences and the facts surrounding the first offence could be used to negative the defence of accident which was raised by the defendant.

The law relating to the defence of '*Accident*' is examined commencing on page **437**.

However, even if there was a witness to the first offence and Siapu was subsequently arrested and sentenced before the second offence, the prosecution could still rely on the circumstances surrounding the first offence to negative the defence of accident which was raised by the defendant. If the first offence had not been dealt with the prosecution should seek the permission of the Court to have both offences joined.

The law relating to the '*Joinder Of Charges*' is examined commencing on page **91**.

When a Court decides whether Siapu was guilty of either or both charges the law relating to '*circumstantial evidence*' would have to be applied.

In *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999) Muria CJ stated at page 22:

> '[The Court] *must* be satisfied beyond reasonable doubt that the circumstances as found to exist are not consistent with any reasonable hypothesis other than guilt of the accused. In other words, the guilt of the accused *must* be the only rational inference open to the Court to find in the light of the evidence.' (emphasis added) [words in brackets added]

In *Martin Sutarake v R* (Unrep. Criminal Appeal No. 6 of 1994) the Court of Appeal held at page 7:

> '[I]t was necessary for the prosecution to show beyond reasonable doubt that there was on the evidence no reasonable hypothesis consistent with innocence.'

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

[8.7] Identification Evidence

[8.7.1] Inherent Dangers

The *fundamental principle of* '*identification evidence*' is that the '*weight*' to be assigned to such evidence is determined by the circumstances under which the '*identification*' was made, ie., at the time of the commission of the offence, see *R v Breslin* (1985) 80 CrAppR 226. It is at that time that the witness identifies the defendant. Therefore, a Court *must* closely examine whether the witness has sufficient *time* to be able to identify the defendant. In order to ensure that those circumstances are properly covered prosecutors should ask the questions as outlined by the Privy Council in *R v Turnbull & others* [1977] QB 224 [(1976) 63 CrAppR 132; [1976] 3 WLR 445; [1976] 3 AllER 549; [1976] CrimLR 565] at page 228.

In *Director of Public Prosecutions v John Fufue & Nelson Fafeloa v R* (Unrep. Criminal Appeal Nos. 3 & 4 of 1988) Kapi JA, as a member of the Court of Appeal, commented at page 10 that the guidelines outlined in *R v Turnbull & others* (*supra*) were appropriate for Solomon Islands.

If a witness or complainant knows the defendant then it is obviously easier to prove the '*identification*' of the defendant, however, mistakes may be made. '[A] perfectly honest witness could believe, and become increasingly convinced that they were right in so believing, that they had identified the right person when subsequently it could be shown in other ways that they had in fact made a mistake and identified the wrong person', see *R v Johnson* [2001] 1 CrAppR 408 at page 412. Furthermore, even a number of honest witnesses may be mistaken, see *R v Grant* [1996] 2 CrAppR 272 at page 281.

See also: *Mills & others v R* [1995] 3 AllER 865.

In *R v Ramsden* [1991] CrimLR 295 the Court held:

> It was true that the same rules applied to police officers as to anyone else, however, it might be, as had happened here, that the officer, due to the fact that he was a police officer, might have paid particular attention to the identity, facial features and so on of the person whom he was observing. An identifying witness who happened to be involved with the criminal justice system was likely to have greater appreciation of the importance of identification, and to so look for some particular identifying feature. Honest police officers were likely to have their observations and recollections affected by the excitement of the situation. Provided that the

usual warnings are given, the reasons scrutinized, and the integrity of the witness not in doubt, the tribunal could give effect to what was only common sense.

However, in *Reid v R* [1989] 3 WLR 771; [1990] AC 363; (1990) 90 CrAppR 121; [1990] CrimLR 113 the Privy Council stressed that experience undoubtedly has shown that the '*identification* evidence' given by police officers can be just as unreliable.

See also: *R v Tyler and others* (1993) 96 CrAppR 332; [1993] CrimLR 60 & *Powell v Director of Public Prosecutions* [1992] RTR 270; [1992] COD 191.

In *R v Turnbull & others* (*supra*) the Privy Council stated at page 228:

'[T]he judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.

[i] *How long did the witness have the accused under observation*?

[ii] *At what distance*?

[iii] *In what light*?

[iv] *Was the observation impeded in any way, as for example by passing traffic or a press of people*?

[v] *Had the witness ever seen the accused before*?

[vi] *How often*?

[vii] *If only occasionally, had he any special reason for remembering the accused*?

[viii] *How long elapsed between the original observation and the subsequent identification to the police*?

[ix] *Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance*?

If in any case whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with the particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but even when the witness is purporting to recognize someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

> All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened; but the poorer the quality, the greater the danger. In our judgment when the quality is good, as for example when the identification is made after a long period of observation, or in satisfactory conditions by a relative, a neighbour, a close friend, a workmate, and the like […].' (emphasis added)

In *R v Cape, Jackson & Gardner* [1996] 1 CrAppR 191 Roch LJ, delivering the judgment of the Court of Appeal, stated at pages 198 – 199:

> 'In the Criminal Law Review at p. 116 there is commentary on that decision [referring to *Courtnell* [1990] CrimLR 115] which says:
>
> "The *Turnbull* rules were *primarily designed*, as Lord Widgery so vividly put it in the later case of *Oakwell*, to deal with the '*ghastly risk run in cases of fleeting encounters*.' Thus the rules are expressed to apply 'whenever the case against the accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken.' If the defence alleges, not mistaken, but a frame – up, no useful purpose would be served by giving the warning."
>
> With that passage this court agrees.' (emphasis added) [words in brackets added]

However, a court should *always* consider the guidelines enunciated in *R v Turnbull & others* (*supra*) if:

[i] a defendant denies that he/she was present at the scene of an offence, see *R v Curry & Keeble* [1983] CrimLR 737; or

[ii] there is a possibility of mistaken identification, see *R v Slater* [1995] 1 CrAppR 584 & *R v Thornton* [1995] 1 CrAppR 578.

In *Pearsall* (1990) 49 ACrimR 439 Hunt J, with whom the other members of the Court concurred, stated at pages 443 – 444:

> 'It is *unfortunate* that the Crown did not lead evidence of the description which the victim gave to the police when reporting the assault upon him. Such evidence would clearly have been admissible, and it may have had a decisive effect upon the weight to be given to the victim's evidence in the light of that error.' (emphasis added)

See also: *R v Swanston* [1982] 2 WLR 546.

When police officers are investigating offences which '*identification evidence*' is an issue it is imperative that the issues addressed by the Court in *R v Turnbull & others* (*supra*), as indicated by the numbers [i] to [ix], are answered by the witness/es in their statements. If however those issues are not addressed in the statement/s the assigned prosecutor would be expected to ask questions which address those issues in the '*Examination – in – Chief*' of the witnesses.

Furthermore, when submitting in relation to '*identification evidence*', prosecutors should outline the strength of such evidence, including any specific weaknesses, see *R v Turnbull & others* (*supra*); *R v Fergus (Ivan)* (1994) 98 CrAppR 313; *R v Pattinson & Exley* [1996] 1 CrAppR 51 & *R v Akaidere* [1990] CrimLR 808.

The law relating to '*Examination – in – Chief*' is examined commencing on page **338**.

See also: *Arthurs v Attorney – General for Northern Island* (1971) 55 CrAppR 161; *R v Long* (1973) 57 CrAppR 871; [1973] CrimLR 577; *R v Chance* (1988) 87 CrAppR 398; *R v Walshie* (1982) 74 CrAppR 85; *R v Davis* (1976) 62 CrAppR 194; *McShane v Northumbria Chief Constable* (1981) 72 CrAppR 208; *R v Pope* (1987) 85 CrAppR 201; *R v McInnes* (1990) 90 CrAppR 99; *Reid & others v R* (1990) 90 CrAppR 121; *Shand v R* [1996] 2 CrAppR 204; *R v Slater* [1995] 1 CrAppR 584 & *Biwa Geta v The State* [1988 – 89] PNGLR 153.

[8.7.2] Disclosure

In *R v Turnbull & others* (*supra*) the Privy Council stated at page 157:

> 'If in any case whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a *material discrepancy* they should supply the accused or his legal advisers with the particulars of the description the police were first given. *In all cases* if the accused asks to be given particulars of such descriptions, the prosecution should supply them.' (emphasis added)

Such disclosure should include any photographs taken of the defendant, see *R v Fergus (Ivan*) (1994) 98 CrAppR 313.

The law relating to the '*Disclosure Of Prosecution Evidence Generally*' is examined commencing on page **134**.

[8.7.3] Confrontation

In *Michael Mini v The State* [1987] PNGLR 224 the case involved a rape incident in which the complainant bit the fingers of one of the defendants. The complainant was taken to a nearby plantation where she failed to identify either defendant.

Three (3) days later she attended at the local police station where the defendant, with a bandage on his finger, was in police custody. At that time she identified him as one of the defendants. About a month later a line - up was held at the police station and the victim again identified the defendant.

The Supreme Court held at page 226:

> 'The whole process of identification was grossly unfair to the [… defendant]. First, the complainant was *prompted by the police* to make the identification and secondly, the [… defendant] was the only person to be identified. No one has to be a mental giant to conclude that the chances of the [… defendant] being identified were nothing but great.
>
> This identification at the police station in such a weighted situation must be looked at in the light of the failure to identify at the plantation shortly after the incident.
>
> The failure to identify shortly after the incident, with the grossly unfair situation at the police station, must lead the court to disregard all the identification evidence insofar as it points to the [… defendant]. This means that there is insufficient evidence of identification of the [… defendant].' (emphasis added) [words in brackets added]

In *Davies & Cody v R* (1937) 57 CLR 170 the High Court of Australia held at page 181:

> 'But where, before the occasion with which it is sought to connect the person accused or suspected, the witness has seldom or never seen him, experience has led the English court to look for the greatest care to avoid a mistake or prejudice. *They treat it as indisputable that a witness, if shown the person to be identified singly and as the person whom the police have reason to suspect, will be much more likely however fair and careful he may be, to assent to the view that the man he is shown corresponds to his recollection*.' (emphasis added)

See also: *R v Smith & Evans* (1908) 1 CrAppR 203; *Alexander v R* (1981) 145 CLR 395 & *Domican v R* (1992) 66 ALJR 285.

[8.7.4] Identification Parade

A defendant has an *option* of participating in an '*identification parade*', see section 14 of the *Constitution*.

The identification parade *must* comprise of at least 8 persons of a similar description as the suspect.

All unauthorised persons *must* be excluded from the location of the identification parade.

The suspect *must* be allowed to select his/her own position in the identification parade.

The particulars of all persons who participated in the identification parade *must* be recorded.

Under no circumstances is the identity of the suspect to made obvious to the witness.

Under no circumstances is the witness to be told or indicated as to who is the suspect.

Under no circumstances should the witness see the suspect in police custody prior to participating in the identification parade.

In *R v Lionel Rifasia* (Unrep. Criminal Case No. 45 of 1976) Davis CJ stated at pages 2 – 3:

> 'Mr. Thomas for the defence has criticized the conduct of the parade in that it was carried out by officers connected with the investigation and was held in the police station where both the accused and PC Waimani were present together for 24 hours. In my view this criticism is only partially valid. There was in my opinion no objection to holding the identification parade at Gizo police station or to its being conducted by Sgt. Pitulia.
>
> *It is essential, however, that the identifying witness should be kept away from the suspect and should be given no opportunity of seeing the accused before the parade or while it is being assembled.* It is in this aspect that the parade held on the 2nd March is open to criticism from the reason that the accused and PC Waimani were together at Gizo Police Station for nearly 24 hours. Such propinquity would and did lead to allegations of malpractice by the police. This could largely have been avoided had not the accused been arrested and detained in custody.
>
> […]

> *The only other criticism I have of the parade is that it is unnecessary and, in my opinion, undesirable, that the identifying witness should be called upon to identify the suspect a second time after having identified him without hesitation on first attending the parade.* Once a clear identification has been made no useful purpose is served in repeating the performance, and to do so in my view only gives rise to suspicion that the first identification was perhaps not done properly.' (emphasis added)

In *R v Chapman* (1911) 7 CrAppR 53 Lord Alverstone CJ, delivering the judgment of the Court, stated at pages 55 - 56:

> 'Later on both the boys were taken to the guard tent, where the prisoner then was, and where there was only one other man besides the prisoner. The police sergeant ask, "Is that the man?" That is not a satisfactory way of identification, whether the persons identifying were young or old. It is not right to point out and ask questions in this way. The usual and proper way in such cases is to place the suspected man with a sufficient number of others, and to have the identifying person pick out a man without assistance.'

In *R v Thorne* [1981] CrimLR 702 the Court of Appeal held:

> It was entirely a matter for the police who were conducting an identification parade to select the people who, in addition to the suspect, were to take part in that parade.

See also: *R v Creamer* (1985) 80 CrAppR 248.

[8.7.5] Voice Identification

In *The State v Daniel* [1988 – 89] PNGLR 580 Doherty AJ, sitting alone, held:

> Evidence that the voice of a person involved in an offence is the voice of a defendant is admissible to prove identification of the defendant where:
>
> (a) the voice is known by the witness and recognized by the witness; and
>
> (b) the voice is not previously known to the witness but has such distinctive features that it leaves a clear mental impression in the mind of the witness enabling him/her to draw the conclusion on hearing it later that it was the same voice.

If '*voice identification*' is in issue, the Court should consider the relevant principles enunciated in *R v Turnbull & others* (*supra*), see *R v Hersey* [1998] CrimLR 281.

See also: *R v Keating (a)* (1909) 2 CrAppR 61; *R v Smith* (1984) 1 NSWLR 462; *Corke* (1989) 41 ACrimR 292 & *R v Brotherton* (1992) 29 NSWLR 95; (1993) 65 ACrimR 301.

[8.7.6] Fingerprint Evidence

Section 22 of the *Police Act* (Ch. 110) enables police officers to take the fingerprints and palm prints 'of any person in lawful custody for any offence punishable by imprisonment, whether such person has been convicted of such offence or not'. However, on acquittal such identification particulars should be destroyed.

In *Parker v R* (1912) 14 CLR 681 Griffith CJ, delivering the judgment of the High Court of Australia, held at page 683:

> 'The fact of the individuality of the corrugations of the skin on the fingers of the human hand is now so generally recognized as to require very little, if any, evidence of it, although it seems to still the practice to offer some expert evidence on the point. A fingerprint is therefore in reality an unforgeable signature.'

The English Court of Appeal in *R v Buckley* (1999) 163 JP 561 at page 568 gave the following guidance as to admissibility of '*fingerprint evidence*':

> '*If there are fewer than eight similar ridge characteristics, it is highly unlikely that a judge will exercise his discretion to admit such evidence and, save in wholly exceptional circumstances, the prosecution should not seek to adduce such evidence*. If there are eight or more similar ridge characteristics, a judge may or may not exercise his or her discretion in favour of admitting the evidence. How the discretion is exercised will depend on all the circumstances of the case, including in particular: (i) the experience and expertise of the witness; (ii) the number of similar ridge characteristics; (iii) whether there are dissimilar characteristics; (iv) the size of the print relied on, in that the same number of similar ridge characteristics may be more compelling in a fingerprint of print than in an entire print; and (v) the quality and clarity of the print on the item relied on, which may involve, for example, consideration of possible injury to the person who left the print, as well as factors such as smearing or contamination.'

As regards proving that the fingerprints at the scene of an offence belong to a particular defendant, refer to section 125(2) of the *Criminal Procedure Code* (Ch. 7) which states:

> 'A certificate in the form prescribed by the Director of Public Prosecutions given under the hand of an officer appointed by the Commissioner of Police in that behalf, who shall have compared the fingerprints of an accused person with the fingerprints of a person previously convicted, shall be prima facie evidence of all facts therein set forth provided it is produced by the person who took the fingerprints of the accused.'

Refer also to the law relating to the '*Proof Of Previous Convictions*' which is examined commencing on page **305**.

The evidence of fingerprints or palm prints alone is sufficient evidence of identity to support a conviction, *subject to their location and the circumstances of the case*, see *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995; Palmer J); *Blacker v R* (1910) 10 CLR 604; *R v Castleton* (1910) 3 CrAppR 74; *R v Court* (1960) 44 CrAppR 242 & *R v Koito – Gaocatal* [1967 – 68] P&NGLR 217.

[8.7.7] Dock Identification

In *Alexander v R* (1981) 145 CLR 395 Gibbs CJ of the High Court of Australia stated at page 399:

> 'Evidence given by a witness identifying an accused as the person whom he saw at the scene of the crime or in circumstances connected with the crime *will generally* be of very little value if the witness has not seen the accused since the events in question and is asked to identify him for the *first time* in the dock, at least when the *witness has not*, by reason of previous knowledge of association, become familiar with the appearance of the accused.

> *In theory the manner in which an accused was identified out of court goes to the weight rather than to the admissibility of the evidence.*' (emphasis added)

The '*weight*' which a Court will give '*dock identification*' will obviously be dictated by:

[i] the circumstances under which the witness initially identified the defendant;

[ii] the time period between the initial observation of the defendant and the subsequent '*identification in the Court*'; and

[iii] whether the witness knew the defendant prior to the commission of the offence.

See also: *Barnes v Chief Constable of Durham* [1997] 2 CrAppR 505; *R v Cartwright* (1914) 10 CrAppR 219; *Davies & Code v R* (1937) 57 CLR 170 at pages 181 – 182 & *Grbic v Pitkethly* (1992) 65 ACrimR 12.

[8.7.8] Clothing

The recognition of the '*clothing*' worn by an offender can assist in proving the '*identification*' of the defendant, see *R v Hickin & others* [1996] CrimLR 584.

[8.8] Opinion Evidence

[8.8.1] General Principles

Opinion evidence *may* be given by:

[i] '*experts*'; and

[ii] '*lay persons*', such as police officers,

depending on the opinion to be given and subject to the witness proving to the Court that he/she is suitably qualified.

[8.8.2] Experts

In *R v Bonython* (1984) 38 SASR 45 King CJ stated at page 46 that there are two questions regarding the admissibility of '*opinion evidence of experts*' to consider:

> 'The first is whether the subject matter of the opinion falls within the class of subjects upon which expert testimony is permissible. This […] may be divided into two parts: (a) whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area, and (b) whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render his opinion of assistance to the court. The second question is whether the witness has acquired by study or experience sufficient knowledge of the subject to render his opinion of value in resolving the issues before the court.'

In *R v Gilfoyle* [2001] 2 CrAppR 57 Rose LJ, delivering the judgment of the Court of Appeal, stated at pages 66 – 67:

> 'In *Turner* (1974) 60 CrAppR 80 [[1975] QB 834] at page 83, Lawton LJ said:
>
> "*An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury.* If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary … the fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors themselves; there is a danger that they think it does .. Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life."
>
> […] But expert witnesses *must* furnish the court "with the necessary scientific criteria for testing the accuracy of their conclusions, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence" (*per* Lord President Cooper in *Davie v Edinburgh Magistrates* 1953 SC 34 at 40; and see, also, the discussion on pages 521 to 523 in *Cross and Tapper on Evidence* (9th ed.).' (emphasis added)

An '*expert witness*' should be asked to outline the *facts* upon which his/her '*opinion*' is based, see *R v JP* [1999] CrimLR 401 and give reasons for his/her conclusion, see *R v Hipson* [1969] CrimLR 85. An '*opinion*' of an '*expert witness*' *may* be based on the examination or test conducted by another person, see *R v Mason* (1912) 7 CrAppR 67.

'*Expert witnesses*' will invariably rely on '*information in their field*', see *Jeffrey* (1991) 60 ACrimR 384 & *Borowski v Quayle* [1966] VR 382.

Any information referred to can *not* be tendered as an exhibit, although the witness may be cross – examined as to its contents, see *R v Allaway* (1922) 77 CrAppR 15.

A witness *may* be qualified to give '*opinion evidence*' as an '*expert*' by virtue of '*practical experience alone*', see *Weal v Bottom* (1966) 40 ALJR 436.

In *R v Abadom* [1983] 1 AllER 364; (1983) 76 CrAppR 48 [[1983] 1 WLR 126] Kerr LJ, delivering the judgment of the Court of Appeal, held at pages 369 & 52 respectively:

> 'We are here concerned with the cogency or otherwise of an opinion expressed by an expert in giving expert evidence. In that regard it seems to us that the process of taking account of information stemming from the work of others in the same field is an essential ingredient of the nature of expert evidence.'

In *R v Clarke* [1995] 2 CrAppR 425 the Court of Appeal stated at pages 429 – 430:

> 'It is essential that our criminal justice system should take into account modern methods of crime detection. It is no surprise, therefore, that tape recordings, photographs and films are regularly placed before juries. Sometimes that is done without expert evidence, but, of course, if that real evidence is not sufficiently intelligible to the jury without expert evidence, it has always been accepted that it is possible to place before the jury the opinion of an expert

in order to assist them in their interpretation of the real evidence. The leading case on that point is *Turner* (1975) 60 CrAppR 80, [1975] QB 834. We would add this. There are no closed categories where such evidence may be placed before a jury. It would be entirely wrong to deny the law of evidence the advantages to be gained from new techniques and new advances in science.'

The law relating to the admissibility of:

- '*Tape Recordings*' is examined on page **236**;
- '*Photographic Evidence*' is examined on page **211**; and
- '*Video Evidence*' is examined commencing on page **210**.

In *Carter v Kilmartin* (1991) 12 QLR 133 the Court held:

(1) For expert evidence to be admissible, it *must* be shown that there is before the court an issue of fact the determination of which requires the application of knowledge, experience, or learning beyond that of ordinary persons.

(2) To establish the admissibility of the sworn opinion of any proposed expert witness, it *must* be shown that he/she possesses sufficient of that knowledge, learning, or experience required to enable him/her to express an opinion on that issue.

An '*expert witness*' should *not* be permitted to usurp the function of the Court as regards making determinations of fact, see *G v Director of Public Prosecutions* [1997] 2 CrAppR 78; *R v Edwards* (1986) 20 ACrimR 463; *R v Haidley & Alford* [1984] VR 229; *R v Ashcroft* [1965] QdR 81; *R v Wallace* (1978) 7 ACrimR 317; *R v Edwards* (1986) 20 ACrimR 463 & *Smith v R* (1990) 64 ALJR 588.

A report under the hand of an '*expert witness*' is generally *not* admissible if he/she is *not* called as a witness, see *R v Abadom* (*supra*). Such reports are admissible if tendered by consent as a '*Formal Admission*'.

There is however a '*statutory exception*' as outlined in section 180 of the *Criminal Procedure Code* (Ch. 7) '*Plans & Reports By Surveyors, Government Analysts & Geologists & Medical Practitioners*' which is outlined on page **235**.

As regards the reports of '*expert witnesses*' who are *deceased*, see *R v McGuire* (1985) 81 CrAppR 323; [1985] CrimLR 719.

If the evidence of an '*expert witness*' will be expensive or timely, the prosecutor should consider trying to obtain a '*Formal Admission*', see *R v Jackson* [1996] 2 CrAppR 420.

The law relating to '*Formal Admissions*' is examined commencing on page **325**.

When eliciting the evidence of an '*expert witness*' prosecutors should ask the witness to tell the Court his/her:

[i] academic qualifications; and

[ii] experience.

If two (2) experts have the same or similar academic qualifications, the opinion of the '*expert witness*' with the greater experience would be more likely to be given more '*weight*' by a Court, depending on the difference in experience.

However, a Court is *not* bound by the '*opinion*' of an '*expert witness*', see *R v Stockwell* (1993) 97 CrAppR 260.

The law relating to the '*weight*' to be assigned to evidence generally is examined on page **173**.

When there is no issue of 'mental illness', medical evidence as to the defendant's intent is inadmissible, see *R v Chard* (1972) 56 CrAppR 268.

As regards the evidence of psychiatrists, see *R v Turner* [1975] 2 WLR 56; [1975] QB 834; (1975) 60 CrAppR 80.

In *R v Bailey* (1978) 66 CrAppR 31 Lord Widgery CJ, delivering the judgment of the Court, held at page 32:

> 'This Court has said on many occasions that of course juries are not bound by what the medical witnesses say, but at the same time they must act on evidence, and if there is nothing before them, no facts or circumstances shown before them which throw doubt on the medical evidence, then that is all that they left with, and the jury, in those circumstances, must accept it.'

See also: *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995; Palmer J); *R v Weightman* (1991) 92 CrAppR 291; [1991] CrimLR 204; *Murphy & others v R* (1988 – 89) 167 CLR 94 at page 111; *R v Robb* (1991) 93 CrAppR 161; *R v Hurst* [1995] 1 CrAppR 82; *R v Grossman & Skirving* (1985) 81 CrAppR 9 at page 16; *R v Vernege* (1982) 74 CrAppR 232 & *R v Somers* (1964) 48 CrAppR 11; [1963] 1 WLR 1306; [1963] 3 AllER 808.

[8.8.3] Lay Persons

In *R v Whitby* (1957) 74 WN (NSW) 441 the Court held:

> There are many fields of a scientific and technical nature where the lay person is quite incompetent to express an opinion. But it is incorrect to say that there are no matters on which a lay person with a certain amount of experience of the affairs of the world can express his/her opinion such as whether a person looked old, sick or angry.

In *R v Von Elnem* (1985) 38 SASR 207 the Court held:

> Witnesses, other than expert witnesses, are permitted to state their impressions or opinions as to everyday matters such as age, speed, weather, *handwriting*, whether relations between two persons appear to be friendly or unfriendly.

The difference between the '*opinion*' of expert witnesses and '*lay persons*' is that the '*opinion of lay persons*' is based on their observations of the facts in issue which is *not* necessarily the basis of the admissibility of '*opinion evidence*' given by an expert witness.

As regards '*lay persons*' there *must* be a factual basis for their opinion. For example, a police officer *should not* give evidence that a witness or defendant appeared affected by liquor without first giving evidence of what was the basis of such an opinion, such as the smelling of liquor on the breath of the person, slurred speech, or being unable to stand up, etc.

In *R v Oakley* [1979] RTR 417 [[(1980) 70 CrAppR 7; [1979] CrimLR 205] Lord Widgery CJ stated at page 421:

> 'The point is so short. The question is: is the judge at fault in admitting the evidence of Constable Robinson giving his opinion of what he has seen? The answer is that as long as he keeps within his *reasonable expertise*, which is a matter for the judge, he is entitled to be heard on every aspect as an expert, to that extent, if no further.' (emphasis added)

Therefore, when eliciting evidence of '*lay persons*', prosecutors should ask questions so that the witness describes the person or circumstances, prior to asking the witness his/her opinion. That principle obviously also applies to the defence.

See also: *Anderson* (1992) 64 ACrimR 312 & *R v Murphy* [1980] 2 WLR 743.

[8.9] Handwriting Evidence

The issue whether a defendant is the author of a particular document can be proved by:

[i] an admission by the defendant;

[ii] a witness who observed the defendant write the document; see *R v O'Brien* (1912) 7 CrAppR 29 & *R v McCartney & Hansen* (1928) 20 CrAppR 179;

[iii] the evidence of a witness who had regularly corresponded with the defendant, see *R v O'Brien* (*supra*); or

[iv] the '*opinion evidence*' of a handwriting expert.

Section 8 of the *Criminal Procedure Act* 1865 (UK) states:

> 'Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine *shall* be permitted to be made by witnesses: and such writings, and the evidence of witnesses respecting the same, *may* be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute.' (emphasis added)

In *R v Rickard* (1918) 13 CrAppR 140 Salter J, delivering the judgment of the Court, stated at page 143:

> 'In *Crouch* [(1850) 4 CoxCC 163] it was proposed on the question of handwriting to ask the opinion of a police officer who had no knowledge of the subject, except that acquired in the course of the case. Maule J rejected the evidence, saying, "Knowledge so obtained, that is to say, for such a specific purpose, and under such a bias, is not such as to make a man admissible as a quasi – expert witness. He does not come to speak as a fact, but as a witness of skill, to use his judgment upon a particular question. The only means he has had of acquiring a capability to form such a judgment are not such to make him a competent witness in that particular."

> That case does not decide what degree of preparation is necessary to constitute an expert, but it does decide that a person is not entitled to give such evidence if his only knowledge on the subject is that acquired in the course of the case.'

See also: *R v Tilley & Tilley* (1961) 45 CrAppR 360 at page 364 & *R v Smith* (1968) 52 CrAppR 648; [1968] CrimLR 674.

The Court *must* be satisfied '*beyond reasonable doubt*' that the disputed writing is genuine, see *R v Ewing* [1983] QB 1039; (1983) 77 CrAppR 47.

If it is anticipated that there will be a dispute as to authorship of the disputed writing, the prosecution is expected to call an handwriting expert. A Court should *not* draw its own conclusions as to the authorship of a disputed writing, see *R v O'Sullivan* (1969) 53 CrAppR 274 *& R v Tilley & Tilley* (1961) 45 CrAppR 360.

See however: *R v Derrick* (1910) 5 CrAppR 162 & *The State v Baine* [1990] 1 PNGLR 1.

The law relating to the '*Admissibility Of The Opinion Evidence Of Expert Witnesses*' is examined commencing on page **202**.

A photocopy of a disputed writing *may* be used for the purpose of comparison, if there is evidence that the original has been lost, see *Lockheed Arabia v Owen* [1993] 3 WLR 468; [1993] 3 AllER 641; [1993] QB 806.

The law relating to '*Missing Exhibits*' is examined commencing on page **238**.

See also: *R v Smith (Hereford) (a)* (1909) 3 CrAppR 87 at page 90.

[8.10] Character Evidence

Occasionally, the defence *may* call witness/es to give evidence of a defendant's '*good character*' for the purpose of trying to persuade the Court that the defendant was unlikely to have committed the offence/s in question.

In *R v Thompson, Sinclair & Maver* [1995] 2 CrAppR 589 Evans LJ, delivering the judgment of the Court of Appeal, stated at page 593:

> 'A defendant is always entitled to call evidence of his good character or other evidence "in disproving his own guilt" of the offence charged against him. […] *The test is whether the evidence is relevant or not to the question of guilt*.' (emphasis added)

In *R v Marr* (1990) 90 CrAppR 154 [[1989] CrimLR 743] Lord Lane CJ, delivering the judgment of the Court, stated at page 156:

> 'The learned judge should, in our judgment, have directed the jury that good character goes primarily to credibility, to whether the defendant should be believed by the jury or not.'

In *R v Richardson & Longman* (1968) 52 CrAppR 317 [[1968] 2 AllER 761; [1968] 3 WLR 15; [1967] 1 QB 299] Edmund Davies LJ, delivering the judgment of the Court, held at page 331:

> 'In our view, evidence of character, when properly admitted, goes to credibility of the witness concerned, whether the evidence discloses good character or bad character.'

In *R v Cohen* (1990) 91 CrAppR 125 Farquharson LJ, delivering the judgment of the Court, stated at page 129:

> 'The proper direction is that the jury should give weight to good character, and the judge should go on to explain in what regard weight should be given. That should be done in two ways: first, by way of bolstering his credibility, as any man of good character is entitled to claim; and secondly, to establish that because he has lived his life to the age he has and remained a man of good character, he is the less likely to commit a crime.'

In *R v Broadhurst, Meanley & Hill* (1918) 13 CrAppR 125 Darling J, delivering the judgment of the Court, stated at pages 129 – 130:

> 'The history of the admission of evidence of good character, as given in Stephen's History of the Criminal Law of England, shews that such evidence does not stand precisely the same plane as that concerning the relevant facts going to prove or disprove the issue. That the view of this kind of evidence taken by the learned judge at the trial is correct is made abundantly clear by the following statement by Lord Ellenborough CJ in *R v Davies*, 31 State Trials, 1808, p. 216:-
>
> "This is the whole of the evidence on the substance of the charge. What follows is evidence, highly important if the case be at all doubtful, if it hangs in even scales. If you do not know which way to decide, character should have an effect; but it is otherwise in cases which are clear … As I have already stated to you, if the evidence were in even balance, character should make it preponderate in favour of a defendant; but in order to let character have its operation, the case must be reduced to that situation."
>
> In *R v Frost*, 4 State Trials NS 85 (1839) more than thirty years later, Trindal CJ – two other judges, Parke B and Williams J, being present – thus expresses himself on evidence of good character called on behalf of the defendant: "If the evidence which goes to the fact is sufficiently strong to convince you that the act of criminality which is imputed to him was actually committed, then it is no more than weighing probability against fact. If the scales are hanging even, and you feel a doubt whether the party is guilty or not of the act charged against him, then undoubtedly, you will give him the full benefit of such testimony of general character which he may have earned by his previous conduct in life. Gentlemen, you are to weigh it not as direct evidence in the case – not as positive evidence contradicting any that has been brought on the other side – but as testimony, probably, to induce you to discard that evidence if you think that it is so.'

In *R v Winfield* (1939) 27 CrAppR 139 the Court held:

> Once any aspect of a person's character is put in issue, it is all put in issue.

In *Re T & Director of Youth & Community Services* [1980] 1 NSWLR 392 the Court held:

> The appropriate evidence is from individuals who know the person, and who know other people who know him/her.

In *R v Lawrence* [1984] 3 NSWLR 674 the Court held:

> Evidence of good character bears upon the probability of guilt and is strictly evidence in the case. The object of evidence of good character is to induce the court to believe, because of the improbability of a person of good character committing the crime alleged, that there is some mistake in the prosecution case. It makes the defendant's account in denial of the Crown case more acceptable.

However, in *Palazoff* (1986) 23 ACrimR 86 the Court observed:

> People do commit offences for the first time.

In *R v de Vere* [1981] 3 AllER 473 Lord Lane CJ, delivering the judgment of the Court of Appeal, held at page 476:

> 'If the defendant puts his character in issue, that is to say adduces evidence of his own good character, whether by cross – examination on his behalf or by means of giving evidence himself or by means of calling witnesses as to character, the prosecution may rebut that evidence either by cross – examination or by independent testimony, and that right has existed at common law for very many years going back, as found expressed in *R v Gadbury* (1838) 8 C & P 676, 173 ER 669. It is repeated more recently in *R v Butterwasser* [1947] 2 AllER 415, [1948] 1 KB 4.
>
> However, Lord Goddard CJ also said in that case […]:
>
> "*However that may be, there is no authority for the proposition – and it is certainly contrary to what all the present members of the court have understood during the whole of the time they have been in the profession – that, where the prisoner does not put his character in issue, but merely attacked the witnesses for the prosecution, evidence can be called by the prosecution to prove that the prisoner is a man of bad character*."' (emphasis added)

The law relating to '*Questioning Credibility Of Defendants*' is examined commencing on page **352**.

See also: *R v Aziz & other appeals* [1995] 3 AllER 149; [1995] 2 CrAppR 478; [1996] 1 AC 41; [1995] 3 WLR 53; *R v Lloyd* [2000] 2 CrAppR 355; *R v Martin* [2000] 2 CrAppR 42; *R v Vye; R v Wise & R v Stephenson* [1993] 1 WLR 471; [1993] 3 AllER 241; (1993) 97 CrAppR 134; *R Jackson & Harim* (1988) 33 ACrimR 413; *R v Bryant & Oxley* (1978) 67 CrAppR 157; [1978] 2 AllER 689; [1979] QB 108; [1978] 2 WLR 589; [1978] CrimLR 307; *R v Noble* (1928) 20 CrAppR 191; *R v Brownhill* (1912) 8 CrAppR 118 at page 120; *R v Thompson* [1966] 1 WLR 405; [1966] 1 AllER 505; (1966) 50 CrAppR 91; *R v Bellis* (1966) 50 CrAppR 88 at page 89 & *R v Murphy* [1985] 4 NSWLR 42.

[8.11] Tracker Dog Evidence

In *R v Pieterson & Holloway* [1995] 2 CrAppR 11 the Court of Appeal held that the evidence of tracking by a dog is admissible provided that:

[i] a dog handler can establish that the dog has been properly trained; and

[ii] over a period of time the dog's reactions indicate that the dog is a reliable pointer to the existence of a scent from a particular individual.

Detailed evidence establishing the reliability of the dog in question is an essential requirement.

See also: *R v Sykes* [1997] CrimLR 752.

[8.12] Video Evidence

Video tapes are admissible as '*real evidence*', to prove what is recorded, just as photographs are. However, video tapes should be properly authenticated. A video tape may be authenticated (verified on oath) by:

[i] the video camera operator;

[ii] a person present when the video tape was recorded;

[iii] a person qualified to state that the representation is accurate; or

[iv] a witness who testifies as to the automatic operation of the equipment, eg., automatic surveillance camera.

In *Taylor v Chief Constable of Cheshire* (1987) 84 CrAppR 191 [[1986] 1 WLR 1479; [1987] 1 AllER 225; [1987] CrimLR 119] Ralph Gibson LJ stated at pages 198 – 199:

> 'For my part I can see no effective distinction so far as concerns admissibility between a direct view of the action of an alleged shoplifter by a security officer and a view of those activities by the officer on the video display unit of a camera, or a view of those activities on a recording of what the camera recorded. He who saw may describe what he saw because, as Ackner LJ said in the case of *Kajala v Noble* [(1982) 75 CrAppR 149] […] it is relevant evidence provided that that which is seen on the camera or recording is connected by sufficient evidence to the alleged actions of the accused at the time and place in question. As with the witness who saw directly, so with him who viewed a display or recording, the weight and reliability of his evidence will depend upon assessment of all relevant considerations, including the clarity of the recording, its length, and, where identification is in issue, the witness's prior knowledge of the person said to be identified, in accordance with well established principles.
>
> Where there is a recording, a witness has the opportunity to study again and again what may be a fleeting glimpse of a short incident, and that study may affect greatly both his ability to describe what he saw and his confidence in an identification. When the film or recording is shown to the court, his evidence and the validity of his increased confidence, if he has any, can be assessed in the light of what the court itself can see. When the film or recording is not available, or is not produced, the court will, and in my view must, hesitate and consider very carefully indeed before finding themselves made sure of guilt upon such evidence. But if they are made sure of guilt by such evidence, having correctly directed themselves with reference to it, there is no reason in law why they should not convict. Such evidence is not, in my view, inadmissible because of the hearsay principle. If direct evidence of what was seen to be happening in a particular place at a particular time and, like all direct evidence, may vary greatly in its weight, credibility and reliability.'

A re-enactment of an offence on a video tape is prima facie admissible, see *Li Shu – Ling v R* (1989) 88 CrAppR 82.

See also: *R v Sitek* [1988] 2 QdR 284; *R v Maqsud Ali* [1966] 1 QB 688; *Kajala v Noble* (1982) 75 CrAppR 149; *R v Beames* (1980) 1 ACrimR 239 at pages 240 – 241; *R v Fowden & White* [1982] CrimLR 588 & *R v Grimer* [1982] CrimLR 674.

[8.13] Photographic Evidence

Photographs are admissible as '*real evidence*' and are able to be tendered by either:

[i] the witness who took the photograph;

[ii] a witness who is capable of advising the Court as to what is depicted on the photograph; or

[iii] the witness who set up the camera in terms of the 'silent witness' theory, ie., a camera which operates automatically.

A photograph of a defendant taken during the course of the commission of an offence is admissible, see *R v Cook* [1987] QB 417; (1987) 84 CrAppR 369; [1987] 2 WLR 775; [1987] 1 AllER 1049 & *R v Dodson & Williams* [1984] 1 WLR 971; (1984) 79 CrAppR 220; [1984] CrimLR 489.

In *Owners of Motorship Sapparo Maree v Owners of Steam Tanker Statute of Liberty* [1968] 2 AllER 195 Simon P stated at page 196:

> 'It would be an absurd distinction that a photograph should be admissible if the camera is operated manually by a photographer, but not if it were operated by a trip or clock mechanism.'

In *R v Sitek* [1988] 2 QdR 286 Carter J, with whom the other members of the Court concurred, stated at page 288:

> 'With later advancements in the art of photographs, however, and with increasing awareness of the manifold evidentiary uses of the products of the art, it has become clear that an additional theory of admissibility of photographs is entitled to recognition. Thus, even though no human is capable of swearing that he personally perceived what a photograph purports to portray (so that it is not possible to satisfy the requirements of the "pictorial testimony" rationale) there may nevertheless be good warrant for receiving the photograph in evidence. Given an adequate foundation assuring the accuracy of the process producing it, the photograph should then be received as a so-called silent witness or as a witness which "speaks for itself".'

[8.14] Confessional Evidence

[8.14.1] Introduction

Clearly the prosecution is expected to present the strongest possible case. That requires statements to be taken from all possible witnesses who are able to give '*material evidence*'. Evidence is 'material' if it is relevant to an issue in the case, see *R v Reading JJ, Ex parte Berkshire County Council* [1996] 1 CrAppR 239. Therefore, arresting / investigating police officers should *not* rely solely on 'caution statements', rather than conducting a comprehensive investigation.

Depending on the circumstances, a confession alone may be sufficient to prove a case '*beyond reasonable doubt*', see *R v Kersey* (1908) 1 CrAppR 260.

A defendant may only '*confess*' to his/her own acts, omissions, knowledge or intentions, but he/she *cannot* '*confess*' as to the acts or omissions of other persons whom he/she did not see and of which he/she can only have knowledge based on '*hearsay*', see *Suriypaul v R* [1958] 3 AllER 300; [1958] 1 WLR 1050; (1958) 42 CrAppR 266.

The law relating to the '*Admissibility Of Hearsay Evidence*' is examined commencing on page **176**.

As regards confessional evidence of a defendant with a disordered mind, see *R v Miller* (1986) 83 CrAppR 192.

Prior to conducting a record of interview the investigating police officer should have prepared his/her interview. The officer should have determined:

[i] what offence/s had been committed;

[ii] what elements need to be proven; and

[iii] what possible defence/s may be raised.

In *R v Lokumana & Ihonoda* (Unrep. Criminal Case No. 32 of 1987) Ward CJ commented at pages 4 – 5:

> 'There is nothing wrong with an officer preparing his questions before an interview. Having prepared them, he is wise to write them down. However, the record of the interview in which they are put to the suspect must be prepared in such a way that all the relevant conversation is recorded. That could include denials or admissions either of which may be lengthy. Unless they are clearly of no relevance, they *must* be recorded by the officer. Similarly, if a question is repeated and elicits a different reply the second time, both the repeated questions and new answers *must* be recorded.
>
> From this it *must* be apparent that the interviewing officer who writes his questions in advance, should, as the interview progresses, write the question again in the interview record as or before he asks it and then note the reply before he writes the next question. To prepare a document, as was done in this case, with a small space for the answer is liable to encourage the interviewing officer to restrict the answer recorded by editing it or omitting all or part of it.
>
> […]
>
> *No interviewing officer is bound by the suspect's answers*. In many cases, he is wise, despite a denial, to rephrase the question or to try a different approach to the same topic. Sometimes it is worth returning to it after other matters have been explored. This may all take time and that, in itself, is not necessarily wrong. However, if the protection of the caution is to have any reality, there *must* be some limit. That limit will vary according to the circumstances of the case, the accused and the conditions of the interview.' (emphasis added)

Interviewing officers and witnessing officers

> 'should sign below where the caution had been recorded to certify that it had been duly given as recorded and that the [… defendant] did understand what it meant', see *R v Warren Godfrey Motui* (Unrep. Criminal Case No. 20 of 1997; Palmer J; at page 3). [word in brackets added]

See also: *R v Todd* (1981) 72 CrAppR 299; [1981] CrimLR 621.

In circumstances in which an '*interpreter*' is used to ask questions and record answers, only the 'interpreter' is permitted to give such evidence, see *R v Attard* (1959) 43 CrAppR 90. Therefore, an 'interpreter' should adopt the notes so that he/she can use the notes to refresh his/her memory in court.

The law relating to '*Witnesses Refreshing Memory In Court*' is examined commencing on page **295**.

Police officers are required to act *fairly* when investigating offences which *requires* compliance with:

[i] the *Constitution*; and

[ii] the *Judges' Rules*.

[8.14.2] Constitution

Section 10(2) of the *Constitution* states (in part):

> 'Every person who is charged with a criminal offence –
>
> (a) *shall* be presumed to be innocent until he is proved or has pleaded guilty;
>
> (b) *shall* be informed as soon as reasonably practicable, in detail and in a language that he understands, of the nature of the offence charged;
>
> (c) *shall* be given adequate time and facilities for the preparation of his defence;
>
> (d) *shall* be permitted to defend himself before the court in person or, at his own expense, by a legal representative of his own choice.' (emphasis added)

Refer also to the chapter titled '*Fundamental Rights & Freedoms*' which is examined commencing on page **144**.

[8.14.3] Judge's Rules

In *Joel Nanango* (Unrep. Criminal Appeal Case No. 4 of 1996) the Court of Appeal stated at page 2:

> 'The Judge's Rules of the English High Court, once applied in the Solomon Islands, were replaced by the rules issued by Daly CJ in the early 1980's. These rules are essentially the same as the English rules but have the added advantage of Pidgin translations of the various cautionary statements.'

See also: *Fred Osifelo, Peter Fitali & Gegeo Maefasia v R* (Unrep. Criminal Appeal Case No. 5 of 1995; per Savage and Palmer JJA at page 8).

However, in *Ben Tofola v R* (Unrep. Criminal Appeal No. 2 of 1993) the Court of Appeal held at page 8:

> 'A breach of the old Judge's Rules or the new Solomon Islands Judge's Rules *does not* automatically mean that a statement must be excluded; the Rules were, and are, rules of guidance, not of law, to assist the court in deciding upon the matter of fairness in the circumstances.' (emphasis added)

See also: *Billy Gatu v R* (Unrep. Criminal Case No. 93 of 1993; Palmer J; at page 4).

The following are the current Judge's Rules applicable to Solomon Islands which were issued by Daly CJ as '*Practice Direction No. 2 of 1982*':

> '**RULES BY CHIEF JUSTICE ON INTERVIEWS IN CONNECTION WITH CRIME**
>
> (These Rules replace the Judge's Rules of the English High Court Judges which have been applied up to now in Solomon Islands. The Rules have been produced after wide consultation.
>
> The pidgin version uses the spelling of words at present used in Solomon Islands in official publications. However should it be found that another form of spelling is more easy for police and suspects to understand then there is no objection to that spelling being used. The important thing is for the sense to be retained.)
>
> **Preliminary:**
>
> Courts want to be fair to police officers who have a hard job to do in bringing cases to court but also to be fair to persons who are suspected and accused of crimes. The law says that if a man says something it may be brought up in court as evidence. But the court must be satisfied that the man said what he did of his own free will, that is, that he was not forced or threatened or promised something and he knew what he was doing. The following rules should be used in relation to interviews as then the court can see that a man was given the right warnings.
>
> There are four stages in the interview of persons in connection with criminal offences. These rules set out what a police officer or other person in authority shall do at each stage so that a court can see that the interview was kept fair. If the interview is not fair because these Rules have not been kept or some other reason the court may refuse to hear evidence of what a person said.

ADMISSIBILITY OF EVIDENCE

Stage 1: Interviewing Witnesses

A police officer has a right to ask and record any questions or answers or statements when interviewing witnesses. Before the police officer has strong evidence that a crime has been committed, and that the person interviewed has committed it, all persons are interviewed as witnesses. ('Strong evidence' here means strong evidence that could prove before a court that the person is guilty).

Stage 2: Interviewing Suspects

When a police officer has strong evidence that a person has committed an offence he shall warn him to be careful of what he says. All warnings should be in a language easily understood by the person warned. All persons under arrest or in custody shall be so warned. This is so a court will know that the person was talking seriously and understood what he was doing. This warning given to suspects shall be –

(Suspect Interview Warning)

If you want to remain silent you may do so. But if you want to tell your side you think carefully about what you say because I shall write what you say down and may tell a court what you say if you go to court. Do you understand?

In Pidgin:

Sapos in laek fo stap kwaet no moa iu save duim. Bat sapos in laek fo tell aot stori blong iu iu tink hevi nao long wannem nao iu tellem. Bae mi ratem kam samting nao iu tellem. Sapos iu go long court bae maet me tellem disfella court toktok blong iu. In minim?

Questions and answers should be recorded either during the interview or very shortly after it and agreed by all police officers present. The date and time when questioning began and finished should be written down together with the names of all present.

The best thing is for the suspect to also agree and sign the record but this is not essential.

Stage 3: Taking of written statement from suspect

Again it is important that a person against whom there is strong evidence that could prove he has committed an offence should only make a written statement after warning of what he is doing.

A. If he wishes to make a written statement this warning shall be given: --

(Suspect Statement Invitation)

If you wish to remain silent you may do so. If you wish to, you may give a written statement. You can write it or I will. That is up to you. If you give a written statement it may be produced to a court if you go to court. Do you wish to give a written statement?

In Pidgin:

Sapos iu laek fo stap kwaet no moa in save duim. Sapos iu laekem iu save givem stori blong iu long paper. Iu save raetem kam seleva o mi save raetem. Hemi saed blong iu. Sapos iu givvem wan fela stori long paper ia bae misfella save taken disfella paper long court for showem long court ia sapos iu go long court. Waswe, iu laek fo givvem stori blong iu long paper?

B. If the suspect agrees and asks the police officer to write the statement it should start—

(Suspect Statement Start)

I agree to give this statement of my own free will. I want the policeman to write down my statement. I have been told I can remain silent. I know the statement may be used in court. It is true what I now put in the statement.

In Pidgin:

Mi seleva agree fo givvem stori blong mi long paper. Mi laekem policeman fo raetem kam stori blong mi. Olketa tellem mi finis mi save stap kwaet no moa. Mi save tu disfella paper ia might hem kamap long court. Stori bae me tellem hem turu wan.

(If the suspect writes the statement himself leave out the words "I want the policeman to write down my statement" or their pidgin equivalent)

This should be signed first or the suspect's mark affixed and the statement then written by the suspect or told by him to the police officer who writes it down in the words used.

C. The suspect should be given a chance to read the statement or it should be read to him. He should be asked if he wants to alter anything, correct anything or add anything. If he says he does, alterations should be made as requested or he should make the alterations himself. There should then be added the following certificate;

(Suspect Statement End)

'I understand what is in the statement which I have read (or "which has been read to me"). It is true.'

In Pidgin:

'Mi save gudfella wannem nao in saet long disfella paper ia. Mi readem finis (o "olketa readem hem kam long me finis"). Evri samting hem turu noa.'

This certificate should be signed by the suspect (or his mark affixed to it) and signed by any persons present. If the suspect refuses to sign or affix his mark, this fact should be noted on the statement. The date and time when the statement is finished should be recorded.

Stage 4: Charging of Accused Person

When a person is charged, the charge should be read to him. Afterwards he should be warned as follows:--

> "Do you wish to say anything about this offence which it is said you have committed? If so, I will write down what you say and the court may hear what you say. You may remain silent if you wish."
>
> **<u>In Pidgin</u>:**
>
> Iu laek fo tellem eni samting about disfella samting ia wannem olketa say iu duim? Sapos iu tellem eni samting bae mi raetem and bae mi save tellem disfella samting long court. Sapos iu laek fo stap kwaet no moa iu save duim."
>
> (Stage 4 is the formal charge when the case is ready to go to court. When a man is arrested he must be told why he is arrested but that is not the time when he is charged for this stage.)'

In *Fred Osifelo, Peter Fitali & Gegeo Maefasia v R* (Unrep. Criminal Appeal Case No. 5 of 1995) Savage and Palmer JJA, in their joint judgment, commented at page 8:

> 'For passing we express the view that it would be desirable that the Solomon Islands Judge's Rules be reviewed and the position made clear as to when persons in custody may properly be interrogated, and the nature of such interrogation.'

In *Joel Nanango* (Unrep. Criminal Appeal Case No. 4 of 1996) the Court of Appeal commented at page 3:

> 'To avoid any recurrence of this situation, consideration should be given by the Chief Justice to republishing the Solomon Island Rules as published by Daly CJ, modifying where appropriate the pidgin used to take account of current usage.'

In *Ben Tofola v R* (Unrep. Criminal Appeal No. 2 of 1993) the Court of Appeal held at page 8:

> '*It is recognized that Rule 8 of the old Judge's Rules, which would have been applicable in these circumstances, no longer formally applies as a part of the guidelines that judges use in deciding upon fairness*. The old Judge's Rules have been replaced by Rules made by the Chief Justice in, we understand, 1982. Those Rules, which for want of a better name may be referred to as the Solomon Islands Judge's Rules, do not contain an equivalent Rule to Rule 8 of the old Rules. *It is our view, however, that in considering whether a challenge to a confessional statement made in circumstances to which the old Rule 8 would have applied, a Judge is likely to have regard to the approach taken by the old Rule since its purpose, and the reasons for it, still remain as sound as ever.*' (emphasis added)

Rule 8 of the old '*Judges' Rules of England*' as set out in (1930) 24 QJP 150 is as follows:

> 'When two or more persons are charged with the same offence, and statements are taken separately from the persons charged, the police should not read these statements to the other person charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charges desires to make a statement in reply the usual caution should be administered.'

[8.15.4] Right To Silence

In *R v Sang* (1979) 69 CrAppR 282; [1980] AC 402 [[1979] 3 WLR 263; [1979] 2 AllER 1222; [1979] CrimLR 282] Lord Scarman stated at pages 308 & 455 respectively:

> '[The "right to silence" means] '"No man is to be compelled to incriminate himself; *nemo tenetur se ipsum prodere*."' [words in brackets added]

See also: *R v Brophy* (1981) 73 CrAppR 287, per Lord Fraser at page 291.

In *R v Nelson Keaviri, Julius Palmer, Patrick Mare Kilatu, Keto Hebala & Willie Zomoro* (Unrep. Criminal Case No. 20 of 1995 [Judgment]) Muria CJ held at pages 8 – 9:

> 'When one compares the rule as I outlined [, referring to the warning to be given before the '*Taking of written statement from suspect*',] with the warning given by the police to the accused one sees the obvious difference. There is a clear omission of the warning that the accused has a [r]ight to remain silent. This part of the warning is important in this country for three reasons. Firstly, it must be remembered that […] our Judges Rules were made after 1978 and clearly the fundamental rights of a person suspected of a criminal offence as […protected] under the *Constitution* must be borne in mind. Secondly the right to seek legal assistance is also that does not come easily in view of the limited manpower resources that we have. A suspect or an accused person must be given the opportunity to obtain legal advice or assistance. It is important therefore to advise a suspect of his right to remain silent in order that he be given the opportunity to make use of his constitutional right to seek the assistance of a lawyer. Thirdly, an accused person who is in official custody is in an environment which is not familiar to him. There may not be any threat or actual violence exerted upon him while in that custody. But the potential for such an occurrence in such an environment cannot be simply ignored as far as the person in custody is concerned. In such a situation he must still be given the opportunity to appreciate his right to remain silent despite in such an unfamiliar environment.
>
> *It was the warning given to these accused upon which the fate of their caution statement now turns. The breach of the Rule as I see it in this case is not just a defect in the wording of the warning but a fundamental omission in the warning itself which has an impact on the fundamental rights of the accused to remain silent. The interviewing officer or authority must ensure that such a right should not be overlooked. It is both in the interest of the suspect or accused as well as the interviewing authority.*
>
> […]
>
> This court however is required by law to ensure that the rights of an individual, including those accused of committing crimes are protected. This it will do by ensuring compliance with the rules and other legal provisions in this regard. In this case the provisions of the Judges Rules to which I have already referred had not been complied with. *That non compliance in this case clearly offends section 10 of the Constitution and is therefore fundamental and as such it renders the caution statements though admissible taken in respect of each of these accused liable to be excluded in the exercise of the courts discretion.* That discretion I now exercise and I rule that the caution statement of each of these accused be excluded.' (emphasis added) [words in brackets added]

In *Kim Kae Jun & the Crew of the Vessel No. 1 New Star v The Director of Public Prosecutions and the Commissioner of Police* (Unrep. Civil Case No. 423 of 1999) Palmer J stated at page 4:

> 'The right to remain silent is a constitutional right to which everyone in this country is entitled, citizens and non – citizens alike. Section 3 of the *Constitution* guarantees the protection of the right to life, liberty, security of the person and protection of the law. Although not specifically mentioned, that provision, in its broad application, must accord a right to silence to an accused, detained person or a suspected person who is under investigation. Once such person exercised his or her constitutional right to remain silent he or she cannot be compelled to give his statement to anyone unless otherwise ordered by the Court.'

In *Joel Nanango v R* (Unrep. Criminal Appeal Case No. 4 of 1996) the Court of Appeal held at page 2:

> 'Whilst the learned trial judge made no reference to the Solomon Islands rules on interviews he did refer to the former English position and did consider the implication of failing to inform the accused of the right to silence. Having applied the correct test, albeit without specific reference to the Solomon Islands rules, we cannot find any ground for interfering with the exercise of his discretion.'

In *R v Joel Nanango* (Unrep. Criminal Case No. 43 of 1996) Palmer J stated at page 2:

> 'It is also important to note that the right of the Accused to remain silent, is not dependent on the caution, and that a failure to give a caution is a fundamental breach of that right. The right to silence is separate and distinct to the rule of practice that a caution must be given. That right is a right which the Accused already possesses at common law and that all that a caution merely serves is to remind the Accused of that right […]. As a matter of practice he should be reminded of it, but where there is a failure to do so, the Court must look at the surrounding circumstances.'

[8.14.5] Voir Dire Proceedings

[A] General Principles

Whilst this section deals specifically with the conduct of a '*voir dire proceedings*', also referred to as a '*trial within a trial*', in order to determine the admissibility of '*confession evidence or caution statements*', such proceedings *may* also be held in order to determine:

[i] the '*competency of witnesses*', the law relating to which is examined commencing on page **281**; and

[ii] the '*qualifications of expert witnesses*'. The law relating to '*Opinion Evidence*' is examined commencing on page **202**.

See: *Wendo & others v R* (1946) 109 CLR 559 at page 573.

In *R v Treacy* (1944) 30 CrAppR 93; [1944] 2 AllER 229 Humphreys J, delivering the judgment of the Court, stated at pages 96 & 236 respectively:

> 'In our view, a statement made by a prisoner under arrest is either admissible or not admissible. If it is admissible, the proper course for the prosecution is to prove it, and if the statement is in writing to make it an exhibit, so that everybody knows what it is and everybody can inquire into it and act accordingly. If it is not admissible, nothing more ought to be heard of it. It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused in cross – examination.'

See also: *R v Rowson, Rowson & Keating* [1986] QB 174; [1985] 3 WLR 99; [1985] 2 AllER 539; (1985) 80 CrAppR 218; [1985] CrimLR 307.

In *MacPherson v R* (1981) 37 ALR 81 Gibbs CJ and Wilson J, of the High Court of Australia, in their joint judgment, stated at page 88:

> 'The judge presiding at a criminal trial is under an obligation to ensure that the trial is conducted fairly and in accordance with law. He must accordingly exclude evidence tendered against the accused which is not shown to be admissible. Particularly if the accused is unrepresented, once it appears that there is a real question of voluntariness of a confession tendered by the Crown, the judge must satisfy himself that the confession was voluntary, and if, as will usually be the case, this can only be done by holding a voir dire, he must proceed to hold a voir dire even if none is asked for. […] *We are not to be taken as suggesting that the trial judge must hold a voir dire on every occasion when a confession is tendered, or that he is bound to accede to an application made for a voir dire when there is nothing to suggest that a real question of voluntariness, unfairness or impropriety arises, for it does not advance the cause of justice to allow a voir dire which is used merely as a fishing expedition, or a means of testing in advance the evidence of the Crown witnesses.*' (emphasis added)

In *Lars, Da Silva & Kalanderian* (1991) 73 ACrimR 91 the New South Wales Court of Criminal Appeal held at page 114:

> 'There is no empty formality. No accused person has an unqualified right to have the [… Court] embark upon a voir dire hearing. Where it is sought to explore on the voir dire the admissibility of evidence, the accused must make application to the judge for such an examination, especially the issues to be explored, and show, to whatever extent the judge may reasonably require, that there is indeed a significant issue to be tried.' (emphasis added) [words in brackets added]

Although a Court may have ruled that a 'caution statement' was admissible during the course of a 'voir dire proceedings', it may re-consider the admissibility of the 'caution statement' if other evidence raises a doubt in that regard, see *R v Watson* [1980] 2 AllER 293.

See also: *R v Walshe* (1982) 74 CrAppR 85.

[B] Grounds To Challenge Admissibility

In *Ben Tofola v R* (Unrep. Criminal Appeal No. 2 of 1993) the Court of Appeal stated at pages 4 – 5:

> 'We think it will be helpful if we set out courses that may be acceptably followed when there is a challenge to the admissibility of an accused's statement. *The challenge may be either on the grounds of non – voluntariness or that in its discretion the Court should refuse to admit the statement as having been unfairly obtained or that its use would in some other way be unfair.*
>
> In the former case there is a *positive evidential burden* on the Crown to prove voluntariness; in the latter case the accused *must* be able to point to some material in the evidence, either that which had already been given, or which was called by either party on the voir dire, which will satisfy the Court that admitting the evidence would be unfair.' (emphasis added)

In the case of either:

[i] '*voluntariness*'; or

[ii] '*unfairness*',

the '*standard of proof*' on the prosecution is '*beyond reasonable doubt*', see *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J; at page 1).

In *Ben Tofola v R* (Unrep. Criminal Appeal No. 2 of 1993) the Court of Appeal stated at page 7:

> 'It has often been said it is the duty of the prosecution to call *all* the relevant evidence in carrying out its task of proving the voluntariness of the statement.' (emphasis added)

The prosecution should therefore call *all* witnesses to the obtaining of a '*caution statement*'.

See also: *Fred Osifelo, Peter Fitali & Gegeo Maefasia v R* (Unrep. Criminal Appeal Case No. 5 of 1995; Court of Appeal, per Savage and Palmer JJA; at page 11); *R v Warren Godfrey Motui* (Unrep. Criminal Case No. 20 of 1997; Palmer J; at page 1); *R v Nelson Keaviri, Julius Palmer, Patrick Mare Kilat, Keto Hebala & Willie Zomoro* (Unrep. Criminal Case No. 20 of 1995; Muria CJ; at page 1) & *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995; Palmer J; at page 1).

[C] Voluntariness

As regards, the issue of '*voluntariness*', a Court *may* admit a '*caution statement*' if it is satisfied by the prosecution '*beyond reasonable doubt*' that it was made '*voluntarily*', ie., out of the defendant's free will, and therefore *not* made out as a consequence of:

[i] any fear of prejudice;

[ii] hope of advantage; *or*

[iii] oppression.

What behaviour amounts to '*oppression*' has been the subject of judicial interpretation. It has been defined as 'the exercise of authority or power in a burdensome, harsh, or wrongful manner; unjust or cruel treatment of subjects, inferiors, etc., or the imposition of unreasonable or unjust burdens', see *R v Fulling* (1987) 85 CrAppR 136 [[1987] QB 426; [1987] 2 WLR 923; [1987] 2 AllER 65; [1987] CrimLR 492], per Lord Lane CJ at page 142.

In *R v Baefaka* [1983] SILR 26 Daly CJ stated at page 26 that the term '*oppression*' was interpreted by Sachs J in the *R v Priestley* (1967) 51 CrAppR 1 where he said:

> '"this word … imports something which tends to sap and has sapped the free will which must exist before a confession is voluntary. Whether or not there is oppression in the individual case depends upon many elements … they include such things as the length of time intervening between periods of questioning, whether the accused person has been given proper refreshment or not and the characteristics of the person who makes the statement. What may be oppressive as regards a child, an invalid old man, or somebody inexperienced in the ways of the world may turn out not to be oppressive when one finds that the accused person is a tough character and an experienced man of the world."'

It therefore follows that each case *must* be decided according to its own circumstances.

See also: *R v Prager* [1972] 1 WLR 260; [1972] 1 AllER 1114; (1972) 56 CrAppR 151 & *R v Isequilla* (1975) 60 CrAppR 52.

In *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997) Lungole - Awich J held at page 7:

> 'I may state the basic purpose of deciding whether to accept in evidence a prior statement made by the accused simply as to ensure that *the Court may admit such a statement only if it had been made out of accused's free will.* The law regarding admitting confession or admission made by accused outside court proceedings, still remains very much as stated by *Lord Summer in the case of Ibrahim –v- R [1914] AC 599/All ER 874.* At page 877, letter H, Lord Summer stated:
>
> "It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as Lord Hale."' (emphasis added)

In *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995) Palmer J stated at page 1:

> 'At the outset, it is important to make clear that the prosecution must prove beyond reasonable doubt that a voluntary statement had been made in the sense that "*it had not been obtained by fear of prejudice or hope of advantage exercised or held out by a person in authority*" (see *Ibrahim v R* (1914) AC 599). *The above classic principle had been extended and accepted in subsequent court decisions to include the requirement that prosecution must prove that the statement had not been obtained in an oppressive manner by force or by oppression; where such grounds are raised in evidence* […].' (emphasis added)

See also: *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J; at page 2); *R v Voisin* (1918) 13 CrAppR 89 at page 94 & *R v Rennie* (1982) 74 CrAppR 207; [1982] 1 AllER 385; [1982] 1 WLR 64; [1982] CrimLR 110.

In *R v Fulling* (*supra*) Lord Lane CJ, delivering the judgment of the Court of Appeal, stated at page 140:

> '*Prager* (1971) 56 CrAppR 151, [1972] 1 WLR 260, was another decision on Note (e) to the Judges' Rules 1964, which required that a statement by the defendant before being admitted in evidence must be proved to be "voluntary" in the sense that it has not been obtained by fear of prejudice or hope of advantage *or by oppression*. At p.161 and p.266 respectively in the judgment of the Court, delivered by Edmund Davies LJ appears the following passage:
>
> "As we have already indicated, the criticism directed in the present case against the police is that their interrogation constituted 'oppression'. This word appeared for the first time in the Judges' Rules of 1964, and it closely followed the observation of the Lord Chief Justice (Lord Parker) in *Callis v Gunn* (1963) 48 CrAppR 36, 40; [1964] 1 QB 495, 501, condemning confessions 'obtained in an oppressive manner.'"
>
> Edmund Davies LJ, having cited the relevant passage from *Priestly* (*supra*), went on as follows: "In an address to the Bentham Club in 1968 […] Lord MacDermott described *'oppressive questioning' as 'questioning which by its nature, duration, or other attendant circumstances (including the fact of custody) excites hopes (such as the hope of release) or fears, or so affects the mind of the subject that his will crumbles and he speaks when otherwise he would have stayed silent.'* We adopt these definitions or descriptions …."' (emphasis added)

In *Fred Osifelo, Peter Fitali & Gegeo Maefasia v R* (Unrep. Criminal Appeal Case No. 5 of 1995) Savage and Palmer JJA, in their joint judgment, stated at pages 7 – 8:

> 'We share, in general terms, the views expressed by the President in his dissenting judgment on this issue as to the undesirability of taking a statement over so long a time and starting at such an early hour of the morning as was the case here.'

Kirby P stated at page 3:

> 'In this jurisdiction, the common law has now been re-inforced by constitutional requirements. See *Constitution*, s 5(3). But it is important to remember the fundamental reason which lies behind this constitutional provision and its common law predecessor. People in official custody, especially for long periods, are at risk that their will be sapped and the exercise of their fundamental rights diminished, by the impact upon them of the unfamiliar and potentially oppressive environment in which they are held.'

The issue of 'a raised voice and limited bad language', though *not* condoned by the RSIP, *does not* necessarily amount to '*oppression*', see *R v Emmerson* (1991) 92 CrAppR 284; [1991] CrimLR 194; *R v Heaton* [1993] CrimLR 593; *R v Beales* [1991] CrimLR 118 & *R v Paris* (1993) 97 CrAppR 99.

Nor does the use of 'hostile and aggressive questioning', see *R v L* [1994] CrimLR 839.

See also: *R v Lokumana & Ihonoda* (Unrep. Criminal Case No. 32 of 1987; Ward CJ).

However, in *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997) Lungole - Awich J expressed his opinion that the issue of 'oppression' relates to the rule of 'unfairness', and not 'voluntariness'. At page 10 His Lordship held:

> 'The rule of *unfairness* applies to cautioned statement to police only in limited circumstances such as when there has been *oppression* to accused. Examples, are; when accused has been unnecessarily subjected to prolonged solitary confinement, denied food, asked to make statement when confronted with a co – accused. Unfairness is usually about admitting evidence which may have been obtained by unlawful means such as during unlawful search or arrest or trespassing and spying, by theft of the evidence from the accused, by obtaining evidence through untoward actions of agent provocateurs and many such others.' (emphasis added)

'To render a confession or admission admissible, the prosecution must prove affirmatively that no inducement relating to the charge or accusation was held out to the defendant to make it; a confession or admission must be excluded if it is made: (i) in consequence of (ii) any inducement (iii) of a temporal character; (iv) connected with the accusation or relating to the charge (v) held out to the accused by a person with some authority over the subject – matter of the charge or accusation', see *R v Joyce* (1957) 42 CrAppR 19 at page 22.

In *R v Smith* (1959) 43 CrAppR 121 Lord Parker CJ, delivering the judgment of the Court, held at pages 128 – 129:

> 'The court thinks that the principle to be adduced from the cases is really this: that if the threat or promise under which the first statement was made still persists when the second statement is made, then it is admissible. Only if the time limit between the two statements, the circumstances existing at the time and the caution are such that it can be said that the original threat or inducement has been dissipated can the second statement be admitted as a voluntary statement.'

See also: *R v Houghton* (1978) 68 CrAppR 197; *R v Challinor & Cross* (1983) 76 CrAppR 229; *Ajodha & others v The State* (1981) 73 CrAppR 129 & *R v Rennie* [1982] 1 WLR 64.

[D] Unfairness

As regards the issue of '*unfairness*', a Court *may* admit a '*caution statement*', if it is satisfied by the prosecution '*beyond reasonable doubt*' that it was *not* '*unfairly*' obtained, such as:

[i] failing to warn a defendant of his/her right to silence in compliance with the *Judges' Rules*. The law in that regard is examined commencing on page **218**; or

[ii] asking a defendant to reply to the contents of a co – defendant's 'caution statement'.

In *Ben Tofola v R* (Unrep. Criminal Appeal No. 2 of 1993) the Court of Appeal stated at pages 4 – 8:

> 'We think it will be helpful if we set out courses that may be acceptably followed when there is a challenge to the admissibility of an accused's statement. The challenge may be either on the grounds of non – voluntariness or *that in its discretion the Court should refuse to admit the statement as having been unfairly obtained or that its use would in some other way be unfair.* […]
>
> […]

> *It is recognized that Rule 8 of the old Judge's Rules, which would have been applicable in these circumstances, no longer formally applies as a part of the guidelines that judges use in deciding upon fairness*. The old Judge's Rules have been replaced by Rules made by the Chief Justice in, we understand, 1982. Those Rules, which for want of a better name may be referred to as the Solomon Islands Judge's Rules, do not contain an equivalent Rule to Rule 8 of the old Rules. It is our view, however, that in considering whether a challenge to a confessional statement made in circumstances to which the old Rule 8 would have applied, a Judge is likely to have regard to the approach taken by the old Rule since its purpose, and the reasons for it, still remain as sound as ever.' (emphasis added)

Rule 8 of the old '*Judges' Rules of England*' as set out in (1930) 24 QJP 150 is as follows:

> 'When two or more persons are charged with the same offence, and statements are taken separately from the persons charged, the police should not read these statements to the other person charged, but each of such persons should be furnished by the police with a copy of such statements and nothing should be said or done by the police to invite a reply. If the person charged desires to make a statement in reply the usual caution should be administered.'

In *Fred Osifelo, Peter Fitali & Gegeo Maefasia v R* (Unrep. Criminal Appeal Case No. 5 of 1995) Savage and Palmer JJA, in their joint judgement, stated at page 9:

> 'We add that in our view it would also be necessary for counsel to present argument to satisfy the Court that a breach of a section in the Constitution leads to otherwise admissible evidence being excluded; the Constitution itself certainly does not say so. No doubt it would ordinarily be the case that evidence obtained as a result of a breach of the Constitution would also be excluded by the judge on the basis that it was unfairly obtained but it may not follow that every breach of the Constitution necessarily results in evidentiary unfairness.'

A failure to warn a defendant of his/her right to remain silent in compliance with the *Judges' Rules may* result in a court ruling that a 'caution statement' was obtained '*unfairly*', see for example *R v Nelson Keaviri, Julius Palmer, Patrick Mare Kilatu, Keto Hebala & Willie Zomoro* (Unrep. Criminal Case No. 20 of 1995 [Judgment]; Muria CJ).

In *R v Warren Godfrey Motui* (Unrep. Criminal Case No. 20 of 1997) Palmer J stated at page 3:

> 'This brings me to deal with the alternative argument, that the statement should be excluded in any event on the grounds of unfairness. A number of matters have been raised in support of this ground. *The first of these is that the caution is defective or incomplete on the ground that it did not warn the "A" that what he says may be used in evidence against him in court. The evidence on this is quite clear. No such words were used. This in my respectful view is a material omission.* It is important as standard police procedure that an "A" is not only informed about his rights to remain silent but also that if he should select to give a statement that it would be taken down in writing and may be used in evidence against him. The rationale for such warning is that it makes the "A" aware of what may eventually happen to any statement that he might give and gives him the opportunity if he wants, to explain his involvement or part in the matter he had been arrested and charged for. One of the primary purposes of a statement obtained under caution is so that it may be used in evidence whether against the maker or in his favour. It is important therefore that the maker is aware of what may be done to his statement. It may be that had the "A" been aware that the statement may be used in evidence, may refuse or say something different, despite the fact that the statement may have been voluntarily given.' (emphasis added)

See also: *R v Gardner & Hancox* (1915) 11 CrAppR 265 & *R v Pilley* (1922) 16 CrAppR 138.

[E] Procedure

The procedure to be followed in a '*voir dire proceedings*' is as follows:

[i] The defence in the absence of the arresting or investigating officer should specify the grounds upon which the admissibility of the '*caution statement*' is being challenged. There is however *no* obligation to also state what would will be the response of the defendant if the '*caution statement*' is admitted, see *R v Keenan* [1990] 2 QB 54; (1990) 90 CrAppR 1 [[1989] 3 AllER 598; [1989] 3 WLR 1193; [1989] CrimLR 720] at pages 69 and 12 respectively; *Lars, Da Silva & Kalanderian* (1991) 73 ACrimR 91 & *R v Walshe* (1982) 74 CrAppR 85.

[ii] The Court rules whether there is a need to conduct a '*voir dire proceedings*'.

[iii] The prosecution should then call the principal interviewing officer, followed by such other witnesses in order to prove the admissibility of the '*caution statement*' '*beyond reasonable doubt*'. Each witness called should give evidence regarding the taking of the '*caution statement*'. Issues raised by the defence should be specifically addressed.

[iv] The defence is obliged to put its case to the prosecution witnesses, see *R v Davis* [1990] CrimLR 860.

[v] The defence *may* then call such witnesses as it thinks proper, including the defendant, on the issues raised on the challenge to admissibility of the '*caution statement*'.

[vi] The defence then addresses the Court followed by the prosecution regarding the admissibility of the '*caution statement*'.

[vii] The Court then rules on the admissibility of the '*caution statement*'.

During the course of the '*voir dire proceedings*' the Court *may* exercise its discretion and look at the '*caution statement*' in order to determine solely its admissibility.

In *Ben Tofolo v R* (Unrep. Criminal Appeal No. 2 of 1993) the Court of Appeal stated at pages 4 – 6:

> 'We think it will be helpful if we set out courses that may be acceptably followed when there is a challenge to the admissibility of an accused's statement. The challenge may be either on the grounds of non – voluntariness or that in its discretion the Court should refuse to admit the statement as having been unfairly obtained or that its use would in some other way be unfair. […]
>
> It may be that before the trial commences defence counsel advises the prosecution that a statement's admissibility is to be challenged, or it may not be disclosed until the Police officer who is to produce the statement gives evidence. In the former case Counsel may agree that the judge be asked to rule before the Crown makes the opening address the judge holds the voir dire and rules upon whether the statement is to be admitted or not. In the latter case, and this is probably the more usual case, once counsel indicates that the admissibility of the

statement is challenged evidence in chief stops, and evidence on the vior dire is taken. In either case the judge should require defence counsel, in the absence of the Police Officer concerned, to specify the grounds on which the statement is challenged. Counsel should then call the Police Officer and lead his evidence in relation to the statement and the grounds upon which its is challenged, which of course is subject to cross – examination.

Crown Counsel may then call such other witnesses as he thinks proper on the issues raised in the challenge of admissibility. When the crown has given its evidence the defence may call such witnesses as it thinks proper, including the accused, on the issues raised on the challenge to admissibility, which may very well not cover all the matters arising upon the charge the accused faces. Counsel then address and the court rules on whether the statement is admissible. After the ruling, the Police officer who was giving evidence when the admissibility of the statement was challenged resumes giving evidence at the point where the challenge was made.

[… I]t is our view that the appropriate course to follow is to treat the prosecution evidence on the voir dire as evidence on the trial, unless counsel object and obtain a ruling from the judge that it should not be so treated; and that the defence evidence be not so treated unless Defence Counsel agree that it should be so treated and also that the defence call the witness or witnesses concerned. The reason why the witness must also give evidence is that cross – examination on the voir dire is limited to matters relevant to the issues raised on the question of admissibility but if an accused or his witnesses give evidence as a part of the defence case they are open to be cross – examined on all issues. The accused should not be able to gain an advantage by calling evidence on a voir dire, use it as a part of the defence and yet avoid cross examination on all the issues.

At the conclusion of the Crown case the normal procedure is followed. Defence counsel opens his case knowing exactly what the evidence is against his client. The accused may or may not give evidence; if he does then Counsel and the judge may accept that the evidence he gave on the voir dire be treated as part of his evidence for the defence and he may add to it and be subject to cross – examination in the usual way. On the other hand if he does not give evidence then what he said on the voir dire should not be referred to by counsel and the judge should put it out of his consideration of the case. The same approach should apply to any other defence witnesses who gave evidence on the voir dire.' (emphasis added)

If the evidence that a defendant gives during the course of a '*voir dire proceedings*' is *not* to be treated as part of the defence case, the prosecution is *not* permitted to lead such evidence as part of its case, irrespective of the outcome of the admissibility of the '*caution statement*'. Furthermore, whilst a defendant may give evidence, he/she has the '*right to silence*' in respect of the substantive trial, see *Wong Kam – Ming v R* [1979] 2 WLR 81; (1979) 69 CrAppR 47; [1980] AC 247; [1979] CrimLR 168.

In *R v Nelson Keaviri, Julius Palmer, Patrick Mare Kilatu, Keto Hebala & Willie Zomoro* (Unrep. Criminal Case No. 20 of 1995 [Voir Dire Proceedings]) Muria CJ held at page 3:

'If Mr. Talasasa's contention is accepted it would mean that the fifth accused would continue to sit in court throughout the rest of the trial even though there was no evidence against him. I do not think any reasonable – minded tribunal would accept such a course of action. […] The only sensible course of action to take was to give him back his liberty and set him free. In other words, at the end of the prosecution evidence there was no evidence against the accused so the court, after hearing counsel for the prosecution and accused, dismissed the charges against the fifth accused and acquitted him, That in my view is in accordance with section 268(1) of *Criminal Procedure Code* […].

> […]
>
> In Solomon Islands, a criminal trial is conducted by a judge sitting alone. He deals with a voir dire hearing as a trial within a trial. The prosecution adduced all the evidence at the one and same trial. *It is therefore well within the power of the court to consider the question of the guilt of the accused after the prosecution concluded its evidence but before the conclusion of the voir dire if at that stage there was no evidence against that accused.* There is the added constitutional right consideration here. The accused is "presumed innocent until he is proved guilty or has pleaded guilty". Section 10(2) *Constitution.* This right to presumption of innocence cannot be overridden by a mere procedural technique [referring to section 268(1) of the *Criminal Procedure Code* (Ch. 7)] which adds nothing against the accused person who stands trial without any evidence against him.' (emphasis added)

Whilst section 268(1) of the *Criminal Procedure Code* (Ch. 7) is a procedure in a trial before the High Court, section 197 of that *Code* is in similar terms and states:

> 'If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused.'

The law relating to '*No Case To Answer Submissions*' is examined commencing on page **372**.

In *Uda Lili Gasika v The State* [1983] PNGLR 58 the Supreme Court amongst other issues considered whether a trial judge should read a record of interview or have it read to the Court prior to determining its admissibility.

At page 62 Andrew J, with whom the other members of the Court concurred, held:

> 'In my view, the better practice in most cases is for the trial judge to hear the evidence of both sides on the voir dire and then to consider whether there might be some assistance from looking at the document. He should invite submissions from counsel as to whether he should exercise that discretion or not.
>
> […]
>
> In my view however, it was incorrect for the trial judge to have ordered the record of interview to be read aloud to the court prior to deciding the question of its admissibility. It had not then become evidence and should only have been read by the trial judge in order to assist on the question of admissibility.'

See also: *R v Davis* [1990] CrimLR 860 *& R v Liverpool Juvenile Court, Ex parte R* [1987] 2 AllER 668; [1987] 3 WLR 224; [1988] 1 QB 86; (1988) 86 CrAppR 1; [1987] CrimLR 572.

[8.14.6] Truth As To Its Contents

In *Slatterie v Pooley* (1840) 151 ER 579 it was held per Parke V at page 581:

> 'What a party himself admits to be true may reasonably be presumed to be.'

ADMISSIBILITY OF EVIDENCE

In *Fred Osifelo, Peter Fitali & Gegeo Maefasia v R* (Unrep. Criminal Appeal Case No. 5 of 1995) Savage and Palmer JJA, in their joint judgment, stated at page 11:

> 'The next matter urged in the appellant's written submission was that the admission of the caution statements did not mean that their contents were true. In our view the learned Chief Justice was perfectly entitled to accept the contents as truthful and to draw further inferences from them and the other evidence […].'

In *R v Victor Tadakusu* (Unrep. Criminal Case No. 239 of 1999) Palmer J held at page 3:

> 'Prosecution's case hinges on this Court accepting that, what was told to Police in his statements contained the truth as opposed to what he had sought to say on oath before this Court. The question as to what weight to attach to those statements will depend on all the circumstances in which they were taken and is a matter for this Court to determine as tribunal of fact and law […].'

In *R v William Erieri* (Unrep. Criminal Case No. 3 of 1993) Palmer J held at pages 2 – 3:

> '*One of the key questions before this court is whether, I can rely on the cautioned statement as revealing the truth of what actually occurred.*
>
> In "Archbold Criminal Pleading Evidence & Practice", Forty – third Edition, Vol. 1, paragraph 15 – 56, the learned author stated:
>
> "The only question for the jury is the probative value and effect of the evidence."
>
> Further down, he stated: "The jury should take into consideration all the circumstances in which a confession was made including allegations of force, if it thinks they may be true, in assessing the probative value of a confession."
>
> In *Phipson on Evidence, Tenth Edition, page 328, paragraph 792*, the learned author stated:
>
> "Voluntary confessions are admissible in evidence because 'what a person having knowledge about the matter in issue says of it is itself relevant to the issue as evidence against him.' Such confessions may reasonably be taken to be true against the defendant himself."
>
> At page 329, the learned author continued: "An unambiguous confession is in general sufficient to warrant a conviction without corroboration." The case referred to in support of this proposition is the case of *R –v- Sykes, 8 CrAppR 233.* At page 236, Ridley J stated:
>
> "It would have been unsatisfactory to convict on the evidence had it not been assisted by the confession, and probably it would have been unsatisfactory if the conviction rested on the confessions only, without the circumstances which make it probable that the confessions were true."
>
> Further down the same page, the learned Judge stated:

> "The main point, however, is one independent of all these details, the question how far the jury could rely on these confessions. I think the Commissioner put it correctly; he said: 'A man may be convicted on his own confession alone; there is no law against it. The law is that if a man makes a free and voluntary confession which is direct and positive, and is properly proved, a jury may, if they think fit, convict him of any crime upon it. But seldom, if ever the necessity arises, because confessions can always be tested and examined, first by the police, and then by you and us in court, and the first question you ask when you are examining the confession of a man is, is there anything outside it to show it was true? Is it corroborated? Are the statements made in it of fact so far as we can test them true? was the prisoner a man who had the opportunity of committing the murder? Is his confession possible? Is it consistent with other facts which have been ascertained and which have been, as in this case, proved before us?"
>
> *I am satisfied that the above statements of Ridley J are also relevant and applicable to the facts surrounding the cautioned statement of this accused, and as to the question of what weight this court should attach to that statement.*' (emphasis added)

A Court is entitled to take into account the entirety of a '*caution statement*', ie., both admissions and defences raised, in order to determine the truth, see *R v Aziz* [1996] 1 AC 41; [1993] CrimLR 708; *R v Sharp (Colin)* [1988] 1 WLR 7; (1988) 86 CrAppR 274; [1985] 1 AllER 65; [1988] CrimLR 303; *Leung Kam-Kwok v R* (1985) 81 CrAppR 83 at page 91; *R v Donaldson & others* (1977) 64 CrAppR 59 at page 65; *R v Duncan* (1981) 73 CrAppR 359; [1981] CrimLR 560 & *R v Hamand* (1986) 82 CrAppR 65; [1985] CrimLR 375.

See also: *R v Patrick Asia & Frezer Lausalo* (Unrep. Criminal Case No. 45 of 1992; Palmer J; at page 3) & *R v Bathurst* (1968) 52 CrAppR 251; [1968] 2 WLR 1092; [1968] 2 QB 99; [1968] 1 AllER 1175.

[8.14.7] Adoption Of Caution Statements

[A] Adopted

A '*caution statement*' which is '*adopted*' by a defendant *may* be tendered as an '*exhibit*', see *R v Todd* (1981) 72 CrAppR 299; [1981] CrimLR 621.

Adoption *includes*:

[i] a defendant signing or attesting his/her mark as an acknowledgement as to the truth of its contents; and

[ii] a defendant who has read the statement or clearly demonstrates that the statement was read to him/her and stating that the statement is correct. In such circumstances that is considered equivalent to signing the statement, see *R v Fenlon* (1980) 71 CrAppR 307; [1980] CrimLR 573 & *R v Dillon* (1987) 85 CrAppR 29; [1984] CrimLR 100.

[B] Unadopted

An '*unadopted*' '*caution statement*' may *not* be tendered as an 'exhibit' by an arresting / investigating officer because such statements have *not* been '*adopted*' by a defendant, see *R v Dillon* (*supra*) & *R v Fenlon* (1980) 71 CrAppR 307; [1980] CrimLR 573.

However, the Arresting / Investigating Officer *may* use such statements to refresh his/her memory in Court. The law relating to "*Witnesses Refreshing Their Memory From Notes*" is examined commencing on page **295**. Obviously, the admissibility of an '*unadopted caution statement*' will be closely scrutinised by a Court, if a defendant makes any denials in respect to it.

See also: *R v Sekhon* (1987) 85 CrAppR 19; [1987] CrimLR 693; *The State v Goi Mubin* [1990] PNGLR 99 at pages 101 – 102 & *R v Virgo* (1978) 67 CrAppR 323; [1978] CrimLR 557.

[8.14.8] Use Of Interpreters

If the services of an interpreter is used to interpret a conversation with a defendant, he/she must be called to give evidence, see *R v Attard* (1958) 43 CrAppR 90. Furthermore, the interpreter should also initial or sign the caution statement so that it can be used by the interpreter to refresh his/her memory in court.

[8.15] Documentary Evidence

[8.15.1] Introduction

Section 43 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Where an Act provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence of the fact then, in any legal proceedings, the document is admissible in evidence and the fact shall be deemed to be established in the absence of evidence to the contrary.'

When seeking to tender any document, like any evidence, the prosecution or defence *must* consider its admissibility.

In *R v Gillespie & Simpson* (1967) 57 CrAppR 172 [[1967] CrimLR 238] Winn LJ, delivering the judgment of the Court, held at page 176:

> 'It is elementary, at any rate as our criminal law now stands, that it is not competent to prove a fact against an accused person by producing a document in which that fact is recorded without calling the maker of the document to say that what he wrote in the document represents a true statement of fact.'

That is subject to statutory exceptions such as the tendering of a certificate under the hand of a Government Chemist under section 42 of the *Dangerous Drugs Act* (Ch. 98). In such circumstances that person need not be called.

'It is a complete mistake to think that a document which is otherwise inadmissible can be made admissible in evidence simply because it is put to an accused person in cross – examination', see *R v Treacy* (1944) 30 CrAppR 93 [[1944] 2 AllER 229] at page 96.

The admissibility of secondary evidence, ie., copies of original documents, has been considered in the courts. If a copy or a copy of a copy is sought to be tendered there *must* be evidence so that it is proved to be a true copy of the original, see *R v Collins* (1960) 44 CrAppR 170 at page 174.

[8.15.2] Real Evidence

In order to seek to tender a document 'used' by a defendant as 'real' evidence, it is necessary to prove some connection between the defendant and the document, such as proving that the defendant:

[i] was the author;

[ii] was aware of the document;

[iii] had exercised some control over it; or

[iv] was some other way connected with it, see *R v Horne* [1992] CrimLR 304 & *Howey v Bradley* [1970] CrimLR 223.

The law relating to '*Handwriting Evidence*' is examined commencing on page **206**.

[8.15.3] Public Documents

A '*public document*' is a document that is produced by a public official for the use of the members of the public and admitted as proof of its contents as an exception to the '*hearsay rule*'.

Such documents may speak for itself, see *R v Patel* (1981) 73 CrAppR 117; [1981] 3 AllER 94; [1981] CrimLR 250.

In *Myers v Director of Public Prosecutions* (1964) 48 CrAppR 348 [[1965] AC 1001; [1964] 2 AllER 881; [1964] 3 WLR 145] Lord Hudson commented at pages 375 - 376:

> 'The law as declared in STURLA v FRECCIA (*supra*) was earlier formulated by Baron Parke in the leading case The IRISH SOCIETY v THE BISHOP OF DERRY (1846) 12 Cl. & F. 641. At p. 668 he used these words – "In public documents made for the information of the Crown, or all the King's subjects who may require the information they contain, the entry by a public officer is presumed to be true when it is made, and is for that reason receivable in all cases, whether the officer or his successor may be concerned in such cases or not."'

The important issue is that the public *must* have access to the document for it to be admissible as a '*public document*'.

The law relating to the admissibility of '*Hearsay Evidence*' is examined commencing on page **176**.

'*Public documents*' *include*:

[i] statutes;

[ii] parliamentary material;

[iii] registers of professional qualifications;

[iv] judicial documents; and

[v] public registers, such as births, deaths and marriages.

It is *not* normally necessary to produce the '*original*' of any '*public document*'.

Section 14 of the *Evidence Act* 1851 (UK) states:

> 'Whenever any book or other document is of such a *public nature* as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person now or hereafter having by law or by consent of parties authority to hear, receive, and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same […].' (emphasis added)

As regards, 'births, deaths and marriages' specifically, refer to the *Births, Deaths & Marriages Act* (Ch. 169).

[8.15.4] Private Documents

[A] Introduction

The issue of admissibility arises when seeking to tender a '*private document*' for the purpose of proving their content, is governed by the '*hearsay rule*'.

Therefore, the principle question to be asked is, 'For what purpose is the document sought to be admitted?' If the document is sought to be admitted so as to prove its contents, then it *must* fall within an exception to the '*hearsay rule*', otherwise a witness will need to be called who was responsible for the document.

The law relating to the admissibility of '*Hearsay Evidence*' is examined commencing on page **176**.

The following are however *exceptions* to that requirement:

[i] section 180 of the *Criminal Procedure Code* (Ch. 7) ['*Plans & Reports of Surveyors, Government Analysts & Geologists & Medical Practitioners*'] which is outlined on page **235**;

[ii] *'caution statements'*, the admissibility of which is examined commencing on page **211**;

[iii] the *Banker's Books Evidence Act* 1879 (UK) the admissibility of which is examined on page **234**; and

[iv] *'business records'*. In *Myers v Director of Public Prosecutions* (1964) 48 CrAppR 348 [[1965] AC 1001; [1964] 2 AllER 881; [1964] 3 WLR 145] Lord Morris stated at page 369:

> 'It has long been a part of our law that if a person in the regular course of his duty makes a contemporaneous record (which he could have no interest to make falsely) of some business matter which it was his duty to transact and if such person dies evidence of the record may be given to prove the performance of the transaction.

> The considerations that there was an obligation to perform the duty faithfully and that in matters of business routine, where no personal interest arises, accuracy can as a rule be expected, have been thought to give some reasonable guarantee of credibility.'

[B] Banker's Books Evidence Act

In *Myers v Director of Public Prosecutions* (*supra*) Lord Morris commented at page 370:

> 'The Bankers' Books Evidence Acts did more than merely avoid the need to have actual books in court.'

At page 375 Lord Hudson commented:

> '[I]n 1876 the first Bankers' Book Evidence Act was passed. The primary object of the Act (now replaced by the Bankers' Book Evidence Act, 1879), as the preamble shows, was to save the time of bankers and protect them and their customers from the inconvenience of producing the originals of their books in court, but bankers' books are private documents and it was necessary to provide by legislation that not only the original entries made in the usual and ordinary course of business but also authenticated copies should be admissible in evidence to prove the transactions recorded in the books.'

The relevant sections of the *Banker's Books Evidence Act* 1879 (UK) are as follows:

Section 3 states:

> 'Subject to the provisions of this Act, a copy of any entry in a banker's book shall in all legal proceedings be received as *prima facie evidence* of such entry, and of the matters, transactions, and accounts therein recorded.' (emphasis added)

Section 4 states:

> 'A copy of an entry in a banker's book shall *not* be received in evidence under this Act *unless* it be first *proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such* proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.
>
> Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices, this section shall have effect with the omission of the words "orally or".' (emphasis added)

Section 5 states:

> 'A copy of an entry in a banker's book shall *not* be received in evidence under this Act *unless* it be *further proved that the copy has been examined with the original entry and is correct.* Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits.

> Where the proceedings concerned are proceedings before a magistrates' court inquiring into an offence as examining justices, this section shall have effect with the omission of the words "orally or".' (emphasis added)

Section 6 states:

> 'A banker or officer of a bank shall *not*, *in any legal proceedings to which the bank is not a party*, be *compellable* to produce any banker's book the contents of which can be proved under this Act, or to appear as a witness to prove the matters, transactions, and accounts therein recorded, unless by order of a judge made for special cause.' (emphasis added)

Section 7 states:

> 'On the application of any party to a legal proceeding a court or judge *may* order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summonsing the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs.' (emphasis added)

See also: *R v Grossman* (1981) 73 CrAppR 302; [1981] CrimLR 396; *R v Dadson* (1983) 77 CrAppR 91; [1983] CrimLR 540; *R v Nottingham Justices, Ex parte Lynn* (1984) 79 CrAppR 238 & *Williams & others v Summerfield* (1972) 56 CrAppR 597; [1972] 3 WLR 131; [1972] 2 QB 513; [1972] 2 AllER 1334; [1972] CrimLR 424.

[8.16] Plans & Reports

Section 180 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) Any document purporting to be a plan made by a *surveyor* or a report under the hand of any *analyst or geologist* in the employment of the Government or of a *medical practitioner* upon any matter or thing submitted to him for examination or analysis and report may be used as evidence in any inquiry, trial or other proceeding under this Code.
>
> (2) The court may presume that the signature to any such document is genuine and that the person signing it held the qualification or office which he professed to hold at the time when he signed it.
>
> (3) When any document is so used, the court may, if it thinks fit, summon the surveyor, analyst, geologist or medical practitioner, as the case may be, and examine him as to the subject – matter of such document.' (emphasis added)

See also: section 43 of the *Interpretation & General Provisions Act* (Ch. 85) & section 85 of the *Liquor Act* (Ch 144).

[8.17] Certificates

Section 43 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Where an Act provides that a document is evidence of a fact without anything in the context to indicate that the document is conclusive evidence of the fact then, in any legal proceedings, the document is admissible in evidence and the fact shall be deemed to be established in the absence of evidence to the contrary.'

A certificate may be admissible provided there is a statutory provision which governs its admissibility. For example, see section 74 of the *Traffic Act* (Ch. 131).

[8.18] Tape Recordings

A tape recording is admissible provided:

[i] the accuracy of the recording can be proved;

[ii] the voices recorded are properly identified; and

[iii] the evidence is relevant and otherwise admissible, see *R v Ali & Hussain* (1965) 49 CrAppR 230 [[1965] 2 AllER 464; [1966] 1 QB 688; [1965] 3 WLR 229], per Marshall J at page 238.

[8.19] Conversations

[8.19.1] Between Prisoners

Conversations between prisoners overheard by a police officer is admissible, subject to the discretion of the Court, see *R v Stewart* (1970) 54 CrAppR 210.

Therefore, an admission made by a defendant is such circumstances may be given the police officer who overheard the conversation.

[8.18.2] Between Spouses

Conversations between a defendant spouse and his/her spouse overheard by a police officer is admissible, subject to the discretion of the court, see *R v Keeton* (1970) 54 CrAppR 267; [1970] CrimLR 402.

Therefore, an admission made by a defendant spouse in such circumstances may be given by the police officer who overheard the conversation.

[8.20] Exhibits

[8.20.1] Checking Procedure

Prosecutors are *expected* to:

[i] check the admissibility of all proposed exhibits;

[ii] communicate with Arresting / Investigating Officers to check the availability of exhibits;

[iii] ensure that the exhibits are able to be produced at Court; and

[iv] check to ensure that all exhibits are being produced by an appropriate witness.

In all statements, including police officers, witnesses should state immediately after referring to an exhibit:

> 'I now seek to produce [identify the exhibit] to the Court.
>
> TENDERED AND MARKED AS EXHIBIT No. ……'

Exhibits should be produced chronologically.

When an exhibit such as clothing is being produced, that property *must* be checked to ensure that it has *not* been cleaned after the commission of the offence. If it has then that should be explained to the court by an appropriate witness.

[8.20.2] Production In Court

Whilst witnesses can produce property to a Court, it is the Court that determines the admissibility of the property being produced. It is therefore essential that prosecutors understand that '*property*' can be tendered and admitted by a Court and marked either:

[i] as an '*exhibit*'; or

[ii] for '*identification purposes only*'.

All '*property*' *must* be formally tendered by the prosecutor in order for it to become an '*exhibit*'. If it has *not* been formally tendered, it should *not* be considered as part of the prosecution case, see *R v Ben Tofola* (Unrep. Criminal Case No. 20 of 1992; Palmer J; at page 9).

Property marked for '*identification purposes only*' is *not* an exhibit and therefore, *can not* be relied on by the prosecution.

The Arresting / Investigating Officer should be the first witness called because that officer can in most cases produce most, if not all, of the exhibits to the Court. If however the Arresting / Investigating Officer is only producing 'property' which he/she has been told about by a witness and not identified by the defendant, then such property can only be produced for '*identification purposes only*'.

For example, in offences involving violence:

[i] a weapon may be produced by a complainant and it can be tendered and marked as an '*exhibit*' because the complainant may identify it as being the weapon used during the commission of the offence in question; however,

[ii] the arresting or investigating officer, if he/she is called before the complainant, can only produce the weapon for '*identification purposes only*', if he/she did *not* observe the offence, *unless* the defendant has identified the weapon as the weapon used to that officer.

Otherwise, the prosecution would be relying on inadmissible evidence known as '*hearsay evidence*' because the arresting or investigating officer would have to rely on what he/she was told by the complainant.

The law relating to '*Hearsay Evidence*' is examined commencing on page **176**.

The following series of questions should be used to tender an '*exhibit*' in court:

[i] "Witness please look at this."

[ii] "Are you able to identify it?"

[iii] "How are you able to identify it?"

[iv] "Please identify it to the Court?"

[v] "Your Worship / Lordship I seek to tender it as an exhibit."

See also: *R v Waterfield* [1975] 2 AllER 40; [1975] 1 WLR 711; (1975) 60 CrAppR 296.

[8.20.3] Continuity Of Possession

If any exhibit is to be admissible then the '*continuity of its possession*' *must* be proven. Therefore, every person who had possession of an exhibit from the time of the commission of the offence until its production in Court *must* be called to give evidence. Obviously, if a number of police officers had possession of an exhibit at the same time then only one of those officers would need to be called to give that evidence.

[8.20.4] Missing Exhibits

If an '*exhibit*' is *not* tendered then an explanation *must* be given for the non – production by a witness. Evidence may be given by person/s who saw the '*exhibit*' before it went missing of what it looked like and what was done to locate it.

See: *R v Peter Sade Kwaimanisi* (Unrep. Criminal Case No. 42 of 1994; Palmer J; at page 4); *Smakowski & Zestfair Ltd v Westminster City Council* [1990] CrimLR 419; *Hocking v Ahlquist Brothers Ltd* [1944] 1 KB 120; [1943] 2 AllER 722; *R v Robson & Harris* [1972] 2 AllER 699; [1972] 1 WLR 651; [1972] CrimLR 316; *Kajala v Noble* (1982) 75 CrAppR 149; *R v Wayte* (1983) 76 CrAppR 110; *Butera v Director of Public Prosecutions (Vic.)* (1987) 62 ALJR 7; *Samuels v Stubbs* (1972) 4 SASR 200 & *Grayden* (1988) 36 ACrimR 163.

[8.21] Documentary Aids

Documentary aids, such as charts, are *not* to be regarded as evidence, but purely as tools which assist the Court in its task of understanding the evidence.

In *Butera v Director of Public Prosecutions (Vic.)* (1987) 62 ALJR 7 it was held by the High Court of Australia, per Mason CJ, Brennan and Deane JJ, in their joint judgment, at page 11:

> '*The general rule that witnesses must give their evidence orally is not without exception*. In Smith v The Queen (1970) 121 CLR 572, a chart has been prepared by a witness to explain complicated business transactions. The chart was admitted in evidence, though what it showed could have been described – albeit laboriously – in oral evidence. This Court (at 577) agreed with the view expressed by the Court of Criminal Appeal … that the chart was rightly admitted:
>
> "The chart was nothing but a convenient record of a series of highly complicated cheque transactions which had been proved by other evidence, and was likely to be of considerable assistance to the jury. Had they all been accountants, doubtless after considerable time they could have prepared such a chart for themselves. The use of such charts and other time – saving devices in complicated trials of this kind is a usual and desirable procedure and is encouraged by the court."
>
> *The practice of requiring witnesses to give their evidence orally should not be waived lightly, especially if there be a risk that writing will give undue weight to that evidence to the disadvantage of the accused person. But the practice is not immutable*.' (emphasis added)

It was further held per Dawson J at page 14:

> '*To admit secondary evidence in the form of a transcript in these circumstances is no more than an application of the well – established principle that when evidence is voluminous or complex, then abstracts, schedules or charts, proved by a suitably qualified person, may be admitted in evidence as an aid to comprehension*.' (emphasis added)

See also: *R v Simmonds* [1969] 1 QB 685; (1967) 51 CrAppR 316; [1967] 3 WLR 367; [1967] 2 AllER 399; *Williams v R* [1982] TasSR 266; *Walsh v Wilcox* [1976] WAR 62; *R v Tucker & another* [1907] SALR 30; *R v Ireland* (1970) 126 CLR 321 at page 336 & *Smith v R* (1970) 121 CLR 572 at page 577.

ADMISSIBILITY OF EVIDENCE

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POWER TO ARREST

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POWER TO ARREST

[9.0] Introduction

[9.0.1] Police Officers

Under section 21(3) of the *Police Act* (Ch.110), a police officer has a duty 'to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists'.

In that regard, police officers *may* arrest a defendant *with or without a warrant*, subject to:

[i] the provisions of section 5 of the *Constitution*;

[ii] the relevant sections of the *Criminal Procedure Code* (Ch. 7); and

[iii] the common law.

'Arrest is a serious interference with personal liberty. It is not something to be taken lightly […]', as commented by Ward CJ in *Peter Hou v The Attorney – General* [1990] SILR 88 at page 90.

An '*arrest*' should only be made if it is the arresting officer's intention to prosecute the offender for an offence, see *R v Chalkley & Jeffries* [1998] 2 AllER 155; [1998] 2 CrAppR 79; [1999] CrimLR 215

The law relating to the '*Decision To Institute Proceedings*' is examined commencing on page **110**.

If a warrant has been lost or destroyed, a duplicate warrant *may* be issued, see *R v Leish Justices, Ex parte Kara* (1981) CrimLR 628.

[9.0.2] Private Persons

The following sections of the *Criminal Procedure Code* (Ch. 7) relates to an '*arrest*' by a '*private person*':

Section 21 states:

> '(1) Any *private person* may arrest any person who is in his view commits a cognisable offence, or whom he reasonably suspects of having committed a felony provided a felony has been committed.
>
> (2) Persons found committing any offence involving injury to property may be arrested without a warrant by the owner of the property or his servants or persons authorised by him.' (emphasis added)

Section 22 states:

> '(1) Any *private person* arresting any other person without a warrant *shall* without unnecessary delay [t]ake over the person so arrested to a police officer, or in the absence of a police officer shall take such person to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 18, a police officer *shall* re – arrest him.

(3) If there is reason to believe that he has committed a non – cognisable offence, and he refuses on the demand of a police officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he *shall* be dealt with under the provisions of section 19. If there is no sufficient reason to believe that he has committed any offence he *shall* be at once released.' (emphasis added)

A '*Cognisable Offence*' *means* any felony and any other offence for which a police officer may arrest under any law for the time being in force arrest without warrant', see section 2 of the *Criminal Procedure Code* (Ch. 7).

See: *Walters v WH Smith & Son Ltd* [1911 – 13] AllER Rep 170; [1914] 1 KB 595.

Refer also to the subsection titled '*Sufficiency Of Evidence Test*' commencing on page **115**.

[9.1] Constitution

Section 5 of the *Constitution* states (in part):

'(1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say –

[…]

(d) in execution of the order of a court made to secure the fulfilment of any obligation imposed on him by law;

(e) for the purpose of bringing him before a court in execution of the order of a court;

(f) upon *reasonable suspicion* of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands;

[…]

(2) Any person who is arrested or detained shall be informed as soon as reasonably practicable, and in a language that he understands, of the reasons for his arrest or detention.

(3) Any person who is arrested or detained --

(a) for the purpose of bringing him before a court in execution of the order of a court; or

(b) upon *reasonable suspicion* of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands, and *who is not released*, shall be brought without undue delay before a court; […].' (emphasis added)

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Section 10(1)(b) of the *Constitution* states:

> 'Every person who is charged with a criminal offence --
>
> (b) shall be informed as soon as reasonably practicable, in detail and in a language that he understands, of the nature of the offence charged.'

In *Baia Takoa v R* (Unrep. Criminal Appeal Case No. 16 of 1998) Palmer J stated at page 2:

> 'The starting point [when considering 'powers of arrest'] *must* be section 5 of the Constitution. This deals with the protection of the right of personal liberty, but indirectly dealing with the situation where a person's liberty may be deprived. Paragraph (f) is the relevant provision which prescribes when a person's liberty may be deprived.
>
> […]
>
> Section 5(1) makes it clear that a person's liberty is to be deprived only where it is authorized by law. That law is to apply in such circumstances as set out in paragraph (f). It is important to appreciate that section 5 of the Constitution sets out the general structure or framework in which a person's liberty may be deprived. To get into specifics the law in application has to be identified. One of these laws is the Criminal Procedure Code (CPC).' (emphasis added) [words in brackets added]

In *Billy Gatu v R* (Unrep. Criminal Case No. 93 of 1993) Palmer J stated at pages 1 – 2:

> 'The key words are "*shall be informed as soon as reasonably practicable*" [in section 5(2) of the *Constitution*]. The reason why it is important to inform the accused why he has been arrested is because, the lawfulness of that arrest and subsequent detention is dependent on the reasons for the arrest. An arrest and subsequent detention of any person can only be effected in accordance to law. Section 5(1)(f) of the Constitution allows a police officer to arrest and detain an accused person "*upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands*".' (emphasis added) [words in brackets added]

At the time of the '*arrest*', a police officer need *not* have to know or be able to specify the specific details of the particular offence for which he/she had in mind, see *Chapman v Director of Public Prosecutions* (1989) 89 CrAppR 190; [1988] CrimLR 843.

At the time of advising the defendant the reason he/she was arrested in compliance with section 5(2) of the *Constitution*, the arresting officer is *not* obliged to use precise or technical language regarding the offence. The officer needs only to advise the defendant the reason why he/she was arrested by outlining what the defendant did or did not do that was illegal, see *Abbassay & another v Commissioner of Police of the Metropolis & others* [1990] 1 WLR 385; [1990] 1 AllER 193; (1990) 90 CrAppR 250.

If such information is *not* provided at the time of arrest, it is to be provided '*as soon as reasonably practicable*' at the police station, see *R v Kulynycz* [1970] 3 AllER 881; [1970] 3 WLR 1029; [1971] 1 QB 367; (1971) 55 CrAppR 34.

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In *Christie v Leachinsky* [1947] AC 573 Lord Simon stated at page 587:

> '(1) If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized. (2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment. (3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained. (4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints of freedom if he knows in substance the reason why it is claimed that this restraint should be imposed. (5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg., by immediate counter – attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter.'

See also: *Brazil v Chief Constable of Surrey* (1983) 77 CrAppR 237.

In *R v Smith (Joe)* [2001] 2 CrAppR 1 [[2001] 1 WLR 1031] Otton LJ, delivering the judgment of the Court of Appeal, stated at page 5:

> '*To establish a reasonable suspicion it is not necessary for a police officer to possess evidence which amounts to a prima facie case*: see *Dunbell v Roberts* [1944] 1 AllER 326.
>
> In *Hussien v Chong Fook Kam* [1970] AC 942, PC, Lord Devlin in the Privy Council stated as follows at p. 948:
>
> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, 'I suspect but I cannot prove'. Suspicion arises at or near the starting – point of an investigation of which the obtaining of prima facie proof is the end."
>
> In *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286, Lord Steyn at 293C stated: "… information from an informer or a tip-off from a member of the public may be enough."
>
> Thus there is only a limited amount that has to be proved in order to establish a reasonable suspicion. This is an objective test and not a subjective test. […]
>
> Lord Hope in *O'Hara* adopted with approval the dicta of Sir Frederick Lawton in *Castorina v Chief Constable of Surrey* (The Times, June 15, 1988):
>
> "suspicion by itself, however, will not justify an arrest. There must be a factual basis for it of a kind which a court would adjudge to be reasonable."
>
> Other authority shows that suspicion can take into account matters which could not be adduced at all, for example, hearsay evidence.' (emphasis added)

POWER TO ARREST

The law relating to:

- '*Fundamental Rights & Freedoms*' is examined commencing on page **144**; and
- '*Bail*' is examined commencing on page **378**.

See also: *Lewis v Chief Constable of South Wales Constabulary* [1991] 1 AllER 206; *R v Brosch* [1988] CrimLR 743; *Chapman v Director of Public Prosecutions* (1989) 89 CrAppR 190; [1988] CrimLR 843 & *Director of Public Prosecutions v Hawkins* [1988] 1 WLR 1166; [1988] 3 AllER 673; [1988] RTR 380; (1989) 88 CrAppR 166; [1989] CrimLR 741.

[9.2] Arrest Generally

Section 10 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) In making an arrest the police officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.
>
> (2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police officer or other person may use all means necessary to effect the arrest:
>
> *Provided* that nothing in this section contained shall be deemed to justify the use of greater force than was reasonable in the particular circumstances in which it was employed or was necessary for the apprehension of the offender.' (emphasis added)

In *Alderson v Booth* (1969) 53 CrAppR 301 [[1969] 2 WLR 1252; [1969] 2 QB 216; [1969] 2 AllER 271] Lord Parker CJ, with whom Blain & Donaldson JJ concurred, at pages 303 – 304:

> 'There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law. There may be arrest by mere words, by saying "I arrest you" without any touching, provided of course that the defendant submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form of words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion. […] I would only say this, that if what I have said is correct in law, it is advisable that police officers should use some very clear words to bring home to a person that he is under compulsion.'

The only obligation in arresting a defendant is to make it plain to him/her by what is said and done that he/she is no longer free, see *R v Inwood* (1973) 57 CrAppR 529 at page 536.

Section 13 of the *Criminal Procedure Code* (Ch. 7) states:

> 'The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.'

[9.3] Enter To Arrest

Section 11 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) If any person acting under a warrant of arrest, or any police officer having authority to arrest, has reason to believe that the person to be arrested has entered into or is within any place, the person residing in or being in charge of such place, *shall, on demand on such person acting as aforesaid or such police officer, allow him free ingress thereto and afford all reasonable facilities for a search therein.*
>
> (2) *If ingress to such place cannot be obtained under subsection (1)*, it shall be lawful in any case for a person acting under a warrant, and, in any case in which a warrant may issue but cannot be obtained without affording the person to be arrested an opportunity to escape, for a police officer to enter such place and search therein, and, in order to effect an entrance into such place, to break open any outer or inner door to be arrested or of any other person, or otherwise effect entry into such house or place, if after notification of his authority and purpose and demand of admittance duly made he cannot otherwise obtain admittance.' (emphasis added)

Section 12 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Any police officer or other person authorised to make an arrest may break out of any house or other place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.'

In *McLorie v Oxford* (1982) 75 CrAppR 137 Donaldson LJ, delivering the judgment of the Court, stated at page 142:

> 'The common law power of entry to effect an arrest without warrant appears to be and to always have been extremely limited. In *Swales v Cox* (1981) 72 CrAppR 171; [1981] 1 AllER 1115 it was conceded to be limited to four cases only, namely, in order to prevent murder, if a felony had been committed and the felon followed to a house, if a felony was about to be committed and would be committed unless prevented and if an offender was running away from an affray. Mr Morland does not accept that this list is exhaustive, but he has been unable to produce any authority to suggest that it is or even was more extensive.'

See also: *R v Richards & Leeming* (1985) 81 CrAppR 125.

Prior to entering a house, whether by force or otherwise, a police officer should make a formal request to enter, see *Swales v Cox* (1981) 72 CrAppR 171; [1981] 1 AllER 1115.

See also: *Kynaston v Director of Public Prosecutions; Heron (Joseph) v Director of Public Prosecutions; Heron (Tracey) v Director of Public Prosecutions* (1988) 87 CrAppR 200.

[9.4] Arrest Without Warrant

Section 18 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Any police officer may, without an order from a Magistrate and *without a warrant*, arrest –
>
> (a) any person whom he *suspects upon reasonable grounds* of having committed a *cognisable offence*;

(b) any person who *commits any offence in his presence*;

(c) any person who *obstructs* a police officer while in the execution of his duty, or who has escaped or attempts to escape from lawful custody;

(d) any person in whose possession anything is found which may reasonably be suspected to be stolen property or who may reasonably be suspected of having committed an offence with reference to such thing;

(e) any person whom he finds in any highway, yard or other place during the night and whom he suspects upon *reasonable grounds* of having committed or being about to commit a felony;

(f) any person having in his possession without lawful excuse the burden of proving which excuse shall lie on such person, any implement of housebreaking;

(g) any person for whom he has reasonable cause to believe a warrant of arrest has been issued;

(h) any released convict committing a breach of any provision prescribed by section 40 of the Penal Code [‘*Police Supervision*’] or any rule made thereunder.’ (emphasis added) [words in brackets added]

As defined in section 2 of the *Criminal Procedure Code* (Ch. 7) a ‘*Cognisable Offence*’ ‘*means* any felony and any other offence for which a police officer may under any law for the time being in force arrest without warrant’. (emphasis added)

As defined in section 4 of the *Penal Code* (Ch. 26) a ‘*Felony*‘ ‘*means* an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with imprisonment for three years or more’. (emphasis added)

In *Baia Takoa v R* (Unrep. Criminal Appeal Case No. 16 of 1998) Palmer J stated at page 3:

‘The Criminal Procedure Code is one of other Acts which deal directly with the situation described in paragraph 5(1)(f) of the Constitution. It prescribes the situation in which a police officer may arrest without a warrant upon reasonable suspicion or where an offence is about to be committed. Of particular relevance are paragraphs (a) and (b) of section 18.

These read as follows:

“*Any police officer may, without an order from a Magistrate and without a warrant, arrest –*

(a) *any person whom he suspects upon reasonable grounds of having committed a cognisable offence*;

(b) *any person who commits any offence in his presence; ….*”

Paragraph (a) above is confined to cognisable offences.

[…]

Paragraph 18(c) of the CPC:

> One of the submissions raised against the appeal by learned Counsel Waleanisia was that the Police had power in any event under paragraph 18(c) to effect an arrest without a warrant; in that the Appellant had obstructed the police officers when effecting the arrest. Unfortunately, this overlooked the fact that if the arrest was invalid, then the police officers may be considered as not acting in the line of duty at the said time.
>
> *In other words, if the police officers do not have power to effect an arrest, it may be argued that in attempting to do so, they were not acting in the execution of their duty. The accused therefore had not committed any offence when resisting arrest.*' (emphasis added)

If there is no power to '*arrest without warrant*' then an application *must* be made for the issue of an order from a Court which will be either: [i] a warrant of arrest; or [ii] a summons, under the provisions of section 77 of the *Criminal Procedure Code* (Ch. 7), see *R v Lionel Rifasia* (Unrep. Criminal Case No. 45 of 1976; Davis CJ; at page 3).

In *O'Hara v Chief Constable of the Royal Ulster Constabulary* [1997] 1 AllER 129 [[1997] AC 286] the House of Lords examined the requirements of legislative provisions which contain the wording such as, 'Any police officer who suspects on reasonable grounds …'

Lord Steyn stated at page 134:

> '(1) In order to have a reasonable suspicion the constable need not have evidence amounting to a prima facie case. Ex hypothesi one is considering a preliminary stage of the investigation and information from an informer or a tip – off from a member of the public may be enough […]. (2) Hearsay information may therefore afford a constable reasonable grounds to arrest. Such information may come from other officers […]. (3) The information which causes the constable to be suspicious of the individual must be in existence to the knowledge of the police officer at the time he makes the arrest. (4) The executive discretion to arrest or not […] vests in the constable, who is engaged on the decision to arrest or not, and not his superior officers.'

Lord Hope stated at pages 138 – 139:

> 'My Lords, the test […] is a simple but practical one. It relates entirely to what is in the mind of the arresting officer when the power is exercised. In part it is a subjective test, because he must have formed a genuine suspicion in his own mind that the person has been concerned in (the commission of the offence suspected). In part also it is an objective one, because there must also be reasonable grounds for the suspicion which he has formed. But the application of the objective test does not require the court to look beyond what was in the mind of the arresting officer. It is the grounds which were in his mind at the time which must be found to be reasonable grounds for the suspicion which he has formed. *All that the objective test requires is that these grounds be examined objectively and that they be judged at the time when the power was exercised.*
>
> *This means that the point does not depend on whether the arresting officer himself thought at that time that they were reasonable. The question is whether a reasonable man would be of that opinion, having regard to the information which was in the mind of the arresting officer. It is the arresting officer's own account of the information which he had which matters, not what was observed by or known to anyone else.*' (emphasis added)

As regards the issuance of warrants, see sections 91 – 96 of the *Criminal Procedure Code* (Ch. 7).

POWER TO ARREST

The law relating to:

- '*Bail*' is examined commencing on page **378**; and
- '*Protection Of Identity Of Informers*' is examined commencing on page **130**.

[9.5] Common Law Powers Of Arrest

In *McLorie v Oxford* (1982) 75 CrAppR 137 Donaldson LJ, delivering the judgment of the Court, stated at page 142:

> 'The common law power of entry to effect an arrest without warrant appears to be and to always have been extremely limited. In *Swales v Cox* (1981) 72 CrAppR 171; [1981] 1 AllER 1115 it was conceded to be limited to four cases only, namely, in order to prevent murder, if a felony had been committed and the felon followed to a house, if a felony was about to be committed and would be committed unless prevented and if an offender was running away from an affray. Mr Morland does not accept that this list is exhaustive, but he has been unable to produce any authority to suggest that it is or even was more extensive.'

See also: *R v Richards & Leeming* (1985) 81 CrAppR 125.

In *Baia Takoa v R* (Unrep. Criminal Appeal Case No. 16 of 1998) Palmer J stated at pages 4 – 5:

> 'Common law powers of arrest form part of the laws of Solomon Islands unless "*(a) they are inconsistent with this Constitution or any Act of Parliament; (b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time; or (c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.*"
>
> [See paragraph (2) of Schedule 3 to the *Constitution*].
>
> What are those common law powers of arrest? These include powers to arrest without warrant on a reasonable charge of felony or reasonable suspicion of felony […]. See also *Kenny's Outlines of Criminal Law 17th Edition by J.W.C. Turner* at paragraph 698, the learned Author states:
>
> "*Like a private person he may arrest anyone who commits, in his presence, a treason, or felony, or dangerous wounding, and may break doors or use fatal violence if necessary.*"
>
> In *Russell on Crime 11th Edition* at page 733, the same view is expressed; that at common law a constable may arrest a person whom he finds committing a felony, or upon reasonable suspicion that a felony has been committed by the person arrested, although no felony has, in fact, been committed.
>
> The views expressed are all consistent with and have in fact been encapsulated under section 18 of the CPC; in particular paragraphs (a) and (b).
>
> The learned Author in Russell on Crime (ibid) however, went on to make an interesting observation which I think is quite relevant to this case. At page 733, the learned Author states:

"*A constable is not as a general rule entitled to arrest for misdemeanour after it has been committed, whether the offence be fraud, breach of the peace, etc., nor to arrest on suspicion of misdemeanour.*

He may arrest any person who in his presence commits a misdemeanour or breach of the peace if the arrest is effected at the time when, or immediately after, the offence is committed, or while there is danger of its renewal, but not after the breach, or danger of its renewal, has ceased. He may arrest or start in immediate pursuit if the misdemeanour is a breach of the public place. And he may take into custody persons given in charge to him by persons who have witnessed a breach of the peace if there is danger of its immediate renewal, but not if the affray is over and peace restored." [Emphasis added]

Where a breach of the peace (this would include misdemeanours) is committed in the presence of a constable, he may effect an arrest without warrant, that is clear from the above passage. It is also clear from the above passage that a constable is not entitled to arrest for misdemeanour or breach of the peace after it had been committed. So where a constable arrives at the scene of the crime after the misdemeanour or breach of the peace had been committed and there is peace, he cannot effect a lawful arrest in those circumstances.

The above passage however seems to include a situation under common law where a constable may be able to effect an arrest without warrant. This is the situation where there is a danger of the renewal of a misdemeanour or a breach of the peace after it had been committed. In such a situation it seems that a constable would have power to effect an arrest without warrant.

The learned Author also appears to have extended this to the situation where the police can arrest a person pointed out by witnesses to have committed a breach of the peace and where there is a danger of its renewal.

In Harris's Criminal Law (ibid) at page 382, the learned Author also appears to identify a similar power.

"*Any person, whether private person or peace officer, may at common law arrest and give into custody –*

(i) To stay a breach of the peace which is either being committed in his presence or which he has reasonable ground to believe will be renewed."

[…]

The conclusion I am left with it that this is good law to be given effect to.' (emphasis added) [words in brackets added]

In *Rice v Connolly* [1966] 2 QB 414 [[1966] 3 WLR 17; [1966] 2 AllER 649] Lord Parker CJ stated at page 419:

'It is also in my judgment clear that it is part of the obligations and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.'

POWER TO ARREST

In *Albert* v *Lavin* (1982) 74 CrAppR 150 [[1982] AC 546; [1981] 3 AllER 878; [1981] 3 WLR 955] Lord Diplock, with the other Lordships concurred, stated at page 152:

> '[E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed, has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will. At common law this is not only the right of every citizen, it is also his duty, although except in the case of a citizen who is a constable, it is a duty of imperfect obligation.'

In *R v Howell* (1981) 73 CrAppR 31 [[1981] 3 WLR 501; [1982] QB 416; [1981] 3 AllER 383; [1981] CrimLR] Watkins LJ, delivering the judgment of the Court, held at page 36:

> 'We entertain no doubt that a constable has a power of arrest where there is reasonable apprehension of imminent danger of a breach of the peace, so far for the matter has the ordinary citizen. […] We hold that there is power to arrest for breach of the peace where: (1) a breach of the peace is committed in the presence of the person making the arrest; or (2) the arrestor reasonably believes that such a breach will be committed in the immediate future by the person arrested although he has not yet committed any breach; or (3) where a breach has been committed and it is reasonably believed that a renewal of it is threatened.
>
> The public expects a policeman not only to apprehend the criminal but to do his best to prevent the commission of crime, to keep the peace, in other words. To deny him, therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognising that a wrongful arrest is a serious invasion of a person's liberty, provides the police with this power in the public interest.
>
> In those instances of the exercise of this power which depend upon a belief that a breach of the peace is imminent it must, we think we should emphasise, be established that it is not only an honest albeit mistaken belief but a belief which is founded on reasonable grounds.'

See also: *Joyce v Hertfordshire Constabulary* (1985) 80 CrAppR 298.

Section 49 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Every police officer may interpose for the *purpose of preventing*, and shall to the best of his ability prevent, the commission of any offence.' (emphasis added)

See also the following sections of the *Criminal Procedure Code* (Ch. 7):

- section 50 ['*Information of design to cognisable offences*'];
- section 51 ['*Arrest to prevent cognisable offences*']; and
- section 52 ['*Prevention of injury to public property*'].

[9.6] Question Of Bail

Section 20 of the *Criminal Procedure Code* (Ch. 7) states:

> 'A police officer making an arrest without a warrant *shall*, without unnecessary delay and subject to the provisions of this Code as to bail take or send the person arrested before a Magistrate having jurisdiction in the case or before an officer of or above the rank of sergeant.' (emphasis added)

The law in relation to '*Bail*' is examined commencing on page **378**.

[9.7] Arrest For Questioning

In *Holgate – Mohammed v Duke* (1984) 79 CrAppR 120 Lord Diplock, with whom their Lordships concurred, stated at pages 125 – 126:

> 'That arrest for the purpose of using the period of detention to dispel or confirm the reasonable suspicion by questioning the suspect or seeking further evidence with his assistance was said by the Royal Commission on Criminal Procedure in England and Wales in 1981 (Cmnd. 8092) at paragraph 3.66 "to be well established as one of the primary purposes of detention upon arrest." That is a fact that will be within the knowledge of those of your Lordships with judicial experience of trying criminal cases; even as long ago as I last did so, more than 20 years before the Royal Commissioner's Report. It is a practice which has been given implicit recognition in rule 1 of successive editions of the Judge's Rules, since they were first issued in 1912.'

POWER TO ARREST

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POWER TO ENTER & SEARCH

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POWER TO ENTER & SEARCH

[10.0] Introduction

In *Maleli Zalao v Attorney – General & the Commissioner of Police* (Unrep. Civil Appeal Case No. 9 of 1996) the Court of Appeal stated at pages 1 – 2:

> 'Section 9 of the Constitution provides that no person shall be subjected to search of his person or property unless a statute, dealing inter alia with breaches of the law as detecting criminal offences, makes specific provision for such a search.'

The *Criminal Procedure Code* (Ch. 7) is one statute that provides the power to police officers to conduct searches and it is that statute which will be examined in this Chapter. There are a number of other statutes which also provide the power of police officers to conduct searches. The statutes which are also examined in this book are:

[i] *Dangerous Drugs Act* (Ch. 98);

[ii] *Firearms & Ammunitions Act* (Ch. 80); and

[iii] *Liquor Act* (Ch. 144).

When conducting a search police officers should explain to the person to be searched the reason for the search, *unless* the circumstances rendered the giving of the reasons unnecessary or impracticable, see *Brazil v Chief Constable of Surrey* [1983] 1 WLR 1155 & *Lens v King* [1988] WAR 76.

Furthermore, the extent of any search *must* be reasonable, having regard to the circumstances that exist for the search at the time, see *Frank Truman Export Ltd v Metropolitan Police Commissioner* [1977] 1 QB 952 at pages 965 – 966; *Crowley v Murphy* (1981) 52 FLR 123 at pages 129, 137 and 154 & *Baker v Campbell* (1983) 49 ALR 385.

Property obtained from an illegal search *may* be excluded by a court, see *King (Herman) v R* (1968) 52 CrAppR 353, per Lord Hodson at page 365; *Jeffrey v Black* [1977] 3 WLR 895; [1978] 1 AllER 555; [1978] QB 490; [1977] CrimLR 555; (1978) 66 CrAppR 81; *Finnigan v Sandiford; Clowser v Chaplin* (1981) 73 CrAppR 153 & *McLorie v Oxford* (1982) 75 CrAppR 137.

[10.1] Constitution

Section 9 of the *Constitution* states (in part):

> '(1) *Except with his own consent*, no person shall be subjected to the search of his person or his property or the entry by others on his premises.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that *the law in question makes provision* –
>
> […]
>
> (d) for the purpose of authorizing the entry upon any premises in pursuance of an order of a court for the purpose of enforcing the judgment or order of a court in any proceedings; or

(e) for the purpose of authorizing the entry upon any premises for the purpose of preventing or detecting criminal offences,

and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.' (emphasis added)

[10.2] Power To Enter Generally

The occupier of any dwelling – house gives implied license to any member of the public, including police officers, coming on his/her lawful business to come through the gate to the yard, provided it is not locked, walk up the steps, and knock on the front door of the house. However, when that license is revoked by the licensee, ie., the occupier of the house, a reasonable time must be give to leave the yard, see *Robson & Robson v Hallett* [1967] 3 WLR 28; [1967] 2 QB 939; [1967] 2 AllER 407; (1967) 51 CrAppR 307 & *Lambert v Roberts* (1981) 72 CrAppR 223.

In *R v Thornley* (1981) 72 CrAppR 302 Dunn LJ, delivering the judgment of the Court, held at page 306:

'The officers were invited into the house by a co – occupier for the purpose of investigating her complaint. They were entitled to remain on the premises for a reasonable period of time in order to carry out that investigation to their satisfaction, notwithstanding that they had been told to get out by her husband.'

Refer also to the '*Power To Enter To Arrest*' which is examined on page **247**.

[10.3] Power To Search Generally

Section 84(3) of the *Penal Code* (Ch. 26) states:

'Any police officer who has reason to believe that a weapon is being concealed or carried on any person or vehicle in a restricted area or place may, without warrant or other written authority, *search and detain any such person or vehicle and take possession of such weapon.*' (emphasis added)

Section 14 of the *Criminal Procedure Code* (Ch. 7) states:

'(1) Whenever a person is arrested by a police officer or a private person, the police officer making the arrest or to whom the private person makes over the person arrested *may search such person, and place in safe custody all articles other than necessary wearing apparel found upon him*:

Provided that whenever the person arrested can be legally admitted to bail and bail is furnished, such person shall not be searched unless there are *reasonable grounds* for believing that he has about his person any –

(a) stolen articles; or

(b) instruments of violence; or

(c) tools connected with the kind of offence which he is alleged to have committed; or

(d) other articles which may furnish evidence against him in regard to the offence which he is alleged to have committed.

(2) The right to search an arrested person *does not include* the right to examine his private person.

(3) Where any property has been taken from a person under this section, and the person is not charged before any court but is released on the ground that there is no sufficient reason to believe that he has committed any offence, *any property so taken from him shall be restored to him*.' (emphasis added)

In *Lindley v Rutter* (1981) 72 CrAppR 1; [1981] QB 128 Donaldson LJ stated at pages 5 – 6 & 134 – 135 respectively:

'It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands. Any claim to be entitled to take action which infringes these rights is to be examined with very great care. But such rights are not absolute. They have to be weighed against the rights and duties of police officers, acting on behalf of society as a whole. It is the duty of any constable who lawfully has a prisoner in his charge to take all reasonable measures to ensure that the prisoner does not escape or assist others to do so, does not injure himself or others, does not destroy or dispose of evidence and does not commit further crime such as, for example, malicious injury to property. This list is not exhaustive, but it is sufficient for present purposes. What measures are reasonable in the discharge of this duty will depend upon the likelihood that the particular prisoner will do any of these things unless prevented. That in turn will involve the constable in considering the known or apparent disposition and sobriety of the prisoner. What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case.'

See also: *Brazil v Chief Constable of Surrey* (1983) 77 CrAppR 237.

Section 15 of the *Criminal Procedure Code* (Ch. 7) states:

'(1) Any police officer who has reason to suspect that any article stolen or unlawfully obtained, or any article in respect of which a criminal offence or an offence against the customs laws has been, is being, or is about to be, committed, is being conveyed, *whether on any person or in any vehicle, package or otherwise, or is concealed or carried on any person in a public place, or is concealed or contained in any vehicle or package in a public place, for the purpose of being conveyed, may*, without warrant or other written authority, detain and search any such person, vehicle or package, and may take possession of and detain any such article which he may reasonably suspect to have been stolen or unlawfully obtained or in respect of which he may reasonably suspect that a criminal offence or an offence against the customs laws has been, is being, or is about to be committed, together with the package, if any, containing it, and may also detain the person conveying, concealing or carrying such article:

Provided that this subsection shall not extend to the case of postal matter in transit by post except where such postal matter has been, or is suspected of having been, dishonestly appropriated during such transit.

(2) *Any police officer of or about the rank of sergeant may*, if he has reason to suspect that there is on board any vessel any property stolen or unlawfully obtained, enter without warrant, and with or without assistants, board such vessel, and may remain on board for such reasonable time as he may deem expedient, and may search with or without assistants any or every part of such vessel, and after demand and refusal of keys, may break open any receptacle, and upon discovery of any property which he may reasonably suspect to have been stolen or unlawfully obtained may take possession of and detain such property and may also detain the person whose possession the same is found. Such police officer may pursue and detain any person who is in the act of conveying any such property away from any such vessel, or after such person has landed with the property so conveyed away or found in his possession.

(3) Any person detained under this section *shall* be dealt with under the provisions of section 23 ['*Detention of persons arrested with warrant*'].' (emphasis added) [words in brackets added]

Section 16 of the *Criminal Procedure Code* (Ch. 7) states:

'Whenever it is necessary to cause a woman to be searched, the search *shall* be made by another woman with strict regard to decency.' (emphasis added)

Section 17 of the *Criminal Procedure Code* (Ch. 7) states:

'Notwithstanding the provisions of section 14 the officer or other person making any arrest may take from the person arrested any instruments of violence which he has about his person, and shall deliver all articles so taken to the court or officer before which or whom the officer or person making the arrest is required by law to produce the person arrested.'

The law relating to '*Bail*' is examined commencing on page **378**.

[10.4] Search Warrants

[10.4.1] Authority To Issue

Section 23 of the *Police Act* (Ch. 110) empowers police officers to apply for a '*search warrant*' before a Magistrate.

Section 11 of the *Magistrates' Courts Act* (Ch. 20) states (in part):

'Subject to the provisions of this and of any other Act, every justice of the peace shall, subject to any exceptions which may be contained in his appointment, within the area in and for which he holds such office, have –

(a) all the powers, rights and duties of a Magistrate under this or any other Act to –

(i) [...];

(ii) *issue search warrants*;' (emphasis added)

Section 105 of the *Criminal Procedure Code* (Ch. 7) provides:

[i] every '*search warrant*' *shall* be under the hand of the Magistrate or Justice of the Peace who issued it;

[ii] '*search warrants*' are normally directed generally to all police officers; and

[iii] every '*search warrant*' *shall* remain in force *until it is executed or* until it is cancelled by the Court which issued it.

If a '*search warrant*' is lost or destroyed, a duplicate warrant may be issued, see *R v Leish Justices, Ex parte Kara* (1981) 72 CrAppR 327; (1981) CrimLR 628.

[10.4.2] Information To Ground Search Warrant

[A] Introduction

Section 101 of the *Criminal Procedure Code* (Ch. 7) states:

> '*Where it is proved on oath* to a Magistrate or a justice of the peace that in fact or according to *reasonable suspicion anything* 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* in any building, ship, vehicle, box, receptacle or place, the Magistrate or justice of the peace *may* by warrant (called a *search warrant*) authorize a police officer or other person therein named to search the building, ship, vehicle, box, receptacle or place (*which shall be named or described in the warrant*) for any such thing and, *if anything searched for be found,* or any other thing there is *reasonable cause to suspect* to have been stolen or unlawfully obtained be found, to seize it and *carry it before the court issuing the warrant or some other court to be dealt with according to law*.' (emphasis added)

The police officer making the application for the issuance of a '*search warrant*' *must* prove *on oath* to the satisfaction of the issuing Magistrate or Justice of the Peace that based on a *reasonable suspicion* there is *reasonable cause* to suspect that as specified in 'Information To Ground Search Warrant' the *property* is at the *location* and that it will constitute evidence which is necessary in the investigation of an *offence known to law*.

To establish *reasonable suspicion* it is *not* necessary to possess evidence that amounts to a prima facie case, see *R v Smith* [2001] 2 CrAppR 1.

In *Malayta* (1996) 87 ACrimR 492 the Queensland Court of Appeal held per Dowsett J at page 505:

> '*The validity of the warrant is also attacked because of the use of so – called hearsay evidence.* This argument assumes the applicability of the rules of evidence to the process of issuing a warrant. The High Court, in a line of cases ending in *Grollo v Palmer* (1995) 184 CLR 348 at 359; 82 AcrimR 547 at 552 – 553, has held that although a judicial officer, in issuing a warrant, may be under a duty to proceed judicially, he is nonetheless exercising an executive, not a judicial power. The decision of the Judicial Committee of the Privy Council in *Hussien v Kam* [1970] AC 942 at 949 is authority for the proposition that *where the formation of a reasonable suspicion is a condition precedent to the exercise of a power, such suspicion may be based upon a matter which would not be admissible evidence in establishing a prima facie case.*' (emphasis added)

POWER TO ENTER & SEARCH

The 'Information To Ground Search Warrant' *must* be sworn *on oath* before the issuing Magistrate or Justice of the Peace.

Although an 'Information to Ground Search Warrant':

[i] will often be prepared at an early stage of an investigation;

[ii] may need to be completed in haste; and

[iii] must be completed in English,

it *must* comply with the requirements of the law if it is to be valid, see *Maleli Zalao v Attorney – General & the Commissioner of Police* (Unrep. Civil Appeal Case No. 9 of 1996; Court of Appeal).

Therefore, it is important that careful preparation is conducted *prior* to applying for the issuance of a '*search warrant*', see *R v Reading JJ, Ex parte South West Meat Ltd* [1992] CrimLR 672.

In *Maleli Zalao v Attorney – General & the Commissioner of Police* (*supra*) the Court of Appeal stated at pages 1 – 7:

> 'Section 9 of the Constitution provides that no person shall be subjected to search of his person or property unless a statute, dealing inter alia with breaches of the law as detecting criminal offences, makes specific provision for such a search. It was accepted by both sides that s. 101 of the Criminal Procedure Code was a statute so providing. S. 101 is constitutionally valid and where there has been compliance with its terms there will be no infringement of the constitution.
>
> […]
>
> […] *There had been no return o[f] the warrant made as required by s. 101 but the police have retained possession of the documents seized.* […]
>
> *The Information is stated to be "on the oath" of Sgt. Taro and the document was held out by him to be a document under oath. That is sufficient at law.* If there was any knowingly false statement therein the maker of the statement would be guilty of perjury. *On occasions it may be necessary for the magistrate to be supplied with additional evidence on oath, either orally or in the form of an affidavit, before he was satisfied the warrant should issue, but otherwise the form of information used here would be sufficient.*
>
> […]
>
> *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 [t]here must be reasonable suspicion that an offence known to law has been committed.* There is reference in broad terms in this information to "goods obtained by fraudulently means from Solomon Islands Government." That may well in some circumstances be an adequate description of the alleged offence.
>
> […]
>
> There is nothing in the information to establish why Sgt. Taro had any suspicion in relation to [… vehicle] A3617 and nothing to indicate why there was some suspicion that the appellant may have been involved in obtaining goods fraudulently from the government. None of those assertions is in any way supported by the quoted statement.

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 inforcement could have [been] 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.' (emphasis added) [words in brackets added]

In *R v Smith (Joe)* [2001] 2 CrAppR 1 [[2001] 1 WLR 1031] Otton LJ, delivering the judgment of the Court of Appeal, stated at page 5:

'*To establish a reasonable suspicion it is not necessary for a police officer to possess evidence which amounts to a prima facie case*: see *Dunbell v Roberts* [1944] 1 AllER 326.

In *Hussien v Chong Fook Kam* [1970] AC 942, PC, Lord Devlin in the Privy Council stated as follows at p. 948:

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking, 'I suspect but I cannot prove'. Suspicion arises at or near the starting – point of an investigation of which the obtaining of prima facie proof is the end."

In *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286, Lord Steyn at 293C stated: "… information from an informer or a tip-off from a member of the public may be enough."

Thus there is only a limited amount that has to be proved in order to establish a reasonable suspicion. This is an objective test and not a subjective test. […]

Lord Hope in *O'Hara* adopted with approval the dicta of Sir Frederick Lawton in *Castorina v Chief Constable of Surrey* (The Times, June 15, 1988):

"suspicion by itself, however, will not justify an arrest. There must be a factual basis for it of a kind which a court would adjudge to be reasonable."

Other authority shows that suspicion can take into account matters which could not be adduced at all, for example, hearsay evidence.' (emphasis added)

[B] Full & Accurate Details

The police officer making the application for the issuance of a '*search warrant*' *must* provide full and accurate details of inquiries conducted and the '*information*' received in the 'Information To Ground Search Warrant', see *Maleli Zalao v Attorney – General & the Commissioner of Police* (*supra*).

There should be *no rumours, assumptions or conclusions*, just facts.

The '*information*' *must* be capable of satisfying the issuing Magistrate or Justice of the Peace that there is the need to issue the '*search warrant*'. In order to satisfy the issuing Magistrate or Justice of the Peace the following *must* be included:

[i] details of the *offence* '*known to law*' which has been committed;

[ii] details of the *property* sought;

[iii] why it is reasonably suspected that the property sought is necessary in the investigation of an offence known to law;

[iv] the reasons why it is reasonably suspected that the property sought is at the *location* as specified;

[v] the names of the occupiers at the location, if known; and

[vi] the reasons why it is reasonably suspected that the *persons* identified are involved in the commission of the offence 'known to law'.

It should *not* be forgotten that it is *not* the investigating officer's opinion that matters. What is crucial is the issuing Magistrate's or Justice of the Peace's satisfaction, based on facts verified on oath by a sworn 'Information To Ground Search Warrant', see *El – Zarw v Nickola, Ex parte El – Zarw* [1992] 1 QdR 145.

Provided sufficient '*information*' is outlined in the 'Information To Ground Search Warrant' to the satisfaction of the issuing Magistrate or Justice of the Peace the additional information on oath, either orally or in the form of an affidavit, will *not* necessarily be required, see *Maleli Zalao v Attorney – General & the Commissioner of Police* (*supra*).

The issuing justice should be made aware of any property that *may* be subject to '*legal professional privilege*', see *R v Southhampton Crown Court, Ex parte J & P* [1993] CrimLR 962.

Refer also to the law relating to the '*Search Of Lawyer's Businesses*' commencing on page **267**.

[C] Offence

It is *not* necessary that the statement of the offence suspected to have been committed be as precise as would be required by a court in the course of a trial, see *Maleli Zalao v Attorney – General & the Commissioner of Police* (*supra*).

However, the offence should be specified in conformity with a wording of a charge and with as much detail as is known at that stage of the investigation.

Such details which should be included are:

[i] the date of the alleged offence;

[ii] the location of the alleged offence; and

[iii] a brief description of the alleged offence.

The alleged offence *must* be an offence 'known to law', as specified in a statute, such as the *Penal Code* (Ch. 26). Details such as 'obtained by fraudulent means from the Solomon Islands Government' are incorrect, see *Maleli Zalao v Attorney – General & the Commissioner of Police* (*supra*).

Considering that in many cases the name of the suspect will *not* be known or capable of being determined before the issue of the warrant, it is *not* considered necessary to identify in the 'Information To Ground Search Warrant', the name of the person who has committed, or whom is suspected to have committed the offence/s, see *Coward v Allen* (1984) 52 ALR 320 at page 330; *Trimboli v Onley (No. 2)* (1981) 56 FLR 317 at page 320 & *R v Tillett* (1969) 14 FLR 101 at pages 112 – 114.

[D] Property Sought

There *must* be '*information*' that will enable the issuing Magistrate or Justice of the Peace to conclude that there was a reasonable cause to suspect that the property as specified in the 'Information To Ground Search Warrant' needs to be taken possession of in order to conduct an investigation into the specified offence by outlining 'information' which shows how the property is related to the commission of the offence.

The property sought *must* be accurately identified.

All available details *must* be included.

The '*search warrant*' *must* identify sufficiently specifically what property is authorised to be searched for and seized, see *Arno v Forsyth* (1986) 65 ALR 125.

[E] Suspect

There *must* be '*information*' that will enable the issuing Magistrate or Justice of the Peace to conclude that there was a reasonable cause to suspect that the person, if named, had either:

[i] committed the offence/s as specified; *or*

[ii] assisted in the unlawful carrying away of the property as specified, to the specified location.

[F] Location

There *must* be '*information*' that will enable the issuing Magistrate or Justices of the Peace to conclude that there was a reasonable cause to suspect that the property sought is at the 'building', 'ship', 'vehicle', 'box', 'receptacle' or 'place', as specified.

It should be noted that section 101 of the *Criminal Procedure Code* (Ch. 7) refers to 'buildings' and 'places'. However, the term 'place' is *not* defined in either the *Criminal Procedure Code* (Ch. 7) or the *Interpretation & General Provisions Act* (Ch. 85). The natural and ordinary meaning of that term in the context of the section 101 of the *Criminal Procedure Code* (Ch. 7) would *include* parks and other areas of land as distinct from buildings.

The law relating to '*Statutory Interpretation*' is examined commencing on page **30**.

There needs to be full and accurate details of the specified *'building'*, *'ship'*, *'vehicle'*, *'box'*, *'receptacle'* or *'place'* which *must* be specified in the '*search warrant*', see section 101 of the *Criminal Procedure Code* (Ch. 7).

This means that it is necessary to describe the location to which the '*search warrant*' is issued with sufficient particularity to enable the occupier/s and/or owner objectively to determine that the '*search warrant*' relates to their *'building'*, *'ship'*, *'vehicle'*, *'box'*, *'receptacle'* or *'place'*.

In *Coward & others v Allen & others* (1984) 52 ALR 320 Northrop J stated at page 330:

> 'Basically, there are *four* main reasons for this.
>
> The *first* is that the officer executing the warrant should be able to identify and locate the place to be searched by reading the description on the warrant.
>
> The *second* is to obviate a challenge founded on a claim that the area in fact searched exceeded the description of the "place" described in the warrant.
>
> *Third*, if no "place" at all were nominated then, […], the warrant would be a general warrant to search such places as the officer executing it deemed fit, and would, consequently, be condemned as an illegal general warrant. The information and warrant should also state, where possible, the name of the occupier of the place to be searched.
>
> *Fourthly*, failure to sufficiently describe the place to be searched may result in the police executing the warrant going to the wrong premises and leaving themselves open to an action for trespass and, perhaps, other actions.' (emphasis added)

In *R v Atkinson* [1976] CrimLR 397 the case involved police obtaining a warrant to search flat 45 but at the time of executing the warrant the police realised that it was flat number 30 which they wished to search. The police decided to force entry into flat 30 without obtaining another search warrant. The Court held that the police acted unlawfully.

If it sought to search more that one location for the same property then such locations should be specified.

[G] Source Of Information

The name of the person providing 'information' does *not* have to be disclosed. The law in relation to the '*Protection Of The Identity Of Informers*' is examined commencing on page **130**.

[10.4.3] Execution

Prior to the execution of a '*search warrant*', there should be a '*briefing*' to the police officers participating in the search, see *R v Reading JJ, Ex parte South West Meat Ltd* [1992] CrimLR 672.

Such '*briefing*' should discuss issues *including*:

[i] the location of the premises;

[ii] the name of the occupier/s and/or owner/s of the premises;

[iii] how the premises is to be entered;

[iv] what property is being searched for;

[v] how that property relates to the offence/s in question;

[vi] the roles of each police officer participating in the search; and

[vii] any dangers which may arise in searching the premises in question.

Section 102 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Every search warrant may be *issued on any day* (including Sunday) and may be *executed on any day* (including Sunday) *between the hours of sunrise and sunset*, but the Magistrate or justice of the peace *may*, *by the warrant, in his discretion, authorize the police officer or other person to whom it is addressed to execute it at any hour*.' (emphasis added)

Section 103 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) Whenever any building or other place liable to search is closed, any person residing in or being in charge of such building or place shall, on demand of the police officer or other person executing the search warrant, and on production of the warrant, allow him free ingress thereto, and egress therefrom and afford all reasonable facilities for a search therein.
>
> (2) If ingress into or egress from such building or other place cannot be so obtained, the police officer or other person executing the search warrant may proceed in the manner prescribed by sections 11 ['*Search of place entered by person sought to be arrested*'] or 12 ['*Power to break out of house or other place for purpose of liberation*'].'
>
> (3) Where any person in or about such building or place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman the provisions of section 16 ['*Mode Of Searching Women*'] be observed.' [words in brackets added]

Section 101 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '[I]f anything searched for be found, *or any other thing there is reasonable cause to suspect to have been stolen or unlawfully obtained be found*, to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law.' (emphasis added)

Therefore, if during the course of a search property other than that specified on the '*search warrant*' is found, there is authority to seize it, provided there is '*reasonable cause*' to suspect that it has been stolen or unlawfully obtained.

Section 105 of the *Criminal Procedure Code* (Ch. 7) provides:

[i] every '*search warrant*' *shall* remain in force *until it is executed or* until it is cancelled by the court which issued it; and

[ii] a '*search warrant*' *may be executed at any place in Solomon Islands*.

See also: *Reynolds v Commissioner of Police for the Metropolis* (1985) 80 CrAppR 125.

The law relating to the '*Power To Arrest*' is examined commencing on page **242**.

[10.4.4] Completion Of Search

Section 101 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '[I]f anything searched for be found, or any other thing there is reasonable cause to suspect to have been stolen or unlawfully obtained be found, *to seize it and carry it before the court issuing the warrant or some other court to be dealt with according to law.*' (emphasis added)

Section 104(1) of the *Criminal Procedure Code* (Ch. 7) states:

> '*When any such thing is seized and brought before a court*, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.' (emphasis added)

In *Maleli Zalao v Attorney – General & the Commissioner of Police* (*supra*) the Court of Appeal stated at page 5:

> 'There had been no *return o[f] the warrant made as required by s. 101* but the police have retained possession of the documents seized.' (emphasis added)

Therefore, at the completion of the search:

[i] the '*search warrant*'; and

[ii] the property seized,

must be taken before the Magistrate or Justice of the Peace which issued the warrant or some other Magistrate or Justice of the Peace to be dealt with according to law.

That Magistrate or Justice of the Peace *may* permit the police to retain the property in accordance with section 104.

See also: *R v Uxbridge JJ, Ex parte Sofaer* (1987) 85 CrAppR 367; *R v Lambeth Metropolitan Stipendiary Magistrate, Ex parte Mc Comb* [1983] 2 WLR 259; [1983] QB 551; (1983) 76 CrAppR 248; [1983] CrimLR 266; *R v Lushington, Ex parte Otto* [1894] 1 QB 420 & *R v Heston – Francois* (1984) 78 CrAppR 209; [1984] 2 WLR 309; [1984] 1 AllER 795; [1984] QB 278; [1984] CrimLR 227.

[10.4.5] Lawyer's Businesses

Prior to applying to a Magistrate or Justice of the Peace for the issuance of a 'search warrant' to search the business premises of a lawyer, the policy of the RSIP is that advice *must* be sought from the office of the Director of Public Prosecutions.

Police officers should be particularly careful if a '*search warrant*' is being sought to be executed on the office of a lawyer. In that regard the issue of '*Legal Professional Privilege*' is important and *must* be respected. The law in that regard is examined commencing on page **162**.

A police officer does *not* have to accept at face value that any material is subject to '*legal professional privilege*', see *R v Chesterfield JJ, Ex parte Bramley* [2000] 2 WLR 409; [2000] QB 576; [2000] 1 AllER 411; [2000] 1 CrAppR 486; [2000] CrimLR 385.

In *R v Chesterfield Justices; Ex parte Bramley* (*supra*) Kennedy LJ, delivering the judgment of the Divisional Court, made the following comments on pages 495 – 496:

> 'In order to decide how much of the available material falls within the scope of the warrant the searchers will have to look at documents, as was accepted by this court in *R v Leeds Magistrates' Court; ex p. Dumbleton* [1993] CrimLR 866, DC, where Leggatt LJ said at page 25E of the transcript (April 24, 1993):
>
> "I do not consider that in attempting to sift or sort the documents at the applicant's premises the police were acting beyond their powers. It was their duty to sort the documents that they were entitled to seize from the remainder, even if some of the other material turned out to consist of special procedure material *or to be legally privileged*."
>
> *But if there is a lot of material, and it is not possible to sort reasonably quickly and easily the material that is relevant (ie., within the scope of the warrant) from that what is not, what is to be done*? *Can the constable who is executing the warrant do a preliminary sift at the premises where the documents are stored, and then take all, or a large part of the material away to sort it out property elsewhere? Common sense suggests that the answer to that question should be in the affirmative, with the owner of the material or his representative having a right to be present when the sorting takes place, and meanwhile the material being stored in sealed containers* […].' (emphasis added)

If during the course of searching a lawyer's business premises there is a dispute as to its seizure, the property should:

[i] not be read in detail;

[ii] placed into a sealed container; and

[iii] immediately conveyed to the Magistrate or Justice of the Peace which issued the '*search warrant*'.

See also: *Propend Finance Ltd v The Commissioner, Australian Federal Police* (1995) 79 ACrimR 453.

[10.4.6] Forms

The forms to be used are prescribed in the *Magistrates' Courts (Forms) Rules* issued under section 76 of the *Magistrates' Courts Act* (Ch. 20) are:

- '*Information To Ground Search Warrant*', a copy of which is on page **269**; and
- '*Search Warrant*', a copy of which is on page **270**.

POWER TO ENTER & SEARCH

(Form 14 – Magistrates' Court Act)

INFORMATION TO GROUND SEARCH WARRANT
(Criminal Procedure Code S. 101)

[GENERAL TITLE]

of
on his / her oath complains that on the day of , the following goods of the value of $ namely:

were unlawfully carried away from
by , and that he / she has reasonable cause to suspect, and does suspect, that those goods, or some of them, are concealed at

occupied by person or persons unknown
of ; for he / she the said says that:

Sworn)
this day of)
Before me:

Magistrate

(Form 15 – Magistrates' Court Act)

SEARCH WARRANT
(Criminal Procedure Code S. 101)

[GENERAL TITLE]

To all Police Officers within Solomon Islands

of
has this day made on oath before the court that

And it appears to this Court that (according to reasonable suspicion) the said goods, or some of them, are concealed as aforesaid. You are therefore hereby authorized and commanded in Her Majesty's name, with proper assistance, by day

to enter the said
if necessary by force, and there diligently to search for the said goods, and if the same or any thereof are found on search, to bring the goods so found before this Court, to be dealt with according to law.

Dated this day of 20 .

Magistrate

This Warrant may be executed during the hours of darkness.

Magistrate

[10.4.7] Example

'On Friday the 7th day of March 2001 an unknown offender decided to rob the King Solomon Hotel.

On that day he decided to wear a blue shirt and brown trousers.

He obtained a firearm from his home at Naha Kola Street, Naha, Honiara City. The offender's home is only house in the street with a burnt – out vehicle in the front yard.

He then drove a grey Toyota Utility which is unregistered and has no registration plates to the King Solomon Hotel.

He entered the hotel at about 9pm with the firearm loaded and a red plastic bag in his right hand.

On approaching the receptionist he said, 'This is a robbery, give me the money, or I'll kill you'. He was then given $1000 in $50 notes and a small quantity of other notes. At the time there were no customers in the immediate vicinity of the reception area.

He then left in the motor vehicle which was parked outside the premises of the Australian High Commission.

However, whilst driving home he was followed by an employee of the King Solomon Hotel.

The employee made a note of the location where the offender decamped from the motor vehicle and immediately advised the police officers at the front counter at the Central Police Station.

Later that night that employee showed the police the location of the house and the vehicle was still in the yard.

POWER TO ENTER & SEARCH

Example Only

(Form 14 – Magistrates' Court Act)

INFORMATION TO GROUND SEARCH WARRANT
(Criminal Procedure Code S. 101)

[GENERAL TITLE]

Constable Johnson Sipolo of **Central Police Station**
on his oath complains that on the **7th** day of **March 2001**, the following goods of the value of **$1250** namely: **cash comprising of $1000 in $50 notes and $250 in assorted notes**

were unlawfully carried away from **the King Solomon Hotel, Honiara,**
by some person or person unknown, and that he has reasonable cause to suspect, and does suspect, that those goods, or some of them, are concealed at a dwelling - house in
Naha Kola Street, Naha, Honiara City
occupied by person or persons unknown
of **Naha Kola Street, Naha, Honiara City**; for he the said **Johnson Sipolo** says that:

the receptionist of the King Solomon Hotel told me that at about 9pm a male person, whom she does not know, entered the King Solomon Hotel. At that time he approached her and demanded money and threatened to kill her whilst producing a firearm and a red plastic bag. As a result she handed over to him $1250 namely cash comprising of $1000 in $50 notes and $250 in assorted notes. He then left the hotel. At the time there were no other customers in the immediate vicinity of the reception area.

Furthermore, an informer advises that she saw the offender walk from the reception area of the King Solomon Hotel to a Toyota Utility. She then followed the offender to a house situated at Naha Kola Street, Naha, Honiara City. The informer then advised the police.

That night the informer showed me the house which the offender entered at Naha Kola Street, Naha, Honiara City and the utility which he drove. That house is only house in the street which has a burnt - out vehicle in the front yard.

Whilst it is unknown at this time what is the identity of the offender, a comprehensive description of the offender has been provided. It is also unknown at this time who are the occupants of the house at Naha.

Sworn)
this **7th** day of **March 2001**)
Before me:

Magistrate

WITNESSES

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WITNESSES

[11.0] Introduction

Section 10(2) of the *Constitution* provides (in part):

> 'Every person who is charged with a criminal offence –
>
> (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court in the same conditions as those applying to witnesses called by the prosecution;'

All statements should be recorded *as soon as possible* after the commission of the offence whilst the incident is still fresh in the memory of the witness.

Notes made at the time of the incident can be used to refresh the memory of any witness for the purpose of:

[i] recording their statement; and

[ii] giving evidence in court.

All statements are to be recorded in the actual words of the person making the statement. The use of police expressions or legal terms is to be avoided. Statements are to contain what the witness knows, ie., perceives with his/her own senses, *not* what he/she has been told by someone else, subject to the '*Hearsay Rule*'.

Any relationship between witnesses and a defendant and between witnesses themselves should be fully explained in the statements of the witnesses. The relationship between a witness and a defendant *may* assist a court in determining whose version of the facts is more probable, see *Charles Kwaita v R* [1990] SILR 71 at page 74.

Exhibits proposed to be tendered should referred to in statements of witnesses and noted on the *'Witness List'*. A pro forma *'Witness List'* is on page **308**.

The law relating to:

- '*Discretion To Call Witnesses*' is examined commencing on page **120**;
- '*Refreshing Memory From Notes*' is examined commencing on page **295**;
- the '*Hearsay Rule*' is examined commencing on page **176**;
- '*Exhibits*' is examined on page **238**; and
- '*Interpreters*' is commencing examined on page **346**.

WITNESSES

[11.1] Order To Call

[11.1.1] Prosecution

Prior to determining the '*order*' in which to call witnesses, there should be consultation between the assigned prosecutor and the Arresting / Investigating Officer.

Essentially witnesses should be called in a logical sequence in court. This can be achieved by firstly calling the Arresting / Investigating Officer in order to:

[i] outline any admission made or defence raised by the defendant; and

[ii] produce exhibits relevant to the charge/s,

followed by the other witnesses in chronological order.

It *must* never be forgotten that the Court generally will have no idea about the prosecution case.

In *Saffron v R* (1988) 17 NSWLR 396 the Court held at page 457:

> 'There is no rule of law, absent some relevant statutory provision, that requires a judge (even if he has the power) to reject evidence tendered by the Crown because of the order in which the witnesses are called.'

There is no such statutory provision applicable to Solomon Islands.

The law relating to:

- the '*Prosecution Discretion To Call Witnesses*' is examined commencing on page **120**; and
- '*Exhibits*' is examined commencing on page **237**.

[11.1.2] Defence

A Court *may* make an adverse comment regarding the failure to call a particular potential witness by the defence if:

[i] the prosecution had no means of knowing that the potential witness had '*material evidence*' to give; and

[ii] the prosecution were *not* advised of the identity of that potential witness, prior to the closure of its case, see *R v Gallagher* [1974] 2 AllER 118; [1974] 1 WLR 1204; (1974) 59 CrAppR 239; [1974] CrimLR 543.

Section 142 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Where the only witness to the facts of the case called by the defence is the person charged, he *shall* be called as a witness immediately after the close of the evidence for the prosecution.' (emphasis added)

See also: *R v Smith (Joan)* (1968) 52 CrAppR 224; [1968] 1 WLR 636; [1968] 2 AllER 115.

[11.2] Attendance

[11.2.1] Responsibilities Of Prosecutors

It is the responsibilities of assigned prosecutors to:

[i] arrange for issuance of 'Summonses to Witness' only to the respective Arresting / Investigating Officer in accordance with section 127 of the *Criminal Procedure Code* (Ch. 7). See also section 60 of the *Magistrates' Courts Act* (Ch. 20).

Witnesses *must* be able to give '*material evidence*'. Evidence is '*material*' if it is relevant to an issue in the case, see *R v Reading JJ, Ex parte Berkshire County Council* [1996] 1 CrAppR 239.

If a court is satisfied that a witness will *not* attend in obedience to a summons to witness, it *may* issue a 'warrant' to compel the witness to give evidence, see sections 128 to 130 of the *Criminal Procedure Code* (Ch. 7) and sections 60 and 61 of the *Magistrates' Courts Act* (Ch. 20).

Furthermore, unless any documents or writings which are required to be produced are '*prima facie*' admissible, the 'Summons To Witness' may be set aside, see *R v Cheltonham JJ, Ex parte Secretary of State for Trade* [1977] 1 AllER 460; [1977] 1 WLR 95;

[ii] monitor the issuance of 'Summonses to Witness' to other witnesses to be called by the prosecution;

[iii] apply for the issuance of a 'Warrant in the First Instance' in respect of all witnesses who fail to attend Court, in accordance with sections 128 and 129 of the *Criminal Procedure Code* (Ch. 7); and

[iv] furnish a report under his/her hand to his/her Officer – in – Charge outlining the circumstances whenever a police officer fails to attend court.

See also: Section 116 ['*Conspiracy to Defeat Justice*'] of the *Penal Code* (Ch. 26).

[11.2.2] Responsibilities Of Arresting Or Investigating Officers

In *R v Christopher Saungao* (Unrep. Criminal Case No. 30 of 1995) Lungole – Awich J commented at page 1:

> 'It is the duty of the police to assist crown counsel and ensure that witnesses are in attendance. Much of the good work of the police in investigating crime will be fruitless if the police neglects the last, but important bit of assisting counsel prosecuting the case, by bringing witnesses to court.'

It is the responsibility of Arresting / Investigating Officers to ensure that:

[i] all witnesses have been issued with a *'Summonses to Witness'*;

[ii] they make arrangements for the transportation of such witnesses, as required; and

[iii] they communicate with the assigned prosecutor at least seven days prior to the 'Trial or Preliminary Investigation / Inquiry'.

For an adjournment to be granted because of the unavailability of a witness it *must* be shown that the witness would give or is in possession of '*material evidence*', see *R v Bishop* (1980) 54 FLR 1. See also: section 127 of the *Criminal Procedure Code* (Ch. 7) & section 60 of the Mag*istrates' Courts Act* (Ch. 20).

The law relating to:

- '*Preliminary Investigations / Inquiries*' is examined commencing on page **310**; and
- '*Adjournments*' is examined commencing on page **392**.

[11.3] Witness Conferences

Taking into account that some witnesses *will not*:

[i] have been to court and therefore do not understand what is the procedure; and

[ii] know what is expected of them,

it is important that there is communication between prosecutors and all witnesses to be called by the prosecution, *prior* to them giving evidence.

Whilst communicating with witnesses, prosecutors should be careful *not* to express an inappropriate attitude. Therefore, they should show respect to *all witnesses* to be called by the prosecution.

All witnesses *must* be spoken to individually, including 'expert witnesses' who *must* base their opinion on primary facts.

Speaking to witnesses is of particular importance if the witness is either:

- a victim of a sexual offence;
- a child;
- elderly;

or if the evidence will obviously cause some distress to the witness.

WITNESSES

In *R v Skinner* (1994) 99 CrAppR 212 Farquharson LJ, delivering the judgment of the Court of Appeal, held at pages 216 – 217:

> 'In some circumstances, of course, it is evitable that discussions between witnesses will take place as where, for example, all the witnesses come the same family. […]
>
> [... In] *Richardson* [(1971) 55 CrAppR 244; [1971] 2 QB 484 …] where the learned judge giving the judgment of the Court, Sachs LJ said at p. 251 and p. 490B:
>
> "Obviously it would be wrong if several witnesses were handed statements in circumstances which enables one to compare with another what each had said."
>
> Whilst that is not directly the situation here, obviously the sense of what the Lord Justice is saying would apply in the present case. *In other words, as a general rule, any discussions as to what evidence is going to be given by them should never take place between two or more witnesses.*
>
> *Counsel goes on to say that statements or proofs should not be read to witnesses in each other's presence. That must obviously follow because it would amount to a discussion between the pair of them as to what evidence is going to be given; one would be enlightened by the evidence that is to be given by the other.*' (emphasis added) [words in brackets added]

Therefore, witnesses *should*:

[i] *never* be told what other witnesses have said or going to say:

- [a] by a prosecutor; or
- [b] by any other police officer;

[ii] be told that they can:

- [a] read their statement *prior* to giving evidence; and
- [b] refer to any notes made at about the time of the incident prior to giving evidence.

The law relating to '*Witnesses Refreshing Their Memory*' is examined commencing on page **295**;

[iii] be told that they are *not* permitted to:

- [a] show their statements to any other potential witness; or
- [b] discuss their evidence with any other potential witness;

[iv] be advised of the procedure which will occur in court, ie., asked to give evidence in the witness box after taking the oath / affirmation and then be cross – examined;

[v] be told that they will be required to tell the truth to the Court or they can be punished.

In *R v Philip Tahea & others* (Unrep. Criminal Case No. 14 of 1995) Palmer J commented at pages 2 - 3:

> 'I feel compelled at this juncture to express my deep displeasure, at the way the Oath that a witness takes to tell the truth, the whole truth in court, and that includes answering questions, has been blatantly abused and taken for granted by witnesses who come before this Honourable Court. Taking the oath is a solemn act in itself, and directly invokes the Authority of God Almighty, recognizing His Omnipresence and Omniscience, as the Witness to the testimony of the witness. All witnesses therefore who take the oath must take it seriously, and seek actively at all times, to speak the truth according to the best of their ability, knowledge and understanding, instead of deliberately lying in court. I raise this concern now because it is clear to me that there are some witnesses who do not appreciate the value and significance of the oath and the assistance that it provides to the Courts in the due administration of justice. I think we should remind ourselves, not to use the oath as a mere human tool which can be abused at will but also a solemn act, in which we make ourselves accountable not only to men, but also to God Almighty. It is my hope that we will have fewer cases where witnesses come to this courts and deliberately lie through their teeth'; and

[vi] be asked what occurred in their own words and definitely never told what to say and any discrepancies should be noted.

A conference with a witness provides an ideal chance for a prosecutor to determine if a witness has the tendency to be:

- hostile; and / or
- nervous, etc.

The law relating to:

- the '*Opinion Evidence - Expert Witnesses*' is examined commencing on page **202**; and
- '*Hostile Witnesses*' is examined commencing on page **288**.

[11.4] Property In Witnesses

In *Harmony Shipping Co SA v Davis & others* [1979] 3 AllER 177 [[1979] 1 WLR 1380] Lord Denning MR, with whom Waller and Cumming – Bruce LJ concurred, held at page 180:

> 'So far as witnesses of fact are concerned, the law is as plain as can be. *There is no property in a witness.* The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. *Neither one side or the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him.* In no way can one side prohibit the other side from seeing a witness of fact, from getting the facts from him and from calling him to give evidence and from issuing him with a subpoena.' (emphasis added)

Therefore, no police officer is to hinder the defence in speaking to witnesses who may potentially be called by the prosecution. However, no witness can be required to speak to either the prosecution or the defence, prior to giving evidence. It is entirely at the witness's own discretion.

See also: *Connolly v Dale* [1996] 1 CrAppR 200 at page 205.

[11.5] Prosecutor As A Witness

Under *no* circumstances should a police officer prosecute a case in which he/she is likely to give evidence, see *Fidelis Agai v Buckly Yarume* [1987] PNGLR 124.

[11.6] Prisoners As Witnesses

Section 131 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Any court desirous of examining as a witness, in any case pending before it, any person confined in any prison may issue an order to the officer in charge of such prison requiring him to bring such prisoner in proper custody, at a time to be named in the order, before the court for determination.'

See also: section 99 of the *Criminal Procedure Code* (Ch. 7) and section 64 of the *Magistrates' Courts Act* (Ch. 20).

Prosecutors are to arrange for issuance of such an order if it is considered necessary to call a prisoner to give evidence for the prosecution. Obviously, such applications are to be made prior to the date of trial.

[11.7] Precincts Of Court

In *R v Smith (Joan)* [1968] 2 AllER 115; (1968) 52 CrAppR 224; [1968] 1 WLR 636 the Court of Appeal held:

> It is a general rule and practice that witnesses *as to fact,* ie., witnesses *not* giving solely 'opinion' or 'character evidence', for either the prosecution or defence should remain out of court until they are required to give their evidence.

However, *all* witnesses to be called by the prosecution should remain outside the precincts of the court.

In *Moore v The Registrar of Lambeth County Court* [1969] 1 WLR 141 the Court held:

> The fact that a witness has been present in Court during the hearing or part of the hearing does not give the Court any discretion to refuse to hear the evidence of that witness although, of course, the fact that the witness had been present may go to the weight of the evidence.

In *Kiso v Manumanua* [1981] PNGLR 507 Kearney DepCJ, sitting alone, held:

> Although it is a general rule of practice that witnesses other than the parties remain out of the hearing of the court until they come to give their evidence, a witness who remains in court, even where witnesses have been told to leave, cannot be excluded from testifying for that reason though the weight to be placed on his/her evidence may be reduced.

See also: *R v Thompson* [1967] CrimLR 62 & *R v Briggs (*1931) 22 CrAppR 68.

WITNESSES

A prosecutor who observes a witness who is in court and who is to be called by the prosecution should speak to the witness and explain the need to be outside of the precincts of the court, until called to give evidence. If the witness refuses to leave the precincts of the court, the prosecutor should make an application for a court order under section 64 of the *Criminal Procedure Code* (Ch. 7) and have the witness escorted from the court.

That section states:

> 'The place in which any criminal court is held for the purpose of inquiring into or trying any offence shall be deemed an open court to which the public generally may have access, so far as the same can conveniently contain them:
>
> Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of the inquiry into or trial of any particular case that the public generally or *any particular person shall not have access to or be or remain in the room or building used by the court*.' (emphasis added)

A witness who disobeys such an order *may* be punished for contempt.

If it becomes apparent that a witness called by the prosecution and who is in the witness box was in court before he/she was called to give evidence, the prosecutor should ask the witness what evidence he/she heard in order to ensure a fair trial for the defendant. The '*weight*' to be given to the evidence of that witness *must* be considered in light of the evidence which he/she heard whilst in court, prior to giving evidence.

Arresting / Investigating Officers are responsible for ensuring that witnesses intended to be called by the prosecution *do not* enter the precincts of the court, *prior* to giving evidence.

The law relating to:

- '*Character Evidence*' is examined commencing on page **207**;
- '*Opinion Evidence*' is examined commencing on page **202**;
- *'Right To Be Heard In Open Court*' is examined commencing on page **155**; and
- the '*Weight*' to be given evidence is examined on page **173**.

[11.8] Competency

[11.8.1] Introduction

Section 134 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Every witness in any criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witness shall appear shall have full power and authority to administer the usual oath or affirmation:

> Provided that the court may at any time, *if it thinks it just and expedient (for reasons to be recorded in the proceedings)*, take without oath the evidence of any person declaring that the taking of any oath whatever is according to his religious belief unlawful, or who by reason of immature age or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath; the fact of the evidence have been so taken being also recorded in the proceedings.' (emphasis added)

A witness who is able to lawfully give evidence is '*competent*'. The '*competency*' of witnesses is therefore a 'question of law'.

It is the duty of the Court to determine the '*competency*' of witnesses, see *R v Surgenor* (1940) 27 CrAppR 175.

The '*competency*' of all witnesses should be done in the presence of the defendant, see *R v Divine* (1929) 21 CrAppR 176 at page 178.

The court may question a witness at any stage of his/her evidence to determine whether the witness understands the obligations imposed by taking an oath, see *R v Wilson* (1924) 18 CrAppR 108 at page 109.

If the '*competency*' of a witness is challenged:

[i] the prosecution *must* prove the '*competence*' of the witness *beyond reasonable doubt*, see *R v Yacoob* (1981) 72 CrAppR 313; [1981] CrimLR 248; and

[ii] the defence *must* prove the '*competence*' of the witness *on the balance of probabilities*, see '*Archbold Criminal Pleadings, Evidence & Practice*', 2002 ed., at page 1038.

The issue of '*competence*' should be determined *prior* to the witness gives evidence, see *R v Hampshire* [1995] 3 WLR 260; [1995] 2 CrAppR 319; [1995] 2 AllER 1019 & *R v Yacoob* (*supra*).

In order to determine '*competence*', a *voir dire proceedings* should be conducted, see *R v Hampshire* (*supra*).

The law relating to '*Voir Dire Proceedings In Respect Of Confessional Evidence*' is examined commencing on page **219**.

However, not all competent witnesses are able to be compelled to give all evidence within their knowledge. The law relating to the '*Compellability Of Witnesses To Give Evidence*' is examined commencing on page **287**.

[11.8.2] Husbands & Wives

[A] Prosecution

Section 136 of the *Criminal Procedure Code* (Ch. 7) states:

> 'In any inquiry or trial the wife or husband of the person charged *shall* be a *competent witness* for the *prosecution* or defence *without the consent of such person* –
>
> (a) in any case where the wife or husband of a person charged may, under any law in force for the time being, be called as a witness without the consent of such person;

(b) in any case where such person is charged with an offence under Part XVI ['*Offences Against Morality*'] or section 170 ['*Bigamy*'] of the Penal Code;

(c) in any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them.' (emphasis added) [words in brackets added]

See: *R v Lapworth* (1930) 22 CrAppR 87 – '*Grievous Harm*'; *R v Blanchard* (1951) 35 CrAppR 183 – '*Gross Indecency*' & *R v Moore* (1954) 38 CrAppR 95 – '*Arson*'.

Prior to giving evidence for the *prosecution*, a spouse should be advised that:

[i] he/she has the right to refuse to give evidence and that if he/she chooses to give evidence he/she will be treated like any other witness, see *R v Pitt* [1982] 3 AllER 63; [1982] 3 WLR 359; [1983] QB 25; (1982) 75 CrAppR 254; [1982] CrimLR 513; *Hoskyn v Metropolitan Police Commissioner* [1978] 1 AllER 136; [1979] AC 474; [1978] 2 WLR 695; [1978] CrimLR 429; (1978) 67 CrAppR 88 & *R v Acaster* (1912) 7 CrAppR 187; (1912) 22 CoxCC 743; and

[ii] if he/she decides to become '*hostile*' whilst giving evidence, he/she can be cross – examined, subject to the approval of the Court, see *R v Pitt* (*supra*).

The law relating to '*Hostile Witnesses*' is examined commencing on page **288**.

In *R v Khan* (1987) 84 CrAppR 44 Glidewell LJ, delivering the judgment of the Court, stated at page 50:

> '[T]he decision of the Court [in *R v Yacoob* (1981) 72 CrAppR 313] makes it clear that it was accepted on all sides, and the Court certainly based its decision upon the proposition, that even though she was living with the man as his wife, if her marriage to him was bigamous and thus invalid, *she was a perfectly competent witness against him and could be called on behalf of the prosecution*.
>
> If that be the position with somebody who has gone through an invalid ceremony of marriage because it is bigamous, what is the position of a lady who has gone through a ceremony of marriage which under the religious observances of a faith, and under the law of some other countries, is entirely valid, but which, because it is a second polygamous marriage, is of no effect in the law of this country? In our judgment the position so far as her ability and competence to give evidence is concerned is no difference from that of a woman who has not been through a ceremony of marriage at all, or one who has been through a ceremony of marriage which is void because it is bigamous.' (emphasis added)

As regards the admissibility of communication between spouses, see *R v Verolla* (1962) 46 CrAppR 252; *Rumpling v Director of Public Prosecutions* [1962] 3 WLR 763; [1962] 3 AllER 256; [1962] AC 814; (1962) 46 CrAppR 398 & *R v Deacon* [1973] 2 AllER 1145; [1973] 1 WLR 696; [1973] CrimLR 781; (1973) 57 CrAppR 688.

As regards the '*competency of former wives*', see *R v Algar* (1953) 37 CrAppR 206 & *R v Ash (Leonard) & others* (1985) 81 CrAppR 294.

See also: *Moss v Moss* (1963) 47 CrAppR 222.

[B] Defence

Section 136 of the *Criminal Procedure Code* (Ch. 7) states:

> 'In any inquiry or trial the wife or husband of the person charged *shall* be a *competent witness* for the prosecution or *defence* without the consent of such person –
>
> (a) in any case where the wife or husband of a person charged may, under any law in force for the time being, be called as a witness without the consent of such person;
>
> (b) in any case where such person is charged with an offence under Part XVI ['*Offences Against Morality*'] or section 170 ['*Bigamy*'] of the Penal Code;
>
> (c) in any case where such person is charged in respect of an act or omission affecting the person or property of the wife or husband of such person or the children of either of them.' (emphasis added) [words in brackets added]

Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged *shall* be a *competent witness* for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided –
>
> […]
>
> (b) the failure of […] the wife or husband, as the case may be, of the person so charged, to give evidence *shall not* be made the subject of any comment by the prosecution;
>
> […]
>
> (c) the wife or husband of the person charged *shall not*, save as hereinbefore mentioned, be called as a witness except upon the application of the person so charged;'

[11.8.3] Children

[A] Introduction

Section 134 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Every witness in any criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witness shall appear shall have full power and authority to administer the usual oath or affirmation:
>
> Provided that the court may at any time, *if it thinks it just and expedient (for reasons to be recorded in the proceedings)*, take without oath the evidence of any person declaring that the taking of any oath whatever is according to his religious belief unlawful, or *who by reason of immature age* or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath; the fact of the evidence have been so taken being also recorded in the proceedings.' (emphasis added)

It is the duty of the Court to satisfy itself as to whether a child of tender years is capable of being sworn, see *R v Surgenor* (1940) 27 CrAppR 175 at page 177. To be sworn in the child needs to understand the nature and solemnity of the oath, see *R v Khan* (1981) 73 CrAppR 190 at page 193.

In *The State v John Saganu* (Unrep. N1261 (PNG); 25, 26 & 28 July 1994) Doherty J, sitting alone, commented:

> 'Children are more susceptible to suggestion they have shorter memory recall and more vivid imaginations than adults. Care should be taken with their evidence but if the court seeing the witness before it considers and finds he is speaking nothing but the truth then the court is entitled to accept it.'

In *R v G* [1994] 1 QdR 540 Pincus J, as a member of the Court of Appeal, made the following observation at pages 546 – 547:

> 'It seems fairly common for young complainants, speaking of sexual abuse, to give inconsistent or confusing accounts; more generally, ordinary experience of young children suggests that some have difficulty attributing numbers and dates to events and getting sequences right.'

See also: *R v Reynolds* [1950] 1 KB 606; [1950] 1 AllER 335; (1950) 34 CrAppR 60.

[B] General Principles

In *R v David James N* (1992) 95 CrAppR 256 Judge J, delivering the judgment of the Court of Appeal, stated at page 260:

> 'Neither the present statutory provisions, nor their predecessors, provided a minimum or arbitrary age limit below which children should not give evidence. The practice of the courts was varied. For example, in *DPP v Christie* (1914) 10 CrAppR 141, [1914] AC 545 the House of Lords made no adverse comment on the reception of the unsworn evidence of a child aged five years. Nevertheless for some years after the decision of the Court of Appeal in *Wallwork* (1958) 42 CrAppR 153 it became a rule of practice that children of five years or under should not be called to give even unsworn evidence. The practice was followed for many years and was confirmed in the case of a child of six years in *Wright* (1990) 90 CrAppR 91.'

In *R v Sharman* [1998] 1 CrAppR 406 Mantell LJ, delivering the judgment of the Court of Appeal, stated at page 408:

> 'The common law rule has always been that the testimony of a witness to be examined *viva voce* in a criminal trial is not admissible unless he has previously sworn to speak the truth. […]
>
> It was formerly an exception to the general rule that a child's evidence might be received unsworn if it were considered by the court that the child in question did not comprehend the meaning of the oath provided always that he or she understood the difference between truth and falsehood.'

In *R v X, Y & Z* (1990) 91 CrAppR 36 Lord Hutchison CJ, delivering the judgment of the Court of Appeal, stated at pages 41 – 42:

> 'But it is a trite observation, I make it nonetheless, that whatever questions are asked or are not asked, the judge in the end really has to judge the situation upon the child's demeanour. He has to ask himself whether, having heard what the witness said, having seen the way the witness has said it, and watched the way the witness has behaved while questions were being asked, it is someone who realizes the gravity of the situation.
>
> The matter is well illustrated in the case of *Hayes* (1977) 64 CrAppR 194, [1977] 1 WLR 234 in the judgment of Bridge LJ who gave the judgment of the Court, when he said this at p. 196 and 237 A-D:
>
> "The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct."'

Therefore, it is at the discretion of the Court as to whether a child should be called to give evidence, sworn or unsworn.

In *R v Spencer & R v Smails* (1986) 83 CrAppR 277 [[1987] AC 128; [1983] 3 WLR 348; [1986] 2 AllER 928] Lord Ackner, with whom the other Lordships concurred, stated at page 286 – 287:

> 'Where there is no corroboration, the rule of practice merely requires that the jury should be warned of the danger of relying upon the sole evidence of an accomplice, or of the complainant in the sexual case, or *upon the evidence of a child*. The warning to be sufficient must explain why it is dangerous so to act, since otherwise the warning will lack significance. The jury are, of course, told that while as a general rule it is dangerous so to act, they are at liberty to do so if they feel sure that the uncorroborated witness is telling the truth.' (emphasis added)

See also: *R v Johnson Tome* (Unrep. Criminal Case No. 24 of 1990; Ward CJ; at page 1) & *R v Bellamy* (1986) 82 CrAppR 222; [1986] CrimLR 54.

As to whether the evidence of an expert should be admitted to assist in determining the competence of a child witness, see *G v Director of Public Prosecutions* [1997] 2 CrAppR 78.

The law relating to:

- the '*Opinion Evidence - Expert Witnesses*' is examined commencing on page **202**; and
- '*Corroboration*' is also examined commencing on page **668**.

[11.8.4] Mentally Ill Witnesses

It is a question of degree of '*mental illness*' as to whether a witness is *competent* to give evidence. Subject to such a person having a sufficient appreciation of the seriousness of the occasion and a realisation of the importance of the oath, he/she should be allowed to give sworn evidence, see *R v Bellamy* (1986) 82 CrAppR 222; [1986] CrimLR 54 & *R v Dunning* [1965] CrimLR 372.

If the only evidence for the prosecution is a witness with a mental condition that *may* impact on the witness's credibility, then a Court should be careful in convicting based on such evidence, see *R v Spencer; R v Smails* [1986] 2 AllER 928; [1986] 3 WLR 348; [1987] AC 128.

See also: *Toohey v Metropolitan Police Commissioner* [1965] 2 WLR 439; [1965] AC 595; [1965] 1 AllER 506; (1965) 49 CrAppR 148.

[11.9] Compellability

Section 11 of the *Magistrates' Courts Act* (Ch. 20) states (in part):

> 'Subject to the provisions of this and of any other Act, *every justice of the peace shall*, subject to any exceptions which may be contained in his appointment, within the area in and for which he holds such office, have –
>
> (a) all the powers, rights and duties of a Magistrate under this or any other Act to –
>
> (i) *issue summonses and warrants for the purpose of compelling the attendance of […] persons as witnesses before a Court*;' (emphasis added)

Section 63 of the *Magistrates' Courts Act* (Ch. 20) states:

> '*Any person present in court*, whether a party or not in a cause or matter, may be *compelled by any Magistrate's Court to give evidence*, or produce any document in his possession or in his power, in the same manner and *subject to the same rules as if he had been summonsed to attend and give evidence, or to produce such document*, and may be punished in like manner for any refusal to obey the order of the Court.' (emphasis added)

Witnesses *may* also be '*compelled*' to give evidence by the issuance of a 'Summons to Witness', see section 127 of the *Criminal Procedure Code* (Ch. 7) and section 60 of the *Magistrates' Courts Act* (Ch. 20).

If a court is satisfied that a witness will not attend in obedience to a summons to witness, it may issue a 'warrant' to compel the witness to give evidence, see sections 128 to 130 of the *Criminal Procedure Code* (Ch. 7) and sections 60 and 61 of the *Magistrates' Courts Act* (Ch. 20).

Section 135(1) of the *Criminal Procedure Code* (Ch. 7) states:

> 'Whenever any person, appearing either in obedience to a summons or by virtue of a warrant, or being present in court and being verbally required by the court to give evidence –
>
> (a) refuses to be sworn; or
>
> (b) having been sworn, refuses to answer any question put to him;
>
> (c) refuses or neglects to produce any document or thing which he is required to produce; or
>
> (d) refuses to sign his deposition,
>
> without in any such case offering any sufficient excuse for such refusal or neglect, the court may adjourn the case for any period not exceeding eight days, and may in the meantime commit such person to prison, unless he sooner consents to do what is required of him.'

That section provides the authority of a court to keep such a witness in custody until he/she consents to do what is required of him/her.

Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged *shall* be a competent witness for the *defence* at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided –
>
> […]
>
> (d) nothing in this section shall make a husband *compellable* to disclose any communication made to him by his wife during the marriage, or a wife *compellable* to disclose any communication made to her by her husband during the marriage.' (emphasis added)

See also: section 10(11)(b) of the *Constitution*, sections 55, 56, 57, 65 & 66 of the *Magistrates' Courts Act* (Ch. 20) & section 318 of the *Criminal Procedure Code* (Ch. 7).

[11.10] Hostile Witnesses

[11.10.1] Defined

In *R v Prefas & Pryce* (1988) 86 CrAppR 111 [[1987] CrimLR 327] Lord Lane CJ, delivering the judgement of the Court of Appeal, stated at page 114:

> 'We have been referred helpfully to Stephen's *Digest on the Law of Evidence*, Article 147, in which the common law rules are set out. It may be helpful if I just read them:
>
> "*Unfavourable and Hostile Witnesses*: If a witness called by a party to prove a particular fact in issue or relevant to the issue fails to prove such fact or proves an opposite fact the party calling him may contradict him by calling other evidence, and is not thereby precluded from relying on those parts of such witness's evidence as he does not contradict.
>
> *If a witness appears to the judge to be hostile to the party calling him, that is to say, not desirous of telling the truth to the Court at the instance of the party calling him, the judge may in his discretion permit his examination by such party to be conducted in the manner of a cross – examination to the extent to which the judge considers necessary for the purpose of doing justice.*
>
> Such a witness may by leave of the judge be cross – examined as to – (1) facts in issue or relevant or deemed to be relevant to the issue; (2) matters affecting his accuracy; and as to (3) whether he has made any former statement, oral or written, relative to the subject – matter of the proceeding and inconsistent with his present testimony [...]".' (emphasis added)

In *Hutchinson* (1990) 49 ACrimR 229 the Court held:

> The correct test for deciding whether a witness should be declared a hostile witness is whether the witness is *deliberately withholding material evidence by reason of an unwillingness to tell the whole truth at the instance of the party calling him/her or for the advancement of justice.* The crucial consideration is whether the party calling the witness is unable for that reason to elicit the facts by non – leading questions.

Therefore, a witness who has provided a statement and who is considered by the Court to be deliberately withholding '*material evidence*' by reason of an '*unwillingness*' to tell the whole truth *may* be declared a '*hostile witness*' and cross – examined by the prosecutor.

Such '*unwillingness*' *may* be exhibited by a witness who:

[i] is reluctant to give evidence, see *R v Thompson* (1977) 64 CrAppR 96.

> However, the degree of reluctance is the consideration as to whether a particular witness is '*hostile*'. In *Daniel Samani v R* (Unrep. Criminal Appeal Case No. 2 of 1995) the Court of Appeal considered a case in which the complainant after giving some evidence refused to answer any further questions and in effect 'remained silent'. In that case there was no application to have the witness declared 'hostile'. Williams JA with whom Kapi JA concurred, stated at page 8:
>
> > 'It is always a matter of concern when a critical prosecution witness, for whatever reason, remains silent and does not answer pertinent questions addressed by the court. It is however, not an entirely unknown circumstance when one is dealing with criminal conduct in the family environment.';

[ii] gives evidence inconsistent with his/her prior statement; or

[iii] professes to have forgotten what happened.

See also: *R v Pitt* [1982] 3 AllER 63; (1982) 75 CrAppR 254; [1983] QB 25; [1982] 3 WLR 359; [1982] CrimLR 513.

The '*demeanour*' of a witness when giving evidence, ie., behaviour of a witness in the witness box, *may* assist a Court in determining whether he/she is '*hostile*', see *R v Daley* [1989] CrimLR 817; *McLellan v Bowyer* (1961) 106 CLR 95 & *Hadlow* (1991) 56 ACrimR 11.

A *defence witness* may also be declared '*hostile*', see *R v Booth* (1982) 74 CrAppR 123; [1981] CrimLR 700.

[11.10.2] Forgetfulness

In *John Jaminan v The State (No. 2)* [1983] PNGLR 318 Pratt J, as a member of the Supreme Court, stated at page 321:

> 'Before [… *the stage when a witness is declared hostile*] is reached of course the trial judge will already *infer* that something has gone radically wrong [, *by virtue of the questioning by the prosecutor,* refer to page **292** in that regard,] but he *may* prefer to ask some questions about the matter before he consents to examining the particular statement.

> Those enquiries of themselves *may* reveal that the witness's memory is simply not as good now as it was at the time when he made the statement or that there may be some genuine ambiguity which has been misunderstood by counsel. If the trial judge however is unable to come to any definite conclusion as a result of his enquiries then of course he *must* examine the statement before leave can be granted to cross – examine upon it.' (emphasis added) [words in brackets added]

In *R v Manning* [1968] CrimLR 675 the Court of Appeal held:

> A witness who is generally forgetful may be unfavourable to the prosecution but cannot be treated as hostile.

See also: *R v Honeyghon & Sayles* [1999] CrimLR 221.

Whilst '*leading questions*' *may* be asked to forgetful witnesses in order to assist them to remember, such witnesses *cannot* be told what they are expected to say. The law relating to '*Leading Questions*' is examined commencing on page **341**.

[11.10.3] Criminal Procedure Act 1865 (UK)

In *R v Henry Bata & Ken Arasi* (Unrep. Criminal Appeal No. 1 of 1998) the Court of Appeal held that sections 4 and 5 of the *Criminal Procedure Act* 1865 (UK) is applicable in the Solomon Islands by virtue of Schedule 3.1 of the *Constitution*.

Section 3 states:

> '***How far witnesses may be discredited by the party producing***. A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in the case the witness shall, in the opinion of the judge, *prove adverse, contradict him by other evidence*, or, by leave of the judge, *prove that he has made at other times a statement inconsistent with his present testimony*; but before such last – mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, *must* be mentioned to the witness, and he *must* be asked whether or not he has made such statement.' (emphasis added)

Section 4 states:

> '***As to proof of contradictory statements of adverse witnesses***. If a witness, upon cross – examination as to a former statement made by him relative to the subject matter of the indictment or proceeding, and inconsistent with his present testimony*, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it*; but before such proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, *must* be mentioned to the witness, and he *must* be asked whether or not he has made such statement.' (emphasis added)

Section 5 states:

> '***Cross – examinations as to previous statements in writing.*** A witness may be cross – examined as to previous statements made by him in writing, or reduced into writing, relative to the subject matter of the indictment or proceeding, *without such writing being shown to him*; *but if it is contended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him*: Provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purpose of the trial as he may think fit.' (emphasis added)

The law relating to '*Questioning The Credibility Of Defendants*' is examined commencing on page **352**.

[11.10.4] General Principles

In *R v Henry Bata & Ken Arasi* (*supra*) the Court of Appeal held at page 4:

> 'It is clear that a witness may be cross – examined as to any previous statements made in writing or otherwise. If a witness denies a prior inconsistent statement then his attention *must* be drawn to the parts which may be used to contradict him and the contradictory statement may be admitted in evidence as proof of contradiction.' (emphasis added)

In *R v Derby Magistrates' Court, Ex parte B & Same v Same, Ex parte Same* [1996] 1 CrAppR 385 [[1995] 3 WLR 681; [1995] AC 487; [1995] 4 AllER 526] Lord Taylor CJ, with whom the other members of the House of Lords concurred, stated at pages 391 – 392:

> 'It is […] necessary to consider the statutory provisions governing the use which can be made of previous inconsistent statements. They are to be found in the Criminal Procedure Act 1865 (Lord Denman's Act). Sections 4 and 5 of the Act provide […].
>
> It was contended by Mr Goldberg, QC for the respondent that section 4 applies only to oral statements and section 5 deals with written statements. That categorisation is adopted by the editors of *Archbold* (1995 ed., paragraphs 8-110 to 8-113) where, in reproducing sections 4 and 5, they have added the headings "Oral Statements" and "Written Statements" respectively as if they appeared in the statute which they do not. Although section 5 clearly refers only to written statements, we see no reason to confine section 4 to oral statements. Its wording does not so confine it and its content is apt to cover statements both oral and written. […] It is also asserted in *Murphy on Evidence*, 5th ed. (1995) at p. 477 and I agree with the exposition to be found there. *Section 4 allows proof that a previous inconsistent statement was made if that is not distinctly admitted. Section 5 additionally permits (a) cross – examination of a witness as to a previous inconsistent written statement without showing him or her the statement and (b) contradiction of the witness's testimony by putting the previous statement to him. If he denies making it, the statement can be proved (section 4). Even if he admits making the statement but adheres to evidence inconsistent with it, the statement, or such part of it as the judge thinks proper, may be put before the jury* (section 5, and see *Beattie* (1989) 89 CrAppR 302).' (emphasis added)

[11.10.5] Procedure

In *John Jaminan v The State (No. 2)* [1983] PNGLR 318 the Supreme Court held:

(1) If a prosecutor wishes to seek to have his/her witness declared hostile he/she must alert the Court and prepare the ground by asking a series of appropriate questions to the witness with a view to making a request for leave to cross – examine the witness as a hostile witness.

The questions should include:

(i) the fact that the witness has made a prior statement concerning the matter;

(ii) where it was made;

(iii) when it was made; and if possible

(iv) an identification of the witness's signature on the written statement.

(2) Where a witness is declared hostile the prosecutor may not only contradict him/her by other witnesses but may also by leave of the Court prove that he/she has made inconsistent statements.

The defence *must* also be given the opportunity to show or argue that the witness is *not* being hostile.

Witnesses need to be questioned after they have given evidence which is inconsistent with their prior statement, including:

'[i] Did you on [the date the statement was provided to police] provide a statement to [full name, rank and station of the police officer] at [where the statement was taken] in relation to the matter before this Court?

[ii] How was that statement recorded?

[iii] Was that statement obtained with any force from [full name, rank and station of the police officer]?

[iv] Did you tell [full name, rank and station of the police officer] the truth when you provided that statement?

[v] Did you [sign / place your mark on] that statement?

[vi] Would you look at the [signature / mark] on this statement?

[vii] Is that your [signature / mark]?

[viii] Did you read the statement or was it read to you before you [signed or marked] it?

[ix] Were you forced to [sign or place your mark on] that statement?

[x] Is what is contained in that statement the same as what you have told this Court today?'

If a witness denies that he/she has provided a statement to police then permission should be sought from the Court to show the witness the statement.

The prosecutor should then request permission to have the witness declared hostile so that he/she can be cross – examined on the contents of the statement.

When cross – examining a '*hostile witness*', upon leave being granted by a Court, the prosecutor is *firstly required* to read to the witness those parts of the statement which are inconsistent with the evidence which the witness gave to the court, in order to contradict the evidence given by witness to the Court, see section 5.

Such questioning must be concise. It is improper practice to ask a '*hostile witness*' long passages from their statement and then ask for his/her comment. The passages relied on *must* be shown to the witness if it is intended to seek to tender the 'prior inconsistent statement', although there is no obligation to tender that statement. It is however, better practice if such statements are tendered as an exhibit.

A prior inconsistent statement may be of a purely oral nature and in such circumstances the person who heard the oral statement may be called to prove that the statement was made, see *R v Hart* (1957) 42 CrAppR 47.

See also: *R v Beattie* (1989) 89 CrAppR 302 & *Price v Bevan* (1974) 8 SASR 81.

[11.10.6] Duty Of The Prosecution

In *R v Francis & Warren* (1956) 40 CrAppR 160 Lord Goddard CJ, delivering the judgment of the Court, held at page 163:

> 'If the prosecution have information in their possession which shows that the evidence which a witness called for the prosecution has given is in flat contradiction of a previous statement which he has made and so entitles the prosecution to cross – examine, they should apply for leave to cross – examine and not leave it to the judge to do so, because it is counsel's duty to cross – examine in such circumstances. If he has not done so, the judge has to do it. That is not right because it may look as if the judge is taking sides, but he cannot help intervening in such circumstances, because it is his duty to see that the justice is done.'

In *R v Blewitt* (1988) 62 ALJR 503 the High Court of Australia held:

> It is established that the calling of a witness known to be hostile for the sole purpose of getting before the Court a prior inconsistent statement which is inadmissible to prove facts against the defendant is *improper* and might well give rise to a miscarriage of justice.

See also: *John Jaminan v The State (No. 2)* [1983] PNGLR 318 at page 321; *R v Hall* [1986] 1 QdR 462 & *Sekhon* (1992) 63 ACrimR 349.

In *R v Mills & Poole* [1998] 1 CrAppR 43 [[1998] AC 382; [1997] 3 WLR 458; [1997] 3 AllER 298] the House of Lords examined the prosecution duty of disclosure of the statements of prosecution witnesses who are regarded as unreliable and whom the prosecution do not intend to call.

Lord Hope of Craighead, with whom the other Lordships concurred, stated at pages 53 – 65:

> 'The point of law of general public importance certified by the Court of Appeal was as follows:

> "Where prosecuting counsel has reasonably decided that the maker of the statement is not a witness of truth and will seek to depart from or contrive an explanation for that statement if the witness is called, is the prosecution's duty limited to furnishing the name and address of the witness only, or must counsel provide copies of the statement to the defence?"
>
> […] I am of the opinion that in the circumstances specified in the certified question the answer to it should be that it is the duty of prosecuting counsel to provide a copy of the statement of the witness to the defence and that the duty is not limited to furnishing only the name and address of the witness.'

Refer also to the law relating to the '*Disclosure Of Prosecution Evidence To The Defence Generally*' commencing on page **134**.

[11.10.7] Weight To Be Attached

In *R v Michael Talu* (Unrep. Criminal Case No. 21 of 2000) Palmer J stated at page 6:

> 'Under cross – examination, it was put to this witness if he had made any prior inconsistent statement to the Police about the crucial events that night and to provide any explanations. No satisfactory explanation however could be provided by this witness other than to say the what he had said in Court was the truth. The effect of this merely goes to credibility.'

In *R v Derby Magistrates' Court, Ex parte B & Same v Same, Ex parte Same* [1996] 1 CrAppR 385 [[1995] 3 WLR 681; [1995] AC 487; [1995] 4 AllER 526] Lord Taylor CJ, with whom the other members of the House of Lords concurred, stated at page 392:

> '*It is settled law and has not been disputed on this appeal, that when a previous inconsistent statement goes before the jury, it is not evidence of the truth of its contents*: *Birch* (1924) 17 CrAppR 26. Its effect is confined to discrediting the witness generally or, if the inconsistencies relate directly to *the matters in issue, to rendering unreliable the witness's sworn evidence on those matters.*' (emphasis added)

In *R v Golder, Jones & Porritt* (1960) 44 CrAppR 5 [[1960] 3 AllER 457; [1960] 1 WLR 1169] Lord Parker CJ, delivering the judgment of the Court, held at page 9:

> 'A long line of authority has laid down the principle that while previous statements may be put to an adverse witness to destroy his credit and thus to render his evidence given at the trial negligible, they are not admissible evidence of the truth of the facts stated therein.'

See also: *R v White* (1922) 17 CrAppR 60; *R v Harris* (1927) 20 CrAppR 144 at pages 147 – 148; *R v Golder* [1960] 3 AllER 457; (1961) 45 CrAppR 5 & *R v Parkinson* [1990] 1 QdR 382.

[11.10.8] Re - Examination

A witness *may* be declared '*hostile*' during '*re – examination*', see *R v Powell* [1985] CrimLR 592.

However, in *R v White* [1970] QWN 46 a witness was called by the prosecution and gave evidence which was inconsistent with the evidence she had given at the '*preliminary investigation / inquiry*' with signed statements which she made to the police. The inconsistencies were apparent during '*examination – in – chief*' of the witness but the prosecutor did not apply to have the witness declared '*hostile*' until the conclusion of the '*re – examination*' of the witness.

The Court held:

> If the prosecutor had applied to have the witness declared '*hostile*' during the course of '*examination – in – chief*' and had been successful, the whole tenor of the cross – examination of the witness may have been different and as a consequence the application made during the course of '*re – examination*' should be refused.

The law relating to '*Re – examination Generally*' is examined commencing on page **365**.

[11.10.9] Preliminary Investigations / Inquiries

In *R v Mann* (1972) 56 CrAppR 750; [1972] CrimLR 704 the Court of Appeal held:

> Where a witness displays evidence of hostility during a '*Preliminary Investigation / Inquiry*' there is *no* rule which requires the prosecution then and there to treat the witness as '*hostile*'.

The law relating to '*Preliminary Investigations / Inquiries Generally*' is examined commencing on page **310**.

[11.11] Refreshing Memory From Notes

[11.11.1] General Principles

In *R v Da Silva* [1990] 1 AllER 29 [(1990) 90 CrAppR 233; [1990] 1 WLR 31; [1990] CrimLR 192] Stuart – Smith LJ, delivering the judgment of the Court of Appeal, stated at pages 32 – 33:

> '[I]f a witness needs to refresh his memory, there is much to be said for it being apparent to the jury that he is doing so and for the jury knowing when the statement was made. *What must be avoided is a witness simply reading his statement when he has no real recollection of events: but that can be avoided by removing the statement from him once he has read it to refresh his memory*. In *R v Richardson* [1971] 2 AllER 773 at 777, [1971] 2 QB 484 at 499 Sachs LJ continued:
>
> "*The courts, however, must take care not to deprive themselves of new, artificial rules of practice of the best chances of learning the truth.* The courts are under no compulsion unnecessarily to follow on a matter of practice the lure of the rules of logic in order to produce unreasonable results which would hinder the course of justice. Obviously it would be wrong if several witnesses were handed statements in circumstances which enabled one to compare with another what each had said. But there can be no general rule (which incidentally would be unenforceable, unlike the rule as to what can be done in the witness box) that witnesses may not before trial see the statements they made at some period reasonably close to the time of the event which is the subject of the trial. Indeed one can imagine many cases, particularly those of a complex nature, where such a rule would militate very greatly against the interests of justice."
>
> The Court is concerned to see that the truth emerges so that justice can be done. The Court in *R v Richardson* [1971] 2 AllER 773 at 777, [1971] 2 QB 484 at 489 approved two observations of the Supreme Court of Hong Kong in *Lau Pak Ngam v R* [1966] CrimLR 443 at 444:

> "Testimony in the witness box becomes more of a test of memory than of truthfulness if witnesses are deprived of the opportunity of checking their recollection beforehand by reference to statements or notes made at a time closer to the events in question … Refusal of access to statements would tend to create difficulties for honest witnesses but be likely to do little to hamper dishonest witnesses."
>
> In our judgment, therefore, it should be open to the judge, in the exercise of his discretion and in the interests of justice, to permit a witness who has begun to give evidence to refresh his memory from a statement made near to the time of events in question, even though it does not come within the definition of contemporaneous, provided he is satisfied
>
> *(1) that the witness indicates that he cannot now recall the details of events because of the lapse of time since they took place,*
>
> *(2) that he made a statement much nearer the time of the events and that the contents of the statement represented his recollection at the time he made it,*
>
> *(3) that he had not read the statement before coming into the witness box, and*
>
> *(4) that he wished to have an opportunity to read the statement before he continued to give evidence*.' (emphasis added)

The Divisional Court in *R v South Ribble Magistrates' Court, Ex parte Cochrane* [1996] 2 CrAppR 544 held that in the interests of justice and fairness, a witness should be permitted to refresh his/her memory from notes *not* made contemporaneously. However, such leave should only be granted in appropriate circumstances.

A witness who has '*forgotten*' what had occurred, may refresh his/her memory from notes, provided the notes accurately depict what occurred and at the time of writing the witness was satisfied with its accuracy, see *R v Bryant & Dickson* (1946) 31 CrAppR 146.

It is irrelevant who wrote the notes, the issue is whether the witness had read the notes when the facts were fresh in his/her memory and agreed with the content of the notes as being accurate, see *R v Richardson* [1971] 2 QB 484; (1971) 55 CrAppR 244; [1972] 2 WLR 889; [1971] 2 AllER 773; *Lau Pak Ngam v R* [1966] CrimLR 443; *R v Keeley* (1982) 74 CrAppR 213 & *R v Mills & Rose* [1962] 1 WLR 1152; [1962] 3 AllER 298; (1962) 46 CrAppR 336.

If the original notes have been lost or destroyed, a copy provided it is accurate, *may* be used to refresh the memory of a witness, see *R v Chang* (1976) 63 CrAppR 20.

Those principles apply equally to all witnesses, including the defendant.

A tape recorder may be used to refresh memory, see *R v Mills & Rose* [1962] 3 AllER 298; [1962] 1 WLR 1152; (1962) 46 CrAppR 336.

Arresting / Investigating Officers should maintain an up – to – date record of their investigations in the respective 'Diary of Action Taken' and *may* refer to such notes for the purpose of '*refreshing memory*' in the court provided they satisfy the criteria as enunciated in *R v Da Silva* (*supra*).

The practice of police officers collaborating in the making of notes is permissible, see *R v Bass* [1953] 1 QB 680; [1953] 2 WLR 825; [1953] 1 AllER 1064; (1953) 37 CrAppR 51.

The prosecution *can not* seek to have the notes tendered as an 'exhibit', *unless*:

[i] the defence strays beyond that part of the notes used by a witness to refresh memory, after being granted leave of the Court to examine the notes, the law relating to which is examined commencing on page **297**;

[ii] the defence calls for the notes which have *not* been used to refresh the memory of a witness, the law relating to which is examined commencing on page **297**; or

[iii] the defendant acknowledges the truth as what is contained in the notes by adopting them, see *R v Cross* (1990) 91 CrAppR 115; *R v Gillespie & Simpson* (1967) 51 CrAppR 172; [1967] CrimLR 238 & *R v Cooper* (WJ) (1986) 82 CrAppR 74; [1985] CrimLR 592.

Refer also to the law relating to the '*Adoption Of Caution Statements*' which is examined on page **230**.

Otherwise, the notes are simply a means of refreshing memory and *can not* be tendered as an exhibit, see *R v Britton* [1987] 1 WLR 539; (1987) 85 CrAppR 14; [1987] 2 AllER 412; [1987] CrimLR 490; *R v Dillon* (1987) 85 CrAppR 27; *R v Sekhon* (1987) 85 CrAppR 19; [1987] CrimLR 693 & *R v Fenlon* (1980) 71 CrAppR 307; [1980] CrimLR 573.

The prosecution should advise the defence if any witness has refreshed his/her memory from his/her statement prior to court, as it may be an issue in the determination as to what '*weight*' the evidence of that witness is given by the Court, see *R v Westwell* [1976] 2 AllER 812; (1976) 62 CrAppR 251; [1976] CrimLR 441.

Tape – recordings *may* be used to 'refresh memory', see *R v Mills & Rose* [1962] 1 WLR 1152; [1962] 3 AllER 298; (1962) 46 CrAppR 336. However, a transcript of the conversation is *not* evidence but simply an aid to the court as a record of the conversation, see *R v Ali & Hussain* [1965] 3 WLR 229; [1965] 2 AllER 464; [1966] 1 QB 688; (1965) 49 CrAppR 230.

See also: *Worley v Bentley* [1976] 2 AllER 449; (1976) 62 CrAppR 239; *R v Virgo* (1978) 67 CrAppR 323; [1978] CrimLR 557; *Heatherington v Brooks* [1963] SASR 321; *Woodcock v Nichol* [1976] 13 ALR 411 & *Guy & Finger v R* [1978] WAR 125.

[11.11.2] Production To Defence

In *R v Britton* (1987) 85 CrAppR 14 [[1987] 1 WLR 539; [1987] 2 AllER 412; [1987] CrimLR 490] Lord Lane CJ, delivering the judgment of the Court, held at page 18:

> 'It is to be observed that in *Cross on Evidence* (6th ed., 1985) at pp. 254 – 355 the following passage appears:
>
> "There is an old general rule, inadequately explored in the modern authorities, that, if a party calls for and inspects a document held by the other party, he is bound to put it in evidence if required to do so. But, [… if] a witness refreshes his memory concerning a date or an address by referring to a diary, he may be cross – examined about the terms or form of the entries used to refresh his memory without there being any question of the right of the party calling him to insist that the diary should become evidence in the case. On the other hand, if the witness is cross – examined about other parts of the diary, the party calling him may insist on its being treated as evidence in the case."
>
> We respectfully adopt that passage.'

Therefore, if:

[i] if the defence calls for the production of notes which had *not* been used to refresh memory of a prosecution witness in order to inspect them, or

[i] after a prosecution witness has been granted leave to refer to his/her notes the defence inspects the contents of any notes not used by that witness to refresh his/her memory,

the defence may be bound by the prosecution to tender those notes as an 'exhibit'.

The Court was *not* referring to the admissibility of '*Confessional Evidence*' which is examined commencing on page **211**.

[11.11.3] Application To Refresh Memory From Notes

All police officers should use the following application to apply to a Court to use notes to refresh their memory:

> 'Your [Worship / Lordship], I have some further recollection of what happened and the conversations which I had in relation to the matter before the court. I recorded my recollection on [ie. describe the type of notes] approximately [how long after the incident were the notes recorded] after the incident. To refresh my memory and for the purpose of accuracy I seek the permission of the Court to refer to those notes.'

[11.12] Accomplices

[11.12.1] Introduction

An '*accomplice*' is a person who can be prosecuted:

[i] for actually committing an offence; or

[ii] for being a '*party*' to an offence within the meaning of section 21 of the *Penal Code* (Ch. 26); or

[iii] for being an '*Accessory After The Fact*' to an offence within the meaning of section 387 of the *Penal Code* (Ch. 26).

In that regard, the law relating to '*Parties To Offences*' is examined commencing on page **406**.

The following principles relate to '*accomplices*' giving evidence for the prosecution:

[i] There is a rule of practice, which now has the force of a rule of law, that although a conviction *may* be founded on the evidence of an '*accomplice*', *it is dangerous to do so unless it is corroborated*, as commented by Connolly P in *Director of Public Prosecutions v John Fufue & Nelson Fafeloa v R* (Unrep. Criminal Appeal Nos. 3 & 4 of 1988) at page 5. See also: *Director of Public Prosecutions v Kilbourne* (1973) 57 CrAppR 381; [1973] 2 WLR 254; [1973] AC 729; [1973] 1 AllER 440; [1973] CrimLR 235;

[ii] The evidence of one '*accomplice*' *can* corroborate the evidence of another, see *R v Cheema* [1994] 1 AllER 639; (1994) 98 CrAppR 195 [[1994] WLR 147] at pages 649 and 204 respectively;

[iii] An '*accomplice*' should only be called as a witness for the prosecution if:

[a] he/she has been *charged, but not necessarily sentenced*, see *R v Palmer* (1994) 99 CrAppR 83; [1994] CrimLR 122.

An '*accomplice*' who is called as a witness for the prosecution and does *not* adhere to the account put forward on his/her behalf by way of mitigation when sentenced can *not* be resentenced for the offence/s, see *Adifaka v Director of Public Prosecutions* [1984] SILR 44; *Director of Public Prosecutions v Kolikisi* [1985 – 86] SILR 150 & *Stone v R* [1970] 2 AllER 594; [1970] 1 WLR 1112; (1970) 54 CrAppR 364. Therefore the best practice is to arrange for the sentencing of a accomplice, *after* he/she has given evidence for the prosecution, see *R v Palmer* (1994) 99 CrAppR 83; [1994] CrimLR 122.

The law in relation to '*Sentencing*' is examined commencing on page **918**.

or

[b] the prosecution has given an undertaking that he/she will *not be prosecuted* for the offence in question, see *R v Austin Yam* (Unrep. Criminal Appeal Case No. 33 of 1994; Palmer J); *R v Grant* [1944] 2 AllER 311; (1945) 30 CrAppR 99; *R v Pipe* (1967) 51 CrAppR 17; [1967] CrimLR 42 & *R v Payne* [1950] 1 AllER 102; (1950) 34 CrAppR 43; and

[iv] The Court should specify what evidence it is relying on as corroborative evidence, see *R v Goddard & Goddard* (1962) 46 CrAppR 456.

Unless there is evidence to the proof of the commission of the offence it does *not* amount to corroboration of the evidence of an accomplice, see *R v Henry Everest (a)* (1909) 2 CrAppR 130 at page 132.

A co – defendant who has been discharged at the close of the prosecution case may be called to give evidence by a co – defendant, see *R v Conti* (1974) 58 CrAppR 387 [[1974] CrimLR 247] at page 393.

[11.12.2] General Principles

In *R v Austin Yam* (Unrep. Criminal Appeal Case No. 33 of 1994) Palmer J stated at pages 2 – 7:

> 'Grounds (i) and (ii) are linked because if it is accepted that the prosecution witness, Peter Tahunimae, is an accomplice and that there was a powerful and obvious inducement to ingratiate himself with the prosecution and the Court, and that it is accepted that he is a self – confessed forger, then it would follow that unless prosecution has undertaken not to proceed against him or, if he had already been convicted and sentenced by a court, he should not have been called by the prosecution as a witness.
>
> The starting point therefore is, is Peter Tahunimae an accomplice? And in order to answer that, the question what is an accomplice would have to be answered first.

The learned author in Halsburys Laws of England, 4th Edition at paragraph 457, stated: "… persons are accomplices if they are participants in the offence charged, whether as principals, procurers, aiders or abettors."

The classic definition is contained in the case of Davies v Director of Public Prosecutions (1954) 1 AllER 507 at 513, HL, per Lord Simmons LC,:

"There is in the authorities no formal definition of the term 'accomplice', and your lordships are forced to deduce a meaning for the word from the cases in which X, Y, and Z have been held to be, or held liable to be treated as accomplices. On the cases it would appear that the following persons, have been treated within the category:- (i) On any view, persons who are particeps criminis in respect of the actual crime charged whether as principals or accomplices before or after the fact (in felonies) or persons committing, procuring or aiding and abetting in the case of misdemeanours. This is surely the natural and primary meaning of the term 'accomplice'."

This definition is referred to in an article by J.L.I.J. Edwards, "Accomplices in crime" page 324, at pages 332 and 333. The learned author also explained why the evidence of an accomplice should be treated differently. At the bottom of page 332 and top of page 333, he states:

"Once it is established that the person who turns Queens evidence was himself involved with the prisoner in committing the actual crime charged his motives are naturally suspect, and this leads to his testimony being treated with suspicion and caution. Knowing all the circumstances of the crime, the accomplice is in a position whereby he can, with little difficulty, make convincing false charges against the prisoner. It is difficult enough to determine whether a witness is telling the truth or lying, but the need for caution is greater than usual in the case of a witness who was 'in on the crime' and then decides to turn against his former confederate."

There are also several cases in Australia which considered the definition of the term 'accomplice'. In R v Webbe & Brown (1926) SASR 108 at 111, 112, the Court said:

"As to what an accomplice is, there is a singular dearth of legal authority. Foster describes him as any particeps criminis (Crown Law, p341, cited by Poole J in R v Young (1923) SASR 35 at 69). The definition given in the Century Dictionary is "any participator in an offence whether as principal or as accessory", and in the Encyclopaedia Britannica, "one who is associated with another or others in the commission of a crime, whether as principal or accessory". Either of these definitions is, we think, sufficient."

In R v Cramp (1880) 14 Cox CC 390, the following was said:

"A person is an accomplice in the crime charged if he took part in its commission, and was privy to the criminal intent of the thing done."

[…]

I am satisfied on the evidence before the Magistrate's Court that Peter Tahunimae was an accomplice in the true sense of the word.

There is one clear distinction that needs to be noted. This witness is not a co – defendant in the proceedings before the court, and neither had he been charged separately.

The question that arises then is whether, this is fatal to the rule of practice described in the two texts referred to by learned Counsel for the Appellant.

In the first text referred to, Blackstones Criminal Practice, 1933 Edition, at page 1790,:

"An accomplice against whom proceedings are pending but who is not an accused in the proceedings in which the prosecution seek to call him, should only be called by the prosecution if they have undertaken to discontinue the proceedings against him. This appears to be a rule of practice rather than of law."

The second text referred to was Phipson on Evidence, 14th Edition, at paragraph 9 – 22,:

"It seems that any person jointly charged with the accused in incompetent to give evidence against him in committal proceedings, but the fact that he has been so called will not make the committal bad. To render co – defendants competent to be called by the prosecution, such co – defendants must have been acquitted, or have obtained a nolle prosequi, or have pleaded guilty, or must be tried separately. There is however a rule of practice, breach of which will lead to a conviction being quashed on appeal, that an accomplice who has been charged either jointly in the indictment with the defendant, or in the same indictment although not under a joint charge, or had been charged and not yet indicted [and semble if separately indicted) shall not be called by the prosecution unless *he has pleaded guilty* or no evidence is offered against him or a nolle prosequi has been entered in his case."

Both quotations referred to the case of a co – defendant, or an accomplice who had been duly arraigned. The rationale behind that rule of practice is that there is an obvious and powerful inducement for such accomplice to ingratiate himself with the prosecution and the court, and that the existence of such inducement made it desirable in the interest of justice to exclude such persons from being called by the prosecution.

[…]

It is my respectful view that *an accomplice in such a position as Peter Tahunimae should not have been called as a witness, unless some form of undertaking from criminal prosecution is provided by the police*. *Peter Tahunimae's position is no different from an accomplice who had been charged with the same offence and where no immunity had been given, or had not been convicted and sentenced by a court.*

The test that should be applied is whether there is in existence an obvious and powerful inducement for such a person to ingratiate himself with the prosecution, and the court. In other words, is there a real possibility that such an inducement exists?

[…]

The rule of practice in my view should be extended to include accomplices who have not been charged, and that they should only be called after a clear undertaking had been provided to that witness that he would not be indicted for the offence in which he had been asked to give evidence in. This course of action should remove the threat of the existence of an obvious and powerful inducement for such an accomplice to ingratiate himself with the prosecution and the court. That however, does not remove the requirement that such accomplice's evidence should be treated with caution, and that the courts bear in mind the dangers of convicting on uncorroborated evidence.' (emphasis added)

In *R v Palmer* (1994) 99 CrAppR 83 [[1994] CrimLR 122] the Court of Appeal examined the law relating to the prosecution calling '*accomplices*'. Russell LJ, on behalf of the Court, stated at pages 85 – 86:

> 'The point is taken that it was improper of the Crown to call Thompson at the committal stage of the proceedings, or indeed at any later stage of the proceedings, without Thompson having been sentenced for his part in what took place. Mr. Coode directed out attention to two authorities: *Pipe* (1967) 51 CrAppR 17 and *Payne* (1950) 34 CrAppR 43; [1950] 1 AllER 102. Both of those authorities, which are now over 20 or 30 years ago, give some support to the proposition that in the ordinary course of events a defendant should be sentenced if he is an accomplice before being called to give evidence for the Crown. *Mr. Coode readily acknowledges that with the passage of the years that practice has been very much modified, and certainly in the experience of all three members of this Court, in the 1980's and 1990's the practice has been generally not to sentence an accomplice until the conclusion of all the proceedings in the case.* By that process the judge can get the flavour of the case and look at it in the round at the conclusion of all the evidence, including in some cases the defendant's evidence as well as witnesses called on behalf of the prosecution.
>
> We emphasise in this case that the committal proceedings of the appellant and of Thompson were entirely separate. *Quite clearly, if two men are charged and it is sought to commit them together as co – defendants, it would be irregular to bring one down from the dock into the witness box to give evidence on behalf of the Crown against the other.* That proposition was borne out by *Grant* (1944) 30 CrAppR 99; [1944] 2 AllER 311. Such was not the case here. *We repeat there were separate committal proceedings and, in our judgment, the Crown were perfectly entitled before sentence had been passed upon Thompson to call him in the committal proceedings.* […]
>
> *Should Thompson have been sentenced before giving evidence at the Crown Court? That is purely a matter for the discretion of the trial judge. We would not ordinarily interfere in that exercise. In this case we go further and express the view that it was manifestly right for the learned judge to adopt the course that he did and to hear the case out before sentencing, first, this appellant after his trial, and then Thompson at the conclusion of the trial in the way that he did.* Thompson earned a very substantial discount for the fact that he had co – operated with the authorities and given evidence in the way we have described.' (emphasis added)

In *Adifaka v Director of Public Prosecutions* [1984] SILR 44 White ACJ stated at page 46:

> 'Mr Brown then raised a point which is not included in the points of appeal but which I shall deal with as a relevant preliminary matter. He submitted that the learned Magistrate erred in warning Sifonabo, when he gave evidence in direct conflict with his statement to the police, which was the basis of his plea of guilty and conviction and sentence, that his sentence could be increased on appeal. Mr. Brown said, that he had found no authority on the point.
>
> For completeness, some guidance on the subject is to be found in <u>*R v Stone*</u> (1970) 54 CrAppR 364, referred to in Archbold 40 Ed. para 401 a. *It is stated on the authority of that case that a judge should never bring back an accused in order to increase his sentence where, in giving evidence against a co – accused after being sentenced originally, he fails to adhere to the account put forward on his behalf by way of mitigation and in effect changes his evidence.*' (emphasis added)

Accomplices may be cross – examined as to credit, see *R v Hughes* (1933) 24 CrAppR 52.

As regards an accomplice who has received an immunity from prosecution, see *Mc Donald v R* (1983) 77 CrAppR 196.

See also: *Director of Public Prosecutions v Kolikisi* [1985 – 86] SILR 150; *R v Anthony Bara* (Unrep. Criminal Case No. 13 of 1991; Ward CJ; at page 5); *Taylor & Goodman* [1999] 2 CrAppR 163; *Chan Wai - Keung v R* [1995] 2 AllER 438; [1995] 1 WLR 251; [1995] 2 CrAppR 194; *R v Beck* [1982] 1 AllER 807; (1982) 74 CrAppR 221; [1982] 1 WLR 461; [1982] CrimLR 586; *R v Governor of Pentonville Prison, Ex parte Schneider* (1981) 73 CrAppR 200*; R v Weekes & others* (1984) 74 CrAppR 161; *The State v Amoko – Amoko* [1981] PNGLR 373; *The State v Titeva Fineko* [1978] PNGLR 262 at page 263; *R v Smith* (1925) 18 CrAppR 19 at page 20; *R v Feigenbuum* [1919] 1 KB 431; (1919) 13 CrAppR 214; *R v Barrett* (1908) 1 CrAppR 64; *R v Christie* (1914) 10 CrAppR 141 at page 156; R v Royce – Bentley (1974) 59 CrAppR 51; *R v Thorpe & others* (1978) 66 CrAppR 6; *R v Charavanmuttu* (1930) 22 CrAppR 1 *&* *R v Andrews* [1987] 1 QdR 21 at page 32.

Once called an '*accomplice*' is like any other witness called by the prosecution, and therefore, the law relating to '*Hostile Witnesses*' applies.

The law relating to:

- '*Evidence Of Co – Defendants*' is examined commencing on page **360**; and
- '*Hostile Witnesses*' is examined commencing on page **288**.

[11.12.3] Need For Corroboration

In *R v Baskerville* (1916) 12 CrAppR 81 [[1916] 2 KB 658] Lord Reading CJ, delivering the judgment of the Court, stated at pages 87 – 91:

> 'There is no doubt that the uncorroborated evidence of an accomplice is admissible in law. […] But it has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices […].
>
> […]
>
> The rule of practice as to corroborative evidence has arisen in consequence of the danger of convicting a person upon the unconfirmed testimony of one who is admittedly a criminal. What is required is some additional evidence rendering it probable that the story of the accomplice is true and that it is reasonably safe to act upon it. If the only independent evidence relates to an incident in the commission of the crime which does not connect the accused with it, or if the only independent evidence relates to the identity of the accused without connecting him with the crime, is it corroborative evidence? […]
>
> […]
>
> We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.'

In *R v Beck* (1982) 74 CrAppR 221 [[1982] 1 WLR 461; [1982] 1 AllER 807; [1982] CrimLR 586] Ackner LJ, delivering the judgment of the Court, held at page 230:

> 'The leading case on the subject of corroboration remains BASKERVILLE (1916) 12 CrAppR 81, 91; [1916] 2 KB 658, in which Lord Reading CJ said that it must be: "Independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms some material particular not only the evidence that the crime has been committed but also that the defendant committed it." The other case to which reference must be made is MULLINS (1848) 3 CoxCC 526 in which it was said [by Maule J in summing-up to the jury at p. 532], in our judgment correctly, that corroboration does not mean that there should be independent evidence of that which the accomplice relates, otherwise his testimony would be unnecessary, as it would merely be confirmatory of other independent testimony.'

In *Director of Public Prosecutions v Kilbourne* (1973) 57 CrAppR 381 [[1973] 2 WLR 254; [1973] AC 729; [1973] 1 AllER 440; [1973] CrimLR 235] Lord Simon commented at page 420:

> '[Corroboration] is required because experience has shown that there is a real risk that an innocent person may be convicted unless certain evidence against an accused […] is confirmed by other evidence. Corroboration is therefore nothing other than evidence which "confirms" or "supports" or "strengthens" other evidence […]. It is, in short, evidence which renders other evidence more probable. If so, there is no essential difference between, on the one hand, corroboration and, on the other, "supporting evidence" or "evidence which helps to determine the truth of the matter". Each is evidence which makes other evidence more probable.' [word in brackets added]

In *Attorney General of Hong Kong v Wong Muk –ping* (1987) 85 CrAppR 167 [[1987] 2 AllER 488] Lord Bridge delivering the judgment of the Judicial Committee of the Privy Council, stated at page 175:

> 'Where the prosecution relies on the evidence of an accomplice and where […] the independent evidence capable of providing corroboration in not of itself sufficient to establish guilt, it will have become obvious to the jury in the course of the trial that the credibility of the accomplice is at the heart of the matter and that they can only convict if they believe him. The accomplice will inevitably have been cross – examined to suggest that his evidence is untrue. The jury will have been duly warned of the danger of relying on his evidence without corroboration. Their Lordships can see no sense in the proposition that the jury should be invited, if effect, to reject his evidence without first considering what, if any, support it derives from other evidence capable of providing corroboration.'

In *R v Farid* (1945) 30 CrAppR 168 Tucker J, delivering the judgment of the Court, stated at pages 174 – 175:

> 'The rule with regard to the proper direction which should be given in cases where the prosecution are relying upon the evidence of accomplices is well known. It is a matter which was originally one of practice and has now become to all intents and purposes a matter of law. As was stated by the Lord Chief Justice (Lord Hewitt) in delivering the judgment of this Court in LEWIS (1937) 26 CrAppR 110, at p. 113: "The rule is familiar. The practice of common law is for the Judge to warn the jury that it is unsafe to convict on the uncorroborated evidence of an accomplice and to advise them not to convict, though, at the same time, he may point out that it is within their legal province to convict if they think proper. Corroborative evidence must be evidence proceeding from a quarter independent of the accomplice and tending to implicate the accused and must corroborate the accomplice's evidence in a material particular." That is the general rule, and in LEWIS (*supra*), this Court

held that that rule was one of universal application. That means this, that it is a warning which must be given to a jury not only in cases where there is no corroboration, but in cases where there is corroboration, and in cases where the Judge may consider that there is ample corroboration.'

In *R v Davies* (1954) 38 CrAppR 11 [[1954] 1 AllER 507] Lord Simonds stated at page 32:

'In a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated.

[…]

This rule, although a rule of practice, now has the force of a rule of law.'

See also: *R v Howard* (1921) 15 CrAppR 177 at page 180 & *R v Beebe* (1925) 19 CrAppR 22.

The law relating to '*Corroboration Generally*' is examined commencing on page **668**.

[11.13] Witnesses With Ulterior Motives

The onus is on the prosecution to ensure that the Court is advised of any possible ulterior motives a witness may have for giving evidence for the prosecution, see *Chan Wai - Keung v R* [1995] 2 AllER 438; [1995] 1 WLR 251; [1995] 2 CrAppR 194.

It is desirable that a witness with ulterior motives or some purpose of their own to serve in giving evidence should be treated as an accomplice, in appropriate circumstances, whether the witness can properly be classed as an accomplice or not, see *R v Plater* (1959) 44 CrAppR 83; [1960] 2 QB 464 & *R v Whitaker* (1976) 63 CrAppR 193.

[11.14] Witnesses With Criminal Histories

If the only evidence for the prosecution is a witness with a '*criminal conviction*' that *may* impact on the credibility of that person's evidence, a Court should be careful in convicting on such evidence, see *R v Spencer; R v Smails* [1986] 2 AllER 928; [1986] 3 WLR 348; [1987] AC 128.

As regards *proving* a '*previous criminal conviction*', section 125 of the *Criminal Procedure Code* (Ch. 7) states (in part):

'(1) In any inquiry, trial or other proceeding under this Code, a previous conviction may be proved, in addition to any other mode provided by any law for the time being in force –

(a) by an extract certified, under the hand of the officer having the custody of the records of the court in which such conviction was had, to be a copy of the sentence or order; or

(b) by a certificate by the officer in charge of the prison in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered; or

(c) by production of the officer having the custody thereof of the appropriate court register recording such conviction or an extract from such register certified under the hand of such officer to be a copy thereof,

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted.

[…]

(3) A previous conviction in any place outside Solomon Islands may be proved by the production of a certificate purporting to be given under the hand of a police officer in the country where the conviction was had, containing a copy of the sentence or order, and the fingerprints, or photographs of the fingerprints of the person so convicted, together with evidence that the fingerprints of the person so convicted are those of the accused person.

Such a certificate as aforesaid shall be prima facie evidence of all facts therein set forth without proof that the officer purporting to sign it did in fact sign it and was empowered so to do.'

The form for a '*Certificate Of Previous Convictions*' is provided for in the '*subsidiary legislation*' for the *Criminal Procedure Code* (Ch. 7).

The law relating to the interpretation of '*Subsidiary Legislation*' is examined on page **63**.

[11.16] Dangerously Ill Witnesses

Section 225 of the *Criminal Procedure Code* (Ch. 7) states:

'Whenever it appears to any Magistrate that any person dangerously ill or hurt and not likely to recover is able and willing to give material evidence relating to any offence triable by the High Court, and it shall not be practicable to take the deposition in accordance with the provisions of this Code of the person so ill or hurt, such Magistrate may take in writing the statement on oath or affirmation of such person, and shall subscribe the same, and certify that it contains accurately the whole of the statement made by such person, and shall add a statement of his reason for taking the same, and of the date and place when and where the same was taken, and shall preserve such statement and file it for record.'

Section 226 of the *Criminal Procedure Code* (Ch. 7) states:

'If the statement relates or is expected to relate to an offence for which any person is under a charge or committal for trial, reasonable notice of the intention to take the same shall be served upon the prosecutor and the accused person, and if the accused person is in custody he shall be brought by the person in whose charge he is, under an order in writing of the Magistrate, to the place where the statement is to be taken.'

Section 227 of the *Criminal Procedure Code* (Ch. 7) states:

'If the statement relates to an offence for which any person is then subsequently committed for trial, it shall be transmitted to the Registrar of the High Court, and a copy thereof shall be transmitted to the Director of Public Prosecutions.'

WITNESSES

Section 228 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Such statement so taken may afterwards be used in evidence on the trial of any person accused of an offence to which the same relates, if the person who made the statement be dead, or if the court is satisfied that for any sufficient cause his attendance cannot be procured, and if reasonable notice of the intention to take such statement was served upon the person (whether prosecutor or accused person) against whom it is proposed to be read in evidence, and he had or might have had, if he had chosen to be present, full opportunity of cross-examining the person making the same.'

See: *R v Thompson* [1982] 2 WLR 603.

WITNESSES

ROYAL SOLOMON ISLANDS POLICE
WITNESS LIST

Police v ……

In the …….Magistrates Court on ……

Witness Name	Tendering An Exhibit [Yes / No]	Summonsed [Yes / No]

PRELIMINARY INVESTIGATIONS / INQUIRIES

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PRELIMINARY INVESTIGATIONS / INQUIRIES

[12.0] Introduction

Section 56 of the *Criminal Procedure Code* (Ch. 7) states:

> 'The High Court may inquire into and try any offence subject to its jurisdiction at any place where it has power to hold sittings:
>
> *Provided that no criminal case shall be brought under the cognizance of the High Court unless the same shall have been previously investigated by a Magistrate's Court and the accused person shall have been committed for trial before the High Court.*' (emphasis added)

'Any Magistrate *may* commit any person for trial to the High Court', see section 210 of the *Criminal Procedure Code* (Ch. 7). (emphasis added)

See also: section 67(1) of the *Criminal Procedure Code* (Ch. 7).

In *R v Sethuel Kelly & Gordon Darcy* (Unrep. Criminal Case No. 2 of 1996) Lungole - Awich J stated at pages 3 – 4:

> 'A fundamental principle in the English Common Law system on which the system in Solomon Islands is based, is that in trial on a charge of felony, generally the more serious offences, the accused must be made to know the serious charge against him and the facts upon which the charge is based, well before his trial. That affords him ample time to prepare his case to oppose the serious charge. That advance knowledge is conveyed to him in proceedings known as preliminary inquiry. It might take the form of calling witnesses [*long form*] or simply reading the charges and depositions [*short form*] and giving copies to accused. The magistrate is required to protect the accused by discharging him if the magistrate does not find sufficient evidence upon which to commit accused to the High Court on the serious charge for trial there. That of course is subject to application of the DPP under section 217 of the CPC. That process protects accused from baseless serious charges.' (emphasis added) [words in brackets added]

The '*purpose*' of a '*Preliminary Investigation / Inquiry*' is to determine whether there is a sufficient case or evidence or grounds to put the defendant on his/her trial by the High Court, see sections 211, 212 & 215 of the *Criminal Procedure Code* (Ch. 7). However, see also section 149 of that Act. In that regard a '*prima facie*' case should be made out against the defendant, see *Epping & Harlow Justices, Ex parte Massaro* [1973] QB 433; (1973) 57 CrAppR 499; [1973] 2 WLR 158; [1973] 1 AllER 1011; [1973] CrimLR 109.

A '*Preliminary Investigation / Inquiry*' for two or more defendants *may* be held, provided the charge/s against those defendants can be properly joined at a trial, see *R v Camberwell Green JJ, Ex parte Christie* [1978] 2 WLR 794; [1978] 2 QB 602; [1978] 2 AllER 377.

[12.1] Discretion To Call Witnesses

Considering the '*purpose*' of a '*Preliminary Investigation / Inquiry'*, the prosecution need *not* call all the witnesses who might be called on a trial, see *Epping & Harlow Justices, Ex parte Massaro* [1973] QB 433; (1973) 57 CrAppR 499 [[1973] 2 WLR 158; [1973] 1 AllER 1011; [1973] CrimLR 109] at pages 435 and 501 respectively; *R v Nugent* [1977] 3 AllER 662 & *R v Grays JJ, Ex parte Tetley* (1980) 70 CrAppR 11.

In *R v Brown (Winston)* [1997] 3 AllER 769; [1998] 1 CrAppR 66 [[1998] AC 367; [1997] 3 WLR 447 Lord Hope of Craighead, with whom their Lordships concurred, commented at page 778 and 76 respectively:

> 'To repeat the words of Lord Diplock in *Dallison v. Caffrey* [1965] 1 QB 348 at 375, the duty of the prosecutor is to prosecute, not to defend. The important developments in the prosecutor's duty of disclosure since he wrote these words have not altered the essential point that there is a difference between the functions of the prosecutor and those of the defence. *The prosecutor's duty is to prosecute the case fairly and openly in the public interest. It is not part of his duty to conduct the case for the defence*.' (emphasis added)

When deciding whether to call a particular witness the paramount consideration is that the prosecution is expected to present its case with fairness to the defendant. The prosecutor, however, determines which witness/es he/she intends to call, and *not* the Court or the defence. However, in respect of '*Preliminary Investigations / Inquiries*', the Director of Public Prosecutions determines which witnesses are to be called.

The Court *may* however either:

[i] make adverse findings that a particular witness should have been called by the prosecution, see *R v Apostilidies* (1984) 53 ALR 445; and / or

[ii] call the witness itself.

Section 133 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Any court *may*, at any stage of any *inquiry*, trial or other proceeding under this Code, summon or *call any person as a witness, or examine any person in attendance though not summonsed as a witness*, or *recall* and re – examine any person already examined, and the court shall summon and examine or *recall* and re – examine any such person if his evidence appears to it essential to the just decision of the case:
>
> Provided that the prosecutor or the advocate for the prosecution or the defendant or his advocate shall have the right to cross – examine any such person, and the court shall adjourn the case for such time (if any) as it thinks necessary to enable such cross – examination to be adequately prepared, if, in its opinion, either party may be prejudiced by the calling of any such person as a witness.' (emphasis added)

If a Court considers that in the interests of justice it is necessary to *call* a particular witness, it may do so without the consent of either the prosecution or defence, see *R v Wallwork* (1958) 42 CrAppR 153.

[12.2] Conduct Of Proceedings

[12.2.1] Introduction

Section 211 of the *Criminal Procedure Code* (Ch. 7) provides that as regards any offence:

[i] not triable by a Magistrates' Court. Refer also to the chapter which examines the law relating to the '*Criminal Jurisdiction of the Courts*' commencing on page **14**;

[ii] as to which the Magistrate is of the opinion that it ought to be tried by the High Court; and

[iii] where an application has been made by a '*public prosecutor*' that it ought to be tried by the High Court,

the Magistrate *shall* either:

[A] commit the person so charged directly for trial to the High Court *in accordance with the provisions of that section* [*short form*] *provided*:

[1] he/she considers it appropriate so to do having regard to the circumstances of the case; and

[2] no application has been made to the contrary by the defendant or his/her advocate or by a public prosecutor; or

[B] hold a '*Preliminary Investigation / Inquiry*' in accordance with section 212 of the *Criminal Procedure Code* (Ch. 7) [*Long Form*] as outlined commencing on page **314**.

The term '*Public Prosecutor*' is defined in section 2 of the *Criminal Procedure Code* (Ch. 7) as *meaning*:

> 'any person appointed as such under section 71 [of the *Criminal Procedure Code* (Ch. 7)] and includes the Director of Public Prosecutions, and any other legal officer, police officer or other person acting under the direction of the Director of Public Prosecutions.' [words in brackets added]

[12.2.2] Short Form

By virtue of sections 211, 215 and 216 of the *Criminal Procedure Code* (Ch. 7), a Magistrate conducting a '*Preliminary Investigation / Inquiry*' [*Short Form*] *shall*:

[i] read over and explain to the defendant the charge in respect of which the '*Preliminary Investigation / Inquiry*' is being held;

[ii] explain to the defendant that he/she will have an opportunity later on in the '*Preliminary Investigation / Inquiry*' of making a statement if he/she so desires;

[iii] explain to the defendant the purpose of the '*Preliminary Investigation / Inquiry*';

[iv] require the defendant to plead to the charge against him/her and record his/her plea thereto, if any. In that regard, '*Practice Direction No. 1 of 1991*' issued by the Chief Justice which is outlined on page **318** should be complied with;

[v] irrespective of the plea entered or whether a plea is entered, require the prosecution to *tender* to the court the statements of any witness whom it is relying on to prove the charge/s and any exhibits;

[vi] read or cause to be read, every such statement to the defendant if he/she is unrepresented, but otherwise unless requested to do so by the defendant's lawyer;

[vii] ask the defendant whether he/she desires to call witnesses on his/her own behalf;

[viii] take the evidence of any witnesses called by the defendant in the same manner a '*Preliminary Investigation / Inquiry*' [Long Form] and such witnesses, other than those giving solely '*Character Evidence*', shall be bound by recognisance to appear and give evidence at the trial of the defendant.

The law relating to '*Character Evidence*' is examined commencing on page **207**;

[ix] adjourn the '*Preliminary Investigation / Inquiry*' if the defendant states that he/she has witnesses to call but that they are not present in court, provided he/she is satisfied that:

[a] the absence of such witnesses is not due to any fault or neglect of the defendant; and

[b] there is likelihood that such witnesses could, if present, give '*material evidence*' on behalf of the defendant. Evidence is '*material*' if it is relevant to an issue in the case, see *R v Reading JJ, Ex parte Berkshire County Council* [1996] 1 CrAppR 239;

[x] issue process or takes other steps to compel the attendance of such witnesses and give evidence;

[xi] give an opportunity to the defendant or his/her advocate to address the court;

[xii] give the prosecution the right of reply.

When addressing a Magistrate, a prosecutor is expected to:

[a] remind the Magistrate that the '*purpose*' of a '*Preliminary Investigation / Inquiry*' is to determine whether there is sufficient evidence to put the defendant on his/her trial by the High Court;

[b] systematically and thoroughly outline the evidence which addresses each and every element of the charge/s;

[c] systematically and thoroughly submit the applicable statute and common law; and

[d] systematically and thoroughly explain how that law applies to the evidence;

[xiii] make an order regarding the retention of exhibits;

[xiv] commit the defendant for trial to the High Court if he/she is satisfied that there is sufficient grounds to do so after having considered the evidence;

[xv] require the defendant to plead to the charge/s and record his/her plea. In that regard, '*Practice Direction No. 1 of 1991*' issued by the Chief Justice which is outlined on page **318** should be complied with;

[xvi] ask the defendant whether he/she:

[a] intends to call witnesses at the trial, other than those called in the course of the '*Preliminary Investigation / Inquiry*'; and

[b] desires to give their names and addresses so that they may be summonsed; and

[xvii] upon committing the defendant for trial to the High Court, either:

[a] admit him/her to bail; or

[b] send him/her to prison for safe-keeping.

Refer also to section 8 of the *Juvenile Offenders Act* (Ch. 14).

The law relating to:

- '*Character Evidence*' is examined commencing on page **207**;
- the '*Power Of A Court To Call Witnesses*' is examined commencing on page **121**;
- '*Exhibit Orders*' is examined commencing on page **320**; and
- '*Bail*' is examined commencing on page **378**.

See also: sections 207 ['*Power to stop summary trial and hold preliminary inquiry in lieu*']; 208 ['*Committal by Magistrate to High Court for sentence*']; 220 ['*Summary adjudication*'] & 232 ['*Return of depositions with a view to summary trial*'] of the *Criminal Procedure Code* (Ch. 7).

[12.2.3] Long Form

By virtue of sections 212, 215, 216 and 219 of the *Criminal Procedure Code* (Ch. 7), a Magistrate conducting an '*Preliminary Investigation / Inquiry*' [*Long Form*] *shall*:

[i] at the commencement of the '*Preliminary Investigation / Inquiry*' read over and explain to the defendant the charge in respect of which the investigation / inquiry is being held;

[ii] explain to the defendant that he/she will have an opportunity later on in the '*Preliminary Investigation / Inquiry*' to make a statement, if he/she so desires;

[iii] explain to the defendant the purpose of the '*Preliminary Investigation / Inquiry*';

[iv] in his/her presence, take down in writing, or cause to be taken down, the statements on oath of those who know the facts and circumstances of the case, referred to as depositions, including any exhibits.

The law relating to '*Examination – in – Chief*' is examined commencing on page **338**;

[v] give an opportunity to the defendant to cross – examine each witness called by the prosecution.

The law relating to '*Cross – Examination*' is examined commencing on page **346**;

[vi] record all answers given in such cross – examination;

[vii] as the statement of each witness taken down is completed, ensure that it is read over to the him/her in the presence of the defendant, and shall if necessary, correct such statements;

[viii] if a witness denies the correctness of any part of the statement when the same is read over to him/her, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he/she thinks necessary;

[ix] if the statement is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the statement shall be interpreted to him/her in a language which he/she understands.

[x] ensure that each witness signs or attests by his/her mark their deposition;

[xi] sign such depositions;

[xii] if he/she considers that such statements disclose or on the evidence as it stands there are sufficient grounds for committing the defendant for trial:

[a] satisfy himself/herself that the defendant understands the charge;

[b] ask the defendant whether he/she wishes to make a statement in his/her defence;

[c] ask whether he/she wishes to make such a statement on oath;

[d] explain to the defendant that he/she is not bound to make a statement and that his/her statement, he/she choses to make one, will be part of the evidence at the trial;

[e] cause everything which the defendant says, either by way of statement or evidence to be recorded in full and shown or read over to the defendant;

[f] give the defendant an opportunity to explain or add to anything contained in the record thereof;

[g] when the defendant is comfortable as to what he/she declares as the truth, certify that such statement or evidence was taken in his/her presence and hearing and contains accurately the whole statement mad, or evidence given, as the case may be, by the defendant;

[h] give an opportunity for the defendant to sign or attest by his/her mark such record;

[i] if the defendant so refuses, add a note of the defendant's refusal and the record may then be used as if the defendant had signed or attested it;

[xiii] ask the defendant whether he/she desires to call witnesses on his/her own behalf;

[xiv] take the evidence of any witnesses called by the defendant in like manner as in the case of the witnesses for the prosecution and such witnesses, other than those giving solely character evidence, shall be bound by recognisance to appear and give evidence at the trial of the defendant;

[xv] adjourn the '*Preliminary Investigation / Inquiry*' if the defendant states that he/she has witnesses to call but that they are not present in court, provided he/she is satisfied that:

[a] the absence of such witnesses is not due to any fault or neglect of the defendant; and

[b] there is likelihood that such witnesses could, if present, give 'material evidence' on behalf of the defendant. Evidence is '*material*' if it is relevant to an issue in the case, see *R v Reading JJ, Ex parte Berkshire County Council* [1996] 1 CrAppR 239;

[xvi] issue process or takes other steps to compel the attendance of such witnesses and give evidence;

[xvii] give an opportunity to the defendant or his/her advocate to address the court;

[xviii] give the prosecution the right of reply.

When addressing a Magistrate, a prosecutor is expected to:

[a] remind the Magistrate that the '*purpose*' of a '*Preliminary Investigation / Inquiry*' is to determine whether there is sufficient evidence to put the defendant on his/her trial by the High Court;

[b] systematically and thoroughly outline the evidence which addresses each and every element of the charge/s;

[c] systematically and thoroughly submit the applicable statute and common law; and

[d] systematically and thoroughly explain how that law applies to the evidence;

[xix] make an order regarding the retention of exhibits;

[xx] formally commit the defendant to the High Court if he/she is satisfied that there is sufficient grounds to do so after having considered the evidence;

[xxi] require the defendant to plead to the charge/s and record his/her plea. In that regard, '*Practice Direction No. 1 of 1991*' issued by the Chief Justice which is outlined on page **318** should be complied with;

[xxii] ask the defendant whether he/she:

[a] intends to call witnesses at the trial, other than those called in the course of the '*Preliminary Investigation / Inquiry*'; and

[b] desires to give their names and addresses so that they may be summonsed; and

[xxiii] upon committing the defendant for trial to the High Court, either:

[a] admit him/her to bail; or

[b] send him/her to prison for safe-keeping.

Refer also to section 8 of the *Juvenile Offenders Act* (Ch. 14).

See also: section 221 ['*Complainants and witnesses to be bound over or summonsed before the High Court*']; 222 ['*Refusal to be bound over*']; 223 ['*Accused persons entitled to copy of statements of witnesses or depositions*']; 224 ['*Summonsing and conditionally binding over of witnesses*'] & 225 ['*Taking the depositions of persons dangerously ill*'] of the *Criminal Procedure Code* (Ch. 7).

The law relating to:

- '*Character Evidence*' is examined commencing on page **207**;
- the '*Power Of A Court To Call Witnesses*' is examined commencing on page **121**;
- '*Exhibits*' is examined commencing on page **320**; and
- '*Bail*' is examined commencing on page **378**.

[12.3] Discretion To Exclude Evidence

At common law, a Magistrate has *no* discretion in a '*Preliminary Investigation / Inquiry*' to refuse to admit evidence on the grounds that its prejudicial effect outweighs its probative value, see *R v King's Lynn Magistrates' Court, ex parte Holland* [1993] 2 AllER 377 [(1993) 96 CrAppR 74; [1993] WLR 324; [1993] CrimLR 880] at page 380; *R v Horsham Justices, Ex parte Bukhari* (1981) 74 CrAppR 291; [1982] CrimLR 178; *Norfolk Quarter Sessions, Ex parte Brunson* [1953] 1 QB 503; [1953] 2 WLR 294; [1953] 1 QB 503; [1953] 1 AllER 346; *Ipswich Justices, Ex parte Edwards* (1979) 143 JP 699; *R v Highbury Magistrates' Court, Ex parte Boyce* (1984) 79 CrAppR 132 & *R v Conway* (1990) 91 CrAppR 143.

Furthermore, the trial judge should decide whether legally admissible evidence should be excluded, though obviously a Magistrate cannot act on inadmissible evidence, see *R v King's Lynn Magistrates' Court, Ex parte Holland* [1993] 2 AllER 377 at page 380 & *R v Phillip & R v Quayle* [1938] 3 AllER 674; [1939] 1 KB 63; (1938) 36 CrAppR 200.

Refer also to: *Shaw & others v Coco* (1991) 54 ACrimR 128 at page 140 & *Seymour v Attorney – General* (1984) 53 ALR 513 at page 540.

The law relating to the '*Admissibility Of Evidence Generally*' is examined commencing on page **171**.

[12.4] Amendments

Section 213 of the *Criminal Procedure Code* (Ch. 7) states:

> 'No objection to a charge, summons or warrant for defect in substance or in form, or for variance between it and the evidence of the prosecution, shall be allowed; but if any variance appears to the court to be such that the accused person has been thereby deceived or misled, the court may, on the application of the accused person, adjourn the inquiry and allow any witness to be recalled, and such questions to be put to him as by reason of the terms of the charge may have been omitted.'

The law relating to '*Amendments Generally*' is examined commencing on page **88**.

[12.5] Pleas

Chief Justice Ward issued the following '*Practice Direction*' in relation to '*Pleas at Preliminary Investigations / Inquiries*':

PRACTICE DIRECTION NO. 1 OF 1991

'When criminal cases are being committed for trial in the High Court, the practice has grown up for defence counsel to "reserve the plea to the High Court". This is unsatisfactory. Such cases have to be treated as contested with the result that all witnesses must be warned to attend the High Court.

In the majority of cases defence counsel should, by the time of the committal proceedings, have taken sufficient instructions to be in a position to advise on the plea. It is only in exceptional cases this will not be possible and the plea reserved. Where that does occur, it is counsel duty to prepare the case for court without delay and, in so doing, ascertain the plea.

In future in all committal proceedings, when the examining magistrate is told the plea is reserved, he shall advise that defence counsel must within 28 days inform the High Court of the plea to entered at the trial. If he has been unable to obtain sufficient instructions to know the plea, he must within the same 28 day period give the High Court details in writing of all steps taken to obtain instructions and the reason for his inability to ascertain the plea. This is, of course, subject to the rules of privilege between his client and himself.'

[12.6] Discharge Of Defendant

Section 217 of the *Criminal Procedure Code* (Ch. 7) provides that if after:

[i] consideration of the evidence for the prosecution; or

[ii] hearing any evidence for the defence,

the Magistrate considers that the case against the defendant is *not* sufficient to put him/her on trial, he/she shall forthwith order the defendant to be discharged. However, such discharge *shall not* be a bar to any subsequent charge in respect of the same facts, provided that nothing in section 217, shall

> 'prevent the court from proceeding, either forthwith, or after such adjournment of the inquiry as may seem expedient in the interests of justice, to investigate any other charge upon which the accused person may have been summonsed or otherwise brought before it, or any offence which, in the course of the charge so dismissed as aforesaid, it may appear that the accused person has committed.'

The defence should be given an opportunity to address the Court if it is considering proceeding under this section, see *R v Gloucester Magistrates' Court, Ex parte Chung* (1989) 153 JP 75.

Section 217 of the *Criminal Procedure Code* (Ch. 7) is consistent with section 10(5) of the *Constitution* because during the course of a '*Preliminary Investigation / Inquiry*', a defendant is *not* in peril of conviction for the offence.

A defendant may be charged with an offence which has previously been dismissed or withdrawn, subject to the discretionary power of the Court to prevent such proceedings if it vexatious or an abuse of process of the court, see *R v Manchester City Stipendiary Magistrate, Ex parte Snelson* [1977] 1 WLR 911; (1978) 66 CrAppR 44; [1977] CrimLR 423; *R v Canterbury & St. Augustine's Justices, Ex parte Klisiak & R v Ramsgate Justices, Ex parte Warren & others* [1981] 3 WLR 60; [1982] QB 398; (1981) 72 CrAppR 250 & *R v Horsham Justices, Ex parte Reeves* (1982) 75 CrAppR 236; [1981] CrimLR 566.

Refer also to the law relating to:

- '*Double Jeopardy*' which is examined commencing on page **105**; and
- '*Abuse of Process*' which is examined commencing on page **138**.

See also: section 218 ['*Power to appeal to High Court for committal in certain cases where defendants are discharged*'] of the *Criminal Procedure Code* (Ch. 7).

[12.7] Adjournments

Section 214 of the *Criminal Procedure Code* (Ch. 7) states:

> 'If, from the absence of witnesses or any other reasonable cause to be recorded in the proceedings, the court considers it necessary or advisable to adjourn the inquiry, the court may from time to time by warrant remand the accused for a reasonable time, not exceeding fifteen clear days at any one time, to some prison or other place of security. Or, if the remand is for not more that three days, the court may be word of mouth order the officer or person in whose custody the accused person is, or any other fit officer or person, to continue to keep the accused in his custody, and to bring him up at the time appointed for the commencement or continuance of the inquiry.
>
> During a remand the court may at any time order the accused to be brought before it.
>
> The court may on a remand admit the accused to bail.'

The law relating to '*Adjournments Generally*' is examined commencing on page **392**.

[12.8] Defendants Of Unsound Mind

Section 144(1) of the *Criminal Procedure Code* (Ch. 7) states:

> 'When in the course of a […] preliminary investigation the court has reason to believe that the accused is of unsound mind so that he is incapable of making his defence, it *shall* inquire into the fact of such unsoundness.' (emphasis added)

See also: sections 144 to 149 of that *Code*.

[12.9] Exhibits

In *R v Lambeth Metropolitan Stipendiary Magistrate and another, Ex parte Mc Comb* (1983) 76 CrAppR 246 [[1983] 2 WLR 259; [1983] QB 551; [1983] CrimLR 266] the Master of Rolls, delivering the judgment of the Court, held at page 250:

> '[O]nce an article has become an exhibit, the court has a responsibility in relation to it. That responsibility is to preserve and retain it, or to arrange for its preservation and retention, for the purposes of justice. The purposes of justice are to ensure that the accused is convicted if guilty and is acquitted if innocent. I would accept that this is the position and would further accept that the usual course is for the court to entrust the exhibits to the police or to the Director subject to the same responsibility. That responsibility was defined by Griffiths LJ in the instant [*Lushington, Ex parte Otto* (1894) 1 QB 420], (2) to co-operate with the defence in order to allow them reasonable access to the exhibits for the purpose of inspection and examination, and (3) to produce the exhibits at the trial.

May LJ commented at page 254:

> 'Clearly once the magistrate has committed for trial he is *functus* and therefore has no further power in relation to the exhibits.'

[12.10] Hostile Witness

In *R v Mann* (1972) 56 CrAppR 750; [1972] CrimLR 704 the Court of Appeal held:

> Where a witness displays evidence of hostility during a '*Preliminary Investigation / Inquiry*', there is no rule which requires the prosecution then and there to treat the witness as '*hostile*'.

The law relating to '*Hostile Witnesses*' is examined commencing on page **288**.

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[13.0] Introduction

Section 54 of the *Magistrates' Courts Act* (Ch. 20) states:

> 'Subject to the provisions of any other law for the time being in force, the jurisdiction vested in Magistrates' Courts shall be exercised (so far as regards practice and procedure) in the manner provided by this Act or by any other Act for the time being in force relating to criminal […] procedure, or by Rules of Court, and in default thereof, *in substantial conformity with the law and practice for the time being observed in England in county courts, police courts and courts of summary jurisdiction*.' (emphasis added)

Section 3 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Subject to the express provisions of any other law for the time being in force, all offences shall be inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.'

This Chapter will examine the law relating to the '*procedure*' in a Magistrates' Court upon a defendant pleading '*not guilty*'. The law relating to the entering of a '*plea*' is examined in the Chapter titled '*Sentencing*' commencing on page **918**.

The '*procedure*' in the conduct of a '*summary trial*', although *not* necessarily always in the following order, is as follows:

[i] '*Formal Opening Of The Court*', the law relating to which is examined on page **323**;

[ii] '*Plea Of Not Guilty*', the law relating to which is examined commencing on page **323**;

[iii] '*Opening Addresses*', the law relating to which is examined commencing on page **324**;

[iv] '*Formal Admissions*', the law relating to which is examined commencing on page **325**;

[v] '*Examination Of Witnesses*', the law relating to which is examined commencing on page **338**;

[vi] '*Amendments*', the law relating to which is examined commencing on page **88**;

[vii] '*Submission Of No Case To Answer*', the law relating to which is examined commencing on page **372**;

[viii] '*The Defence*', the law relating to which is examined commencing on page **327**;

[ix] '*Re – opening*', the law relating to which is examined commencing on page **368**;

[x] '*Final Addresses*', the law relating to which is examined commencing on page **329**; and

[xi] '*Decision*', the law relating to which is examined commencing on page **330**.

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During the course of a '*summary trial*' the Court *may*:

[i] take '*Judicial Notice*' of a '*fact in issue*'.

The law in that regard is examined commencing on page **333**;

[ii] take a '*View of the Crime Scene*';

The law in that regard is examined commencing on page **335**;

and / or

[iii] call witnesses.

The law in that regard is examined commencing on page **121**.

See also section 185 of the *Criminal Procedure Code* (Ch. 7) which provides for a second Magistrate to take over a trial whenever the former Magistrate ceases to exercise jurisdiction therein.

As regards the 'procedure' in '*Juvenile Courts*' refer to sections 9 and 10 of the *Juvenile Offenders Act* (Ch. 14).

[13.1] Formal Opening Of Court

There is a formal requirement in law for the hearing of the Court to be valid and for orders thus be enforceable. If challenged because for example the Court was not formally opened and therefore not in session, orders made by the Court in such circumstances may be set aside.

It is therefore imperative for prosecutors to either:

[i] formally open the Court upon the presiding Magistrate entering the Court; or

[ii] advise the presiding Magistrate if the Court has not been formally opened.

[13.2] Plea Of Not Guilty

[13.2.1] Criminal Procedure Code

Section 195 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '(1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies the truth of the charge.
>
> (2) […]
>
> (3) If the accused person *does not admit* the truth of the charge, the court *shall* proceed to hear the case as hereinafter provided.
>
> (4) If the accused person refuses to plead, the court *shall* order a plea of "not guilty" to be entered for him.' (emphasis added)

Section 10(2)(e) of the *Constitution* states:

> 'Every person who is charged with a criminal offence –
>
> […]
>
> (e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution.'

[13.2.2] General Principles

In *R v Paul Maenu'u & Augustine Tuita* (Unrep. Criminal Appeal Case No. 11 of 1998) Lungole - Awich J stated at page 7:

> '*A plea of guilty must still come from the accused himself otherwise what follows is void. A plea of not guilty must also come from the accused*, but when a trial has proceeded as if accused had pleaded not guilty, and he in fact had intended to plea not guilty, failure to take the plea will not vitiate the trial if the plea of not guilty was vicariously offered, tacitly conveyed or waived or a formal arraignment was implied.' (emphasis added)

A defendant *must* have a free choice of plea, see *R v Turner* [1970] 2 QB 321; [1970] 2 AllER 281; *R v Brook* [1970] CrimLR 600; *R v Inns* [1975] CrimLR 182 & *R v Barnes* (1970) 55 CrAppR 100.

In *R v Horseferry Road Magistrates' Court, Ex parte K* [1996] 2 CrAppR 574 Forbes J, on behalf of the Divisional Court, commented on page 582:

> 'It must be remembered that it is the plea of not guilty which puts the defendant's guilt in issue and creates the need for a "trial" in the narrow sense. In that respect, we take the view that a plea of not guilty can be said to initiate the process of determining guilt, ie., it is an essential and necessary introduction to the trial.'

See also: *R v Heyes* [1951] 1 KB 29; [1950] 2 AllER 587 & *R v Ellis* (1973) 57 CrAppR 571.

[13.3] Opening Addresses

[13.3.1] Criminal Procedure Code

Section 200(1) of the *Criminal Procedure Code* (Ch. 7) states:

> 'Subject to the provisions of subsection (2) the prosecutor *shall be entitled* to address the court at the commencement of his case, and the accused person or his advocate shall be entitled to address the court at the commencement and in conclusion of his case.' (emphasis added)

However, subsection (2) of section 200 of the *Criminal Procedure Code* (Ch. 7) has no application.

[13.3.2] General Principles

The *purpose* of an '*Opening Address*' is to outline the case against the defendant so that the Court and the defendant can understand it.

However, the prosecution is *not* bound by what is mentioned in an '*Opening Address*', unless the Court has treated the opening as equivalent to the calling of the evidence, see *R v Jackson* (1953) 37 CrAppR 43 [[1953] 1 AllER 872; [1953] 1 WLR 591 at pages 46 – 47.

An '*Opening Address*' should:

[i] be concise;

[ii] entail, in the order in which the prosecutor intends to call the witnesses, simply reading the name of each witness followed *briefly* by what their evidence will be; and

[iii] not include any submission in respect of the admissibility of any evidence, see *R v Patel* [1951] 2 AllER 29; (1951) 35 CrAppR 62.

Therefore, an '*Opening Address*' *must not*:

[i] include any argument as to the guilt of the defendant; and

[ii] be used to question the credibility of the defendant or any potential witness/es to be called by the defence.

As a matter of practice, an '*Opening Address*' should only be provided in respect of 'complex and / or circumstantial' cases.

[13.4] Formal Admissions

[13.4.1] Criminal Procedure Code

Section 181 of the *Criminal Procedure Code* (Ch. 7) states:

'(1) *Subject to the provisions of this section*, *any fact of which oral evidence* may be given in any proceedings to which this Code applies *may be admitted by or on behalf of the prosecutor or accused person*, and the admission by any party of any such fact under this section *shall* be conclusive evidence in those proceedings of the fact admitted.

(2) An admission made under this section –

(a) may be made before or at the proceedings;

(b) if made otherwise than in court shall be in writing and if made in court shall be entered in the court record;

(c) if made in writing by an individual shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;

(d) if made on behalf of an accused person who is an individual and is represented, shall be made by his advocate;

(e) if made at any stage before the trial by an accused person who is represented at the trial, must be approved by his advocate (whether at the time it was made or subsequently) before or at the proceedings in question:

Provided always that where an admission is made by *an accused person who is not represented* –

(i) the admission shall be made in writing or reduced to writing by the court; and

(ii) shall be read in court to the accused person by the court or an officer of the court; and

(iii) the effect of making the admission shall be explained to the accused person; and

(iv) the accused person shall be asked if he wishes to make the admission; and

(v) if the accused person appears to understand the admission and the effect thereof and states that he wishes to make it he shall be asked to put his signature thereto; and

(vii) the admission so signed by the accused person shall only then be an admission for the purposes of this section.

(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including appeal or retrial).

(4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent proceedings relating to the same matter.' (emphasis added)

[13.4.2] General Principles

'*Formal admissions*' may be made by *both* the prosecution and the defence. Such '*admissions*' should be recorded by the Court, see *R v Lennard* [1973] 1 WLR 483; [1973] 2 AllER 831; [1973] RTR 252; (1973) 57 CrAppR 542; [1973] CrimLR 312.

Upon a '*formal admission*' being accepted by a Court, the party making the '*admission*' is *bound* by it, until the Court has granted leave for it to be withdrawn.

'*Formal admissions*' should *not* be withdrawn, *unless* the Court is satisfied that there was a misunderstanding or an error, see *R v Rolten* [2000] CrimLR 761.

In *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997) Lungole - Awich J commented at page 3:

> 'During the proceeding it became obvious that some relevant facts would not be contested. I asked Counsel for the Crown to consult with defence counsel and draw up admitted facts. […] I would like to draw attention to all practitioners to s.181 […]. *The section authorizes admission of uncontested facts.* In most criminal cases a lot of relevant facts are not contested. *Much time will be saved if practitioners make more use of the section.*' (emphasis added)

In *R v Mitchell* [1971] VR 46 the Court held per Winneke CJ at page 64:

> '[I]t is plain beyond doubt, in the result, proof according to the ordinary rules of evidence, and a vast amount of public time and expense, could have been avoided, by the use of [… formal admissions].' [words in brackets added]

Ideally if either the prosecution or the defence wishes to make a '*formal admission*', such 'admission' should be made *prior* to commencement of the trial because such 'admissions' *may* influence which witnesses need to be called.

In *R v Raabe* [1985] 1 QdR 115 the defence tried to prevent the prosecutor from calling the complainant, although the '*formal admissions*' made by the defendant *did not* cover all matters which the prosecution sought to raise. The prosecution determines whether it is necessary to call a witness, irrespective of whether '*formal admissions*' have been made.

The law relating to the '*Prosecution's Discretion To Call Witnesses*' is examined commencing on page **120**.

See also: *R v Lewis* (1971) 55 CrAppR 386; [1971] CrimLR 414; *The State v Jeoff Ipata* [1988] PNGLR 34; *The State v Misari Warun* [1988 – 89] PNGLR 327 at page 335 & *The State v Peter Raima* [1993] PNGLR 230 at page 239.

[13.5] The Defence

Section 198 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence, the court shall again explain the substance of the charge to the accused and *shall inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross – examination, or to make a statement not on oath from the dock*, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court shall then hear the accused and his witnesses and other evidence (if any).
>
> (2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give *material evidence* on behalf of the accused person, the court may adjourn the trial and issue process, or take other steps, to compel the attendance of such witnesses.' (emphasis added)

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Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged *shall* be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided –
>
> […]
>
> (g) every *person called as a witness in pursuance of this section shall, unless otherwise ordered by the court, give his evidence from the witness box or other place from which the other witnesses have given their evidence;*
>
> (h) *nothing in this section shall effect the provisions of section 215* ['*Preliminary Investigations / Inquiries*'] *or any right of the person charged to make a statement without being sworn.*' (emphasis added) [words in brackets added]

Section 142 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Where the only witness to the facts of the case [ie., not '*Character Evidence*' or '*Opinion Evidence*'] called by the defence is the person charged, he *shall* be called as a witness immediately after the close of the evidence for the prosecution.' (emphasis added) [words in brackets added]

It does *not* help to support the evidence of the defendant to know that he/she has frequently told other persons what his/her defence is, see *Fox v General Medical Council* [1960] 1 WLR 1017; [1960] 3 AllER 225; *R v Roberts* (1943) 28 CrAppR 102 & *R v Islam* [1999] 1 CrAppR 22.

Evidence based on such information would be 'hearsay' and therefore, inadmissible.

A Court *may* in its discretion direct that a defendant refrain from giving irrelevant evidence, such as political views, see *R v King* (1973) 57 CrAppR 696; [1973] CrimLR 380.

See also: *R v Brown (Milton)* [1998] 2 CrAppR 364; *R v Graham* (1922) 16 CrAppR 40; *R v Villars* (1927) 20 CrAppR 150; *R v Smith* [1968] 2 AllER 115; [1968] 1 WLR 636; (1968) 52 CrAppR 224 & *R v Carter* (1960) 44 CrAppR 225.

The law relating to:

- the admissibility of '*Hearsay Evidence*' is examined commencing on page **176**;
- the '*Right To Silence*' is examined commencing on page **218**;
- the '*Order Of Witnesses Called By The Defence*' is examined on page **275**;
- the '*Competency of Spouses Called By The Defence*' is examined on page **284**;
- '*Opinion Evidence*' is examined commencing on page **202**; and
- '*Character Evidence*' is examined commencing on page **207**.

[13.6] Final Addresses

[13.6.1] Timing

The defence has the right to make a final address or closing speech after that of the prosecution.

[13.6.2] Prosecution

Section 200(2) of the *Criminal Procedure Code* (Ch. 7) states:

> 'If the accused person, or any of one of several accused persons, adduces any evidence, *the prosecutor shall*, *subject to the provisions of section 143*, be entitled to address the court at the close of the evidence for the defence and before the closing speech (if any) by or on behalf of the accused person or any one of several accused persons.' (emphasis added)

Section 143 states:

> 'In cases where the right of reply depends upon the question whether evidence has been called for the defence, the fact that the person charged has been called as a witness *shall not* of itself confer on the prosecution the right of reply.' (emphasis added)

Therefore, prosecutors are only entitled to address the Court at the close of the evidence for the defence if the defence has called evidence from a witness, other than the defendant.

See: *R v Mondon* (1968) 52 CrAppR 695; [1968] CrimLR 630; *R v Pink* [1970] 3 WLR 903; [1970] 3 AllER 897; [1971] 1 QB 508; (1971) 55 CrAppR 16 & *R v Bryant & Oxley* [1978] 2 WLR 589; [1978] 2 AllER 689; [1979] QB 108; (1978) 67 CrAppR 157; [1978] CrimLR 307.

When making a '*Final Address*' it is expected that a prosecutor *will*:

[i] remind the Court that the onus is on the prosecution to prove each and every element of the charge/s '*beyond reasonable doubt*'. The law relating to '*Proof Of Issues*' is examined commencing on page **68**;

[ii] remind the Court the law relating to the onus on the defence in respect of any defence raised;

[iii] remind the Court that the onus is on the prosecution to negative any defence raised '*beyond reasonable doubt*';

[iv] systematically and thoroughly outline the evidence which addresses each and every element of the charge/s. The procedure relating to '*Elementising Charges*' is examined on page **73**.

Whilst a prosecutor may comment on the evidence of a defendant, if he/she has given evidence, see *R v Gardner* [1899] 1 QB 150, a prosecutor may *not* comment on the fact that a defendant did *not* give evidence, *including* providing an '*unsworn statement*'.

The law relating to:

[a] the '*Right To Testify*' is examined commencing on page **164**; and

[b] '*Unsworn Statements*' is examined commencing on page **166**.

[v] systematically and thoroughly submit the applicable statute and common law; and

[vi] systematically and thoroughly explain how that law applies to the evidence.

[13.6.3] Defence

The '*final address*' by the defence may include remarks as to the evidence *and* any other issue considered relevant, see *R v Wainwright* (1895) 13 CoxCC 171.

[13.7] Decision

[13.7.1] Introduction

A defendant *may* be convicted of:

[i] the offence for which he/she has been charged;

[ii] a lesser offence than that for which he/she has been charged, subject to section 159 of the *Criminal Procedure Code* (Ch. 7); or

[iii] having 'attempted to commit the offence' for which he/she has been charged, even though he/she may *not* have been charged with the 'attempt', see section 160 of the *Criminal Procedure Code* (Ch. 7).

The law relating to '*Attempts To Commit Offences*' is examined commencing on page **398**.

Section 159 states:

> '(1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete lesser offence, and such combination is proved but the remaining particulars are not proved, he *may* be convicted of the lesser offence although he was not charged with it.
>
> (2) 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.' (emphasis added)

Section 160 states:

> 'When a person is charged with an offence, he *may* be convicted of having attempted to commit that offence, although he was not charged with the attempt.' (emphasis added)

Section 203 of the *Criminal Procedure Code* (Ch. 7) states:

> 'The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon *or* make an order against

him according to law *or* shall acquit him or may, pursuant to the provisions of section 35 of the Penal Code, without proceeding to conviction, if it is of opinion that it is not expedient to inflict any punishment notwithstanding that it thinks the charge against the accused is proved, make an order dismissing the charge either absolutely or conditionally.' (emphasis added)

[13.7.2] Evaluation Of Evidence

A Court is entitled to put what '*weight*', ie., '*importance*', it wishes to the evidence of each witness.

In *Samuel Dalu v R* (Unrep. Criminal Case No. 43 of 1992) Palmer J stated at pages 1 - 3:

'It is trite law that matters on weight of evidence are matters for the Magistrate (as judge of both law and fact) to decide upon. Questions on the weight of evidence are not determined by arbitrary rules, but by common sense, logic and experience. (*See Phipson on Evidence 10th Edition, paragraph 2011*)

In the same paragraph the statement of Birch J in the case of R v Madhub Chunder (1874) 21 WRCr 13 at p.19 were quoted by the learned author as follows:

"*For weighing evidence and drawing inferences from it, there can be no cannon. Each case presents its own peculiarities and in each common sense and shrewdness must be brought to bear upon the facts elicited*.

[…]

In Phipson on Evidence, (ibid) paragraph 2012, the learned author makes the following pertinent comments:

"The principal purpose of the observation of witnesses is to ascertain or test their truthfulness, but it would be a dangerous thing to fill in gaps in the proof merely from observation. If the evidence is weak or non – existent then what is lacking in the evidence cannot be supplied by observation of the witnesses."' (emphasis added)

In assessing the evidence of witnesses a court should take into consideration the relationships of the witnesses with other witnesses and the deceased, if applicable, see *R v Michael Talu* (Unrep. Criminal Case No. 21 of 2000; Palmer J; at page 9).

In *Attorney – General of Hong Kong v Wong Muk – ping* [1987] 2 AllER 488; (1987) 85 CrAppR 167 Lord Bridge of Harwich whilst delivering the judgment of the Judicial Committee of Privy Council commented at pages 493 and 173 respectively:

'It is common place of judicial experience that a witness who makes a poor impression in the witness box may be found at the end of the day, when his evidence is considered in the light of all the other evidence bearing upon the issue, to have been both truthful and accurate. Conversely, the evidence of a witness who at first seemed impressive and reliable may at the end of the day have to be rejected. Such experience suggests that it is dangerous to assess the credibility of the evidence given by any witness in isolation from other evidence in the case which is capable of throwing light on its reliability […].'

In that regard a Court *may* partly accept and partly reject some of the evidence given by a witness, see *The Director of Public Prosecutions v John Jackson* (Unrep. Criminal Appeal No. 5 of 1991; Court of Appeal, at page 2) & *Director of Public Prosecutions v John Fufue & Nelson Fafeloa v R* (Unrep. Criminal Appeal Nos. 3 & 4 of 1988; Court of Appeal; Connolly P at page 5; Savage JA at page 9 & Kapi JA at page 7).

Kapi JA in *Director of Public Prosecutions v John Fufue & Nelson Fafeloa v R* (*supra*) commented that:

> 'A trial Judge must use his common sense and good judgment in coming to conclusions of fact.'

See also: *DPP v Hester* [1972] 2 WLR 910; [1972] 3 AllER 440; (1973) 57 CrAppR 212; [1973] AC 296.

The law relating to the '*Weight*' to be given to evidence is examined commencing on page **173**.

[13.7.3] Judgments

Section 150 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '(1) *The judgment in every trial in any criminal court in the exercise of its original jurisdiction shall be pronounced*, or the substance of such judgment shall be explained, in *open court* either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties and their advocates, if any:
>
> Provided that the whole judgment shall be read out by the presiding Judge or Magistrate if he is requested so to do either by the prosecution or the defence.
>
> (2) [This subsection deals with the appearance of the defendant];
>
> (3) [This subsection provides that be deemed invalid by reason only of the absence of any party on the day that the '*judgment*' was delivered.]' (emphasis added) [words in brackets added]

In *Sau v R* [1982] SILR 65 Daly CJ held at page 67:

> 'This subsection [, referring to section 150(1) of the *Criminal Procedure Code* (Ch. 7),] clearly contemplates that a short form of decision may be given followed by a full judgment given even subsequent to the termination of the trial.' [words in brackets added]

In respect of trials, the '*judgments*' of such courts '*shall* contain the point or points for determination, the decision thereon and the reasons for the decision', see section 151 of the *Criminal Procedure Code* (Ch. 7). (emphasis added)

Such '*judgments*' should make clear exactly the charge the Court found proved, see *R v Stanley Bade* [1988 – 89] SILR 121 at page 124.

See also: *Kenneth Charles Ferris v R* [1988 – 89] SILR 128 at page 130; *Dickson Kwaifanabo & Sale Kwatebeo v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 16 of 1984; Ward CJ) & *David Kio v R* (Unrep. Criminal Appeal Case No. 20 of 1977).

The law relating to '*Sentencing*' is examined commencing on page **918**.

Section 177 of the *Criminal Procedure Code* (Ch 7) states:

> 'If on any trial for misdemeanour the facts proved in evidence amount to a felony, the accused shall not be therefore acquitted of such misdemeanour; and no person tried for such misdemeanour shall be liable afterwards to be prosecuted for felony on the same facts, unless the court shall think fit, in its discretion, to refrain from giving a verdict and to direct such person to be prosecuted for felony, whereupon such person may be dealt with as if not previously put on trial for misdemeanour.'

Whilst a defendant is entitled to a copy of the judgment upon application by virtue of section 10(3) of the *Constitution* and section 153 of the *Criminal Procedure Code* (Ch. 7),

> '[n]o person shall be entitled, as of right, at any time or for any purpose, to inspection of the record of evidence given in any case before any Magistrate's Court, or to a copy of the notes of such Court, save as may be expressly provided by any Rules of Court, or, in the absence of such Rules, unless the leave of a Magistrate to make such inspection or receive such copy, has been first had and obtained', see section 68 of the *Magistrates' Courts Act* (Ch. 20).

Section 283(2) of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person convicted on trial by a Magistrates' Court is not represented by an advocate he shall be informed by the Magistrate of his right of appeal at the time when sentence is passed.'

The law relating to '*Appeals*' is examined commencing on page **14**.

[13.7.4] Related Issues

As regards the 'recording of evidence', see section 182 of the *Criminal Procedure Code* (Ch. 7) & section 69 of the *Magistrates' Courts Act* (Ch. 20).

See also: sections 152 ['*Copy of the judgment to be given to the defendant on application*']; 153 ['*Costs against defendants*']; 154 ['*Order to pay costs appealable*']; 155 ['*Compensation in case of frivolous or vexatious charge*']; 156 ['*Power of courts to award expenses or compensation out of fine*'] & 207 ['*Power to stop summary trial and hold preliminary inquiry in lieu*'] of the *Criminal Procedure Code* (Ch. 7).

[13.8] Judicial Notice

[13.8.1] Introduction

If a court takes '*judicial notice*' of something there is no need to call evidence in that regard, see *R v Simpson* [1983] 3 AllER 789; [1983] 1 WLR 1494; (1984) 78 CrAppR 115; [1984] CrimLR 39.

[13.8.2] Interpretation & General Provisions Act

Section 4 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Every Act is a public Act and *shall* be *judicially noticed* as such.' (emphasis added)

Section 39(4) of that Act states:

> 'All courts, Judges and persons acting judicially *shall* take *judicial notice* of the seal of a body corporate constituted by an Act affixed to a document and shall presume that it was duly affixed.' (emphasis added)

[13.8.3] General Principles

In *Carolus Ketsimur v Joe Morerei* [1987] PNGLR 325 King AJ, sitting alone, stated at page 328:

> '[I]t is convenient to call to mind shortly what the nature of a fact must be before a court can take judicial notice of it without it being strictly proved. The concept is simple. *A fact of which judicial notice may be taken must be "notorious" in the sense of being of a class so generally known as to give rise to the presumption that all persons are aware of it*: *Holland v Jones* (1971) 23 CLR 149 at 153; D Byrne, J d Heydon, *Cross on Evidence* (3rd Aust. Ed., 1986) at 112. The reference to "all persons" need not literally mean "everybody"; in an appropriate case it can mean all persons in a particular area or locality, or all persons of a particular background, calling or profession: *Cross* (supra) at 101.' (emphasis added)

In *Mullen v Hackney London Borough Council* [1997] 1 WLR 1103; [1997] 2 AllER 906 it was held by the Court of Appeal that Courts may take '*judicial notice*' of matters which are so notorious, or *clearly established, or susceptible of demonstration by reference to a readily obtainable and authoritative source* that evidence of their existence is unnecessary'.

In *Mesulam Tomalana v Drug House of Papua New Guinea* [1991] PNGLR 65 Ellis J, sitting alone, stated at page 69:

> '*Judicial notice is a term used to describe a situation where a fact is so generally well – known and / or obviously correct that the court "notices" it, thereby removing the need for its proof*. An obvious example is the proposition that the sun rises in the east or […] that Christmas Day is celebrated on 25 December. What is judicially noticed will clearly vary from place to place. For example, a court in Rabaul might take judicial notice of the fact that Kokopo is more than 1 km from Rabaul yet a court in Goroka might not, with the consequence that evidence would need to be led on that point in the latter court. *Hence, what will be judicially noticed depends upon such factors as the time and place as well as the nature of topic in question.* It is as if the proposition in question, if put to any *reasonable person* in that locality at that time, would bring an answer "of course" or "obviously that is correct". However, judicial notice may be taken if the matter in question relates to people residing in a particular locality […] or to matters notorious within a particular trade or profession […]. *The consequences of taking judicial notice of a matter is that evidence is not required to be led in order to prove the matter. Although the principles are easily explained, they can be difficult to apply* […].' (emphasis added)

See also: *R v Ben Tofola* (Unrep. Criminal Case No. 20 of 1992; Palmer J; at page 9 ['*Medical Report*']; *R v William Erieri* (Unrep. Criminal Case No. 3 of 1993; Palmer J; at page 6 ['*Structure of Neck*']; *The State v Anthony Sim* [1980] PNGLR 424 ['*Source & Distribution of Electrical Power*'] & *McCourt* (1993) 69 ACrimR 151.

Prosecutors should, if the prosecution wishes to rely on '*judicial notice*' enquire with the Court at the commencement of their case whether the Court will take '*judicial notice*' of a fact in issue, if applicable. Otherwise, evidence will have to be called.

In *R v Tobani* (Unrep. Criminal Case No. 39 of 1990) Ward CJ expressed doubt as to whether a Court could take '*judicial notice*' of the process of arrest, charge and bail.

[13.8.4] Meaning Of Ordinary Words

A Court *may* take '*judicial notice*' of the meaning of '*ordinary words*', see *Bendixen v Coleman* (1943) 68 CLR 451.

[13.8.5] Local Knowledge

A Court *may* take '*judicial notice*' of issues within their '*local knowledge*' such as well – known geographical features, see *Mullen v Hackney London Borough Council* [1997] 1 WLR 1103; [1997] 2 AllER 906; *Mersulam Tomalana v Drug House of Papua New Guinea* [1991] PNGLR 65; *Pope v Ewendt* (1971) SASR 45, *R v Dodd* [1985] 2 QdR 277; *Bowman v Director of Public Prosecutions* (1990) 154 JPR 524 & *Weatherall v Harrison* [1976] 1 QB 773.

However, a Court should advise the prosecution and the defence, if it is doing so, see *Bowman v Director of Public Prosecutions* [1990] CrimLR 600; [1991] RTR 263.

[13.8.6] Age Of A Witness

A Court *may* take '*judicial notice*' of the '*age*' of a witness in '*obvious cases*', see *Dwyer v Bridges, Ex parte Bridge & Dwyer v Brough, Ex parte Brough* [1951] StRQd 90.

[13.9] View Of Crime Scenes

[13.9.1] Magistrates' Courts Act

Section 67 of the *Magistrates' Courts Act* (Ch. 20) states:

> 'In any cause or matter, a Magistrate *may* make such order for inspection by the Court, parties or witnesses of any real or personal property, the inspection of which may be material to the determination of the matter in dispute, and may give such directions with regard to such inspection as to the Court may seem fit.' (emphasis added)

[13.9.2] General Principles

In *R v Philip Tahea & two others* (Unrep. Criminal Case No. 14 of 1995) Palmer J held at pages 1 - 2:

> 'The law does not condemn a private view of the scene of the crime in the absence of a judge and witnesses, but it does say that it would be wrong for a view to take place with witnesses in the absence of a judge, and is a defect which would vitiate a trial (Tameshwar and Another v R [1957] AC 476 [(1957) 41 CrAppR 161]).
>
> The actions taken by the learned DPP on the face of it, would not be wrong. This is on the basis that it was a private view and that no witnesses accompanied him or that those persons who accompanied him are not called as witnesses. The distinction to be made here is not so much the fact that a private view had been made, but that as a result of that, the impression is given on matters clearly in dispute that fresh evidence or further evidence is being introduced by the learned Director under the guise of cross – examination, and further giving the wrong impression that other witnesses could be called to contradict defence witnesses in what they have said by raising the possibility that actions for perjury could be instituted at a later stage. These bold assertions were made directly as a result of that private visit. That with respect, does give the impression of an unfair advantage to prosecution against the defence and in the interest of justice, appropriate remedial actions should be taken to remove such impressions at this stage.
>
> […]
>
> *A better approach in my view would be to have a view of the locus in quo conducted at this point of time, but in the presence of Legal Counsels and the court only; witnesses are to be excluded. Also I would suggest that Legal Counsels agree on certain specific sites or spots which you would want the court to take note of, apart from a general view of the locus in quo. I stress that no communication about the results of that visit should be made by counsels to their witnesses or anyone going on that view.*
>
> *There should preferably be someone independent or objective who knows the place and who can assist with identifying the sites.*' (emphasis added) [citation in brackets added]

In *R v Hunter* (1985) 81 CrAppR 40 [[1985] 1 WLR 613; [1985] 2 AllER 173; [1985] CrimLR 309] Boreham J, delivering the judgment of the Court, held at page 44:

> 'The judge should be present at every stage of the trial. A view is a stage of the trial. Whether or not a witness is present, in our judgment the judge should always be present.'

A defendant should attend at the view, in the absence of exceptional circumstances, see *R v Ely JJ, Ex parte Burgess* [1992] CrimLR 888.

A witness who has already given evidence *may* attend a view, provided that he/she is available to be recalled to be further cross – examined, if necessary, see *Karamat v R* [1956] 2 WLR 412; [1956] AC 256; [1956] 1 AllER 415; [1956] 40 CrAppR 13.

See also: *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996; Palmer J; at page 6) & *R v Parry v Boyle* [1987] 1 RTR 282; (1986) 83 CrAppR 310; [1986] CrimLR 551.

EXAMINATION OF WITNESSES

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EXAMINATION OF WITNESSES

[14.0] Introduction

Section 196 of the *Criminal Procedure Code* (Ch. 7) states:

> '*If the accused person does not accept the truth of the charge, the court shall proceed to hear the witnesses for the prosecution and other evidence (if any).*
>
> The accused person or his advocate *may* put questions to each witness produced against him.
>
> If the accused person does not employ an advocate, the court *shall*, at the close of the examination of each witness for the prosecution, ask the accused person whether he wishes to put any questions to that witness and shall record his answer.' (emphasis added)

See: *Director of Public Prosecutions v Glass; Director of Public Prosecutions v Kuper & Kuper v Director of Public Prosecutions* [1984] SILR 28.

This chapter examines the law relating to:

- '*Examination – in – Chief*';
- '*Cross – Examination*'; and
- '*Re – examination*'.

[14.1] Examination – in - Chief

[14.1.1] Introduction

The purpose of '*Examination – in – Chief*' is to elicit all *admissible* evidence from witnesses by '*non – leading questions*'.

Section 134 of the *Criminal Procedure Code* (Ch. 7) states:

> 'Every witness in any criminal cause or matter shall be examined upon oath or affirmation, and the court before which any witness shall appear shall have full power and authority to administer the usual oath or affirmation:
>
> Provided that the court *may at any time*, if it thinks it just and expedient (for reasons to be recorded in the proceedings), take without oath the evidence of any person declaring that the taking of any oath whatever is according to his religious belief unlawful, or who by reason of immature age or want of religious belief ought not, in the opinion of the court, to be admitted to give evidence on oath; the fact of the evidence have been so taken being also recorded in the proceedings.' (emphasis added)

As regarding the administering of '*oaths*' or '*affirmations*', see sections 33 & 62 of the *Magistrates' Courts Act* (Ch. 20) & section 46 of the *Interpretation & General Provisions Act* (Ch. 85).

If a witness wishes to affirm rather than taking the oath, the Court should ask the following questions:

> 'Do you have any religious belief?'

and, if necessary,

> 'Is the taking of an oath contrary to your religious belief?'

See: *R v Clark* (1962) 46 CrAppR 113 at page 117.

The wording of the '*Oath*' is:

> 'I swear by Almighty God that the evidence which I shall give to this Court shall be the truth, the whole truth and nothing but the truth so help me God.'

The wording of the '*Affirmation*' is:

> 'I solemnly and sincerely truly declare and affirm that the evidence which I shall give to this Court shall be the truth, the whole truth and nothing but the truth.'

In *R v Beattie* (1989) 89 CrAppR 302 Lord Lane CJ, delivering the judgment of the Court, stated at page 306:

> '*The general well – known rule is that it is not competent for a party calling a witness to put to that witness a statement made by the witness consistent with is testimony before the Court in order to lend weight to the evidence. There are three well known exceptions to that rule.* The first one is where it has been suggested to the witness that the evidence he or she has given on oath is a recent invention, that the witness has just made it up. If that suggestion is made, then it is obviously a rule of common sense as well as of law, that a previous consistent statement can be shown in order to demonstrate that the evidence has not recently been fabricated.
>
> The second exception is complaints made in sexual cases, complaints which are made at the first opportunity, are admissible in order to show consistency. Finally, […] where the statement forms part of the actual events in issue, sometimes known as the *res gestae* rule.' (emphasis added)

In *R v Hulusi & Purvis* (1974) 58 CrAppR 378 Lawton LJ, delivering the judgment of the Court of Appeal, commented at page 385:

> 'It is a fundamental principle of an English trial that, if an accused gives evidence he must be allowed to do without being badgered and interrupted. Judges should remember that most people go into the witness box, whether they be witnesses for the Crown or defence, in a state of nervousness. They are anxious to do their best. They expect to receive a courteous hearing, and when they find, almost as soon as they get into the witness box and are starting to tell their story, that the judge of all people is intervening in a hostile way, the human nature being what it is, they are liable to become confused and not to do so well as they would have done had they not been badgered and interrupted.'

EXAMINATION OF WITNESSES

In *Director of Public Prosecutions v Haikiu* [1984] SILR 155 the Court of Appeal held at pages 159 – 160:

> 'In the course of his judgment Daly CJ [in R v Kwatefena [1984] SILR 106] said, "it is wrong for the Court to give the impression that it is doing the work of one side." That is undoubtedly true if the questioning suggests that the judge is satisfied that the accused is guilty; or that it shows, as Lord Denning MR said in Jones v National Council Board [1957] 2 QB 55, that the judge has "dropped the mantle of the judge and assumed the role of an advocate." *Further*, a judge must *not* cross – examine an accused when giving his evidence in chief at such length or with such severity that he is assisting the prosecution.' (emphasis added) [words in brackets added]

When the '*examination – in – chief*' of a witness has commenced, but has *not* completed, as a *general rule* neither the prosecutor or defence counsel should speak to the witness, about evidence which is to be given. However, with the *permission of the Court* a witness *may* be spoken to in respect to the evidence which the witness has given during the '*examination – in – chief*'.

It is however a better practice *not* to speak to any witness once their '*examination – in – chief*' has commenced.

The law relating to:

- the ' *Admissibility Of Evidence*' is examined commencing on page **171**;
- the '*Order*' in which '*Witnesses For The Prosecution*' should be called is examined on page **275**; and
- '*Leading Questions*' is examined commencing on page **341**.

[14.1.2] Eliciting Evidence Generally

[A] Introduction

The following procedure can be used after the witness has been sworn – in:

[i] Ask "What is your name?"

[ii] Ask "What is your occupation?"

[iii] Ask do "You remember the [date in question]?"

[iv] Ask "What occurred at about [time in question]?"

[v] Ask a series of questions commencing with the words, "What happened then / next?"

[vi] Ask "Can you see any person involved?"

It would be expected that the defendant would be identified by the witness in appropriate instances.

Whilst a witness is giving evidence the prosecutor is *expected* to closely read the statement of the witness to check if the evidence given by the witness is consistent with their statement, otherwise the witness may be declared '*hostile*'. The law relating to '*Hostile Witnesses*' is examined commencing on page **288**.

See also: *Shaw v Director of Public Prosecutions* [1961] 2 WLR 897; [1961] 2 AllER 446; [1962] AC 220; (1961) 45 CrAppR 113.

[B] Name

Whilst ordinarily all witnesses are required to provide their '*full name*', a Court has the inherent power to depart from that practice in appropriate and rare circumstances, see *R v Socialist Worker, Ex parte Attorney – General* [1975] QB 637, per Lord Widgery CJ at page 644.

In such cases a 'letter' may be used to refer to the witness, instead of their surname.

See also: *R v (Al – Fawwaz) v Governor of Brixton Prison & another* [2001] 1 WLR 1234.

[C] Address

A witness should *not* be asked to disclose his/her '*address*', *unless* such disclosure is necessary for evidentiary purposes.

[D] Occupation

Whilst it is *not* objectionable to ask a witness what his/her '*occupation*' is, being employed does *not* make a witness's evidence more creditable, see *R v DS* [1999] CrimLR 911.

[14.1.3] Leading Questions

[A] Defined

Neither the prosecution or the defence are permitted to elicit evidence using '*leading questions*'.

A '*leading question*' is simply a question which puts something in the mouth of the witness before the witness actually says it.

In *Saunders* (1985) 15 ACrimR 115 the Court held:

> A '*leading question*' is one which either suggests the desired answer or assumes the existence of disputed facts.

In *The State v Daniel* [1988 – 89] PNGLR 580 Doherty AJ, sitting alone, stated at page 583:

> 'Defence counsel returned several times to the objection that the question "Do you recall three weeks before 12 December 1988?" was leading. A leading question has been defined by Halsbury's Laws of England (4th ed.), vol. 17, par 272 at 189, as follows:

> "*Leading questions, that is to say questions which by their form suggest the answer which it is desired the witness shall give, are not generally permitted in examination in chief.*"
>
> And:
>
> "*Questions which assume the existence of facts in issue may not be asked.*"
>
> I do not see what this question suggests. Its immediate answer is either "Yes, I recall" or "No, I do not recall"; nothing else. Possibly a witness would take it further than "Yes, I recall" by stating what happened. But there is no suggestion in that question about what happened three weeks before 12 December. The witness's scope to answer is wide, he could say he went to a party, played football, went to work – anything! *I do not find this a leading question*.' (emphasis added)

For example, the question to a complainant:

> "Did the defendant strike you with a piece of rock to your head?",

would be '*leading*' if there was no *prior* evidence from the complainant that the defendant:

[i] was the person who struck the complainant; and

[ii] did use a piece of rock to strike the head of the complainant.

The questions which should be asked are:

[i] "Were you assaulted?";

[ii] "Where on your body were you assaulted?";

[iii] "How were you assaulted?"; and

[iv] "Who assaulted you?"

Those questions *would not* be classed as '*leading questions*'.

'*Leading questions*' are also *not* permitted in '*Re – examination*'.

The law relating to '*Re – examination*' is examined commencing on page **365**.

[B] Grounds For Exclusion

The *prohibition* against '*leading questions*' during '*examination – in – chief*' of favourable witnesses is intended to prevent the examination being unfairly conducted, ie., to guard against the risk that a witness, who is asked a '*leading question*', may adopt the suggestion implied in the question, rather than answering it truthfully from his/her own knowledge, see *R v Thynne* [1977] VR 98.

Furthermore, the prohibition lies to inhibit the natural bias which a witness has in favour of the party calling him/her, see *Mooney v James* [1949] VLR 22.

As explained in *Cross on Evidence*, 2nd Australian ed., para. 10-16:

> 'Leading questions are *objectionable* because of the danger of collusion between the person asking them and the witness, or the impropriety of suggesting the existence of facts which are not in evidence.' (emphasis added)

However, the answers to '*leading questions*' are *not* per se inadmissible, but the '*weight*' to be given to such evidence may invariably be reduced, see *Moor v Moor* [1954] 2 AllER 459; [1954] 1 WLR 929 & *R v Wilson* (1914) 9 CrAppR 124.

The law relating to '*Weight*' to be assigned to evidence is examined on page **173**.

[C] Exceptions

The following are the '*exceptions*' to the rule involving '*leading questions*':

[i] *Formal Matters*

Therefore, the following questions may be asked:

[a] "Your name is …";

[b] "You reside at …"; and

[c] "Your occupation is …"

[ii] *Introductory Matters*

Therefore, the following question could be asked:

> "Is it correct that at about [time] on [date] you were on patrol in [location] with [name of police officer/s concerned]?"

See: *R v Robinson* (1897) 61 JP 520.

[iii] *Undisputed Facts*

Undisputed facts are those which are *not* disputed by the defence. However, if a Court does not know that such evidence is *not* disputed then it may rule that the question is '*leading*'.

The Court should therefore be advised what evidence is *not in dispute*. Such evidence would amount to a '*Formal Admission*', the law relating to which is examined commencing on page **325**.

An example of such a question is:

> "Did you go to the park and see the dead body of [the name of the deceased]?",

when it is not disputed that the body of the deceased was in the park in question.

[iv] ***Assisting Memory***

When the memory of a witness has failed on a particular topic, permission from the Court can be sought to assist the witness.

If permitted, the question should only assist the memory of the witness by directing the witness to a particular topic, without suggesting the answer, see *Accers v Petroni* (1815) 1 Stark 100 & *Nichollas v Dowding* (1815) 1 Stark 81.

Refer also to the section which examines '*Refreshing Memory From Notes*' commencing on page **295**.

However, the '*leading questions*' *must* only relate to '*general matters*'.

[v] ***Identification***

'*Leading questions*' may be asked for the purpose of identifying persons or things.

To identify the defendant by a witness, the question that should be asked is: "Is the person which you have mentioned in the precincts of this court?"

See: *R v John* [1973] CrimLR 113 & *R v Howick* [1970] CrimLR 403.

[vi] ***Expert Witnesses***

As regards, medical practitioners for example, the following series of questions could be asked:

[a] "Did you examine [name of the complainant]?";

[b] "When was that?";

[c] "Where was that?";

[d] "Did [name of the complainant] tell you what allegedly happened?";

[e] "What did the complainant say?";

Such evidence is admissible, refer to the section which examines the law relating to '*Hearsay Evidence*' commencing on page **176**; and

[f] "What did your examination reveal?"

Refer also to the section which examines the law relating to '*Opinion Evidence*' commencing on page **202**.

[vii] ***Hostile Witnesses***

Refer to the section which examines the law relating to '*Hostile Witnesses*' commencing on page **288**.

[viii] ***Lack of Consent***

'*Leading questions*' are usually allowed when dealing with such matters.

In *Saunders* (1985) 15 ACrimR 115 Bunt CJ, on behalf of the Court, stated at page 188:

> '[I]n a rape case, upon the element of consent, I find it difficult to see how the question could be otherwise formulated than by asking, "Did you consent" or perhaps by putting it in the alternative, "Did you or did you not consent?".'

The law relating to '*Sexual Offences*' is examined commencing on page **630**.

[ix] ***Contradicting Another Witness's Evidence***

'*Leading questions*' are permitted in order to contradict the evidence of other witnesses, such as "What did the defendant then say?".

See: *Edmonds v Walter* (1819) 3 Stark 7; *Hollett v Cousens* (1839) 2 M&M 238 & *Courteen v Touse* (1807) 1 Camp 43.

A Court may ask leading questions of a supplementary or explanatory kind to clarify issues, see *R v Hodgson* (1924) 18 CrAppR 7.

[D] Yes Or No Answers

In *Saunders* (1985) 15 ACrimR 115 the Court held:

> A question to which the answer is necessarily 'yes' or 'no' is *not* for that reason alone an improper '*leading question*'.

[14.1.4] Unresponsive Answers

In *Practical Evidence* (1991) 65 ALJ 344 Young J stated:

> 'Unresponsive answers can really be put into three categories, namely:
>
> (a) where the witness volunteers an answer deliberately with an intent to gain an advantage;
>
> (b) where the witness volunteers something unwittingly which is relevant and would have been unquestionably admissible had the appropriate questions been asked;
>
> (c) where the answer is given innocently but would otherwise be inadmissible. […]
>
> The *general rule*, according to Wigmore on Evidence (3rd ed., 1940), par 785, *is that it is a "novel and unwholesome assertion" that "where an answer is not responsive to the question put, it is the duty of the court to strike it out*."' (emphasis added)

See also: *R v Aston* (No. 1) [1991] 1 QdR 363.

[14.1.5] Need For Interpreters

Section 59 of the *Magistrates' Courts Act* (Ch. 20) states:

> '(1) The language of the Magistrates' Courts *shall* be English.
>
> (2) In any proceedings in any Magistrates' Court in which the language spoken by any witness or party requires to be interpreted into English, the Magistrate having jurisdiction in the proceedings *may* appoint suitable persons as interpreters.' (emphasis added)

Section 183 of the *Criminal Procedure Code* (Ch. 7):

> 'The language of the court in the case of both the High Court and the Magistrates' Courts *shall* be English.' (emphasis added)

Section 184 of the *Criminal Procedure Code* (Ch. 7):

> '(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it *shall* be interpreted to him in open court in a language which he understands.
>
> (2) When documents are put in for the purpose of formal proof it shall be in the discretion of the court to interpret as much thereof as appears necessary.' (emphasis added)

Interpreters however are only be considered as 'translating machines' and their translations *must* be accurate and the evidence of the defendant, like any other witness whose evidence requires the services of an interpreter, *must* be interpreted faithfully, see *Gaio v R* (1960) 104 CLR 419.

The law relating to the '*Right Of A Defendant To An Interpreter*' is examined commencing on page **159**.

[14.2] Cross - Examination

[14.2.1] Introduction

The '*purpose*' of '*cross – examination*' is to:

[i] elicit answers to questions to fact, see *R v Baldwin* (1925) 18 CrAppR 175; and

[ii] try to show that the evidence of a particular witness should *not* be believed, in appropriate instances.

In *Mechanical & General Inventions Co & Lebwess v Austin & the Austin Motor Co* [1935] AC 346 Lord Hawworth commented at page 359:

> 'Cross – examination is a powerful and valuable weapon for the purpose of testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to the hands of counsel in the confidence that it will be used with discretion, and with due regard to the assistance to be rendered by the Court, not forgetting at the same time the burden that is imposed upon the witness.'

In *Lui Mei Lin v R* (1989) 88 CrAppR 296 [[1989] AC 288; [1989] 2 WLR 175; [1989] 1 AllER 359; [1989] CrimLR 364] Lord Roskill, delivering the judgment of the Privy Council, held at page 301:

> 'In their view the right to cross – examine is, as Lord Donovan stated [in *Murdoch v Taylor* (1965) 49 CrAppR 119; [1965] AC 574], unfettered, the only limit being *relevancy*.' (emphasis added) [words in brackets added]

In *R v Hart* (1932) 23 CrAppR 202 Lord Hewart CJ, delivering the judgment of the Court, stated at page 207:

> 'In our opinion, if on a crucial part of the case, the prosecution intend to ask the jury to disbelieve the evidence of a witness, it is right and proper that that witness should be challenged in the witness box or, at any rate, that it should be made plain, while the witness is in the box that his evidence is not accepted.'

In *R v Funderburk* (1990) 90 CrAppR 466 Henry J, delivering the judgment of the Court, stated at pages 469 – 476:

> 'When one comes to cross – examination, questions in cross – examination equally have to be relevant to the issues before the court, and those issues of course include the credibility of the witness giving evidence as to those issues. *But a practical distinction must be drawn between questions going to an issue before the court and questions merely going either to the credibility of the witness or to facts that are merely collateral.* When questions go solely to the credibility of the witness or to collateral facts the general rule is that answers given to such questions are final and cannot be contradicted by rebutting evidence. This is because of the requirement to avoid multiplicity of issues in the overall interests of justice.
>
> The authorities show that the defence may call evidence contradicting that of the prosecution witnesses where their evidence:
>
> (a) goes to an issue in the case (that is obvious);
> (b) shows that the witness made a previous inconsistent statement relating to an issue in the case […];
> (c) shows bias in the witness (*Phillips* (1936) 26 CrAppR 17);
> (d) shows that the police are prepared to go to improper lengths to secure a conviction (*Busby* (1982) 75 CrAppR 79);
> (e) in certain circumstances proves the witness's previous convictions;
> (f) shows that the witness has a general reputation for untruthfulness;
> (g) shows that medical causes would have affected the reliability of his testimony.
>
> All those categories listed, other than category (a), might be considered exceptions to the general rule as to the finality requirement of questions put on issues of credibility and collateral matters. The demonstrate the obvious proposition that a general rule designed to serve the interests of justice should not be used where so far from it might defeat them.
>
> […]
>
> As far as concerns the general test as to the limits of cross – examination as to credit, the locus classicus of that is to found in Lawton J's judgment in the case of *Sweet-Escott* (1971) 55 CrAppR 316, 320. There the witness was cross – examined as to his credit in relation to convictions 20 years ago. As a general test Lawton J having found that the question should not have been allowed said:

> "What, then, is the principle upon which the judge should draw the line? It seems to me that it is this. Since the purpose of cross – examination as to credit is to show that the witness ought not to be believed on oath, the matters about which he is questioned must relate to his likely standing after cross – examination with the tribunal which is trying him or listening to his evidence."
>
> […]
>
> Pollock CB said in the leading case of *Attorney – General v Hitchcock* (1847) 1 Exch 91 – 99:
>
> "… the test, whether the matter is collateral or not, is this: if the answer of a witness is a matter which you would be allowed on your own part to prove in evidence – if it have such a connection with the issue, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him."
>
> The difficulty we have in applying that celebrated test is that it seems to us to be circular. If a fact is not collateral then clearly you can call evidence to contradict it, but the so – called test is silent on how you decide whether that fact is collateral. The utility of the test may lie in the fact that the answer is an instinctive one based on the prosecutor's and the court's sense of fair play rather than any philosophic or analytic process.'

Questions in '*cross – examination*' may be '*leading*' in nature. The law relating to '*Leading Questions*' is examined commencing on page **341**.

When cross – examining witnesses, prosecutors should:

[i] only ask '*relevant*' questions;

[ii] give the witness the opportunity to answer questions, *before* asking further questions;

[iii] not include statements of opinion, just facts;

[iv] never ask insulting or scandalous questions with the intention of insulting or annoying the witness;

[v] should not entice the witness into argument;

[vi] never repeat the same question; and

[vii] not introduce any '*fresh matter*' which could and should have been proved as part of the case for the prosecution, other than issues going only to credit, see *R v Sansom* [1991] 2 QB 130; [1991] 2 WLR 366; [1991] 2 AllER 145; (1991) 92 CrAppR 115; [1991] CrimLR 126; *R v Phillipson* (1990) 91 CrAppR 226; [1990] CrimLR 407; *R v Halford* (1978) 67 CrAppR 318; *R v Kane* (1977) 65 CrAppR 270 & *R v Rice* [1963] 2 WLR 585; [1963] 1 AllER 832; [1963] 1 QB 857; (1963) 47 CrAppR 79.

Neither the prosecution or defence should ask questions relating to the identity of any person referred to by a witness, *unless* there is a specific reason for such evidence, see *R v Flynn* [1972] CrimLR 428.

The law relating to '*Protecting The Identity Of Informers*' is examined commencing on page **130**.

In *R v Praturion* (Unrep. NSW CA; 9 November 1985) Street CJ stated:

> 'What the Crown Prosecutor did was contrary to a comparatively elementary rule of cross – examination, namely that it is *not permissible* to put one witness the proposition that the evidence of that witness is to the contrary of the evidence of other witnesses, so as in effect to *invite a witness to express an opinion as to whether other witnesses are telling the truth*.' (emphasis added)

That rule also applies to the defence.

It is the Court which determines the truthfulness or otherwise of witnesses.

When '*cross - examination*' of a witness has commenced, but has *not* completed, as a *general rule* neither the prosecutor or defence counsel should speak to any such witness, other than an 'expert witness'. As regards expert witnesses clarification of evidence given may be sought. However, with the *permission of the Court* any witness *may* be spoken to in respect to the evidence which the witness has given.

It is however a better practice *not* to speak to any witness once their '*cross - examination*' has commenced.

[14.2.2] Limits

[A] Generally

In *Lui Mei Lin v R* (1989) 88 CrAppR 296 [[1989] AC 288; [1989] 2 WLR 175; [1989] 1 AllER 359; [1989] CrimLR 364] Lord Roskill, delivering the judgment of the Privy Council, held at page 301:

> 'In their view the right to cross – examine is, as Lord Donovan stated [in *Murdoch v Taylor* (1965) 49 CrAppR 119; [1965] AC 574], unfettered, the only limit being *relevancy*.' (emphasis added) [words in brackets added]

In *Wakely v R* (1990) 64 ALJR 321 the High Court of Australia held at page 325:

> 'Although it is important in the interest of the administration of justice that cross – examination be contained within reasonable limits, a judge should allow counsel some leeway, in cross – examination in order that counsel may perform the duty, where counsel's instructions warrant it, of testing the evidence given by an opposing witness.'

In *R v Sharp* [1993] 3 AllER 225; (1994) 98 CrAppR 144 the Court of Appeal held:

> A judge should *not* intervene, when cross – examination is being conducted by competent counsel, save to clarify matters which he/she did not understand. If a judge wishes to ask questions about matters not touched with in cross – examination, he/she should wait until the end of the cross – examination.

'*Cross – examination*' should *not* be stopped simply on the basis that the questions relate to a tenuous legal issue, see *R v Flynn* [1972] CrimLR 428.

It is generally *impermissible* to cross – examine a defendant on the contents of co – defendant's 'caution statement', see *R v Gray & Evans* [1998] CrimLR 570.

See also: *Jones v Director of Public Prosecutions* [1962] 2 WLR 575; [1962] 1 AllER 569; [1962] AC 635; [1962] AC 635; (1962) 46 CrAppR 129; *R v Bateman* (1946) 31 CrAppR 106; *R v Gilson & Cohen* (1944) 29 CrAppR 174 at page 181; *R v Cain* (1936) 25 CrAppR 204 at page 205 & *R v Kalia* [1974] 60 CrAppR 200; [1975] CrimLR 181.

[B] Prosecution

Provided questions are properly formulated and based on evidence previously given, other than issues going to credit, the '*cross – examination*' by a prosecutor should *not* be limited by a Court, see *R v Tuegal & others* [2000] 2 AllER 872; [2000] 2 CrAppR 361; *R v Hill* (1993) 96 CrAppR 456 & *R v Halford* (1978) 67 CrAppR 318.

A defendant who gives evidence may be cross – examined, although such evidence may incriminate another person, see *R v Minihane* (1921) 16 CrAppR 38.

Once a defendant enters the witness box he/she is liable to cross – examination like any other witness, see *R v Paul & McFarlane* (1920) 14 CrAppR 155 at page 156.

[C] Defence

Section 10(2)(e) of the *Constitution* states:

> 'Every person who is charged with a criminal offence –
>
> […]
>
> *(e) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court*, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court in the same conditions as those applying to witnesses called by the prosecution;' (emphasis added)

Section 196(3) of the *Criminal Procedure Code* (Ch. 7) states:

> 'If the accused person does not employ an advocate, the court *shall*, at the close of the examination of each witness for the prosecution, *ask the accused person whether he wishes to put any questions to that witness and shall record his answer*.' (emphasis added)

A defence lawyer should *not* conduct lengthy '*cross – examination*' on issues which are *not* in dispute, see *R v Maynard (*1979) 69 CrAppR 309 & *R v Kalia* [1974] 60 CrAppR 200; [1975] CrimLR 181.

The defence has the right to cross – examine a co – defendant who has given evidence, see *R v Hilton* (1955) 71 CrAppR 466.

It is improper practice to cross – examine a prosecution witness by way of defence, as distinct from issues going to credit, if it is not intended to call the defendant to substantiate the issues raised in cross – examination, see *R v O'Neill & Ackers* (1950) 34 CrAppR 108.

In *R v Brown (Milton)* [1998] 2 CrAppR 364 Lord Bingham CJ, delivering the judgment of the Court of Appeal, stated at pages 369 – 371:

'*When defendants represent themselves in criminal trials problems regularly arise.* Such defendants lack that knowledge of procedure, evidence and substantive law; that appreciation of relevance; that ability to examine and cross – examine witnesses and present facts in an orderly and disciplined way; and that detachment which should form part of the equipment of the professional lawyer. These deficiencies exist even where a defendant attempts to represent himself in all good faith. But the problems are magnified one hundred – fold where the defendant is motivated by a desire to obstruct the proceedings or to humiliate, intimidate or abuse any one taking part in it.

The trial judge's duty is to ensure to the utmost of his ability that the defendant, even if unrepresented, or perhaps particularly if unrepresented, has a fair trial. Every defendant is not guilty until proved to be so. Where, for example, a defendant is accused of rape, the trial cannot be conducted on the assumption that he is a rapist and the complainant a victim, since the whole purpose of the proceeding is to establish whether that is so or not. […]

[…]

The trial judge is, however, obliged to have regard not only to the need to ensure a fair trial for the defendant but also to the reasonable interests of other parties to the court process, in particular witnesses, and among witnesses particularly those who are obliged to relive by describing in the witness box an ordeal to which they have been subject. It is the clear duty of the trial judge to do everything he can, consistently with giving the defendant a fair trial, to minimize the trauma suffered by other participants. Furthermore, a trial is not fair if a defendant, by choosing to represent himself, gains the advantage he would not have had if represented of abusing the rules in relation to relevance and repetition which apply when witnesses are questioned.

Judges do not lack power to protect witnesses and control questioning. The trial judge is the master of proceedings in his court. He is not obliged to give an unrepresented defendant his head to ask whatever questions, at whatever length, the defendant wishes. In a case such as the present it will often be desirable, before any question is asked by the defendant of the complainant in cross – examination, for the trial judge to discuss the course of proceedings with the defendant […]. The judge can then elicit the general nature of the defence and identify the specific points in the complainant's evidence with which the defendant takes issue, and any points he wishes to put to her. If the defendant proposes to call witnesses in his own defence, the substance of their evidence can be elicited so that the complainant's observations on it may, so far as relevant, be invited. *It will almost always be desirable in the first instance to allow a defendant to put questions to a complainant, but it should be made clear in advance that the defendant will be required, having put a point, to move on, and if he fails to do so the judge should intervene and secure compliance. If the defendant proves unable or unwilling to comply with the judge's instructions the judge should, if necessary in order to save the complainant from avoidable distress, stop further questioning by the defendant or take over the questioning of the complainant himself.* If the defendant seeks by his dress, bearing, manner or questions to dominate, intimidate or humiliate the complainant, or if it is reasonably apprehended that he will seek to do so, the judge should not hesitate to order the erection of a screen, in addition to controlling questioning in the way we have indicated.' (emphasis added)

A Court should assist a defendant in framing his/her questions in cross – examination, if necessary, see *R v Barker* (1927) 20 CrAppR 70.

[14.2.3] Questioning Credibility Of Defendants

[A] General Principles

In *R v Miller & others* (1953) 36 CrAppR 169 Devlin J stated at page 171:

> 'The fundamental principle, equally applicable to any question that is asked by the defence as to any question that is asked by the prosecution, is that it is not normally relevant to inquire into a prisoner's previous character, and, particularly, to ask questions which tend to show that he has previously committed some criminal offence. It is not relevant because the fact that he has committed an offence on one occasion does not in any way show that he is likely to commit an offence on any subsequent occasion. Accordingly, such questions are, in general, inadmissible, not primarily for the reason that they are prejudicial, but because they are irrelevant. That is, however, this difference in the application of the principle. In the case of the prosecution, a question of this sort may be relevant and at the same time be prejudicial, and, if the court is of the opinion that the prejudicial effect outweighs its relevance, then it has the power, and indeed, the duty, to exclude the question. Therefore, counsel for the prosecution rarely asks such a question. No such limitation applies to a question asked by a counsel for the defence. His duty is to adduce any evidence which is relevant to his own case and assists his client, whether or not it prejudices anyone else.'

See also: *Lui Mei Lin v R* [1989] AC 288; [1989] 2 WLR 175; [1989] 1 AllER 359; (1989) 88 CrAppR 296; [1989] CrimLR 364.

In *R v Chinmaya* [1995] 1 QdR 542; [(1995) 73 ACrimR 316] the Court of Appeal stated at page 544:

> '*It is settled that the discretion to permit cross examination about prior convictions is not to be lightly exercised*, *but* as was said in *Phillips v The Queen* (1985) 159 CLR 45, 57, "*sparingly and cautiously*". […] At the same time there is, as Mason, Wilson, Brennan and Dawson JJ held in that case, no rule that the discretion must be exercised against the Crown unless the circumstances can be described as exceptional (159 CLR 45, 54). In the end, their Honours said, "*the sole criterion governing its exercise is what fairness requires in the circumstances of the case*" (at 58).' (emphasis added)

In *R v Turner* (1924) 18 CrAppR 161 Lord Hewart CJ, delivering the judgment of the Court, stated at page 162:

> 'It cannot too clearly be understood that where previous convictions are relied on for any purpose in a trial they must be either: (a) proved by lawful evidence; or (b) expressly admitted by the accused person.'

As regards the '*Proof Of Previous Convictions*', refer to page **305**.

In *Donnini v R* (1972) 128 CLR 114 the High Court of Australia held:

> Where the evidence of prior convictions are properly before a Court for the sole purpose of combating a suggestion of good character or destroying the defendant's credibility, the Court *may not* use the fact of a prior conviction as evidence tending to the guilt of the defendant, but that the fact of prior convictions can only be used for the purpose of discrediting the defendant where his/her evidence conflicts with that of witnesses called by the prosecution or where he/she makes exculpatory claims in his/her defence.

Subject to obtaining the Court's permission a defendant *may* be cross – examined on offences committed after the offence for which he/she is charged, see *R v Coltress* (1979) 68 CrAppR 193 & *R v Wood* [1920] 2 KB 179; (1920) 14 CrAppR 149.

Furthermore, a Court *may* only allow '*cross – examination*' on parts of a defendant's criminal history, see *R v Billings* [1966] VR 396. For example, in a case of 'Simple Larceny', a Court *may* only allow '*cross – examination*' in relation to offences of 'dishonesty'.

If the prosecution believes that an unrepresented defendant may by his/her questioning result in an application under section 141 of the *Criminal Procedure Code* (Ch. 7), the prosecutor *should* seek an adjournment. The defendant should then be advised by the prosecutor in the presence of an independent person that if he/she continues such an application may be made, see *R v Cook* (1959) 43 CrAppR 138; [1959] 2 WLR 616; [1959] 2 QB 340; [1959] 2 AllER 97 & *R v Morris* (1959) 43 CrAppR 206.

See also: *Maxwell v Director of Public Prosecutions* [1935] AC 309; (1934) 24 CrAppR 152; *R v Powell* [1985] 1 WLR 1364; (1986) 82 CrAppR 165; [1986] 1 AllER 193; [1986] CrimLR 175; *R v Nelson* [1979] 68 CrAppR 112; *R v Levy* (1966) 50 CrAppR 238; [1966] CrimLR 381; *Stirland v Director of Public Prosecutions* [1944] AC 315; [1945] 30 CrAppR 40; *R v Devine* [1985] 18 ACrimR 185*; A Moe v DPP (Nauru)* (1991) 103 ALR 595 & *Attwood v R* (1960) 102 CLR 353.

[B] Similar Fact Or Propensity Evidence

Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged *shall* be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided –
>
> […]
>
> (f) *a person charged and called as a witness* in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, *unless* –
>
> (i) *the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged.*' (emphasis added)

The *purpose* of this subsection is to permit the '*cross – examination*' of a defendant regarding his/her previous and subsequent criminal conduct *to show that the defendant has the propensity to commit the offence/s charged.* Otherwise, the prosecution would *not* be able to cross – examine the defendant on such matters.

In *R v Fisher* [1910] 1 KB 149 Channell J, delivering the judgment of the Court, stated at page 152:

> 'The principle is that the prosecution is not allowed to prove that the prisoner has committed the offence with which he is charged by giving evidence that he is a person of bad character, and one who is in the habit of committing crimes, for that is equivalent to asking the jury to say that because the prisoner has committed other offences he must therefore be guilty of the particular offence for which he is being tried. But if the evidence of other offences does go to prove that he did commit the offence charged, it is admissible because it is relevant to the issue, and it is admissible not because, but notwithstanding that it proves that the prisoner has committed another offence.'

If the prosecution intends to rely on '*similar fact / propensity evidence*' then such evidence should be raised as part of the prosecution case, rather than raising such 'issues' in '*cross – examination*', see *Jones v Director of Public Prosecutions* [1962] 2 WLR 575; [1962] AC 635; [1962] 1 AllER 569; (1962) 46 CrAppR 129 & *R v Anderson (M)* [1988] QB 678; (1988) 87 CrAppR 349; [1988] 2 AllER 549.

See also: *R v Ellis* (1910) 5 CrAppR 41; [1910] 2 KB 746.

The law relating to:

- '*Similar Fact Or Propensity Evidence*' is examined commencing on page **188**; and
- the '*Weight*' to be assigned evidence is examined on page **173**.

[C] Character

Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged *shall* be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided –
>
> […]
>
> (f) *a person charged and called as a witness* in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, *unless* –
>
> […]
>
> (ii) *he has personally or by his advocate asked questions of the witness for the prosecution with a view to establishing his own good character, or has given evidence of his own good character* […]*.'* (emphasis added)

In determining whether to permit such '*cross – examination*', the Court should balance the possible prejudicial effect of such questions against the damage caused to the prosecution case in order to ensure that a fair trial is conducted, see *R v McLeod* [1995] 1 CrAppR 591.

EXAMINATION OF WITNESSES

The *purpose* of this '*cross – examination*' is to show that the defendant is *not worthy of belief* and that therefore, the evidence of the prosecution witness/es should be given more '*weight*' than that of the defendant. However, its *purpose* is *not* to show that the defendant has the propensity or tendency to commit the offence/s charged, see *R v McLeod* (*supra*) & *R v Prince* [1990] CrimLR 49.

The law relating to the '*Weight*' to be assigned evidence is examined on page **173**.

In *R v McLeod* (*supra*) the Court of Appeal held at pages 604 – 605:

> 'For the general principles upon which the discretion, […], should be exercised we cannot improve upon the analysis contained in the judgment of Ackner LJ in *Burke* (1986) CrAppR 156, as supplemented by the observations of Neill LJ in *Owen* (1986) 83 CrAppR 100, 104, 105, to which we have referred. As to the nature of the questions that may properly be put, we consider that the following propositions should be borne in mind:
>
> 1. *The primary purpose of cross – examination as to previous convictions and bad character of the accused is to show that he is not worthy of belief. It is not, and should not be, to show that he has a disposition to commit the type of offence with which he is charged* […]. But the mere fact that the offences are of a similar type to that charged or because of their number and type have the incidental effect of suggesting a tendency or disposition to commit the offence charged will not make them improper […]
>
> 2. *It is undesirable that there should be prolonged or extensive cross – examination in relation to previous offences*. […].' (emphasis added)

Such '*cross – examination*' *may* relate to the entire record of the defendant, see *Stirland v Director of Public Prosecutions* [1944] AC 315; (1945) 30 CrAppR 40 & *R v Thompson* (1966) 50 CrAppR 91; [1966] 1 WLR 405; [1966] 1 AllER 505.

In *R v de Vere* [1981] 3 AllER 473 [(1981) 73 CrAppR 352] Stuart – Smith LJ, delivering the judgment of the Court of Appeal, held at page 476:

> '*If the defendant puts his character in issue, that is to say adduces evidence of his own good character, whether by cross – examination on his behalf or by means of giving evidence himself or by means of calling witnesses as to character, the prosecution may rebut that evidence either by cross – examination or by independent testimony*, and that right has existed at common law for very many years going back, as found expressed in *R v Gadbury* (1838) 8 C & P 676, 173 ER 669. It is repeated more recently in *R v Butterwasser* [1947] 2 AllER 415, [1948] 1 KB 4.
>
> However, Lord Goddard CJ also said in that case […]:
>
> "*However that may be, there is no authority for the proposition – and it is certainly contrary to what all the present members of the court have understood during the whole of the time they have been in the profession – that, where the prisoner does not put his character in issue, but merely attacked the witnesses for the prosecution, evidence can be called by the prosecution to prove that the prisoner is a man of bad character*."

> *The reason for that is this, that, by attacking the witnesses for the prosecution and suggesting that they are not reliable, he is not putting his character in issue. He is putting their character in issue, that is to say he is not stating, directly or indirectly, anything about his own character at all.* Accordingly there is nothing, so far as his character is concerned, which the prosecution are called on or are entitled to rebut. Such confusion as exists has perhaps been caused by the loose use of the expression 'puts his character in issue'. It is sometimes used incorrectly to cover cases where the defendant has subjected himself to cross – examination as to character by attacking the character of the prosecution witnesses. That is, strictly speaking, not putting his character in issue.
>
> *The exception has already been dealt with, that is to say, where he gives evidence and subjects himself to cross – examination under the terms of s 1(f)(ii) of the* [… *Criminal Evidence Act 1898*]. *If he is not called as a witness, then that section does not apply at all, and one is cast back on the ordinary rules of evidence. These do not permit, as a general rule, proof of a defendant's bad character as part of the prosecution case. In general it is not of course permissible, in order to prove a defendant's guilt, to adduce evidence as part of the prosecution case that the defendant had a bad reputation or a disposition to commit, or indeed has committed, crimes in the past. Nor is there any relaxation of that rule on the ground, so to speak, of tit for tat if the defence attacks the character of the prosecution witnesses. The rule is only relaxed by virtue of S 1(f)(ii). That only applies when the defendant is being cross – examined and he himself is giving evidence. If he does not give evidence it does not apply* […].' (emphasis added) [words in brackets added]

The law relating to '*Character Evidence*' is examined commencing on page **207**.

Irrespective, a Court *may* in the exercise of its discretion choose to *exclude* such evidence from consideration as to the guilt of a defendant bearing in mind the overriding duty to ensure that a fair trial is conducted, see *R v Taylor & Goodman* [1999] 2 CrAppR 163; *Selvey v Director of Public Prosecutions* [1970] AC 304; [1968] 2 WLR 1494; [1968] 2 AllER 497; (1968) 52 CrAppR 443; *Jones v Director of Public Prosecutions* [1962] AC 635; [1962] 2 WLR 575; [1962] 1 AllER 569; (1962) 46 CrAppR 129; *Noor Mohamed v R* [1949] AC 182; [1949] 1 AllER 365 & *Maxwell v Director of Public Prosecutions* [1935] AC 309; (1934) 24 CrAppR 152.

Such '*cross – examination*' should *not* relate to offences for which the defendant has *not* been convicted, see *R v Cokar* [1960] 2 QB 207; [1960] 2 WLR 836; [1960] 2 AllER 175; (1960) 44 CrAppR 165 & *Maxwell v Director of Public Prosecutions* [1935] AC 309; (1934) 24 CrAppR 152.

See also: *Donnini v R* (1972) 128 CLR 114 7.

[D] Imputations

Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged *shall* be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided –
>
> […]

(f) *a person charged and called as a witness* in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, *unless* –

[…]

(ii) […] *the nature or conduct of the defence is such as to involve imputations on the character of the complainant or the witnesses for the prosecution.*' (emphasis added)

Such '*imputations*' *must* be against witnesses called by the prosecution, see *R v Lee* [1976] 1 WLR 71; [1976] 1 AllER 570; (1976) 62 CrAppR 33; [1976] CrimLR 521 & *R v Westfall* (1912) 7 CrAppR 176.

The *purpose* of this cross – examination is to show that the defendant is *not worthy of belief* and that the evidence of the prosecution witness/es should be given more '*weight*' than that of the defendant. However, its purpose is *not* to show that the defendant has the propensity or tendency to commit the offence/s charged.

The fact that a defendant, or a defence witness, denies what is alleged by the prosecution does *not* automatically involve an '*imputation*' on the character of the prosecution, see *R v Desmond* [1999] CrimLR 313 & *Selvey v Director of Public Prosecutions* [1970] AC 304; [1968] 2 WLR 1494; [1968] 2 AllER 497; (1968) 52 CrAppR 443.

The defence are entitled to put their case to the witnesses called by the prosecution, see *R v Westfall & Murphy* (1912) 7 CrAppR 176 at 179.

For example, a defendant may allege:

[i] consent was given in respect of a charge of rape, see *R v Turner (J)* (1944) 30 CrAppR 9; [1944] KB 463 & *Selvey v Director of Public Prosecutions* (*supra*); and

[ii] that police officers are lying.

In *R v Grout* (1909) 3 CrAppR 64 Lord Alverstone CJ, delivering the judgment of the Court, held at page 66:

> 'When a man in appellant's station of life uses such terms as "he is lying" and "it is a lie", or even stronger expressions, all that is generally meant is a denial of the truth of the case for the prosecution and not a real reflection upon the character of the witness.'

See also: *R v Rouse* [1904] 1 KB 184; *Selvey v Director of Public Prosecutions* (*supra*) & *Cushing v R* [1977] WAR 7.

However, it is an '*imputation*' if the defendant alleges that:

[i] he/she was improperly induced to make a confessional statement, see *R v Wright* (1910) 5 CrAppR 131 at page 132; and

[ii] the evidence of the witness was fabricated, see *R v Tanner* (1978) 66 CrAppR 56 & *R v Britzmann & Hall* [1983] 1 AllER 369; (1983) 76 CrAppR 134; [1983] 1 WLR 350; [1983] CrimLR 106.

EXAMINATION OF WITNESSES

In *R v Owen (*1986) 83 CrAppR 100 Neill LJ, delivering the judgment of the Court, stated at pages 104 – 105:

> 'In order to consider this aspect of the case [, referring to the cross – examination fo the appellant upon his previous convictions,] it is necessary to bear the following points in mind:
>
> (1) When an application is made on behalf of the Crown for leave to cross – examine the accused as to his previous convictions on the basis that the nature or conduct of the defence has been such as to involve imputations on the character of the prosecutor, or the witnesses for the prosecution, the judge at trial has two tasks to perform:
>
> (a) first he must form a judgment as to "the nature or conduct of the defence" in order to decide whether the condition set out in paragraph (ii) of section (1)(*f*) of the 1898 Act has been satisfied; and
>
> (b) if he is so satisfied, he must decide whether in the exercise of his discretion he should allow the cross – examination to take place.
>
> (2) In forming a judgment as to the nature and conduct of the defence the judge will have to consider the facts of the individual case. Where explicit allegations of the fabrication of evidence have been made against prosecution witnesses, his task will be easy. But it is clear that in many cases imputations on the character of the witnesses for the prosecution may be made even though no explicit allegation of fabrication is made and even though counsel for the accused has conducted his cross – examination with delicacy and restraint. A challenge to the evidence of a witness, where there can be no question of mistake or misunderstanding or confusion, may well bear the necessary implication that the evidence has been fabricated. If the reality of the position is that the jury will have to decide whether the evidence of the witness whose testimony has been challenged, has been made up, then, in the words of Lawton LJ in *Britzmann* (1983) 76 CrAppR 134, 138; [1983] 1 WLR 350, 354 "there is no room for drawing a distinction between a defence which is so conducted as to make specific allegations of fabrication and one in which the allegation arises by way of necessary and reasonable implication." See also *Turner* (1978) 66 CrAppR 56, 64.
>
> (3) Where the condition set out in paragraph (ii) of section (1)(*f*) of the 1898 Act has been satisfied, the trial judge must weigh the prejudicial effect of the questions to be directed to the accused against the damage done by the attack on the prosecution's witness, and must generally exercise his discretion so as to secure a trial that is fair to the prosecution and the defence: see *Burke* [1985] CrimLR 660 and *Powell* (1985) 82 CrAppR 165; [1985] 1 WLR 1364 where the guidance to this effect by the Court of Criminal Appeal in *Cook* [1959] 43 CrAppR 138, 143; [1959] 2 QB 340, 348, was approved.
>
> (4) Cases must occur in which, although the grounds for putting questions to the accused about his previous convictions have been established, the effect of allowing such questions might be fraught with results which would unreasonably outweigh the result of the questions put by the defence and might make a fair trial of the accused almost impossible: see *Burke* (*supra*) and *Powell* (*supra*), approving the observations of Singleton J in *Jenkins* (1945) 31 CrAppR 1, 15.

(5) In the normal and ordinary case, however, the trial judge may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked: see *Burke* (*supra*) and *Powell* (*supra*). If imputations on the character of a prosecution witness have been made and if there is a real issue about the conduct of that witness which the jury will inevitably have to settle in order to arrive at their verdict, then, in the words of Devlin J delivering the judgment of the full Court in *Cook* (*supra*) at p.143 and p.348 of the respective reports, "… the jury is entitled to know the credit of the man on whose word the witness's character is being impugned." Devlin J was considering the case of a police officer whose evidence had been attacked, but it seems clear that the same principle is to be applied in the case of any important witness against whom such an imputation has been made and about whose conduct the jury will have to reach a conclusion.

(6) The fact that the accused's convictions are not for offences of dishonesty, but may be for offences bearing a close resemblance to the offences charged, are matters for the judge to take into consideration when exercising his discretion, but they certainly do not oblige the judge to allow the proposed cross – examination: see *Powell* (*supra*).

(7) An appellant court will not interfere with the exercise of the trial judge of his discretion unless he has erred in principle or there was no material on which he could properly arrive at his decision: see *Selvey v DPP* (1968) 52 CrAppR 443, 468; [1970] AC 304, 342 and *Powell* (*supra*). The Court will not quash a conviction merely because it would have exercised the discretion differently.' [words in brackets added]

However, as soon as an un*represented defendant* commences to impugn the credibility of prosecution witnesses, the prosecutor *should* seek an adjournment. The defendant should then be advised by the prosecutor in the presence of an independent person that if he/she continues to impugn the credibility of the witnesses called by the prosecution, the prosecution *may* be granted leave to cross – examine him/her on any previous convictions, subject to him/her giving evidence on oath, see *R v Weston – super – Mare Justice, Ex parte Townsend* [1968] 3 AllER 225.

In *Wulff v Honan* (1989) 11 QLR 72 Judge Bolton stated at pages 75 – 76:

'For an unrepresented person to call a witness a liar might be more than a denial of what he is saying. As Viscount Dilhorne pointed out in *Selvey v DPP* [1970] AC 304 at 334:

"Accordingly, when a man in the accused's station of life uses such terms as 'he is lying' and 'it is a lie', or even stronger expressions, all that is generally meant is a denial of the truth of the case for the prosecution and not a real reflection upon the character of a witness."

In any event it is prudent course to warn such a person if he is beginning to reflect upon a witness's character. As Viscount Dilhorne said in Selvey's Case (at 342):

"It is desirable that a warning should be given when it becomes apparent that the defence is taking a course which may expose the accused to such cross – examination."

In *R v Morris* (1959) 43 CrAppR 206 at 210 Gorman J had referred to the statement of Delvlin J in *R v Cook* [1959] 2 QB 340:

> "In cases of this sort, where there is no hard and fast rule, some warning to the defence that it is going too far is of great importance; and it has always been the practice for prosecuting counsel to indicate in advance that he is going to claim his rights under the subsection, or for the judge to give the defence a caution."'

In determining whether to admit the evidence of previous convictions, a Court should consider the seriousness of the '*imputations*', see *R v Taylor & Goodman* [1999] 2 AppR 163.

Irrespective, a Court *may* in the exercise of its discretion choose to *exclude* such evidence from consideration as to the guilt of the defendant bearing in mind the overriding duty to ensure that a fair trial is conducted, see *R v Taylor & Goodman* [1999] 2 CrAppR 163; *Selvey v Director of Public Prosecutions* [1970] AC 304; [1968] 2 WLR 1494; [1968] 2 AllER 497; (1968) 52 CrAppR 443; *Jones v Director of Public Prosecutions* [1962] AC 635; [1962] 2 WLR 575; [1962] 1 AllER 569; (1962) 46 CrAppR 129; *Noor Mohamed v R* [1949] AC 182; [1949] 1 AllER 365 & *Maxwell v Director of Public Prosecutions* [1935] AC 309; (1934) 24 CrAppR 152.

See also: *R v Prince* [1990] CrimLR 49; *R v Preston* [1909] 1 KB 568 at page 575; *R v McLean* (1926) 19 CrAppR 104 at page 108; *R v Morgan* (1910) 5 CrAppR 157; *The State v Rain* [1976] PNGLR 43 & *R v Pointon & Constable* [1967 – 68] PNGLR 395.

[E] Co - Defendants

Section 141 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged *shall* be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person:
>
> Provided –
>
> […]
>
> (f) *a person charged and called as a witness* in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, *unless* –
>
> […]
>
> (iii) *he has given evidence against any other person charged with the same offence.*' (emphasis added)

In *R v Crawford* [1998] 1 CrAppR 338 Lord Bingham CJ, delivering the judgment of the Court of Appeal, stated at pages 341 – 343:

> 'The sub-paragraph [, referring to the equivalent paragraph in section 1(f) of the *Criminal Evidence Act 1898*,] is plainly directed to the situation where a defendant is called as a witness and gives evidence against a co – defendant jointly charged in the same proceedings.

The meaning of the statutory reference to "*evidence against any other person*" has been subject of judicial consideration. […]

[…]

The most recent detailed consideration of this question is to be found in *Varley* (1982) 75 CrAppR 242; [1982] 2 AllER 519. Giving the reserved judgment of the Court in that case, at p. 246 and p. 522, Kilner Brown J said:

"Now putting all the reported cases together, are there established principles which might serve as guidance to trial judges when called upon to give ruling in this very difficult area of the law? We venture to think that they are these and, if they are borne in mind, it may not be necessary to investigate all the relevant authorities.

(1) If it established that a person jointly charged has given evidence against the co – defendant that defendant has a right to cross – examine the other as to previous convictions and the trial judge has no discretion to refuse an application.

(2) Such evidence may be given either in chief or during cross – examination.

(3) It has to be objectively decided whether the evidence either supports the prosecution case in a material respect or undermines the defence of the co – accused. A hostile intent is irrelevant.

(4) If consideration has to be given to the undermining of the other's defence care must be taken to see that the evidence clearly undermines the defence. Inconvenience to or inconsistency with the other's defence is not of itself sufficient.

(5) Mere denial of participation in a joint venture is not of itself sufficient to rank as evidence against the co – defendant. For the proviso to apply, such denial must lead to the conclusion that if the witness did not participate then it must have been the other who did.

(6) Where the one defendant asserts or in due course would assert one view of the joint venture which is directly contradicted by the other such contradiction may be evidence against the co – defendant."

The evidence of one defendant is, therefore, evidence against a co – defendant if it supports the prosecution case against the co – defendant in a material respect or undermines the defence of the co – defendant. […]

The essential question put at its simplest is this: Does the evidence given by the defendant in the witness box, if accepted, damage in a significant way the defence of the co – defendant? If so, then the statute provides that the defendant may be asked and obliged to answer questions relating to previous convictions. If on any factual matter there is no issue between the Crown and a co – defendant, the defendant's evidence does not damage the defence of the co – defendant if the defendant's evidence is also to the same effect. That, as we understand it, is why Lord Donovan and also Kilner Brown J referred to the defendant's evidence supports the Crown case in "a material respect". If the defendant's defence supports the Crown in a respect which is not contentious, that is not a material respect. If, however, the defendant's evidence supports the prosecution case on a significant matter in issue between the Crown and the co – defendant and relative to proof of the commission by

the co – defendant of the offence charged against him, then that is evidence potentially damaging to the defence of the co – defendant and is to be regarded, for purposes of the statutory proviso, as evidence by the defendant against the co – defendant.' (emphasis added) [words in brackets added]

In *R v Knutton* (1993) 97 CrAppR 115 the Court of Appeal held at page 119:

'In our judgment, one defendant A is not allowed to adduce evidence of the bad character of another B except –

(a) by asking B about his previous conviction in the circumstances for which section 1(1)(f) of the Act 1898 expressly provides, *and*

(b) by leading or eliciting evidence of B's previous convictions, when they are relevant to A's evidence.

Proof of a particular conviction of B may be relevant, for example, when it helps A's defence to prove that B was not available to commit the offence charged because he was in prison: *Miller* [(1952) 36 CrAppR 169 at 171; [1952] 2 AllER 667 at 668]. When A and B are jointly charged, and B leads evidence of his own lack of propensity to commit the offence. A may elicit B's previous convictions which suggest that he does have that propensity […].' (emphasis added)

In *R v Cheema* [1994] 1 AllER 639; (1994) 98 CrAppR 195 [[1994] 1 WLR 147] Lord Taylor of Gosforth CJ, delivering the judgment of the Court of Appeal, commented at pages 648 – 649 & 204 respectively:

'[I]n our judgment, what is required when one defendant implicates another is simply to warn the jury of what may very often be obvious – namely that the defendant witness may have a purpose of his own to serve.'

See also: *R v Cain* (1994) 99 CrAppR 208; [1994] 1 WLR 1449; [1994] 2 AllER 398 & *R v Douglass* (1989) 89 CrAppR 264; [1989] RTR 271; [1989] CrimLR 569.

Refer also to the law relating to the '*Joinder Of Charges In Respect Of Multiple Defendants*' which is examined commencing on page **95**.

[14.2.4] Cross – Examination Of Co – Defendants Generally

In *R v Paul & Mc Farlane* (1920) 14 CrAppR 155 [[1920] 2 KB 183; (1920) 26 CoxCC 619] Lord Reading CJ, delivering the judgement of the Court stated at page 156:

'It was argued that although the Act of 1898 [, referring to the Criminal Evidence Act 1898 (UK),] made a person charged a competent witness for the defence, yet if the person charged goes into the box and says that he is guilty, he cannot be cross – examined by the prosecution, as the issue is then dead. But that argument is fallacious. When a person charged goes into the witness box to give evidence for the defence, and has been sworn, he is in the same position as an ordinary witness, and is therefore liable to be cross – examined. It is immaterial whether he stands mute, or whether he gives evidence for the defence or the prosecution. It is not what he says in the witness – box that renders him liable to cross – examination, but the fact that he is called as a witness for the defence. As soon as a person

goes into the witness – box for the defence, and is sworn, counsel for the prosecution is entitled to cross – examine him.'

[14.2.5] Questioning Credibility Of Witnesses, Other Than A Defendant

Witnesses may be '*cross – examined*' as to their '*credit*'. The issue for a Court to decide is whether a witness should be believed and therefore, what '*weight*' should be given to his/her evidence.

In *R v Sweet – Escott* (1971) 55 CrAppR 316 Lawton J held at page 320:

'Since the purpose of cross – examination as to credit is to show that the witness might not be believed on oath, the matters which he is questioned must relate to his likely standing after cross – examination with the tribunal which is trying him or *listening to him*.' (emphasis added)

Such issues may *include* antecedents, lifestyle and associates. Therefore, police officers *may* be asked about any relevant criminal or disciplinary charges which have been *proven*, see *R v Edwards* [1991] 2 AllER 266; [1991] 1 WLR 207; (1991) 93 CrAppR 48; [1991] CrimLR 372.

See also: *R v Funderburk* [1990] 2 AllER 482; [1990] 1 WLR 587; (1990) 90 CrAppR 466; [1990] CrimLR 405.

As regards the '*Proof Of Previous Convictions*' refer to page **305**.

[14.2.6] Rule In Browne v Dunn

In *The State v Simon Ganga* (Unrep. N1232 (PNG); 25, 26 May & 7 June 1994) Sevua J stated:

'*In respect of defence counsel's failure to put his client's defence to the prosecutrix* [ie., the complainant in a 'sexual' offence] *in cross – examination, let me repeat here that there is an important rule of practice known as the rule in Browne v Dunn* (1894) 6 R 67 (HL) […]. […]

The essence of this rule, if I may be allowed to put it in a more simplified form is that, the accused's case should be put to the prosecution witnesses in cross – examination. In other words, it is desirable that what the accused relies upon be put or suggested to the prosecution witnesses so that they can refute or explain. His Honour, Hart J, in *Allied Pastoral Holdings Pty Ltd v Commissioner of Taxation* [1983] 1 NSWLR at 16 formulated the rule as follows:

"*It has in my experience always been a rule of professional practice that, unless notice has already clearly been given of the cross – examiner's intention, to rely upon such matters, it is necessary to put to an opponent's witness in cross – examination the nature of the case upon which it is proposed to rely in contradiction of his evidence, particularly where that case relies upon inferences to be drawn from other evidence in the proceedings. Such a rule of practice is necessary both to give the witness the opportunity to deal with that other evidence, or the inferences drawn from it, and to allow the other party the opportunity to call evidence either to corroborate that explaination or to contradict the inference sought to be drawn.* That rule of practice follows from what I have always believed to be rules of conduct which are generally regarded as being established by the decision of the House of Lords in *Browne v Dunn* (1894) 6 R 67."

[… T]he fundamental essence of the rule is that, it is desirable for a party to put it's case to the opposing party in cross – examination so that, the opposing party can afford an opportunity to refute or explain the matters that are being put forth in cross – examination.

[…] *It is obvious in my view that the defence counsel is under a duty to comply with the rule, not only does this duty arise from his obligation to his client, but also his obligation to this Court.* It behoves counsel and he is under strict obligation to put his instructions to the prosecution in cross – examination if the case his client relies upon is consistent with his instructions.

In *R v Robinson* [1977] QdR 387, where the conduct of case by counsel was under scrutiny, if I could use that phrase, and the Court was considering whether, discrepancy may be regarded in evaluating evidence. Dunn, J of the Queensland Court of Appeal said at 394:

"By contrast, cross – examining counsel is concerned with primary facts. His instructions are as to primary facts, and it is his obligation – a strict obligation – that, if he 'puts' occurrences to witnesses, he puts them in accordance with his instructions. This being so, the instructions may be inferred from the questions. If there is a discrepancy in a significant particular (I do not mean a minor or explicable discrepancy, for which perfection in communication between client and legal adviser is aimed at, it is not always achieved) between questioning based on instructions as inferred and the evidence of the person from whom the instructions must be taken to have come from, it seems to me to be quite permissible for a Judge to ask the jury to have regard to the discrepancy in evaluating the evidence."

[…] Of course, the Court is entitled to infer from the defence case and defence counsel's action whether the version given by the accused in his defence were matters contained in his instructions to his lawyer. Because the accused's version has not been put to the prosecutrix during cross – examination, the Court could draw a reasonable inference that what the accused finally said in his evidence did not form his instructions to his counsel. However, that did not mean his evidence should be rejected for that reason. The Court should in my view consider the general rule of fairness apart from the issue of weight. For instance, in *Bulstrode v Trimble* [1970] VR 840, His Honour, Newton J observed at p. 846, that there were two aspects to be considered. Firstly, there is a rule of practice or procedure based upon general principles of fairness to witnesses and a fair trial between the parties. And secondly, there is a rule relating to the weight or cogency of the evidence.' (emphasis added) [words in brackets added]

In *Awoda v The State* [1984] PNGLR 165 the Supreme Court stated at page 172:

'We would take this opportunity of repeating and adopting what His Honour [Prentice J in *The State v Ogadi Minijipa* [1977] PNGLR 293] had to say at 296 – 297:

"Before concluding, I should again mention […] that defence counsel do their clients no good by not opening in cross – examination of State witnesses the version upon which the defence case relies. It is to be suggested that State witnesses are lying or mistaken or failing in accuracy of recollection, they should be questioned to that effect and given an opportunity to explain. You cannot correctly professionally keep your own case secret until your client gives evidence. Nor can you expect that his story will receive much credit – if this course be taken.

I draw counsel's attention again to the old case of Browne v Dunn (1894) 6 R 67 HL […].
[…]

> The case of *R v Hart* (1932) 23 CrAppR 202 illustrates the converse case – *that if the prosecution intends to ask the tribunal to disbelieve a witness – it is right and proper that that witness be challenged by cross – examination while in the witness box and it made plain that his evidence is not accepted*."' (emphasis added) [words in brackets added]

Therefore, prosecutors *should*:

[i] *record* carefully what the defence 'puts' to the prosecution witness/es, ie., the basis of the defence case in compliance with the rule in *Browne v Dunn* (*supra*);

[ii] *record* carefully what evidence the witness/es for the defence give; and

[iii] *advise* the Court in their final submission if there is any major discrepancies.

See also: *Cyne v Bar Association of NSW* (1960) 104 CLR 186; *The State v Saka Varimo* [1978] PNGLR 62; *The State v Manasseh Voeto* [1978] PNGLR 119 & *John Jaminan v The State (No. 2)* [1983] PNGLR 318.

[14.2.7] Hostile Witnesses

The law relating to the '*cross – examination*' of '*Hostile Witnesses*' is examined commencing on page **288**.

[14.3] Re - examination

[14.3.1] Purpose

In *R v Szach* (1980) 23 SASR 504 the Court held:

> *Re – examination is permitted for the purpose of explaining matters arising out of the cross – examination.* It is to be permitted "whenever an answer or answers given by a witness in cross – examination would, unless supplemented or explained in the manner proposed by the re – examiner, leave the Court with an impression of the facts, derived from the witness, that is capable of being construed unfavourable to the side responsible for calling the witness, and that represents a distortion, or an incomplete account of the truth as the witness is able to present it.

[14.3.2] Leading Questions

'*Leading questions*' should *not* be asked in '*re – examination*', see *Ireland v Taylor* [1949] 1 KB 300 at page 313.

The law relating to '*Leading Questions Generally*' is examined commencing on page **341**.

[14.3.3] Refreshing Memory From Notes

In *R v Sutton* (1992) 94 CrAppR 70 the Court of Appeal held at page 73:

> 'All of us have had experience of cases where a witness has departed from his statement on some point of detail which may be very material, such as a date, as well as cases where a witness has omitted some point of detail. We do not think there is any difference in principle between those two. It is, of course, easy to forget details. But it is just as easy, as we all know, for memory to play us tricks. Provided the proper basis is laid, a witness may be asked to refresh his memory in both types of case. It is not a valid objection in the latter case to say that the witness is being cross – examined by his own counsel. The essential question is, as was said by this Court in *Richardson* [(1971) 55 CrAppR 244; [1971] 2 QB 484, that the court should not deprive itself of its best chance of hearing the truth. *Then it is said that there is no reported case of a witness being allowed to refresh his memory in re-examination. But why should he not? That is just the sort of artificial rule which should, in the light of Richardson, be eschewed*.' (emphasis added)

See also: *R v Foggo, Ex parte Attorney – General* [1989] 2 QdR 409 & *Wentworth v Rogers (No. 10)* (1987) 8 NSWLR 398.

The law relating to '*Refreshing Memory From Notes*' is also examined commencing on page **295**.

[14.3.4] Hostile Witnesses

A witness *may* be treated as a '*hostile witness*' during '*re – examination*', see *R v Powell* [1985] CrimLR 592.

However, in *R v White* [1970] QWN 46 a witness was called by the prosecution and gave evidence which was inconsistent with the evidence she had given at the '*Preliminary Investigation / Inquiry*' with signed statements which she made to the police. The inconsistencies were apparent during '*examination – in – chief*' of the witness but the prosecutor did not apply to have the witness declared '*hostile*' until the conclusion of the '*re – examination*' of the witness.

The Court held:

> If the prosecutor had applied to have the witness declared '*hostile*' during the course of '*examination – in – chief*' and had been successful, the whole tenor of the cross – examination of the witness may have been different and as a consequence the application made during the course of '*re – examination*' should be refused.

The law relating to '*Hostile Witnesses Generally*' is examined commencing on page **288**.

RE - OPENINGS

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RE - OPENINGS

[15.0] Introduction

An application by the prosecution to '*re-open*' its case and call '*evidence – in – rebuttal*' may be made under either:

- section 199 of the *Criminal Procedure Code* (Ch. 7); and / or
- the common law.

[15.1] Criminal Procedure Code

Section 199 of the *Criminal Procedure Code* (Ch. 7) states:

> 'If the accused person adduces evidence in his defence *introducing new matter* which the prosecutor could not have foreseen, the court *may* allow the prosecutor to adduce evidence in reply to rebut the said matter.' (emphasis added)

In *R v Frost* (1839) 9 C & P 129 Tindal CJ stated at page 159:

> '[I]f an matter arises ex improviso, which the Crown *could not foresee*, supposing it be entirely new matter, which they may be able to answer only by contradicting evidence, they may give evidence in reply.' (emphasis added)

Therefore, if the prosecution should have *reasonable foreseen* the matter, such evidence should have been given as part of its case, see *R v Scott* (1984) 79 CrAppR 49.

The prosecution *may* seek to call evidence to rebut matters raised for the *first time* when the witness/es for the defence give evidence and therefore, *not* during the cross – examination of the witnesses called by the prosecution. The prosecution *may* be permitted to '*re – open*' its case and therefore call witness/es to rebut the matters raised for the first time by the defence because the defence in such situations has failed to comply with the rule in *Browne v Dunn*.

The law relating to that rule is examined commencing on page **363**.

See also: *R v Anderson (M.)* [1988] QB 678; (1988) 87 CrAppR 349; [1988] 2 AllER 549 & *R v Blick* (1966) 50 CrAppR 280; [1966] CrimLR 508.

[15.2] Common Law

In *R v Francis* (1990) 91 CrAppR 271, [1991] 1 AllER 225 [[1990] 1 WLR 1264; [1990] CrimLR 431] Lloyd LJ, with whom the other members of the Court of Appeal concurred, outlined the following principles at pages 274 and 228 respectively:

> '(1) The general rule is that the prosecution *must* call the whole of their evidence before closing their case. The rule has been described as being most salutary.
>
> (2) There are, however, exemptions. The best known exception is that the prosecution may call evidence in rebuttal to deal with matters which have arisen *ex improvios*: see *Pilcher* (1974) 60 CrAppR 1. [see section 199 of the *Criminal Procedure Code* (Ch. 7)]

(3) The prosecution *do not* have to foresee every eventuality. They are entitled to make reasonable assumptions; see *Scott* (1984) 79 CrAppR 49. [see section 199 of the *Criminal Procedure Code* (Ch. 7)]

(4) Another exception to the general rule is where what has been omitted is a *mere formality* as distinct from a central issue in the case – contrast *Royal v Prescott Clarke* [1966] 2 AllER 366 with *Central Criminal Court, ex p. Garnier* [1988] RTR 42.

(5) In cases within the two above exceptions the judge has a discretion to admit the evidence. Like any other discretion it must be exercised judicially and within the principles which have been established by the Court of Appeal. If the discretion is exercised in a way that no reasonable judge or no reasonable bench of magistrates could have exercised it, the decision will be set aside as erroneous in law, see *Royal v Prescott Clark* (*supra*).

(6) The earlier the application to admit the further evidence is made after the close of the prosecution case the more likely it is that the discretion will be exercised in favour of the prosecution […].

(7) *The discretion of the judge to admit the evidence after the close of the prosecution case is not confined to the two well established exceptions.* There is a wider discretion. We refrain from defining precisely the limit of that discretion since we cannot foresee all the circumstances in which it might fall to be exercised. It is of the essence of any discretion that it should be kept flexible. But lest there be any misunderstanding and lest it be thought we are opening the door too wide, we would echo what was said by Edmund Davies LJ in the *Doran* case at p. 437 that *the discretion is one which should only be exercised outside the two established exceptions on the rarest of occasions*.' (emphasis added) [words in brackets added]

Another '*exception*' is the calling of evidence in rebuttal to negate evidence of good character given by the defence, see *R v Butterwassen* [1948] 1 KB 4; [1947] 2 AllER 415; (1948) 32 CrAppR 81

However, the discretion to permit the prosecution to '*reopen*' its case should only be exercised sparingly, see *Cook v Director of Public Prosecutions* [2001] CrimLR 321 & *Jolley v Director of Public Prosecutions* [2000] CrimLR 471.

See also: *R v Munnery* (1992) 94 CrAppR 164 at page 168; *James v South Glamorgan County Council* (1994) 99 CrAppR 321; *R v Mc Kenna* (1956) 40 CrAppR 65; *R v Joseph* (1972) 56 CrAppR 60; *Phelan v Back* [1972] 1 AllER 901; [1972] 1 WLR 273; (1972) 56 CrAppR 257; *R v Doran* (1972) 56 CrAppR 429; [1972] CrimLR 392; *R v Pilcher & others* (1975) 60 CrAppR 1; *R v Chin* (1985) 157 CLR 671 at pages 676 – 677 & *R v Dawes* [1992] 2 QdR 435.

[15.3] Limits On Cross - Examination

In *R v Beckett & MacIntosh* [1986] QdR 170 the Court held:

> When a witness is called in rebuttal the party against whose interests it has called has a fundamental right to cross – examine at large. [ie., in relation to all the evidence given by the witness.]

The law relating to '*Cross – Examination*' is examined commencing on page **346**.

See also: *R v Howarth* (1918) 13 CrAppR 99 at page 100.

[15.4] Oaths

In *R v Campbell* [1933] StRQd 123 the Court held:

> No rule of law requires a Court to remind a witness who had been recalled that he/she is still on his/her former oath, the oath being binding for the whole case.

However, as a matter of practice witnesses should be so reminded.

NO CASE TO ANSWER

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NO CASE TO ANSWER

[16.0] Introduction

At the close of the case for the prosecution, the defence *may* submit in accordance with section 197 of the *Criminal Procedure Code* (Ch. 7) that there is '*no case to answer*' for the defendant because there is either:

[i] no evidence; or

[ii] insufficient evidence

to prove an element of the charge.

Therefore, if the submission of '*no case to answer*' is successful, the defendant will *not* be required to answer the charge or make a defence in accordance with section 198 of that *Code*.

However, in respect of unsuccessful applications, magistrates are *not* obliged to give reasons for rejecting it, see *Harrison v Department of Social Security* [1997] COD 220.

[16.1] Criminal Procedure Code

Section 197 of the *Criminal Procedure Code* (Ch. 7) states:

> 'If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person *sufficiently* to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused.' (emphasis added)

Section 198 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) *At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence*, the court *shall* again explain the substance of the charge to the accused and *shall* inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross – examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court *shall* then hear the accused and his witnesses and other evidence (if any).
>
> (2) If the accused person states that he has witnesses to call but that they are not present in court, and the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, and that there is a likelihood that they could, if present, give material evidence on behalf of the accused person, the court *may* adjourn the trial and issue process, or take others steps, to compel the attendance of such witnesses.' (emphasis added)

The law relating to a '*Defendant's Right To Silence*' is examined commencing on page **218**.

NO CASE TO ANSWER

[16.2] General Principles

In *R v Maenadi Watson, Smith Pitapio, Youngston Watson & Saro Norman* (Unrep. Criminal Case No. 16 of 1997) Muria CJ stated at pages 3 – 5:

> 'The starting point on the consideration of a no case to answer submission is section 197 *Criminal Procedure Code* […].
>
> […]
>
> That section is specifically worded to suit the circumstances of a criminal trial where there is no trial by jury. As such in Solomon Islands where a judge is both a judge of fact and law he is entitled to go beyond the mere consideration of evidence on the essential element of the offence as expressed in the *English Practice Note* [1962] 1 AllER 448 and referred to in *Archbold Criminal Pleading Evidence and Practice, 38 Ed.* para. 575(a). A judge in a criminal trial in Solomon Islands is entitled to consider the sufficiency of the evidence at the close of the prosecution case in order to determine whether or not the accused has a case to answer.
>
> The words "*it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence*" in section 197 clearly bore out the basis for the stand which I pointed out. Thus, *it is not simply a matter of the prosecution adducing evidence to establish the essential element of the offence, but adducing evidence which is sufficient to make out a case against the accused*. That is what the judge must be satisfied with under section 197 *Criminal Procedure Code.*
>
> In this jurisdiction, *R –v- Lutu* [1985/86] SILR 249 pointed this out. It is the authority on the application of s. 196 (now s. 197) *Criminal Procedure Code* and ought to be followed. His Lordship Ward CJ expressed the law in section 196 in the following words at pp. 250 – 251:
>
> "*In this case I am the judge both of fact and law. As such my duty to decide whether a case has been made out sufficiently to require the accused to make a defence under section 196 goes further than that of a judge sitting with a jury.*
>
> *Thus if at the close of the prosecution case I, as judge of fact, do not feel that there is sufficient evidence even at that stage on which I could convict, I should stop the case.*
>
> *I feel that the words in section 196 that where "it appears to the court that a case is not made out sufficiently to require (the accused) to make a defence" suggest that, where the tribunal is judge of fact as well as law, it is entitled to consider the sufficiency of the evidence at the close of the prosecution case.*"' (emphasis added)

In *R v Philip Tahea & two others* (Unrep. Criminal Case No. 14 of 1995) Palmer J stated at pages 1 – 5:

> 'The starting point must be section 196 [now section 197] of the Criminal Procedure Code which deals directly with the question of a submission of no case to answer.
>
> […]
>
> The key word to take note of [in that section] is the word "*sufficiently*". *There must be a case sufficiently made out at the close of the prosecution case to require the accused to make a defence*. What does this mean in practice? […]

[…]

[… *T]he crucial requirement is that the court should be satisfied at the close of prosecution's evidence that there is a case sufficiently made out to require the accused person to make a defence*.

[…]

In this case, there is evidence before the court or the judge, to consider, but that after cross – examination it had been so discredited to the point where it can be said that no reasonable tribunal could safely rely on it. In other words it had also become manifestly unreliable.

I think it is this latter which has caused creates the confusion, in that it may not have been clear how it should be assessed in practice. This is where the comments of Ward CJ in R –v- Lutu [[1985/86] SILR 249] at page 251, relevant as a guideline.

"*Clearly this is not the time to evaluate such matters as discrepancies between witnesses, or which parts of the evidence are credible and accurate and which are not. These are all matters for the conclusion of the evidence as a whole and, where there is evidence that could result in a conviction by the court, then the accused must be put to his defence."*

Does this mean that the court should not evaluate the evidence? This answer is no, but as stated by the learned authors In Criminal Law and Practice of PNG at page 620, and referred to by Mr Kama, "…*any weighing of the evidence by the judge or magistrate, required by a 'no case to answer' submission at the close the state case, should be kept to the absolute minimum."* (Emphasis added)

Also, at page 619 of the same text, the learned author made similar pertinent comments.

"*Second, where there is more than an iota of evidence with respect to each element of the offence, the court still has discretion whether or not to entertain the 'no case' submission. However, a submission on this basis should be entertained only when the judge really has no weighing up to do. That is, it must be a very clear case, …*"

An important point to note here as well is that, a submission of "no case to answer" is a question of law. In other words, if at the close of prosecution evidence, that was the only evidence before the court and nothing more, (*and one could imagine the situation where the defence decides not to call evidence*), could a reasonable tribunal enter a conviction? If not then the court should not require the accused to make a defence. This was more or less what was said by Ward CJ in Lutu's case (supra), at page 251, paragraph (3):

"*where, however, there is some evidence but it is so little or unconvincing (and I would add "has been so discredited in cross – examination"*) that it is sufficient even if uncontradicted by the defence to make a conviction possible, the court should not require the accused to make a defence." (words in brackets added).' (emphasis added) [words in brackets added]

See also: *The State v Roka Pep (No. 2)* [1983] PNGLR 287.

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[16.3] Duty Of Prosecution

Prosecutors are expected to:

[i] remind the Magistrate that the crucial requirement is that the Court *must* be satisfied that there is *sufficient* evidence to require the defendant to make a defence; and

[ii] argue their strongest possible case. In that regard each and every element of the offence/s charged *must* be addressed by outlining:

[a] the relevant statute and / or common law; and

[b] the relevant evidence which addresses those elements.

Those elements which have been the subject of '*cross – examination*' should be carefully addressed.

The law relating to '*Cross – Examination*' is examined commencing on page **346**.

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[17.0] Introduction

In *R v Perfili* (Unrep. Criminal Case No. 30 of 1992) Muria ACJ held at page 3:

> 'The common law presumption of innocence is embedded under the Constitution of Solomon Islands and it is done without qualification […]. *Thus prima facie, an accused person is entitled to bail.*' (emphasis added)

In *John Mae Jino & John Gwali Ta'ari v R* (Unrep. Criminal Appeal Case No. 172 of 1999) Palmer J held at page 1:

> 'Bail is a right protected by law (section 106 of the Criminal Procedure Code). The granting of bail by the court however is discretionary. That means it is not to be unreasonably withheld.'

In *Wells Street Magistrates' Court; Ex parte Albanese* (1982) 74 CrAppR 180 [[1981] 3 AllER 769; [1981] 3 WLR 694; [1981] CrimLR 771] Ralph Gibson J, delivering the judgment of the Court, commented at page 187:

> '[T]he public duty of the Court is to grant bail unless, *inter alia*, it considers that there are substantial grounds for believing that the defendant would fail to surrender to custody.'

The onus is therefore on the prosecution to satisfy the Court on the '*balance of probabilities*' that a defendant should *not* be granted '*bail*'.

In *R v Mackintosh* (1983) 76 CrAppR 177 Lawton LJ, delivering the judgment of the Court, commented at page 182:

> 'It is important that the police should bear in mind that it is stupid as well as unlawful to keep someone in custody for a minute longer than they should.'

In *R v Sanghera* [1953] 2 VR 130 the Court held:

> It is open to a Court to receive and take into account any relevant evidence, whether admissible under the rules of evidence or not, if it considers the evidence creditable or trustworthy in the circumstances.

If in objecting to the granting of bail, the prosecution is relying on the criminal history of a defendant, it should be handed in writing to the Court, rather than reading it out in open court, see *R v Dyson* (1944) 29 CrAppR 104.

If a defendant is granted bail, subject to bail conditions, the onus is on the defence to satisfy on the '*balance of probabilities*' that the defendant:

[i] will *not* abscond; and

[ii] will comply with such conditions.

See also: *R v Mansfield JJ, Ex parte Sharkey* [1985] 1 AllER 193; [1984] 3 WLR 1328; [1985] QB 613; [1985] CrimLR 148.

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[17.1] Constitution

Section 5(3) of the *Constitution* states (in part):

> 'Any person who is arrested or detained –
>
> (a) […]; or
>
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under the law in force in Solomon Islands,
>
> and who is not released, *shall be brought without undue delay before a court*; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, *he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial*.' (emphasis added)

[17.2] Adults

The following provisions of the *Criminal Procedure Code* (Ch. 7) *must* be considered:

Section 20 states:

> 'A police officer making an arrest without a warrant shall, without unnecessary delay and subject to the provisions of this Code as to bail, take or send the person arrested before a Magistrate having jurisdiction in the case *or* before an officer of or above the rank of sergeant.' (emphasis added)

Section 23 states:

> 'When any person has been taken into custody without a warrant for an offence *other than murder or treason, the officer in charge of a police station to whom such person shall have been brought may in any case and shall, if it does not appear practicable to bring such person before an appropriate Magistrates' Court within twenty – four hours after he has been so taken into custody*, inquire into the case, and *unless the offence appears to the officer to be of a serious nature*, release the person on his entering into a recognizance with or without sureties, for a reasonable amount to appear before a Magistrates' Court at a time and place to be named in the recognizance, *but where any person is detained in custody he shall be brought before a Magistrates' Court as soon as practicabl*e: […]' (emphasis added)

Defendants who are charged with 'murder' or 'treason' *must* also be brought before a Magistrates' Court '*as soon as practicable*', as commented by Daly CJ in *R v Baefaka* [1983] SILR 26 at page 29.

See also: *R v Holmes, Ex parte Sherman & another* [1981] 2 AllER 612.

Section 106 states:

'(1) Subject to the provisions of section 23 where any person, *other than a person accused of murder or treason*, is arrested or detained without warrant by a police officer or appears or is brought before a court and is prepared at any time while in the custody of such officer or at any stage of the proceedings before *such court* to give bail, such person may in the discretion of the officer or court be admitted to bail with or without a surety or sureties.

(2) The amount of bail shall be fixed with due regard to the circumstances of the case and shall not be excessive.

(3) Notwithstanding anything contained in subsection (1), the High Court may in any case direct that any person be admitted to bail or that the bail required by a Magistrate's Court or police officer be reduced.' (emphasis added)

See also: sections 107 ['*Recognisance of bail*']; 108 ['*Discharge from custody*']; 109 ['*Deposit instead of recognizance*']; 110 ['*Power to order sufficient bail when that first taken is insufficient*']; 111 ['*Discharge of sureties*']; 112 ['*Death of surety*']; 113 ['*Persons bound by recognizance absconding may be committed*']; 114 ['*Forfeiture of recognizance*']; 115 ['*Appeal from and revision of orders*'] & 116 ['*Power to direct levy of amount due on certain recognisances*'].

[17.3] Children

The following provisions of the *Juvenile Offenders Act* (Ch. 14) *must* be considered:

Section 5 states:

'Where a person *apparently under the age of eighteen years* is apprehended, with or without warrant, and cannot be brought forthwith before a juvenile court, a police officer of or above the rank of Inspector, or the officer in charge of a police station to which such person is brought, *shall forthwith enquire into the case*, *and* –

(a) *unless* the case concerns a *grave crime*; or

(b) *unless* it is necessary in the interests of such person to remove him from association with any undesirable person; or

(c) *unless* the officer has reason to believe that the release of such person would defeat the ends of justice,

shall release such person on a recognisance, with or without sureties, for such amount as will, in the opinion of the officer, secure the attendance of such person upon the hearing of the charge, such recognisance being entered into by him or by his parent or guardian or other responsible person.' (emphasis added)

The term '*Grave Crime*' '*means* any crime specified in the *Schedule*, and the Minister *may* from time to time by order amend the Schedule', see section 2 of the Act. (emphasis added)

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As outlined in the Schedule, the following are '*Grave Crimes*' for the purpose of the *Juvenile Offenders Act* (Ch. 14):

- Murder;
- Attempted Murder;
- Manslaughter;
- Unlawful Wounding;
- Unlawful Poisoning; and
- Causing Grievous Harm.

Section 6 states:

> 'Where a person *apparently under the age of eighteen years* having been apprehended is *not released as aforesaid*, the officer in charge of the police station to which such person is brought *shall* cause him to be detained in a *place of detention* until he can be brought before a juvenile court *unless* the officer certifies –
>
> (a) that it is not practicable to do so; or
>
> (b) that he is of so unruly or depraved a character that he cannot be safely so detained;
>
> (c) that by reason of his state of health or his mental or bodily condition it is inadvisable so to detain him,
>
> and the certificate shall be produced to the court before which the person is brought.' (emphasis added)

A '*place of detention*' '*means* a place of detention provided for or appointed by the Minister under section 17', see section 2 of that Act.

Considering that no such places have been so appointed, such persons *apparently under the age of eighteen years* should be held in custody in a watchhouse and segregated from adult offenders. In such circumstances the parent and / or guardian should be advised.

Section 7 states:

> 'It shall be the duty of the Commissioner of Police or other person having custody of a child or young person being detained to make arrangements for preventing so far as practicable such child or young person while being detained, from associating with any other person not being a child or young person, other than a relative or guardian, charged with an offence.'

Section 8 states:

> '(1) A court on remanding or committing for trial a *child* or *young person* who is not released on bail shall, instead of committing him to prison, commit him to custody in a place of detention, or to the care or custody of any person, named in the commitment, to be detained or cared for, as the case may be, for the period during which he is remanded or until he is thence delivered in due course of law:

Provided that in the case of a young person it shall not be obligatory on the court so to commit him if the court certifies that he is of so unruly a character that he cannot be safely so committed, or that he is of so depraved a character that he is not a fit person to be so detained or cared for.

(2) A commitment under this section may be varied, or, in the case of a young person who proves to be of so unruly a character that he cannot be safely detained in such custody, or cared for, as the case may be, or to be so depraved a character that he is not a fit person to be so detained, or cared for, revoked by any court, and if it is revoked the young person may be committed to prison.' (emphasis added)

According to section 2 of that Act, the term:

- '*Child*' '*means* a person who is, in the opinion of the court having cognisance of any case in relation to such person, under the age of fourteen years' (emphasis added); and

- '*Young Person*' '*means* a person who is, in the opinion of the court having cognisance of any case in relation to such person, fourteen years of age or upwards and under the age of eighteen years.' (emphasis added)

Bail applications in respect of children should *not* be held in public, see section 4(4) of the *Juvenile Offenders Act* (Ch. 14).

Refer also to the law relating to the '*Right To Be Heard In Open Court*' commencing on page **155**.

[17.4] Question Of Bail

The following factors should be considered when deciding whether to grant '*bail*':

[i] ***Whether the defendant will abscond on bail*.**

In *R v Kong Ming Khoo* (Unrep. Criminal Case No. Unknown of 1991) Ward CJ held at page 3:

> 'The principal consideration in all bail applications is whether the accused will attend his trial.'

See also: *R v Dickson Maeni* (Unrep. Criminal Case No. 117 of 1999; Palmer J; at page 2).

Refer also to section 113 of the *Criminal Procedure Code* (Ch. 7).

[ii] ***The nature of the accusation or 'seriousness' of the alleged offence*.**

See: *R v Philip Tagea, Amos Teikagei & Damaris Teikagei* (Unrep. Criminal Case No. 14 of 1995; Palmer J; at page 1); *R v Perfili* (Unrep. Criminal Case No. 30 of 1992; Muria CJ; at page 2) & *R v Phillips* (1947) 32 CrAppR 47.

[iii] ***The nature of the evidence to be adduced*.**

See: *R v Kong Ming Khoo* (Unrep. Criminal Case No. Unknown of 1991; Ward CJ; at page 3); *R v Philip Tagea, Amos Teikagei & Damaris Teikagei* (Unrep. Criminal Case No. 14 of 1995; Palmer J; at page 1); *R v Perfili* (Unrep. Criminal Case No. 30 of 1992; Muria CJ; at page 2) & *R v Phillips* (1947) 32 CrAppR 47.

[iv] ***The severity of the punishment which conviction would entail*.**

In *R v Kong Ming Khoo* (Unrep. Criminal Case No. Unknown of 1991) Ward CJ held at page 3:

> 'I must also bear in mind that the nature of the offence and the penalty if convicted raise a prima facie risk the accused may try to avoid the trial.'

See also: *R v Philip Tagea, Amos Teikagei & Damaris Teikagei* (Unrep. Criminal Case No. 14 of 1995; Palmer J; at page 1); *R v Perfili* (Unrep. Criminal Case No. 30 of 1992; Muria CJ; at page 2) & *R v Phillips* (1947) 32 CrAppR 47.

[v] ***Whether the defendant will interfere with prosecution witnesses and police investigation*.**

In *Perfili v R* (Unrep. Criminal Case No. 30 of 1992) Palmer PJ stated at pages 3 – 4:

> 'Although I am satisfied that if the applicant is released on bail he will not abscond there are other factors that this Court is entitled to consider.
>
> One of these and the main one raised by Prosecution is the possibility of tampering with evidence and interference with prosecution witnesses and investigation.
>
> […]
>
> […] *It is obviously in the interests of justice that police are allowed the opportunity to investigate all avenues and sources, links and persons properly and that no possibility of interference is permitted.*' (emphasis added)

See also: *R v Kong Ming Khoo* (Unrep. Criminal Case No. Unknown of 1991; Ward CJ; at page 3); *R v Philip Tagea, Amos Teikagei & Damaris Teikagei* (Unrep. Criminal Case No. 14 of 1995; Palmer J; at page 2); *R v Dickson Maeni* (Unrep. Criminal Case No. 117 of 1999; Palmer J; at page 2) & *The State v Tohian* [1990] PNGLR 173 at pages 177 – 178.

[vi] ***The possibility of a repetition of the offence or of further offences*.**

See: *R v Kong Ming Khoo* (Unrep. Criminal Case No. Unknown of 1991; Ward CJ; at page 3).

'Some crimes are not likely to be repeated pending trial and in those cases there may be no objection to bail; but some are, and house-breaking particularly is a crime which will very probably be repeated if a prisoner is released on bail, especially in the case of a man who has a record for housebreaking such as the applicant had. It is an offence which can be committed with a considerable measure of safety to the person committing it', see *R v Phillips* (1947) 32 CrAppR 47 at page 48.

[vii] ***The length of any delay*.**

In *R v Perfili* (Unrep. Criminal Case No. 30 of 1992) Muria ACJ held at page 2:

> 'The question of delay in bringing an accused person to trial is a relevant factor to be taken into account in considering bail applications. I feel it is particularly important that the liberty of an accused person must be borne in mind in order to minimize any delay in bringing an accused person to trial.'

In *R v Philip Tagea, Amos Teikagei & Damaris Teikagei* (Unrep. Criminal Case No. 14 of 1995) Palmer J held at page 2:

> 'The accused has spent a better part of his time in custody and now that a trial date has been fixed not more than a month away, *it needs to be shown that further remand in custody until that time taking all relevant matters into account would be prejudicial to this accused's interests.*' (emphasis added)

[viii] ***The family needs of the defendant*.**

In *R v Philip Tagea, Amos Teikagei & Damaris Teikagei* (Unrep. Criminal Case No. 14 of 1995) Palmer J held at page 3:

> 'It has not been shown that his wife and children urgently need him; that if he is not released on bail that something drastic will happen to them.'

However, a defendant should *not* be held in custody, only on the basis that the arresting or investigating officer needs to finalise his/her investigation, see *Peter Hou v The Attorney – General* [1990] SILR 88 at pages 90 – 91.

[17.5] Bail Conditions

In *R v Perfili* (Unrep. Criminal Case No. 30 of 1992) Muria ACJ held at pages 3 - 4:

> 'The common law presumption of innocence is embedded under the Constitution of Solomon Islands and it is done without qualification […]. Thus prima facie, an accused person is entitled to bail. However, *the law also allows conditions to be put on the bail in order to secure the attendance of the accused at his trial. Once conditions are imposed on a bail granted, it is for the accused to show that those conditions do not apply to him and that he will attend at his trial.*
>
> […] The object of imposing conditions on a bail is to secure the attendance of the accused at the trial. The onus is on the Accused to satisfy the Court that he will attend at the trial.' (emphasis added)

'*Bail conditions*' which *may* be imposed by a court *include*:

[i] Requirement to reside at a particular address.

[ii] Imposition of sureties.

The law relating to '*Sureties*' is examined commencing on page **385**.

[iii] Imposition of cash bail.

See: section 109 of the *Criminal Procedure Code* (Ch. 7).

[iv] Surrender of a passport.

In *R v Perfili* (Unrep. Criminal Case No. 30 of 1992) Muria CJ commented at pages 2 – 4:

> 'It is not unusual that a foreigner charged with a criminal offence in a foreign country may very well find his passport or other travelling documents withheld to prevent him escaping criminal prosecution. […]
>
> […]
>
> Apart from the other considerations raised by Counsel for the Court to take into account in exercising its discretion, *the paramount consideration in such a case as the present where an accused is from a different country, is the question of securing the attendance of the accused at the trial.* If the Court is not satisfied that the Accused will attend at the trial, then even if the other considerations are satisfied, the Court will not grant unconditional bail.' (emphasis added)

[v] Reporting condition to a police station.

[vi] No contact with the complainant and / or other witnesses to be called by the prosecution.

and

[vii] No interference with the on-going police investigation.

See: *R v John Robu, Henry Faramasi, Lency Maenu & Peter Ka'abe* (Unrep. Criminal Case No. 29 of 1998; Palmer J; at page 2); *R v Dickson Maeni* (Unrep. Criminal Case No. 117 of 1999; Palmer J; at page 2); *John Mae Jino & John Gwali Ta'ari v R* (Unrep. Criminal Appeal Case No. 172 of 1999; Palmer J; at page 2) & *R v Perfili* (Unrep. Criminal Case No. 30 of 1992; Muria CJ; at page 1).

[17.6] Sureties

As regards the issuance of a '*surety*' refer to sections 106, 107 108, 109, 111, 112 of the *Criminal Procedure Code* (Ch. 7).

It is at the discretion of the police officer or Court granting bail as the sufficiency of a surety. Prior to the acceptance of the obligations of a surety, the police officer or Court should ensure that such a person:

[i] is advised exactly what his/her obligations as a surety are;

[ii] understands such obligations;

[iii] understands what action can be taken against him/her, if he/she fails to fulfil such obligations; and

[iv] is still prepared to undertake such obligations.

In *R v Inner London Crown Court; Ex parte Springall & another* (1987) 85 CrAppR 214 [[1987] CrimLR 252] Peter Pain J stated at pages 218 – 219:

> '*Southampton Justices; Ex parte Green* [1976] QB 11 […] is the authority showing that in considering whether there should be some mitigation of the recognizances which are to be estreated, the court may look at the conduct of the surety concerned, and we were referred to the passage at p.19F in the report when Lord Denning said this:
>
> "By what principles are the justices to be guided? They ought, I think, to consider to what extent the surety was at fault. If he or she connived at the disappearance of the accused man, or aided it or abetted it, it would be proper to forfeit the whole of the sum. If he or she was wanting in due diligence to secure his appearance, it might be proper to forfeit the whole or a substantial part of it, depending on the degree of fault. If he or she was guilty of no want of diligence and used every effort to secure the appearance of the accused man, it might be proper to remit it entirely."
>
> […]
>
> The width of what Lord Denning said has perhaps been curtailed a little by what was said by the Master of the Rolls and Donaldson LJ in a case which is not reported, but is referred to in the judgment of McCullough J in *Uxbridge Justices; Ex parte Heward – Mills* [1983] 1 AllER 530, a judgment which contains a valuable collection of various authorities on the subject. At p.533E he refers to the judgment of Donaldson LJ in *Walthman Forest Justices; Ex parte Parfrey* noted in [1980] CrimLR 571, although Mc Cullough J was obviously quoting from a transcript of the judgment. The Master of the Rolls said this:
>
> "*The obligation entered into by someone who enters into a recognizance as a surety is a very serious obligation indeed. I hope that nothing I say today will suggest to the contrary. There is an obligation on a surety to be fully satisfied that he or she can meet the liability which will arise if the accused person does not surrender to his bail. This failure to surrender is not a theoretical possibility, though a surety may think it is. The unhappy event of arrested persons not surrendering happens frequently. There is a real risk. Indeed it is difficult to conceive of a set of circumstances in which a surety can be absolutely sure that the accused will surrender to his bail. So let no one think that this is an obligation which can be entered into lightly. Furthermore, the burden of satisfying a court that the full sum should not be forfeit is a very heavy one, so again let no one think that they can simply appear before the magistrates and tell some hard luck story, whereupon the magistrates will say, 'Well, be more careful in future'. We are not dealing with that character of obligation at all*."
>
> Then in reference to what Lord Denning said in *Ex parte Green*, Donaldson LJ said this:
>
> "Lest this passage be misunderstood by justices, as I think it might well be misunderstood, let me stress the fact that Lord Denning said that, if there was no want of due diligence and every effort had been made to secure the appearance of the accused man, if might (not that it would necessarily, but it might) be proper to remit it entirely. For my part, I think that Lord Denning was contemplating a wholly extreme and exceptional case when he said that. I do not, for my part, believe that he ever intended to suggest that the mere fact that every effort to secure the appearance of the accused man had been made and that there was no want of due diligence involved the proposition that the amount of the obligation should be remitted entirely."' (emphasis added)

See also: *R v Tottenham Magistrates' Court, Ex parte Riccardi* (1978) 66 CrAppR 150 & *R v Wells Street Magistrates' Courts; Ex parte Albanese* [1981] 3 AllER 769; [1981] 3 WLR 694; (1982) 74 CrAppR 180; [1981] CrimLR 771.

[17.7] Fresh Applications

Generally on a '*fresh application*' for '*bail*' the Court should only consider any '*new considerations*' which were *not* before the court on the previous occasion when '*bail*' was refused, see *R v Nottingham Justices, Ex parte Davies* [1980] 2 AllER 775; [1981] QB 38; (1980) 71 CrAppR 178; [1980] 3 WLR 15.

However, the '*exceptions*' to that rule of practice are when:

[i] permission is granted by the Court which refused '*bail*' to a defendant to apply for '*bail*' afresh;

[ii] an appeal is being made to a higher court; or

[iii] a defendant is committed for trial or sentence.

In *R v Slough Justices, Ex parte Duncan & another* (1982) 75 CrAppR 384 [[1981] QB 451] Ormrod LJ, delivering the judgment of the Court, stated at page 388:

> 'Mr Smith contends that the committal itself is ipso facto a material change of circumstances for this purpose and so requires the court to reconsider the question of bail. In many cases there will, in fact, be a material change or changes in the circumstances at this stage for obvious reasons. For example, the strength of the prosecution case may be better known, or it may be possible to re – evaluate the seriousness of the offence, or the time likely to elapse before the case comes to trial. Other relevant considerations may emerge at this stage. But in other cases the fact that the committal stage has been reached may leave the actual position in regard to bail unchanged, eg., it is unlikely to reduce the likelihood of further offences being committed if bail is granted.'

The law relating to '*Preliminary Investigations / Inquiries*' is examined commencing on page **310**.

[17.8] Murder & Treason

Section 23 states:

> 'When any person has been taken into custody without a warrant for an offence *other than murder or treason, the officer in charge of a police station to whom such person shall have been brought may in any case and shall, if it does not appear practicable to bring such person before an appropriate Magistrates' Court within twenty – four hours after he has been so taken into custody*, inquire into the case, and *unless the offence appears to the officer to be of a serious nature*, release the person on his entering into a recognizance with or without sureties, for a reasonable amount to appear before a Magistrates' Court at a time and place to be named in the recognizance, *but where any person is retained in custody he shall be brought before a Magistrates' Court as soon as practicabl*e: […]' (emphasis added)

Considering that in respect of 'murder' and 'treason' charges only the High Court can grant '*bail*, arresting or investigating officers are required to advise the officer of the Director of Public Prosecutions as soon as reasonably practicable.

Defendants who are charged with 'murder' or 'treason' *must* also be brought before a Magistrates' Court *as soon as practicable*, as commented by Daly CJ in *R v Baefaka* [1983] SILR 26 at page 29.

In *Karawaisa Taisia v Director of Public Prosecutions* (Unrep. Criminal Case No. 266 of 2001) Kabui J stated at pages 2 – 3:

> 'The Court has a discretion to grant bail or not to grant bail. This means that granting bail is not automatic on its own. The exercise of the discretion of the Court therefore depends upon the facts of each case before the Court in view of the principles governing bail applications in murder cases such as this case. In the first place, a person is detained by Police in connection with the offence of treason or murder cannot be released by the Police but must be brought to the Magistrate Court as soon as is reasonably possible. This is done under section 23 of the Criminal Procedure Code Act. The reason for non – release of a person held by the Police in connection with treason or murder is that such offences are serious offences. In such cases, bail can only be granted by the High Court. The test to be applied is whether or not it is probable that the accused will appear in Court at the trial date.'

In *R v Kong Ming Khoo* (Unrep. Criminal Case No. Unknown of 1991) Ward CJ stated at page 2:

> '[S]ection 106 makes it clear, when the charge is murder or treason, it is only exceptionally that bail is granted. Mr. Young seeks to distinguish between good reason, special circumstances and exceptional circumstances. I am afraid I do not feel such distinctions apply in this case. The effect of Section 106 is that bail in murder cases will only be granted in exceptional circumstances. However, *whilst that places a heavier burden on the defence, the same considerations apply as in any bail application. The court must consider them all but bear in mind that the effect of section 106 in a case involving a charge of murder or treason means it is only in rare cases that bail will be granted*.' (emphasis added)

In *R v Dickson Maeni* (Unrep. Criminal Case No. 117 of 1999) Palmer J stated at page 1:

> 'It is correct that bail applications in murder charges are rarely given by this Court. It is because the nature of the charge and the severity of the punishment are very serious. But that does not mean that bail will not be considered or given.'

[17.9] Bail After Conviction

Section 290 of the C*riminal Procedure Code* (Ch. 7) provides the authority of the High Court or the Court which convicted the appellant to grant bail pending an appeal.

In *Susan Tamana v R* (Unrep. Criminal Case No. 15 of 1995) Muria CJ stated at pages 1 – 2:

> 'It must be pointed out, […], that the principles to be considered in an application for bail after conviction cannot be treated as the same as those in an application for bail before conviction. The presumption of innocence which is a guiding legal principle in criminal cases no longer exist after a person has been found guilty by a competent court. By the same note, the right of appeal does not revive that pre-conviction presumption of innocence. It will therefore be a

case of exceptional circumstances which will justify the court in granting bail to a person who has been found guilty and convicted.

The position in this jurisdiction is that an application must show that there are matters which constitute exceptional circumstances before bail is allowed pending appeal. This has been succinctly pointed out in *INITO –v- R (1983) SILR 177* where the court re-iterated the inveterate practice of appellant courts in bail applications pending appeals. In *Inito's case*, the court pointed out the conditions to be satisfied before bail can be granted pending appeal. These are:

(a) *there is a possibility that a sentence of imprisonment be set aside entirely*; or

(b) *the sentence is likely to be served completely before the appeal is heard*; or

(c) *there are exceptional reasons. This last criteria of exceptional reasons or exceptional circumstances must be those of the case and not of the applicant.*' (emphasis added)

See also: *R v Garnham* (1910) 4 CrAppR 150; *R v Wise* (1922) 16 CrAppR 17 & *R v Fitzgerald* (1923) 17 CrAppR 147.

BAIL

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ADJOURNMENTS

[18.0] Introduction

In *R v Niger Pitisopa* (Unrep. Criminal Appeal Case No. 120 of 1999) Kabui J stated at page 8:

> 'It is in the public interest that criminal charges against accused persons be dealt with by the Courts as soon as possible. It is the duty of the Crown to ensure that the process of criminal law justice is activated in a manner that is consistent with the provisions of section 10 of the Constitution.'

The law relating to a '*Defendant's Right To A Fair Trial Within A Reasonable Time*' is examined commencing on page **148**.

Although the prosecution and the defence *may* consent to an '*adjournment*', it is the Court which will make the final decision.

[18.1] Criminal Procedure Code

Section 191 of the *Criminal Procedure Code* (Ch. 7) states:

> '*Before or during the hearing of any case, it shall be lawful for the court in its discretion to adjourn the hearing to a certain time and place to be then appointed and stated in the presence and hearing of the party or parties or their respective advocates then present*, and in the meantime the court may suffer the accused person to go at large, or may commit him to prison, or may release him upon his entering into a recognizance, with or without sureties at the discretion of the court, conditioned for his appearance at the time and place to which such hearing or further hearing is adjourned:
>
> *Provided* that no such adjournment shall be for more than thirty clear days, or if the accused person has been committed to prison, for more than fifteen days, the day following that on which the adjournment is made being counted as the first day.' (emphasis added)

The law relating to the '*Punctuality At Court Of Prosecutors*' is examined commencing on page **126**.

See also: sections 52 & 53 of the *Magistrates' Courts Act* (Ch. 20) & section 55 of the *Interpretation & General Provisions Act* (Ch. 85).

[18.2] Discretionary Power

In *Tatau v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 289 of 1992) Palmer J stated at page 9:

> '*The court's primary duty is to ensure that the trial is conducted fairly* […].
>
> In its supervision of the hearing or trial the court often has to rule on applications for adjournments by learned counsels and prosecutors.
>
> […]

> Section 190 [now section 191] gives a discretionary power to the magistrate. *That discretionary power however must be exercised in such a way as to ensure that the accused has a fair trial according to law*.' (emphasis added) [words in brackets added]

A Court has an inherent discretionary power to '*adjourn*' any matter before it, but it *must* exercise that power judicially by weighing several competing considerations, which *include* the interests of the defendant and of *justice* itself, see *Carryer v Kelly* (1969 – 1970) 90 WN (Part 1) NSW 566 & *R v Maher* [1987] 1 QdR 171.

Rigid rules of fixed formulae *cannot* be prescribed to limit the judicial discretion. The concern is to do *justice* between the parties, see *Appleton v Tomasetti* (1983) 5 ALR 428.

In *R v Swansea Justices & Davies, Ex parte Director of Public Prosecutions & R v Swansea Justices & Phillips, Ex parte Director of Public Prosecutions* (1990) 154 JPR 709 the Court held:

> It was often a mistake to lay down rigid principles as to the way in which a court should exercise its discretion to conduct the proceedings before it. *The principle which should always guide justices was that they must take care to observe the interests of fairness towards both sides. The public had an interest in ensuring that properly brought prosecutions were conducted in court just as much as the defendant was entitled to present his/her case to the fullest advantage.* The Court did not lay down any rigid formula because each case was different and must be decided on its own facts.

Mustill LJ, with whom Schiemann J concurred, stated at page 712:

> 'In the context of adjournments, the justices will, in order to maintain the balance of fairness, wish to take into account all the circumstances including the practicality to one side or the other of putting forward his or her case adequately if the adjournment is refused. The court will also want to consider questions such as the passage of time, also whether this is the first or only one of many occasions on which an indulgence by way of adjournment has been requested, and also whether the party asking for the adjournment is in fault in not being in a position to proceed at once. I emphasise in relation to the latter consideration that it is only one of the factors to be taken into account. *The power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the court shall have the best opportunity of giving the fairest available hearing to the parties.*' (emphasis added)

Appellate courts ought to be very slow to interfere with the exercise of a discretion on a question as to an '*adjournment*'. However, if the result of the order made in the inferior court is to defeat the rights of the parties altogether *and* the appellate court is satisfied that the effect of the order is that *injustice* has been done, then the court has the power to intervene and ought to do so, see *Maxwell v Keun* [1928] 1 KB 645 at pages 653 & 657.

See also: *Block v Block* (1981) 55 ALJR 701 at page 703 & *Ahern v Deputy Commissioner of Taxation (Qld)* (1987) 76 ALR 137.

[18.3] Each Application To Be Considered Separately

In *R v Aberdare Justices, Ex parte Director of Public Prosecutions* (1990) 155 JP 324 the case involved a charge which had several adjournments and which the court file was marked "must proceed" on the next occasion. On that occasion the prosecution applied for a further adjournment because a witness was unavailable. The defence objected and the application was refused.

The Divisional Court held (per Bingham LJ):

> Circumstances change and it is incumbent on any bench to have regard to the situation which actually presents itself on the day of decision.

[18.4] Need For Evidence

In *R v Jones* [1971] VR 72 the Court held:

> Many applications for adjournment are made which are plainly without foundation. If these applications are to be made in a bona fide way, then we think it is highly desirable that they should be supported by evidence, either verbal evidence or affidavit.

Prosecutors are to outline *clearly* the reason why an '*adjournment*' is being sought. As regards '*Incomplete Investigations*' refer to page **395**.

[18.5] Applications By Defence Specifically

In *Cameron v Cole* (1944) 68 CLR 571 the High Court of Australia held at page 589:

> 'It is a fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given *reasonable opportunity* of appearing and presenting his case.' (emphasis added)

In *R v Thames Magistrates' Court, Ex parte Polemis* (1974) 2 AllER 1219 the Court of Appeal held:

> If a defendant in a criminal case is not given a *reasonable chance* to present his/her case it amounts to a breach of natural justice. Justice *must* be seen to be done.

Section 198 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) *At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require him to make a defence*, the court *shall* again explain the substance of the charge to the accused and *shall* inform him that he has a right to give evidence on oath from the witness box, and that, if he does so, he will be liable to cross – examination, or to make a statement not on oath from the dock, and shall ask him whether he has any witnesses to examine or other evidence to adduce in his defence, and the court *shall* then hear the accused and his witnesses and other evidence (if any).

(2) If the accused person states that he has witnesses to call but that they are not present in court, *and* the court is satisfied that the absence of such witnesses is not due to any fault or neglect of the accused person, *and* that there is a likelihood that they could, if present, give *material evidence* on behalf of the accused person, the court *may* adjourn the trial and issue process, or take others steps, to compel the attendance of such witnesses.' (emphasis added)

Evidence is '*material*' if it is relevant to an issue in the case, see *R v Reading JJ, Ex parte Berkshire County Council* [1996] 1 CrAppR 239;

[18.6] Incomplete Investigations

In *Weary v Stok* (1986) 3 MVR 411, Pidgeon J, sitting alone, held:

> If there was an application for an adjournment by the complainant of a minor charge, the grounds of which were *based on inefficiency or indolence on the part of the complainant* and the result of the adjournment would cause wasted time and consequent delays to other litigants in the court system, combined with significant inconvenience to the defendant, then in my view the public interest would require that the matter be not adjourned. […] *I would regard the matter of the charge and its degree of seriousness to a factor to take into account.*

In relation to '*incomplete investigations*', the prosecutor is expected to:

[i] consult the Arresting / Investigating Officer to determine:

[a] the reasons why the investigation is incomplete;

[b] what further investigation needs to be completed; and

[c] what time period the Arresting / Investigating Officer *requests* in order to complete the investigation; and

All such details should be recorded in the Docket on the 'Diary Of Action Taken';

[ii] advise their Officer – in – Charge if such information is not provided;

[iii] advise the court *comprehensively* of the reasons for the application for '*adjournment*'; and

[iv] formally advise the Arresting / Investigating Officer of the date that the case was adjourned to, if granted, and record such notification in the Docket on the 'Diary Of Action Taken'.

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ATTEMPTS TO COMMIT OFFENCES

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ATTEMPTS TO COMMIT OFFENCES

[19.0] Introduction

Whilst the term '*Attempts To Commit An Offence*' is *not* defined in the *Interpretation & General Provisions Act* (Ch. 85), it is defined in the section 378 of the *Penal Code* (Ch. 26).

Section 378 of that *Code* states:

> 'When a person, intending to commit an *offence*, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, *he is deemed to attempt to commit the offence*.' (emphasis added)

Section 3 of that *Code* states:

> 'This Code *shall* be interpreted in accordance with the Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

The term '*Offence*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *meaning*:

> 'any crime, felony, misdemeanour or contravention or breach of, or failure to comply with, any written law, for which a penalty is provided.'

It is considered that it is appropriate to refer to section 378 of the *Penal Code* (Ch. 26) for the purposes of consistency, see *R v Wong Chin Kwee & others* [1983] SILR 78 and considering that it is consistent with the common law definition, see *Susak* (1999) 105 ACrimR 592 at pages 594 – 595 & *R v Prior* (1992) 91 NTR 53; (1992) 65 ACrimR 1 at pages 58 – 59 & 7 respectively.

[19.1] Elements

The elements of section 378 of the *Penal Code* (Ch. 26) are as follows:

- A defendant *intends* to commit an offence;
- The defendant *begins* to put that *intention* into execution by committing an *overt act*, ie., the defendant does an *act* necessary to commit the intended offence; and
- That intention is *not* fulfilled.

[19.2] General Principles

In *Haughton v Smith* (1974) 58 CrAppR 198 [[1975] AC 476; [1974] 2 WLR 1; [1973] 3 AllER 1109] the Lord Chancellor, with whom the other Lordships concurred in either principle or in entirety, stated at pages 207 – 214:

'[I] desire to make an observation on the expression "*actus reus*" […]. Strictly speaking, though in almost universal use, it derives, I believe, from a mistranslation of the Latin aphorism: "*Actus non facit reum nisi mens sit rea*." Properly translated, this means "An act does not make *a man* guilty of a crime, unless his mind be also guilty." It is thus not the *actus* which is "*reus*", but the man and his mind respectively. […]

[…] I derive the following propositions:

(1) There is a distinction between the intention to commit a crime and an attempt to commit it. Thus, in this case, the respondent intended to commit a crime under section 22 of the Theft Act. But this dishonest intention does not amount to an attempt. […]

(2) In addition to the intention, or *mens rea*, there must be an overt act of such a kind that it is intended to form and does form part of a series of acts which would constitute the actual commission of the offence if it were not interrupted. […]

(3) The act relied on as constituting the attempt must not be an act merely preparatory to commit the completed offence, but must bear a relationship to the completion of the offence referred to in EAGLETON (supra) as being "proximate" to the completion of the offence and in DAVEY AND OTHERS v LEE (supra) as being "immediately and not merely remotely connected" with the completed offence. […]

[…]

[…] I agree with the decision in PERCY DALTON (LONDON) LTD (1949) 33 CrAppR 102, and particularly with the quotation from Birkett J at p. 110 cited by the Lord Chief Justice in the present case where he said: "Steps on the way to the commission of what would be a crime, if the acts were completed, may amount to attempts to commit that crime, to which, unless interrupted, they would have led; but steps on the way to the doing of something which is thereafter, done, and which is no crime, cannot be regarded as attempts to commit a crime."

I would add to the last sentence a rider to the effect that equally steps on the way to do something which is thereafter not completed, but which if done would not constitute a crime cannot be indicted as attempts to commit that crime.'

In *Davey & others v Lee* (1967) 51 CrAppR 303; [1968] 1 QB 366 Lord Parker CJ stated at pages 305 and 370 respectively:

'What amounts to an attempt has been described variously in the authorities, and for my part I prefer to adopt the definition given in Stephen's *Digest of Criminal Law* (5th ed.) Art. 50: "An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of act which would constitute its actual commission if it were not interrupted."

As a general statement that seems to me to be right, although it does not help to define the point of time at which the series of acts begins. That, as Stephen said, depends upon the facts of each case. A helpful definition is given in paragraph 4104 … of *Archbold's Criminal Pleading*, etc., where it is stated: "It is submitted that the *actus reus* necessary to constitute an attempt is complete if the prisoner does an act which is a step towards the commission of the specific crime, which is immediately and not merely remotely connected with the commission of it, and the doing of which cannot reasonably be regarded as having any other purpose than the commission of the specific crime."'

Diplock LJ stated at pages 306 and 371 respectively:

> 'I accept the definition which my Lord has taken from the current edition (36th) of *Archbold* as a correct definition of the test to be applied […].'

In *R v Green* (1976) 62 CrAppR 74 [[1976] 2 WLR 57; [1976] QB 985; [1975] 3 AllER 1011; [1976] CrimLR 47] Ormond LJ, delivering the judgment of the Court, stated at page 78:

> '[I]ntention alone is not enough to attract the sanctions of the criminal law; proof of a substantive offence requires proof of the act or omission specified in the description of the offence; proof of an attempt requires proof of some act sufficiently proximate to the commission of the substantive offence, which, must be capable of proof, in the sense that its essential constituents are in existence.'

In *R v Williams, Ex parte Minister for Justice & Attorney – General* [1965] QdR 86 the Court of Criminal Appeal held at page 100:

> '[A]n attempt is complete if the [… defendant] does an act which is a step towards the commission of a specific crime, and that act *cannot* reasonably be regarded as having any other purpose than the commission of that specific crime.' (emphasis added) [word in brackets added]

Therefore, to constitute an '*attempt*' a defendant *must* do an act which is a step towards the commission of the offence which the defendant intended to commit. Furthermore, that act *must* also be reasonably regarded as having no other purpose other than the commission of the offence in question.

Perhaps a better way of defining the 'test' is as follows:

> 'A defendant *must* manifest his/her intention by some *overt act/s*. That is, the behaviour of the defendant in taking into account any intention:
>
> - confessed to; or
> - which could be inferred from the facts,
>
> should plainly show the defendant's intention to commit the offence in question. The act/s relied on should be consistent with that intention.'

Intention, which is a state of mind, can never by proved as a fact, it can only be inferred from other facts which are proved: *Sinnasamy Selvamayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, '*the guilt of the defendant must be the only rational inference open to the Court to find in the light of the evidence', see R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22) & *Martin Sutarake v R* (Unrep. Criminal Appeal No. 6 of 1994; Court of Appeal; at page 7).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

In *R v Miskell* (1954) 1 AllER 137; (1954) 37 CrAppR 214 [[1954] 1 WLR 438] the Court stated at pages 138 and 215 respectively:

> 'It has long been established that whether an act or acts can amount to an attempt to commit a crime is a question of law. Once it is decided by the court that what an accused person has done can be an attempt to commit the crime, it is a question of fact for the jury whether what was done should be decided to have been an attempt. *Not all acts which are steps towards the commission of a crime can be regarded as attempts.* Some may be too far removed from the commission of the crime to be regarded as attempts to commit the crime, but just where the distinction is to be drawn between preliminary acts of preparation and acts which are nearly enough related to the crime to amount to attempts to commit it is often a difficult and nice question.' (emphasis added)

In *Jones v Brooks & Brooks* (1968) 52 CrAppR 614 Lord Parker CJ delivering the judgment of the Court, stated at pages 616 – 617:

> 'Ignoring entirely the expressed intention that these two respondents admitted, it is clear that the attempt to open this door was equivocal in the sense that it might have been a step towards the commission of a number of different crimes, not merely taking and driving away, but stealing either the car or some contents of the car, or indeed for purely innocent purpose of going to sleep in it. If the expressed intention here is to be disregarded entirely, then quite clearly, in my judgment, the justices were right in saying that it had not been shown that the step in attempting to open the door was a step towards the commission of the specific crime of taking and driving away. It was submitted to the justices, and to this Court, that the expressed intention of these respondents does not enter into this matter at all except at a later stage in considering *mens rea*.
>
> I am quite unable to accept that contention. Of course, an expressed intention alone does not amount to an attempt; there must be an actus reus which is sufficiently proximate to the expressed intention. But that does not mean to say that the courts should disregard entirely as part of the surrounding circumstances and the evidence in the case the expressed intention of the respondents, both at the time and after the actus reus. It seems to me that that intention is relevant when the act concerned is equivocal in order to see towards what the act is directed. Once that is decided, then it still remains for the prosecution to show that the act itself is sufficiently proximate to amount to an attempt to commit the crime which it was the intention of the respondents to commit.
>
> Looked at in this way, I have no doubt that the specific crime being isolated by the expressed intention as one to take and drive away, the insertion of the key into the door and seeking to open the door of the car was an act sufficiently proximate.'

Section 160 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with an offence, he may be convicted of having attempted to commit that offence, although he was not charged with the attempt.'

See also: section 39(4) of the *Dangerous Drugs Act* (Ch. 98).

See also: *R v Robinson* [1915] 2 KB 342; (1915) 11 CrAppR 124; *R v Woods* (1930) 22 CrAppR 41 at page 44; *R v Laitwood* (1910) 4 CrAppR 248 at page 252; *R v Linnekar* [1906] 2 KB 99 at page 103; *R v Punch* (1927) 20 CrAppR 18 at page 20; *R v Blockham* (1943) 29 CrAppR 37 at page 39; *R v Percy Dalton Ltd, Dalton & Strong* (1949) 33 CrAppR 102 at page 110; *R v Baxter* (1971) 55 CrAppR 214 [[1971] 2 WLR 1138; [1972] QB 1; [1971] 2 AllER 539; [1971] CrimLR 281] at page 219; *R v Mohan* (1975) 60 CrAppR 272 at page 276 & *Partington v Williams* (1976) 62 CrAppR 220.

[19.3] Examples

The 'test' can be explained by means of the following examples:

Example A:

Suppose (A) decides to break and enter a dwelling - house and steal from that dwelling - house anything of value. At 3am (A) goes to the front door of the dwelling – house which is 10 metres from the edge of the footpath. At that time there is no person in the dwelling – house. Whilst (A) is standing at the dwelling – house a security guard sees him/her turn the door handle on the front door and asks what he/she is doing. (A) states that he/she is there for the purpose of breaking into the dwelling – house and stealing property from in it. At that time (A) does *not* have possession of instruments which could be used to break into the dwelling – house.

However, there is sufficient evidence to prove the offence of 'attempted break and enter' because:

- (A) was seen to turn the door handle;
- At that time there was no person in the dwelling – house; and
- (A) admits to the security guard that his/her purpose for being there was to break into the dwelling – house and steal property from in it.

It is *immaterial* that (A) does not have possession of instruments which could be used to break into the dwelling – house because he/she had manifested his/her intention by going to the front door of the dwelling – house at 3am, ie., that *act* of the defendant going to the front of the dwelling – house, and turning the door handle. Furthermore, the *purpose* of the defendant going to the front of the dwelling – house at that time was to break into it and steal property as admitted to the security guard.

If the defendant had *not* been seen to turn the door handle then the prosecution could *not* prove that he/she had attempted to commit a 'break and enter' offence. The *act* of going to the front door of the dwelling – house and standing there whilst doing nothing else does *not* prove by itself that the defendant attempted to break and enter the dwelling – house.

Without any admission by a defendant to prove intent, the prosecution has to rely on the actions of a defendant to infer intention, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87. Whilst the intention of breaking and entering the dwelling - house and stealing property in the example in question may be inferred, it *may* also be *equally* inferred that the defendant did *not* have that intention and was for example, only looking. Therefore, the prosecution would *not* be able to prove that element '*beyond reasonable doubt*' because the *'only'* rational inference was that the defendant intended to commit a 'break and enter' offence. Such offences are examined commencing on page **491**.

However, the prosecution may be able to prove that the defendant committed the offence as specified in section 189 of the *Penal Code* (Ch. 26).

The offence of '*Criminal Trespass*' is examined commencing on page **502**.

Example B:

Suppose (A) decides to break and enter a dwelling – house and steal from that dwelling – house anything of value. At 3am (A) whilst in possession of a steel bar goes to the front door of the dwelling – house which is 10 metres from the edge of the footpath. At that time there is no person in the dwelling – house. (A) then places that bar against the front door and was seen to be trying to force that door open by a security guard. (A) makes no admission either to the security guard or the police.

However, there is sufficient evidence to prove the offence of 'attempted break and enter' because:

- (A) was located standing at the front door of the dwelling – house;
- The front door of the dwelling – house is 10 metres from the edge of the footpath;
- At that time there was no person working in the dwelling – house; and
- (A) was seen trying to force open the front door by the use of the bar.

It is *immaterial* that (A):

- does not make any admission; or
- did not break into the dwelling – house,

because he/she had manifested his/her intention by going to the front door of the dwelling – house at 3am and was seen trying to break into it.

The conduct of that person is consistent with his/her intention to commit an offence. In such circumstances the 'only' rational inference was that the defendant intended to commit a 'break and enter' offence.

[19.4] Sentencing

Section 379 of the *Penal Code* (Ch. 26) states:

> 'Any person who attempts to commit a felony or misdemeanour is guilty of an offence, which, unless otherwise stated, is a misdemeanour.'

Section 380 of the *Penal Code* (Ch. 26) states:

> 'Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of imprisonment for a term of fourteen years or upwards, with or without other punishment, is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for seven years.'

In *Koraua & Kaitira v R* [1988 – 89] SILR 4 the Court of Appeal commented at pages 5 – 6:

> 'Generally speaking, an attempt is to be punished with a lesser sentence than that for the completed offence, but there may be some circumstances in which an attempt will be more severely punished than a complete offence.'

ATTEMPTS TO COMMIT OFFENCES

[19.5] Wording Of Charges

If it is intended to charge a defendant with an '*attempt to commit an offence*', then the word '*attempt*' should be included in the wording of the charge.

PARTIES TO OFFENCES

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PARTIES TO OFFENCES

[20.0] Introduction

This chapter will examine the law relating to:

[i] '*Parties To Offences Generally*';

[ii] '*Accessories After The Fact*';

[iii] '*Accomplices*'; and

[iv] '*Conspiracy*'.

[20.1] Parties To Offences Generally

[20.1.1] Section 21 – Penal Code

Section 21 of the *Penal Code* (Ch. 26) states:

> '*When an offence is committed*, each of the following persons is deemed [ie., assumed in law] to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids or abets another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence;
>
> In the last – mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.
>
> A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of the offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.' (emphasis added) [words in brackets added]

Section 3 of that *Code* states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

[20.1.2] When An Offence Is Committed

The meaning of term '*When an offence is committed*' was examined in *R v Wyles; Ex parte Attorney - General* [1977] QdR 169.

Lucas J, with whom Hoare and Matthews JJ concurred, stated at page 176:

> 'In my opinion the construction adopted by the learned judges places too much emphasis on the opening words of the section "When an offence is committed". These words do not in my view mean that before section 7 can come into operation one must find a completed offence committed under a section of the Code; the words have no temporal connotation. The section is brought into operation by the commission of the offence itself.'

Hoare J, with whom Matthews J concurred, stated at pages 179 – 180:

> 'It is clear that at the time the Code was enacted the criminal law has developed in a way which could sheet home criminal responsibility by a jury being able to *look at the totality of the acts where it could be inferred that the persons acted in concert, one doing the one thing and others doing other things, all leading to the completion of the incident which constituted the offence. In such cases each of the perpetrators was held to be liable as a principle. He was treated as if he had "actually committed the offence"*.' (emphasis added)

See also: *R v Webb, Ex parte Attorney – General* [1990] 2 QdR 275.

[20.1.3] Doer

Section 21 of the *Penal Code* (Ch. 26) states (in part):

> 'When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> (a) every person who *actually does the act or makes the omission* which constitutes the offence;' (emphasis added)

In a simplistic example suppose a defendant walked into a bank and demanded money with violence. That defendant would be covered by this section, and therefore guilty of the offence of '*Robbery*' because he/she actually did the act/s which constituted that offence.

In *R v Webb, Ex parte Attorney – General* [1990] 2 QdR 275 Macrossan CJ, with whom Thomas and Lee JJ concurred, stated at page 283:

> 'It is now settled that section 7(a) can include cases where there are several persons acting in concert each doing some act so that the actions, in totality, would constitute all of the elements if the offence were committed by one person.'

In another simplistic example suppose three defendants walk into a bank but only defendant demanded money whilst the other defendants pointed their firearms at customers and bank employees. Each of those defendants would be covered by this section, and guilty of the offence of '*Robbery*'.

That offence is examined commencing on page **602**.

[20.1.4] Enabling Or Aiding

Section 21 of the *Penal Code* (Ch. 26) states (in part):

> 'When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> […]
>
> (b) every person who does or omits to do any act *for the purpose of enabling or aiding another person to commit the offence*;' (emphasis added)

In *R v Alfred Maetia & Newton Misi* (Unrep. Criminal Case No. 42 of 1992) Muria ACJ stated at pages 8 – 10:

> 'The general principle of law is that a criminal offence may be the subject of aiding and abetting provided the person accused of aiding and abetting knows the facts constituting the principal offence and actively assists and encourages the principal offender. […] There are numerous authorities on the law on aiding and abetting. However, it is suffice to refer to the case of Johnson –v- Youden [1950] 1 KB 544 where at pages 546 – 547, Lord Goddard CJ said:-
>
> "Before a person can be convicted of aiding and abetting the commission of an offence he must at least know the essential matters which constitute that offence. He need not actually know that an offence has been committed, because he may not know that the facts constitute an offence and ignorance of the law is not a defence. If a person knows all the facts and is assisting another person to do certain things, and it turns out that the doing of those things constitutes an offence, the person who is assisting is guilty of aiding and abetting that offence, because to allow him to say, "I knew of all those facts but I did not know that an offence was committed", would be allowing him to set up ignorance of the law as a defence."
>
> […]
>
> The authorities […] clearly show that *for a person to have aided and abetting the commission of an offence there must be established that he is present (actual or constructive); that he knows the facts necessary to constitute the offence, and that he is actively encouraging or in some way assisting the other person in the commission of the offence. Knowledge of the actual offence committed is not essential*.' (emphasis added)

In *Director of Public Prosecutions v Merriman* (1972) 56 CrAppR 766; [1972] 3 WLR 545 [[1973] 3 AllER 42; [1973] AC 584; [1973] CrimLR 764] Lord Diplock, with whom Lordships Reid & Salmon concurred, stated at pages 796 & 564 respectively:

> 'I conclude, therefore, that whenever two or more defendants are charged in the same count of an indictment with any offence which me can help one another to commit it is sufficient to support a conviction against any and each of them to prove *either* that he himself did a physical act which is an essential ingredient of the offence charged or that he helped another defendant to do such an act, *and*, that in doing the act or in helping the other defendant to do it, he himself had the necessary criminal intent.' (emphasis added)

PARTIES TO OFFENCES

In *Lee Karani & Eddie Aimondi v The State* (Unrep. SC540; 27 & 29 November 1997 & 31 December 1997) the Supreme Court of Papua New Guinea stated:

> 'At the material time the two accused were policemen stationed at Kimbe Police Station. They were charged with being involved in the robbery of the Spirit of West New Britain Company store in Kimbe on 14 September 1997. They were charged under S. 386 of the Criminal Code in connection with S. 7 of the Code, in aiding and abetting the commission of the robbery by some other persons by supplying a pistol, namely a Ruger Magnum .357 Pistol, for use in the robbery. In the robbery large sums of money in cash and cheques and a motor vehicle were stolen.
>
> The issue before the trial judge was whether "*the accused (got) possession of the pistol and whether they supplied it to those persons who actually committed the robbery, knowing that it would be so used.*" This is the same issue raised in this appeal by the two Appellants in their respective grounds of appeal. To the extent that the two Appellants raise this issue, we take it that they do not contest the trial judge's findings that at all material times the said pistol belonged to Kimbe Police, that prior to the robbery it went missing from the Kimbe Police Firearms Armoury and that the same pistol was used by those other persons to commit the robbery.
>
> […]
>
> […] The trial judge was entitled to hold that they [ie., the Appellants] took possession of the pistol. There was also sufficient evidence to show that the two Appellants were in possession of the pistol before and after the robbery and that they gave the pistol to those persons who committed the robbery of Spirit of West New Britain Co. Store.
>
> The question is whether it was necessary for the prosecution to show that when they handed over the pistol, they knew that the pistol was going to be used for this particular robbery, namely robbery of the Spirit of West New Britain Co. store on 12 April 1995. This is where the application of the principles of *R v Bainbridge* [1959] AllER 200 becomes relevant. […]
>
> […]
>
> […] In refusing to criticise the trial judge's direction to the jury and dismissing the appeal, Lord Parker, who delivered the judgment of the Court [of Appeal] said (at p. 203):
>
> "The court fully appreciates that it is not enough that it should be shown that a person knew that some illegal venture was intended. To take this case, it would not be enough if the appellant knew – he says that he only suspected – that the equipment was going to be used to dispose of stolen property. That would not be enough. Equally, this court is quite satisfied that it is unnecessary that knowledge of the intention to commit the particular crime which in fact committed should be shown, and by 'particular crime' I am using the words in the same way as that in which counsel for the appellant used them, on a particular date and particular premises."
>
> […]
>
> The trial judge in the present case said this of the application of the above principles in *R v Bainbridge*:

> "Their involvement is by virtue of S. 7 of the Criminal Code as aiding and abetting by supplying a pistol to persons they knew were going to use the pistol in a robbery or robberies. The fact that they may not have known the exact details of the time and place of the robbery or robberies does not matter as the principles are quite clear. It is well established in authorities that it is enough if a person supplies items or materials in order that a crime of a particular kind can be committed but without knowing the details of the crime. See *R v Bainbridge* […]."
>
> […]
>
> We are of the view that the principles set out in *R v Bainbridge* is sound law and were correctly adopted and applied by the trial judge to the facts of the present case. We agree with the trial judge that on the evidence, it was safe for him to find that:
>
> The two Appellants knew that the gun was required to be used by these persons to commit certain robberies, that some money or goods were to be obtained in the process of the robbery and that they would be given a portion of the proceeds of the robbery in payment for the use of the pistol.
>
> These persons committed several robberies using the pistol and one of them was the robbery of the Spirit of West New Britain Co. store. In return for the pistol, the two Appellants were given portions of the proceeds of this robbery.
>
> 'In these circumstances, "It is unnecessary that knowledge of the intention to commit the 'particular crime' … namely, on a particular date and particular premises" should be shown by the prosecution. *It is sufficient that a crime of a particular kind was intended namely, robbery of a person involving actual or threatened violence using the pistol, which involved the obtaining of property in the form of money or valuable goods. It was unnecessary for the State to show that the Appellants at the time they gave the pistol specifically intended that these persons would rob the Spirit of West New Britain Co. store on the 12th of April 1995 [… at] the particular time. In any case, the Appellants received part of the proceeds of several robberies committed using the same pistol including the robbery of Spirit of West New Britain Co. store and it was open for the trial judge to find that the Appellants* aided *the commission of the robbery of Spirit of West New Britain Co. store.'* (emphasis added) [words in brackets added]

In *R v William Taupa Tovarula & others* [1973] PNGLR 140 Minogue CJ, sitting alone, stated at page 196:

> 'Section 7(b) attaches criminal responsibility to those who do not in fact aid in the commission of an offence but who engage in conduct for the purpose of aiding. *I agree with Mr Brennan's proposition that under this subsection an offender who has tried to aid may be guilty of the crime committed even though he did not succeed in aiding.* But as will be apparent when I come to consider the individual accused I do not regard this subsection as being relevant in this case.' (emphasis added)

In *R v Umarum* [1969 – 70] PNGLR 190 Clarkson J, sitting alone, held at page 191:

> '[I]t is clear from the authorities that mere prior knowledge of what is intended is in itself *not* sufficient to bring the accused within the section.' (emphasis added)

In a simplistic example suppose if an employee of a store ensured that the back door to a store was unlocked but closed after the store was closed so that another person could enter and steal some of the property. That employee would also be guilty of the offence of '*Break & Enter & Steal*' by virtue of this section because he/she either:

- did an act; *or*
- omitted to do an act

thereby ensuring that the back door was unlocked *and* the unlocking of that door either:

- enabled; *or*
- aided

that other person to commit the offence.

The prosecution would *not* have to prove that the employee knew which items of property the second defendant intended stealing. However, if the second defendant after stealing some property set the store alight, the employee would *not* be guilty of '*Arson*', *unless he/she was aware of that intended action on the part of the second defendant* by virtue of section 22 of the *Penal Code* (Ch. 26) as examined commencing on page **417.**

The offence of:

- *'Break & Enter*' is examined commencing on page **491**; and
- *'Arson'* is examined commencing on page **524**.

See also: *R v Witrasep Binengim* [1975] PNGLR 95 at page 97 & *R v Ancuta* [1991] 2 QdR 413 at page 418.

In *Attorney – General's Reference (No. 1 of 1975)* [1975] 2 AllER 684; [1975] QB 773 [(1975) 61 CrAppR 118; [1975] 3 WLR 11] Lord Widgery CJ, delivering the judgment of the Court, stated at pages 686 and 778 respectively:

> 'Of course it is the fact that in the great majority of instances where a secondary part is sought to be convicted of an offence there has been a contact between the principal offender and the secondary party. Aiding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence, and are in contact so that each knows what is passing through the mind of the other. [...] *The fact that so often relationship between the secondary party and the principal will be such that there is a meeting of minds between them caused the trial judge in the case from which this reference is derived to think that this was really an essential feature of proving or establishing the guilt of the secondary party and, as we understand his judgment, he took the view that in the absence of some sort of meeting of minds, some sort of mental link between the secondary party and the principal, there could be no aiding, abetting and counseling is concerned we would go a long way with that conclusion.* It may very well be, as I said a moment ago, difficult to think of a case of aiding, abetting or counseling when the parties have not met and have not discussed in some respects the terms of the offence which they have in mind. But we do not see why a similar principle should apply to procuring.' (emphasis added)

[20.1.5] Aids Or Abets

Section 21 of the *Penal Code* (Ch. 26) states (in part):

> 'When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> […]
>
> (c) every person who *aids or abets another person in committing the offence*;' (emphasis added)

In *R v Allan, Boyle, Ballantyne & Mooney* (1965) 47 CrAppR 243; [1965] 1 QB 130 Edmund Davies J, delivering the judgment of the Court, stated at pages 246 – 250 & 135 – 138 respectively:

> 'The *locus classicus* on this branch of the law is the majority decision of the Court of Crown Cases Reserved in CONEY (1882) 8 QBD 534, whereby the conviction of more spectators of a prize – fight as being aiders and abettors in the fight was quashed. Before proceeding to quote from HALE and from FOSTER, Cave J said at p.539: "Now it is a general rule in the case of principals in the second degree that there must be participation in the act, and that, although a man is present whilst a felony is being committed, if he takes no part in it, and does not act in concert with those who commit it, he will not be a principal in the second degree merely because he does not endeavour to prevent the felony, or apprehend the felon." […]
>
> […]
>
> *In our judgment, encouragement in one form or another is a minimal requirement before an accused person may properly be regarded as a principal in the second degree to any crime*.' (emphasis added)

'It is *not* enough, then, that the presence of the accused person has, in fact, given encouragement. It *must* be proved that he/she intended to give encouragement; that he *willfully encouraged*', see *R v Clarkson, Dodd & Carroll* (1971) 55 CrAppR 445; [1971] 1 WLR 1402.

In *R v Gray* (1917) 12 CrAppR 244 Lord Reading CJ, delivering the judgment of the Court, held at page 246:

> 'It is not necessary that a man, to be guilty of murder, should actually have taken part in a physical act in connection with the crime. If he has participated in the crime – that is to say, if he is a confederate – he is guilty, although he has no hand in striking the fatal blow. Equally it must be borne in mind that the mere fact of standing by when the act is committed is not sufficient. A man, to become amenable to the law, must take such a part in the commission of the crime as must be the result of a concerted design to commit the offence.'

In *R v Betts & Ridley* (1930) 22 CrAppR 148 Avory J, delivering the judgment of the Court, stated at page 154:

> 'It is clear law that it is not necessary that the party, to constitute him a principal in the second degree, should be actually present, an eye – witness or ear – witness, of the transaction. He is, in construction of law, present aiding and abetting if with the intention of giving assistance, he is near enough to afford it, should occasion arise. Thus, if he be outside the house, watching to prevent surprise, whilst his companions are in the house committing a felony, such constructive presence is sufficient to make him a principal in the second degree.'

In *Attorney – General's Reference (No. 1 of 1975)* [1975] 2 AllER 684; [1975] QB 773 [(1975) 61 CrAppR 118; [1975] 3 WLR 11] Lord Widgery CJ, delivering the judgment of the Court, stated at pages 686 and 778 respectively:

> 'Of course it is the fact that in the great majority of instances where a secondary part is sought to be convicted of an offence there has been a contact between the principal offender and the secondary party. Aiding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence, and are in contact so that each knows what is passing through the mind of the other. […] *The fact that so often relationship between the secondary party and the principal will be such that there is a meeting of minds between them caused the trial judge in the case from which this reference is derived to think that this was really an essential feature of proving or establishing the guilt of the secondary party and, as we understand his judgment, he took the view that in the absence of some sort of meeting of minds, some sort of mental link between the secondary party and the principal, there could be no aiding, abetting and counseling is concerned we would go a long way with that conclusion.* It may very well be, as I said a moment ago, difficult to think of a case of aiding, abetting or counseling when the parties have not met and have not discussed in some respects the terms of the offence which they have in mind. But we do not see why a similar principle should apply to procuring.' (emphasis added)

See also: *R v Clarkson* [1971] 1 WLR 1402; (1971) 55 CrAppR 445; *R v Jones & Mirrless* (1977) 65 CrAppR 250; *Wilcox v Jeffrey* [1951] 1 AllER 464; *R v Rubens & Rubens* (1909) 2 CrAppR 163 at page 167; *Awap Omowo & Warsa Yirihim v The State* [1976] PNGLR 188; *Porewa Wani v The State* [1979] PNGLR 593; *The State v Laiam Kiala & Meiri Gomosi* [1977] PNGLR 470; *The State v John Badi Woli & Pengas Rakom* [1978] PNGLR 51; *McCarthy & Ryan* (1993) 71 ACrimR 395; *Jeffries v Strucke* [1992] 2 QdR 392; *R v Jervis* (1991) 56 ACrimR 374 at page 377 & *R v Beck* [1990] 1 QdR 30; (1989) 43 ACrimR 135.

[20.1.6] Counsel Or Procure

[A] Statutory Provisions

Section 21 of the *Penal Code* (Ch. 26) states (in part):

> 'When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say –
>
> […]
>
> (d) any person who *counsels or procures any other person to commit the offence*;
>
> In the last – mentioned case he may be charged either with committing the offence or with counseling or procuring its commission.

A conviction of counseling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of the offence of the same kind, and is liable to the same punishment, as if he had himself done the act or made the omission; and he may be charged with doing the act or making the omission.' (emphasis added)

Section 23 of the *Penal Code* (Ch. 26) states:

'When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counseled or a different one, or whether the offence is committed in the way counseled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.

In either case the person who have the counsel is deemed to have counseled the other person to commit the offence actually committed by him.

If the facts constituting the offence actually committed are not a probable consequence of carrying out the counsel, the person who gave the counsel is not deemed to be responsible.'

See: *R v Richards* [1974] QB 776; [1973] 3 AllER 1088; [1973] 3 WLR 888; (1974) 58 CrAppR 60.

[B] Counsel

The ordinary meaning of the term '*Counsel*' is to 'incite', 'solicit', 'instruct' or 'authorise'.

In *R v Calhaem* [1985] 2 AllER 267 [[1985] QB 808; (1985) 81 CrAppR 131; [1985] 2 WLR 826; [1985] CrimLR 303] Parker LJ delivering the judgment of the Court of Appeal, held at page 272:

'The natural meaning of the word ['counsel'] does not imply the commission of the offence. So long as there is counseling […], so long as the principal offence is committed by the one counselled and so long as the one counseled is acting within the scope of his authority […] we are of the view that the offence is made out.' [word in brackets added]

In *Attorney – General's Reference (No. 1 of 1975)* [1975] 2 AllER 684; [1975] QB 773 [(1975) 61 CrAppR 118; [1975] 3 WLR 11] Lord Widgery CJ, delivering the judgment of the Court, stated at pages 686 and 778 respectively:

'Of course it is the fact that in the great majority of instances where a secondary part is sought to be convicted of an offence there has been a contact between the principal offender and the secondary party. Aiding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence, and are in contact so that each knows what is passing through the mind of the other. In the same way it seems to us that a person who counsels the commission of a crime by another, almost inevitably comes to a moment when he is in contact with that other, when he is discussing the offence with that other and when, to use the words of the statute, he *counsels* the other to commit the offence.

> *The fact that so often relationship between the secondary party and the principal will be such that there is a meeting of minds between them caused the trial judge in the case from which this reference is derived to think that this was really an essential feature of proving or establishing the guilt of the secondary party and, as we understand his judgment, he took the view that in the absence of some sort of meeting of minds, some sort of mental link between the secondary party and the principal, there could be no aiding, abetting and counseling is concerned we would go a long way with that conclusion.* It may very well be, as I said a moment ago, difficult to think of a case of aiding, abetting or counseling when the parties have not met and have not discussed in some respects the terms of the offence which they have in mind. But we do not see why a similar principle should apply to procuring.' (emphasis added)

[C] Procure

In *Attorney – General's Reference (No. 1 of 1975)* [1975] 2 AllER 684; [1975] QB 773 [(1975) 61 CrAppR 118; [1975] 3 WLR 11] Lord Widgery CJ, delivering the judgment of the Court, stated at pages 779 & 121 respectively:

> 'To procure means to produce by endeavour. You procure a thing by setting out to see that it happens and taking the appropriate steps to produce that happening. We think that there are plenty of instances in which a person may be said to procure the commission of a crime by another even though there is no sort of conspiracy between the two, even though there is no attempt at agreement or discussion as to the form which the offence should take.'

[D] Withdrawal

In *R v Whitefield* (1984) 89 CrAppR 36 [[1984] CrimLR 97] Dunn LJ, delivering the judgment of the Court, held at pages 39 – 40:

> 'The law upon withdrawal is stated in BECERRA AND COOPER (1976) 62 CrAppR 212 and GRUNDY [1977] CrimLR 543. So far as material to the facts of this case, the law may be shortly stated as follows. If a person has counseled another to commit a crime, he may escape liability by withdrawal before the crime is committed, but it is not sufficient that he should merely repent or change his mind. If his participation is confined to advice or encouragement, he must at least communicate his change of mind to the other, and the communication must be such as "will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the aid and assistance of those who withdraw."'

[20.1.7] Sentencing Of Co - Defendants

All defendants are equally culpable for offences committed, see *Adifaka v Director of Public Prosecutions* [1984] SILR 44 at page 50 & *Gimble v The State* [1988 – 89] PNGLR 271 at page 273.

In *Adifaka v Director of Public Prosecutions* (*supra*) White ACJ stated at page 50:

> '[N]ot all disparities in sentence result in reductions and that it was necessary to show that the disparity was such as to justify "a real and genuine grievance." The principles are stated by the Court of Appeal in Magu v R [1980/81] SILR 40, 42.

> […]
>
> Bearing in mind the salutary provisions of S. 21 of the Penal Code, making all persons who take part in offences as there stated guilty of the offence committed, it is necessary to examine "the relevant considerations affecting the individual appellant", *the general rule being that where two or more offenders are concerned in the same offence a proper relationship should be established between the sentences passed on each offender* […].' (emphasis added)

In *Magu v R* (*supra*) Spreight JA, on behalf of the Court of Appeal, held at page 42:

> 'The principles relating to disparity are well known. Where one prisoner has received a sentence which is disproportionately low, that is no ground for reducing a proper sentence on another. *But where it is shown that the sentence under review is very heavy and out of proportion to the majority of punishments for comparable offences it is the duty of the Court to ensure that there is a degree of consistency*. In comparable cases the level of punishment to be meted out should not ebb or flow in a marked way otherwise there will be room for prisoners who have been heavily and disproportionately sentenced to have a legitimate grievance and this encourages resentment and lack of confidence in the judicial system among the public at large.' (emphasis added)

For the disparity to be '*objectionable*' it *must* be shown that one of the two or more defendants received a more severe sentence than the other and that the difference is not justified by any relevant distinction in their culpability or personal circumstances, see *R v Alulu & others* (Unrep. Criminal Review Case No. 147 of 1991; Muria ACJ).

Therefore, if '*mitigating factors*' which only apply to one defendant result in a reduced sentence, the co - defendant/s should *not* be given that same benefit, see *Attorney General's References Nos. 62, 63 & 64 of 1995; R v O'Halloran & others* [1996] 2 CrAppR(S) 233 & *Attorney General's Reference No. 73 of 1999; R v Charles* [2000] 2 CrAppR(S) 210.

In considering whether there is '*objectionable*' disparity the question to be asked is "Would right – thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of the sentence consider that something had gone wrong with the administration of justice?", see *R v Fawcett* (1983) 5 CrAppR(S) 158.

It is immaterial that proceedings have *not* been instituted against all defendants.

In *Jack Igi & others v R* (Unrep. Criminal Appeal Case No. 47 of 1996) Palmer J held at pages 3 – 4:

> The fact that there may have been hundreds others who have never been arrested and charged does not alter the fact that that these Appellants had taken part in a grave criminal offence. Lord Justice Sachs in R v Caird [(1970) 54 CrAppR 499] describes this ground as the "Why pick on me?" argument. He states:
>
> "It has been suggested that there is something wrong in giving an appropriate sentence to one convicted of an offence because there are considerable numbers of others who were at the same time committing the same offence, some of whom indeed, if identified and arrested and established as having taken a more serious part, could have received heavier sentences. This is a plea which is almost invariably put forward where the offence is one of those classed as disturbances of the public peace – such as riots, unlawful assemblies and affrays.

> It indicates a failure to appreciate that on these confused and tumultuous occasions each individual who takes an active part by deed or encouragement is guilty of a really grave offence by being one of the number engaged in a crime against the peace. It is, moreover, impracticable for a small number of police sought to be overwhelmed by a crowd to make a large number of arrests. It is indeed all the more difficult when, as in the present case, any attempt at arrest is followed by violent efforts of surrounding rioters to rescue the person being arrested.
>
> … If this plea were acceded to, it would reinforce that feeling which may undoubtedly exist that if an offender is but one of a number he is unlikely to be picked on, and even if he is so picked upon, can escape proper punishment because others were not arrested at the same time. Those who choose to take part in such unlawful occasions must do so at their own peril."'

As regards '*Wilful Damage by Rioters*', see *Solomon Keto & 6 others v R* (Unrep. Criminal Appeal Case No. 9 of 1982; Daly CJ).

See also: *R v Robert Mani* (Unrep. Criminal Appeal Case No. 29 of 1997; Palmer J; at page 3); *R v Tremarco* (1979) 1 CrAppR(S) 286 & *R v Strutt* (1993) 14 CrAppR(S) 56.

[20.2] Prosecution Of A Common Purpose

[20.2.1] Statutory Provisions

Section 22 of the *Penal Code* (Ch. 26) states:

> 'When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'

See also: section 3 of that *Code*.

[20.2.2] Elements

In *R v Victor Tadakusu* (Unrep. Criminal Case No. 239 of 1999) Palmer J stated at pages 2 – 3:

> 'The crucial elements in section 22 are:
>
> (1) a common intention,
>
> (2) to prosecute an unlawful purpose,
>
> (3) an offence is committed,
>
> (4) it is a probable consequence arising from the prosecution of such purpose.'

[20.2.3] Common Purpose

In *R v Peter Fitali & others* (Unrep. Criminal Case No. 39 of 1992) Muria CJ stated at page 8:

> '[T]he existence of a joint enterprise must be first established. Then it must be proved that the accused were all parties to that joint enterprise and that the acts of the accused were done in furtherance of that joint enterprise or common purpose.'

In *R v Ben Tungale & others* (Unrep. Criminal Case No. 12 of 1997) Lungole – Awich J stated at pages 17 – 18:

> 'The law of joint liability is that when more than one persons embark on a joint enterprise, each is liable for the acts of the others, done in pursuance of that joint enterprise and that includes liability for unusual consequences if they arise from the execution of the joint enterprise. Each one is, however, not liable if one of them acts beyond what was expressly or tacitly agreed as part of the joint enterprise; he is not liable for the consequences of unagreed and therefore unauthorised act of the others. That rule was firmly established in the English case of *Anderson and Morris* [1966] 50 CrAppR 216, [1966] 2 QB 110, confirmed in the case of *John David Ward* [1987] 85 CrAppR 71.'

In *R v Powell & Daniels; R v English* [1998] 1 CrAppR 261 Lord Hutton, with whom their Lordships Goff of Chieveley, Lord Jauncey of Tullichettle and Lord Steyn concurred, stated at pages 274 – 287:

> 'In *Anderson and Morris* (1966) 50 CrAppR 216, [1966] 2 QB 110 the primary party (Anderson) killed the victim with a knife. The defence of the secondary party (Morris) was that even though he may have taken part in a joint attack with Anderson to beat up the victim, he did not know that Anderson was armed with a knife. In his summing – up the trial judge told the jury they could convict Morris of manslaughter even though he had no idea that Anderson had armed himself with a knife. The Court of Appeal held that this was a misdirection in respect of Morris and quashed his conviction for manslaughter.
>
> In delivering the judgment of the Court of Appeal Lord Parker CJ accepted, at p. 221 and p. 118, the principle formulated by Mr Geoffrey Lane QC (as he then was) on behalf of Morris:
>
> "*where two persons embark on a joint enterprise, each is liable for the acts done in pursuance of that joint enterprise, and that includes liability for unusual consequences if they arise from the execution of the agreed joint enterprise but (and this is the crux of the matter) that, if one of the adventurers goes beyond what had been tacitly agreed as part of the common enterprise, his co – adventurer is not liable for the consequences of that unauthorised act. Finally, he says it is for the jury in every case to decide whether what was done was part of the joint enterprise, or went beyond it and was in fact an act unauthorised by that joint enterprise*."
>
> […]
>
> Later at p. 223 and p. 120B I consider that Lord Parker applied the test of foresight when he stated:

> "*It seems to this Court that to say that adventurers are guilty of manslaughter when one of them had departed completely from the concerted action of common design and has suddenly formed an intent to kill and has used a weapon and acted in a way which no party to that common design could suspect is something which would revolt the conscience of people today*."
>
> […]
>
> In this judgment I have cited two passages from the judgment of Lord Parker in Anderson and Morris (1966) 50 CrAppR 216, [1966] 2 QB 110. One passage commences at p. 221 and p. 118F, the second passage commences at p. 223 and p. 120B. Trial judges have frequently based their directions to the jury in respect of the liability of a secondary part for an action carried out in a joint venture on the first passage. There is clearly no error in doing so. However in many cases there would be no difference in result between applying the test stated in that passage and the test of foresight, and if there would be a difference the test of foresight is the proper one to apply. I consider that the test of foresight is a simpler and more practicable test for a jury to apply than the test of whether the act causing the death goes beyond what had been tacitly agreed as part of the joint enterprise. Therefore, in cases where an issue arises as to whether an action was within the scope of the joint venture, I would suggest that it might be preferable for a trial judge in charging a jury to base his direction on the test of foresight rather than on the test set out in the first passage in *Anderson and Morris.* But in a case where, although the secondary party may have foreseen grievous bodily harm, he may not have foreseen the use of the weapon employed by the primary party or the manner in which the primary party acted, the trial judge should qualify the test of foresight stated in *Hyde* (1991) 92 CrAppR 131, [1991] 1 QB 134 in the manner stated by Lord Parker in the second passage in *Anderson and Morris.*' (emphasis added)

See also: *Foster & others v R* (Unrep. Criminal Appeal Case No. 8 of 1994; Court of Appeal); *R v Gilmour* [2000] CrAppR 407; *R v Pridmore* (1913) 8 CrAppR 198 at pages 202; *R v Reid* (1976) 62 CrAppR 109; *R v Grant & Gilbert* (1954) 38 CrAppR 107; *R v Becerra & Cooper* (1976) 62 CrAppR 212; *Chan Wing – Sui & others v R* (1985) 80 CrAppR 117; [1980] AC 168; *R v Barr & others* (1989) 88 CrAppR 362 & *R v Slock* (1989) 88 CrAppR 252.

[20.2.4] Summary

Section 22 of the *Penal Code* (Ch. 26) has no application in the circumstances where (A) and (B) form a common intention to commit an offence and in fact do nothing further except commit that proposed offence. For example, if (A) and (B) decide to commit the offence of '*Robbery*' then section 21 of the *Penal Code* (Ch. 26) applies and there is no need to consider section 22, as (A) and (B) are equally culpable.

However, if during the course of the robbery (A) kills a teller, the question to be decided is whether (B) is also culpable for that offence. In this case section 22 is applied to decide this because the unlawful killing now becomes an additional offence to that originally intended. The important consideration would be whether the resorting to actual violence was a probable consequence of the original intended offence of committing the '*Robbery*' on the bank.

Therefore, if the prosecution is relying on section 22, co – defendants may be charged conjointly with different offences because that section does not deem that co – defendants are always equally liable.

The offence of '*Robbery*' is examined commencing on page **602**.

[20.3] Withdrawal

In *R v Rook* [1993] 2 AllER 955; (1993) 97 CrAppR 327 [[1993] 1 WLR 1805] Lloyd LJ, delivering the judgment of the Court of Appeal, stated at pages 961 – 962 and 333 respectively:

> 'In *Whitehouse* [1941] 1 WWR 112, 115, Sloan JA said:
>
> "Can it be said on the facts of this case that a mere change of mental intention and a quitting of the scene of the crime just immediately prior to the striking of the fatal blow will absolve those who participate in the commission of the crime by overt acts up to that moment from all the consequences of its accomplishment by the one who strikes in ignorance of his companion's change of heart? I think not. After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view, in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. I would not attempt to define too closely what must be done in criminal matters involving participation in a common unlawful purpose to break the chain of causation and responsibility. That must depend upon the circumstances of each case but it seems to me that one essential element ought to be established in a case of this kind: *Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate themselves from the contemplated crime to those who desire to continue in it. What is 'timely communication' must be determined by the facts of each case, but where practicable and reasonable it ought to be such communication, verbal or otherwise, that will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw.* The unlawful purpose of him who continues alone is then his own and not one in common with those who are no longer parties to it nor liable to its full and final consequences."
>
> In *Becerra* (1976) 62 CrAppR 212 the Court approved that passage as a correct statement of the law. The facts in Becerra were that the victim was killed in the course of a burglary. The appellant had provided the knife shortly before the murder. The court held that the appellant's sudden departure from the scene of the crime with the words "Come on let's go" was an insufficient communication of withdrawal. So the appellant's conviction as a secondary party to the murder was upheld. In *Whitefield* (1984) 79 CrAppR 36, 39, 40, Dunn LJ stated the law as follows:
>
> "If a person has counselled another to commit a crime, he may escape liability by withdrawal before the crime is committed, but it is not sufficient that he should merely repent or change his mind. If his participation is confined to advice or encouragement, he must at least communicate his change of mind to the other, and the communication must be such as will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the aid and assistance of those who withdraw."' (emphasis added)

See also: *R v Perman* [1996] 1 CrAppR 24.

[20.4] Accessories After The Fact

[20.4.1] Offence

Section 387 of the *Penal Code* (Ch. 26) states:

> 'Any person who becomes an accessory after the fact to a felony is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for three years.'

See also: section 3 of that *Code*.

[20.4.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was an accessory after the fact to a felony to wit **[**Specify the felony**]** committed by **[**Specify the name of this person**]** at **[**Specify the place**]** on **[**Specify the date**]**.'

[20.4.3] Elements

A. Defendant

B. Place

C. Date

D. Accessory After The Fact

E. Felony

F. Principal Offence

[20.4.4] Definition

Section 386 of the *Penal Code* (Ch. 26) states:

> 'A person who *receives or assists* another who is, to his knowledge, guilty of a *felony in order to enable him to escape punishment*, is said to become an *accessory after the fact* to the felony.
>
> A person does not become an accessory after the fact of an offence of which the person's spouse is guilty by receiving or assisting the spouse in order to enable the spouse to escape punishment; or by receiving or assisting in the spouse's presence and by the spouse's authority another person who is guilty of an offence in the commission of which the spouse has taken part in order to enable that other person to escape punishment.' (emphasis added)

The term '*Felony*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with imprisonment for three years or more.'

[20.4.5] Escape Punishment

In *Sykes v Director of Public Prosecutions* (1961) 45 CrAppR 230; [1961] 3 WLR 371 [[1962] AC 528] Lord Denning commented at pages 247 & 382 respectively:

> '*[I]t has been said that, the assistance must be given to the felon personally, in order to prevent or hinder him from being apprehended or tried or suffering punishment* […]: so that if the assistance was not given the felon personally, but only indirectly by persuading witnesses not to give assistance against him […], or if the facts of assistance were done, not to hinder the arrest of the felon, but with another motive, such as to avoid arrest himself […] or *to make money for himself without regard to what happened to the felon* […], he would not be guilty as an accessory after the fact.' (emphasis added)

As regards the term, 'or to make money for himself without regard to what happened to the felon', see *R v Andrews & Craig* (1962) 47 CrAppR 32.

In *The State v Roy Nana* [1986] PNGLR 83 the Court held:

> To be an accessory after the fact a defendant must do some act in order to enable the principal offender to escape detection and punishment.

At page 87 Mc Dermott AJ, sitting alone, stated:

> 'What the accused were doing in this case was going around trying to find buyers for the stolen goods. The could not be found guilty of being an accessory after the fact, if this activity was for their own gain and unrelated to giving assistance to the principal to avoid apprehension. There has to be such connection before one can be considered an accessory.'

In *R v Winston* [1995] 2 QdR 204 the Court of Appeal held:

> The authorities show that under section 10 some positive act has to be found in an aspect of the behaviour of the person charged directed towards the principal offender before it can be said that he/she has been assisted or received. [at page 207]
>
> To 'receive' implies an act of acceptance of the offender into an area or location which the accessory controls or over which he/she exercises some influence and it will involve some measure of positive support for the principal. It can be expected that it will be included within the scope of assisting, which is a more embracing term. Viewed in this way receiving will constitute a particular form of assistance and a whole range of acts of assisting will not involve any aspect of receiving. [at page 208]

In *R v Barlow* (1962) 79 WN (NSW) 756 the Court held:

> The fact that a person accepts a lift in a car at a time when he realises that the driver has earlier stolen it does not, of itself, make him an accessory after the fact to the stealing of the car; it is necessary to show that he was intending to assist or was in fact assisting the driver to escape punishment.

See also: *R v Jones* (1948) 33 CrAppR 33; *R v Helley* (1963) 47 CrAppR 13; *R v Levy* [1911 – 13] AllER Rep 222; [1912] 1 KB 158; (1912) 7 CrAppR 61; *R v Angie – Ogun* [1969 – 70] P&NGLR 36 & *The State v Amoko – Amoko* [1981] PNGLR 373 at page 385.

[20.4.6] Principal Offence

In *R v Tevendale* [1955] VLR 95 the Court held:

> It is necessary before a person can be convicted of being an accessory after the fact that the Court be satisfied that he/she did know that the principal offence had been committed by the principal offender.

See also: *R v Middap* (1992) 63 ACrimR 484 & *R v Carter* [1990] 2 QdR 371.

In *Mahadeo v R* (1936) 2 AllER 813 the Privy Council held:

> An accessory is entitled to:
>
> - insist on the proof of the commission of the offence by the principal offender; and
> - challenge the evidence of it even if the principal offender had pleaded guilty.

The conviction of the principal offender can be proved by tendering a certificate under section 125 of the *Criminal Procedure Code* (Ch. 7).

In *R v Carter & Savage, Ex parte Attorney – General* [1990] 2 QdR 371 the Court of Appeal held:

> Upon the trial of an accessory after the fact, proof of the conviction of the principal offender was admissible and constituted prima facie evidence that the principal offender did the acts and possessed the state of mind necessary to constitute the principal offence; and
>
> A confession made by the principal offender was not sufficient proof for that purpose.

See also: *R v Dawson* [1961] VR 773.

In *R v Anthony* (1965) 49 CrAppR 104 Lord Parker CJ, delivering the judgment of the Court, stated at page 107:

> 'In the opinion of this Court, there is certainly no principal of law that a man cannot be found guilty of being an accessory unless the principal felon is brought to book and convicted. What has to be proved is the felony […].'

An accessory can *not* convicted if the principal offender has been acquitted, see *Hui Chi – Ming v R* [1992] 1 AC 34; [1991] 3 WLR 495; [1991] 3 AllER 897; (1992) 94 CrAppR 236; [1972] CrimLR 446 and therefore, the guilt of the principal offender should be determined before a plea of guilty is taken from an accessory, see *R v Rowley* (1948) 32 CrAppR 147; [1948] 1 AllER 570.

The law relating to '*Proving The Criminal Convictions Of Witnesses*' is examined commencing on page **305**.

[20.4.7] Sentencing

Section 387 of the *Penal Code* (Ch. 26) states:

> 'Any person who becomes an accessory after the fact to a felony is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for three years.'

Refer to the section which examines '*Sentencing – Co-defendants*' commencing on page **961**.

[20.5] Accomplices

An '*accomplice*' is a person who can be prosecuted:

[i] for actually committing an offence;

[ii] for being a '*party*' to an offence within the meaning of section 21 of the *Penal Code* (Ch. 26); or

[iii] for being an '*Accessory After The Fact*' to an offence within the meaning of section 387 of the *Penal Code* (Ch. 26).

The law relating to '*Accomplices Giving Evidence*' is examined commencing on page **298**.

[20.6] Conspiracy

Section 383 of the *Penal Code* (Ch. 26) states:

> 'Any person who conspires with another to commit any felony, or to do any act in any part of the world which if done in Solomon Islands would be a felony, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a felony and shall be liable, if no other punishment is provided, to imprisonment for seven years, or, if the punishment to which a person convicted of the felony in question is liable to less than imprisonment for seven years, then to such lesser punishment.'

Section 384 of the *Penal Code* (Ch. 26) states:

> 'Any person who in Solomon Islands conspires with another to commit a misdemeanour, or to any act in any part of the world which if done in Solomon Islands would be a misdemeanour, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a misdemeanour.'

Section 385 of the *Penal Code* (Ch. 26) states:

> 'Any person who conspires with another to effect any of the purposes following, that is to say
>
> (a) to effect any unlawful purpose; or
>
> (b) to effect any lawful purpose by any unlawful means, is guilty of a misdemeanour.'

The crime of conspiracy requires two or more person to commit an unlawful act with the intention of carrying it out. It is the intention to carry out the crime that constitutes the necessary *mens rea*, ie., '*intention*' for the offence, see *Yip Chui – cheung v R* [1994] 3 WLR 514; [1995] 1 AC 111; (1994) 99 CrAppR 406.

In *R v West, Northcott, Weitzman & White* (1948) 32 CrAppR 152 [[1948] 1 AllER 718; [1948] 1 KB 709] Humphrey J, delivering the judgment of the Court, stated at page 160:

> 'The definition of conspiracy to be found in the speech of Lord Bampton in the House of Lords in the case of QUINN v LEATHEM [1901] AC 495, at p.528, is as follows: "A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person", and His Lordship continued by quoting with approval the language of Willes J in MULCAHY (1868) LR 3 HL 306, at p.317, in delivering the unanimous opinion of himself and four other Judges whose opinion had been asked for by the House of Lords, "*A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means*."' (emphasis added)

In *R v Simmonds & others* (1967) 51 CrAppR 316 [[1967] 3 WLR 367; [1967] 2 AllER 399; [1967] 1 QB 685] Fenton Atkinson J, delivering the judgment of the Court of Appeal, stated at page 332:

> '[I]f two men agree on a particular day to embark on a course of criminal conduct over a period of months, the offence of conspiracy is committed at the moment of agreement. But they remain conspirators and their conspiracy continues until either the criminal purpose has been achieved or their agreement has been brought to an end. The offence of conspiracy has, clearly over the centuries, been committed by being a member of what in the old books is referred to as a "confederacy" – that is to say, being one of two or more persons acting or planning to act in concert under some agreement (be it express or implied) in pursuit of a criminal design. Furthermore, it is well established law that if A and B conspire together to carry on, for example, a course of fraudulent trading, C may join in (or in the older phraseology "adhere to") the conspiracy at a later date and then A may drop out and be replaced by D. But it all remains a single conspiracy as long as all of them are for the period of their participation acting in combination to achieve the same criminal objective.'

In *Churchill v Walton* (1967) 51 CrAppR 212 [[1967] 2 WLR 682; [1967] 2 AC 224; [1967] 1 AllER 497] Viscount Dilhorne, with whom their Lordships concurred, held at page 232:

> '[I] would say that mens rea is only an essential ingredient in conspiracy insofar as there must be an intention to be a party to an agreement to do an unlawful act; that knowledge of the law on the part of the accused is immaterial and that knowledge of the facts is only material in so far as such knowledge throws a light on what was agreed.
>
> In cases of this kind, it is desirable to avoid the use of the phrase "mens rea", which is capable of different meanings, and to concentrate on the terms or effect of the agreement made by the alleged conspirators. The question is: "What did they agree to do?" If what they agreed to do was, on the facts known to them, an unlawful act, they are guilty of conspiracy and cannot excuse themselves by saying that, owing to their ignorance of the law, they did not realise that such an act was a crime.'

The law relating to '*Ignorance Of The Law*' is examined on page **430**.

Conversations between conspirators may be used as evidence against them, see *Archbold 'Criminal Pleading, Evidence & Practice'* 2002, at page 2680.

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See also: *R v Devenport & Pirano* [1996] 1 CrAppR 221; *R v Phillips* (1988) 86 CrAppR 18; *R v Donat* (1986) 82 CrAppR 173; *R v Ayres* [1984] 2 WLR 257; [1984] AC 447; [1984] 1 AllER 617; [1984] CrimLR 252; (1984) 78 CrAppR 232; *Attorney – General's Reference No. 1 of 1983* (1983) 77 CrAppR 9; *R v Longman & Cribben* (1981) 72 CrAppR 121; [1981] CrimLR 38; *R v Thomas & Ferguson* [1979] 1 AllER 577; (1978) 68 CrAppR 275; *R v Nock & Alsford* (1978) 67 CrAppR 116; *R v Coughlan & Young* (1976) 63 CrAppR 33; *R v Green* [1976] 2 WLR 57; [1975] 3 AllER 1011; [1976] QB 985; (1976) 62 CrAppR 74; *Scott v Metropolitan Police Commissioner* [1975] AC 819; [1974] 3 AllER 1032; [1974] 3 WLR 741; (1975) 60 CrAppR 124; [1975] CrimLR 94; *Withers & others v Director of Public Prosecutions* [1974] 3 WLR 751; [1974] 3 AllER 984; [1975] AC 842; (1975) 60 CrAppR 85; [1975] CrimLR 95; *Director of Public Prosecutions v Shannon* [1974] 3 WLR 717; [1975] AC 717; [1974] 2 AllER 1009; (1974) 59 CrAppR 250; [1975] CrimLR 703; *R v O'Brien* (1974) 59 CrAppR 222; *R v Jones & others* (1974) 59 CrAppR 120; *Kamara & others v Director of Public Prosecutions* (1973) 57 CrAppR 880, [1973] 3 WLR 198; [1973] AllER 1242; [1974] AC 104; [1974] CrimLR 39; *R v Greenfield & others* (1973) 57 CrAppR 600; *R v Shannon & others* (1973) 57 CrAppR 13; *R v Ardalann & others* (1972) 56 CrAppR 320; *R v Cox* (1968) 52 CrAppR 106; [1968] 1 AllER 410; [1968] 1 WLR 88; *R v Thomson* [1966] 1 WLR 405; [1966] 1 AllER 505; (1966) 50 CrAppR 1; *R v Froggett* (1965) 49 CrAppR 334; *R v Thesiger* (1965) 49 CrAppR 317; *R v Fountain* (1965) 49 CrAppR 315; *R v Griffiths & others* (1965) 49 CrAppR 279; [1966] 1 QB 589; [1965] 2 AllER 448; [1965] WLR 405; *R v Blamires Transport Services Ltd & Blamire* (1963) 47 CrAppR 272; *R v Dawson & Wenlock* (1960) 44 CrAppR 87; [1960] 1 AllER 558; [1960] 1 WLR 163; *R v Davey & Davey* [1960] 1 WLR 1287; [1960] 3 AllER 533; (1960) 44 CrAppR 11; *R v Hammersley, Heath & Bellson* (1958) 42 CrAppR 207; *Board of Trade v Owen & Seth – Smith* (1957) 41 CrAppR 11; [1957] 1 AllER 411; [1957] 2 WLR 351; [1957] AC 602; *R v Owens & others* (1956) 40 CrAppR 103; *R v Cooper & Crompton* [1947] 2 AllER 701; (1947) 32 CrAppR 102; *R v Meyrick & Ribuffi* (1929) 21 CrAppR 94; *R v Pepper & Platt* (1921) 16 CrAppR 12; *R v Higgins* (1919) 14 CrAppR 28 & *R v Rogerson, Nowytarger & Paltos* (1992) 174 CLR 268; (1992) 107 ALR 225; (1992) 66 ALJR 500.

CRIMINAL RESPONSIBILITY

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CRIMINAL RESPONSIBILITY

[21.0] Introduction

In *R v Wong Chin Kwee & others* [1983] SILR 78 Daly CJ held at pages 80 – 81:

> 'The starting point in Solomon Islands in considering questions of general criminal liability must be our own Penal Code ("the Code"). The time has come when we must grapple with the terms of the Code and not rely upon common law doctrines which may have been replaced by it.
>
> Part IV of the Code deals with General Rules as to Criminal Responsibility. In the codes of Queensland and Western Australia where similar provisions occur, express provision has been made (section 36 in each code) to apply these General Rules "to all persons charged with an offence against the Statute Law". We, in common with Tasmania, have no such provision. However in view of the wide terms of the provisions in Part IV and the fact that the word "offence" (earlier defined as "an act, attempt or omission punishable by law": see section 4) is used in a number of sections, *the only reasonable interpretation is that Part IV applies to all offences against law*. Again there is no provision making the Penal Code exclusive such as in contained in section 2 of the Criminal Code Act 1899 of Queensland. However as this Court held in the preliminary Ruling in R v Ngena [… [1983] SILR 1], the Penal Code is a comprehensive statute of Solomon Islands and Schedule 3 of the Constitution provides that received law shall, in the case of received statute be "subject" to a Solomon Islands statute (Para. 1) and, in the case of principles and rules of common law and equity, shall apply –
>
> "Save in so far as
>
> (c) they are inconsistent with … any Act of Parliament; or
>
> (d) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time ….." (Para. 2(1)).
>
> *In my judgment where there is a comprehensive Code of Solomon Islands dealing with matters such as general rules as to criminal responsibility, even if there is no direct inconsistency, it is incumbent on the Court to apply that Code instead of relying on the common law rules on the basis that the common law rules are "inapplicable or inappropriate" […] in the circumstances of Solomon Islands.* Adapting what this Court said in Ngena […], it is the intention of the Constitution that the common law rules should "wither away" when the Solomon Islands legislature has legislated for Solomon Islands in relation to every subject. Parliament so legislated comprehensively in relation to the criminal law when it enacted the Penal Code. *Thus I also find that the Penal Code is exclusive in relation to matters dealt with therein, including general rules as to criminal responsibility*.' (emphasis added)

Section 3 of the *Penal Code* (Ch. 26) states:

> 'This Code *shall* be interpreted in accordance with the Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

CRIMINAL RESPONSIBILITY

All defences need only be *fairly* raised by the defence, except for the defence of '*Insanity*' which must be raised on the '*balance of probabilities*'. Once raised all defences *must* be negatived '*beyond reasonable doubt*' by the prosecution.

The law relating to '*Proof Of Issues*' is examined commencing on page **68**.

[21.1] Ignorance Of The Law

Section 7 of the *Penal Code* (Ch. 26) states:

> 'Ignorance of the law does *not* afford any excuse for any act or omission which would otherwise constitute an offence *unless knowledge of the law by the offender is expressly declared to be an element of the offence*.' (emphasis added)

See: *Attorney – General's Reference No. 1 of 1995* [1996] 4 AllER 21 & *Evans v Bartlam* [1937] AC 473; [1937] 2 AllER 654.

[21.2] Honest Claim Of Right

[21.2.1] Statutory Provision

Section 8 of the *Penal Code* (Ch. 26) states:

> 'A person is *not* criminally responsible in respect of *an offence relating to property*, if the act done or omitted to be done by him with respect to the property was done in the exercise of an *honest claim of right* and *without intention to defraud*.' (emphasis added)

[21.2.2] Elements

The elements of the defence of '*Honest Claim Of Right*' are as follows:

- offence relating to property;
- honest claim of right; and
- without intention to defraud.

[21.2.3] Offences Relating To Property

The offences of *'Forgery'* and *'Uttering'* are *'offences relating to property'*, see *R v Hobart Magalu* [1974] PNGLR 188. These offences are examined commencing on pages **548** and **558** respectively.

[21.2.4] Honest Claim Of Right & Without Intention To Defraud

In *Toritelia v R* [1987] SILR 4 Kapi JA stated at pages 31 - 33:

> 'What is an honest claim of right? Section 8 of the Penal Code is similar to the wording of s. 22 of the Queensland Criminal Code. Section 23 of Papua New Guinea Code is in exact terms as the Queensland provision. I would adopt the decisions from these jurisdictions on the question of the meaning and application of this defence. In particular, I adopt the words of Gibbs, J as he then was in the case of *The Queen v Pollard* [1962] QWN 13,
>
> "*It is well settled that a claim of right sufficient to relieve a person of criminal responsibility need only be honest and need not be reasonable* (*Clerkson v Aspinall; Ex parte Aspinall* [1950] StRQd 79, at 89); 'the fact that it is wrongheaded does not matter': *R v Gilson and Cohen* [1944] 29 CrAppR 174 at 180). In *Rex v Bernard* [1938] 2 KB 264 at 270 the Court of Criminal Appeal said that a person has such a claim of right 'if he is honestly asserting what he believes to be a lawful claim, even though it may be unfounded in law or in fact.
>
> […]

> […] I have already dealt with the element of honest claim of right. These two elements must go together and one cannot go without the other. A person cannot successfully raise the defence by saying that he had an intention to return the property if he used the property without the consent of the owner or without an honest claim of right. Similarly, a person who has an honest claim of right cannot be successful in raising the defence under s.8 unless he has acted without intention to defraud. Compare *R v Hobart Magalu* [1974] PNGLR 188 at 200. The legislature has clearly set out these matters.
>
> *The words "intent to defraud" within the context of s.8 of the Penal Code, means that not only must a person deal with property based on an honest claim of right, but he must show that he had no intention to deprive the owner of the property. This is a question of fact*. The manner in which the property is dealt with is relevant. A person who intends to restore or return property and has ability to do so may successfully raise the element. But this may not always be the case. It may be shown that such a person may have failed to fulfil the intention between the date of commission of the offence and trial. This conduct may be contrary to any intention to return or pay back property. On the other hand, a person who has no ability to pay may collect enough money from relatives in the village and repay the money as he intended. As I have indicated, it is a question of fact and each case will be decided on its own facts.' (emphasis added)

A person has a claim of right if he/she is honestly asserting what he/she believes to be a lawful claim, even though it may be unfounded in law or in fact, see *R v Bernhard* (1938) 26 CrAppR 137 [[1938] 2 AllER 140; [1938] 2 KB 264] at page 145.

If a person takes money he/she knew that he/she had no right to take, the fact that he/she may have had a hope or expectation in the future of repaying that money is *not* a defence and only capable of going to mitigation of sentence, see *Toritelia v R* (*supra*) & *R v Williams* (1953) 27 CrAppR 71; [1953] 1 AllER 1068; [1953] 1 QB 660.

In *R v Pollard* [1962] QWN 13 the Court held that where the evidence was that the defendant knew that the owner of the motor vehicle had consented to him/her using it previously, but believed that the owner would:

- not have any objection to him/her using it; and
- have given consent if asked,

the question whether the defendant took the motor vehicle in the exercise of an honest claim of right should be left to the jury, ie., a question of fact.

The offence of '*Taking Vehicles Without Authority*' is examined commencing on page **734**.

In *R v Hobart Magalu* [1974] PNGLR 188 Frost ACJ, sitting alone, held at page 199:

> 'It is clear that a claim of right sufficient to relieve a person of criminal responsibility need only be honest and reasonable and need not be reasonable. *R v Pollard* ([1962] QWN 13) per Gibbs J and *Tiden – Tokavanamur – Topaparik* ([1967 – 68] P&NGLR 231.
>
> In the former case it was held that, "*an accused person acts in the exercise of an honest claim of right, if he honestly believes himself to be entitled to do what he is doing. A belief that he may acquire a right in the future is not in itself enough*", at page 29.

> But the section does not excuse an offender whose act was done in the mistaken belief that it was not unlawful which is mistake of law and no defence to any criminal prosecution.' (emphasis added)

See also: *R v Cockburn* (1968) 52 CrAppR 134; [1968] 1 WLR 281; [1968] 1 AllER 466; *R v Clayton* (1920) 15 CrAppR 45; *R v Gilson & Cohen* (1944) 29 CrAppR 174 & *Sebulon Wat v Peter Kari (No. 2)* [1975] PNGLR 339.

[21.3] Intention Or Accident

[21.3.1] Statutory Provision

Section 9 of the *Penal Code* (Ch. 26) states:

> 'Subject to the express provisions of this Code relating to *negligent acts and omissions*, a person is *not* criminally responsible for *an act or omission which occurs independently of the exercise of his will*, or for *an event which occurs by accident*.
>
> *Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted*, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.
>
> Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility.' (emphasis added)

[21.3.2] Negligent Acts Or Omissions

Sections 237 to 243 are the relevant sections of the *Penal Code* (Ch. 26) relating to '*negligent acts and omissions*'.

In *Java Johnson Beraro v The State* [1988 – 89] PNGLR 562 the Supreme Court held:

> The defence of accident has *no* application if a defendant is found to be criminally negligent.

The onus is on the prosecution to prove '*beyond reasonable doubt*' in such circumstances that the defendant was criminally negligent, see *Beraro v R & Griffiths v R* (1994) 69 ALJR 77 at page 80.

[21.3.3] Involuntary Acts

Section 9 of the *Penal Code* (Ch. 26) states (in part):

> '[A] person is *not* criminally responsible for *an act or omission which occurs independently of the exercise of his will*.' (emphasis added)

An act or omission that occurs involuntary and unintentionally, and therefore, independently of the exercise of the will of a defendant, is an act or omission done in a state of '*automatism*'. It appears to be roughly equivalent to what a layman might call a 'blackout'. Such a state of mind can arise from:

- *concussion*, see *Low* (1992) 57 ACrimR 8; *Wogandt* (1988) 33 ACrimR 31 & *Cooper v McKenna, Ex parte Cooper* [1960] QdR 406;
- *sleep disorders*, see *R v Burgess* [1991] 2 QB 92; [1991] 2 AllER 769; (1991) 93 CrAppR 41; *Jiminez v R* (1992) 173 CLR 572; (1992) 106 ALR 162; (1992) 53 ACrimR 56 & *Kroon* (1990) 52 ACrimR 15;

- *acute stress*, see *R v Falconer* (1990) 171 CLR 30; (1990) 96 ALR 545; (1990) 50 ACrimR 244; *R v Radford* (1985) 42 SASR 266; (1985) 20 ACrimR 15 & *Tsigos* [1964] NSWR 1607;

- *some forms of epilepsy*, see *Bratty v Attorney – General for Northern Ireland* [1963] AC 386; [1961] 3 WLR 965; [1961] 3 AllER 523; [1962] 46 CrAppR 1;*R v Sullivan* [1984] AC 156; [1983] 2 AllER 673; *R v Sullivan* (1983) 77 CrAppR 176; *Youseff* (1990) 50 ACrimR 1 & *Cottle* [1958] NZLR 999; and

- *some forms of neurological and physical ailments*, see *R v Charlson* [1955] 1 AllER 859; (1955) 39 CrAppR 37 (cerebral tumour); *Police v Bannin* [1991] 2 NZLR 237; [1991] CRNZ 55 (Klein – Levin syndrome) & *Hall* (1988) 36 ACrimR 368 (swelling of the brain).

Therefore, such persons are *not* necessarily insane.

In *Broome v Perkins* (1987) 85 CrAppR 321 Glidewell LJ, delivering the judgment of the Court, stated at pages 328 – 320:

> 'The House of Lords held [in *Bratty v Attorney – General for Northern Ireland* [1963] AC 386; (1961) 46 CrAppR 1] that there were in law two types of automatism, namely insane and non – insane automatism. The judge was only under a duty to leave the issue of automatism of either type to the jury where the defence had laid a proper foundation for so doing by adducing positive evidence in respect of it, which was a question of law for the judge to decide; and that where, as in that case, the only cause alleged for the "unconscious" act was a defect of reason from disease of mind, and that cause was rejected by the jury, there could be no room for the alternative defence of automatism, either insane or non – insane.
>
> In his speech, Lord Denning said, at pp. 16 and 409 respectively:
>
> "The requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case. *No act is punishable if it is done involuntarily: and an involuntary act in this context – some people nowadays speak of it as 'automatism' – means an act which is done by the muscles without any control by the mind, such as a spasm, a reflex action or convulsion; or an act done by a person who is not conscious of what he is doing, such as an act whilst suffering from concussion or whilst sleep – walking.* The point was well put by Stephen J in 1889: 'Can anyone doubt that a man who, though he might be perfectly sane, committed what would otherwise be a crime in a state of somnambulism, would be entitled to be acquitted? And why is this? Simply because he would not know what he was doing,' see *Tolson* (1889) 23 QBD 168, 187. *The term 'involuntary act' is, however, capable of wider connotations: and to prevent confusion it is to be observed that in the criminal law an act is not to be regarded as an involuntary act simply because the doer does not remember it.* When a man is charged with dangerous driving, it is no defence to him to say 'I don't know what happened. I cannot remember a thing,' see *Hill v Baxter* (1958) 42 CrAppR 51; [1958] 1 QB 277. Loss of memory afterwards is *never* a defence in itself, so long as he was conscious at the time, see *Russell v H.M. Advocate* [1946] SC(J) 37; *Podola* (1959) 43 CrAppR 220; [1960] 1 QB 325. *Nor is an act to be regarded as an involuntary act simply because the doer could not control his impulse to do it*. When a man is charged with murder, and it appears that he knew what he was doing, but he could not resist it, then his assertion "I couldn't help myself' is no defence in itself, see *Attorney – General of South Australia v Brown* (1960) 44 CrAppR 100; [1960] AC 432: though it may go towards a defence of diminished responsibility, in places where that defence is available, see *Bryne* (1960) 44 CrAppR 246; [1960] 2 QB 396: but it does not render his act involuntary so as to entitle him to an unqualified acquittal."

Then on pp. 18 and 411, Lord Denning quoted with approval the direction to the jury of Barry J in the case of *Charlson* (1955) 39 CrAppR 37; [1955] 1 WLR 317, a case in which the evidence pointed to the possibility that Charlson, who had injured his son by hitting him on the head with a hammer and throwing him into a river without any apparent cause, was suffering from a cerebral tumour which would make him liable to motiveless outburst of impulsive violence over which he would have no control. The defence was automatic and Barry J directed the jury in these words (ibid):

"*If he did not know what he was doing, if his actions were purely automatic and his mind had no control over the movement of his limbs, if he was in the same position as a person in an epileptic fit then no responsibility rests upon him at all, and the proper verdict is 'Not Guilty'. On that direction the jury found him not guilty*."

Finally, Lord Denning referred to the evidence necessary to lay the foundation for a defence of automatism. He said (1961) 46 CrAppR 1, 21, [1963] AC 386, 413:

"The necessity of laying the proper foundation is on the defence: and if it is not so laid, the defence of automatism need not be left to the jury any more than the defence of drunkenness (*Kennedy v H.M. Advocate* [1944] SC(J) 171), provocation (*Gouthier* (1943) 29 CrAppR 113), or self – defence (*Lohell* (1957) 41 CrAppR 1000, [1957] 1 QB 541) need be. What then is a proper foundation? The presumption of mental capacity of which I have spoken is a provisional presumption only. It does not put the legal burden on the defence in the same way as the presumption of sanity does. It leaves the legal burden on the prosecution, but nevertheless, until it is displaced, it enables the prosecution to discharge the ultimate burden of proving that the act was voluntary. Not because the presumption is evidence itself, but because it takes the place of evidence. *In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity*. It is not sufficient for a man to say 'I had a black – out': for '*black – out*' as Stable J said in *Cooper v McKenna, ex parte Cooper* (1960) Qd LR 406, 419 '*is one of the first refuges of a guilty conscience and a popular excuse*'. The words of Devlin J in *Hill v Baxter* (1958) 42 CrAppR 51, 59, [1958] 1 QB 277, 285 should be remembered: '*I do not doubt that there are genuine cases of automatism and the like, but I do not see how the layman can safely attempt without the help of some medical or scientific evidence to distinguish the genuine from the fraudulent.*'" (emphasis added) [words in brackets added]

A psychologist with no medical qualifications should *not* be called to prove that a defendant was suffering from any specific disease or defect or abnormality of the mind, see *R v Mackenney & Pinfold* (1983) 76 CrAppR 271.

See also: *R v Wong Chin Kwee & others* [1983] SILR 78; *R v Hennessy* [1989] 2 AllER 9; [1989] 1 WLR 287; [1989] RTR 153; (1989) 89 CrAppR 10; [1988] CrimLR 356; *R v Smith (Stanley)* [1979] 3 AllER 605; (1979) 69 CrAppR 378; *R v Hatenave – Tete & Loso – Sarafu* [1965 – 66] P&NGLR 336; *The State v Hevako* [1991] PNGLR 394; *The State v Enakuan Salaiau* [1994] PNGLR 388 & *Jiminez v R* (1992) 173 CLR 572; (1992) 66 ALJR 292; (1992) ALR 162; (1992) 53 ACrimR 56.

[21.3.4] Accidents

Section 9 of the *Penal Code* (Ch. 26) states (in part):

> '[A] person is *not* criminally responsible […] for *an event which occurs by accident*.' (emphasis added)

The elements of this defence are:

- the event, ie., the consequence of the act committed or omission made by the defendant, *must not* be intended by the defendant;
- the event *must not* have been easily able to have been foreseen by the defendant; and
- an 'ordinary person' *should not* have easily foreseen the event.

In *R v Paul Rakaimua* (Unrep. Criminal Case No. 24 of 1995) Muria CJ stated at pages 7 – 9:

> 'Thus under this section [, referring to section 9 of the *Penal Code* (Ch. 26),] the accused is claiming that the landing of the spear on the deceased's neck which eventually resulted in her death was an event which occurs by accident. As to the act of throwing the spear toward the hedges, that was a deliberate act and with the intention to leave the spear at the hedges. It is counsel's contention that the striking of the deceased's neck which subsequently led to her death was an event which occurred by accident and as such no criminal responsibility should attach to it.
>
> […]
>
> The defence set out in the first paragraph of section 9 consists of two limbs. The first limb operates to relieve a person from criminal responsibility "for an act or omission which occurs independently of the exercise of his will" and secondly it operates to relieve a person from criminal responsibility "for an event which occurs by accident". In this connection the distinction is between the physical action apart from its consequences and the accidental outcome (event) of the willed act. Such a distinction was discussed in *Timbu – Kolian –v- The Queen* (1968) 119 CLR 47; *Kapronovski –v- The Queen* (1973) 133 CLR 209 and *The Queen –v- Van Den Bemb* (1993 – 1994) 179 CLR 137 which are all decisions of the High Court of Australia on provisions which are similar to the first paragraph of section 9 of our Penal Code.
>
> That the act of accused of throwing the spear to the direction of hedges where the girls including the deceased were, is beyond challenge in this case. Also that the accused's act of throwing the spear was deliberate must, on the evidence, be equally beyond challenge. The question in the light of the defence raised must therefore be whether the striking of the deceased whereby she was killed was an event which occurred by accident and not whether the death of the deceased following a deliberate act of throwing the spear was an event which occurred by accident. In this regard I would respectively prefer the remarks of Windeyer J in *Timbu –v- Kolian* (supra) which is a Papua New Guinea case where the accused threw a stick at his wife and it hit and killed their baby whom his wife was carrying in her arms. The accused was not aware that his wife was carrying in her arms their child as it was dark. He was convicted of manslaughter by the Supreme Court of the Territory of Papua New Guinea but on appeal to the High Court of Australia he was acquitted. In considering the defence of accident under s. 23 of the PNG Criminal Code, Windeyer J said at p. 69:

> "*In this case the question is not whether death after a blow intentionally delivered was an event which occurred by accident. It is whether the striking of the child where by he was killed was an event which occurred by accident. In my opinion it was, because it was not intended and it occurred as the result of the accused being both ignorant of a circumstance (the presence of the child) in which he wielded the stick, and without any foresight of the consequence of his doing so. These facts remove it from the area of mens rea and bring it within the description of an accidental event*."' (emphasis added) [words in brackets added]

In *The State v Samson Jangau of Tabele ESP* (Unrep. N463, Papua New Guinea) the facts involved a defendant who intended to strike a woman with a stick by missed and struck a child who was sitting next to her. There was nothing in between the defendant and the child that could have obscured the visibility of the defendant.

Kaputin J, sitting alone, held:

> 'Even though the act of striking was unintended, it could easily have been foreseen, under the circumstances, by the accused, and such an event could easily have been foreseen by an ordinary person. In order for the defence [of accident] to succeed the three elements must exist. […] In the instant case only the one element is present [ie., that the act of striking was unintended].' [words in brackets added]

In *R v Talu* [1963] P&NGLR 136 Smithers J, sitting alone, held:

> '*An event which occurs by accident*' is one which the person doing the act did not foresee as a possibility substantial enough to be worthy of attention in deciding whether or not to do the act and which was so unlikely to result from the act that no ordinary person similarly circumstantial could fairly have been expected to take it into account.

See also: *R v Taiters, Ex parte Attorney – General* [1997] 1 QdR 333 & *R v Kalit* [1971] PNGLR 124.

In *R v Joel Nanango* (Unrep. Criminal Case No. 43 of 1996) Palmer J stated at page 18:

> 'Having raised the defence of accident, is there evidence which supports this defence. Apart from the statement of the accused in his caution statement, he has not adduced any other evidence in support. It is one thing to raise a defence, it is another thing to adduce some evidence in support of that. […]
>
> […]
>
> Apart from saying that it was accidental, there is no evidence even in that statement as to how that stabbing may have been accidental as claimed or suggested in his defence. Having raised this defence, the accused is required to point to some evidence in support of that defence. I must point out that it is not transferring the burden of proof to the accused. What is vital is that he should point to some evidence in support, and having done so, it is for Prosecution to disprove that beyond reasonable doubt.'

[21.4] Mistake Of Fact

Section 10 of the *Penal Code* (Ch. 26) states:

> 'A person who does or omits to do an act under an *honest and reasonable, but mistaken, belief* in the existence of any state of things is *not* criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.' (emphasis added)

For this defence to apply, a person *must* commit the offence under an honest and reasonable, but mistaken, belief in the existence of any state of things that relates to the commission of the offence. An '*honest*' belief involves the application of a '*subjective*' test, see *R v Yoka Kiok* (Unrep. SC 607/70; Papua New Guinea). *Therefore, the test to be applied is whether the defendant held such an 'honest' belief*.

However, the '*belief*' *must* also be '*reasonable*'. A *'reasonable*' belief involves the application of an '*objective*' test, see *R v Yoka Kiok* (*supra*). *Therefore, the test to be applied is whether an ordinary or reasonable person in the circumstances of the defendant would have held such a 'reasonable' belief.*

The '*belief*' *must* also be '*mistaken*' and the offence *must* be committed whilst holding such a '*belief*'.

In *Anide v Denehy* [1973] PNGLR 215 Kelly J, sitting alone, stated at page 222:

> 'Where the defence of mistake is raised by the evidence it is the duty of the Court to consider whether section 24 [now section 25] applies […] and where there is some evidence of operative mistake the onus is on the prosecution to satisfy the court of its non – existence [beyond reasonable doubt].' [words in brackets added]

In *Karu Noho v Proy Vali* (Unrep. N188; Papua New Guinea) the facts of the case were:

> Sibona told the defendant that he would get the complainant's permission to use a motor vehicle. The defendant assumed that that had occurred when he arrived back. However, no such permission was sought.

Greville Smith J, sitting alone, stated:

> '[… I] am of the opinion that the defence was clearly raised that the accused honestly and reasonably believed that Sibona had got the permission of Sibona's uncle, the owner of the vehicle, for Sibona and himself to use the vehicle and that there was no evidence of any cogency to the contrary.'

Therefore, the defendant was not criminally responsible for the doing of an act, ie., the use of the motor vehicle, to any greater extent than if the real state of things had been such as he believed to exist, ie., that if permission had been obtained.

The offence of '*Taking Vehicles Without Authority*' is examined commencing on page **734**.

When comparing this section with the defence of '*Honest Claim Of Right*' as examined commencing on page **431** it should be noted that:

- this defence relates to *any* offence, *not just those relating to property*; and
- the claim of right *must* be both honest and reasonable, *and not just honest*.

See also: *R v Selwyn Sisiolo* (Unrep. Criminal Case No. 5 of 1998; Lungole – Awich J; at pages 8 – 10); *The State v Angela Colis Towavik* [1981] PNGLR 140; *R v KJ & Another* [1973] PNGLR 93 at page 101; *Director of Public Prosecutions v Morgan* [1976] AC 182; [1975] 2 AllER 347; [1975] 2 WLR 913; (1975) 61 CrAppR 136; [1975] CrimLR 717 & *B (A Minor) v Director of Public Prosecutions* [2000] 2 AC 428; [2000] 2 WLR 452; [2000] 1 AllER 833; [2000] 2 CrAppR 65; [2000] CrimLR 403.

[21.5] Insanity

[21.5.1] Presumption Of Sanity

Section 11 of the *Penal Code* (Ch. 26) states:

> 'Every person is *presumed* to be of sound mind, and to have been of sound mind at any time which comes in question, until the contrary is proved.' (emphasis added)

[21.5.2] Proof Of Insanity

Section 12 of the *Penal Code* (Ch. 26) states:

> 'Subject to the express provisions of this Code and of any other law in force a person shall not be criminally responsible for an act or omission if at the time of doing the act or making the omission he is through any disease affecting his mind incapable of understanding what he is doing, or of knowing that he ought not to do the act or make the omission:
>
> Provided that a person may be criminally responsible for an act or omission, although his mind is affected by disease, if such disease does not in fact produce upon his mind one or other of the effects above mentioned in reference to that act or omission.' (emphasis added)

In *R v Ephrem Suraihou* (Unrep. Criminal Case No. 33 of 1992) Muria ACJ stated at pages 4 – 6:

> 'The onus of proof where the defence of insanity has been raised, is on the defence. The burden of proof is on the balance of probabilities: See *R –v- Oliver Smith* (1911) 6 CrAppR 20 and *R –v- Carr – Briant* (1943) 29 CrAppR 76.
>
> The law in England and other countries of common law jurisdictions and the test to be applied have been well settled. In England the test is basically that which was stated in *R –v- Windle* (supra). In Australia the High Court did not follow *Windle's* case when considering what the test of insanity was in *Stapleton –v- R* [1952] ALR 929; 86 CLR 358. In that case the Court held that the test was whether the accused person knew his act was wrong according to the ordinary principles of reasonable men, and not whether he knew it was wrong as being contrary to law as laid down in *R –v- Windle*.
>
> In Solomon Islands the test of insanity must be found in the words as expressed in section 12 of the Penal Code […].
>
> When one reads the language used in section 12 of the Code, one sees clearly the difference between language of that provision and that of the common law. Section 12 refers to "*any disease affecting the mind*". The other difference that can be drawn is that whereas the Code, it speaks of "*capacity to understand*" and "*capacity to know*", the common law simply refers to actual knowledge.
>
> Having observed section 27 of the Western Australia Criminal Code (which is identical to section 12 of the Queensland Criminal Code) on insanity, the phrases "*capacity to understand*" and "*capacity to know*" have been used. Although the text of section 27 in the Western Australia and Queensland Criminal Codes are slightly different to our Code, the parts of our Code that I have referred to above as being distinct from that of the common law position are in a similar position as well regarding section 27 of the Western Australia and Queensland Criminal Codes and the common law.

It would be observed that section 12 of the Code treats as insane people who are to the extent that they do not have the capacity to –

(a) understand; or

(b) know that they ought not to do the act done or omitted to be done.

That is very much expressing the test of moral capacity as found by the High Court of Australia in *R –v- Porter* (1933) 55 CLR 182; *Sodeman –v- R* (1936) 55 CLR 192 and *Stapleton –v- R* (1952) 86 CLR 358.

In my judgment the appropriate test to be applied in Solomon Islands when applying section 12 of the Penal Code on the question of insanity is the test as applied by the High Court of Australia in *R –v- Porter* (supra) and *Sodeman –v- R* (supra) where Dixon said in *Porter's* case:--

"*Could this man be said to know ……. Whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make the act right or wrong? If through the disordered condition of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong. What is meant by "wrong"? What is meant by "wrong" is wrong having regard to the every day standards of reasonable people*"

and later he reiterated that opinion in *Sodeman's* case saying:--

"*In general it may be correctly said that if the disease or mental derangement so governs the faculties that it is impossible for the party accused to reason with some moderate degree of calmness in relation to the moral quality of what he is doing, he is prevented form knowing that what he is doing is wrong*."

The Accused having raised the issue of the state of his mind now carries the onus of satisfying the court that owing to a disease affecting his mind he did not have at the time of committing the offence any of the capacities mentioned in section 12 of the Penal Code. It will also be observed that even if a disease is shown to have affected his mind but he has not shown that the disease had deprived him of any of the capacities mentioned, then he has failed in satisfying the onus resting upon him.' (emphasis added)

In *R v Quick & Paddison* (1973) 57 CrAppR 722 [[1973] 3 WLR 26; [1973] 3 AllER 347; [1973] QB 910; [1973] CrimLR 434] Lawton LJ, delivering the judgment of the Court, stated at pages 734 – 735:

'Our task has been to decide what the law means now by the words "disease of the mind". In our judgment, the fundamental concept is of a malfunctioning of the mind caused by disease. A malfunctioning of the mind of transitory effect caused by the application to the body of some external factor such as violence, drugs, including anaesthetics, alcohol and hypnotic influences cannot fairly be said to be due to disease. Such malfunctioning, unlike, that caused by a defect of reason from disease of the mind, will not always relieve an accused from criminal responsibility. A self – induced incapacity will not excuse […] nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, taking alcohol against medical advice after using certain prescribed drugs, or failing to have regular meals whilst taking insulin. From time to time difficult border line cases are likely to arise. When they do, the test suggested by the New Zealand Court of Appeal in COTTLE (supra) is likely to give the correct result, viz. can this mental condition be fairly regarded as amounting to or producing a defect of reason from disease of the mind?'

In *Bratty v Attorney – General for Northern Ireland* [1963] AC 386; (1961) 46 CrAppR 1 [[1961] 3 WLR 965; [1961] 3 AllER 523] Lord Denning stated at pages 413 and 21 respectively:

> 'In order to displace the presumption of mental capacity, the defence must give sufficient evidence from which it may reasonably be inferred that the act was involuntary. The evidence of the man himself will rarely be sufficient unless it is supported by medical evidence which points to the cause of the mental incapacity.'

The evidence from a psychologist with no medical qualifications is *not* sufficient to raise the defence of '*Insanity*', see *R v Mackenney & Pinfold* (1983) 76 CrAppR 271.

See also: *Goi v The State* [1991] PNGLR 161 at pages 167 – 168; *Kutapa Keapu v The State* [1994] PNGLR 135 at pages 136 – 137 & *Pangallo* (1989) 44 ACrimR 462.

Refer also to sections 144 – 148 of the *Criminal Procedure Code* (Ch. 7).

[21.6] Intoxication

Section 13 of the *Penal Code* (Ch. 26) states:

'(1) Save as provided in this section intoxication shall not constitute a defence to any criminal charge.

(2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such an act or omission was wrong or did not know what he was doing and –

(a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or

(b) the person charged was by reason of intoxication insane, temporarily or otherwise, at the time of such act or omission.

(2) Where the defence under the preceding subsection is established, then in a case falling under paragraph (a) thereof the accused shall be discharged and in a case falling under paragraph (b) the provisions of this Code and of the Criminal Procedure Code relating to insanity shall apply.

(3) 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.

(4) For the purpose of this section "intoxication" shall be deemed to include a state produced by narcotics or drugs.'

In respect of all charges, a defendant is *not* criminally responsible if by virtue of being in a state of intoxication caused by either the consumption of alcohol *or* drugs he/she did not know that:

- the commission of the offence was wrong; *or*
- what he/she was doing when committing the offence

and

- the state of intoxication was caused without his/her consent by the malicious or negligent act of another person, such as the spiking of drinks with either alcohol or drugs. This is referred to as '*Involuntary Intoxication*'. If a defendant had the necessary intent at the time of committing the offence, it is irrelevant as how the defendant had become intoxicated, see *R v Kingston* [1995] 2 AC 355; (1994) 99 CrAppR 286;

or

- by virtue of that state of intoxication he/she was insane, temporarily or otherwise, at the time of the commission of the offence. In that regard, the defendant would need to raise a defence of '*Insanity*' which is examined commencing on page **441**.

Intoxication caused by either the consumption of alcohol or drugs *must* be taken into account for the purpose of determining whether the defendant had formed any intention, specific or otherwise, in the absence of which he/she would not be guilty of the offence.

In *R v Kennth Iro* (Unrep. Criminal Case No. 66 of 1993) Muria CJ stated at pages 2 - 3:

> 'On the question of intoxication as a defence, I agree that intoxication is available as a defence, in cases of murder whether such intoxication is self – induced or not, that is to say, all forms of intoxication should be taken into account. See R v Kauwai (1980 – 1981) SILR 108, R –v- O'Connor 29 ALR 449.
>
> […]
>
> *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*.' (emphasis added)

In *R v Warren Godfrey Motui* (Unrep. Criminal Case No. 20 of 1997) Palmer J stated at pages 1 - 9:

> 'The defence of the Accused essentially is that of intoxication. That he was too drunk and therefore did not know what he was doing or that it was wrong (section 13(2)(b) of the Penal Code).
>
> The onus of proof lies throughout with prosecution and in the case of intoxication, to prove beyond reasonable doubt that the Accused did know what he was doing or that it was wrong.
>
> […]
>
> *Having raised the defence [of 'Intoxication'] it is for Prosecution to prove beyond reasonable doubt that the Accused did know what he was doing or that it was wrong*.' (emphasis added) [words in brackets added]

In *Attorney – General for Northern Ireland v Gallagher* (1961) 45 CrAppR 316 [[1961] 3 WLR 619; [1961] 3AllER 299] the House of Lords held per Lord Tucker at pages 341 – 343:

> '[T]he case falls to be decided by the general principle of English law that, subject to very limited exceptions, drunkenness is no defence to a criminal charge nor is a defect of reason produced by drunkenness. This principle was stated by Sir Matthew Hale in his Pleas of the Crown, Vol. I, p. 32, in words which I would repeat here: "This vice" (drunkenness) "doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy …. By the laws of England such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."
>
> This general principle can be illustrated by looking at the various ways in which drunkenness may produce a defect of reason:
>
> (a) It may impair a man's powers of perception so that he may not be able to foresee or measure the consequences of his actions as he would if he were sober. Nevertheless he is not allowed to set up his self – induced want of perception as a defence. Even if he did not himself appreciate that what he was doing was dangerous, nevertheless if a reasonable man in his place, who was not befuddled with drink, would have appreciated it, he is guilty […].

(b) It may impair a man's power to judge between right or wrong, so that he may do a thing when drunk which he would not dream of doing while sober. He does not realise he is doing wrong. Nevertheless he is not allowed to set up his self – induced want of moral sense as a defence. In BEARD's CASE (1920) 14 CrAppR at p. 198; [1920] AC at p. 506, Lord Birkenhead LC distinctly ruled that it was not a defence for a drunken man to say he did not know he was doing wrong.

(c) It may impair a man's power of self – control so that he may more readily give way to provocation than if he were sober. Nevertheless he is not allowed to set up his self – induced want of control as a defence. The acts of provocation are to be assessed, not according to their effect on him personally, but according to their effect they would have on a reasonable man in his place. […]

The general principle which I have enunciated is subject to two exceptions: (1) If a man is charged with an offence in which a specific intention is essential (as in murder, though not in manslaughter) then evidence of drunkenness, which renders him incapable of forming that intent, is an answer […]. This degree of drunkenness is reached when the man is rendered so stupid by drink that he does not know what he is doing […].

(2) If a man by drinking brings on a distinct disease of the mind such as delirium tremens, so that he is temporarily insane within the M'Naughten Rules, that is to say, he does not at the time know what he is doing or that it is wrong, then he has a defence on the ground of insanity.'

In *Ruse v Read* (1949) 33 CrAppR 67 Humphreys J, delivering the judgment of the Court, stated at page 70:

'The decision of the House of Lords in DIRECTOR OF PUBLIC PROSECUTIONS v BEARD, 14 CrAppR 159; [1920] AC 479, shows that upon the question of intention evidence of a state of drunkenness rendering the accused incapable of forming the intent necessary to constitute the particular crime should be taken into consideration with the other facts of the case, not because drunkenness may be incompatible with the actual crime charged, and may therefore negative the commission of that crime. Can it be said that a man who is able to mount and ride a bicycle for two hours is yet so incapably drunk that he is unable to apply his mind to the simple question whether he intends to take the machine away for good or to borrow or return it?'

[21.7] Immature Age

Section 14 of the *Penal Code* (Ch. 26) states:

> 'A person *under the age of eight years* is not criminally responsible for any act or omission. [ie., an irrebuttable presumption of law]
>
> A person *under the age of twelve years* is not criminally responsible for an act or omission, unless it is proved that at the time of doing the act or making the omission he had capacity to know that he ought not to do the act or make the omission. [ie., a rebuttable presumption of law]
>
> A male person *under the age of twelve years* is presumed to be incapable of having sexual intercourse.' (emphasis added) [words in brackets added]

In *R v Paul Rakaimua* (Unrep. Criminal Case No. 24 of 1995) Muria CJ stated at pages 4 – 5:

> 'Under that provision only a person under eight years of age will be excused of any criminal responsibility for his act or omission. A person who is eight years but still under 12 years will also be excused from criminal responsibility unless it is proved that the person had the capacity to know that he ought not to have done what he did or made the omission at the time the act was done or omission was made. The defence says that the accused in this case is a person who was less than 12 years of age at the time of the commission of the offence and who then did not have the capacity to know that what he did would cause death. […]
>
> […]
>
> It is for the prosecution to show by evidence that the defence of immature age raised by the accused must be excluded. But I think I can also say without shifting the burden of proof to the defence that the accused must point to some evidence supporting the suggestion that he was of immature age at the time and which may help to raise doubt in the Court's mind.'

The criminal responsibility of children between the ages of 8 and 12 years was considered in *R v Sheldon* [1996] 2 CrAppR 50. Simon Brown LJ delivering the judgment of the Court of Appeal, accepted the application of the following principles at page 53:

> '1. It is presumed that a child between the ages of 10 and 14 is doli incapax and in all cases it is for the Crown to rebut the presumption: to prove that when doing the act charged the child knew that this act was seriously wrong as distinct from an act of mere naughtiness or childish mischief.
>
> 2. The criminal standard of proof applies: clear positive evidence is required, not consisting merely in the evidence of the act amounting to the offence itself, however horrifying or obviously wrong that act may be.
>
> 3. The older the defendant is and […] the more obviously wrong the act, the easier it will generally be to prove guilty knowledge.
>
> 4. The surrounding circumstances are clearly relevant and what the defendant said and did both before and after the act may go to prove guilty knowledge. Certain conduct, however, such as running away or lying, may, depending on the circumstances, be equivocal, as consistent with naughtiness as with wickedness.

5. Proof that the defendant was a normal child for his age (which must not be presumed but, assuming guilty knowledge can otherwise be established, need not be proved) will not necessarily prove also that he knew his action was seriously wrong. The less obviously wrong the act, the less likely is it to do so.'

To prove that a child under the age of 12 but over the age of 8 years was criminally responsible, the prosecution *must* prove *beyond reasonable doubt* that at the time of the commission of the offence he/she had the 'capacity or understanding' to know that he/she ought not commit the offence.

That 'capacity or understanding' may be proven by:

[1] calling any person who:

[a] knows the child; *and*

[b] is able to prove that the child did know the he/she ought not commit the offence.

Such persons would include parents, relatives and teachers; *and / or*

[2] the investigating police officer during the course of questioning the child by simply asking the following questions:

[a] Did you know that what you did was seriously wrong?;

[b] Why did you know that it was seriously wrong?;

[c] Would you have done what you did if a police officer could see you?;

[d] Would you have done what you did if your parents could see you?;

[e] Would you have done what you did if your teacher/s could see you?;

[f] Would you have done what you did if your village elders could see you?; and

[g] Would you have done what you did if your pastor could see you?;

See also: *JM (A Minor) v Runeckles* (1984) 79 CrAppR 255; *R v Coulburn* (1988) 87 CrAppR 309 & *R v B; R v A* [1979] 3 AllER 460; (1979) 69 CrAppR 362; [1979] 1 WLR 1185; [1979] CrimLR 589.

[21.8] Compulsion

Section 16 of the *Penal Code* (Ch. 26) states:

> 'A person is not criminally responsible for an offence if it is *committed by two or more offenders*, and if the act is done or omitted only because during the whole of the time in which it is being done or omitted the person is compelled to do or omit to do the act by threats on the part of the other offender or offenders instantly to kill him or do him grievous bodily harm if he refuses; but threats of future injury do not excuse any offence.' (emphasis added)

In *R v Martin* [2000] 2 CrAppR 42 Mantell LJ, delivering the judgment of the Court of Appeal, stated at pages 47 – 48:

> 'The classic definition of duress is to be found in the speech of Lord Simon of Glaisdale in *Director of Public Prosecutions for Northern Ireland v Lynch* (1975) 61 CrAppR 6, [1975] AC 653 at pp. 23 and 686:
>
> "I take it for present purposes to denote such [well – grounded] fear, produced by threats, of death or grievous bodily harm [or unjustified imprisonment] if a certain act is not done, as overbears the actor's wish not to perform the act, and is effective, at the time of the act, in constraining him to perform it. I am quite uncertain whether the words which I have put in square brackets should be included in any such definition. It is arguable that the test should be purely subjective, and that it is contrary to principle to require the fear to be a reasonable one."
>
> The definition was approved in *R v Howe* (1987) 85 CrAppR 32, [1987] AC 417, HL. In the same case Lord MacKay of Clashfern cited with approval the judgment of Lord Lane CJ in *Graham* (1982) 74 CrAppR 235, [1982] 1 WLR 294 at pp. 241 and 300:
>
> "As a matter of public policy, it seems to us essential to limit the defence of duress by means of an objective criterion formulated in terms of reasonableness. Consistency of approach in defences to criminal liability is obviously desirable. Provocation and duress are analogous. In provocation the words or actions of one person break the self – control of another. In duress the words or actions of one person break the will of another. The law requires a defendant to have the self – control reasonably to be expected of the ordinary citizen in his situation. It should likewise require him to have the steadfastness reasonably to be expected of the ordinary citizen in his situation. So too with self – defence, in which the law permits the use of no more force than is reasonable in the circumstances. And, in general, if a mistake is to excuse what would otherwise be criminal, the mistake must be a reasonable one.
>
> It follows that we accept Mr Sherrard's submission that the direction in this case was too favourable to the appellant. The Crown having conceded that the issue of duress was open to the appellant and was raised on the evidence, the correct approach on the facts of this case would have been as follows: (1) Was the defendant, or may he have been, impelled to act as he did because, as a result of what he reasonably believed King had said or done, he had good cause to fear that if he did not so act King would kill him or (if this is to be added) cause him serious physical injury? (2) If so, have the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to whatever he reasonably believed King said or did by taking part in the killing? The fact that a defendant's will to resist has been eroded by the voluntary consumption of drink or drugs or both is not relevant to the test"'.

In *R v Martin (Colin)* (1989) 88 CrAppR 343 [[1989] 1 AllER 652] Simon Brown J stated at pages 345 – 346:

> 'The principles may be summarised thus. First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called 'duress of circumstances'.
>
> Secondly, the defence is available only if, from an objective standpoint, the accused can be said to acting reasonably and proportionately in order to avoid a threat of death or serious injury.
>
> Thirdly, assuming the defence to open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result? Second, if so, may a sober person of reasonable firmness, sharing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was yes, then the jury would acquit: the defence of necessity would have been established."'

See also: *Kelly & others v R* (Unrep. Criminal Case No. 44 of 1990; Ward CJ); *R v Selwyn Buaeda* (Unrep. Criminal Case No. 22 of 1975; Davis ACJ); *R v Cairns* [1999] 2 CrAppR 137; *R v Bowen* [1996] 2 CrAppR 157; *R v Hurst* [1995] 1 CrAppR 82; *R v Pommell* [1995] 2 CrAppR 606; *R v Taylor* (1972) 56 CrAppR 1; *R v Sharp* [1987] 3 WLR 1; [1987] QB 853; [1987] 3 AllER 103; [1987] CrimLR 566;(1987) 85 CrAppR 207; *R v Shepherd* (1988) 86 CrAppR 47; [1987] CrimLR 686 & *R v Conway* (1989) 88 CrAppR 159; [1989] QB 290; [1988] RTR 35; [1988] 3 AllER 1025; [1988] 3 WLR 1238.

[21.9] Defence Of Person Or Property

Section 4 of the *Constitution* states (in part):

> '(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Solomon Islands of which he has been convicted.
>
> (2) *A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable* --
>
> (a) *for the defence of any person from violence or for the defence of property*.' (emphasis added)

Section 17 of the *Penal Code* (Ch. 26) states:

> 'Subject to any express provisions in this Code or any other law in operation in Solomon Islands, criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law.'

Section 204 of the *Penal Code* (Ch. 26) states (in part):

> '*Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely –*
>
> (a) that he was deprived of the power of self – control by such extreme provocation given by the person killed as mentioned in the next succeeding section; or
>
> (b) *that he was justified in causing some harm to the other person, and that, in causing him harm in excess of the harm which he was justified in causing, he acted from such terror or immediate death or grievous harm as in fact deprived him for the time being of the power of self – control*;' (emphasis added)

A summary of the principles is as follows:

- It is lawful to use such force as is '*reasonably necessary*' in order to defend one's person, any other person or one's property;
- The question is whether the force used was '*reasonable*' in all the circumstances;
- What is '*reasonable*' in the circumstances is always a question of fact, and not law, see *Reference under section 48A of the Criminal Appeal (Northern Ireland) Act 1968* (No. 1 of 1975) [1976] 2 AllER 937; [1977] AC 105;
- Whilst the test to be applied as to whether '*reasonable force*' was used is an '*objective test*', the state of mind of the defendant must also be taken into account, ie., a '*subjective test*';
- In some circumstances a person may need to consider simply avoiding the assailant by way of '*withdrawal*'; and

- The onus is on the prosecution to negative this defence '*beyond reasonable doubt*' if it is '*fairly raised*'.

In *Rachel Tobo v Commissioner of Police* (Unrep. Criminal Appeal No. 1 of 1993) the Court of Appeal stated at pages 2 – 3:

> 'So far as is relevant that provides that criminal responsibility for the use of force in defence of person shall be determined according to the principles of English common law. *Under the common law it is lawful to use such force as is reasonably necessary in order to defend one's person against attack*.' (emphasis added)

A person who is assaulted may not only defend himself/herself, but may also retaliate, see *R v Deana* (1909) 2 CrAppR 75 at page 76.

The question to be asked is whether the defendant used more violence than was reasonably necessary to repel the attack, see *R v Morse* (1910) 4 CrAppR 50 at page 51.

In *R v Zamagita & 6 others* [1985 – 86] SILR 223 Ward CJ stated at pages 231 – 233:

> 'Section 17 of the Penal Code provides that criminal responsibility for the use of force in the defence of person or property shall be determined according to the principles of English common law. The present law in England is covered by section 3 of the Criminal Law Act 1967 which has replaced the rules of the common law. What was the exact extent of the common law prior to the 1967 act is complex and uncertain.
>
> *In general terms, the common law has always given a man the right to defend himself or his close family and property by such force as is necessary. What force is necessary is a matter of fact to be decided on a consideration of all the surrounding facts.* It was stated in 1924 in Hussey's case, 18 CAR 160 that a man may use force, may even kill, to defend himself or his property. Much more recently Parker LCJ in Chisam v R (1963) 47 CAR 130 cited with approval the statement of the law in Halsbury's Laws of England "*where a forcible and violent felony is attempted on the person of another, the party assaulted, or his servant, or any other person present, is entitled to repel force by force and, if necessary, to kill the aggressor. There must be a reasonable necessity for the killing, or at least an honest belief based on reasonable grounds that there is such a necessity*."
>
> Thus, if the evidence establishes to the satisfaction of the court that the accused believed he was in imminent danger and held that belief on reasonable grounds induced by the words and conduct of the deceased, the defence of self defence is made out. The same considerations apply to defence of family and property. *But it is only in the most extreme circumstances of clear and very serious danger that a court would hold, these days, that a man was entitled to kill simply to defend his property, as there are many other effective remedies available.* Where however, attack places him or his family in serious and immediate danger, he may properly meet that force with the force reasonably necessary to avert the danger. The evidence shows that, when Andrew and Mathew approached Pastor Ragoso's house that night, Jese's wife and Herrick's sister and parents were inside.
>
> Lulu had no relative inside but knew, as he had been there earlier, that there were women and children in the house. The other four accused arrived to see a violent attack on the premises already in progress by armed men. From inside the house they could hear screams of terror. Their involvement was to stop such an attack. In R v Duffy (1966) 2 WLR 229, Edmund Davies J (as he then was) stated:-

> "Quite apart from any special relationship between the person attacked and his rescuer, there is a general liberty even as between strangers to prevent a felony. That is not to say, of course, that a new – comer may lawfully join in a fight just for the sake of fighting. Such conduct is wholly different in law from that of a person who in circumstances of necessity intervenes with the sole object of restoring the peace by rescuing a person being attacked."
>
> I am satisfied each of these accused had every reason to fear that the occupants of that house were in imminent danger. They had a right and, indeed, a duty to try and prevent the attack and in order to do so were entitled to use reasonable force.' (emphasis added)

In *R v Duffy* (1966) 50 CrAppR 68 [[1966] 2 WLR 229; [1967] 1 QB 63; [1966] 1 AllER 62] Edmund Davies J, delivering the judgment of the Court, stated at pages 70 – 71:

> 'It is established that [the defence of '*self defence*'] is not restricted to the person attacked. It has been said to extend to "the principal civil and natural relations" Hale […] gives as instances master and servant, parent and child, and husband and wife who, if they even kill an assailant in the necessary defence of each other, are excused, the act of the relative assisting being considered the same as the act of the party himself.' [words in brackets added]

In *R v Julien* (1969) 53 CrAppR 407; [1969] 1 WLR 839 [[1969] 2 AllER 856] Widgery LJ, delivering the judgment of the Court of Appeal, held at pages 410 – 411 & 843 respectively:

> 'The submission here is that the obligation to retreat before using force in self – defence is an obligation which only arises in homicide cases. As the Court understands it, it is submitted that, if the injury results in death, then the accused cannot set up self – defence except on the basis that he had retreated before he resorted to violence. On the other hand, it is said that where the injury does not result in death […] the obligation to retreat does not arise.
>
> […]
>
> It is not, as we understand it, the law that a person threatened must take his heels and run in the dramatic way suggested by Mr. McHale; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and to the extent that that is necessary as a feature of the justification of self – defence is true, in our opinion, whether the charge is a homicide charge or something less serious.'

In *R v Barrett & Barrett* (1981) 72 CrAppR 212 [[1980] CrimLR 641] Cumming – Bruce LJ, delivering the judgment of the Court, held at page 217:

> '*In the view of this Court the test where excessive force is relied upon to found reliance upon self – defence is objective and not subjective*. This Court does not understand the observations of their Lordships in DPP v MORGAN [(1975) 61 CrAppR 136; [1976] AC 182] to have been intended to invalidate the law of self – defence where excessive force is alleged to have been used against the defendants. This Court does not accept that the test is a subjective test depending on the honest belief of the defendant, but affirms – as has in the past been regarded as the law – that where repelling excessive force is relied upon by the defendants, the test is an objective test.' (emphasis added)

In *R v Whyte* (1987) 85 CrAppR 283 [[1987] 3 AllER 416] Lord Lane CJ stated at page 285:

> 'What the learned judge said to the jury on the question of self – defence, having given them an impeccable direction on the general effect of that defence, was this:

"… if a man does use violence and claims he was only violent in self – defence, he may only use such force to defend himself as was reasonable in all the circumstances. It is for you, the jury, to decide as a matter of common sense whether a blow with a knife was in self – defence, and if it was, if the use of a knife against a man is not alleged to have been armed is reasonable … So before you can convict Mr. Whyte of either count 1 or count 2, you must be satisfied so that you are sure that Mr. Whyte struck Mr. Khan a blow with a knife as an assailant, and that the blow was not a blow in self – defence, or if it was, it was an unreasonable amount of force, having regard to the danger Mr. Whyte himself was in at the hands of Mr. Khan."

In most cases, where the issue is one of self – defence, it is necessary and desirable that the jury should reminded that the defendant's state of mind, that is his view of the danger threatening him at the time of the incident, is material. The test is reasonableness or not, to put it at its lowest, a purely objective test.

We have been referred to two authorities. The first is an opinion of the Privy Council in the case of *Palmer v R* (1971) 55 CrAppR 223; [1971] AC 814, and the second is the case of *Shannon* (1980) 71 CrAppR 192, a decision of this Court which of course is binding upon us. The effect of those two decisions seems to be this. *A man who is attacked may defend himself, but may only do what is reasonably necessary to effect such a defence. Simple avoiding action may be enough if circumstances permit. What is reasonable will depend upon the nature of the attack. If there is a relatively minor attack, it is not reasonable to use a degree of force which is wholly out of proportion to the demands of the situation. But if the moment is one of crisis for someone who is in imminent danger, it may be necessary to take instant action to avert that danger*.

Although the test is what is sometimes called an objective one, yet nevertheless, to quote the words of Lord Morris in *Palmer v R* (1971) 55 CrAppR 223, 242, [1971] AC 814, 832, "If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken."' (emphasis added)

In *Jimmy Kwai v R* (Unrep. Criminal Appeal No. 3 of 1991) the Court of Appeal stated at page 5:

'Honest belief in a case of self – defence may be relevant at two points at least. In many cases it may be apparent, on a calm appraisal of the facts after the event that the accused was not being attacked at all. The circumstances may be such that the jury entertains a reasonable doubt as to whether he genuinely believed that to be the case, or to put it another way concludes that he may well have entertained such a genuine belief. But, as Ward CJ correctly points out, the force used must not be disproportionate to the situation as the accused saw it. In *Williams* at AllER p. 415h [[1987] 3 AllER 411; (1987) 78 CrAppR 276] the court regarded the following passage from the Criminal Law Revision Committee's 14th report (Cmnd 7844 (1980) as a correct statement of law:

"The common law defence of self – defence should be replaced by a statutory defence providing that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person."

The Privy Council in *Beckford* at AllER p. 432a [[1988] AC 130; [1987] 3 AllER 425; (1987) 85 CrAppR 378] would seem to have taken the same view.

[…]

In *Palmer v R* [[1971] AC 814; [1971] 2 WLR 831; (1971) 55 CrAppR 223] Lord Morris of Borth – y – Gest delivering the opinion of the Privy Council, said [at pages 832, 844 and 242 respectively]:

"If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of this necessary defensive action. If a jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self – defence, where the evidence makes it raising possible, will only fail if the prosecution show beyond doubt that what the accused did was not by way of self – defence."

In our judgment it is not sufficient to say that the force was not reasonable. It is impossible to conclude, beyond a reasonable doubt, that it was not reasonable in the circumstances as the applicant believed them to be.' (emphasis added)

In *R v Owino* [1996] 2 CrAppR 128 Collins J, delivering the judgment of the Court of Appeal, held at pages 132 – 133:

'The essential elements of self – defence are clear enough. The jury have to decide whether a defendant honestly believed that the circumstances were such as required him to use force to defend himself from an attack or a threatened attack. In this respect *a defendant must be judged in accordance with his honest belief, even though that belief may have been mistaken. But the jury must then decide whether the force used was reasonable in the circumstances as he believed them to be*.' (emphasis added)

See also: *R v Ome* [1980 – 81] SILR 27.

In *Palmer v R* (1971) 55 CrAppR 223 [[1971] AC 814; [1971] 1 AllER 107; [1971] 2 WLR 831] Lord Morris of Borth – y – Gest, delivering the judgment of the Privy Council, stated at pages 241 – 243:

'In their Lordship's view, the defence of self – defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in immediate danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains, then the employment of force may be my way of revenge and punishment or by way of paying off an old score or may be pure aggression. There may no longer by any link with a necessity of defence. Of all these matters the good sense of a jury will be the arbiter. There are no prescribed words which must be employed in or adopted in a summing – up. All that is needed is a clear exposition, in relation to the particular facts of the case, of the conception of necessary self – defence. If there has been no attack, then clearly there will have no need for defence. If there has been attack so that defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his

> necessary defensive action. If a jury thought in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought was necessary, that would be most potent evidence that only reasonable defensive action had been taken. A jury will be told that the defence of self – defence, where the evidence makes its raising possible, will fail only if the prosecution show beyond doubt that what the accused did was not by way of self – defence. But their Lordship's consider, in agreement with the approach in the DE FREITAS case [(1960) 2 WLR 523], that if the prosecution have shown that what was done was not done in self – defence, then that issue is eliminated from the case. If the jury consider that an accused acted in self – defence or if the jury are in doubt as to this, then they will acquit. The defence of self – defence either succeeds so as to result in an acquittal or it is disproved, in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict might be one of manslaughter. Any other possible issues will remain. If in any case the view is possible that the intent necessary to constitute the crime of murder was lacking, then that matter would be left to the jury.'

In *R v O'Grady* (1987) 85 CrAppR 315 [[1987] QB 995; [1987] 3 WLR 321; [1987] 3 AllER 420; [1987] CrimLR 706] Lord Lane CJ, delivering the judgment of the Court, held at page 321:

> '[A] defendant is not entitled to rely, so far as self – defence is concerned, upon a mistake of fact which has been induced by voluntary intoxication.'

The law relating to the defence of '*Intoxication*' is examined commencing on page **444**.

In *R v Lobell* (1957) 41 CrAppR 100 [[1957] 1 QB 547; [1957] 2 WLR 524; [1957] 1 AllER 734] Lord Goddard CJ, delivering the judgment of the Court, held at page 104:

> 'It must, however, be understood that maintaining the rule that the onus always remains on the prosecution does not mean that the Crown must give evidence – in – chief to rebut a suggestion of self – defence before that issue is raised, or indeed need give any evidence on the subject at all. If an issue relating to self – defence is to be left to the jury, there must be some evidence from which a jury would be entitled to find that issue in favour of the accused, and ordinarily, no doubt, such evidence would be given by the defence. But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. The truth is that the jury must come to a verdict on the whole of the evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him.'

That decision was subsequently approved by the Judicial Committee of the Privy Council in *Billard v R* (1957) 42 CrAppR 1.

'[T]he onus of proving that an accused person did not act in self defence, where the question is raised on or by the evidence, is upon the Crown', see *R v Ome* [1980 – 81] SILR 27 at page 34.

In *R v Moon* [1969] 1 WLR 1705 [[1969] 3 AllER 803] Salmon LJ, delivering the judgment of the Court, stated at page 1706:

> 'It is elementary that once that defence is raised [ie., '*self - defence*'], the onus is fairly and squarely on the Crown to disprove it. It is for the Crown to satisfy the jury beyond reasonable doubt that self – defence is negatived by the evidence. It is never for the defence – there is no sort of onus on the defence – to prove self – defence.' [words in brackets added]

The law relating to '*Proof Of Issues*' is examined commencing on page **68**.

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See also: *R v John Teo'ohu* [1990] SILR 265 at page 267; *R v Garunu* [1985 – 86] SILR 192; *Director of Public Prosecutions v Bailey* [1995] 1 CrAppR 257; *R v Whyte* (1987) 85 CrAppR 283; [1987] 3 AllER 416; *Edwards v R* (1973) 57 CrAppR 157; *R v Bird* [1985] 2 AllER 513; [1985] 1 WLR 816; [1985] CrimLR 388; (1985) 81 CrAppR 110; *Beckford v R* [1987] 3 WLR 611; [1987] 3 AllER 425; [1988] AC 130; (1987) 85 CrAppR 378; *R v Abraham* [1973] 1 WLR 1270; [1973] 3 AllER 694; [1974] CrimLR 246; (1973) 57 CrAppR 799; *Taylor v Mucklow* [1973] CrimLR 750; *R v McInnes* [1971] 3 AllER 295; [1971] 1 WLR 1600; (1971) 55 CrAppR 551; *R v Cousins* [1982] 2 AllER 115 & *R v Hussey* (1924) 18 CrAppR 160.

[21.10] Compulsion By Spouse

Section 19 of the *Penal Code* (Ch. 26) states:

> 'A married person is not free from criminal responsibility for doing or omitting to do an act merely because the act or omission takes place in the presence of that person's spouse; *but on a charge against a married person for any offence other than treason or murder, it shall be a good defence to prove that the offence was committed in the presence of and under the coercion of that person's spouse*.' (emphasis added)

The spouse *must* be able to prove that his/her will was overborne by the wishes of his/her spouse which may result as a consequence of:

- physical force;
- a threat of physical force; or
- moral force.

Such coercion *must* go beyond persuasion out of loyalty, see *R v Shortland* [1996] 1 CrAppR 116.

See also: *R v Ditta, Hussain & Kara* [1988] CrimLR 42.

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LARCENY

[22.0] Introduction

This chapter will examine specifically the offence of '*Simple Larceny*', as provided for by section 261 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In that regard reference should be made to the *Larceny Act* 1916 (UK), see *Toritelia v R* [1987] SILR 4.

Section 171 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with stealing anything and –
>
> (a) it is proved that he received the thing knowing the same to have been stolen, he may be convicted of the offence of receiving although he was not charged with it;
>
> (b) it is proved that he committed an offence against section 273 of the Penal Code (relating to embezzlement), he may be convicted of embezzlement although he was not charged with it;
>
> it is proved that he obtained the thing in any such manner as would amount, under the provisions of the Penal Code or of any other law for the time being in force, to obtaining it by false pretences with intent to defraud, he may be convicted of the offence of obtaining it by a false pretences although he was not charged with it.'

[22.1] Offence

Section 261 of the *Penal Code* (Ch. 26) states:

> '(1) Stealing for which no special punishment is provided under this Code or any other Act for the time being in force is simple larceny and a felony punishable with imprisonment for five years.
>
> (2) Any person who commits the offence of simple larceny after having been previously convicted of felony, shall be liable to imprisonment for ten years.
>
> (3) Any person who commits the offence of simple larceny, after having been previously convicted of any misdemeanour punishable under this Part or under Part XXXV of this Code, shall be liable to imprisonment for seven years.'

[22.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did steal **[**specify the property**]** the property of **[**specify the name of the complainant**]**.'

All things capable of being stolen alleged to have been stolen *must* be specified. Use of the words such as 'and other articles' is objectionable, see *R v Douglas* (1926) 19 CrAppR 119.

A charge of '*Larceny*' is bad for '*duplicity*' if it alleges theft from a number of different complainants on the same day, see *R v Ballingsingh* (1953) 37 CrAppR 28 at page 29.

The law relating to '*Duplicity*' is examined commencing on page **86**.

[22.3] Circumstances Of Aggravation

Include these '*circumstances of aggravation*' at the end of the abovementioned charge in appropriate cases:

(2) and the said **[**specify the name of the defendant**]** being a person previously convicted of a felony to wit **[**specify the felony**]** under section 175 of the *Penal Code* (Ch. 26) at the **[**insert the name**]** **[**Magistrates'/High**]** Court on **[**specify the date**]**.

(3) and the said **[**specify the name of the defendant**]** being a person previously convicted of a misdemeanour to wit **[**specify the misdemeanour**]** punishable under Part XXXV of the *Penal Code* (Ch. 26) at the **[**insert the name**]** **[**Magistrates'/High**]** Court on **[**specify the date**]**.

Section 120 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –
>
> […]
>
> (c)(iv)
>
> […]
>
> (h) *where a previous conviction of an offence is charged in a charge or information*, it *shall* be charged at the end of the charge or information by means of a statement that the accused person has been previously convicted of that offence at a certain time and place without stating the particulars of the offence;'

As regards proving a previous conviction, refer to page **305**.

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[22.4] Elements

A. Defendant

B. Place

C. Date

D. Steal

E. Anything Capable Of Being Stolen

F. Complainant

[22.5] Steal

[22.5.1] Defined

Section 258(1) of the *Penal Code* (Ch. 26) states:

> 'A person steals who, *without the consent of the owner*, *fraudulently* and *without claim of right made in good faith*, *takes and carries away anything capable of being stolen with intent*, at the time of such taking, *permanently to deprive the owner thereof*:
>
> Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, of, being a bailee or part owner thereof, he *fraudulently converts* the same to his own use or the use of any person other than the owner.' (emphasis added)

[22.5.2] Fraudulently

In *Toritelia v R* [1987] SILR 4 the Court of Appeal examined the term '*fraudulently*'. Whilst that term was examined in context of the offence of '*Embezzlement*' as prescribed in section 273 of the *Penal Code* (Ch. 26), the legal reasoning should be adopted when interpreting the same term as prescribed in section 258 of that Code.

White P stated at page 7:

> 'In the United Kingdom the Theft Act 1968 replaced the Larceny Act 1916 but the Solomon Islands provisions have remained unaltered.'

It is therefore appropriate only to refer to cases which refer to the latter Act for the purpose of interpreting all offences as outlined in Part XXVII of the *Penal Code* (Ch. 26) which is headed '*Larceny, Embezzlement and Conversion*'.

In *Toritelia v R* (*supra*) White P stated at page 12:

> '[T]he question of fact to be determined on all the relevant evidence is whether the prosecution has proved beyond reasonable doubt that the accused did prejudice or take the risk of prejudicing another's right, knowing that he had no right to do so. *Throughout the cases the statement of proof of that knowledge is commonly described as proving the accused's "dishonesty".*' (emphasis added)

In *Williams & others v Phillips; Roberts & others v Phillips* (1957) 41 CrAppR 5 the defendants who were employed as dustmen took property which they collected on behalf of their employer and kept it for their own purpose. Lord Goddard CJ, delivering the judgment of the Court, held at pages 9 – 10:

> 'It is not necessary to talk Latin in these cases and use expressions like *animus furandi* or *animo furandi*. The question is: were they acting honestly? That is the test. Of course, they were not acting honestly. They know perfectly well what their duty was, what they had to do with this refuse, and that if they appropriated it to their own use they were stealing it.'

[22.5.3] Claim Of Right

A person has a claim of right if he/she is honestly asserting what he/she believes to be a lawful claim, even though it may be unfounded in law or in fact, see *R v Bernhard* (1938) 26 CrAppR 137 [[1938] 2 AllER 140; [1938] 2 KB 264] at page 145.

If a person takes money he/she knew that he/she had no right to take, the fact that he/she may have had a hope or expectation in the future of repaying that money is not a defence and only capable of going to mitigation of sentence, see *Toritelia v R* (*supra*) & *R v Williams* (1953) 27 CrAppR 71; [1953] 1 AllER 1068; [1953] 1 QB 660.

See also: *R v Cockburn* (1968) 52 CrAppR 134; [1968] 1 WLR 281; [1968] 1 AllER 466; *R v Clayton* (1920) 15 CrAppR 45 & *R v Gilson & Cohen* (1944) 29 CrAppR 174.

The law relating to '*Honest Claim Of Right*' is examined commencing on page **431**.

[22.5.4] Takes

[A] Statutory Provision

Section 258(2)(a) of the *Penal Code* (Ch. 26) states:

> 'The expression "*takes*" *includes* obtaining the possession –
>
> (i) by any *trick*;
>
> (ii) by *intimidation*;
>
> (iii) under a *mistake on the part of the owner with knowledge on the part of the taker* that possession has been so obtained; or
>
> (iv) by *finding*, where at the time of finding the finder believes that the owner can be discovered by taking reasonable steps.' (emphasis added)

[B] Defined

In *Russell v Smith* (1957) 41 CrAppR 198 the defendant was a lorry driver who in the course of his occupation received a greater quantity of goods to deliver than he should. Upon realising the mistake he decided to keep the excess goods for his own purpose. Lord Goddard CJ, with whom Slade & Gorman JJ concurred, stated at pages 204 – 206:

> 'The respondent did not know what he had got until, by empting of the lorry at the buyer's premises, he found he had got eight sacks too many. He was never intended to have eight sacks too many and he never intended to take eight sacks too many. He was intending to take the consignment, which the buyer had ordered, into the possession of the buyer. When he found that he had got more than he ought to have, then for the first time he became aware of the mistake which had been made and of the addition that had been made. […]
>
> […]
>
> In this case these eight sacks were not intended to be put into the respondent's lorry; they were not intended to be delivered to the consignee when the rest of the property was delivered. I think it is very much akin to a finding. *If a person by inadventure places the sacks in the lorry, it is not very much different from having lost the sacks. In my opinion, therefore, there was a taking. The taking took place when the respondent discovered that he had got the sacks, which were never intended to be given to him and which he must have known were never intended to be given to him at all, except in the sense that they were put on the lorry by mistake*.' (emphasis added)

In such circumstances the defendant was guilty of '*Larceny*'.

In *R v Ashwell* (1885) 16 QBD 190 Lord Coleridge CJ stated at page 225:

> 'In good sense it seems to me that he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it.'

See also: *R v Thomas* (1953) 37 CrAppR 169; *R v Hudson* (1943) 29 CrAppR 65 at page 71; *R v Kindon* (1957) 41 CrAppR 208 & *Martin v Puttick* (1967) 51 CrAppR 272.

[C] Larceny By Finding

Section 258(2)(a) of the *Penal Code* (Ch. 26) states (in part):

> 'The expression "*takes*" *includes* obtaining the possession –
>
> […]
>
> (iv) by *finding*, where at the time of finding the finder believes that the owner can be discovered by taking reasonable steps.' (emphasis added)

The onus is on the prosecution to negative the defence as outlined in section 258(2)(a)(iv) of the *Penal Code* (Ch. 26) '*beyond reasonable doubt'* if there is evidence that the defendant believed that at the time of finding the property he/she did believe that the owner could *not* be discovered by taking reasonable steps.

In *Thorburn* 1 DewCC 387 [3 CoxCC 277] Parke B, delivering the judgment of the Court, stated at page 396:

> 'The result of [the] authorities is that the rule of law on this subject seems to be that if a man finds goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing, when he takes them, that the owner cannot be found, it is not larceny; but if he takes them, with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny.' [word in brackets added]

In *Dolby v Stanta* [1996] 1 QdR 138 Williams J of the Court of Appeal, with whom Thomas J and Pincus JA concurred, stated at pages 142 – 144:

> '*Abandonment* [ie., abandoned / lost] is a common law concept, and although the term has been used in many cases no one has really set out a clear definition of it. In *Donoghue v Coombe* (1987) 45 SASR 330 von Doussa J said at page 333:
>
> "The abandonment of goods will not lightly be inferred. Abandonment occurs where an owner is indifferent [ie., does not care] to any future asportation [ie., movement[of them by others, where the owner leaves them 'for anybody to take (them) away […]. It is possible that the circumstances of the finding, and the nature and condition of the goods, is such that a person may reasonably believe that they have been abandoned, yet at the same time, know, or have the means of ascertaining, the identity of the former owner who abandoned them."
>
> […]
>
> There is common law authority for the proposition that there can be no theft of property which has been abandoned by the owner. […]
>
> […]
>
> *Many of the cases* indicate that the most critical time is the time of the taking or carrying away of the thing as distinct from the time of finding. […] But those cases also support the proposition that where there is some mark or other feature on or about the thing which indicates ownership and that is ignored by the finder who does nothing to contact a reasonably obvious possible owner, the court may infer that the initial taking was with a fraudulent intent.' (emphasis added) [words in brackets added]

In *Thompson v Nixon* (1965) 49 CrAppR 324 Sachs J, with whom Browne J and Parker LCJ concurred, stated at page 329:

> 'It seems to me not only odd but wrong that those who find goods and who at the time of the finding have honest intentions towards them cannot be held to have committed any crime at all [, referring to the offence of '*Larceny*',] if later they dishonestly sell those goods. That, however, is not a matter which this court can deal with.' [words in brackets added]

See also: *R v Mortimer* (1907) 1 CrAppR 21 at page 24.

[22.5.5] Carries Away

Section 258(2)(b) of the *Penal Code* (Ch. 26) states:

> 'The expression "*carries away*" *includes* any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached.' (emphasis added)

In *R v Taylor* [1911] 1 KB 674 Pickford J, delivering the judgment of the Court, held at page 679:

> '[I]f a man puts his hand into another man's pocket, sizes his purse, removes it from the position in which it was at the bottom of the pocket to the edge of the pocket, and is only prevented from taking it entirely out of the pocket by the accident that it meets an obstruction in the shape of the man's belt, that is sufficient asportation to constitute a simple larceny.'

See also: *Wallis v Lane* [1964] VR 293 & *R v McDonald* [1992] 2 QdR 634.

[22.5.6] Anything Capable Of Being Stolen

[A] Statutory Provision

Section 257(1) of the *Penal Code* (Ch. 26) states:

> 'Every inanimate thing which has value and is the property of any *person*, and if adhering to the realty then after severance therefrom, is capable of being stolen:
>
> Provided that, save as hereinafter expressly provided with respect to fixtures, growing things, and minerals as defined in the Mines and Minerals Act [Ch. 42], anything attached to or forming part of the realty is not capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof.' (emphasis added)

That section also outlines other '*things*' capable of being stolen.

See: *Billing v Pill* (1953) 37 CrAppR 174.

[B] Specific Rules

Section 120 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –
>
> […]
>
> (c)(i) *the description of property in a charge or information shall* be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, *if the property is so described, it shall not be necessary* (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;
>
> [Therefore, provided the property in question has been described with as much detail as possible, it is *not* necessary to state the name of the owner of the property or its value, unless such details are required to prove a specific offence.]
>
> […]

(iv) *coin and bank notes may be described as money; and any allegation as to money, so far as regards the description of the property*, *shall* be sustained by proof of any amount of coin or of any bank or currency note (although the particular species of coin of which such amount was composed or the particular nature of the bank or currency note, shall not be provided); and in cases of stealing, embezzling and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note, or any portion of the value thereof, although such coin or bank or currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person and such part shall have been returned accordingly;' (emphasis added) [words in brackets added]

[22.5.7] Ownership

[A] Definitions

Section 258(2)(c) of the *Penal Code* (Ch. 26) states:

'The expression "owner" includes any part owner, or person having possession or control of, or a *special property* in, anything capable of being stolen.' (emphasis added)

Section 4 of the *Penal Code* (Ch. 26) states:

'"*person*" and "*owner*", and other like terms, when used with reference to property, *include* corporation of all kinds and any other association of persons capable of owning property, and also when so used include Her Majesty.' (emphasis added)

The term '*Property*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

'any description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.'

[B] Specific Rules

Section 120 of the *Criminal Procedure Code* (Ch. 7) states (in part):

'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –

[…]

(c) (i) the description of property in a charge or information shall be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, if the property is so described, *it shall not be necessary (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property*;

(ii) *where the property is vested in more than one person*, and the owners of the property are referred to in a charge or information, it shall be sufficient to describe the property as owned by one of those persons by name and others, and if the person owning the property are a body of persons with a collective name, such as a joint stock company or "Inhabitants", "Trustees", "Commissioners", or "Club" or other such name, it *shall* be sufficient to use the collective name without naming any individual;

[Therefore, if the property in question is owned by more than one person it is sufficient to specify 'the name of one of the owners and others'. For example, '… the property of Edmon Peters and others'.

If the property in question is owned by a 'body of persons' with a collective name it is sufficient to specify the name of that 'body of persons'.]

(iii) property belonging to or provided for the use of any public establishment, service or department *may* be described as the property of *Her Majesty the Queen*;

[Therefore, for example, the ownership of the property belonging to the RSIP may be vested in 'Her Majesty the Queen'.]

(d) *the description or designation in a charge or information* of the accused person*,* or *of any other person to whom reference is made therein*, *shall* be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "*a person unknown*".' (emphasis added) [words in brackets added]

[C] Special Property

The term '*Special Property*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation and General Provisions Act* (Ch. 85).

A person who '*special property*' in property is said to have a limited or qualified right in relation to the said property. For example, if (A) takes his/her motor vehicle to (B) a mechanic to have it repaired. But in order to avoid paying the bill (A) secretly removes it, that action would amount to '*Larceny*' of the 'motor vehicle the special property of (B) [the mechanic]' because (A) had thereby deprived (B) of his/her 'special property' (this is called a 'lien') in the motor vehicle.

See: *Rose v Matt* (1951) 35 CrAppR 1.

Furthermore, people have '*special property*' in cheques which are made out to them. Therefore, whilst some other person may have possession of a cheque the money which is obtained on presentation of a cheque to a bank belongs to the person who has '*special property*' in the cheque, see *Tom Amaiu v The State* [1979] PNGLR 576 at page 580.

[D] Identification Of Property

The prosecution need only prove the identity and ownership of the property, to the same, but to no greater degree than any other element which is '*beyond reasonable doubt*'.

In *R v Schiffmann & Brown* [1910] VLR 348 the Court held at page 354:

> '*It is not necessary that there should be an absolute identification*.
>
> If such a necessity existed it would make a successful prosecution almost impossible with regard to many commodities which are often the subject matter of theft and which exist in large volume, and as to which it is impossible to say that any one unit (any one bottle of beer or any one case with a certain label, for example), is the particular thing which the person alleged to have been robbed had in his possession, and could identify as that particular thing. He can only say that he missed a thing of that description under circumstances suggesting theft, and that this which is found is similar.
>
> Then each case *must* depend on its own circumstances and the mere possession of that which is similar to a thing which as been stolen would not of itself be sufficient to justify a conviction. On the other hand, if the similar things are found under circumstances which make a connection between them and the thing supposed to have been stolen in such a way as to make it reasonably probably that they are the same things, the conclusion that they are the same things is one at which the jury is at liberty to arrive, although there is mere similarity in the things themselves.' (emphasis added)

The circumstances in which property is located may assist in proving the issue of ownership even for so – called 'common articles', see *R v Bridger* (1930) 22 CrAppR 21 at page 22.

[22.5.8] Intent To Permanently Deprive

Section 258(1) of the *Penal Code* (Ch. 26) states:

> 'A person steals who, without the consent of the owner, fraudulently and without claim of right made in good faith, takes and carries away anything capable of being stolen *with intent, at the time of such taking*, *permanently to deprive the owner thereof*:
>
> Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, of, being a bailee or part owner thereof, he fraudulently converts the same to his own use or the use of any person other than the owner.' (emphasis added)

In *Toritelia v R* [1987] SILR 4 Connolly JA commented at page 22:

> 'A person who intends permanently to deprive the owner of the thing taken must surely be taking it deliberately and with knowledge that it is the property of the owner.'

In *R v Wilson Ono* (Unrep. Criminal Case No. 33 of 1995) Muria CJ stated at pages 2 – 3:

> 'What the accused asserts in this case is that he took the cheque book without consent of the bank and without any claim of right but that he only took it for safe – keeping with the intention of returning it to the bank later. The suggestion is that there was no intention to deprive the bank of its property and that in those circumstances it is not a larceny.

> To ascertain whether the accused had no intention of depriving the owner of the property taken regard will be hard as to the manner in which the property is dealt with by the accused. This is a question of fact. The accused intending to return the property taken and having the ability to do so may be able to successfully [raise] this element in a larceny charge. On the other hand such person may have failed to fulfill the intention between the date of the commission of the offence and trial. Such a conduct on the part of the accused runs counter to the suggestion that he intends to return the property.' [words in brackets added]

See also: *Augustine Taeramo & Thomas Ilala v R* (Unrep. Criminal Case No. 38 of 1992; Muria ACJ).

[22.6] Fraudulently Converts

Section 258(1) of the *Penal Code* (Ch. 26) states:

> 'A person steals who, without the consent of the owner, fraudulently and without claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof:
>
> Provided that a person may be guilty of stealing any such thing notwithstanding that he has lawful possession thereof, of, being a *bailee* or part owner thereof, he *fraudulently converts* the same to his own use or the use of any person other than the owner.' (emphasis added)

The term '*Fraudulently Converts*' is *not* defined in the *Penal Code* (Ch. 26) or the *Interpretation and General Provisions Act* (Ch. 85).

In *Rogers v Arnott* (1960) 44 CrAppR 195 [[1960] 2 AllER 417; [1960] 3 WLR 73; [1960] 2 QB 244] Donovan J, with whom Parker LCJ & Davies J concurred, stated at pages 199 – 201:

> 'The respondent contends that there was a fraudulent conversion here when the respondent, having dishonestly assumed to himself the rights of ownership in the property, endeavoured to exercise it by offering the property for sale.
>
> There appears to be no reported judicial decision directly on point. […]
>
> So far as the textbooks are concerned, paragraph 245 of the 16th edition of Kenny's *Outlines of Criminal Law* contains this passage: "Exactly what constitutes the 'conversion', which involves the bailee in the guilt of stealing, has not been authoritatively stated. The principle must have possession of the goods, otherwise he would not be bailee, and then, as it would seem, *any conduct on his part which shows that he assumes either the full title of ownership in the goods, or asserts a right to pass the full title of ownership, will amount to such conversion as will render him guilty of stealing then within the statute*." The 16th edition of Russell on Crime, by the same author, at p.1095, has this to say upon the subject: "It is unfortunate that the term 'conversion' does not appear to have been given a precise definition either judicially or in the textbooks. But for the purposes of larceny it is submitted that it is necessary that the offender should have possession of the goods, and that when possession has been obtained any setting up by the offender of a full title to the property in himself, adverse to that of the owner, if done without a bona fide claim of right, will render him guilty of larceny."

> It would be rash, I think to attempt a definition of the term "converts to his own use" which would cover every possible case. […] In short, I agree with the learned author of *Kenny* and *Russel* in his view upon this point.' (emphasis added)

'[The] word "bailee" in the proviso refers only to that limited class of persons who have received into possession goods from some other person on express or implied terms with regard to that possession', see *Thompson v Nixon* (1965) 49 CrAppR 324 at page 327.

A '*bailee*' is a person to whom goods are entrusted by way of '*bailment*'. A '*bailment*' refers to the delivery of property from a bailor to the bailee for a specific purpose under an agreement. Such an agreement requires that after the purpose has been fulfilled the property is to be either:

[i] redelivered back to the bailor;

[ii] dealt with according to the instructions of the bailor; *or*

[iii] kept by the bailee until the bailor reclaims the property.

A '*bailment*' may be of five kinds:

[i] the delivery of property to a carrier to a person who is to carry out some services in respect of them for payment, including where the carriage or services are to be gratuitous;

[ii] the lending of property for the use of convenience of the bailee;

[iii] the placing of property with the bailee on hire;

[iv] the bare deposit of property with another, for the exclusive use of the bailor; and

[v] the pawning or pledging of property.

'A bailee's authority is to store and keep the goods in question and only to part with them, in other words to end the bailment, on express instructions from the owner. In such a case his authority is a limited authority, and is in no way a general authority to deal with the owner's goods', see *R v Sutton* (1966) 50 CrAppR 114, per Lord Parker CJ at page 119.

See also: *R v Wainwright* (1960) 44 CrAppR 190.

[22.7] Liability Of Husbands & Wives

Section 260 of the *Penal Code* (Ch. 26) states:

> '(1) A wife has the same remedies and redress under this Code for the protection and security of her own separate property as if such property belonged to her as a feme sole:

> Provided that no proceedings under this Part of this Code [ie., Part XXVII – '*Larceny, Embezzlement & Conversion*'] shall be taken by any wife against her husband while they are *living together* as to or concerning any property claimed by her, nor while they are living apart as to or concerning any act done by the husband while they were living together concerning property claimed by the wife, unless such property has been wrongfully taken by the husband *when leaving or deserting or about to leave or desert his wife or for the purpose of giving it to a paramour*. [ie., his/her lover]
>
> (2) A wife doing an act with respect to any property of her husband, if done by the husband in respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this Part of this Code, shall be in like manner liable to criminal proceedings by her husband.' (emphasis added) [words in brackets added]

The principles of that section are as follows:

- A husband and wife, who are living together, are *not* criminally responsible for any offence outlined in Part XXVII of the *Penal Code* (Ch. 26) in respect of anything that they do to their property;

- A husband or wife is criminally responsible for an offence outlined in Part XXVII of the *Penal Code* (Ch. 26) if either of them is leaving, deserting or about to leave or desert or for the purpose of giving it to a paramour, ie., lover; and

- Furthermore, for example, although a husband and wife who burn their own property commit no offence, if they make a false claim as to who burnt the property to an insurance company they would be criminally responsible for the offence of '*False Pretences*' or '*Attempted False Pretences*'.

The law relating to the offence of '*False Pretences*' is examined commencing on page **534**.

'A husband or wife do not live together only when they are living in the same house or occupying the same rooms. They may sometimes be said not to live apart when they are separated by the wide seas. The law regards not merely the physical separation of the one from the other, but the existence or determination of the consortium', see *R v Creamer* (1919) 14 CrAppR 19 at page 21.

'A married woman [or man] living with her husband can steal from her husband only if she steals from him when leaving or deserting, when she is about to leave or desert him; therefore, unless it was proved that she took the property when she was leaving or about to leave her husband, she could not have stolen the property, although she might have taken it', see *Walters v Lunt & another* (1951) 35 CrAppR 94 [[1951] 2 AllER 645] at page 98. [words in brackets added]

See also: *R v King* (1914) 10 CrAppR 44 at page 48 as regards the term '*about to leave or desert*'.

[22.8] Automatic Teller Machines

In *R v Mujunen* [1994] 2 QdR 647; (1993) 67 ACrimR 350 the Court of Appeal examined a case which involved a defendant who firstly deposited a cheque which he knew to be forged to the credit of his bank account which had a credit balance of less than $300. That account was subject to conditions that:

- it *not* be overdrawn unless prior arrangements had been made with the bank; *and*
- proceeds of cheques deposited would *not* be available until cleared.

Secondly, before the cheque was dishonoured and without making any further deposits he withdrew $500 from his account on two occasions by activating an automatic teller machine and a further $300 by withdrawing money over the counter. The defendant was convicted of three charges of stealing from the bank in respect of the money specified.

As regards the withdrawal of money from the automatic teller machine, Fitzgerald P stated at page 652:

> 'The bank did *not* consent to the appellant [ie., the defendant] taking the money from the automatic teller machine or intend to pass the property in that money to him. I do not think that such an intention should be attributed to the bank merely because its system enabled the appellant to withdraw money *before* his cheque was cleared, contrary to his contract with the bank.' (emphasis added) [words in brackets added]

McPherson JA stated at page 656:

> '[T]he proper conclusion is that the property in the money withdrawn by the appellant from or by means of the automatic teller was in the circumstances *not* intended by the bank to pass to the appellant. Since the money remained throughout the property of the bank, the appellant was guilty of stealing when he took or converted it with the requisite intent. It thus becomes unnecessary to consider whether, even before the money reached him, the appellant had already dealt with it in a manner that was inconsistent with the rights of the bank as owner by activating the teller machine with a view to obtaining fraudulently money to which he knew he had no right.' (emphasis added)

[22.9] Related Offences

[22.9.1] Larceny Offences

The following are related '*Larceny*' offences as provided for in the *Penal Code* (Ch. 26):

[i] '*Larceny by Co – partners, etc*', section 259;

[ii] '*Larceny of Will*', section 262;

[iii] '*Larceny of Documents of Title & other Legal Documents*', section 263;

[iv] '*Larceny of Electricity*', section 264;

[v] '*Larceny of Minerals*', section 265;

[vi] '*Larceny of Postal Packets*', section 266;

[vii] '*Larceny by Officer of Post Office*', section 267;

[viii] '*Larceny in Dwelling – House*', section 269;

[ix] '*Larceny from the Person*', section 270;

[x] '*Larceny from Ship, Dock, etc*', section 271;

[xi] '*Larceny by Tenant or Lodger*', section 272;

[xii] '*Larceny of Cattle*', section 274;

[xiii] '*Larceny of Dog*', section 275;

[xiv] '*Larceny of Creatures not the subject of Larceny at Common Law*', section 276;

[xv] '*Larceny of Trees*', section 279;

[xvi] '*Larceny of Fences*', section 280;

[xvii] '*Larceny of Fruit & Vegetables*', section 281;

[xviii] '*Killing Animals with Intent to Steal*', section 289.

[xix] '*Larceny of Or Dredging of Oysters*', section 290;

[xx] '*Larceny by Clerks & Servants*', section 273; and

[xxi] '*Advertisement for Stolen Property*', section 119.

[22.9.2] Embezzlement Offences

The following are related '*Embezzlement*' offences as provided for in the *Penal Code* (Ch. 26):

[i] '*Embezzlement by Co – partners, etc*', section 259;

[ii] '*Embezzlement by Officer of Post Office*', section 267; and

[iii] '*Embezzlement by Clerks & Servants*', section 273.

In *Toritelia v R* [1987] SILR 4 Kapi JA stated at page 27:

> '[A] person may be adjudged guilty of "fraudulent embezzlement" if he uses, diverts, applies or disposes of chattel, money or valuable security in breach of his legal obligation in looking after his employer's property. The fact that he intended to pay back or return the property is irrelevant. This line of authority is supported by *R v Williams* [1953] 37 CrAppR 71 and *R v Cockburn* [1968] 52 CrAppR 134. The High Court adopted this line of argument [and the Court of Appeal adopted that line of argument].'

In that case White P stated at page 20:

> 'In the present case the appellant, charged with embezzlement admitted that he knew he had no right to take and use the funds he held as supervisor of the fish market at Yandina. That his intention was to pay back the amount he had taken and that he had some prospects of being able to do so was accepted. But those prospects depended on an advance payment

> which he would have received if an overseas course had been approved. These prospects were not fulfilled and he was never in a position to repay the amount appropriated. Clearly, the appellant had acted deliberately in breach of his obligations in a manner prejudicing another's right knowing that he had no right to do so. That being the appellant's state of mind at the time of the appropriation with no more than a hope or expectation of being able to repay the amount he had taken there can be no doubt he was dishonestly prejudicing another's right knowing he had no right to do so. In the circumstances he was guilty of embezzlement and should have been convicted.'

See also: *R v Christopher Saungao* (Unrep. Criminal Case No. 30 of 1995; Lungole – Awich J).

Section 174 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with any offence against section 273 of the Penal Code (relating to embezzlement), and it is proved that he stole the property in question; he may be convicted of the offence of stealing although he was not charged with it.'

Refer also to section 120(c)(iv) of the *Criminal Procedure Code* (Ch. 7).

Where it is possible to specify particular offences it is improper to rely on a '*general deficiency*', see *R v Tomlin* [1954] 2 WLR 1140; [1954] 2 AllER 272; [1954] 2 QB 274; (1954) 38 CrAppR 82.

[22.9.3] Larceny & Embezzlement By Clerks & Servants

As regards the offence of '*Larceny & Embezzlement by Clerks & Servants*', section 120 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –
>
> […]
>
> (j) when a person is charged with any offence under sections 259 ['*Stealing & Embezzlement by Co – Partners, Etc*'], 273 ['*Larceny & Embezzlement by Clerks Or Servants*'] or 278 ['*Conversion*'] of the Penal Code it *shall* be sufficient to specify the *gross amount of property in respect of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed without specifying particular times or exact dates*.' (emphasis added) [words in brackets added]

In *R v Wals*h [1971 – 72] PNGLR 293 the Supreme Court stated at page 298:

> 'To us it seems that the term "general deficiency" is an expression in money terms of the difference between the amount which at the end of the period selected for accounting a person or corporation should possess in cash or deposits or investments representing cash and the amount he or it actually possesses. Such a difference is generally to be discovered by an examination of the books of account or entries kept or made in relation to receipts and disbursements.

> In this case we think that there should have been evidence of an examination of the books of account or entries kept or made under the appellant's charge or supervision, or some other evidence that there was a deficiency over some relevant period between the total sums of money received by her and the amount actually accounted for.'

[22.9.4] Conversion

The offence of '*Conversion*' is provided for by section 278 of the *Penal Code* (Ch. 26).

In *R v Adachi Reqeo* (Unrep. Criminal Case No. 96 of 1998) Lungole – Awich J stated at page 4:

> 'The essence of the offence of conversion, which was adopted in s.271 of our Penal Code from the English Larceny Act of 1916, is that *the property had been received or was in the possession of the accused lawfully and that he fraudulently converted it to his own use or to the use of some other person.* The most significant element in conversion, like in larceny, embezzlement and other related offences in the English Larceny Act 1916 and our Penal Code is the fraudulent intent. *The fraudulent intent is disclosed when one deals with the property of another, without that others consent and well knowing that it will prejudice the interest of that other person*. The point is explained in great detail in the case of *R –v- Williams* [… (1953) 37 CrAppR 71]. An important case from our Court of Appeal, on the point is *Toritelia v The Queen* (1987) SILR 4.' (emphasis added)

To deposit an employer's cheque into a bank account which it is not authorised does *not* amount to the offence of '*Larceny*', but '*Conversion*'.

In *R v Davenport* (1954) 38 CrAppR 37 Lord Goddard CJ, delivering the judgment of the Court, stated at pages 41 – 42:

> 'There was no larceny here because in larceny there must be an asportation, a taking and a carrying away. The fallacy that led to the charge of stealing money was this: It was thought that because the master's account got debited that was enough to constitute a theft. But, although one talks about a person having money in a bank, it is just as well that it should be understood that the only person who has money in a bank is a banker. If I pay money into my bank either by paying cash or a cheque, that money at once becomes the money of the banker. The relationship between banker and customer is that of debtor or creditor. He does not hold my money as an agent or trustee […]. Directly the money is paid into the bank, it becomes the banker's money, and the contract between the banker and the customer a against his promise to honour the customer's cheques on demand. When the bank is paying out, whether in cash over the counter or by crediting the bank account of somebody else, he is paying out his own money, not the customer's money, but he is debiting the customer in account. The customer has a chose in action, that is to say, a right to expect that the banker will honour his cheque, but the banker does it out of his own money. Therefore, the money paid on those cheques was the banker's money but it led to the customer's account being debited. If the appellant had been charged with the fraudulent conversion of the cheques, there could have been no answer at all, but he was charged with larceny, and it is quite obvious that he could not be convicted of larceny because he did not steal the company's money. He caused their account to be debited, but that is not the stealing of the money.'

However, the defendant could have been convicted of stealing the cheques.

Refer also to section 120(j) of the *Criminal Procedure Code* (Ch. 7).

See also: *R v Sotere Ria* (Unrep. Criminal Case No. 9 of 1993; Palmer J); *R v Bottomley* (1922) 16 CrAppR 184 at page 189; *R v Smith* (1924) 18 CrAppR 76; *R v Sheaf* (1925) 19 CrAppR 46; *R v Morter* (1927) 20 CrAppR 53; *R v Lynskey* (1952) 36 CrAppR 30; *R v Pilkington* (1958) 42 CrAppR 233 & *R v Yale* (1963) 47 CrAppR 229.

[22.10] Alternative Charges

[22.10.1] Statutory Provision

Section 171(a) of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with stealing anything and –
>
> (a) it is proved that he received the thing knowing the same to have been stolen, he may be convicted of the offence of receiving although he was not charged with it.'

Section 59(3) of the *Traffic Act* (Ch. 131) states:

> 'If on the trial of a charge of stealing a vehicle the court is of the opinion that the defendant was not guilty of stealing the vehicle but was guilty of an offence under this section, the court may find him guilty of an offence under this section and thereupon he shall be liable to be punished accordingly.'

[22.10.2] Practice Note

The prosecution is required to advise the Court whenever it is relying on charges in the alternative.

In *David Kio v R* (Unrep. Criminal Appeal Case No. 11 of 1977) Davis CJ issued the following '*Practice Note*':

> 'In view of this provision [, referring to section 171(a) of the *Criminal Procedure Code* (Ch. 7),] it is unnecessary to include in a charge of stealing an alternative count of receiving […].
>
> […]
>
> In future cases of stealing, where there is a possibility of the court finding the accused not guilty of stealing but guilty of receiving, I recommend that the accused be charged with stealing alone. Where this is done the prosecutor should always draw to the court's attention the provisions of section 171(a) of the Criminal Procedure Code.' [words in brackets added]

[22.10.3] Doctrine Of Recent Possession

The '*Doctrine Of Recent Possession*' may be applied in appropriate cases, see *David Kio v R* (Unrep. Criminal Appeal Case No. 11 of 1977; Davis CJ; at page 3).

In *R v Langmead* (1864) Le & Ca 427; 169 ER 1459 Blackburn J stated at pages 441 and 1464 respectively:

> 'I do not agree … that recent possession is not as vehement evidence of receiving as of stealing. When it has been shown that the property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.'

At pages 439 – 440 and 1464 respectively Pollock CB stated:

> 'If, as I have said, there is no other evidence, the jury will probably consider with the reason that the prisoner stole the property; but, if there is other evidence which is consistent either with is having stolen the property, or with his having received it from someone else, it will be for the jury to say which appears to them to be the more probable solution.'

In *R v Brain otherwise Jackson* (1918) 13 CrAppR 197 Avory J, delivering the judgment of the Court, stated at pages 198 – 199:

> '*It is quite true that if a man is found in possession of recently stolen property it may give rise to a presumption either that he is the person who actually stole it or that he received it knowing it to have been stolen. What is "recent" stealing depends on the character of the goods.* Some naturally change hands quicker than others. But after the presumption has been raised it is still the duty of the judge to tell the jury that it is only a presumption which calls for some explanation by the prisoner. If he gives no explanation or one which the jury does not believe, the jury may presume he is the person who stole the property or received it knowing it to have been stolen.' (emphasis added)

In *Trainer v R* (1906) 4 CLR 126 Griffith CJ explained the '*doctrine of recent possession*' at page 132:

> 'It is a well known rule that *recent possession* of stolen property is evidence *either* that the person in possession of it *stole* the property *or received* it knowing it to have been stolen according to the circumstances of the case.
>
> *Prima facie* the presumption is that he *stole* it himself, *but* if the circumstances are such as to show it to be impossible that he stole it, it may be *inferred* that he received it knowing that someone else had stolen it.' (emphasis added)

See also: *Attorney – General of Hong Kong v Yip Kai – Foon* [1988] 1 AllER 153; [1988] 2 WLR 326; (1988) 86 CrAppR 368 & *R v Marcus* (1923) 17 CrAppR 191.

[22.11] Compared With False Pretences

In *R v Caslin* (1960) 44 CrAppR 47 [[1961] 1 WLR 59; [1961] 1 AllER 246] Lord Parker CJ, delivering the judgment of the Court, stated at page 53:

> 'The first question which arises is whether she was properly charged with larceny by a trick or whether this was a case of obtaining money by false pretences. The distinction between the two is a very fine one and, […] the distinction is often largely academic. The authorities on subject are numerous, and the result in each case must depend upon the exact facts and the true inferences to be drawn therefrom. *The guiding test in each case is whether the person*

> *whose money is obtained meant to part with the property in the money, in which case it would, if the representation was false and as to an existing fact be false pretences, or whether he meant only to part with possession, in which case, whether the false representation was to an existing fact or as to the future, it would be a case of larceny by trick*.' (emphasis added)

Simply the distinction between the offences of '*Larceny*' and '*False Pretences*' is that in respect of the offence of '*Larceny*' the complainant loses possession, but not ownership; whereas in respect of the offence of '*False Pretences*' the complainant loses both possession and ownership. As a consequence of a 'fraud' the owner of the property gives the defendant ownership of the property in question by consent.

The offence of '*False Pretences*' is examined commencing on page **534**.

See also: *Tom Amaiu v The State* [1979] PNGLR 576 at page 580.

[22.12] Jurisdiction

The law relating to the jurisdiction of the courts in respect of the offence of '*Larceny*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of the offence of '*Larceny*' and related offences is examined commencing on page **918**.

In respect of stolen property a Court should direct that the property be restored to the person from whom it was taken, see section 104(3) of the *Criminal Procedure Code* (Ch. 7).

LARCENY

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RECEIVING

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RECEIVING

[23.0] Introduction

This chapter will examine specifically the offence of '*Receiving*', as provided for by section 313(1) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In that regard reference should be made to the *Larceny Act* 1916 (UK), see *Toritelia v R* [1987] SILR 4.

In *R v Matthews* (1949) 34 CrAppR 55 [[1950] 1 AllER 137] Lord Goddard CJ, delivering the judgment of the Court, stated at page 58.

> 'If at the time when the property is received the receipt is innocent, the fact that the receiver changes his mind and later misappropriates the property does not turn the receipt into a felony, and that has been the law of this country for very many years. If a person, having received property innocently, then changes his mind and misappropriates it it has been more than once attempted to be said, that that would be larceny.'

[23.1] Offence

Section 313(1) of the *Penal Code* (Ch. 26) states:

> 'Any person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour, is guilty of an offence of the like degree (whether felony or misdemeanour) and shall be liable –
>
> (a) in the case of felony, to imprisonment for fourteen years; and
>
> (b) in the case of misdemeanour, to imprisonment for seven years.'

'Every person may be proceeded against on information and convicted, whether the principal offender has or has not been previously convicted, or is or is not amenable to justice', see section 313(3) of that *Code*.

See: *R v Smith* (1962) 46 CrAppR 277.

[23.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did receive property to wit **[**specify the property**]** knowing the said property to have been **[**stolen **or** obtained**]** in a way and under circumstances which amounted to a **[**felony **or** misdemeanour**]** to wit **[**specify the **(**felony **or** misdemeanour**)]**.'

See: *R v Quinter* (1934) 25 CrAppR 32.

RECEIVING

[23.3] Elements

A. Defendant

B. Place

C. Date

D. Receive

E. Property

F. Knowing The Said Property To Have Been

[1] Stolen; Or

[2] Obtained In A Way And Under Circumstances Which Amounted To A
[i] Felony; Or
[ii] Misdemeanour

[23.4] Receive

The term '*Receive*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation and General Provisions Act* (Ch. 85).

In *R v Seiga* (1960) 44 CrAppR 26 Ashworth J, delivering the judgment of the Court, stated at page 30:

> 'In paragraph 2092 of the 34th edition of *Archbold*, it is stated: "Even if there is proof of a criminal intent to receive and a knowledge that the goods are stolen, if the exclusive possession still remains in the thief, a conviction for receiving cannot be sustained." Various authorities are cited in support of this statement, including WILEY (1850) 2 Den 37 and BERGER (1915) 11 CrAppR 72. In the latter case, at p.74, the Lord Chief Justice quoted with approval a passage from the judgment of Patterson J in WILEY's case in the following terms: "*I do not think it necessary that in order to constitute a man a receiver it is necessary that he should touch the goods, or that under certain circumstances a party having a joint possession with the receivers may not be convicted as a receiver; but, I think, to make a person liable as a receiver the goods must be under his control*." That states the law accurately […].' (emphasis added)

In *Hobson v Impett* (1957) 41 CrAppR 138 Lord Goddard CJ, with whom Hilbery & Donovan JJ concurred, stated at page 141:

> 'It is not the law that, if a man knows goods are stolen and puts his hands on them, that in itself makes him guilty of receiving, because it does not follow that he is taking them into his control. The control may still be in the thief or the man whom he is assisting, and the alleged receiver may be only picking the goods up without taking them into his possession, the goods all the time remaining in the possession of the person whom he is helping. […] It cannot be the law that merely because a man picks up goods which he knows are stolen he is receiving the goods.'

In *R v Cavendish* (1961) 45 CrAppR 374 [[1961] 2 AllER 856; [1961] 1 WLR 1083] Lord Parker CJ, delivering the judgment of the Court, held at page 378:

> 'A man cannot be convicted of receiving goods of which delivery has been taken by his servant unless there is evidence that he, the employer, had given the servant authority or instructions to take the goods.'

'It is *not* necessary in cases of receiving that a jury should be directed that they must be satisfied that the prisoner received the property from somebody else,' see *R v Seymour* (1954) 38 CrAppR 68 [[1954] 1 AllER 1006; [1954] 1 WLR 678] at page 70. (emphasis added)

[23.5] Property

The term '*Property*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.'

See: *D'Andrea v Woods* (1953) 37 CrAppR 182.

Section 120 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –
>
> […]
>
> (c)(i) *the description of property in a charge or information shall* be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, *if the property is so described, it shall not be necessary* (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;
>
> [Therefore, provided the property in question has been described with as much detail as possible, it is *not* necessary to state the name of the owner of the property or its value, unless such details are required to prove a specific offence.]
>
> […]

(iv) *coin and bank notes may be described as money; and any allegation as to money, so far as regards the description of the property*, *shall* be sustained by proof of any amount of coin or of any bank or currency note (although the particular species of coin of which such amount was composed or the particular nature of the bank or currency note, shall not be provided); and in cases of stealing, embezzling and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note, or any portion of the value thereof, although such coin or bank or currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person and such part shall have been returned accordingly;' (emphasis added) [words in brackets added]

[23.6] Proof Of Knowledge

Section 313(1) of the *Penal Code* (Ch. 26) states:

'Any person who receives any property *knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour* […].' (emphasis added)

The onus is *never* on the defendant to prove that he/she did not have the requisite knowledge, see *R v Hepworth; R v Fearnley* [1955] 2 AllER 918; [1955] 2 QB 600; (1955) 39 CrAppR 152; (1955) 3 WLR 331; *R v Grinberg* (1917) 12 CrAppR 259; *R v Badash* (1917) 13 CrAppR 17; *R v Bacon* (1917) 13 CrAppR 36; *R v Bryant* (1917) 13 CrAppR 49; *R v Sanders* (1919) 14 CrAppR 11 & *R v Sharma; R v Abramovitch* [1914 –15] AllER Rep 204; (1916) 11 CrAppR 45.

In *R v Garth* (1949) 33 CrAppR 100 [[1949] 1 AllER 773] Lord Goddard CJ, delivering the judgment of the Court, stated at page 101:

'I have more than once endeavoured to say what ABRAMOVITCH's CASE [(1914) 11 CrAppR 45)] lays down and it is this: *Possession of property recently stolen, where no explanation is given, is evidence which can go to the jury that the prisoner received the property knowing it to have been stolen*. It must be borne in mind that the onus is always on the prosecution; but if the prisoner gives an explanation which raises a doubt in the minds of the jury on the question whether or not he knew that the property was stolen, then the ordinary rule applies and the case has not been proved to the satisfaction of the jury, and therefore the prisoner is entitled to be acquitted. It is not a question whether the prisoner gives an account which may possible be true, because as I have said, any account may be true. A much more accurate direction to the jury is: "If the prisoner's account raises a doubt in your minds, then you ought not to say that the case has been proved to your satisfaction."' (emphasis added)

In *Director of Public Prosecutions v Nieser* (1958) 43 CrAppR 35 Diplock J, delivering the judgment of the Court, stated at pages 42 – 44:

'The subsection thus creates two classes of offence, one a felony and the other a misdemeanour, according to the circumstances in which the property received was stolen or obtained. It treats property as falling into two classes: (1) property which has been stolen or obtained in any way whatsoever under circumstances which amount to a felony; and (2) property which has been stolen or obtained in any way whatsoever under circumstances amounting to misdemeanour, and it requires as an ingredient of the offence knowledge by the receiver of at least the category into which the property he has received falls.

> Does it require more specific knowledge by the receiver than this of the nature of the offence committed by the person by whom the property was stolen or obtained? Neither the structure of the subsection itself nor its antecedent legal history compels us to such a conclusion. […]
>
> […]
>
> *[It is not] necessary for the prosecution to adduce evidence to show that the defendant knew the precise nature of the felony or misdemeanour by which the property was in fact obtained*.' (emphasis added) [words in brackets added]

In *R v Sbarra* (1918) 13 CrAppR 118 Darling J, delivering the judgment of the Court, held at page 120:

> 'The circumstances in which a defendant receives goods may of themselves prove that the goods were stolen, and further may prove that he knew it at the time when he received them. It is not a rule of law that there must be other evidence of the theft.'

Section 317 of the *Penal Code* (Ch. 26) states:

> 'Whenever any person is being proceeded against for receiving any property knowing it to have been stolen, or for having in his possession stolen property, *for the purpose of proving guilty knowledge* there may be given in evidence at any stage of the proceedings –
>
> (a) the fact that other property stolen within the period of twelve months preceding the date of the offence charged was found or had been in his possession; and
>
> (b) the fact that within the five years preceding the date of the offence charged he was convicted of any offence involving fraud or dishonesty. This last – mentioned fact may not be proved unless –
>
> (i) seven days notice in writing has been given to the offender that proof of such previous conviction is intended to be given; and
>
> (ii) evidence has been given that the property in respect of which the offender is being tried was found or had been in his possession.' (emphasis added)

The Court has the discretion and overriding duty in every case to secure a fair trial, and if in any particular case the Court comes to the conclusion that even though certain evidence is strictly admissible, referring to the evidence of previous convictions which are sought to be admitted under section 317 of the *Penal Code* (Ch. 26), if its prejudicial effect once admitted outweighs its probative value it may exclude such evidence, see *R v Herron* [1967] 1 QB 107; [1966] 3 WLR 374; [1966] 2 AllER 26; (1966) 50 CrAppR 132.

See also: *R v Aves* [1950] 2 AllER 330; (1950) 34 CrAppR 159 at page 160; *R v Smith & Currier* (1918) 13 CrAppR 151; *R v Fuschillo* [1940] 2 AllER 487; (1940) 27 CrAppR 193 & *R v McGuire* (1930) 22 CrAppR 31.

[23.7] Doctrine Of Recent Possession

The '*Doctrine Of Recent Possession*' may be applied in appropriate cases, see *David Kio v R* (Unrep. Criminal Appeal Case No. 11 of 1977; Davis CJ; at page 3).

RECEIVING

The prosecution is required to advise the Court whenever it is relying on charges in the alternative, see '*Practice Note*' issued by Davis CJ in *David Kio v R* (Unrep. Criminal Appeal Case No. 11 of 1977).

In *R v Langmead* (1864) Le & Ca 427; 169 ER 1459 Blackburn J stated at pages 441 and 1464 respectively:

> 'I do not agree … that recent possession is not as vehement evidence of receiving as of stealing. When it has been shown that the property has been stolen, and has been found recently after its loss in the possession of the prisoner, he is called upon to account for having it, and, on his failing to do so, the jury may very well infer that his possession was dishonest, and that he was either the thief or the receiver according to the circumstances.'

Pollock CB stated at pages 439 – 440 and 1464 respectively:

> 'If, as I have said, there is no other evidence, the jury will probably consider with the reason that the prisoner stole the property; but, if there is other evidence which is consistent either with is having stolen the property, or with his having received it from someone else, it will be for the jury to say which appears to them to be the more probable solution.'

In *R v Brain otherwise Jackson* (1918) 13 CrAppR 197 Avory J, delivering the judgment of the Court, stated at pages 198 – 199:

> '*It is quite true that if a man is found in possession of recently stolen property it may give rise to a presumption either that he is the person who actually stole it or that he received it knowing it to have been stolen. What is "recent" stealing depends on the character of the goods.* Some naturally change hands quicker than others. But after the presumption has been raised it is still the duty of the judge to tell the jury that it is only a presumption which calls for some explanation by the prisoner. If he gives no explanation or one which the jury does not believe, the jury may presume he is the person who stole the property or received it knowing it to have been stolen.' (emphasis added)

In *Trainer v R* (1906) 4 CLR 126 Griffith CJ explained the '*Doctrine Of Recent Possession*' at page 132:

> 'It is a well known rule that *recent possession* of stolen property is evidence *either* that the person in possession of it *stole* the property *or received* it knowing it to have been stolen according to the circumstances of the case.
>
> *Prima facie* the presumption is that he *stole* it himself, *but* if the circumstances are such as to show it to be impossible that he stole it, it may be *inferred* that he received it knowing that someone else had stolen it.' (emphasis added)

See also: *Attorney – General of Hong Kong v Yip Kai – Foon* [1988] 1 AllER 153; [1988] 2 WLR 326; (1988) 86 CrAppR 368 & *R v Marcus* (1923) 17 CrAppR 191.

In *R v Bailey* (1917) 13 CrAppR 27 Avory J, delivering the judgment of the Court, stated at page 30:

> 'It is true that in some cases where the housebreaking takes place one day and the property stolen is found in the possession of the prisoner on the following day, it is open to the jury to infer that he broke into the premises; but not where he is not found in possession until three or four months later, it may, however, be evidence that he was guilty of receiving the goods knowing them to have been stolen.'

The law related to the '*Doctrine of Recent Possession*' is also examined commencing on pages **477** and **514**.

[23.8] Co - Defendants

Section 176 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When any two or more persons are charged with jointly receiving any property knowing the same to have been stolen, and it is proved that one or more of such persons separately received any part of such property, such of the persons may be convicted as are proved to have received any part of such property.'

[23.9] Evidence Of Accomplices

A Court should warn itself on the danger of convicting a 'receiver' on the evidence of the 'thief', unless such evidence is corroborated in some material particular implicating the 'receiver', see *R v Reynolds* (1927) 20 CrAppR 125 at page 126.

The law relating to the evidence of '*Accomplices Generally*' is examined commencing on page **298**.

[23.10] Jurisdiction

The jurisdiction of the court in respect of the offence of '*Receiving*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of the offence of '*Receiving*' is examined commencing on page **918**.

In respect of stolen property a Court should direct that the property be restored to the person from whom it was taken, see section 104(3) of the *Criminal Procedure Code* (Ch. 7).

[23.11] Related Offences

The following are related offences as provided for in the *Penal Code* (Ch. 26):

[i] '*Receiving Things Sent Or Intended To Be Sent By Post*', section 313(2);

[ii] '*Receiving Goods Stolen Outside Solomon Islands*', section 314; and

[iii] '*Tracing Possession & Unlawful Possession*', section 315.

BREAK & ENTER & RELATED OFFENCES

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BREAK & ENTER & RELATED OFFENCES

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BREAK & ENTER & RELATED OFFENCES

[24.0] Introduction

This chapter will examine specifically the offences of:

- '*Burglary*', as provided for by section 299 of the *Penal Code* (Ch. 26);
- '*Housebreaking & Committing Felony*', as provided for by section 300 of the *Penal Code* (Ch. 26);
- '*Housebreaking With Intent To Commit Felony*', as provided for by section 301 of the *Penal Code* (Ch. 26);
- '*Sacrilege*', as provided for by section 298 of the *Penal Code* (Ch. 26); and
- '*Being Found By Night Armed Or In Possession Of Housebreaking Implements*', as provided for by section 302 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In that regard reference should be made to the *Larceny Act* 1916 (UK), see *Toritelia v R* [1987] SILR 4.

See also: *John Solo v R* (Unrep. Criminal Appeal Case No. 89 of 2000; Kabui J; at page 7).

Section 170 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with any offence mentioned in Part XXXI ['*Burglary, Housebreaking & Similar Offences*'] of the Penal Code and the court is of the opinion that he is not guilty of that offence but that he is guilty of any other offence mentioned in the said Part, he may be convicted of that other offence although he was not charged with it.' [words in brackets added]

In *R v Kurasch* (1937) 26 CrAppR 25 Finlay J, delivering the judgment of the Court, held at page 28:

> 'Where a prisoner is charged with housebreaking, it is clearly relevant to give evidence of housebreaking implements having been found in his house, whether they were merely lying in the house, or in the possession of his wife, or in a bag belonging to a servant of his wife, or in a bag belonging to his wife. The mere discovery of the implements in the house would be admissible in evidence.'

BREAK & ENTER & RELATED OFFENCES

[24.1] Burglary

[24.1.1] Offences

Section 299 of the *Penal Code* (Ch. 26) states:

> 'Any person who in the *night* –
>
> (a) breaks and enters the dwelling – house of another with intent to commit any felony therein; or
>
> (b) breaks out of the dwelling – house of another having –
>
> (i) entered the said dwelling – house with intent to commit any felony therein; or
>
> (ii) committed any felony in the said dwelling – house,
>
> is guilty of the felony called burglary, and shall be liable to imprisonment for life.' (emphasis added)

[24.1.2] Wording Of Charges

Section 299(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** in the night did break and enter the dwelling-house of a person namely **[**specify the name/s of the occupier/s**]** with intent to commit a felony therein to wit **[**specify the felony**]**.'

Section 299(b)(i)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** in the night did break out of the dwelling-house of a person namely **[**specify the name/s of the occupier/s**]** having entered the said dwelling-house with intent to commit a felony therein to wit **[**specify the felony**]**.'

Section 299(b)(ii)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** in the night did break out of the dwelling-house of a person namely **[**specify the name/s of the occupier/s**]** having committed a felony therein to wit **[**specify the felony**]** in the said dwelling-house.'

In *R v Calos Galofia* (Unrep. Criminal Review Case No. 1293 of 1991) Muria J stated at page 1:

> 'I refer to my Review Judgments in Criminal Case No. 1245/91 given on 10 January 1992 and Criminal Case No. 1167/91 given on 13 January 1992 in which I said that a count alleging that the accused "broke and entered ….. with intent to steal and did steal therein ….." is bad for duplicity. It is clear that the charge against the accused is bad for duplicity.'

Such a charge is bad for 'duplicity' because it alleges two separate offences, ie., 'break and enter with intent' under section 299(a) of the *Penal Code* (Ch. 26) and 'break and enter and commit' under section 300(a) of the *Penal Code* (Ch. 26).

The law relating to '*Duplicity*' is examined commencing on page **86**.

[24.1.3] Elements

Section 299(a)

A. Defendant

B. Place

C. Date

D. Night

E. Break & Enter

F. Dwelling – House

G. Intent To Commit A Felony Therein

Section 299(b)(i)

A. Defendant

B. Place

C. Date

D. Night

E. Breaks Out

F. Dwelling - House

G. Having Entered The Said Dwelling – House With Intent To Commit A Felony Therein

Section 299(b)(ii)

A. Defendant

B. Place

C. Date

D. Night

E. Breaks Out

F. Dwelling - House

G. Having Committed A Felony In The Said Dwelling – House

BREAK & ENTER & RELATED OFFENCES

[24.2] Housebreaking & Committing Felony

[24.2.1] Offences

Section 300 of the *Penal Code* (Ch. 26) states:

> 'Any person who –
>
> (a) breaks and enters any dwelling – house, or any building within the curtilage thereof and occupied therewith, or any school – house, shop, warehouse, counting – house, office, store, garage, pavilion, factory or workshop, or any building belonging to Her Majesty, or to the Government, or to any Town Council, local government council or other public authority, and commits any felony therein; or
>
> (b) breaks out of the same, having committed any felony therein,
>
> is guilty of a felony, and shall be liable to imprisonment for fourteen years.'

[24.2.2] Wording Of Charges

Section 300(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did break and enter

- **[**a dwelling-house **or** a building within the curtilage thereof and occupied therewith a dwelling – house**]** of a person namely **[**specify the occupier/s of the dwelling – house**]**; **or**
- **[**a school-house to wit **[**specify the name of the school**]** **or** **(**a shop, a warehouse, a counting-house, an office, a store, a garage, a pavilion, a factory **or** a workshop**)]** the property of **[**specify the name of the owner**]**; **or**
- a building the property of **[**Her Majesty, the Government, a Town Council, the local government council **or** the **(**specify other public authority**)]**

and did commit a felony therein to wit **[**specify the felony**]**.'

Section 300(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did break out of

- **[**a dwelling-house **or** a building within the curtilage thereof and occupied therewith a dwelling – house**]** of a person namely **[**specify the occupier/s of the dwelling – house**]**; **or**
- **[**a school-house to wit **[**specify the name of the school**]** **or** **(**a shop, a warehouse, a counting-house, an office, a store, a garage, a pavilion, a factory **or** a workshop**)]** the property of **[**specify the name of the owner**]**; **or**
- a building the property of **[**Her Majesty, the Government, a Town Council, the local government council **or** the **(**specify other public authority**)]**

having committed a felony therein to wit **[**specify the felony**]**.'

[24.2.3] Elements

Section 300(a)

A. Defendant

B. Place

C. Date

D. Break & Enter

E. [i] Dwelling – House;
[ii] Building Within The Curtilage Thereof & Occupied Therewith A Dwelling – House;
[iii] School – House;
[iv] Shop;
[v] Warehouse;
[vi] Counting – House;
[vii] Office;
[viii] Store;
[ix] Garage;
[x] Pavilion;
[xi] Factory;
[xii] Workshop; or
[xiii] Building The Property Of
[1] Her Majesty;
[2] the Government;
[3] a Town Council;
[4] the local government council; or
[5] other public authority

F. Commit Felony Therein

Section 300(b)

A. Defendant

B. Place

C. Date

D. Break Out Of

E. [i] Dwelling – House;
[ii] Building Within The Curtilage Thereof & Occupied Therewith A Dwelling – House;
[iii] School – House;
[iv] Shop;
[v] Warehouse;
[vi] Counting – House;

[vii] Office;
[viii] Store;
[ix] Garage;
[x] Pavilion;
[xi] Factory;
[xii] Workshop; or
[xiii] Building The Property Of
[1] Her Majesty;
[2] the Government;
[3] a Town Council;
[4] the local government council; or
[5] other public authority

F. Having Committed A Felony

[24.3] Housebreaking With Intent To Commit Felony

[24.3.1] Offences

Section 301 of the *Penal Code* (Ch. 26) states:

'Any person who, with intent to commit any felony therein –

(a) enters any dwelling – house in the night; or

(b) breaks and enters any dwelling – house, place of divine worship or any building within the curtilage, or any school – house, shop, warehouse, counting – house, office, store, garage, pavilion, factory or workshop, or any building belonging to Her Majesty, or to the Government, or to any Town Council, local government council or other public authority,

is guilty of a felony, and shall be liable to imprisonment for seven years.'

[24.3.2] Wording Of Charges

Section 301(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did with intent to commit a felony therein enter a dwelling-house of a person namely **[**specify the name/s of the occupier/s**]** in the night.'

Section 301(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** with intent to commit a felony therein did break and enter

- **[**a dwelling-house of a person namely **(**specify the name/s of the occupier/s**) or** a building within the curtilage of a dwelling-house of **(**specify the name of the occupier/s**)]**; **or**

- **[**a place of divine worship to wit **(**specify the name of the owner**)** belonging to **(**specify the name of the owner**) or** a building within the curtilage of a place of divine worship to wit **(**specify the name of the owner**)** the property of **(**specify the name of the owner**)]**; **or**

- **[**a school-house, a shop, a warehouse, a counting-house, an office, a store, a garage, a pavilion, a factory **or** a workshop**]** the property of **[**specify the name of the owner**]**; **or**

- a building the property of **[**Her Majesty, the Government, a Town Council, the local government council **or** the **(**specify other public authority**)]**.'

[24.3.3] Elements

Section 301(a)

A. Defendant

B. Place

C. Date

D. Intent To Commit A Felony Therein

E. Enter

F. Dwelling - House

G. Night

Section 301(b)

A. Defendant

B. Place

C. Date

D. Intent To Commit A Felony Therein

E. Break & Enter

F. [i] Dwelling – house;
[ii] Place Of Devine Worship;
[iii] Building Within The Curtilage Of A Dwelling – house;
[iv] Building Within The Curtilage Of A Place Of Devine Worship
[v] School – House;
[vi] Shop;
[vii] Warehouse;
[viii] Counting – House;
[ix] Office;
[x] Store;
[xi] Garage;
[xii] Pavilion;
[xiii] Factory;
[xiv] Workshop; or

[xv] Building The Property Of

[1] Her Majesty;
[2] the Government;
[3] a Town Council;
[4] the local government council; or
[5] other public authority

[24.4] Sacrilege

[24.4.1] Offences

Section 298 of the *Penal Code* (Ch. 26) states:

'Any person who –

(a) breaks and enters any place of divine worship and commits any felony therein; or

(b) breaks out of any place of divine worship having committed any felony therein,

is guilty of the felony called sacrilege, and shall be liable to imprisonment for fourteen years.'

[24.4.2] Wording Of Charges

Section 298(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did break and enter a place of divine worship namely **[**specify the name of place of divine worship**]** and commit a felony therein to wit **[**specify the felony**]**.'

Section 298(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did break out of a place of divine worship namely **[**specify the name of place of divine worship**]** having committed a felony therein to wit **[**specify the felony**]**.'

[24.4.3] Elements

Section 298(a)

A. Defendant

B. Place

C. Date

D. Break & Enter

E. Place Of Devine Worship

F. Commit A Felony Therein

Section 298(b)

A. Defendant

B. Place

C. Date

D. Breaks Out

E. Place Of Devine Worship

F. Having Committed A Felony Therein

[25.5] Being Found by Night Armed Or In Possession Of Housebreaking Implements

[25.5.1] Offences

Section 302 of the *Penal Code* (Ch. 26) states:

> 'Any person who is found by night –
>
> (a) armed with any dangerous or offensive weapon or instrument, with intent to break or enter into any building and to commit any felony therein; or
>
> (b) having in his possession without lawful excuse (the proof whereof shall lie on such person) any key, picklock, crow, jack, bit or other implement of house – breaking; or
>
> (c) having his face masked or disguised with intent to commit any felony; or
>
> (d) in any building with intent to commit any felony therein,
>
> is guilty of a misdemeanour, and shall be liable –
>
> (i) if he has been previously convicted of any such misdemeanour or of any felony, to imprisonment for ten years; and
>
> (ii) in all other cases to imprisonment for five years.'

[25.5.2] Wording Of Charges

Section 302(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was found by night armed with **[(**a dangerous **or** an offensive**) (**weapon **or** instrument**)]** to wit a **[**specify the **(**weapon or instrument**)]** with intent to **[**break **or** enter**]** into a building and to commit a felony therein.'

Section 302(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was found by night having in **(**his/her**)** possession without lawful excuse a **[**key, picklock, crow, jack, bit **or (**specify other implement of house-breaking**)]**.'

Section 300(c)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was found by night having **(**his/her**)** face **[**masked **or** disguised**]** with intent to commit a felony.'

Section 302(d)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was found by night in a building the property of **[**specify the name of the owner**]** with intent to commit a felony.'

Circumstance of Aggravation

Include the following '*circumstance of aggravation*' in appropriate cases:

- and the said **[**insert the name of the defendant**]** has been previously convicted of a **[**misdemeanour **or** felony**]** to wit **[**specify the **(**misdemeanour or felony**)]** at the **[**specify the name of the Court**]** on **[**specify the date**]**.

The law relating to '*Proving A Previous Conviction*' is examined commencing on page **305**.

[24.5.3] Elements

Section 302(a)

A. Defendant

B. Place

C. Date

D. Found

E. Night

F. Armed

[i] Dangerous Weapon;
[ii] Dangerous Instrument;
[iii] Offensive Weapon; or
[iv] Offensive Instrument

G. Intent To

[i] Break; or
[ii] Enter

H. Building

I. Commit A Felony Therein

Section 302(b)

A. Defendant

B. Place

C. Date

D. Found

E. Night

F. Possession

G. Without Lawful Excuse

H. [i] Key;
[ii] Picklock;
[iii] Crow;
[iv] Jack;
[v] Bit; or
[vi] Other Implement Of House - breaking

Section 300(c)

A. Defendant

B. Place

C. Date

D. Found

E. Night

F. Face

[i] Masked; or
[ii] Disguised

G. Intent To Commit A Felony

Section 302(d)

A. Defendant

B. Place

C. Date

D. Found

E. Night

F. In A Building

G. With Intent To Commit A Felony

[24.6] Criminal Trespass

[24.6.1] Offences

Section 189 of the *Penal Code* (Ch. 26) states:

'(1) Any person who –

(a) enters into or upon property in the possession of another with intent to commit an offence or to intimidate or annoy any person lawfully in possession of such property;

(b) having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult or annoy any such person or with intent to commit any offence; or

(c) unlawfully persists in coming or remaining upon such property after being warned not to come thereon or to depart therefrom,

is guilty of a misdemeanour, and shall be liable to imprisonment for three months.

If the property upon which the offence is committed is any building, tent or vessel used as a human dwelling, or any building used as a place of worship, or as a place for the custody of property, the offender shall be liable to imprisonment for one year.

(2) Any person who enters by night any dwelling – house, or any verandah or passage attached thereto, or any yard, garden or other land adjacent to or within the curtilage of such dwelling – house, without lawful excuse, is guilty of a misdemeanour, and shall be liable to imprisonment for one year.'

[24.6.2] Wording Of Charges

Section 189(1)

(a) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did enter **[**into **or** upon**]** property to wit **[**specify the property**]** in the possession of a person namely **[**specify the name of this person**]** with intent to **[**commit an offence **or (**intimidate **or** annoy**)** a person namely **(**specify the name of this person**)]** lawfully in possession of the said property.'

(b) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** having lawfully entered **[**into **or** upon**]** property to wit **[**specify the property**]** in the possession of a person namely **[**specify the name of this person**]** did unlawfully remain there with intent **[**thereby to **(**intimidate, insult **or** annoy**) (**the said person **or [**specify the name of this person**]) or** to commit an offence**]**.'

(c) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did unlawfully persist in **[**coming **or** remaining**]** upon property to wit **[**specify the property**]** in the possession of a person namely **[**specify the name of this person**]** after being warned **[**not to come thereon **or** to depart therefrom**]** the said property.'

Include the following '*circumstances of aggravation*' in appropriate cases:

- and the said **[**building, tent **or** vessel**]** was being used as a human dwelling by the said **[**specify the name of the person/s in possession of the property**]**;
- and the said building was used as a place of worship; or
- and the said place was being used for the custody of property.

Section 189(2)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without lawful excuse enter by night

- the dwelling-house of a person namely **[**specify the name of this person**]**'; **or**
- the **[**verandah **or** passage**]** attached to the dwelling – house of a person namely **[**specify the name of this person**]**'; **or**
- the **[**yard, garden **or (**specify any other land**)] [**adjacent to **or** within**]** the curtilage of the dwelling – house of a person namely **[**specify the name of this person**]**'.

[24.6.3] Elements

Section 189(1)(a)

A. Defendant

B. Place

C. Date

D. Enter
   [i] Into; or
   [ii] Upon

E. Property

F. Possession Of Complainant

G. Intent To
   [i] Commit An Offence; or
   [ii] [l] Intimidate; or
   [2] Annoy
   Person Lawfully In Possession Of The Said Property

BREAK & ENTER & RELATED OFFENCES

Section 189(1)(b)

A. Defendant

B. Place

C. Date

D. Lawfully

E. Enter
- [i] Into; or
- [ii] Upon

F. Property

G. Possession Of Complainant

H. Unlawfully

I. Remain

J. Intent To
- [i] Commit An Offence; or
- [ii] [l] Intimidate;
  - [2] Insult; or
  - [3] Annoy

  Person Lawfully In Possession Of The Said Property

Section 189(1)(c)

A. Defendant

B. Place

C. Date

D. Unlawfully

E. Persist In
- [i] Coming; or
- [ii] Remaining

Upon

F. Property

G. Possession Of Complainant

H. After Being Warned
- [i] Not To Come Thereon; or
- [ii] To Depart Therefrom

Property

Section 189(2)

A. Defendant

B. Place

C. Date

D. Without Lawful Excuse

E. Enter

F. Night

G. [i] Dwelling-house Of Complainant;
[ii] [1] Verandah; or
[2] Passage
Attached To The Dwelling – house Of Complainant; or
[iii] [1] Yard;
[2] Garden; or
[3] Land
[A] Adjacent To; or
[B] Within
Curtilage Of The Dwelling – house Of Complainant

[24.7] Dates Of Offences

The date of 'break and enter' offences should be carefully examined, like any other offence. Particular notice should be given to 'break and enter' offences which occur during a period which complainants are away, if it is unknown on which day the offence occurred. Under such circumstances the wording of the charge should commence with the following words:

> 'That on a date unknown between …'

The law relating to the '*Dates Of Offences*' is examined commencing on page **85**.

[24.8] Night

The term '*Night*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'the interval between half – past six o'clock in the evening and half – past six o'clock in the morning.'

[24.9] Break & Enter

Section 297 of the *Penal Code* (Ch. 26) states:

> 'A person who breaks any part, whether external or internal, of a building, or opens by unlocking, pulling, pushing, lifting or any other means whatever, any door, window, shutter, cellar flap or other thing intended to close or cover an opening in a building, or an opening giving passage from one part of a building to another, *is deemed to break the building*.
>
> A person *is deemed to enter a building* as soon as any part of his body or any part of any instrument used by him is within the building.
>
> A person who obtains entrance into a building by means of any threat or artifice used for that purpose, or by collusion with any person in the building, or who enters any chimney or other aperture of the building permanently left open for any necessary purpose, but not ordinarily used as a means of entrance, *is deemed to have broken and entered the building*.' (emphasis added)

In *John Solo v R* (Unrep. Criminal Appeal Case No. 89 of 2000) Kabui J stated at page 7:

> 'The element of "breaking" in burglary is stated thus on page 656 of Archbold, Criminal Pleading Evidence & Practice, Thirty – Sixth Edition, 1966 by T.R. Fitzwalter Butler and Marston Garsia; "*To constitute burglary, there must be a breaking of the house, either actual or constructive. If a man leaves his doors or window open, and another enters therein with intent to commit a felony, it is no burglary*: 1 Hale 551; 3 Co. Inst. 64. So if there is an aperture in a cellar window to admit light, through which a thief enters in the night, this not burglary: R v Lewis, 2 C & P 628; R v Spriggs and Hancock, 1 M & Rob 357.
>
> Again at page 657, the learned authors state "*An actual breaking is, where the offender for the purpose of getting admission for any part of his body or for a weapon or other instrument, in order to effect his felonious intention, breaks a hole in a wall of a house, breaks a door or window, picks the lock of a door, or opens it with a key, or even by lifting a latch, or unlooses any other fastening to doors or windows which the owner has provided*: …' (emphasis added)

In *Luke Misitana v R* (Unrep. Criminal Appeal Case No. 7 of 1996) Muria CJ stated at pages 3 – 4:

> 'It must be noted that under the section 290 definition [now section 297], *it is sufficient to constitute "breaking" any part of a building if a person pulls or pushes any door of a building which is closed*. Through his counsel, the appellant agreed the door was closed, though as he said was not locked, and that he only opened the door by pushing it. The door was closed which was intended to close entry into the sacricity room. The appellant gained entry (which was not denied) by pushing the door open. That however, must clearly satisfy the definition of "breaking" the building as defined in section 290.' (emphasis added) [words in brackets added]

In *R v Boyle* (1954) 38 CrAppR 111 [[1954] 2 QB 292; [1954] 2 AllER 721; [1954] 3 WLR 364] Lord Goddard CJ stated at pages 112 – 113:

> '[T]he law cannot be better stated than it is stated in the present 33rd edition of Archbold's Criminal Pleading etc at p.669: "*A constructive breaking is where the offender, with intent to commit a felony, obtains admission by some artifice, trick or threat, for the purpose of effecting it." In other words, if the householder, had she known the true facts, would not have admitted the prisoner, and the prisoner has obtained admission by means of a trick or a threat, that is in law a constructive breaking*. Take the very common case where a man represents himself as calling from a gas company or an electric light company. If he is a man from the company who comes into the house for the proper purpose and steals when he is in the house, that is not breaking and entering; that is larceny in a dwelling – house, because he has not used a trick to get into the house. He has come in the ordinary course of his duty, representing (as he is in fact) that he is an employee of the company whose duty it is to read the meter. If he has come in to read the meter and then steals in the house, the offence is larceny in the dwelling – house and not breaking and entering.' (emphasis added)

See also: *R v Chandler* [1911- 13] AllER Rep 428; [1913] 1 KB 125; (1913) 8 CrAppR 428.

If the prosecution *cannot* prove a 'break' then other charges should be considered such as '*Larceny*', section 261 of the *Penal Code* (Ch. 26), see *R v Calrose Pilly* (Unrep. Criminal Review Case No. 74 of 2001; Kabui J).

The law relating to the offence of '*Larceny*' is examined commencing on page **460**.

[24.10] Dwelling - house

[24.10.1] Definition

The term '*Dwelling - house*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any building or structure or part of a building or structure which is for the time being kept by the owner or occupier for the residence therein of himself, his family or servants or any of them, and it is immaterial that it is from time to time uninhabited; a building or structure adjacent to or occupied with a dwelling – house is deemed to be part of the dwelling – house.'

A motel unit occupies for a week was held to be a dwelling – house, see *R v Halloran & Reynolds* [1967] QWN 34.

[24.10.2] Criminal Trespass

In *Lanemua v R* (Unrep. Criminal Case No. 27 of 1992) Palmer J stated at pages 2 – 3:

> 'Subsection (2) [of section 189 of the *Penal Code* (Ch. 26)] does not say that the dwelling house must be occupied by the owner at the time of commission of the offence.
>
> *An owner may be on leave, and so leave his house vacant or he may have his relations or friends occupying the house and looking after it whilst he is away*. The fact that a stranger or a person comes into the dwelling – house in such circumstances can amount to an offence if the element of 'lawful excuse' is lacking.

It is not a necessary requirement of the subsection that it must be established that the woman and the 2 children were the owners of the house. Rather, the question that needs to be asked is, were they lawfully there? If yes, then anyone else who enters that house without lawful excuse is a trespasser. *It is not necessary to establish that the occupants were owners.* […]

[…]

For the purposes of criminal trespass, it is important that there is evidence which identifies either who the owner is or who was in lawful possession of the house. The relationship of the complainant to the house as owner or occupier is therefore important.' (emphasis added) [words in brackets added]

[24.11] Store

The term '*Store*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* a place where a retail business is carried on, either by actual sales or by exposure of goods for sale, see *City Motors (1933) Pty Ltd v Tuting* [1964] TasSR 194 at page 198 & *Plummer & Adams v Needam* (1954) 56 WALR 1 at page 10.

[24.12] Warehouse

The term '*Warehouse*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* a place whose 'predominant and indeed the sole, purpose [is] the exposure of goods for sale by wholesale and the storage of large stocks so that buyers may take immediate delivery of the full amount of their purchases. These, in ordinary usage, are the characteristics of a "warehouse" in one of its forms, see *A G Campbell (Properties) Ltd v Parramatta City Council* [1961] NSWLR 542, per Sugerman J at page 543.

[24.13] Counting - house

The term '*Counting - house*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* 'a part of a house which is devoted to the purposes of commercial business. It never has been suggested that it must be an entire house', see *Piercy v Maclean* (1870) LR5CP 252, per Willes J at page 261.

[24.14] Garage

The term '*Garage*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section was discussed by Atkinson J in *Barnett & Block v National Parcels Insurance Co Ltd* [1942] 1 AllER 221 at page 223:

> 'Now what is a garage? No evidence was given to suggest or prove the word "garage" in the trade had got any special meaning, and it was agreed to take the four dictionary definitions set out in the agreed statement of facts. The four definitions were these. From the Shorter Oxford Dictionary: "A building for sheltering, cleaning or refitting motor vehicles". From the New Century Dictionary: "A building for sheltering, cleaning or repairing motor vehicles. To put or keep in a garage." From the New Standard Dictionary: "A building for stabling or storing of motor vehicles of all kinds". From Nuttal's Standard Dictionary: "A storehouse for motor vehicle." *Those are four definitions from leading dictionaries all containing at any rate on word in common, and this is "building".*' (emphasis added)

[24.15] Pavilion

The term '*Pavilion*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* a building for the housing of exhibitions and a building beside a playing field.

[24.16] Factory

The term '*Factory*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* 'a building or place in which goods are manufactured or made', see *O'Sullivan v Arriola* [1951] SASR 108, per Napier J at page 110.

[24.17] Workshop

The term '*Workshop*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* building and rooms used for the manufacturing of products or fixing of machinery.

[24.18] Building

The term '*Building*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section was discussed by Jacobs J in *Hilderbrandt v Stephen* [1964] NSWLR 740 at page 742:

> 'It is true to say that the word is defined in the Shorter Oxford Dictionary as a structure or edifice, but I do not think that it can thereby be suggested that every structure is a building, although obviously every building is a structure. The second word in the definition, namely, "edifice", refers, of course, to a large or formal building and every building is not edifice. I do not think that a single word as a synonym for the word "building" is available in the language, and it is necessary therefore to regard the word in terms of the concept. *To me the ordinary concept is, as I have said, a structure of which the main feature is probably the existence of some form of roof*.' (emphasis added)

[24.19] Place Of Devine Worship

The term '*Place Of Devine Worship*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would include a church or other places of devine worship.

[24.20] Felony

The term '*Felony*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with imprisonment for three years or more.'

[24.21] Offence

The term '*Offence*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'an act, attempt or omission punishable by law'.

[24.22] Without Lawful Excuse

The onus is on the defendant to show on the '*balance of probabilities*' that he/she had a '*lawful excuse*' for entering as specified in section 189(2) of the *Penal Code* (Ch. 26).

Refer also to the chapter which examines '*Proof Of Issues*' commencing on page **68** and particularly the section titled '*Negative Averments*' commencing on page **83**.

[24.23] Armed

The term '*Armed*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *R v Jones* (1987) 85 CrAppR 259 [[1987] 2 AllER 692; [1987] 1 WLR 692] Tucker J, delivering the judgment of the Court of Appeal, held at page 266:

> 'The expression "armed" is an ordinary English word. *Normally, it will involve either physically carrying arms, or it will involve proof that, to his knowledge, a defendant knows that they are immediately available.* In our judgment, it is not necessary to prove an intent to use those arms if the situation should require it, though clearly if a defendant does use them, or has used them, then that is an obvious indication that he is armed.' (emphasis added)

See also: *Rowe v Conti; Threlfall v Panzera* [1958] VR 547; [1958] ALR 1038.

[24.24] Dangerous Or Offensive Weapon Or Instrument

The terms '*Dangerous Or Offensive Weapon Or Instrument*' are *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* 'a weapon or instrument made or adapted or intended for causing injury to human being', see *Sinaje v Balmer* [1965] 2 AllER 248. A 'firearm' would be classed as a 'dangerous weapon', whereas a large knife may be classed as a 'dangerous instrument'.

[24.25] Intent

Intention which is a state of mind, can never be proved as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of the offences as outlined in sections 189, 301 & 302 of the *Penal Code* (Ch. 26), 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to commit the offence in question', see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

As regards the '*intent to steal*', it is irrelevant that there was nothing to steal, see *R v Walkington* [1979] 2 AllER 716; [1979] 1 WLR 1169; (1979) 68 CrAppR 427; [1979] CrimLR 526.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[24.26] Found In Possession Of Instrument Of House breaking

[24.26.1] Introduction

Section 302 of the *Penal Code* (Ch. 26) states (in part):

> 'Any person who is found by night –
>
> […]

(b) having in his possession *without lawful excuse* (the proof whereof shall lie on such person) any key, picklock, crow, jack, bit or other implement of house – breaking;' (emphasis added)

In *R v Harris* (1924) 18 CrAppR 157 Lord Hewart CJ, delivering the judgment of the Court, held at page 159:

'To prove the offence with which the appellant was charged [ie., '*Possession of Housebreaking Implements By Night*'], it must be shown that he was found by night in possession by night of housebreaking implements. […] On the true construction of this section the finding and the possession must both be by night and the possession must be the possession by a free man.' [words in brackets added]

[24.26.2] Possession

The term '*Possession*' is defined in section 4 of the *Penal Code* (Ch. 26) as follows:

'(a) "be in possession of" or "have in possession" *includes* not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.' (emphasis added)

To prove '*possession*' the prosecution *must* prove '*knowledge*' *and* '*control*'.

In *Director of Public Prosecutions v Brooks* [1974] AC 862; [1974] 59 CrAppR 185 [[1974] 2 AllER 840; [1974] 2 WLR 899; [1974] CrimLR 364] Lord Diplock stated at pages 866 & 187 respectively:

'In the ordinary use of the word "possession", one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's own physical control.'

In *R v Boyesen* [1982] AC 768; (1982) 75 CrAppR 51 [[1982] 2 AllER 161; [1982] 2 WLR 882; [1981] CrimLR 596] Lord Scarman stated at pages 773 – 774 & 53 – 54 respectively:

'Possession is a deceptively simple concept. It denotes a physical control *or* custody of a thing *plus* knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature: but you do *not* possess it *unless* you know you have it.' (emphasis added)

A person does *not* have '*knowledge*' of property if he/she:

- does not know where the property was; and
- was not in position to find out.

When two men are found in association for the common purpose of house – breaking, the possession of one instrument is capable of being used for house – breaking is in possession of both, see *R v Martin* [1965] NZLR 228. When house – breaking instruments are found in a car or in the physical possession of one defendant, the prosecution *must* be able to prove that both persons were acting together for a common purpose. That inference will not be lightly inferred, see *R v Edmonds* [1963] 2 QB 142 [[1963] 2 WLR 715; [1963] 1 AllER 828; (1963) 47 CrAppR 114] at pages 149 – 150; *R v Harris* [1961] CrimLR 256 & *R v Allingham & Bandy* [1954] NZLR 1123. The best possible evidence are admissions by each defendant in relation to the purpose the instruments or implements were to be used.

The law relating to '*Parties To Offences*' is examined commencing on page **406**.

See also: *R v Cugullere* [1961] 2 AllER 843; [1961] 1 WLR 858; (1961) 45 CrAppR 108; *R v Cavendish* [1961] 2 AllER 856; [1961] 1 WLR 1083; (1961) 45 CrAppR 374; *R v Lewis* (1910) 4 CrAppR 96 at page 100; *Warner v Metropolitan Police Commissioner* (1968) 52 CrAppR 373; [1969] 2 AC 256; [1969] 2 AllER 356; [1968] 2 WLR 1303; *R v Holland* [1974] PNGLR 7 at page 19; *R v Iona Griffin* [1974] PNGLR 72 at page 75; *R v Angie – Ogun* [1969 – 70] P&NGLR 36; *Wanganeed* (1988) 38 ACrimR 187 & *Dayman v Newsome; Ex parte Dayman* [1973] QdR 399.

[24.26.3] Other Implement Of House - breaking

In *R v Patterson* (1961) 46 CrAppR 106 [[1962] 2 QB 429; [1962] 1 AllER 340] Lord Parker CJ, delivering the judgment of the Court, stated at page 110:

> 'It seems to this court that those words [, referring to the words "or other implement of housebreaking',] mean no more than any other implement capable of being used for housebreaking.' [words in brackets added]

In *R v Brown* (1968) 52 CrAppR 70 Lord Parker CJ, delivering the judgment of the Court, held at page 73:

> 'This court is quite clear that an implement can be a housebreaking – implement although its purpose is not to effect the actual breaking; so long as it is capable of being used and is commonly used for facilitating the breaking and entering, it is sufficient.'

In that case a torch was held to be an implement of house – breaking.

See also: *R v Hodges* (1957) 41 CrAppR 218.

[24.26.4] Without Lawful Excuse

In *R v Patterson* (1961) 46 CrAppR 106 [[1962] 2 QB 429; [1962] 1 AllER 340] Lord Parker CJ, delivering the judgment of the Court, stated at page 112:

> 'It seems to the court that in the first instance the prosecution must prove that the prisoner was found in possession by night of either an implement which can properly be described as one of those specifically named in the section, or of an implement capable in fact of being used as a housebreaking implement from its common, though not exclusive, use for the purpose or from the particular circumstances of the case in question. *Once possession of such an implement has been shown, the burden shifts on to the prisoner to prove, on the balance of probabilities, that there was lawful excuse for his possession of the implement at the time and place in question.*' (emphasis added)

Refer also to the chapter which examines '*Proof Of Issues*' commencing on page **68** and particularly the section titled '*Negative Averments*' commencing on page **83**.

[24.27] Found In

Section 302 of the *Penal Code* (Ch. 26) states (in part):

> 'Any person who is *found by night* –
>
> […]
>
> (e) *in* any building with intent to commit any felony therein,' (emphasis added)

In *R v Lumsden* (1951) 35 CrAppR 57 Cassels J, delivering the judgment of the Court, stated at page 60:

> 'If "found in" means what it says, it does not necessarily mean that the person charged must be caught in or apprehended in, or that the finder should also be in the building as well, but it does mean, and can only be taken to mean, that, *if a person is to be convicted of an offence against this section, there must be clear and unmistakable evidence that he has been, as the section says, found in the building.*' (emphasis added)

Therefore, the defendant *must* be found inside the building.

See also: *R v Parkin* (1949) 34 CrAppR 1 at page 3.

[24.28] Doctrine Of Recent Possession

In *R v Loughlin* (1951) 35 CrAppR 69 Lord Goddard CJ, delivering the judgment of the Court, held at page 71:

> 'If it is proved that premises have been broken into, and that certain property has been stolen from those premises, and that very shortly afterwards a man is found in possession of that property, that is certainly evidence from which the jury can infer that he is the housebreaker or shopbreaker and; if he is, it is inconsistent to find him guilty of receiving, because a man cannot receive from himself. That is what is so often done. It is perfectly good evidence of the prisoner being the housebreaker that he is found in possession of property stolen from a house quite soon after the breaking.'

In *R v Bailey* (1917) 13 CrAppR 27 Avory J, delivering the judgment of the Court, stated at page 30:

> 'It is true that in some cases where the housebreaking takes place one day and the property stolen is found in the possession of the prisoner on the following day, it is open to the jury to infer that he broke into the premises; but not where he is not found in possession until three or four weeks later; it may, however, be evidence that he was guilty of receiving the goods knowing them to have been stolen.'

See also: *R v Seymour* [1954] 1 AllER 1006; [1954] 1 WLR 678; (1954) 38 CrAppR 68.

The law relating to the '*Doctrine of Recent Possession*' is also examined commencing on page **477**.

[24.29] Jurisdiction

The jurisdiction of the courts in respect of the offences as specified in this Chapter is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of the offences as specified in this Chapter is examined commencing on page **918**.

In respect of stolen property a Court should direct that the property be restored to the person from whom it was taken, see section 104(3) of the *Criminal Procedure Code* (Ch. 7).

[24.30] Related Offences

The following are related offences as provided for in the *Penal Code* (Ch. 26):

[i] '*Forcible Entry*', section 85 of the *Penal Code* (Ch. 26);

[ii] '*Forcible Detainer*', section 86 of the *Penal Code* (Ch. 26); and

[iii] '*Larceny*', section 261 of the *Penal Code* (Ch. 26) which is examined commencing on page **460**.

BREAK & ENTER & RELATED OFFENCES

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WILFUL DAMAGE OR DESTRUCTION

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WILFUL DAMAGE OR DESTRUCTION

[25.0] Introduction

This chapter will examine the offences of '*Wilful and Unlawful Damage*', as provided for by section 326(1) of the *Penal Code* (Ch. 26). As regards '*Special Cases of Wilful and Unlawful Damage*' reference should be made to the other subsections of section 326.

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

[25.1] Offences

Section 326(1) of the *Penal Code* (Ch. 26) states:

> 'Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence, which, unless otherwise stated, is a misdemeanour, and he shall be liable, if no other punishment is provided, to imprisonment for two years.'

[25.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did wilfully and unlawfully **[**destroy **or** damage**]** property to wit **[**specify the property**]** the property of **[**specify the name of the complainant**]**.'

[25.3] Elements

A. Defendant

B. Place

C. Date

D. Wilfully

E. Unlawfully

F. [i] Destroy; or
[ii] Damage

G. Property

H. Complainant

[25.4] Wilfully

The term '*Wilfully*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Pukari – Flabu v Hambakon – Sma* [1965 – 66] P&NGLR 348 Frost J, sitting alone, held:

> 'Wilfully' *means* 'intentionally', or 'deliberately' or 'recklessly' or 'maliciously', *but not 'accidentally' or 'negligently'.*

In *R v M K* [1973] PNGLR 204 Minogue CJ & Kelly J, in their joint judgment, stated at page 207:

> 'By "wilfully" is meant that the act is done deliberately and intentionally, not by accident or inadvertence.'

In *R v Lockwood, Ex parte Attorney – General* [1981] QdR 209 the Court of Criminal Appeal held:

> The word 'wilfully' requires the prosecution no more proof, so far as that element is concerned, than that the defendant deliberately did an act, that is, that it was a willed act, aware at the time he/she did it, that the result charged was a likely consequence of his/her act and that he/she recklessly did the act regardless of the risk.

See also: *McIntosh & McIntosh v Lowe* (1982) 8 ACrimR 471.

Intention which is a state of mind, can never be proved as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of the offences as provided for in section 326 of the *Penal Code* (Ch. 26), 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to either destroy or damage the property in question', see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[25.5] Unlawfully

The term '*Unlawfully*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The prosecution needs to prove absence of consent either by:

- the calling of evidence from the complainant, see *R v McClymont, Ex parte Attorney - General* [1987] 2 QdR 442;

- by an admission, see *R v McClymont; Ex parte Attorney - General* (*supra*); or

- inference in appropriate circumstances, such as damage to a court house, see *R v Stevenson* (1996) 90 ACrimR 259.

In *R v Stevenson* (*supra*) Ambrose J stated at page 267:

> 'Merely to state the ground highlights its absurdity. It is true that absence of consent is an element of the offence […]. However that absence of consent may be inferred and the only proper inference which could have been drawn in this case was the Director – General did not consent to the door and window of the courthouse being destroyed by a shotgun blast.'

Property belonging to other people may be lawfully damaged or destroyed, provided it was damaged or destroyed by an act that was either authorised, justified or excused by law. The mere possession of property does not enable a person to damage or destroy property without consent of the owner/s, unless it is authorised, justified or excused by law.

The law relating to '*Criminal Responsibility Generally*' is examined commencing on page **428**.

As regards husbands and wives damaging or destroying their own property refer to section 260 of the *Penal Code* (Ch. 26) which is examined on page **471**.

[25.6] Destroy

The term '*Destroy*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* 'elements of finality and totality about it, ie., unable to be repaired', see *Barnett London Borough Council v Eastern Electricity Board* [1973] 2 AllER 319.

[25.7] Damage

The term '*Damage*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

To '*damage*' *means* to cause 'an injury impairing value or usefulness', see *Cox v Riley* (1986) 83 CrAppR 54 at page 57.

In *R v Zischke* [1983] QdR 240 the Court of Criminal Appeal examined the meaning of the term 'damage'. In that case the defendant painted a number of slogans on the surface of buildings, footpaths and walls in the Townsville Mall. In order to remove a large number of the slogans money and trouble had been expended by or on behalf of the owners in restoring or attempting to restore their property.

That Court held:

(1) Property is '*damaged*' when it is rendered imperfect or inoperative; and

(2) It is not necessary to establish that expenditure of money was required to restore property in order to prove 'damage'.

In *Samuels v Stubbs* (1972) 4 SASR 200 the Court held that a police officer's cap was '*damaged*' when it was crushed as a result of being jumped on, notwithstanding that it might have been restored to its original state and without physical damage being caused to it. At pages 203 – 204 Walters J stated:

> '*It seems to me that it is difficult to lay down any very general and, at the same time, precise and absolute rule as to what constitutes "damage". One must be guided in a great degree by the circumstances of each case, the nature of the article, and the mode in which it is affected or treated.*
>
> Moreover, the meaning of the word "damage" must as I have already said, be controlled by its context. The word may be used in the sense of "mischief done to property".
>
> I have come to the conclusion that the constable's cap was damaged, in that it was injured or harmed in such a way to cause temporary derangement of its function and of the purpose which it was normally to serve.' (emphasis added)

In *H M Advocate v Wilson* [1984] SLT 117 the Scottish High Court of Judiciary held that '*damage*' included shutting off a power station thereby stopping power being produced. In that case no physical damage was caused but there was economic loss.

See also: *Hardman & others v Chief Constable of Avon & Somerset Constabulary* [1986] CrimLR 330; *Kathness v Police* [1984] NZ Recent Law 127 & *Griffiths v Morgan* [1972] TasSR 279.

[25.8] Property

The term '*Property*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any description of real and personal property, money, debts and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.'

Reference should also be made to subsections (2) to (7) of section 326 of the *Penal Code* (Ch. 26) as regards '*Malicious Injuries To Property In Special Cases*'.

[25.9] Jurisdiction

The jurisdiction of the courts in respect of the offences of '*Wilful Damage Or Destruction*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[25.10] Related Offences

The following are related offences as provided for in the *Penal Code* (Ch. 26):

- '*Attempts To Destroy Property By Explosives*', section 327 of the *Penal Code* (Ch. 26); and

- '*Wilful Damage, etc, To Survey & Boundary Marks*' , section 330 of the *Penal Code* (Ch. 26).

ARSON

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ARSON

[26.0] Introduction

This chapter will examine the offences of:

- '*Arson*', as provided for by section 319 of the *Penal Code* (Ch. 26); and
- '*Attempts To Commit Arson*', provided for by section 320 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

[26.1] Arson

[26.1.1] Offence

Section 319 of the *Penal Code* (Ch. 26) states:

> 'Any person who wilfully and unlawfully sets fire to –
>
> (a) any building or structure whatever, whether completed or not; or
>
> (b) any aircraft, vehicle or vessel, whether completed or not; or
>
> (c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or
>
> (d) a mine, or the workings, fittings or appliances of a mine,
>
> is guilty of a felony, and shall be liable to imprisonment for life.'

[26.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did wilfully and unlawfully set fire to **[**a building, a structure, an aircraft, a vehicle, a vessel**,** a stack of **(**cultivated vegetable produce, mineral **or** vegetable fuel**)**, a mine **or** the **[**workings, fittings **or** appliances of a mine**])]** the property of **[**specify the name of the complainant**]**.'

[26.1.3] Elements

A. Defendant

B. Place

C. Date

D. Wilfully

E. Unlawfully

F. Sets Fire To

G. [i] Building;
[ii] Structure;
[iii] Aircraft;
[iv] Vehicle;
[v] Vessel;
[vi] Stack Of
[1] Cultivated Vegetable Produce;
[2] Mineral;
[3] Vegetable Fuel;
[vii] Mine; Or
[viii] [1] Workings;
[2] Fittings; or
[3] Appliances
Of A Mine

H. Property Of Complainant

[26.1.4] Wilfully

The term '*Wilfully*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Pukari – Flabu v Hambakon – Sma* [1965 – 66] P&NGLR 348 Frost J, sitting alone, held:

> 'Wilfully' *means* 'intentionally', or 'deliberately' or 'recklessly' or 'maliciously', *but not 'accidentally' or 'negligently'.*

In *R v M K* [1973] PNGLR 204 Minogue CJ & Kelly J, in a joint judgment, stated at page 207:

> 'By "wilfully" is meant that the act is done deliberately and intentionally, not by accident or inadvertence.'

In *R v Lockwood, Ex parte Attorney – General* [1981] QdR 209 the Court of Criminal Appeal held:

> The word 'wilfully' requires the prosecution no more proof, so far as that element is concerned, than that the defendant deliberately did an act, that is, that it was a willed act, aware at the time he/she did it, that the result charged was a likely consequence of his/her act and that he/she recklessly did the act regardless of the risk.

See also: *McIntosh & McIntosh v Lowe* (1982) 8 ACrimR 471.

Intention which is a state of mind, can never be proved as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of the offence of '*Arson*', 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to set fire to the property in question', see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[26.1.5] Unlawfully

The term '*Unlawfully*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The prosecution needs to prove absence of consent either by:

- the calling evidence from the complainant;
- by an admission; or
- inference in appropriate circumstances, such as the 'arson' of a court house.

As regards the property of husbands and wives, refer to section 260 of the *Penal Code* (Ch. 26) which is examined on page **471**.

[26.1.6] Sets Fire To

The term '*Sets Fire To*' is *not* defined in the *Penal Code* (Ch. 26) or the *Interpretation & General Provisions Act* (Ch. 85).

In *R v B* [1997] 2 QdR 459 Macrossan CJ and Davies JA of the Court of Appeal, with whom Moynihan J concurred, stated at pages 463 – 464:

> 'A different matter in respect of which some statutory amendment to the section could be considered relates to what is involved in the concept of "sets fire to". This phrase appears to have been adopted at a time when the principal building material which would be employed for internal use was wood and grave dangers were associated with it should it become ignited, whereas some modern structures can be damaged by the application of fire or heat without their burning in the sense of oxidising or having their chemical composition altered. Some modern materials may, however, be melted and effectively destroyed. Other common law jurisdictions have moved away from inviting the sterile debates that can be involved in determining whether any part of a structure has been consumed by fire as opposed to being simply scorched: note the tension that is involved between two longstanding decisions dating from an earlier time: *R v Parker* (1839) Car & P 45; 173 ER 733 and *R v Russell* (1842) Car & M 541; 174 ER 626. Thus, the *Crimes Act 1900* (NSW), s. 195(b) refers to damage "caused by means of fire" and the *Criminal Damage Act 1971* (UK) s1(3) refers to "damaging property by fire". In this context some illustration of the manner in which judicial interpretation

> can deal with the problem is provided by the decision of the California Court of Appeal in *People v Mentzer* 209 Cal Rptr 549 (1985). There the offence was arson and under the Penal Code it had to be shown that structure was burned. The defendant had set a fire in a cemetery against a mausoleum and it was shown that the marble floor was broken, buckled and cracked from the heat and that the plaster walls were chipped. *It was held that supported a conclusion that within the meaning of the Penal Code the structure was burned. It was said that an item is "consumed" if it is destroyed or devastated in whole or in part by fire and that if an item is ravaged or ruined by fire, it is "consumed" although not reduced to ashes*.' (emphasis added)

In *R v Jorgenson* (1955) 3 CCC 30 the defendant had set out a fire in a concrete fireproof building in order to destroy its contents. Although the contents were consumed the only damage to the building itself was that the walls were blackened or scorched and the paint blistered. The Court held that that did not amount to arson and that the term '*sets fire to*' has a legal meaning and means '*to burn*' in the sense that the word is used in the common law definition of arson. *At common law there must be an actual consuming by fire before the material is 'burned'. Charring, that is the carbonisation of the material, constitutes burning but not mere scorching, blackening or blistering by heat.*

[26.1.7] Building Or Structure

The terms '*Building*' and '*Structure*' are *not* defined in the *Penal Code* (Ch. 26) or the *Interpretation & General Provisions Act* (Ch. 85).

In *London County Council v Tann* [1954] 1 AllER 389 Lord Goddard CJ, with whom the other members of the Court concurred, stated at page 390:

> 'I think the learned magistrate was wrong in saying that he must construe the term "structure" as ejusdem generis with the term "building". There is no genus, and it is obvious that the Act is meant to include something wider than a building. If you had simply to construe the word "structure" ejusdem generis with the word "building" and say that "structure" meant a building, there would have been no necessity for the legislature to use both words.'

The '*Ejesdum Generis*' or '*Class*' Rule in statutory interpretation is examined on page **57**.

See also: *Springham v R* (1964) 3 CCC 105 at page 109; *British Columbia Forest Products Ltd v Minister of National Revenue* (1971) 19 DLR(3d) 657 & *R v Bedard* (1976) 31 CCC (2d) 559.

The 'natural and ordinary' meaning of the term '*structure*' in the context of this section would *include* 'what is constructed; and involves the notion of something which is put together, consisting of a number of different things which are so put together or built together, constructed as to make one whole, which is then called a structure', see *Hobday v Nichol* [1944] 1 AllER 302, per Humphries J at page 303.

In *R v B* [1997] 2 QdR 459 Macrossan CJ and Davies JA of the Court of Appeal, with whom Moynihan J concurred, held:

Section 461(a) [ie., the equivalent Queensland provision] does not require that a 'structure' be a substantial construction or of any particular economic value or a fixture. There may be involved some restriction to a constructed entity which either serves a purpose of protecting from the elements in support of some human activity, or of confining or containing things to be held within it or, in terms of its size, is ordinarily expected to function with a substantial degree of contact with the ground.

[26.1.8] Vessel

The term '*Vessel*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

'any ship, a boat and every other kind of vessel used in navigation either on the sea or in inland waters, and includes aircraft.'

[26.2] Attempts To Commit Arson

[26.2.1] Offences

Section 320 of the *Penal Code* (Ch. 26) states:

'Any person who –

(a) attempts unlawfully to set fire to any such thing as is mentioned in the last preceding section; or

(b) wilfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in the last preceding section is likely to catch fire from it,

is guilty of a felony, and shall be liable to imprisonment for fourteen years.'

[26.2.2] Wording Of Charges

Section 320(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did attempt unlawfully to set fire to **[**a building, a structure, an aircraft, a vehicle, a vessel**,** a stack of **(**cultivated vegetable produce, mineral **or** vegetable fuel**)**, a mine **or** the **[**workings, fittings **or** appliances of a mine**])]** the property of **[**specify the name of the complainant**]**.'

Section 320(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did wilfully and unlawfully set fire to a thing to wit **[**specify the thing**]** which was so situated to **[**a building, a structure, an aircraft, a vehicle, a vessel**,** a stack of **(**cultivated vegetable produce, mineral **or** vegetable fuel**)**, a mine **or** the **(**workings, fittings **or** appliances of a mine**)]** the property of **[**specify the name of the complainant**]** that it was likely to catch fire from the said thing.'

[26.2.3] Elements

Section 320(a)

A. Defendant

B. Place

C. Date

D. Attempt

E. Unlawfully

F. Set Fire To

G.
- [i] Building;
- [ii] Structure;
- [iii] Aircraft;
- [iv] Vehicle;
- [v] Vessel;
- [vi] Stack Of
  - [1] Cultivated Vegetable Produce;
  - [2] Mineral;
  - [3] Vegetable Fuel;
- [vii] Mine; Or
- [viii]
  - [1] Workings;
  - [2] Fittings; or
  - [3] Appliances

  Of A Mine

H. Property Of Complainant

Section 300(b)

A. Defendant

B. Place

C. Date

D. Wilfully

E. Unlawfully

F. Set Fire To

G. Thing

H. Which Was So Situated To
- [i] Building;
- [ii] Structure;
- [iii] Aircraft;

[iv] Vehicle;
[v] Vessel;
[vi] Stack Of
[1] Cultivated Vegetable Produce;
[2] Mineral;
[3] Vegetable Fuel;
[vii] Mine; Or
[viii] [1] Workings;
[2] Fittings; or
[3] Appliances
Of A Mine

I. Property Of Complainant

J. Likely To Catch Fire From The Said Thing

[26.2.4] Attempt

The law relating to '*Attempts To Commit Offences*' is examined commencing on page **398**.

[26.2.5] Set Fire To Anything So Situated

In *R v Webb, Ex parte Attorney – General* [1990] 2 QdR 275 the Court of Criminal Appeal held:

> It is *not* necessary to prove that the thing set fire to was the property of some person and that the setting fire to it was done with consent of that person; and
>
> In relation to the element of 'wilfulness', it is necessary to prove that the defendant realised that there was a likelihood of a second thing catching fire or that the defendant acted recklessly in disregard of that prospect.

Macrossan CJ, with whom Lee J concurred, stated at page 282:

> '[T]he subsection should be taken as proscribing the setting fire to anything while wilfully contemplating an unlawful result that a thing within the classes specified within section 461 would catch fire from the first – mentioned thing. This meaning restricts the operation of the proscribed intention and the unlawfulness so that they qualify only the burning or possible burning of items specified in section 461 and, in this respect, the construction suggested is consistent with the plan appearing in sections 461 and 462(1) which deal with the cases of arson and attempted arson.'

Refer also to the section which examines the term '*Sets Fire To*' commencing on page **526**.

[26.3] Jurisdiction

The jurisdiction of the Courts in respect of the offences of '*Arson*' and '*Attempted Arson*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of those offences are examined commencing on page **918.**

[26.4] Related Offences

The following offences are related to offences of '*Arson*' and '*Attempts To Commit Arson*' as provided for in the *Penal Code* (Ch. 26):

- '*Setting Fire To Crops And Growing Plants*', section 321 of the *Penal Code* (Ch. 26); and
- '*Attempting To Set Fire To Crops, etc*', section 322 of the *Penal Code* (Ch. 26).

ARSON

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FALSE PRETENCES

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FALSE PRETENCES

[27.0] Introduction

This chapter will examine the offence of '*False Pretences*', as provided for by section 308(a) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In that regard reference should be made to the *Larceny Act* 1916 (UK).

Section 172 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with obtaining anything capable of being stolen by false pretences with intent to defraud, and it is proved that he stole the thing, he may be convicted of the offence of stealing although he was not charged with it.'

In *R v Harden* (1961) 46 CrAppR 90 it was held per Widgery J at page 96:

> 'It appears from ELLIS [1899] 1 QB 230, that the gist of the offence of obtaining by false pretences lies in the act of obtaining, and that if this act is done within the jurisdiction it matters not that the false pretence was made abroad.'

[27.1] Offences

Section 308(a) of the *Penal Code* (Ch. 26) states:

> 'Any person who by any false pretence –
>
> (a) with intent to defraud, obtains from any other person any chattel, money or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person;
>
> […]
>
> is guilty of a misdemeanour, and shall be liable to imprisonment for five years.'

[27.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** by a false pretence to wit **[**specify the false pretence**]** with intent to defraud did

- obtain from a person namely **[**specify the name of this person**] [**a sum of money to wit **(**specify the amount of money**) or** a **(**chattel **or** valuable security**)** to wit a **[**specify the **(**chattel **or** valuable security**)]**; **or**

- **[**cause **or** procure**] [**a sum of money to wit **(**specify the amount of money**)** to be paid **or** a **(**chattel **or** valuable security**)** to wit a **[**specify the **(**chattel **or** valuable security**)]** to be delivered to **[(**himself/herself**) or** a person namely **(**specify the name of this person**)] [**for the **(**use **or** benefit**) or** on account**]** of **[(**himself/herself**) or** a person namely **(**specify the name of this person**)]**.'

Section 120 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –
>
> […]
>
> (c)(i) *the description of property in a charge or information shall* be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, *if the property is so described, it shall not be necessary* (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;
>
> […]
>
> (iv) *coin and bank notes may be described as money; and any allegation as to money, so far as regards the description of the property*, *shall* be sustained by proof of any amount of coin or of any bank or currency note (although the particular species of coin of which such amount was composed or the particular nature of the bank or currency note, shall not be provided); and in cases of stealing, embezzling and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note, or any portion of the value thereof, although such coin or bank or currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person and such part shall have been returned accordingly;' (emphasis added) [words in brackets added]
>
> (d) *the description or designation in a charge or information* of the accused person*,* or *of any other person to whom reference is made therein*, *shall* be such as is reasonably sufficient to identify him, without necessarily stating his correct name, or his abode, style, degree, or occupation; and if, owing to the name of the person not being known, or for any other reason, it is impracticable to give such a description or designation, such description or designation shall be given as is reasonably practicable in the circumstances, or such person may be described as "*a person unknown*".' (emphasis added) [words in brackets added]

It is *not* necessary in respect of a charge of '*False Pretences*' to specify the name of the owner of the property.

The '*false pretence*' however *must* be specified in the charge, see *R v Thomas* (1931) 23 CrAppR 21.

FALSE PRETENCES

[27.3] Elements

A. Defendant

B. Place

C. Date

D. False Pretence

E. Intent To Defraud

F. Obtain From A Person

G. [i] Sum Of Money;
[ii] Chattel; or
[iii] Valuable Security

Or

A. Defendant

B. Place

C. Date

D. False Pretence

E. Intent To Defraud

F. [i] Cause; or
[ii] Procure

G. [i] Sum Of Money To Be Paid; or
[ii] [1] Chattel; or
[2] Valuable Security
To Be Delivered

H. [i] To Himself/Herself; or
[ii] To Another Person

I. [i] For The Use Of;
[ii] For The Benefit Of; or
[iii] On Account Of

J. [i] Himself/Herself; or
[ii] Another Person

[27.4] Dates Of Offences

A 'false pretence' is a continuing offence if it is operating on the mind of the complainant at the time the property was obtained, see *R v Moreton* [1911- 13] AllER Rep 699; (1913) 8 CrAppR 214.

It is *not* necessary to particularise to whom the alleged false pretence was made, see *R v Johnstone* (1950) 34 CrAppR 107 at page 108.

[27.5] False Pretences

Section 307 of the *Penal Code* (Ch. 26) states:

> 'Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true, is a false pretence.'

In *R v Maytum – White* (1957) 42 CrAppR 165 Lord Goddard CJ, delivering the judgment of the Court, held at page 168:

> 'If a man gives a post-dated cheque, it means that the cheque will be paid on the date on which the cheque is presented, though it does not mean that the drawer has immediately got the money in the bank. The only point in the case is that by giving a cheque on Williams Deacons Bank, Old Brompton Road S.W.7., he was representing that he was a customer of that bank. That is what he represented, and he was not. In other words, the false pretence laid in the indictment was proved.'

In *Albert Alexander Age v The State* [1979] PNGLR 589 the Supreme Court examined a case in which the defendant assisted a friend to obtain a loan for a motor vehicle.

At page 591 the Court stated:

> 'The loan application form in the instant case was made out by the appellant and signed by him. Under the heading "purpose" he, in filling in the form, inserted the words "assist purchase new Datsun utility". And it was indicated on the reverse side of the form that part of the purchase monies would be provided by the trade – in for K1900 of a vehicle then owned by Patu. Now all this was untrue. The loan was not required for Patu's purposes. Patu did not intend to purchase a new Datsun utility and did not intend to trade – in a vehicle he already owned. He did not intend to use the loan monies himself. Indeed he signed a cheque "to cash", to enable the appellant to pay those monies into his (the appellant's) account.
>
> […] *This was not the case of a promise to do something in the future or a representation by the representor as to the existence of an intention to do something in the future.* It was a representation as to the alleged existing facts, viz. that Patu desired to purchase another vehicle that he was making an application on his own behalf for loan monies, and that part of the purchase price was to be in the form of a trade – in. Those representations we consider to be representations as to material existing facts – representations which were false.' (emphasis added)

FALSE PRETENCES

The false representation *must* relate to a matter of fact, *either* past or present, but *not* in the future, see *R v Dent* [1955] 2 AllER 806; *Albert Alexander Age v The State* [1979] PNGLR 589 & *Green v R* (1949) 79 CLR 353.

The prosecution *must* prove that the complainant parted with the property as a result of the representation acting on his/her mind, see *R v Laverty* [1970] 3 AllER 432; (1970) 54 CrAppR 495.

In *R v Ball* (1951) 35 CrAppR 24 Lord Goddard CJ, delivering the judgment of the Court, stated at page 27:

> 'The statute [, referring to the *Larceny Act* 1916 (UK),] does *not* make it necessary to allege that the prisoner obtained the property from the owner; the words "obtains from any other person", and that would include a person who had authority to pass the property.' (emphasis added) [words in brackets added]

All documents necessary to prove the 'false pretence' should be tendered by the prosecution, see *R v Thomas* (1931) 23 CrAppR 36.

Refer also to the law relating to '*Missing Exhibits*' which is examined on page **238**.

See also: *Panjuboe v Director of Public Prosecutions* [1985 – 86] SILR 122; *R v John Flyn* (Unrep. Criminal Case No. 19 of 1997; Muria CJ); *R v Potter & another* (1958) 42 CrAppR 168; *R v Jones* (1910) 4 CrAppR 17 at page 18; *Police v Carrandine* (1996) 66 SASR 584 & *R v Devine* (1986) 25 ACrimR 7.

[27.6] Intent To Defraud

'It is elementary that, to constitute the commission of the offence with which the appellant was charged [, ie., false pretences,] intent to defraud must be shewn', see *R v Seccombe* (1917) 12 CrAppR 275 at page 276. [words in brackets added]

See also: *R v Bentone* (1918) 13 CrAppR 145 at page 150; *R v Weeks* (1928) 20 CrAppR 188 at page 190; *R v Baker* (1923) 17 CrAppR 190 at page 191; *R v Marck* (1928) 21 CrAppR 65 & *R v Smith* (1931) 22 CrAppR 180.

Intention, which is a state of mind, can never be proved as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

In *R v Sullivan* (1945) 30 CrAppR 132 Humphreys J, delivering the judgment of the Court, stated at pages 134 – 136:

> 'In order that a person may be convicted of that offence [ie., 'false pretences'] it has been said hundreds of times that *it is necessary for the prosecution to prove to the satisfaction of the jury that there was some misstatement which in law amounts to a pretence, that is, a misstatement as to an existing fact made by the accused person; that it was false and false to his knowledge; that it acted upon the mind of the person who parted with the money, and that the proceeding on the part of the accused person was fraudulent. That is the only meaning to be applied to the words "with intent to defraud".* […]

> It is, we think, undoubtedly good law that the question of inducement acting upon the mind of the person who may be described as the prosecutor is not a matter which can only be proved by the direct evidence of the witness. It can be, and very often is, proved by the witness being asked some question which brings the answer "I believed that statement and that is why I parted with my money"; but it is not necessary that there should be that question and answer if the facts are such that it is patent that there was only one reason which anybody could suggest for the person alleged to been defrauded parting with his money, and that is the false pretence, if it was a false pretence.' (emphasis added) [words in brackets added]

In *R v Kritz* (1949) 33 CrAppR 169 Lord Goddard CJ, delivering the judgment of the Court, stated at pages 173 – 174:

> 'This Court desires to lay down in the clearest possible terms that they approve of the judgment of Channell J in CARPENTER (1911) 22 CoxCC 618, at p.624. This is the *locus classius* on this point. […] The learned Judge said this: "If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, them gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and *although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money, because you may by fraud get hold of money, even if you mean to repay it, and thoroughly believe that you can repay it – you are still defrauding the depositor.*" Now mark the next passage: "You are not defrauding him out of the money if you eventually do repay it, but you are defrauding the man because you are giving him something different from what he thinks he is getting, and you are getting his money by your false statement. *In such a case as that the false statement would not be honestly made, and this question as to the intent to defraud substantially comes to this: whether or not the statements were honestly made*."' (emphasis added)

In *Toritelia v R* [1987] SILR 4 White P stated at page 12:

> '[T]he question of fact to be determined on all the relevant evidence is whether the prosecution has proved beyond reasonable doubt that the accused did prejudice or take the risk of prejudicing another's right, knowing that he had no right to do so. Throughout the cases the statement of proof of that knowledge is commonly described as proving the accused's "dishonesty".'

In other words, did the defendant act dishonestly?, see *R v Faith Osifelo* (Unrep. Criminal Case No. 36 of 1992; Palmer J; at page 5.

Prima facie there is an intent to fraud where money is obtained by false pretences, see *R v Porter* (1935) 25 CrAppR 59 at page 62.

[27.7] Obtain

The term '*Obtain*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

"Obtained" *means* obtaining the property and *not* merely the possession of the property, see *R v Lurie* (1951) 35 CrAppR 113; [1951] 2 AllER 704; *R v Ball* (1951) 35 CrAppR 24; [1951] WN 130; *R v Smith & others* (1951) 34 CrAppR 168; [1951] 1 KB 53 & *R v Stones* (1968) 52 CrAppR 36.

The prosecution *must* prove that the complainant was induced to lose both ownership and possession of the property to the defendant, see *R v Beck* [1980] QdR 123.

In *R v Marston* (1918) 13 CrAppR 203 Darling J stated at page 204:

> 'In our judgment, to upheld a conviction of obtaining goods or money by false pretences it is not necessary that the accused should have had manual possession of the goods or money in question. It is sufficient if they are under his control.'

[27.8] Chattel

The term '*Chattel*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* 'moveable possessions'.

[27.9] Money

The term '*Money*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'bank notes, bank drafts, cheques and any other orders, warrants or requests for the payment of money.'

As regards the wording of charges which involve 'money' refer to section 120(c)(iv) of the *Criminal Procedure Code* (Ch. 7).

[27.10] Valuable Security

The term '*Valuable Securit*y' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any writing entitling or evidencing the title of any person to any share or interest in any public stock, annuity, fund or debt of any part of Her Majesty's dominions, or any territory which is under Her Majesty's protection or in respect of which a mandate has been accepted by Her Majesty, or of any foreign state, or in any stock, annuity, fund or debt of any body corporate, company or society, whether within or without Her Majesty's dominions, or any territory which is under Her Majesty's protection or in respect of which a trusteeship has been accepted by Her Majesty, or to any deposit in any bank, and also includes any scrip, debenture, bill, note, warrant, order or other security for the payment of money, or any authority or request for the payment of money or for the delivery or transfer of goods or chattels, or any accountable receipt, release or discharge, or any receipt or other instrument evidencing the payment of money, or the delivery of any chattel personal, and any document of title to lands or goods.'

[27.11] Attempts

The law relating to '*Attempts To Commit Offences*' is examined commencing on page **398**.

[27.12] Similar Fact Or Propensity Evidence

In *R v Simmonds* (1909) 2 CrAppR 303 Walton J held at page 304:

> 'Speaking generally, evidence cannot be given against an accused person of the commission of other offences; but where the gist of the offence alleged is fraud, the question of intent becomes material, and it has been decided that evidence of other similar offences for the purpose of shewing intent is admissible.'

In *R v Ellis* (1910) 5 CrAppR 41 [[1910] 2 KB 746] Bray J, delivering the judgment of the Court, stated at pages 58 – 59:

> 'In our opinion the law on this subject is laid down with perfect accuracy by Channell J in *Rex v Fisher* (1910) 1 KB [(1909) 3 CrAppR 176 at page 179]. He says, giving the judgment of the Court of Criminal Appeal […]:
>
> "In other words, whenever it can be shewn that the case involves a question as to there having been some mistake or as to the existence of a system of fraud, it is open to the prosecution to give evidence of other instances of the same kind of transaction, notwithstanding that the evidence goes to prove the commission of other offences, in order to negative the suggestion of mistake or in order to shew the existence of a systematic course of fraud."'

See also: *R v Deller* (1952) 36 CrAppR 184; *R v Skinner* (1920) 15 CrAppR 114; *R v West* (1916) 12 CrAppR 145 & *R v Hurren* (1962) 46 CrAppR 323.

The law relating to '*Similar Fact Or Propensity Evidence*' is also examined commencing on page **188**.

[27.13] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*False Pretences*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[27.14] Compared To Larceny

In *R v Caslin* (1960) 44 CrAppR 47 [[1961] 1 AllER 246; [1961] 1 WLR 59] Lord Parker CJ, delivering the judgment of the Court, stated at page 53:

> 'The first question which arises is whether she was properly charged with larceny by a trick or whether this was a case of obtaining money by false pretences. The distinction between the two is a very fine one and, […] the distinction is often largely academic. The authorities on subject are numerous, and the result in each case must depend upon the exact facts and the true inferences to be drawn therefrom. The guiding test in each case is whether the person

> whose money is obtained meant to part with the property in the money, in which case it would, if the representation was false and as to an existing fact be false pretences, or whether he meant only to part with possession, in which case, whether the false representation was to an existing fact or as to the future, it would be a case of larceny by trick.'

Simply the distinction between the offences of '*Larceny*' and '*False Pretences*' is that in respect of the offence of '*Larceny*' the complainant loses possession, but not ownership; whereas in respect of the offence of '*False Pretences*' the complainant loses both possession and ownership. As a consequence of a 'fraud' the owner of the property gives the defendant ownership of the property in question by consent.

The offence of '*Larceny*' is examined commencing on page **460**.

See also: *Tom Amaiu v The State* [1979] PNGLR 576 at page 580.

[27.13] Related Offences

The following offences are related to the offence of '*False Pretences*' as provided for in the *Penal Code* (Ch. 26):

- '*Obtaining Credit By False Pretences*', section 309 of the *Penal Code* (Ch. 26) which is examined commencing on page **544**;
- '*Pretending To Tell Fortunes*', section 310 of the *Penal Code* (Ch. 26);
- '*Obtaining Registration, etc., By False Pretences*', section 311 of the *Penal Code* (Ch. 26); and
- '*False Declaration For Passport*', section 312 of the *Penal Code* (Ch. 26).

OBTAINING CREDIT BY FALSE PRETENCES

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OBTAINING CREDIT BY FALSE PRETENCES

[28.0] Introduction

This chapter will examine the offence of '*Obtaining Credit By False Pretences*', as provided for by section 309(a) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In that regard reference should be made to the *Larceny Act* 1916 (UK).

[28.1] Offence

Section 309(a) of the *Penal Code* (Ch. 26) states:

> 'Any person who –
>
> (a) in incurring any debt or liability obtains credit by any false pretence or by means of any other fraud,
>
> is guilty of a misdemeanour, and shall be liable to imprisonment for one year.'

[28.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** in incurring a **[**debt **or** liability**]** with **[**specify the name of the complainant**]** did obtain credit by **[**a false pretence **or** fraud**]** to wit **[**specify the **(**false pretence or fraud**)]**.'

The '*false pretence*' or the '*fraud*' *should* be specified in the charge, see *R v Thomas* (1931) 23 CrAppR 21.

[28.3] Elements

A. Defendant

B. Place

C. Date

D. Incur
   [i] Debt; or
   [ii] Liability

E. Obtain Credit

F. By Means Of
[i] False Pretences; or
[ii] Fraud

[28.4] Obtain Credit

The term '*Obtain Credit*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Fisher v Raven; Raven v Fisher* (1963) 47 CrAppR 174 Lord Dilhorne LC, with whom their Lordships concurred, held at page 193:

> 'To commit an offence against this section credit has to be obtained and its ordinary significance, in my view, the expression "obtained credit" connotes the obtaining of credit in respect of the payment of money and no more. To constitute the offence there must be the obtaining of credit in particular circumstances, namely, in incurring a debt or liability and by particular methods, namely, under false pretences or by means of any other fraud.'

'Obtaining credit means obtaining some benefit from another under an agreement which postponed payment of the consideration for the benefit; there has to be words or conduct designed to secure that credit is to be given', see *R v Miller* [1977] 1 WLR 1129; [1977] 3 AllER 986; (1977) 65 CrAppR 79; [1977] CrimLR 562; *R v Thornton* (1963) 47 CrAppR 1; *R v Dawson & Wenlock* (1960) 44 CrAppR 87; [1960] 1 AllER 558; [1960] 1 WLR 163 & *R v Garlick* (1958) 42 CrAppR 141.

A charge of obtaining credit by entering into a hire – purchase agreement is bad because in law the passing of money under a hire – purchase transaction is *not* an obtaining of credit, see *R v Inman* [1967] 1 QB 140; [1965] 3 AllER 414; (1966) 50 CrAppR 247; [1966] 3 WLR 567 & *R v Mitchell* [1955] 3 AllER 263.

[28.5] False Pretences

Section 307 of the *Penal Code* (Ch. 26) states:

> 'Any representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows to be false, or does not believe to be true, is a false pretence.'

The element '*False Pretences*' is examined commencing on page **534**.

[28.6] Similar Fact Or Propensity Evidence

The law relating to '*Similar Fact Or Propensity Evidence*' is examined commencing on pages **541** and **188**.

[28.7] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Obtaining Credit By False Pretences*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[28.8] Related Offences

The following offences are related to the offence of '*Obtaining Credit By False Pretences*' as provided for in the *Penal Code* (Ch. 26):

- subsections (b) and (c) of section 309 of the *Penal Code* (Ch. 26);
- '*False Pretences*', section 308 of the *Penal Code* (Ch. 26) which is examined commencing on page **533**;
- '*Pretending To Tell Fortunes*', section 310 of the *Penal Code* (Ch. 26);
- '*Obtaining Registration, etc., By False Pretences*', section 311 of the *Penal Code* (Ch. 26); and
- '*False Declaration For Passport*', section 312 of the *Penal Code* (Ch. 26).

FORGERY

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FORGERY

[29.0] Introduction

This chapter will examine the offence of '*Forgery*', as provided for by sections 336 and 337 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Forgery Act* 1913 (UK), section 3.

[29.1] Offences

Sections 336 and 337 of the *Penal Code* (Ch. 26) provides that '*forgery*' of specified documents with either an intent to defraud or deceive constitutes an offence.

[29.2] Wording Of Charges

Section 336(1)

(a) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a will, a codicil, a **(**specify other testamentary document**) or (**a probate **or** letters of administration**) (**with **or** without**)** a will annexed**]** of **[**specify the name of this person**]** with intent to defraud **[**the said person **or** a person namely **(**specify the name of this person**)]**.'

(b) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a deed, a bond, an assignment **(**at law **or** in equity**)** of a **(**deed **or** bond**) or** an attestation of the execution of a **(**deed **or** bond**)]** of **[**specify the name of this person**]** with intent to defraud **[**the said person **or** a person namely **(**specify the name of this person**)]**.'

(c) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a currency note, bank note **or** an **(**endorsement on **or** assignment of**)** a bank note**]** with intent to defraud.'

Section 336(2)

(a) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a valuable security, an **(**assignment thereof **or** endorsement thereon**)** a valuable security to wit a **(**specify the valuable security**) or** an acceptance thereof of a valuable security to wit a bill of exchange**]** of **[**specify the name of this person**]** with intent to defraud **[**the said person **or** a person namely **(**specify the name of this person**)]**.'

(b) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge **[**a document of title to lands **or** an **(**assignment thereof **or** endorsement thereon**)** a document of title to lands**]** of **[**specify the name of this person**]** with intent to defraud **[**the said person **or** a person namely **(**specify the name of this person**)]**.'

(c) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge **[**a document of title to goods **or** an **(**assignment thereof **or** endorsement thereon**)** a document of title to goods**]** of **[**specify the name of this person**]** with intent to defraud **[**the said person **or** a person namely **(**specify the name of this person**)]**.'

(d) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a **[**power of attorney **or (**specify other authority**)]** to transfer **[**a share **or** interest**]**

- in **[**stock, an annuity **or** the public fund of **(**Solomon Islands, a part of Her Majesty's dominions to wit **[**specify the name of this country**]** **or** a **[**foreign state **or** country**]** to wit **[**specify the name of this country**])]**; **or**
- in the **[**debt **or** capital stock**]** of a **[**Solomon Islands **or** foreign**]** **[**public body, company **or** society**]** to wit the **[**specify the name of the **(**public body, company **or** society**)]**

with intent to defraud a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a **[**power of attorney **or (**specify other authority**)]** to receive **[**a dividend **or** money payable**]** in respect of **[**a share **or** interest**]**

- in **[**stock, an annuity **or** the public fund of **(**Solomon Islands, a part of Her Majesty's dominions to wit **[**specify the name of this country**]** **or** a **[**foreign state **or** country**]** to wit **[**specify the name of this country**])]**; **or**
- in the **[**debt **or** capital stock**]** of a **[**Solomon Islands **or** foreign**]** **[**public body, company **or** society**]** to wit the **[**specify the name of the **(**public body, company **or** society**)]**

with intent to defraud a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a **[**power of attorney **or (**specify other authority**)]** to transfer **[**a share **or** interest**]**

- in **[**stock, an annuity **or** the public fund of **(**Solomon Islands, a part of Her Majesty's dominions to wit **[**specify the name of this country**]** **or** a **[**foreign state **or** country**]** to wit **[**specify the name of this country**])]**; **or**

- in the **[**debt **or** capital stock**]** of a **[**Solomon Islands **or** foreign**]** **[**public body, company **or** society**]** to wit the **[**specify the name of the **(**public body, company **or** society**)]**.

to receive an attestation of the said **[**power of attorney **or** authority**]** with intent to defraud a person namely **[**specify the name of this person**]**.'

(e) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit an entry in a **[**book **or** register**]** which was evidence of the title of a person namely **[**specify the name of this person**]** to **[**a share or interest**]**

- in **[**stock, an annuity **or** the public fund of **(**Solomon Islands, a part of Her Majesty's dominions to wit **[**specify the name of this country**]** **or** a **[**foreign state **or** country**]** to wit **[**specify the name of this country**])]**; **or**
- in the **[**debt **or** capital stock**]** of a **[**Solomon Islands **or** foreign**]** **[**public body, company **or** society**]** to wit the **[**specify the name of the **(**public body, company **or** society**)]**

with intent to defraud a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit an entry in a **[**book **or** register**]** which was evidence of the title of a person namely **[**specify the name of this person**]** to **[**a dividend **or** money payable**]** in respect of **[**a share **or** interest**]**

- in **[**stock, an annuity **or** the public fund of **(**Solomon Islands, a part of Her Majesty's dominions to wit **[**specify the name of this country**]** **or** a **[**foreign state **or** country**]** to wit **[**specify the name of this country**])]**; **or**

- in the **[**debt **or** capital stock**]** of a **[**Solomon Islands **or** foreign**] [**public body, company **or** society**]** to wit the **[**specify the name of the **(**public body, company **or** society**)]**

with intent to defraud a person namely **[**specify the name of this person**]**.'

(f) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a policy of insurance **or** an **(**assignment thereof **or** endorsement thereon**)** a policy of insurance**]** with intent to defraud a person namely **[**specify the name of this person**]**.'

(g) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a charter-party **or** an assignment thereof a charter-party**]** with intent to defraud a person namely **[**specify the name of this person**]**.'

(h) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a certificate of **[**the Chief Accountant **or** an officer acting in execution of the *Income Tax Act* (Ch. 123)**]** namely **[**specify the name of this person**]** with intent to defraud the Government of the Solomon Islands.'

Section 337(1)

(1) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document having **[**thereon **or** affixed thereto**] [**the **(**stamp **or** impression**)** of the Great Seal of the United Kingdom, Her Majesty's Privy Seal, a privy signet of Her Majesty, Her Majesty's Royal Sign Manual, **(**specify other of Her Majesty's official seals**) or** the National Seal of Solomon Islands**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(2)(a) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a **[**register **or** record**]** of **[**births, baptisms, namings, dedications, marriages, deaths, burials **and/or** cremations**]** which **[**was **or** hereafter may be**]** by law **[**authorised **or** required**]** to be kept relating to any **[**birth, baptism, naming, dedication, marriage, death, burial **and/or** cremation**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a part of a **[**register **or** record**]** of **[**births, baptisms, namings, dedications, marriages, deaths, burials **and/or** cremations**]** which **[**was **or** hereafter may be**]** by law **[**authorised **or** required**]** to be kept relating to any **[**birth, baptism, naming, dedication, marriage, death, burial **and/or** cremation**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(b) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a copy of a register of **[**baptisms, marriages, burials **or** cremations**] [**directed **or** required**]** by law to be transmitted to **[**a registrar **or** an officer of **(**specify the position of this officer**)]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(c) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a certified copy of a record purporting to be signed by an officer having charge of public **[**documents **or** records**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(d) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a **[**wrapper **or** label**]** provided **[**by **or** under**]** the authority of the **[**Chief Accountant **or** Comptroller of Customs and Excise**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(3)(a) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge an official document **[(**of **or** belonging to**)** a court of justice **or (**made **or** issued**)** by a **(**Judge, Magistrate, officer **or** clerk of a court of justice**)]** to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(b) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a **[**register **or** book**]** kept under the **[**provisions of a law in **or** authority of**]** a court of justice to wit a **[**specify the **(**register **or** book**)]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(c) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a certificate **or (**an office **or** a certified**)** copy**]** of

- an official document **[(**of **or** belonging to**)** a court of justice **or (**made **or** issued**)** by a **(**Judge, Magistrate, officer **or** clerk of a court of justice**)]** to wit a **[**specify the document**]**; **or**
- a **[**register **or** book**]** kept under the **[**provisions of a law in **or** authority of**]** a court of justice to wit a **[**specify the **(**register **or** book**)]**

with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a part of **[**a certificate **or (**an office **or** a certified**)** copy**]** of

- an official document **[(**of **or** belonging to**)** a court of justice **or (**made **or** issued**)** by a **(**Judge, Magistrate, officer **or** clerk of a court of justice**)]** to wit a **[**specify the document**]**; **or**
- a **[**register **or** book**]** kept under the **[**provisions of a law in **or** authority of**]** a court of justice to wit a **[**specify the **(**register **or** book**)]**

with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(d) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document which a Magistrate was **[**authorised **or** required**]** by law to **[**make **or** issue**]** to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(e) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document which a person authorised to administer an oath under the law is **[**authorised **or** required**]** by law to **[**make **or** issue**]** to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(f) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document **[**made **or** issued**]** by a head of a **[**Government department **or** law officer of the Crown**]** to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document upon which by **[**the law **or** usage**]** at the time in force **[**a court of justice **or** an officer**]** might act to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(g) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a **[**document **or** copy of a document**]** **[**used **or** intended to be used**]** in evidence in a court of record to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document which was made evidence by law to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(h) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a certificate **or** the consent**]** required by an Act to wit the **[**specify the Act**]** for the celebration of marriage to wit a **[**specify the document**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(i) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a licence for the celebration of marriage which may be given by law with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(j) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a certificate, a declaration **or** an order**]** under an enactment relating to the registration of births or deaths to wit [specify the enactment] with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(k) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit **[**a register, a book, a builder's certificate, a surveyor's certificate, a certificate of registry, a declaration, a bill of sale, an instrument of mortgage, **or** certificate of **(**mortgage **or** sale**)]** under Part I of the *Merchant Shipping Act* 1894 with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit an **[**entry **or** endorsement**]** required by Part I of the *Merchant Shipping Act* 1894 to be made **[**in **or** on**] [**a register, a book, a builder's certificate, a surveyor's certificate, a certificate of registry, a declaration, a bill of sale, an instrument of mortgage, **or** certificate of **(**mortgage **or** sale**)]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(l) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a **[**permit, certificate **or (**specify a similar document**)] [**made **or** granted**] [**by **or** under**]** the authority of **[**the Comptroller of Customs and Excise **or** an officer of Customs and Excise**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

(m) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did forge a document to wit a certificate to wit a **[**specify the certificate**]** with intent to **[**defraud **or** deceive**]** a person namely **[**specify the name of this person**]**.'

[29.3] Forgery

Section 333 of the *Penal Code* (Ch. 26) states:

'(1) *Forgery is the making of a false document in order that it may be used as genuine*, and in the case of the seals and dies mentioned in this Part of this Code the counterfeiting of a seal or die, and forgery *with intent to defraud or deceive*, as the case may be, shall be punishable as provided in this Part of this Code.

(2) It is immaterial in what language a document is expressed or in what place within or without Her Majesty's dominions it is expressed to take effect.

(3) Forgery of a document may be complete even if the document when forged is incomplete, or is not or does not purport to be such a document as would be binding or sufficient in law.

(4) The crossing on any cheque, draft on a banker, post office money order, postal order, coupon, or other document the crossing of which is authorised or recognised by law, is a material part of such cheque, draft, order, coupon, or document.' (emphasis added)

The term '*Document*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

'any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter.'

In *R v Dodge & Harris* (1971) 55 CrAppR 440 [[1972] 1 QB 416; [1971] 2 AllER 1523; [1971] 3 WLR 366] Phillimore J, delivering the judgment of the Court, held at page 442:

'Now the words "making a false document" in plain simple language would be wide enough, I suppose, to cover a document which contains statements which are untrue, but the words have always been interpreted in a restricted sense – the phrase that is used is that *the document must tell a lie about itself*.' (emphasis added)

In *R v Gambling* (1975) 60 CrAppR 25 [[1975] QB 207; [1974] 3 AllER 479; [1974] 3 WLR 558; [1974] CrimLR 600] May J, delivering the judgment of the Court, stated at pages 27 – 28:

'Now section 1(1) of the Act [, referring to the *Forgery Act* 1913 (UK),] provides that "forgery is the making of a false document in order that it may be used as genuine." *This definition involves two considerations: first, that the relevant document should be false; and secondly, that it was made in order that it might be used as genuine.*

[…]

Given […] that each application was "false", was it made "in order that it might be used as genuine"? Indeed what do these words involve in the context of the present case? *Clearly they require proof of an intent on the part of the maker of the false document that it shall in fact be used as genuine.* We think that they also involve that the untrue statement in the document must be the reason or one of the reasons which results in the document being accepted as genuine when it is thereafter used by the maker. It is this concept which we think is sought to be expressed in the aphorism – as to the usefulness of which views may differ strongly – that the document must not only tell a lie, it must tell a lie about itself. […] If this correct, then it seems to us to follow that in cases such as the present in which the falsity of a document arises from the use of a fictitious name or signature, or both, then that document is a forgery only if, as counsel for the appellant contended, having regard to all the circumstances of the transaction, the identity of the maker of the document is a material factor. […]

In many cases the materiality of the identity of the maker would be so obvious that evidence would be unnecessary: for example, when the document is a cheque or bill of exchange and the purported signature of the drawer, or endorser, or the acceptor has been written by someone other than the person whose signature it purports to be. In other cases, such as the present, evidence would be required, and the materiality or otherwise of the identity of the maker of the document must be a matter for the jury.' (emphasis added) [words in brackets added]

In *R v Bussey* (1931) 22 CrAppR 160 Swift J, delivering the judgment of the Court, stated at page 162:

> 'The distinction between the two intents [, referring to 'intent to defraud' and 'intent to deceive',] was mentioned by Buckley J in LONDON AND GLOBE FINANCE CORPORATION. In r: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the 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*.' (emphasis added) [words in brackets added]

See also: *Attorney – General's Reference No. 2 of 1980* (1981) 72 CrAppR 64; [1981] 1 AllER 493 & *R v Turner* (1981) 72 CrAppR 117.

The terms '*Bank Note*', '*Coin*', '*Current Coin*', '*Currency Note*', '*Die*', '*Revenue Paper*', '*Seal*', '*Stamp*' & '*Treasury Bill*' are defined in section 332 of the *Penal Code* (Ch. 26).

[29.4] False Document

Section 334 of the *Penal Code* (Ch. 26) states:

> '(1) A document is false if the whole or any material part thereof purports to be made by or on behalf or on account of a person who did not make it nor authorise its making; or if, though made by or on behalf or on account of the person by who or by whose authority it purports to have been made, the time or place of making, where either is material, or, in the case of a document identified by number or mark, the number of any distinguishing mark identifying the document is falsely stated therein; and in particular a document is false —
>
> (a) if any material alteration, whether by addition, insertion, obliteration, erasure, removal, or otherwise, has been made therein; or
>
> (b) if the whole or some material part of it purports to be made by or on behalf of a fictitious or deceased person; or
>
> (c) if, though made in the name of an existing person, it is made by him or by his authority with the intention that it should pass as having been made by some person, real or fictitious, other than the person who made or authorised it.
>
> (2) A document may be a false document for the purposes of this Part of this Code notwithstanding that it is not false in any such manner as is described in subsection (1) of this section.'

The term '*Document*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter.'

For a document to be a false document it *must* tell a lie about itself, see *R v Dodge & Harris* [1972] 1 QB 416; [1971] 2 AllER 1523; (1971) 55 CrAppR 440; [1971] 3 WLR 366.

Where the falsity of a document is alleged to arise from the use of a fictitious name or signature the document is a forgery only if, having regards to all the circumstances of the transaction the identity of the maker of the document was a '*material factor*', see *R v Gambling* [1975] QB 207; [1974] 3 AllER 479; (1974) 60 CrAppR 25; [1974] 3 WLR 558; [1974] CrimLR 600.

The use of a fictitious name on cheques for the purpose of 'fraud' may also amount to a forgery, see *R v Hassard & Devereaux* [1970] 2 AllER 647; (1970) 54 CrAppR 295.

See also: *Brott v R* (1992) 173 CLR 426; (1992) 105 ALR 189; (1992) 66 ALJR 256; (1992) 55 ACrimR 97 & *R v Haskett & Calder* [1975] 1 NZLR 30.

[29.5] Intent To Defraud

Section 335 of the *Penal Code (*Ch. 26) states:

> 'An intent to defraud is *presumed to exist* if it appears that at the time when the false document was made there was in existence a specific person ascertained or unascertained capable of being defrauded thereby, and this *presumption is not rebutted* by proof that the offender took or intended to take measures to prevent such person from being defrauded in fact, nor by the fact that he had or thought he had a right to the thing to be obtained by the false document.' (emphasis added)

In *Welham v Director of Public Prosecutions* (1960) 44 CrAppR 123 [[1961] AC 103; [1960] 1 AllER 805; [1960] 2 WLR 669] it was held per Lord Denning at page 155:

> 'Put shortly, "with intent to defraud" means "with intent to practice a fraud" on someone or other. It need not be anyone in particular. Someone in general will suffice. If anyone may be prejudiced in any way by the fraud, that is enough.'

See also: *R v Faith Osifelo* (Unrep. Criminal Case No. 36 of 1992; Palmer J); *R v Sotere Ria* (Unrep. Criminal Case No. 9 of 1993; Palmer J); *R v Austin Yam* (Unrep. Criminal Appeal Case No. 33 of 1994; Palmer J); *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J) & *R v Moon* (1968) 52 CrAppR 12.

[29.6] Disputed Handwriting

The law to the admissibility of '*Handwriting Evidence*' is examined commencing on page **206**.

[29.7] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Forgery'* is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[29.8] Related Offences

The offences are related to the offence of '*Forgery*' are provided for in Part XXXVI '*Forgery, Coining, Counterfeiting & Similar Offences*' of the *Penal Code* (Ch. 26).

The offence of '*Uttering*', section 343 of the *Penal Code* (Ch. 26) is examined commencing on page **558**.

UTTERING

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UTTERING

[30.0] Introduction

This chapter will examine the offence of '*Uttering*', as provided for by section 343 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In that regard reference should be made to the *Forgery Act* 1913 (UK), section 6.

[30.1] Offence

Section 343 of the *Penal Code* (Ch. 26) states:

> '(1) Any person who knowingly and with intent to deceive or defraud utters any forged document, seal or die is guilty of an offence of the like degree (whether felony or misdemeanour) and shall be liable to the same punishment as if he himself had forged the document, seal or die.
>
> (2) It is immaterial where the document, seal or die was forged.'

[30.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did knowingly and with intent to **[**deceive **or** defraud**]** **[**insert the name of the complainant**]** did utter a forged **[**document, seal **or** die**]** to wit **[**specify the document, seal **or** die**]**.'

[30.3] Elements

A. Defendant

B. Place

C. Date

D. Knowingly

E. Intent To

[i] Deceive; or
[ii] Defraud

F. Complainant

UTTERING

G. Utter

H. Forged

[i] Document;
[ii] Seal; or
[iii] Die

[30.4] Knowingly

Section 4 of the *Penal Code* (Ch. 26) states that the term '*knowingly*' when 'used in connection with any term denoting uttering or using, implies knowledge of the character of the thing uttered or used.'

[30.5] Intent To Deceive To Defraud

In *R v Bussey* (1931) 22 CrAppR 160 Swift J, delivering the judgment of the Court, stated at page 162:

> 'The distinction between the two intents [, referring to 'intent to defraud' and 'intent to deceive',] was mentioned by Buckley J in LONDON AND GLOBE FINANCE CORPORATION. In r: "To deceive is, I apprehend, to induce a man to believe that a thing is true which is false, and which the person practicing the 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.' [words in brackets added]

See also: *Attorney – General's Reference No. 2 of 1980* (1981) 72 CrAppR 64; [1981] 1 AllER 493 & *R v Turner* (1981) 72 CrAppR 117.

[30.6] Utter

The term '*Utter*' is defined in section 4 of the *Penal Code (*Ch. 26) as *including*:

> 'using or dealing with and attempting to use or deal with and attempting to induce any person to use, deal with or act upon the thing in question'.

See also: *R v Austin Yam* (Unrep. Criminal Appeal Case No. 33 of 1994; Palmer J).

[30.7] Forged Document Or Seal Or Die

The term '*Document*' is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'any publication and any matter written, expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, which is intended to be used or may be used for the purpose of recording that matter.'

UTTERING

The term '*Seal*' is defined in section 332 of the *Penal Code* (Ch. 26) as *including*:

> 'any stamp or impression of a seal or any stamp or impression made or apparently intended to resemble the stamp or impression of a seal as well as the seal itself.'

The term '*Die*' is defined in section 332 of the *Penal Code* (Ch. 26) as *including*:

> 'any plate, type, tool, or implement whatsoever, and also any part of any die, plate, type, tool, or implement, any stamp or impression thereof or any part of such stamp or impression.'

The law relating to a '*False Document*' is examined commencing on page **554**.

[30.8] Disputed Handwriting

The law to the admissibility of '*Handwriting Evidence*' is examined commencing on page **206**.

[30.9] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Uttering'* is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[30.10] Related Offences

The offences are related to the offence of '*Uttering*' are provided for in Part XXXVI '*Forgery, Coining, Counterfeiting & Similar Offences*' of the *Penal Code* (Ch. 26).

The offences of '*Forgery*', sections 336 and 337 of the *Penal Code* (Ch. 26), are examined commencing on page **548**.

COMMON ASSAULT

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COMMON ASSAULT

[31.0] Introduction

This chapter will examine the offence of '*Common Assault*', as provided for by section 244 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Offences Against The Person* Act 1861 (UK), section 47.

[31.1] Offence

Section 244 of the *Penal Code* (Ch. 26) states:

> 'Any person who unlawfully assaults another is guilty of a misdemeanour, and, if the assault is not committed in circumstances for which a greater punishment is provided in this Code, shall be liable to imprisonment for one year.'

[31.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did unlawfully assault a person namely **[**specify the name of the complainant**]**.'

[31.3] Elements

A. Defendant

B. Place

C. Date

D. Unlawfully

E. Assault

F. Complainant

[31.4] Unlawfully

[31.4.1] Introduction

An act or omission is '*unlawful*' unless it is authorised, justified or excused by law.

The prosecution has the burden of proving the '*unlawfulness*' of the defendant's actions, see *R v Williams* (1984) 78 CrAppR 276 [[1984] CrimLR 163] at page 281 & *R v May* (1912) 8 CrAppR 63; [1912] 3 KB 572, per Lord Alverstone CJ at page 575.

[31.4.2] Consent

The prosecution *must* prove that the absence of consent, see *R v Brown (A.)* [1994] 1 AC 212; [1993] 2 AllER 75; [1993] 2 WLR 556; (1993) 97 CrAppR 44.

In *Attorney – General's Reference No. 6 of 1980* (1981) 73 CrAppR 63 [[1981] QB 715; [1981] 2 AllER 1057; [1981] 3 WLR 125; [1981] CrimLR 533] Lord Widgery CJ, delivering the judgment of the Court, stated at pages 65 - 66:

> 'For convenience we use the word "assault" as including "battery", and adopt the definition of James J in FAGAN V METROPOLITAN POLICE COMMISSIONER (1968) 52 CrAppR 700, 703; [1969] 1 QB 439, 444, namely "… the *actual intended use of unlawful force to another person without his consent*", to which we would respectfully add '*or any other lawful excuse*'.
>
> […]
>
> 'The answer to the question [, "Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?,] in our judgment, is that it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.
>
> Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.' (emphasis added) [words in brackets added]

In *R v Richardson* [1998] 2 CrAppR 200 Otton LJ, delivering the judgment of the Court of Appeal, held at page 206:

> 'The concept of informed consent has no place in the criminal law. It would also be a mistake, in our view, to introduce the concept of a duty to communicate information to a patient about the risk of an activity before consent to an act can be treated as valid. The gravemen of the appellant's conduct in the instant case was that the complainants consented to treatment from her although their consent had been procured by her failure to inform them that she was no longer qualified to practice. This was clearly reprehensible and may well found the basis of a civil claim for damages. But we are quite satisfied that it is not a basis for finding criminal liability in the field of offences against the person.'

[31.4.3] Defence Of Person Or Property

The law relating to the '*Defence Of Person Or Property*' is examined commencing on page **451**.

[31.4.4] Corporal Punishment

In *R v Rose* [1987] SILR 45 Ward CJ stated at pages 50 – 51:

> '[W]hen this defence is raised, the Court must consider, on the facts, whether the punishment is reasonable and the question of whether it offends section 7 of the Constitution should be borne in mind as part of that assessment. Any infliction of corporal punishment on a child that was inhuman or degrading must, in the light of that provision, be unreasonable punishment.
>
> […]
>
> In determining whether the conduct was degrading, the section should be interpreted in the light of present day conditions and the commonly accepted standards in this country at this time. Whilst the very old cases established the defence of reasonable correction, the generally accepted standard of what is reasonable has changed radically since then. If the manner of inflicting corporal punishment is outside the standards normally accepted and expected today, the possibility that the victim will feel humiliated is increased.'

Section 233(4) of the *Penal Code* (Ch. 26) states:

> 'Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person, having the lawful control of a child or young person to administer reasonable punishment to him.'

[31.5] Assault

In *R v Kimber* (1983) 77 CrAppR 225 Lawton LJ, delivering the judgment of the Court, stated at page 228:

> 'An assault is an act by which the defendant intentionally or recklessly causes the complainant to apprehend immediate, or to sustain, unlawful personal violence.'

An act causing a complainant to apprehend an imminent application of force is an assault, see *Fagan v Metropolitan Police Commissioner* (1968) 52 CrAppR 700; [1969] 1 QB 439 [[1968] 3 AllER 442; [1968] 3 WLR 1120] at pages 703 & 444 respectively.

In *Fairclough v Whipp* (1951) 35 CrAppR 138 [[1951] 2 AllER 834] Lord Goddard CJ, with whom Hilbery & Slade JJ concurred, stated at pages 139 – 140:

> 'An assault can be committed without there being battery, for instance, by a threatening gesture or a threat to use violence made against a person, but I do not know of any authority that says that, where one person invites another person to touch him, that can amount to an assault. The question of consent or non – consent arises only if there is something which, without consent, would be an assault on the latter. [… I] cannot hold that an invitation to somebody to touch the invitor can amount to an assault on the invitee.'

COMMON ASSAULT

In *R v Rolfe* (1952) 36 CrAppR 4 Lord Goddard CJ, delivering the judgment of the Court, held at page 6:

> 'An assault can be committed without touching a person. One always thinks of an assault as the giving of a blow to somebody, but that is not necessary. An assault may be constituted by a threat or a hostile act committed towards a person, and if a man indecently exposes himself and walks towards a woman with his person exposed and makes an indecent suggestion to her that, in the opinion of this court, can amount to an assault.'

In *R v Ireland; R v Burstow* [1998] 1 CrAppR 177 [[1998] AC 147] Lord Slynn of Hadley, with the other members of the House of Lords concurred, stated at page 190:

> 'It is to assault in the form of an act causing the victim to fear an immediate application of force to her that I must turn. Counsel argued that as a matter of law an assault can never be committed by words alone and, therefore, it cannot be committed by silence. The premise depends on the slenderest authority, namely, an observation by Holroyd J to a jury that "no words or singing are equivalent to an assault": *Meade and Belt* (1823) 1 Lew. 184. The proposition that a gesture may amount to an assault, but that words can never suffice, is unrealistic and indefensible. A thing said is also a thing done. There is no reason why something said should be incapable of causing an apprehension of immediate personal violence, eg. A man accosting a woman in a dark alley saying "come with me or I will stab you". *I would, therefore, reject the proposition that an assault can never be committed by words.*
>
> That brings me to the critical question whether a silent caller may be guilty of an assault. The answer to this question seems to me be "yes, depending on the facts". It involves questions of fact within the province of the jury. After all, there is no reason why a telephone caller who says to a woman in a menacing way "I will be at your door in a minute or two" may not be guilty of an assault if he causes his victim to apprehend immediate personal violence. Take now the case of the silent caller. He intends by his silence to cause fear and he is so understood. The victim is assailed by uncertainty about his intentions. Fear may dominate her emotions, and it may be the fear that the caller's arrival at her door may be imminent. She may fear the possibility of immediate personal violence. As a matter of law the call may be guilty of an assault: whether he is or not will depend on the circumstances and in particular on the impact of the caller's potentially menacing call or calls on the victim. Such a prosecution case under section 47 may be fit to leave to the jury. And a trial judge may, depending on the circumstances, put a common – sense consideration before the jury, namely what, if not the possibility of imminent personal violence, was the victim terrified about? I conclude that an assault may be committed in the particular factual circumstances which I have envisaged. For this reason I reject the submission that as a matter of law a silent telephone caller cannot ever be guilty of an offence under section 47.' (emphasis added)

Lord Hope of Craighead commented at pages 193 – 194:

> 'As Swinton Thomas LJ observed in the Court of Appeal [1996] 2 CrAppR 426, 429, [1997] QB 114, 119D, that […] it has been recognised for many centuries that putting a person in fear may amount to what in law is an assault. This is reflected in the meaning which is given to the word "assault" in *Archbold Criminal Pleading, Evidence and Practice* (1997), p. 1695 para. 19-166, namely that *an assault is any act by which a person intentionally or recklessly causes another to apprehend immediate and unlawful violence.* This meaning is well vouched by authority: see *Venna* (1975) 61 CrAppR 310, [1976] QB 421; *R v Savage* (1992) 94 CrAppR 193, 214, [1992] 1 AC 699, 740F, *per* Lord Ackner.' (emphasis added)

The law relating to '*Voice Identification*' is examined commencing on page **200**.

See also: *Director of Public Prosecutions v Taylor & Director of Public Prosecutions v Little* (1992) 95 CrAppR 28; [1992] 1 AllER 299; [1992] 2 WLR 460; [1992] 1 QB 645; *Director of Public Prosecutions v Rogers* (1953) 37 CrAppR 137; [1953] 1 WLR 1017; [1953] 2 AllER 644; *R v Venna* [1976] QB 421 at page 428 – 429; (1976) 61 CrAppR 310 at 314; [1975] 3 WLR 737; [1975] 3 AllER 788; [1975] CrimLR 701; *R v Harrow Justices, Ex parte Osaseri* (1985) 81 CrAppR 306; [1985] 3 WLR 819; [1986] QB 589; [1985] 3 AllER 185; [1985] CrimLR 784; *R v Lynsey* [1995] 2 CrAppR 667; [1995] 3 AllER 654; *R v Roberts* (1971) 56 CrAppR 95; *Collins v Wilcock* [1984] 1 WLR 1172; [1984] 3 AllER 374; (1984) 79 CrAppR 229; [1984] CrimLR 481; *R v Lamb* [1967] 2 QB 981, [1967] 2 AllER 1282; [1967] 3 WLR 888; (1967) 51 CrAppR 417 *& Smith v Chief Superintendent Woking Police Station* (1983) 76 CrAppR 234; [1983] CrimLR 323.

[31.6] Multiplicity Of Acts

In *R v T* [1993] 1 QdR 454 the Court of Criminal Appeal stated at page 455:

> 'The question arises – what is an offence?
>
> If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five?
>
> […]
>
> In many different situations comparable questions could be asked.
>
> *In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances.*
>
> No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery CJ in a case where it was being considered whether an information was bad for duplicity: see *Jemmison v Priddle* [1972] 1 QB 489, 495.
>
> I agree respectfully with Lord Widgery CJ that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve more than one act.
>
> It must, of course, depend upon the circumstances.
>
> […] The question is whether that series of acts may reasonably be regarded as one transaction or as comprising one offence: In *R v Morrow and Flynn* (CA 120 and 122 of 1990 CCA unreported 30th August 1990) Connolly J observed:
>
> "It is obvious that a knifing attack by one man who delivers a number of blows may properly be charged as a series of woundings, but one must ask oneself whether this would be an application of common sense in terms of Lord Morris's speech".
>
> His Honour further observed:

> "For my part I see no objection to charging the incident as one offence, provided always that it is clear what the offender is charged with. Similarly, a series of penetrations by the same offender in the course of one sexual attack need not, in my judgment, *be the subject of separate counts as long as they are not seen to be separate and distinct in time and circumstance* […]'" (emphasis added)

Therefore, it may be proper for the prosecution to charge a defendant for a single offence although it may comprise of a number of acts. For example, if a complainant is punched eight times such circumstances do not necessarily require that the defendant should be charged with eight charges of assault because each act is an assault as defined. The prosecution should apply common sense in deciding whether to prosecute the defendant for more than one offence in such circumstances. The duration and circumstances of the offence are obvious important factors to be considered.

The law relating to '*Duplicity*' is examined commencing on page **86**.

[31.7] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Common Assault'* is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[31.8] Related Offences

The following offences are related to the offence of '*Common Assault*' as provided for in the *Penal Code* (Ch. 26):

- '*Assaults Causing Actual Bodily Harm*', section 245 of the *Penal Code* (Ch. 26) which is examined commencing on page **570**;
- '*Assaults On Magistrates & Other Persons Protecting Wrecks*', section 246 of the *Penal Code* (Ch. 26); and
- '*Assaults Punishable With Two Years Imprisonment*', section 247 of the *Penal Code* (Ch. 26) some of which are examined commencing on page **590**.

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BODILY HARM

[32.0] Introduction

This chapter will examine the offence of '*Assault Causing Actual Bodily Harm*', as provided for by section 245 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act* and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Offences Against The Person Act* 1861 (UK), section 47.

[32.1] Offence

Section 245 of the *Penal Code* (Ch. 26) states:

> 'Any person who commits an assault occasioning actual bodily harm is guilty of a misdemeanour, and shall be liable to imprisonment for five years.'

[32.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did unlawfully assault a person namely **[**specify the name of the complainant**]** and in doing so did cause **[**him/her**]** actual bodily harm to wit **[**specify the harm caused to the complainant**]**.'

[32.3] Elements

A. Defendant

B. Place

C. Date

D. Unlawfully

E. Assault

F. Complainant

G. Bodily Harm

[32.4] Unlawfully

[32.4.1] Introduction

An act or omission is '*unlawful*' unless it is authorised, justified or excused by law.

The prosecution has the burden of proving the '*unlawfulness*' of the defendant's actions, see *R v Williams* (1984) 78 CrAppR 276 [[1984] CrimLR 163] at page 281 & *R v May* (1912) 8 CrAppR 63; [1912] 3 KB 572, per Lord Alverstone CJ at page 575.

Section 235 of the *Penal Code* (Ch. 26) states:

> 'Any person authorised by law or by the consent of the person injured to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.'

See also: section 234 of the *Penal Code* (Ch. 26) – '*Surgical Operations*'.

If a complainant in trying to escape from the defendant as a consequence of what he/she said and / or did suffers injuries amounting to bodily harm, then the defendant may be guilty of an offence under section 245 of the *Penal Code* (Ch. 26).

In *R v Roberts* (1972) 56 CrAppR 95 the Court held at page 102:

> 'The test is: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing?'

In *R v Mackie* (1973) 57 CrAppR 453 [[1973] CrimLR 438] Stephenson LJ, delivering the judgment of the Court, stated at page 459:

> 'Where the injuries are not fatal, the *attempt to escape* must be the natural consequence of the assault charged, not something which could not be expected, but something which any reasonable and responsible man in the assailant's shoes would have foreseen.' (emphasis added)

See also: *Director of Public Prosecutions v Daley* [1979] 2 WLR 239.

The courts have consistently held that the *mens rea* of every type of offence against the person covers both actual intent and recklessness, in the sense of taking the risk of harm ensuing with foresight that it might happen, see *R v Spratt* (1990) 91 CrAppR 362; [1991] 2 AllER 210; [1990] 1 WLR 1073; [1990] CrimLR 797.

The question is therefore whether the defendant considered the possibility that the complainant might have been hurt by his/her actions.

[32.4.2] Consent

Section 235 of the *Penal Code* (Ch. 26) states:

> 'Any person authorised by law or by the consent of the person injured to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.'

See also: section 234 of the *Penal Code* (Ch. 26) – '*Surgical Operations*'.

When a complainant suffers actual bodily harm consent is no defence, unless there was a good reason for such an assault, see *R v Brown (A.)* [1994] 1 AC 212; [1993] 2 WLR 556; [1993] 2 AllER 75; (1993) 97 CrAppR 447.

In *Attorney – General's Reference No. 6 of 1980* (1981) 73 CrAppR 63 [[1981] QB 715; [1981] 2 AllER 1057; [1981] 3 WLR 125; [1981] CrimLR 533] Lord Widgery CJ, delivering the judgment of the Court, stated at page 66:

> 'The answer to the question [, "Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?,] in our judgment, is that it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason. Minor struggles are another matter. So, in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.
>
> Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions, etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in the other cases.' [words in brackets added]

In *R v Jones (T.)* 83 CrAppR 375 [[1987] CrimLR 123] McCowan J, delivering the judgment of the Court, stated at page 378:

> '[C]onsent to "rough and undisciplined play" where there is no intention to cause injury, must be a defence. Secondly, […] even if consent is in fact absent, genuine belief by a defendant that consent was present would be a defence. Thirdly, […] if the belief is genuinely held, it is irrelevant whether it is reasonably held or not. Those propositions […], are, in our judgment correct.'

[32.4.3] Defence Of Person Or Property

The law relating to the '*Defence Of Person Or Property*' is examined commencing on page **451**.

[32.4.4] Corporal Punishment

In *R v Rose* [1987] SILR 45 Ward CJ stated at pages 50 – 51:

> '[W]hen this defence is raised, the Court must consider, on the facts, whether the punishment is reasonable and the question of whether it offends section 7 of the Constitution should be borne in mind as part of that assessment. Any infliction of corporal punishment on a child that was inhuman or degrading must, in the light of that provision, be unreasonable punishment.
>
> […]
>
> In determining whether the conduct was degrading, the section should be interpreted in the light of present day conditions and the commonly accepted standards in this country at this time. Whilst the very old cases established the defence of reasonable correction, the generally accepted standard of what is reasonable has changed radically since then. If the manner of inflicting corporal punishment is outside the standards normally accepted and expected today, the possibility that the victim will feel humiliated is increased.'

Section 233(4) of the *Penal Code* (Ch. 26) states:

> 'Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person, having the lawful control of a child or young person to administer reasonable punishment to him.'

[32.5] Assault

The element '*Assault*' is examined commencing on page **564**.

[32.6] Bodily Harm

The term '*Harm*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'any bodily hurt, disease or disorder whether permanent or temporary'.

In *R v Clarence Barrington Morris* [1998] 1 CrAppR 386 Potter LJ delivering the judgment of the Court of Appeal stated at page 393:

> 'What constitutes "actual bodily harm" for the purposes of section 47 of the 1861 Act is succinctly and accurately set out in *Archbold* (1997 ed.) at para. 19-197 as follows:
>
> "Bodily harm has its ordinary meaning and includes any *hurt* (our emphasis) or injury calculated to interfere with the health or comfort of the victim: such hurt or injury need not be permanent, but must be more than merely transient or trifling: *Donovan* [1934] 25 CrAppR 1, cited with approval … in *R v Brown (Anthony)* [1994] 1 AC 212 at pp. 230 and 242 respectively.
>
> Actual bodily harm is capable of including psychiatric injury but it does not include mere emotion, such as fear, distress or panic … *Chan – Fook* (1994) 99 CrAppR 147."'

In *R v Ireland; R v Burstow* [1998] 1 CrAppR 177 [[1998] AC 147] Lord Slynn of Hadley, with the other members of the House of Lords concurred, stated at pages 185 – 186:

> '[I]n *Chan – Fook* (1994) 99 CrAppR 147; [1994] 1 WLR 689 the Court of Appeal squarely addressed the question whether psychiatric injury may amount to bodily harm under section 47 of the Act of 1861 [, referring to the *Offences Against the Person Act 1861* (UK)]. […] In a detailed and careful judgment given on behalf of the court Hobhouse LJ said (at p. 152 and p. 695G – 595H):
>
> "The first question on the present appeal is whether the inclusion of the word 'bodily' in the phrase 'actual bodily harm' limits harm to harm to the skin, flesh and bones of the victim … The body of the victim includes all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties."
>
> In concluding that "actual bodily harm" is capable of including psychiatric injury Hobhouse LJ emphasised […] that "it does not include mere emotions such as fear or distress or panic, nor does it include, as such, states of mind that are not themselves evidence of some identifiable clinical condition." He observed that in the absence of psychiatric evidence a question whether or not an assault occasioned psychiatric injury should not be left to the jury.
>
> […] I hold that "bodily harm" in sections 18, 20 and 47 must be interpreted so as to include recognisable psychiatric illness.' [words in brackets added]

See also: *R v Miller* [1954] 2 AllER 529.

[32.7] Multiplicity Of Acts

The law relating to '*Multiplicity Of Acts*' is examined commencing on page **566**.

[32.8] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Bodily Harm*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[32.9] Related Offences

The following offences are related to the offence of '*Bodily Harm*' as provided for in the *Penal Code* (Ch. 26):

- '*Common Assault*', section 244 of the *Penal Code* (Ch. 26) which is examined commencing on page **562**;
- '*Unlawful Wounding*', section 229 of the *Penal Code* (Ch. 26) which is examined commencing on page **578**; and

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- '*Grievous Harm*', section 226 of the *Penal Code* (Ch. 26) which is examined commencing on page **584**.

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UNLAWFUL WOUNDING

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UNLAWFUL WOUNDING

[33.0] Introduction

This chapter will examine the offence of '*Unlawful Wounding*', as provided for by section 229 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Offences Against The Person Act* 1861 (UK), sections 18 & 20.

[33.1] Offence

Section 229 of the *Penal Code* (Ch. 26) states:

> 'Any person who unlawfully wounds another is guilty of a misdemeanour, and shall be liable to imprisonment for five years.'

[33.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did unlawfully wound a person namely **[**specify the name of the complainant**]**.'

[33.3] Elements

A. Defendant

B. Place

C. Date

D. Unlawfully

E. Wound

F. Complainant

[33.4] Unlawfully

[33.4.1] Introduction

An act or omission is '*unlawful*' unless it is authorised, justified or excused by law.

The prosecution has the burden of proving the '*unlawfulness*' of the defendant's actions, see *R v Williams* (1984) 78 CrAppR 276 [[1984] CrimLR 163] at page 281 & *R v May* (1912) 8 CrAppR 63; [1912] 3 KB 572, per Lord Alverstone CJ at page 575.

Section 235 of the *Penal Code* (Ch. 26) states:

> 'Any person authorised by law or by the consent of the person injured to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.'

See also: section 234 of the *Penal Code* (Ch. 26) – '*Surgical Operations*'.

If a complainant in trying to escape from the defendant as a consequence of what he/she said and/or did suffers injuries amounting to a wounding, then the defendant may be guilty of an offence under section 229 of the *Penal Code* (Ch. 26).

In *R v Roberts* (1972) 56 CrAppR 95 the Court held at page 102:

> 'The test is: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing?'

In *R v Mackie* (1973) 57 CrAppR 453 [[1973] CrimLR 438] Stephenson LJ, delivering the judgment of the Court, stated at page 459:

> 'Where the injuries are not fatal, the attempt to escape must be the natural consequence of the assault charged, not something which could not be expected, but something which any reasonable and responsible man in the assailant's shoes would have foreseen.'

See also: *Director of Public Prosecutions v Daley* [1979] 2 WLR 239.

The courts have consistently held that the *mens rea* of every type of offence against the person covers both actual intent and recklessness, in the sense of taking the risk of harm ensuing with foresight that it might happen, see *R v Spratt* (1990) 91 CrAppR 362 [[1991] 2 AllER 210; [1990] 1 WLR 1073; [1990] CrimLR 797] at page 370.

The question is therefore whether the defendant considered the possibility that the complainant might have been hurt by his/her actions.

[33.4.2] Defence Of Person Or Property

The law relating to the '*Defence Of Person Or Property*' is examined commencing on page **451**.

[33.5] Wound

The term '*Wound*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is exterior for the purpose of this definition which can be touched without dividing or piercing any other membrane'.

In *C (A Minor) v Eisenhower* [1983] 3 AllER 230; (1983) 76 CrAppR 48 [[1984] QB 331] Robert Goff LJ, with whom Mann J concurred, stated at pages 232 – 233 and 53 – 54 respectively:

> '*There must be a break in the continuity of the skin. It must be a break in the continuity of the whole skin, but the skin may include not merely the outer skin of the body but the skin of an internal cavity of the body where the skin of the cavity is continuous with the outer skin of the body.*
>
> […]
>
> *It is not enough that there has been a rupturing of blood vessel or vessels internally for there to be a wound under the statute because it is impossible for a court to conclude from that evidence alone whether or not there has been any break in the continuity of the whole skin.* There may have simply been internal bleeding of some kind or another, the cause of which is not established. Furthermore, even if there had been a break in some internal skin, there may not have been a break in the whole skin.' (emphasis added)

The medical terms '*skin*' and '*true skin*' are defined in the *Butterworths Medical Dictionary* as follows:

'*Skin*'	'The outer covering of the body consisting of two layers, an inner, the dermis or corium and an outer, the epidermis.'
'*True Skin*'	'Dermis – the inner skin.'

In *R v Berwick & Findlater* [1979] TasR 101 Crawford J stated at page 109:

> 'I hold that the cut into the dermis is *not* a wounding, that an injury going further than the dermis is necessary before there can be wounding … It seems to me when Coleridge J [in *R v McLoughlin* (1838) 8 C & P 635, 173 ER 651] said:
>
> "If it is necessary to constitute a wound, the skin should be broken, it must be the whole skin."
>
> He could hardly be saying that the *whole skin* should be broken unless he was referring to the complete depth of the *whole skin* and he was not saying that a partial break in the dermis was sufficient.' (emphasis added)

Therefore, the prosecution *must* prove that the complainant suffered a bodily injury that resulted in the *whole skin* being broken.

The evidence of a doctor will therefore be essential, unless there is a '*Formal Admission*'.

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The law relating to:

- '*Opinion Evidence - Experts*' is examined commencing on page **202**; and
- '*Formal Admissions*' is examined commencing on page **325**.

See also: *Jervis* (1991) 56 ACrimR 374 & *Epeli Davinga v The State* [1995] PNGLR 263 at page 266 regarding '*Formal Admissions*'.

[33.6] Multiplicity Of Acts

The law relating to '*Multiplicity Of Acts*' is examined commencing on page **566**.

[33.7] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Unlawful Wounding*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[33.8] Related Offences

The following offences are related to the offence of '*Unlawful Wounding*' as provided for in the *Penal Code* (Ch. 26):

- '*Common Assault*', section 244 of the *Penal Code* (Ch. 26) which is examined commencing on page **562**;
- '*Bodily Harm*', section 245 of the *Penal Code* (Ch. 26) which is examined commencing on page **570**; and
- '*Grievous Harm*', section 226 of the *Penal Code* (Ch. 26) which is examined commencing on page **584**.

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GRIEVOUS HARM

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GRIEVOUS HARM

[34.0] Introduction

This chapter will examine the offence of '*Grievous Harm*', as provided for by section 226 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See sections 18 and 20 of the *Offences Against The Person Act* 1861 (UK).

[34.1] Offence

Section 226 of the *Penal Code* (Ch. 26) states:

> 'Any person who unlawfully does grievous harm to another is guilty of a misdemeanour, and shall be liable to imprisonment for fourteen years.'

[34.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did unlawfully do grievous harm to a person namely **[**specify the name of the complainant**]**.'

[34.3] Elements

A. Defendant

B. Place

C. Date

D. Unlawfully

E. Grievous Harm

F. Complainant

[34.4] Unlawfully

[34.4.1] Introduction

An act or omission is '*unlawful*' unless it is authorised, justified or excused by law.

The prosecution has the burden of proving the '*unlawfulness*' of the defendant's actions, see *R v Williams* (1984) 78 CrAppR 276 [[1984] CrimLR 163] at page 281 & *R v May* (1912) 8 CrAppR 63; [1912] 3 KB 572, per Lord Alverstone CJ at page 575.

Section 235 of the *Penal Code* (Ch. 26) states:

> 'Any person authorised by law or by the consent of the person injured to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.'

Section 236 of the *Penal Code* (Ch. 26) states:

> 'Notwithstanding anything contained in section 235, consent by a person to the causing of his own death or his own *maim* does not affect the criminal responsibility of any person by whom such death or maim is caused.' (emphasis added)

See also: section 234 of the *Penal Code* (Ch. 26) – '*Surgical Operations*'.

If a complainant in trying to escape from the defendant as a consequence of what he/she said and/or did suffers injuries amounting to *grievous bodily harm*, then the defendant may be guilty of an offence under section 226 of the *Penal Code* (Ch. 26).

In *R v Roberts* (1972) 56 CrAppR 95 the Court held at page 102:

> 'The test is: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing?'

In *R v Mackie* (1973) 57 CrAppR 453 [[1973] CrimLR 438] Stephenson LJ, delivering the judgment of the Court, stated at page 459:

> 'Where the injuries are not fatal, the attempt to escape must be the natural consequence of the assault charged, not something which could not be expected, but something which any reasonable and responsible man in the assailant's shoes would have foreseen.'

See also: *Director of Public Prosecutions v Daley* [1979] 2 WLR 239.

The courts have consistently held that the *mens rea* of every type of offence against the person covers both actual intent and recklessness, in the sense of taking the risk of harm ensuing with foresight that it might happen, see *R v Spratt* (1990) 91 CrAppR 362 [[1991] 2 AllER 210; [1990] 1 WLR 1073; [1990] CrimLR 797] at page 370.

The question is therefore whether the defendant considered the possibility that the complainant might have been hurt by his/her actions.

[34.4.2] Defence Of Person Or Property

The law relating to the '*Defence Of Person Or Property*' is examined commencing on page **451**.

[34.5] Grievous Harm

The term '*Grievous Harm*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'any harm which amounts to a *maim or dangerous harm*, *or* seriously *or* permanently injures health *or* which is likely so to injure health, *or* which extends to permanent disfigurement, *or* to any permanent *or* serious injury to any external *or* internal organ, membrane *or* sense.' (emphasis added)

The term '*Maim*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'the destruction or permanent disabling of any external or internal organ, member or sense'.

The evidence of a doctor will therefore be essential, unless there is a '*Formal Admission*'.

The law relating to:

- '*Opinion Evidence - Experts*' is examined commencing on page **202**; and
- '*Formal Admissions*' is examined commencing on page **325**.

See also: *Freezer Lausalo v R* (Unrep. Criminal Appeal No. 4 of 1994; Court of Appeal) & *Epeli Davinga v The State* [1995] PNGLR 263 at page 266 regarding '*Formal Admissions*'.

[34.6] Multiplicity Of Acts

The law relating to '*Multiplicity Of Acts*' is examined commencing on page **566**.

[34.7] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Grievous Harm*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[34.8] Related Offences

The following offences are related to the offence of '*Grievous Harm*':

- '*Common Assault*', section 244 of the *Penal Code* (Ch. 26) which is examined commencing on page **562**;

GRIEVOUS HARM

- '*Bodily Harm*', section 245 of the *Penal Code* (Ch. 26) which is examined commencing on page **570**; and

- '*Unlawful Wounding*', section 229 of the *Penal Code* (Ch. 26) which is examined commencing on page **578**.

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ASSAULT WITH INTENT

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ASSAULT WITH INTENT

[35.0] Introduction

This chapter will examine the offence of '*Assault With Intent*', as provided for by section 247(a) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Offences Against The Person Act* 1861 (UK), section 18.

[35.1] Offence

Section 247(a) of the *Penal Code* (Ch. 26) states:

'Any person who –

(a) assaults any person with intent to commit a felony or to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence,

is guilty of a misdemeanour, and shall be liable to imprisonment for two years.'

[35.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did assault a person namely **[**specify the name of this person**]** with intent to **[**commit a felony to wit **(**specify the felony**) or (**resist **or** prevent**)** the **(**lawful apprehension **or** detainer**)** of **([**himself/herself**] or** a person namely **[**specify name of person**])** for an offence to wit **(**specify the offence**)]**.'

[35.3] Elements

A. Defendant

B. Place

C. Date

D. Assault

E. Complainant

F. Intent

G. [i] Commit A Felony;
[ii] [1] Resist; or
[2] Prevent
[A] Lawful Apprehension; or
[B] Detainer
Of
[I] Himself/Herself; or
[II] Person
For An Offence

[35.4] Assault

The element '*Assault*' is examined commencing on page **564**.

[35.5] Intent To Commit A Felony

Section 247(a) of the *Penal Code* (Ch. 26) requires that the defendant *must* assault another person with intent to commit a *felony*. At the time of the assault the prosecution *must* prove '*beyond reasonable doubt*' that the defendant had that intention.

Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of this offence, 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to commit a felony, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

The felony intended to be committed does *not* necessarily have to relate to the person assaulted.

The defendant may after the commission of the assault either:

- commit the felony intended;
- attempt to commit the felony intended; or
- change his/her mind and not commit the felony intended.

Under each of those circumstances the defendant would still be guilty of this offence.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

ASSAULT WITH INTENT

The term '*Felony*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

> 'an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with imprisonment for three years or more.'

[35.6] Intent To Resist Or Prevent Lawful Apprehension Or Detention

[35.6.1] Introduction

Section 18 of the *Penal Code* (Ch. 26) states:

> 'Where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, *the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person*.' (emphasis added)

[35.6.2] Intent

Section 247(a) of the *Penal Code* (Ch. 26) requires that the defendant *must* assault another person with intent to resist or prevent the lawful apprehension or detention of himself/herself or of any other person. At the time of the assault the prosecution *must* prove '*beyond reasonable doubt*' that the defendant had that intention.

Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of this offence, 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to resist or prevent the lawful apprehension or detention of himself/herself or of any other person, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[35.6.3] Resist

The term '*Resist*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

However, the 'natural and ordinary' meaning of that term in the context of this section would *include* opposing by force some course of action which the police officer resisted is attempting to pursue, see *R v Galvin (No. 2)* [1961] VR 740.

In *Collins v Murray, Ex parte Murray* [1989] 1 QdR 614 the case involved two police officers who each had hold of the defendant, one officer on either side, attempting to effect the defendant's arrest for another offence. The defendant pulled away, screaming and yelling. The defendant was charged with two counts of resisting police in the execution of their duty.

The court held that one bodily movement of twisting and struggling constituted resisting each of the two police officers in the execution of their duty; the one bodily movement on the part of the defendant gave rise to two charges. However, Williams J, with whom the other members of the court concurred, stated at page 618:

> 'In my view […] the second charge is constituted by the "gist or gravemen" of the former and it would be an harassment of the accused to charge him with two several offences. […] The magistrate should have recorded a conviction on one of those charges and forever stayed the other; […] The penalty with respect to the conviction recorded should reflect the overall criminality of the conduct constituting the offence.'

[35.6.4] Lawful Arrest Or Detention

The element relating to the '*lawful arrest or detention*' is examined in the chapters titled:

- '*Power To Arrest*' commencing on page **242**; and
- '*Power To Enter & Search*' commencing on page **256**.

It should be noted that:

- both police officers and civilians have the power to arrest under the *Criminal Procedure Code* (Ch. 7); and
- police officers have the power to detain a person for the purpose of a search under the *Criminal Procedure Code* (Ch. 7).

[35.6.5] Defence

In *R v Lee* [2001] 1 CrAppR 293 Rose LJ, delivering the judgment of the Court, stated at pages 294 – 296:

> '[D]oes the *mens rea* for assault with intent to resist lawful apprehension [under section 38 of the *Offences Against The Person Act* 1861 (UK)] include an absence of honest belief in the defendant that the arrest was lawful?
>
> […]
>
> In *Bentley* (1850) 4 CoxCC 408, Talfourd J put the point at page 410 in a way which in our judgment is still good law:

> "I think that, to support a charge of resisting a lawful apprehension, it is enough that the prisoner is lawfully apprehended, and it is his determination to resist it. If the apprehension is in point of fact lawful, we are not permitted to consider the question, whether or not he believed it to be so, because that would lead to infinite niceties of discrimination. The rule is not, that a man is always presumed to know the law, but that no man shall be excused for an unlawful act from his ignorance of the law. It was the prisoner's duty, whatever might be his consciousness of innocence, to go to the station – house and hear the precise accusation against him. He is not to erect a tribunal in his own mind to decide whether he was legally arrested or not. He was taken into custody by an officer of the law, and it was his duty to obey the law."
>
> […]
>
> *In our judgment, once the lawfulness of the proposed arrest is established, the mens rea necessary for a section 38 offence is an intention by the defendant to resist arrest, accompanied by knowledge that the person he assaults (who may or may not be a police officer) is a person who is seeking to arrest him. Whether or not an offence has actually been committed or is believed by the defendant not to have been committed is irrelevant*.' (emphasis added)

In *Horne v Coleman* (1929) 46 WN(NSW) 30 the Court held:

> A constable, whether in uniform or not, or at a time outside his/her ordinary working hours or not, has a continuing duty to prevent, or assist in preventing disturbances in public places, or breaches of peace. A person who strikes a constable who is in plain clothes at a time outside his/her ordinary hours and who is arresting him/her for the commission of a disturbance in a public place or a breach of peace, is guilty of the offence of assaulting a constable in the execution of his/her duty.

However, police officers *not* in uniform should at all times ensure that people who they are dealing with are aware that they are members of the RSIP. Otherwise, a defendant may not realise that the person he/she is assaulting or resisting or wilfully obstructing is a police officer. Those circumstances may enable such a defendant to 'fairly raise' the defence of '*Mistake Of Fact*' which is examined commencing on page **439**.

See also: Duncan v Jones [1936] 1 KB 218; [1935] AllER 710.

[35.7] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Assault With Intent*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[35.8] Related Offences

Refer also to the other '*Assaults Punishable With Two Years Imprisonment*' as provided for by section 247 of the *Penal Code* (Ch. 26). Subsection (b) of that section is examined commencing on page **595**.

ASSAULT, RESIST & WILFULLY OBSTRUCT POLICE

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ASSAULT, RESIST & WILFULLY OBSTRUCT POLICE

[36.0] Introduction

This chapter will examine the offence of '*Assault, Resist & Wilfully Obstruct*', as provided for by section 247(b) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Police Act* 1954 (UK), section 51(3).

[36.1] Offence

Section 247(b) of the *Penal Code* (Ch. 26) states:

'Any person who –

(b) assaults, resists or wilfully obstructs any police officer in the due execution of his duty, or any person acting in aid of such officer,

is guilty of a misdemeanour, and shall be liable to imprisonment for two years.'

[36.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**assault, resist **or** wilfully obstruct**]** a **[**police officer namely **(**specify the name and rank of police officer**)** in the due execution of **(**his/her**)** duty **or** person acting in aid of a police officer namely **(**specify the name and rank of officer**)** in the due execution of **(**his/her**)** duty**]**.'

[36.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Assault;
[ii] Resist; or
[iii] Wilfully Obstruct

E. [i] Police Officer Acting In The Due Execution Of His/Her Duty; or
[ii] Person Acting In Aid Of A Police Officer In The Due Execution Of His/Her Duty

[36.4] Assault

The element '*Assault*' is examined commencing on page **564**.

[36.5] Resist

Section 18 of the *Penal Code* (Ch. 26) states:

> 'Where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, *the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person*.' (emphasis added)

The term '*Resist*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

However, the 'natural and ordinary' meaning of that term in the context of this section would *include* opposing by force some course of action which the police officer resisted is attempting to pursue, see *R v Galvin (No. 2)* [1961] VR 740.

In *Collins v Murray; Ex parte Murray* [1989] 1 QdR 614 the case involved two police officers who each had hold of the defendant, one officer on either side, attempting to effect the defendant's arrest for another offence. The defendant pulled away, screaming and yelling. The defendant was charged with two counts of resisting police in the execution of their duty.

The court held that one bodily movement of twisting and struggling constituted resisting each of the two police officers in the execution of their duty; the one bodily movement on the part of the defendant gave rise to two charges. However, Williams J, with whom the other members of the court concurred, stated at page 618:

> 'In my view […] the second charge is constituted by the "gist or gravemen" of the former and it would be an harassment of the accused to charge him with two several offences. […] The magistrate should have recorded a conviction on one of those charges and forever stayed the other; […] The penalty with respect to the conviction recorded should reflect the overall criminality of the conduct constituting the offence.'

[36.6] Wilfully Obstruct

The term '*Wilfully Obstruct*' is *not* defined in either the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Rice v Connolly* [1966] 2 AllER 649 [[1966] 3 WLR 17; [1966] 2 QB 414] Lord Parker CJ stated at page 651 what the prosecution had to prove was:

- That there was an obstructing of a police officer;
- That the defendant obstructing did so wilfully; and

- That the police officer was at that time acting in the execution of his/her duty.

In *Lewis v Cox* (1985) 80 CrAppR 1 Webster J stated at page 6:

> 'Lord Parker CJ […] in RICE v CONNOLLY [1966] 2 QB 414, 419 [[1966] 2 AllER 649] said that *"wilful"* in the context of this section [, referring to section 51(3) of the *Police Act* 1954 (UK),] "not only in my judgment *means 'intentional' but something which is done without lawful excuse*"; and Lord Parker's explanation of "wilfully obstructs" as being something which makes it more difficult for the police to carry out their duties was taken by him from the judgment of Lord Goddard CJ in HINCHCLIFFE v SHELDON [1955] 1 WLR 1207, 1210; [1955] 3 AllER 406, 408 where Lord Goddard said: "*Obstructing, for the present purpose, means making it more difficult for the police to carry out their duties*."'

Kerr LJ stated at page 8:

> 'I agree with Webster J's analysis of the authorities. *The actus reus is the doing of an act which has the effect of making it impossible or more difficult for members of the police to carry out their duty.* The word "wilfully" clearly imports an additional requirement of mens rea. *The act must not only have been done deliberately, but with the knowledge and intention that it will have this obstructive effect*. But in the absence of a lawful excuse, the defendant's purpose or reason for doing the act is irrelevant, whether this be directly hostile to, or "aimed at", the police, or whether he has some other purpose or reason.' (emphasis added) [words in brackets added]

In *Willmott v Atack* [1977] QB 498; [1976] 3 AllER 794; (1976) 63 CrAppR 207 the court held that it was *not* sufficient for the prosecution to prove that the defendant had deliberately done an act which had resulted in the obstruction of a police officer; what also had to be shown was that he/she had done the act with the intention of obstructing the officer *in the sense of making it more difficult to carry out his/her duty.*

In appropriate circumstances, the defendant *must* however be under a legal obligation to comply with the direction of the police officer concerned, see *Ingleton v Dibble* [1972] 1 QB 480; [1972] 1 AllER 275.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

See also: *Moore v Green* [1983] 1 AllER 663; *Hinchcliffe v Sheldon* [1955] 3 AllER 1207; [1955] 1 WLR 1207; *Hills v Ellis* (1983) 76 CrAppR 217 *& Carmichael v Mac Gowan* [1967] WAR 11.

[36.7] Execution Of Duty

The term '*Execution Of Duty*' is *not* defined in either the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Donnelly v Jackman* [1970] 1 WLR 562; [1970] 1 AllER 987; (1970) 54 CrAppR 229 the case involved a defendant who was tapped on the shoulder by a police officer who was investigating an offence. The court held that although the police officer only wanted to talk to the defendant that police officer was acting in the execution of his duty.

In *Malayta* (1996) 87 ACrimR 492 Pincus JA, as a member of the Court of Appeal, stated at page 495:

> 'For a police officer to act in accordance with a search warrant would ordinarily be "in the performance of the officer's duties". However, the High Court in *Corbett* (1932) 47 CLR 317 held, in a case concerning a charge of obstructing police in the execution of their duty, that (at 327 per Gavan Duffy CJ, Rich and Dixon JJ):
>
> "… when the alleged duty arises from a warrant, the charge cannot be sustained unless the warrant did operate in law as an authority to the officer, and, unless when he was resisted, he was in the course of executing that authority according to law … *It is not enough that the officer was acting bona fide in obedience to a warrant, which, although bad, appeared to be good.*"' (emphasis added)

The prosecution does *not* have to prove the defendant knew that the police officer concerned was acting in the execution of his/her duty, see *R v Reynhoudt* (1962) 107 CLR 381; [1962] ALR 483.

Refer to the sections which examine:

- '*Institution Of Proceedings*' commencing on page **110**; and
- '*Common Law Powers Of Arrest*' commencing on page **250**.

See also: *Robson v Hallett* [1967] 2 QB 939; [1967] 2 AllER 407; (1967) 51 CrAppR 307; [1967] 3 WLR 28; *Davis v Lisle* [1936] 2 KB 434; [1936] 2 AllER 213; *Henderson v O'Connell* [1937] VLR 171; [1937] ALR 218; *R v Timmins* [1913] QWN 44; (1913) 7 QJPR 61; *R v McDowall* [1910] QWN 43; (1910) 4 QJPR 141; *Re K* (1993) 46 FCR 336; *Innes v Weate* (1984) 12 ACrimR 45 & *McLaughlin v Mesics* (1966) 116 CLR 340; (1966) 40 ALJR 204.

If there is uncertainty as to whether the prosecution can prove '*beyond reasonable doubt*' that the police officer was acting in the execution of his/her duty then a charge of '*Common Assault'* should be considered.

That offence is examined commencing on page **562**.

[36.8] Effect Of Dismissal

In *Veivers v Roberts, Ex parte Veivers* [1980] QdR 226 the case involved a defendant who was charged with being found in an enclosed yard without lawful excuse, and also with resisting a police officer in the execution of his duty.

The magistrate dismissed the first charge on a matter of law because the defendant was on private premises, and dismissed the second charge on the grounds that the honest belief purported to be held by the police officer making the arrest for the offence, could not be entertained on reasonable grounds because such belief would have been held by him on an erroneous view of the law.

The Court held:

> A person arrested for the offence of being found in an enclosed yard without lawful excuse but found not guilty of that offence may be convicted of the offence of resisting the arresting officer in the execution of his/her duty, if at the time of the arrest the police officer had reasonable grounds for believing that the offence for which the defendant was arrested had been committed.

See also: *Normandale v Rankine* (1972) 4 SASR 205 & *R v McDowall* [1910] QWN 43; (1910) 4 QJPR 141.

[36.10] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Assault, Resist & Wilfully Obstruct Police*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of those offences are examined commencing on page **918**.

[36.11] Related Offences

Refer also to the other '*Assaults Punishable With Two Years Imprisonment*', as provided for by section 247 of the *Penal Code* (Ch. 26). Subsection (a) of that section is examined commencing on page **590**.

ROBBERY

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ROBBERY

[37.0] Introduction

This chapter will examine the offence of '*Robbery*', as provided for by section 293 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In *Toritelia v R* [1987] SILR 4 the Court of Appeal examined the term '*fraudulently*'. Whilst that term was examined in context of the offence of '*Embezzlement*' as prescribed in section 273 of the *Penal Code* (Ch. 26), the legal reasoning should be adopted when interpreting the same term as prescribed in section 313 of that Code.

White P stated at page 7:

> 'In the United Kingdom the Theft Act 1968 replaced the Larceny Act 1916 but the Solomon Islands provisions have remained unaltered.'

It is therefore appropriate only to refer to cases which refer to the latter Act for the purpose of interpreting the offence of '*Robbery*'. In that regard see section 23 of that Act.

Section 173 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with robbery, and it is proved that he committed an assault with intent to rob, he may be convicted of that offence although he was not charged with it.'

[37.1] Offences

Section 293 of the *Penal Code* (Ch. 26) states (in part):

> '(1) Any person who –
>
> (a) being armed with any offensive weapon or instrument, or being together with one other person or more, robs, or assaults with intent to rob, any person; or
>
> (b) robs any person and, at the time of or immediately after such robbery, uses or threatens to use any personal violence to any person,
>
> is guilty of a felony, and shall be liable to imprisonment for life.
>
> (2) Any person who robs any person is guilty of a felony, and shall be liable to imprisonment for fourteen years.'

ROBBERY

[37.2] Wording Of Charges

Section 293(1)

(a) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** **[**being armed with an offensive **(**weapon **or** instrument**)** to wit a **(**specify the offensive **[**weapon **or** instrument**])** **or** together with **(**one **or [**specify any number more than one**])** person/s namely **(**specify the name of this/these person/s**)]** did **[**rob **or** assault with intent to rob**]** a person namely **[**specify the name of this person**]**.'

(b) '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did rob a person namely **[**specify the name of this person**]** and **[**at the time of **or** immediately **(**before **or** after**)]** the said robbery did **[**use **or** threaten to use**]** personal violence to **[**the said person **or** a person namely **(**specify the name of this person**)]**.'

Section 293(2)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did rob a person namely **[**specify the name of this person**]**.'

[37.3] Elements

Section 293(1)(a)

A. Defendant

B. Place

C. Date

D. [i] Armed With An Offensive Weapon Or Instrument; or
[ii] Together With Another Defendant

E. [i] Rob; or
[ii] Assault With Intent To Rob

F. Complainant

Section 293(1)(b)

A. Defendant

B. Place

C. Date

D. Rob

E. Complainant

F. [i] At The Time; or
[ii] Immediately Before Or After
The Said Robbery

G. [i] Use; or
[ii] Threaten To Use

H. Personal Violence

I. [i] Complainant; or
[ii] Another Person

Section 293(2)

A. Defendant

B. Place

C. Date

D. Rob

E. Complainant

[37.4] Rob

'[R]obbery consists in the violent and forcible taking from the person of another or in his presence and against his will of any money or goods to any value of violence, or putting him in fear', see *R v Harding* (1929) 21 CrAppR 166 at page 170.

The person robbed need *not* be the owner of the property, see *R v Harding* (*supra*).

It is a question of fact as to whether property was in the complainant's immediate and personal protection and care, see *Smith v Desmond & Hill* (1965) 49 CrAppR 246.

[37.5] Assault With Intent To Rob

[37.5.1] Assault

The term '*Assault*' is examined commencing on page **564**.

[37.5.2] Intent To Rob

Section 293(1)(a) of the *Penal Code* (Ch. 26) requires that the defendant *must* assault another person with intent to rob.

Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of this offence, 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to rob the complainant, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[37.6] Armed With An Offensive Weapon Or Instrument

[37.6.1] Armed

The term '*Armed*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *R v Jones* (1987) 85 CrAppR 259 [[1987] 2 AllER 692; [1987] 1 WLR 692] Tucker J, delivering the judgment of the Court of Appeal, held at page 266:

> 'The expression "armed" is an ordinary English word. Normally, it will involve either physically carrying arms, or it will involve proof that, to his knowledge, a defendant knows that they are immediately available. In our judgment, it is not necessary to prove an intent to use those arms if the situation should require it, though clearly if a defendant does use them, or has used them, then that is an obvious indication that he is armed.'

See also: *Rowe v Conti; Threlfall v Panzera* [1958] VR 547; [1958] ALR 1038.

[37.6.2] Dangerous Or Offensive Weapon Or Instrument

The terms '*Dangerous Or Offensive Weapon Or Instrument*' are *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* 'a weapon or instrument made or adapted or intended for causing injury to human being', see *Sinaje v Balmer* [1965] 2 AllER 248. A 'firearm' would be classed as a 'dangerous weapon', whereas a large knife may be classed as a 'dangerous instrument'.

[37.7] Personal Violence

Any degree of violence is sufficient, there need no be excessive violence or serious injury, see *R v Harrison* (1930) 22 CrAppR 82, but mere fear of violence is *not* sufficient, see *R v Parker* [1919] NZLR 365; [1919] GLR 238.

In *R v Broughton* [1986] NZLR 641 it was held:

> A threat of violence in its natural and ordinary meaning was the manifestation of an intention to inflict violence unless the money and property was handed over. The threat could be directed or veiled, and it could be conveyed by words or conduct or combination of both. Whether or not the conduct complained of was capable of amounting to a threat of violence must be assessed in the context in which it occurred. Although it was the conduct of the defendant which had to be assessed, and not the presence or absence of fear on the part of the complainant, the reaction of the person against whom the conduct was addressed was relevant when characterising the conduct of the defendant.

[37.8] Honest Claim Of Right

Section 8 of the *Penal Code* (Ch. 26) states:

> 'A person is not criminally responsible in respect of *an offence relating to property*, if the act done or omitted to be done by him with respect to the property was done in the exercise of an *honest claim of right* and *without intention to defraud*.' (emphasis added)

In *Alick Fefele v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 5 of 1987) it was argued that the defendant had a honest claim of right to commit the offence of '*Robbery*' because the victim had sex with his wife. Ward CJ stated at pages 2 – 3:

> 'Counsel refers to the case of R v Skivington (1967) 1 AER 483 [(1967) 51 CrAppR 167]. That was an appeal against the judge's direction to the jury that where, on a charge of robbery, the accused raised a defence of claim of right, he had to show he had an honest belief that he was entitled to the goods and also that he had a honest belief he was entitled to take them in the way in which he did.
>
> The Court of Appeal held that this was a misdirection. Lord Parker CJ at page 484 reiterates the principle that a claim of right exists whenever a man honestly believes that he has a lawful claim, even though it may be completely unfounded in law or in fact and continues:-
>
> "The question is whether that defence to larceny applies equally when the offence with which one is concerned is really an aggravated larceny, such as in this case of robbery, or whether the honest belief must extend to being entitled to take the money by force. In the opinion of the court, both on principle and on the cases, it is clear that it can be a defence. So far as principle is concerned, it can be stated in the simple form that larceny is an ingredient of robbery, and if the honest belief that a man has a claim of right is a defence to larceny, then it negatives one of the ingredients in the offence of robbery, without proof of which the full offence is not made out. That principle simply stated as such has been upheld in case after case."
>
> Counsel for the appellant suggests that means the court must decide the question of claim of right to the stealing without looking at the means by which it was taken and only to consider those when and if he does not accept it was an honest belief.

> That is an interpretation that strains commonsense. In deciding any issue, the magistrate must use all relevant matters available in the evidence. Of course, the violence here was an extension of the stealing to which claim of right was the defence but the very fact that he was willing to resort to such threats in order to pursue what he claimed was a genuine right must be a matter the magistrate might consider in assessing the accused's bona fides.'

The law in relation to '*Honest Claim Of Right*' is examined commencing on page **431**.

[37.9] Doctrine Of Recent Possession

In *R v Fallon* (1963) 47 CrAppR 160 Lord Parker CJ, delivering the judgment of the Court, stated at page 163:

> 'It is well known that the doctrine of recent possession can afford evidence upon which in certain circumstances a jury can convict of the taking, stealing or housebreaking and stealing, or, as the count conceives it, robbery.'

The law relating to the '*Doctrine Of Recent Possession*' is also examined commencing on page **477**.

[37.10] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Robbery*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[37.11] Related Offences

The following offences are related to the offence of '*Robbery*' as provided for in the *Penal Code* (Ch. 26)::

- '*Assault With Intent To Rob*', section 293(3) of the *Penal Code* (Ch. 26); and
- '*Demanding Property With Menaces*', sections 294 and 295 of the *Penal Code* (Ch. 26) which is examined commencing on page **912**;

ROBBERY

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HOMICIDAL OFFENCES

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HOMICIDAL OFFENCES

[38.0] Introduction

This chapter will examine the offences of:

- '*Murder*', as provided for by section 200 of the *Penal Code* (Ch. 26);
- *'Manslaughter*', as provided for by section 199 of the *Penal Code* (Ch. 26); and
- *'Attempted Murder*', as provided for by section 215 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

In that regard reference should be made to the *Offences Against The Person Act* (1861) (UK) and the *Homicide Act* 1957 (UK).

As regards alternative convictions, see sections 161 to 165 of the *Penal Code* (Ch. 26).

[38.1] Murder

[38.1.1] Offence

Section 200 of the *Penal Code* (Ch. 26) states:

> 'Any person who of *malice aforethought* causes the death of another person by an *unlawful act or omission* is guilty of murder and shall be sentenced to imprisonment for life.' (emphasis added)

[38.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did murder **[**specify the name of the deceased**]**.'

[38.1.3] Elements

A. Defendant

B. Place

C. Date

D. Murder

E. Victim

[38.1.4] Malice Aforethought

[A] Introduction

Section 202 of the *Penal Code* (Ch. 26) states:

> 'Malice aforethought may be expressed or implied and express malice shall be deemed to be established by evidence proving either of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated –
>
> (a) an intention to cause the *death or grievous bodily harm* to any person, whether such person is the person actually killed or not; *or*
>
> (b) knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.' (emphasis added)

In *R v Noel Ta'asi* (Unrep. Criminal Case No. 32 of 1997) Palmer J at pages 1 – 8:

> 'There are two crucial elements in the offence of murder […]. These also form the issues before this Court. First, is proof of the unlawful act in this case; that it was the Accused who stabbed the deceased; and secondly, that of malice aforethought. […]
>
> […]
>
> According to our law, malice aforethought is established if either of the two elements in paragraphs (a) or (b) above are proven beyond reasonable doubt.'

In *R v Ellison Orinasikwa* (Unrep. Criminal Case No. 18 of 1998) Muria CJ stated at page 6:

> 'That section [, referring to section 202 of the *Penal Code* (Ch. 26),] clearly sets out the mens rea to be proved. There are two states of mind *must* be established under the section, as was pointed out in *R v Jimmy Viu* (1994) CRC15 of 1993 (HC) (Judgment given on 11 February 1994) which was upheld by the Court of Appeal in *Jimmy Viu v R* (1994) Cr App No 7 of 1994 (Judgment given on 17 June 1994). This Court stated in that case:
>
> "there are two states of mind either of which, if proved, would establish malice aforethought. The first of those states of mind is an intention to cause the death of or grievous bodily harm to a person. The second, is the knowledge that the act which causes the death will probably cause the death of or grievous bodily harm to a person whether such person is the person actually killed or not."
>
> The accused's state of mind must be established, of course, on the evidence before the Court and must be done so by the prosecution beyond a reasonable doubt. Such evidence would include what the witnesses, including, the accused, said happened at the time of the incident or immediately prior to or after the incident, so far as is relevant. The nature of the injuries are also a very important factor in determining the state of mind of the accused and the Court will also bear this in mind in this case.' (emphasis added) [words in brackets added]

For the purpose of section 202 of the *Penal Code* (Ch. 26), the term '*grievous bodily harm*' *means* '*really serious harm*', see *Director of Public Prosecutions v Smith* (1960) 44 CrAppR 261 [[1960] 3 AllER 161; [1960] 3 WLR 546; [1961] AC 290] at page 291.

See also: *R v Paggett* (1983) 76 CrAppR 279 at page 292 & *R v Moloney* [1985] AC 905; [1985] 2 WLR 648; [1985] 1 AllER 1025; (1985) 81 CrAppR 93; [1985] CrimLR 378.

[B] Section 202(a) -- Penal Code

Section 202(a) of the *Penal Code* (Ch. 26) states:

> 'Malice aforethought may be expressed or implied and express malice shall be deemed to be established by evidence proving either of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated –
>
> (a) an intention to cause the *death or grievous bodily harm* to any person, whether such person is the person actually killed or not.' (emphasis added)

In *R v David Kwaoga* (Unrep. Criminal Case No. 22 of 1998) Palmer J stated at page 11:

> 'The crucial ingredient in the offence of murder is malice aforethought. Malice aforethought in the laws of Solomon Islands is in turn defined in section 202 of the Penal Code. Under paragraph 202(a) malice aforethought may be established if there is an intention to kill, or an intention or cause really serious harm and as a result of which the person injured dies.'

'The crucial issue of proof on the part of the prosecution in this case therefore will lie in showing beyond reasonable doubt that there was an intention to cause the death of or grievous bodily harm to the deceased', see *R v Joel Nanango* (Unrep. Criminal Case No. 43 of 1996; Palmer J; at page 3).

In *R v Vickers* [1957] 2 QB 664; [1957] 2 AllER 741 Lord Goddard CJ, delivering the judgment of the Court, stated at pages 670 & 743 respectively:

> 'Murder is, of course, killing with malice aforethought, but "malice aforethought" is a term of art. It has always been defined in English law as either an express intention to kill, as could be inferred when a person, having uttered threats against another, produced a lethal weapon and used it on a victim, or implied where, by a voluntary act, the accused intended to cause grievous bodily harm to the victim, and the victim died as the result.'

See also: *R v Cunningham* [1981] 3 WLR 223; [1981] 2 AllER 863; [1982] AC 566; (1981) 73 CrAppR 253; [1981] CrimLR 835 *&* *R v Ward* (1987) 85 CrAppR 71 at page 75.

Intention which is a state of mind, can never be proved as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

In *Martin Sutarake v R* (Unrep. Criminal Appeal No. 6 of 1994) the Court of Appeal held at page 7:

> 'Before he could be found guilty of the murder, it was necessary for the prosecution to show beyond reasonable doubt that there was on the evidence no reasonable hypothesis consistent with innocence. See *DPP v Togiabae* (CA 5 of 1986, March 30, 1987. White P, Connolly, Kapi JJA). *To state it another way, there had to be no reasonable explanation of the evidence except that it was the appellant who killed the deceased in circumstances amounting to murder*.' (emphasis added)

See also: *R v Alwin Paul & Pye Roberts* (Unrep. Criminal Case No. 27 of 1997; Muria CJ); *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999); *R v Berry* [1986] CrimLR 394; (1986) 83 CrAppR 7 & *Director of Public Prosecutions v Smith* (1960) 44 CrAppR 261; [1960] 3 AllER 161; [1960] 3 WLR 546; [1961] AC 290.

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on pages **626** and **444**.

[C] Section 202(b) – Penal Code

Section 202(b) of the *Penal Code* (Ch. 26) states:

> 'Malice aforethought may be expressed or implied and express malice shall be deemed to be established by evidence proving either of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated –
>
> (a) […]; or
>
> (b) knowledge that the act which caused death will probably cause the death of, or grievous bodily harm to, some person whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.' (emphasis added)

This is a '*subjective test*', see *Joel Aosi v R* [1988 – 89] SILR 1 at page 3.

In *Daniel Samani v R* (Unrep. Criminal Appeal No. 2 of 1995) Muria CJ, with whom Kapi and Williams JJA concurred, stated at page 5:

> 'There is no doubt that the deceased had an unusually enlarged spleen. There is also no doubt that the appellant delivered two separate blows to the upper left quadrant of the deceased's abdomen. There is also no doubt on the evidence that the blows delivered by the appellant ruptured the deceased's spleen completely severing it into two halves. The force used by the appellant in this case was found by the trial judge to be of considerable magnitude. On the evidence before his Lordship I see no reason to disagree with that finding.

There may well be cases where death may occur from a raptured spleen which is caused by a comparatively minor blow delivered without any intention to kill or cause grievous bodily harm. Such a death may occur because of the grossly enlarged spleen. In such a case the appropriate verdict would be of manslaughter.

The appellant in the present case delivered two severe blows to the abdomen of the deceased with such a magnitude of force that the deceased's spleen was not only ruptured but split into two halves. The conclusion reached by the learned trial judge that the force used by the appellant when delivering the two blows to the deceased was such that he could not have failed to realise that it would *probably cause grievous bodily harm* was entirely correct and that conclusion justifies a verdict of murder. See *Loel Aosi –v- R (1988/89) SILR 1*. (emphasis added)

In *R v Joel Nanango* (Unrep. Criminal Case No. 43 of 1996) Palmer J stated at pages 13 - 18:

'The second crucial question for this court to consider is whether there is evidence proving the state of mind of the accused, that he knew, that the act which caused death (stabbing with a knife, and which caused severe internal injuries from which the deceased did not recover from) will probably cause death or grievous bodily harm. There is no doubt that the deceased did suffer grievous harm and that she died as a consequence […]. *The vital question for this court to consider, is whether the accused realised that it was probable that the act of stabbing with the knife would cause grievous bodily harm.*

[…]

The crucial question for this court to determine is whether he knew, that is, appreciated or realised, that the act of stabbing will probably cause the death of or grievous bodily harm to the deceased. The crucial element of proof is knowledge that the act of stabbing with a copra knife, will probably cause grievous bodily harm to the deceased. When the accused picked up the knife, and stabbed the deceased with it on her backside, was that a deliberate act? With respect, there no evidence to suggest that it may have been anything else. […]

The issue however is whether he realised that the act of stabbing will probably cause grievous bodily harm to the deceased. The answer with respect must clearly be yes. I have already pointed out that a copra knife when used in a stabbing action is a very dangerous weapon indeed. Clearly, the accused cannot have failed to realise that when he plunged the knife into the backside of the deceased, that it would probably cause grievous bodily harm to the deceased. It is immaterial that the accused may have not desired or wished to kill the deceased or seriously injure her. What is crucial to note is that there is no way he would not have failed to realise what the probable consequences of his action.

When the question of the probability of a consequence is further assessed in the light of the facts of this case, the probability that grievous bodily harm will be caused to the deceased when such a sturdy and sharp instrument is used is very high indeed; even as high as nine times out of ten. In fact, the probable consequences in the facts of this case is no more a probability but an almost certainty. The learned Author in *Archbold Criminal Pleading Evidence & Practice, Forty – Third Edition, par. 17-13*, refers to the "*natural consequences of an act*" in the ordinary course of events. At page 1339 the learned Author states:

"… *the greater the probability of a consequence the more likely it was that the consequence was foreseen and that if it was foreseen the greater the probability that it was also intended*."

> If the act of stabbing with a copra knife, in the ordinary course of events will, as a natural consequence, (note it is no longer a "probable consequence", but a certain result or consequence) cause grievous bodily harm to the deceased, then most likely the consequence was foreseen, and if foreseen, then the accused cannot have failed to realise that such act will certainly cause grievous bodily harm. No evidence whatsoever has been produced by the accused to point to any suggestion or to raise any reasonable doubt that he did not have the requisite knowledge; that is, that he did not appreciate or realise that when he stabbed the deceased, it would probably cause grievous bodily harm.' (emphasis added)

In *R v William Erieri* (Unrep. Criminal Case No. 3 of 1993) Palmer J commented at page 6:

> 'It is common knowledge that the neck area is a very vulnerable and weak area, and it seems that even if what may, or can be described as reasonable force is applied with a hard object, such a stick, (depending on what sort of stick it is, whether a soft stick, or hard wood) it bound to cause some sort of injury.'

Whilst a kick has been described as a very powerful way of inflicting injury, see *R v Garunu* [1986] SILR 192 at page 196, to properly determine the effect of such a blow 'the state of the evidence *must* be considered for some indication as to the amount of force used and the type of kick applied', see *R v Lensley Kwaimani* (Unrep. Criminal Case No. 3 of 1997; Palmer J; at page 4).

See also: *R v Rockson Konaga* (Unrep. Criminal Case No. 32 of 1994; Palmer J); *Hyam v Director of Public Prosecutions* (1974) 59 CrAppR 91; [1975] AC 55; *R v Barr & others* (1989) 88 CrAppR 362; *Frankland v R* (1988) 86 CrAppR 116 at page 128; *R v Nedrick* (1986) 83 CrAppR 267; [1986] 3 AllER 1; *R v Hancock & Shankland* [1986] 2 WLR 357; [1986] 1 AllER 641; [1986] AC 455; (1986) 82 CrAppR 264; [1986] CrimLR 400; *R v Williamson & Ellerton* [1978] CrimLR 228; (1978) 67 CrAppR 63 & *R v Ward* (1956) 40 CrAppR 1.

[38.2] Manslaughter

[38.2.1] Offence

Section 199 of the *Penal Code* (Ch. 26) states:

> '(1) *Any person who by an unlawful act or omission causes the death of another person is guilty of the felony known as manslaughter.* An *unlawful omission* is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.
>
> (2) Any person who commits the felony of manslaughter shall be liable to imprisonment for life.' (emphasis added)

In *R v Buck & Buck* (1960) 44 CrAppR 213 Edmund Davies J commented at page 219:

> 'The offence of manslaughter is unlawful killing without malice aforethought. *Russell on Crime*, 11th ed, Vol. 1, p.662, says that it is a killing which the killer neither intended nor foresaw as likely to happen. It is an accident, albeit blameworthy and felonious killing.'

See also: *R v Church* (1965) 49 CrAppR 206; [1965] 2 WLR 1220; [1966] 1 QB 59; [1965] 2 AllER 72.

[38.2.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did unlawfully kill **[**specify the name of the deceased**]**.'

[38.2.3] Elements

A. Defendant

B. Place

C. Date

C. Unlawfully

E. Kill

F. Victim

[38.2.4] Unlawfully

The prosecution *must* prove that the death was caused by an '*unlawful act or omission*'.

The prosecution has the burden of proving the '*unlawfulness*' of the defendant's actions, see *R v Williams* (1984) 78 CrAppR 276 [[1984] CrimLR 163] at page 281 & *R v May* (1912) 8 CrAppR 63; [1912] 3 KB 572, per Lord Alverstone CJ at page 575.

Section 235 of the *Penal Code* (Ch. 26) states:

> 'Any person authorised by law or by the consent of the person injured to use force is criminally responsible for any excess, according to the nature and quality of the act which constitutes the excess.'

Section 236 of the *Penal Code* (Ch. 26) states:

> 'Notwithstanding anything contained in section 235, consent by a person to the causing of his own *death* or his own maim does not affect the criminal responsibility of any person by whom such *death* or maim is caused.' (emphasis added)

See also: section 234 of the *Penal Code* (Ch. 26) – '*Surgical Operations*'.

In *R v Goodfellow* (1986) 83 CrAppR 23 [[1986] CrimLR 468] Lord Lane CJ, delivering the judgment of the Court, held at page 26:

> 'It seems to us that this was a case which was capable of falling within either or both types of manslaughter. On the *Lawrence* aspect [see *R v Lawrence* (1981) 73 CrAppR 1; [1982] AC 510; [1981] 2 WLR 524; [1981] 1 AllER 974; [1981] RTR 217; [1981] CrimLR 409], the jury might well have been satisfied that the appellant was acting in such a manner as to create an obvious and serious risk of causing physical injury to some person, and secondly that he, having recognised that there was some risk involved, had nevertheless gone on to take it.

> This was equally, in our view, a case for the "unlawful and dangerous act" direction. Where the defendant does an unlawful act of such a kind as all sober and reasonable people would inevitably recognise must subject another person to, at least, the risk of some harm resulting therefrom, albeit not serious harm and causes death thereby, he is guilty of manslaughter: *Church* (1965) 49 CrAppR 206; [1966] 1 QB 59.
>
> Lord Salmon in *Director of Public Prosecutions v Newbury* (1967) 62 CrAppR 291; [1976] 2 AllER 365 approved a dictum of Humphreys J in *Larkin* [1943] 1 AllER 217, 219: "Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently he causes the death of that other person by that act, then he is guilty of manslaughter."' [words in brackets added]

If a complainant in trying to escape from the defendant as a consequence of what he/she said and/or did suffers injuries amounting to *death*, then the defendant may be guilty of an offence under section 199 of the *Penal Code* (Ch. 26).

In *Director of Public Prosecutions v Daley* [1979] 2 WLR 239 Lord Keith stated at pages 245 - 246:

> 'The law regarding manslaughter of the species with which this appeal is concerned was considered by the Court of Appeal (Criminal Division) in Reg v. Mackie (1973) 57 CrAppR 453. It is unnecessary to recite the facts of the case or to quote any passages from the judgment of the court delivered by Stephenson LJ. It is sufficient to paraphrase what their Lordship's view were there held to constitute the essential ingredients of the prosecution's proof of a charge of manslaughter, laid upon the basis that a person has sustained fatal injuries while trying to escape from assault by the defendant. These are: (1) that the victim immediately before he sustained the injuries was in fear of being hurt physically; (2) that his fear was such that it caused him to try to escape; (3) that whilst he was trying to escape, and because he was trying to escape, he met his death; (4) that his fear of being hurt there and then was reasonable and was caused by the conduct of the defendant; (5) that the defendant's conduct which caused the fear was unlawful; and (6) that his conduct was such as any sober and reasonable person would recognise as likely to subject the victim to at least the risk of some harm resulting from it, albeit not serious harm. Their Lordships have to observe that it is unnecessary to prove the defendant's knowledge that his conduct was unlawful.

See also: *R v Dalby* [1982] 1 WLR 621; [1982] 1 AllER 916; [1982] CrimLR 439; (1982) 74 CrAppR 348 at page 352; *R v Russell & Russell* (1987) 85 CrAppR 388; [1987] CrimLR 494; *Kong Cheuk Kwan v R* (1986) 82 CrAppR 18; *R v Lane & Lane* (1986) 82 CrAppR 5; [1985] CrimLR 89; *R v Dawson, Nolan & Walmsley* (1985) 81 CrAppR 150; *R v Mitchell* [1983] QB 741; [1983] 1 WLR 676; [1983] 2 AllER 427; (1983) 76 CrAppR 293 & *R v Pagett* (1983) 76 CrAppR 279 at page 292.

[38.3] Attempted Murder

[38.3.1] Offences

Section 215 of the *Penal Code* (Ch. 26) states:

> 'Any person who –

(a) attempts unlawfully to cause the death of another; or

(b) with intent unlawfully to cause the death of another does any act, or omits to do any act which it is his duty to do, such an act or omission being such a nature as to be likely to endanger human life,

is guilty of a felony, and shall be liable to imprisonment for life.'

[38.3.2] Wording Of Charges

Section 215(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did attempt unlawfully to cause the death of a person namely **[**specify the name of this person**]**.'

Section 215(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** with intent to unlawfully cause the death of a person namely **[**specify the name of this person**]** did **[**do an act **or** omit to do an act**]** which was **(**his/her**)** duty to do being of such a nature as to be likely to endanger human life.'

[38.3.3] Elements

Section 215(a)

A. Defendant

B. Place

C. Date

D. Attempt

E. Unlawfully

F. Cause Death Of Victim

Section 215(b)

A. Defendant

B. Place

C. Date

D. Intent To Unlawfully Cause Death Of Victim

E. [i] Did Do An Act; or
[ii] Did Omit To Do An Act
Which Was His/Her Duty To Do Being Of Such A Nature As To Be Likely To Endanger Human Life

[38.3.4] Test To Be Applied

In *R v Walker & Hayles* (1990) 90 CrAppR 226 Lloyd LJ, delivering the judgment of the Court, stated at page 229:

> 'Since the charge was attempted murder, the prosecution had to prove an intention to kill. Intention to cause really serious harm would not have been enough. […]
>
> […]
>
> […] If he desires serious harm, and death results from his action, he is guilty of murder. A simple direction suffices in such cases. The rare and exceptional case is where the defendant does not desire serious harm, or indeed any harm at all. *But where a defendant is charged with attempted murder, he may well have desired serious harm, without desiring death. So the desire of serious harm does not provide the answer. It does not go hand in hand with the relevant intention, as it does in the great majority of murder cases, since in attempted murder the relevant intention must be an intention to kill*.' (emphasis added)

In *R v Whybrow* (1951) 35 CrAppR 141 Lord Goddard CJ, delivering the judgment of the Court, stated at pages 146 – 147:

> '[I]f one person attacks another, inflicting a wound in such a way that an ordinary reasonable person must know that at least grievous bodily harm will result, and death results, there is the malice aforethought sufficient to support the charge of murder. *But, if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime*. It may be said that the law, which is not always logical, is somewhat illogical in saying that, if one attacks a person intending to do grievous bodily harm and death results, that is murder; but if one attacks a person and only intends to do grievous bodily harm, and death does not result, it is not attempted murder, but wounding with intent to do grievous bodily harm. It is not really illogical because, in that particular case, the intent is the essence of the crime while, where the death of another is caused, the necessity is to prove malice aforethought, which is supplied in law by proving intent to do grievous bodily harm.' (emphasis added)

See also: *R v Grimwood* (1962) 46 CrAppR 393 at page 397.

[38.3.5] Duties Relating To The Preservation Of Life & Health

The '*Duties Relating To The Preservation Of Life And Heath*' are provided for in sections 210 to 214 of the *Penal Code* (Ch. 26) inclusive.

See: *R v Stone; R v Dobinson* [1977] 2 AllER 341; [1977] QB 354; [1977] 2 WLR 169; (1977) 64 CrAppR 186; [1977] CrimLR 166.

[38.4] Caused Death

Section 207 of the *Penal Code* (Ch. 26) states:

> 'A person is deemed to have caused the death of another person although his act is not the immediate or the whole cause of death in any of the following cases –

(a) if he inflicts bodily harm on another person in consequence of which that other person undergoes surgical or medical treatment which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith and with common knowledge and skill; but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith or was so employed without common knowledge or skill;

(b) if he inflicts bodily harm on another which would not have caused death if the injured person had submitted to proper surgical or medical treatment or had observed proper precautions as to his mode of living;

(c) if by actual or threatened violence he causes such other person to perform an act which causes the death of such person, such act being a means of avoiding such violence which in the circumstances would appear reasonable to the person whose death is so caused;

(d) if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;

(e) if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons.'

In *Jimmy Viu v R* (Unrep. Criminal Appeal No. 7 of 1994) the Court of Appeal stated at page 7:

'[W]e consider that the appellant cannot raise any form of defence from the fact that the deceased was already suffering from a serious injury before the appellant delivered the fatal kicks. He would be still liable under section 200(d) [now section 207(d)] of the Penal Code […].

It is clear that the deceased was suffering from some serious injury at the time the appellant delivered the fatal blows. The injuries to the chest and the sides simply hastened the death of the deceased. In the circumstances, he is deemed to have caused the death of the deceased.' [words in brackets added]

It is *not* necessary to always have a body in order to prove the cause of death, see *Attorney – General's Reference No. 6 of 1980* (1981) 73 CrAppR 40; [1981] 3 WLR 125; [1981] 2 AllER 1057; [1981] QB 715; [1981] CrimLR 533.

See also: *R v Watson* (1989) 89 CrAppR 211; [1989] 2 AllER 865; [1989] 1 WLR 684; [1989] CrimLR 733; *Malcherek & Steel v R* [1981] 2 AllER 422; [1981] 1 WLR 690; (1981) 73 CrAppR 173; [1981] CrimLR 401; *R v Blaue* [1975] 1 WLR 1411; [1975] 3 AllER 446; (1975) 61 CrAppR 271 & *R v Smith* [1959] 2 WLR 623; [1959] 2 QB 35; [1959] 2 AllER 198; (1959) 43 CrAppR 121.

[38.5] Limitation As To The Time Of Death

Section 209 of the *Penal Code* (Ch. 26) states:

'A person is *not* deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.

Such period is reckoned inclusive of the day on which the last unlawful act contributing to the cause of death was done.

> When the cause of death is an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the omission ceased.
>
> When the cause of death is in part an unlawful act, and in part an omission to observe or perform a duty, the period is reckoned inclusive of the day on which the last unlawful act was done or the day on which the omission ceased, whichever is the later.' (emphasis added)

A doctor who has not seen the body may give evidence, based on the observations of witnesses who viewed the body as to whether the deceased died as a consequence of injuries, from natural causes or whether the injuries were self – inflicted, see *R v Mason* (1911) 7 CrAppR 67 at page 69.

Refer also to the sections which examine:

- '*Opinion Evidence – Expert Witnesses*' commencing on page **202**; and
- '*Reports Of Medical Practitioners*' commencing on page **235**.

Refer also to section 55 of the *Interpretation & General Provisions Act* (Ch. 85).

As regards '*Duties Relating To The Preservation Of Life And Health*', refer to sections 210 to 214 of the *Penal Code* (Ch. 26) inclusive.

[38.6] Child Deemed A Person

Section 208 of the *Penal Code* (Ch. 26) states:

> 'A child becomes a person capable of being killed when it has completely proceeded in a living state from the body of its mother, whether it has breathed or not, and whether it has an independent circulation or not, and whether the navel – string is severed or not.'

[38.7] Defences

[38.7.1] Introduction

In *R v Mc Pherson* (1957) 41 CrAppR 213 Lord Goddard CJ, delivering the judgment of the Court, held at pages 216 – 217:

> 'The case which I have just referred [, referring to *R v Lobell* (1957) 41 CrAppR 100; [1957] 1 QB 547; [1957] 1 AllER 734; [1957] 2 WLR 524,] shows that the position is where the defendant is setting up a plea of self – defence or provocation, but the jury must be reminded that the onus remains throughout on the prosecution, and therefore if they are left in doubt whether or not the facts show sufficient provocation to reduce the killing to manslaughter, that issue must be determined in favour of the prisoner.' (emphasis added) [words in brackets added]

Refer also to the law relating to '*Proof Of Issues*' which is examined commencing on page **68**.

[38.7.2] Provocation

[A] Statutory Provisions

Section 204 of the *Penal Code* (Ch. 26) states (in part):

> '*Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely –*
>
> *(a) that he was deprived of the power of self – control by such extreme provocation given by the person killed as mentioned in the next succeeding section*; or
>
> (b) that he was justified in causing some harm to the other person, and that, in causing him harm in excess of the harm which he was justified in causing, he acted from such terror or immediate death or grievous harm as in fact deprived him for the time being of the power of self – control;' (emphasis added)

Section 205 of the *Penal Code* (Ch. 26) states:

> 'Where on a charge of murder there is evidence on which the court can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self – control, the question whether the provocation was enough to make a reasonable man do as he did shall be determined by the court; and in determining that question there shall be taken into account everything both done and said according to the effect which it would have on a reasonable man.'

See: *Homicide Act* 1957 (UK), section 3.

[B] Tests To Be Applied

In *Phillips v R* (1969) 53 CrAppR 132 Lord Diplock, delivering the judgment of the Court, stated at page 134:

> 'The test of provocation in the law of homicide is two – fold. The first, which has always been a question of fact for the jury, assuming that there is any evidence upon which they can so find, is: "Was the defendant provoked into losing self – control?" The second, which is not of fact but of opinion, "Would a reasonable man have reacted to the same provocation in the same way as the defendant did?"'

In *R v Ellison Orinasikwa* (Unrep. Criminal Case No. 18 of 1998) Muria CJ stated at pages 11 – 14:

> 'The accused's case is clearly pivoted on his defence of provocation. The accused clearly intended to kill the deceased but relied on the defence that his intention to do so arose from a sudden passion involving loss of self-control by reason of provocation. In support of that proposition, Counsel for the defence relied on the cases of *Lee Chun-Chuen v R* [1963 1 ALL.E.R.73; *R v Martindale* [1966] 1 WLR 1564; *Perera v AG for Ceylon* [1953] 2 WLR 238 and *Parker v The Queen* [1962 – 1963] 111 CLR 665. I have considered those cases and they all appear to take the view that an intention to kill does not necessarily negative the defence of provocation which may nevertheless arise, even where a person intends to kill or

cause grievous bodily harm provided his intention to do so arises from sudden passion which gives rise to loss of self-control due to the provocation. Such a position appears to be in conflict with Viscount Simon's dictum in *Homes v DPP* [1964] A.C. 588 where he said:

"… where the provocation inspires an actual intention to kill … or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies."

However, that dictum did not receive the approval of the Court in *Lee Chun-Chuen v The Queen* where Lord Devlin reaffirmed the law as stated by Lord Goddard in *Perera v AG for Ceylon* when he said:

"The defence of provocation may arise where a person, does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving loss of self-control by reason of provocation."

The learned Law Lord then gave an illustration of a case involving a person finding his wife in the act of adultery and kills her. In such a situation, Lord Goddard pointed out:

"… the law has always regarded that, although an intentional act, as amounting only to manslaughter by reason of the provocation received, although no doubt the accused person intended to cause death or grievous bodily harm."

Thus the view taken by the Courts in such a situation is that if there were some material upon which the Court acting reasonably could find a case for manslaughter it could not be said that it would have found murder. It is for the prosecution to prove that the killing was not provoked.

The position in law as stated by Lord Goddard in *Perera* and affirmed in *Lee Chun-Chuen* is, in my respectful view, the position also in Solomon Islands, so that *the defence of provocation is still available to an accused person where he intends to kill or cause grievous bodily harm but his intention to do so is the result of sudden passion causing him to lose his self-control by reason of provocation.* Both the legislative provisions and case law support the view which I have just expressed. See s.205 (formerly s.198) of the *Penal Code* and *Loumia v DPP* [1985 – 1986] SILR 158.

The test of provocation is an objective one and the position in Solomon Islands is that stated in *Loumia v DPP* applying the test as set out in *DPP v Camplin* (1978) 67 Cr. App. R 14; [1978] A.C. 705 which stated:

"*The judge should state what the question is using the terms of the section. He should then explain to them the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would effect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also would react to the provocation as the accused did*."

Applying that test, the Court of Appeal stated in *Loumia* in respect of the appellant who is an ordinary East Kwaio pagan villager:

> "Now the learned Acting Chief Justice did not use this formulation. What is complained is that his Lordship failed in terms to direct the assessors that they should consider whether the provocation was enough to make a reasonable East Kwaio pagan villager do as the appellant did and that in determining that question they should take into account everything according to the effect it would have on a reasonable East Kwaio pagan village. Now without in the slightest degree questioning the guidelines suggested by Lord Diplock, it may be noted that it is not expressed to be a formulation which must be adopted and on its face it is no more than a proper direction. Any other direction to the same effect will equally satisfy s. 198. His Lordship in this case did indeed state what the question was, using the terms of the section. He did not in so many words say that the reactions of the appellant should be assessed for the purposes of s. 198 in the light of his being an East Kwaio pan village but that fact was adverted to more than once."
>
> The Court of Appeal undoubtedly held that the standard of self-control which the law requires before provocation can justify a verdict of manslaughter in a murder case is still that of a reasonable person having regard to the entire factual situation including, the characteristics of the accused. Equally the statute law also reaffirms this in section 205 of *Penal Code* where the words used are "*the Court shall take into account everything…"* which require the Court, in determining whether a reasonable person in the position of the accused would lose his self-control in the circumstances, to take into considerations, the whole factual situation including the characteristics of the accused.
>
> It does not necessarily follow, however, that when the defence of provocation is raised the Court should consider it. There must be some evidence pointing to the defence which entitled the Court to consider it. It does not shift the burden. The prosecution still bears the burden of proving that the killing is unprovoked. All that the defence needs to do is to point to some evidence which could raise a reasonable doubt in the mind of the Court: *Lee Chun-Chuen v The Queen* see also *Ben Tofola v Reginam Crim. App. Cas. 2 of 1993 (CA).*' (emphasis added)

In *R v Brown* (1972) 56 CrAppR 564 [[1972] 3 WLR 11; [1972] 2 QB 229; [1972] 2 AllER 1328; [1972] CrimLR 506] Talbot J, delivering the judgment of the Court, stated at pages 568 – 569:

> 'In the view of this Court, when considering whether the provocation was enough to make a reasonable man do as the accused did, it is relevant for a jury to compare the words or acts or both of these things which are put forward as provocation with the nature of the act committed by the accused. It may be, for instance, that a jury might find that the accused's act was so disproportionate to the provocation alleged that no reasonable man would have so acted. We think, therefore, that a jury should be instructed to consider the relationship of the accused's acts to the provocation when asking themselves the question "Was it enough to make a reasonable man do as he did?" We feel that Lord Diplock's warning should be followed and that it would be better not to use the precise words of Viscount Simon LC unless it is made quite clear that it is not a rule of law which the jury have to follow. We think too that this view expresses the meaning of Lord Devlin's words in LEE CHUN – CHUEN v R [1963] AC 220 at p. 231 where he said: "*Provocation in law consists mainly of three elements: the act of provocation, the loss of self – control, both actual and reasonable, and the retaliation proportionate to the provocation*".' (emphasis added)

'Provocation is some act or series of acts done or words spoken by the deceased to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of self – control, rendering the accused so subject to passion as to make him for the moment not master of his mind', see *R v Duffy* [1949] 1 AllER 932, per Devlin J.

The actions done or words spoken by a person other than the victim is admissible, see *R v Davies* (1975) 60 CrAppR 253; [1975] QB 691; [1975] 1 AllER 890; [1975] CrimLR 231.

Refer also to the law relating to '*Res Gestae*' which is examined commencing on page **179**.

See also: *R v Joel Nanango* (Unrep. Criminal Case No. 43 of 1996; Palmer J; pages 19 – 22), *R v Rakaimua* (Unrep. Criminal Case No. 24 of 1995; Muria CJ; at pages 12 – 17); *R v John Waiwai* (Unrep. Criminal Case No. 41 of 1994; Muria CJ; pages 2 – 3); *R v Smith (Morgan)* [2001] 1 CrAppR 31; [2000] 3 WLR 654; [2001] AC 146; [2000] 4 AllER 289; [2000] CrimLR 1004; *R v Morhall* [1995] 2 CrAppR 502; *R v Richens* [1993] 4 AllER 877; [1994] 98 CrAppR 43; *R v Johnson* (1989) 89 CrAppR 148; *R v Gilbert* (1978) 66 CrAppR 237; [1978] CrimLR 216; *R v Martindale* [1966] 3 AllER 305; [1966] 1 WLR 1564; [1966] CrimLR 621; (1966) 50 CrAppR 273; *Bedder v Director of Public Prosecutions* (1954) 38 CrAppR 133; *R v Cunningham* (1958) 43 CrAppR 79 & *Holmes v Director of Public Prosecutions* [1946] AC 588; (1946) 31 CrAppR 123.

[38.7.3] Self - Defence

Section 4 of the *Constitution* states (in part):

> '(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Solomon Islands of which he has been convicted.
>
> (2) *A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable* --
>
> (a) *for the defence of any person from violence or for the defence of property*.' (emphasis added)

Section 204 of the *Penal Code* (Ch. 26) states (in part):

> '*Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely –*
>
> (a) […]
>
> (b) *that he was justified in causing some harm to the other person, and that, in causing him harm in excess of the harm which he was justified in causing, he acted from such terror or immediate death or grievous harm as in fact deprived him for the time being of the power of self – control*;' (emphasis added)

The law relating to '*Defence Of Person & Property*' is examined commencing on page **451**.

[38.7.4] Intoxication

In *R v Kennth Iro* (Unrep. Criminal Case No. 66 of 1993) Muria CJ held at pages 2 – 3:

> 'On the question of intoxication as a defence, I agree that intoxication is available as a defence, in cases of murder whether such intoxication is self – induced or not, that is to say, all forms of intoxication should be taken into account. […]
>
> […]
>
> 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 must be answered in the light of the accepted evidence now before the court.'

In *R v Warren Godfrey Motui* (Unrep. Criminal Case No. 20 of 1997) Palmer J stated at pages 1 – 9:

> 'The defence of the Accused essentially is that of intoxication. That he was too drunk and therefore did not know what he was doing or that it was wrong (section 13(2)(b) of the Penal Code).
>
> The onus of proof lies throughout with prosecution and in the case of intoxication, to proof beyond reasonable doubt that the Accused did know what he was doing or that it was wrong.
>
> […]
>
> […] I must acquit however if there is a reasonable doubt in my mind that the Accused did not form any intent to kill or cause any grievous bodily harm because of drink. Having raised the defence it is for Prosecution to prove beyond reasonable doubt that the Accused did know what he was doing or that it was wrong.'

See also: *R v Garlick* (1981) 72 CrAppR 291; [1981] CrimLR 536.

The law relating to the defence of '*Intoxication*' is examined commencing on page **444**.

[38.7.5] Diminished Responsibility

Section 203 of the *Penal Code* (Ch. 26) states:

> '(1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such *abnormality of mind* (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.
>
> (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.
>
> (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.

(4) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.' (emphasis added)

This section is the same as section 2(1) of the *Homicide Act* 1957 (UK) and section 3A of the *Offences Against The Person Act* 1868 (Barbados).

In *R v Tandy* (1988) 87 CrAppR 45 [[1988] CrimLR 404] Watkins LJ, delivering the judgment of the Court, stated at page 50:

'The authority of *Byrne* (1960) 44 CrAppR 246, 252 [1960] 2 QB 396, 403 established that *the phrase "abnormality of mind" was wide enough to cover the mind's activities in all its aspects, including the ability to exercise will power to control physical acts in accordance with rational judgment. But "abnormality of mind" means a state of mind so different from that of ordinary human beings that a reasonable man would term it abnormal.*

The defence of diminished responsibility was derived from the law of Scotland, in which one of the colloquial names for the defence was "partial insanity". Normal human beings frequently drink to excess and when drunk do not suffer from abnormality of the mind, within the meaning of that phrase in section 2(1) of the Act of 1957.

Whether an accused person was at the time of the act which results in the victim's death suffering from any abnormality of mind is a question for the jury; and as this Court stated in *Byrne* (supra), although medical evidence is important on this question, the jury are not bound to accept medical evidence if there is other material before them from which in their judgment a different conclusion may be drawn.

The Court of Appeal in *Gittens* (1984) 79 CrAppR 272 said that it was a misdirection to invite the jury to decide whether it was inherent causes on the one hand or drink and pills on the other hand which were the main factor in causing the appellant in that case to act as he did. The correct direction in the case was to tell the jury that they had to decide whether the abnormality arising from the inherent causes substantially impaired the appellant's responsibility for his actions.

Lord Lane CJ at p. 277 said:

"Where alcohol or drugs are factors to be considered … the best approach is … approved by this Court in *Fenton* (supra) …. The jury should be directed to disregard what, in their view, the effect of alcohol or drugs upon the defendant was, since abnormality of mind induced by alcohol or drugs is not (generally speaking) due to inherent causes … Then the jury should consider whether the combined effect of the other matters which do fall within the section amounted to such abnormality of mind as substantially impaired the defendant's mental responsibility …"'

In *Walton v R* (1978) 66 CrAppR 25 [[1978] 1 AllER 542; [1978] AC 788; [1977] 3 WLR 902; [1977] CrimLR 747] Lord Kieth, delivering the judgment of the Privy Council, held at page 30:

'These cases make clear that upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case. These include the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality. It being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence. As was pointed out by Lord Parker CJ in BYRNE (1960) 44 CrAppR 246, 254; [1960] 2 QB 396, 404

what the jury was essentially seeking to ascertain is whether at the time of the killing the accused was suffering from a state of mind bordering on but not amounting to insanity. That task is to be approached in a broad common sense way.'

As a practical necessity a defendant relying on a defence of '*Diminished Responsibility*' is expected to call medical evidence, see *R v Dix* (1982) 74 CrAppR 306; [1982] CrimLR 302; *R v Tandy* (1988) 87 CrAppR 45; [1988] CrimLR 404; *R v Campbell* (1987) 84 CrAppR 255; *R v Bradshaw* (1986) 82 CrAppR 79; [1985] CrimLR 733; *R v Seers* (1984) 79 CrAppR 261; [1985] CrimLR 315 & *R v Gittens* [1984] QB 698; [1984] 3 AllER 252; [1984] 3 WLR 327; [1984] CrimLR 553; (1984) 79 CrAppR 272.

Refer also to the sections which examine:

- '*Opinion Evidence – Expert Witnesses*' commencing on page **202**; and
- '*Reports Of Medical Practitioners*' commencing on page **235**.

As regards a defendant refusing to allow this defence to be raised, see *R v Kooken* (1982) 74 CrAppR 30.

[38.8] Sentencing

The law relating to '*Sentencing*' in respect of the specific offences examined in this Chapter is examined commencing on page **918**.

[38.9] Related Offences

The following offences are related to '*Homicidal Offences*' as provided for in the *Penal Code* (Ch. 26):

- '*Infanticide*', section 206 of the *Penal Code* (Ch. 26);
- '*Accessory After The Fact To Murder*', section 216 of the *Penal Code* (Ch. 26);
- '*Written Threats To Murder*', section 217 of the *Penal Code* (Ch. 26);
- '*Conspiracy To Murder*', section 218 of the *Penal Code* (Ch. 26);
- '*Complicity In Another's Suicide*', section 219 of the *Penal Code* (Ch. 26);
- '*Concealing The Birth Of A Child*', section 220 of the *Penal Code* (Ch. 26); and
- '*Killing An Unborn Child*', section 221 of the *Penal Code* (Ch. 26).

RAPE

Table Of Contents

RAPE

[39.0] Introduction

This chapter will examine the offences of:

- '*Rape*', as provided for by section 137 of the *Penal Code* (Ch. 26); and
- '*Attempted Rape*', as provided for by section 138 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Sexual Offences Act* 1956 (UK), section 1.

Section 166 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with rape and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 141(1) ['*Indecent Assaults On Females*'], 142 ['*Defilement Of Girl Under Thirteen Years Of Age*'], 143 ['*Defilement Of A Girl Between Thirteen And Fifteen Years Of Age, Or Of Idiot Or Imbecile*'], 145 ['*Procuring Defilement Of Woman By Threats Or Fraud Or Administering Drugs*'] and 163 ['*Incest By Males*'] of the Penal Code, he may be convicted of that offence although he was not charged with it.' [words in brackets added]

See also: sections 159 and 175 of the *Criminal Procedure Code* (Ch. 7) & *R v Okea & Kenikaesia* (Unrep. Criminal Case No. 5 of 1991; Ward CJ; at page 5).

As regards a '*Submission Of No Case To Answer*', see *R v Lutu* [1985 – 86] SILR 249.

The law relating to '*Submissions Of No Case To Answer Generally*' is examined commencing on page **372**.

[39.1] Rape

[39.1.1] Offence

Section 137 of the *Penal Code* (Ch. 26) states:

> 'Any person who commits the offence of rape shall be liable to imprisonment for life.'

[39.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did rape **[**name of the complainant**]**.'

[39.1.3] Elements

A. Defendant

B. Place

C. Date

D. Rape

E. Complainant

[39.1.4] Rape

The term '*Rape*' is defined in section 136 of the *Penal Code* (Ch. 26) as follows:

> 'Any person who has *unlawful sexual intercourse* with a woman or girl, *without her consent*, *or with her consent* if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, is guilty of the felony termed rape.' (emphasis added)

[39.1.5] Proof Of Sexual Intercourse

Section 168 of the *Penal Code* (Ch. 26) states:

> 'Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove sexual intercourse, it shall not be necessary to prove the completion of the intercourse by the actual emission of seed *but the intercourse shall be deemed complete upon proof of penetration only*.' (emphasis added)

In *R v Selwyn Sisiolo* (Unrep. Criminal Case No. 5 of 1998) Lungole – Awich J stated at pages 3 - 4:

> 'Sexual intercourse is, to use the old expression, having carnal knowledge of a woman. In rape it is just penetration of the vagina by penis, however slight the penetration may be. No more than penetration is required to prove sexual intercourse.'

In *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995) Palmer J stated at page 13:

> '[I]t is not a requirement of law that emission of seed be proven as a separate element by prosecution in order to show that sexual intercourse had taken place […]. It is sufficient if penetration is proven by prosecution.'

In *Randall* (1991) 53 ACrimR 380 Cox J of the South Australian Court of Criminal Appeal commented at page 382:

> '[I]t would appear that, at least for the last 150 years, the common law, for obvious practical reasons, has made no attempt to distinguish for [the purpose of proving "sexual intercourse" …] between penetration of the vulva, as denoted by the labia majora, or other lips, and penetration of the vagina itself. What little explicit authority on the point may be found in the

> books supports the wider notion of sexual intercourse. In *Lines* (1844) 1 Car & K 393; 174 ER 861, Parke B was trying a man for carnal knowledge of a female child under 10. There was evidence that the hymen of the child was not ruptured and counsel for the prisoner submitted that all the physical appearances were consistent with a failure to penetrate the vagina so that his client could not be convicted of the completed offence. The learned judge's ruling was:
>
> "I shall leave it to the jury to say, whether, at any time, any part of the virile member of the prisoner was within the labia of the pudendum of the prosecutrix; for it ever it was (no matter how little), that will be sufficient to constitute a penetration, and the jury ought to convict the prisoner of the complete offence."
>
> *Lines* has always been cited in textbooks and judgements dealing with the physical requirements of rape without, so far I am aware, ever attracting adverse comment […].'

See also: *M v R* (1994) 69 ALJR 83; (1994) 76 ACrimR 213, per McHugh J of the High Court of Australia at pages 109 & 250 respectively & *R v Mayberry* [1973] QdR 211, per Hanger CJ at page 229.

The law relating to '*Opinion Evidence - Experts*' is examined commencing on page **202**.

Section 14 of the *Penal Code* (Ch. 26) states (in part):

> 'A male person *under the age of twelve years* is presumed to be incapable of having sexual intercourse.' (emphasis added)

See: *Sexual Offences Act* 1956 (UK), section 44.

[39.1.6] Consent

[A] Introduction

A statement obtained from a prosecutrix / complainant should explain as comprehensively as possible how she indicated to the defendant that she was not consenting to sexual intercourse. Therefore, such statements should indicate what the prosecutrix / complainant:

- said in the 'first person'; and
- did in terms of her actions.

The following is a summary of the principles examined in this subsection:

- The question of consent is an essential issue of fact, see *R v Donovan* [1934] 2 KB 498; (1934) 25 CrAppR 1; *R v Linekar* [1995] 3 AllER 69; [1995] 2 CrAppR 49; [1995] QB 250; [1995] 2 WLR 237; *Birch v The State* [1979] PNGLR 75 at page 87; & *R v Karibe – Puni* [1967 – 68] P&NGLR 388;
- Mere submission does *not* necessarily involve consent, see *R v Day* (1841) 9 C&P 722; 173 ER 1026;

- Consent obtained by force, intimidation or false representation as to the nature of the act of sexual intercourse is *no* consent, see *R v Selwyn Sisiolo* (Unrep. Criminal Case No. 5 of 1998; Lungole – Awich J; at page 3); *The State v Andrew Tovue* [1981] PNGLR 8 & *R v Kake* [1960] NZLR 595;

- The age, social experience and/or mental state of the prosecutrix *may* be a consideration in determining whether consent was given, see *R v Howard* [1966] 1 WLR 13; (1966) 50 CrAppR 56; [1966] 3 AllER 684; *R v Lang* (1976) 62 CrAppR 50 at page 52 & *R v Karibe – Puni* [1967 – 68] P&NGLR 388;

- The prosecution *must* prove '*beyond reasonable doubt*' that the complainant / prosecutrix did not consent, see *R v Karibe – Puni* [1967 – 68] P&NGLR 388;

- A complainant / prosecutrix does *not* have to give in evidence the words, 'I did not consent', see *The State v John Lauriston Birch* [1978] PNGLR 79 & *Bernard Touramasong & others v The State* [1978] PNGLR 337;

- The question of whether a complainant / prosecutrix did consent can be determined by an *examination of the circumstances*, see *The State v John Lauriston Birch* [1978] PNGLR 79; *The State v Sugueri Sipi* [1987] PNGLR 357 & *R v I A Shaw* [1996] 1 QdR 641; (1995) 78 ACrimR 150;

- *Consent can be revoked* at the discretion of the complainant / prosecutrix, see *R v Molanisau* (Unrep. Criminal Case No. 21 of 1980; Ward CJ; at page 2); *R v Salman* (1924) 18 CrAppR 50 & *The State v Charles* [1990] PNGLR 63;

- Whether consent is given grudgingly, tearfully, hesitantly or reluctantly is immaterial, see *The State v Michael Rave, James Maien & Phillip Baule* [1993] PNGLR 85 & *The State v Stuart Hamilton Merriam* [1994] PNGLR 104; and

- Complainants / Prosecutrixs do *not* consent simply because they are incapable of deciding due to stupefaction or intoxication, see *R v Lang* (1976) 62 CrAppR 50 & *R v Francis* [1993] 2 QdR 300.

In *R v Donovan* (1934) 25 CrAppR 1 Lord Hewart CJ, delivering the judgment of the Court, stated at pages 7 – 8:

> '[C]onsent, being a state of mind, is to be proved or negatived only after a full and careful review of the behaviour of the person who is alleged to have consented. Unless a jury is satisfied beyond reasonable doubt that the conduct of the person has been such that, viewed as a whole, it shews that she did not consent, the prisoner is entitled to be acquitted.'

In *R v Day* (1841) 9 C&P 722; 173 ER 1026 Coleridge J stated at pages 724 & 1027 respectively:

> 'There is a difference between consent and submission; every consent involves a submission; but it by no means follows, that a mere submission involves consent.'

In *R v Selwyn Sisiolo* (Unrep. Criminal Case No. 5 of 1998) Lungole – Awich J stated at page 3:

> 'Rape in Solomon Islands is still the act of male having sexual intercourse with a woman or girl, without her consent. Consent obtained by force, intimidation or false representation as to the nature of the act of sexual intercourse are no consent.'

'Lack of consent *must* be proved by the prosecution and this is always more difficult where consent has been given and then withdrawn during the sexual acts', see *R v Molanisau* (Unrep. Criminal Case No. 21 of 1980; Ward CJ; at page 2). (emphasis added)

In *R v Leonard Laule* (Unrep. Criminal Case No. 29 of 1976) Davis CJ stated at page 4:

> 'By having intercourse with the complainant while she was asleep the accused falls into the category of a man who has sexual intercourse with a woman with indifference as to whether or not she consented.
>
> As stated by Lord Hailsham in the case of *DPP v Morgan* [[1975] 2 AllER 347] at page 357f, "if the intention of the accused is to have intercourse nolens volens, that is recklessly and not caring whether the victim be a consenting party or not, that is equivalent on ordinary principles to an intent to do the prohibited act without the consent of the victim."'

In *R v Salman* (1924) 18 CrAppR 50 Lord Hewart CJ, delivering the judgment of the Court, held at pages 51 - 52:

> 'There was only one issue in this case: consent and no consent. […]
>
> It may well be that a woman in the earlier stages will resist a man's attempts to have connection with her; but if she changes her mind and subsequently permits that which she had hitherto resisted, the consent so given being a real consent, the prisoner is not taken to be convicted of rape.'

In *R v Linekar* [1995] 3 AllER 69; [1995] 2 CrAppR 49 Morland J, delivering the judgment of the Court of Appeal, stated at pages 73 and 53 respectively:

> 'An essential element of the offence of rape is the proof that the woman did not consent to the actual act of sexual intercourse with the particular man who penetrated her. If the Crown prove that she did not consent to sexual intercourse, rape is proved. That ingredient is proved in the so – called "medical cases". The victim did not agree in those cases to sexual intercourse. In *R v Flattery* (1877) 2 QBD 410 she agreed to a surgical procedure which she hoped would cure her fits. In *R v Williams* [1923] 1 KB 340 she agreed to a physical manipulation which would provide her with extra air supply to improve her singing.
>
> In our judgment, it is the non – consent to sexual intercourse rather than the fraud of the doctor or choirmaster that makes the offence rape. Similarly, that ingredient is not proved in the husband impersonation cases because the victim did not consent to sexual intercourse with the particular man who penetrated her.'

In *R v Lang* (1976) 62 CrAppR 50 Scarman LJ, delivering the judgment of the Court, held at page 52:

> 'We have no doubt that there is no special rule applicable to drink and rape. If the issue be, as here, did the woman consent? the critical question is not how she came to the take the drink, but whether she understood her situation and was capable of making up her mind.'

In *R v Francis* [1993] 2 QdR 300 Davies & Demack JJA of the Court of Appeal, in a joint judgment, with whom Macrossan CJ concurred, held at page 305:

> 'It is not correct as a matter of law that it is rape to have carnal knowledge of a woman who is drunk who does not resist because her submission is due to the fact that she is drunk. The reason why it is not is that at least includes the case where the carnal knowledge is consensual notwithstanding that the consent is induced by excessive consumption of alcohol.
>
> *The critical question in this case was whether the complainant had, by reason of sleep or a drunken stupor, been rendered incapable of deciding whether to consent or not*.' (emphasis added)

In *Bernard Touramsong & others v The State* [1978] PNGLR 337 the Supreme Court stated at page 341:

> 'The prosecutrix was not a virgin and was mature, so presumably would have been capable of receiving the male organ without any difficulty under normal conditions. Of course, conditions were not normal if it was rape. However, assuming it was, it certainly was not one other those hideously wild affairs that we have all heard of, where so often, serious physical injury is caused. *And we have no doubt that sensible women, seeing their inevitable fate, give in, and relax at the critical moment, thus reducing the risk of injury. That is not to say that they consent. We have all tried cases of rape and carnal knowledge where serious physical and nervous damage resulted. But we have also tried cases where the undoubted victims emerged unscathed, sometimes even when sexually very immature*.
>
> Applying that passage to the present case, there is no doubt that in the circumstances of this case the prosecutrix has been a sensible woman and as she stated in her evidence, she did not want to risk her life by screaming, or running away and therefore at the end of the whole episode, she gave in to the accused and ended up with no physical injuries both to her person as well as her private parts. *That is not to say that she consented*.' (emphasis added)

In *The State v Charles* [1990] PNGLR 63 Doherty AJ, sitting alone, held at page 65:

> 'I consider that consent can be given in such a way that it is dependent on certain conditions and that consent can be revoked if those conditions are not fulfilled. One such example is that the woman not be exposed to danger […].'

See also: *R v Simon Mani* (Unrep. Criminal Case No. 49 of 1993; Palmer J).

[B] Mistake Of Fact

Section 10 of the *Penal Code* (Ch. 26) states:

> 'A person who does or omits to do an act under an *honest and reasonable, but mistaken, belief* in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as he believed to exist.
>
> The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.' (emphasis added)

In *R v I A Shaw* [1996] 1 QdR 641; (1995) 78 ACrimR 150 Davies & McPherson JJA of the Court of Appeal, in a joint judgment, held at pages 646 & 155 respectively:

'Under section 347 consent refers to a subjective state of mind on the part of the complainant at the time when penetration takes place. *It is not in law necessary that the complainant should manifest her dissent, or strictly even that she should say in evidence at that trial that she did not consent to sexual intercourse. Whether or not oral evidence to that effect is needed to prove a charge of rape depends very much on the circumstances.*

An obvious case where it is not often given is that of a young or infant girl, or of a woman who is mentally incapacitated, and so is unable to appreciate the nature or significance of the act or later to give evidence about her state of mind at the time. A more mature and intellectually aware complainant would, on the other hand, ordinarily be expected to testify that she did not consent to the act of sexual intercourse that is charged. Whether or not her evidence to that effect is accepted depends on the impression formed by the jury of her credibility considered in the light primarily of the circumstances at the time of the act complained of as disclosed by all the evidence at trial.

A complainant who at or before the time of sexual penetration fails by word or action to manifest her dissent is not in law thereby taken to have consented to it. Failing to do so, may, however, depending on the circumstances, have the consequence that at the trial a jury may decide not to accept her evidence that she did not consent; or it may furnish some ground for a reasonable belief on the part of the accused that the complainant was in fact consenting to sexual intercourse, and so provide a basis for exemption from criminal responsibility under section 24 of the *Criminal Code* [, which is equivalent to section 10 of the *Penal Code* (Ch. 26)].' (emphasis added) [words in brackets added]

In *R v Selwyn Sisiolo* (Unrep. Criminal Case No. 5 of 1998) Lungole – Awich J stated at pages 7 – 9:

'On the evidence as a whole I accept the complainant's version, even without corroboration, that she consented to having sexual intercourse because of the beneficial purpose accused said it was intended to lead to, namely, using it in custom way to get the complainant's boyfriend to marry her.

[…]

In my view, accused did not at any moment mistake part of the *actus*, the sexual intercourse, for anything else, not even the effect of the sexual intercourse, as enabling people to marry. If he is believed, he used the sexual intercourse as a means of obtaining body fluid. It was the power of the body fluid mixed with blood and scraping from finger nail and eaten that he may have mistaken, if we assume that his "custom medicine" does not work. The sexual intercourse was a method of obtaining the fluid, but an unlawful method. Accused would have to use lawful means, to obtain the fluid, possibly by asking the complainant to secure the body fluid herself. There was no mistake in the mind of the accused, let alone honest mistake, about the act of sexual intercourse. The defence under s.10 of the Penal Code fails.

Accused's custom means may be described as witchcraft. It would not be consistent with justice to excuse unlawful acts committed in pursuance of the power of witchcraft because the perpetrator believes in it. That would be repugnant to justice as provided by schedule 3 to the Constitution made under s. 76. Whatever belief there may be in witchcraft or "custom medicine", it must not include the carrying out of actions which are unlawful under the Penal Code or any other enactment.'

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See also: *William Tebounapa v R* (Unrep. Criminal Appeal Case No. 2 of 1999; Court of Appeal); *Director of Public Prosecutions v Morgan* [1976] AC 182; [1975] 2 AllER 347; [1975] 2 WLR 913; (1975) 61 CrAppR 136; [1975] CrimLR 717; *The State v John Kalabus & Aita Sanangkepe* [1977] PNGLR 87 at page 96 & *Attorney – General's Reference No. 1 of 1977* [1979] WAR 45.

The law relating to the defence of '*Mistake Of Fact*' is examined commencing on page **439**.

[39.2] Attempted Rape

[39.2.1] Offence

Section 138 of the *Penal Code* (Ch. 26) states:

> 'Any person who attempts to commit rape is guilty of a felony, and shall be liable to imprisonment for seven years.

[39.2.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did attempt to rape **[**name of the complainant**]**.'

[39.2.3] Elements

A. Defendant

B. Place

C. Date

D. Attempt

E. Rape

F. Complainant

[39.2.4] Attempt To Rape

The law relating to:

- '*Attempts To Commit Offences*' is examined commencing on page **398**; and
- '*Rape*' is examined commencing on page **630**.

Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of this offence, 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to rape the complainant, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[39.3] Dates Of Offences

The element regarding the '*Dates Of Offences Of A Sexual Nature*' is examined on page **668**. The law relating to '*Dates Of Offences Generally*' is examined commencing on page **85**.

[39.4] Corroboration

In *James v R* (1971) 55 CrAppR 299 Viscount Dilhorne, delivering the judgment of the Privy Council, held at page 302:

> 'Where the charge is rape, the corroborative evidence *must* confirm in some material particular that intercourse has taken place and that it has taken place without the woman's consent, and also that the accused was the man who committed the crime. In sexual cases, in view of the possibility of error in identification by the complainant, corroborative evidence confirming in a material particular her evidence that the accused was the guilty man is just as important as such evidence confirming that intercourse took place without her consent.' (emphasis added)

The law relating to the need for '*Corroboration*' in respect of '*offences of sexual nature generally*' is examined commencing on page **668**.

[39.5] Young Complainants

The '*age*' of the complainant is *not* an element of this offence. The law relating to the evidence of '*Young Complainants Generally*' is however examined commencing on page **699**.

[39.6] Husbands

In *R v Iro Gwagwango & Casper Taedola* (Unrep. Criminal Case No. 21 of 1991) Muria J stated at page 5:

> 'It is suffice however to state that the present law in Solomon Islands, in my view, is that a man could not be guilty of rape upon his wife, this exception being depended on the wife's implied consent given to intercourse with her husband until that consent is revoked by a decree nisi, a separation order or in certain circumstances by a separation agreement. See *R v Clarke* (1949) 33 CrAppR 216, *R v Miller* (1954) 38 CrAppR 1 and *R v O'Brien* [1974] 3 AllER 663. *But a husband may be an aider and abettor*. See *Archbold*, 44th Ed. 1992, Vol 2 para 20 – 24 page 2221.' (emphasis added)

See also: *R v Kowaleki* (1988) 86 CrAppR 339 at page 341.

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The law relating to '*Parties To Offences*' is examined commencing on page **406**.

A husband may also be convicted of '*Indecent Assault*'. That offence is examined commencing on page **641**.

[39.7] Jurisdiction

The jurisdiction of the Courts in respect of the offences of '*Rape*' and '*Attempted Rape*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of those offences is examined commencing on page **918**.

[39.8] Related Offences

Refer to '*Offences Against Morality*' as provided for in Part XVI of the *Penal Code* (Ch. 26) from section 136 to 168.

The offences of:

- '*Indecent Assault*', section 141(1) of the *Penal Code* (Ch. 26) is examined commencing on page **642**;
- '*Defilement*', sections 142 & 143 of the *Penal Code* (Ch. 26) is examined commencing on page **647**;
- '*Incest By Males*', section 163 of the *Penal Code* (Ch. 26) is examined commencing on page **656**; and
- '*Incest By Females*', section 164 of the *Penal Code* (Ch. 26) is examined commencing on page **662**.

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INDECENT ASSAULT

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INDECENT ASSAULT

[40.0] Introduction

This chapter will examine the offence of '*Indecent Assault*', as provided for by section 141(1) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Sexual Offences Act* 1956 (UK), section 14.

See also: *Criminal Procedure Code* (Ch. 7), sections 159 & 175.

[40.1] Offence

Section 141(1) of the *Penal Code* (Ch. 26) states:

> 'Any person who unlawfully and indecently assaults any woman or girl is guilty of a felony, and shall be liable to imprisonment for five years.'

[40.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did unlawfully and indecently assault **[**name Of complainant**]**.'

[40.3] Elements

A. Defendant

B. Place

C. Date

D. Unlawfully

E. Indecently

F. Assault

G. Complainant

[40.4] Dates Of Offences

The element regarding the '*Dates Of Offences Of A Sexual Nature*' is examined commencing on page **668**. The law relating to '*Dates Of Offences Generally*' is examined commencing on page **85**.

[40.5] Unlawfully

[40.5.1] Introduction

An '*assault*' is unlawful *unless* it is authorised, justified or excused by law.

In *R v Kimber* (1983) 77 CrAppR 225 [[1983] 3 AllER 316; [1983] 1 WLR 1118] Lawton LJ, delivering the judgment of the Court, stated at pages 228 – 229:

> 'An assault is an act by which the defendant intentionally or recklessly causes the complainant to apprehend immediate, or to sustain, unlawful personal violence: see VENNA (1975) 61 CrAppR 310, 314; [1976] QB 421, 428 – 429. In this case the appellant by his own admissions did intentionally lay his hands on Betty. That would not, however, have been enough to prove the charge. There had to be evidence that the appellant had intended to do what he did unlawfully. When there is a charge of indecent assault on a woman, the unlawfulness can be proved, as was sought to be done in DONOVAN (1934) 25 CrAppR 1; [1934] 2 KB 498, by evidence that the defendant intended to cause bodily harm. In most cases, however, the prosecution tries to prove that the complainant did not consent to what was done. The burden of proving lack of consent rests upon the prosecution: see MAY (1912) 8 CrAppR 63; [1912] 3 KB 572 per Lord Alverstone CJ at p. 575. The consequence is that the prosecution has to prove that the defendant intended to lay hands on his victim without her consent. If he did not intend to do this, he is entitled to be found not guilty; and if he did not so intend because he believed he was consenting, the prosecution will have failed to prove the charge. It is the defendant's belief, not the grounds on which it was based, which goes to negative the intent.'

[40.5.2] Consent

Section 141(2) of the *Penal Code* (Ch. 26) states:

> 'It is no defence to a charge for an indecent assault on a girl under the age of fifteen years to prove that she consented to the act of indecency.'

The burden of proving lack of consent rests on the prosecution, see *R v May* [1912] 3 KB 572 [(1912) 8 CrAppR 63)] at page 575, per Lord Alverstone CJ.

'It is clear that it is *not* the law that a man may never be guilty of an indecent assault upon his wife', see *R v Kowalski* (1988) 86 CrAppR 339 at page 341 & *R v Caswell* [1984] CrimLR 111. (emphasis added)

In *R v Tabassum* [2000] 2 CrAppR 328 [[2000] CrimLR 686] Rose LJ, delivering the judgment of the Court of Appeal, stated at pages 336 – 337:

> 'On the evidence, if the jury accepted it, consent was given because they mistakenly believed that the defendant was medically qualified or, in the case of the third complainant, trained at Christie's and that, in consequence, the touching was for a medical purpose. As this was not so, there was no true consent. They were consenting to touching for medical purposes not to indecent behaviour, that is, there was consent to the nature of the act but not its quality. *Flattery* [(1877) 2 QB 410] and *Harms* [(1944) 2 DLR 61] […] are entirely consistent with that view because, in each of those cases, the woman's consent to sexual intercourse was to a therapeutic, not a carnal act. A similar principle underlines the decision in *Rosinsk*i (1824) 1 Mood 18, 168 Eng Rep 1168.'

See also: *Faulkner v Talbot* (1982) 74 CrAppR 1; [1981] 3 AllER 468; [1981] 1 WLR 1528; [1981] CrimLR 705.

[40.6] Indecently

In *R v Goss & Goss* (1990) 90 CrAppR 400 Saville J, delivering the judgment of the Court, stated at page 406:

> 'If in all the circumstances the act complained of is capable of being considered by right – minded people as indecent; if there is the requisite intention; and if there is no consent […], then it seems to us that the ingredients of the offence are made out.'

In *R v Court* (1988) 87 CrAppR 144 [[1989] AC 28; [1988] 2 WLR 1071; [1988] 2 AllER 221; [1988] CrimLR 537] Lord Ackner, with whom Lordships Keith and Fraser concurred, held at page 156:

> 'I, therefore, conclude that on a charge of indecent assault the prosecution must not only prove that the accused intentionally assaulted the victim, but that in so doing he intended to commit an indecent assault, ie., an assault which right – minded persons would think was indecent. Accordingly, any evidence which tends to explain the reason for the defendant's conduct, be it his own admission or otherwise, would be relevant to establish whether or not he intended to commit, not only an assault, but an indecent one.'

In *R v Leeson* (1968) 52 CrAppR 185 Diplock LJ, delivering the judgment of the Court, held at page 187:

> 'The definition of "indecent assault" which has long been accepted in these courts is an assault accompanied with circumstances of indecency on the part of the prisoner towards the person assaulted. This Court has no doubt that where an assault of this kind involving the kissing of a girl against her will is accompanied by suggestion that sexual intercourse should take place or that sex play should take place between them, the assault is an indecent one.'

In *Beal v Keeley* (1951) 35 CrAppR 128 [[1951] 2 AllER 763; [1951] WN 505] Lord Goddard LJ, delivering the judgment of the Court, stated at pages 129 – 130:

> 'The only facts which need be stated are these: the respondent, being by a wood with a boy of the age of fourteen, exposed his erect penis to the boy and asked him to get hold of it and rub it. The boy refused to do so, whereupon the respondent caught hold of him and pulled him towards himself. There at any rate, was the assault, a hostile act, because the act was against the boy's will. It does not matter that the boy could not give consent; the act was in fact against his will. It is said that that was not an indecent assault. Why not? In my opinion

> the definition given in *Archbold's Criminal Pleading*, etc (32nd ed., p.1067), of an indecent assault is perfectly right: "An assault accompanied with circumstances of indecency on the part of the prisoner", that is to say, indecency towards the person alleged to have been assaulted. If a person assaulted, that is to say, if there is a hostile act with every circumstance of indecency, I cannot see why it is not an indecent assault. If a man assaults a woman, at the time exposing his person to her, I have no doubt that is an indecent assault on a female, just as I have no doubt that the conduct of the respondent was an indecent assault.'

See also: *R v Thomas* (1985) 81 CrAppR 331; *R v Sutton* [1977] 3 AllER 476; [1977] 1 WLR 1086; [1977] CrimLR 569; (1978) 66 CrAppR 21; *R v McCormack* [1969] 2 QB 442; [1969] 3 AllER 371; [1969] 3 WLR 175; (1969) 53 CrAppR 514; *Director of Public Prosecutions v Rogers* (1953) 37 CrAppR 137; [1953] 1 WLR 1017; [1953] 2 AllER 644 & *R v Rolfe* (1952) 36 CrAppR 4.

[40.7] Assault

If there is no assault, there is no indecent assault, see *R v Mason* (1968) 52 CrAppR 12 at page 18.

The element '*Assault*' is examined commencing on page **564**.

[40.8] Corroboration

'What is required to be corroborated in cases of indecent assault is the indecency', see *R v Rolfe* (1952) 36 CrAppR 4, per Lord Goddard CJ at page 6.

The law relating to the need for '*Corroboration*' in respect of 'offences of sexual nature generally' is examined commencing on page **668**.

[40.9] Young Complainants

The '*age*' of the complainant is *not* an element of this offence. The law relating to the evidence of '*Young Complainants Generally*' is however examined commencing on page **699**.

[40.10] Evidence Of Spouses

The law relating to the '*Competency Of Spouses*' is examined commencing on page **282**.

[40.11] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Indecent Assault*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[40.12] Related Offences

Refer to '*Offences Against Morality*' as provided for in Part XVI of the *Penal Code* (Ch. 26) from section 136 to 168.

The offences of:

- '*Rape*' and '*Attempted Rape*', section 137 of the *Penal Code* (Ch. 126) are examined commencing on page **629**;
- '*Defilement*', sections 142 & 143 of the *Penal Code* (Ch. 26) is examined commencing on page **647**;
- '*Incest By Males*', section 163 of the *Penal Code* (Ch. 26) is examined commencing on page **656**; and
- '*Incest By Females*', section 164 of the *Penal Code* (Ch. 26) is examined commencing on page **662**.

Refer also to subsection (3) of section 141 of the *Penal Code* (Ch. 26).

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[41.0] Introduction

This chapter will examine the offences of:

- '*Defilement Of Girls Under Thirteen Years Of Age*', as provided for by section 142 of the *Penal Code* (Ch. 26); and

- '*Defilement Of Girls Between Thirteen And Fifteen Years Of Age, Idiots & Imbeciles*', as provided for by section 143 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Sexual Offences Act* 1956 (UK), sections 5, 6, 7 & 9.

Section 168 of the *Penal Code* (Ch. 26) states:

> 'When a person is charged with the defilement of a girl under the age of fifteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 141(1) ['*Indecent Assaults On Females*'], 142 ['*Defilement Of Girls Under Thirteen Years Of Age*'] and 145 ['*Procuring Defilement Of Woman By Threats Or Fraud Or Administering Drugs*'] of the Penal Code, he may be convicted of that offence although he was not charged with it.' [words in brackets added]

Section 169 of the *Penal Code* (Ch. 26) states:

> 'When a person is charged with the defilement of a girl under the age of thirteen years and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 141(1) ['*Indecent Assaults On Females*'], 143 ['*Defilement Of Girls Between Thirteen And Fifteen Years Of Age, Idiots And Imbeciles*'] and 145 ['*Procuring Defilement Of Woman By Threats Or Fraud Or Administering Drugs*'] of the Penal Code, he may be convicted of that offence although he was not charged with it.' [words in brackets added]

See also: *Criminal Procedure Code* (Ch. 26), sections 159 & 175.

[41.1] Defilement Of Girls Under 13 Years

[41.1.1] Offences

Section 142 of the *Penal Code* (Ch. 26) states (in part):

> '(1) Any person who has unlawful sexual intercourse with any girl under the age of thirteen years is guilty of a felony, and shall be liable to imprisonment for life.

(2) Any person who attempts to have unlawful sexual intercourse with any girl under the age of thirteen years is guilty of a misdemeanour, and shall be liable to imprisonment for two years.'

[41.1.2] Wording Of Charges

Section 142(1)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did have unlawful sexual intercourse with a girl namely **[**Name Of Complainant**]** under the age of thirteen years of age to wit **[**Specify the Age of the Girl**]**.'

Section 142(2)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did attempt to have unlawful sexual intercourse with a girl namely **[**Name Of Complainant**]** under the age of thirteen years of age to wit **[**Specify the Age of the Girl**]**.'

[41.1.3] Elements

Section 142(1)

A. Defendant

B. Place

C. Date

D. Unlawful

E. Sexual Intercourse

F. Complainant

G. Under The Age Of Thirteen Years

Section 142(2)

A. Defendant

B. Place

C. Date

D. Attempt

E. Unlawful

F. Sexual Intercourse

G. Complainant

H. Under The Age Of Thirteen Years

[41.2] Defilement Of Girls Between 13 & 15 Years, Idiots & Imbeciles

[41.2.1] Offences

Section 143 of the *Penal Code* (Ch. 26) states (in part):

'(1) Any person who –

(a) has or attempts to have unlawful sexual intercourse with any girl being of or above the age of thirteen years and under the age of fifteen years; or

(b) has or attempts to have unlawful sexual intercourse with any female idiot or imbecile woman or girl under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was an idiot or imbecile,

shall be guilty of a misdemeanour, and shall be liable to imprisonment for five years:

[…]

(2) *No prosecution shall be commenced for an offence under paragraph (a) of subsection (1) of this section more than twelve months after the commission of the offence*.' (emphasis added)

[41.2.2] Wording Of Charges

Section 143(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**have **or** attempt to have**]** unlawful sexual intercourse with a girl namely **[**name of the complainant**]** being of the age of or above the age of thirteen years and under the age of fifteen years to wit **[**specify the age of the complainant**]**.'

Section 143(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**have **or** attempt to have**]** unlawful sexual intercourse with **[**a female idiot **or** an imbecile **(**woman **or** girl**)]** namely **[**name of the complainant**]** under circumstances which did not amount to rape but which prove that **[**insert the name of the Defendant**]** knew at the time of the commission of the offence that the said **[**woman **or** girl**]** was an **[**idiot **or** imbecile**]**.'

[41.2.3] Elements

Section 143(a)

A. Defendant

B. Place

C. Date

D. [i] Have; or
[ii] Attempt To Have

E. Unlawful

F. Sexual Intercourse

G. Complainant

H. Of The Age Of Or Above The Age Of Thirteen Years And Under The Age Of Fifteen Years

Section 143(b)

A. Defendant

B. Place

C. Date

D. [i] Have; or
[ii] Attempt To Have

E. Unlawful

F. Sexual Intercourse

G. [i] Female Idiot;
[ii] Imbecile Woman Or Girl

H. Under Circumstances Which Did Not Amount To Rape But Which Prove That The Defendant Knew At The Time Of The Commission Of The Offence That The Said Complainant Was An Idiot Or Imbecile

[41.3] Dates Of Offences

The element regarding the '*Dates Of Offences Of A Sexual Nature*' is examined commencing on page **668**. The law relating to '*Dates Of Offences Generally*' is examined commencing on page **85**.

[41.4] Unlawful

It is *no* defence to the charges for an offence under sections 142 or 143(1)(a) to prove that the girl consented to the act, see sections 142(3) and 143(3) of the *Penal Code* (Ch. 26).

[41.5] Attempt

The law relating to '*Attempts To Commit Offences*' is examined commencing on page **398**.

[41.6] Sexual Intercourse

The element '*Sexual Intercourse*' is examined commencing on page **631**.

[41.7] Proof Of Age

The law relating to '*Proof Of Age*' is examined commencing on page **702**.

[41.8] Idiot

The term '*Idiot*' is *not* defined in either the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

An '*idiot*' is a person in whose case there exists mental defectiveness of such a degree that he/she is unable to guard himself/herself against common physical dangers, see '*Halsbury's Laws of England*', 2nd ed., Vol. 21, page 278 & *R v Jeffrey Archibold Lindsay* (1984) 15 ACrimR 179 at page 181.

The opinion of an appropriate expert would be necessary to prove that a particular complainant was an '*idiot*'.

The law relating to '*Opinion Evidence - Experts*' is examined commencing on page **202**.

[41.9] Imbecile

The term '*Imbecile*' is *not* defined in either the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

An '*imbecile*' is a person in whose case their exists mental defectiveness which, though not amounting to idiocy, is yet so pronounced that they are incapable of managing themselves or their affairs, see '*Halsbury's Laws of England*', 2nd ed., Vol. 21, page 278.

The opinion of an appropriate expert would be necessary to prove that a particular complainant was an '*imbecile*'.

The law relating to '*Opinion Evidence - Experts*' is examined commencing on page **202**.

[41.10] Corroboration

The law relating to the need for '*Corroboration*' in respect of 'offences of sexual nature generally' is examined commencing on page **668**.

[41.11] Young Complainants

The law relating to the evidence of '*Young Complainants Generally*' is examined commencing on page **699**.

[41.12] Evidence Of Spouses

The law relating to the '*Competency Of Spouses*' is examined commencing on page **282**.

[41.13] Defence

As regards an offence under section 142 of the *Penal Code* (Ch. 26), section 167 of that Code applies. That section states:

> 'Except as otherwise expressly stated, it is immaterial in the case of the offences referred to in this Part of this Code ['*XVI – Offences Against Morality*'] committed with respect to a woman or girl under a specified age, that the accused person did not know that the woman or girl was under that age, or believed that she was not under that age.' [words in brackets added]

Section 143(1) of the *Penal Code* (Ch. 26) states (in part):

> 'Provided that it shall be a sufficient defence to any charge under paragraph (a) of this subsection [, referring to subsection (1),] if it shall be made to appear to the court before whom the charge is brought that the person so charged *had reasonable cause to believe* and did in fact believe that the girl was of or above the age of fifteen years.' (emphasis added) [words in brackets added]

The onus is on the defendant to prove such a defence on the '*balance of probabilities*'.

In *R v Banks* [1916] 2 KB 621; (1916) 12 CrAppR 74 Avory J, delivering the judgment of the Court, stated at pages 622 & 75 respectively:

> 'In our judgment the phrase "had reasonable cause to believe" means "had reasonable cause to believe and did in fact believe, ie., that the person charged believed on reasonable grounds that the girl was at least sixteen [fifteen] years of age.' [word in brackets added]

See also: *R v Harrison & others* (1938) 26 CrAppR 166; [1938] 3 AllER 134; *R v Forde* [1923] 2 KB 400; (1923) 17 CrAppR 99 & *B (A Minor) v Director of Public Prosecutions* [2000] 2 CrAppR 65; [2000] 2 WLR 452; [2000] 2 AC 428; [2000] 1 AllER 833; [2000] CrimLR 403.

Refer also to the chapter which examines '*Proof Of Issues*' commencing on page **68** and particularly to the section which examines '*Negative Averments*' on page **83**.

[41.14] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Defilement*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

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[41.15] Related Offences

Refer to '*Offences Against Morality*' as provided for in Part XVI of the *Penal Code* (Ch. 26) from section 136 to 168.

The offences of:

- '*Rape*' and '*Attempted Rape*', section 141(1) of the *Penal Code* (Ch. 26) are examined commencing on page **629**;
- '*Indecent Assault*', sections 142 & 143 of the *Penal Code* (Ch. 26) is examined commencing on page **642**;
- '*Incest By Males*', section 163 of the *Penal Code* (Ch. 26) is examined commencing on page **656**; and
- '*Incest By Females*', section 164 of the *Penal Code* (Ch. 26) is examined commencing on page **662**.

INCEST BY MALES

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INCEST BY MALES

[42.0] Introduction

This chapter will examine the offences of:

- '*Incest By Males*'; and
- '*Attempted Incest By Males*',

as provided for by section 163 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Sexual Offences Act* 1956 (UK), section 10.

See also: *Criminal Procedure Code* (Ch. 7), section 159 & 175.

Section 166 of the *Penal Code* (Ch. 26) states:

> 'No prosecution for an offence under sections 163 or 164 shall be commenced without the sanction of the Director of Public Prosecutions.'

In that regard refer also to the section which examines '*Decision To Institute Proceedings*' commencing on page **112**.

[42.1] Offences

Section 163 of the *Penal Code* (Ch. 26) states (in part):

> '(1) Any person who has sexual intercourse with a female person, who is to his knowledge his granddaughter, daughter, sister or mother, is guilty of a felony, and shall be liable to imprisonment for seven years.
>
> Provided that if it is alleged in the information or charge and proved that the female person is under the age of thirteen years, the offender shall be liable to imprisonment for life.
>
> […]
>
> (3) If any male person attempts to commit any such offence as aforesaid he shall be guilty of a misdemeanour.'

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[42.2] Wording Of Charges

Section 163(1)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did have sexual intercourse with a female person namely **[**specify the name of the female**]** who was to his knowledge his **[**granddaughter, daughter, sister **or** mother**]**.'

Include the following circumstance of aggravation:

'and the said **[**name of the female**]** was under the age of thirteen years to wit **[**specify the age of the female**]**.'

Section 163(3)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did attempt to have sexual intercourse with a female person namely **[**specify the name of the female**]** who was to his knowledge his **[**granddaughter, daughter, sister **or** mother**]**.'

[42.3] Elements

Section 163(1)

A. Defendant

B. Place

C. Date

D. Sexual Intercourse

E. Female Person

F. Who Was To His Knowledge His
   [i] Granddaughter;
   [ii] Daughter;
   [iii] Sister; or
   [iv] Mother

Include the following circumstance of aggravation:

G. Female Person

H. Under The Age Of Thirteen Years

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Section 163(3)

A. Defendant

B. Place

C. Date

D. Attempt

E. Sexual Intercourse

F. Female Person

G. Who Was To His Knowledge His
   [i] Granddaughter;
   [ii] Daughter;
   [iii] Sister; or
   [iv] Mother

[42.4] Dates Of Offences

The element regarding the '*Dates Of Offences Of A Sexual Nature*' is examined commencing on page **668**. The law relating to '*Dates Of Offences Generally*' is examined commencing on page **85**.

[42.5] Sexual Intercourse

The element '*Sexual Intercourse*' is examined on page **631**.

Section 163(2) of the *Penal Code* (Ch. 26) states:

> 'It is immaterial that the sexual intercourse was had with the consent of the female person.'

[42.6] Attempt

The law relating to '*Attempts To Commit Offences*' is examined commencing on page **398**.

[42.7] Proof Of Relationship

Section 165 of the *Penal Code* (Ch. 26) states:

> 'In the two last preceding sections the expressions "brother" and "sister" respectively include half – brother and half – sister, and the provisions of the said sections shall apply whether the relationship between the person charged with an offence and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock'.

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There *must* be evidence to prove '*beyond reasonable doubt*' the relationship between the defendant and the complainant, see *R v Jones* (1933) 24 CrAppR 55 & *R v Hemmings* (1939) 27 CrAppR 46.

In *R v Carmichael* (1940) 27 CrAppR 183 Charles J, delivering the judgment of the Court, held at page 190:

> 'In our opinion whether A is B's daughter is totally distinct from the question whether to B's knowledge she is his daughter. Knowledge is vital to the commission of the offence.'

[42.8] Proof Of Age

The law relating to '*Proof Of Age*' is examined commencing on page **702**.

[42.9] Corroboration

The law relating to the need for '*Corroboration*' in respect of 'offences of sexual nature generally' is examined commencing on page **668**.

[42.10] Young Complainants

The law relating to the evidence of '*Young Complainants Generally*' is examined commencing on page **699**.

[42.11] Evidence Of Spouses

The law relating to the '*Competency Of Spouses*' is examined commencing on page **282**.

[42.12] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Incest By Males*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

Section 163(4) of the *Penal Code* (Ch. 26) states:

> 'On the conviction before any court of any male person of an offence under this section, or of an attempt to commit the same, against any female under the age of eighteen years, it shall be in the power of the court to divest the offender of all authority over such female, and, if the offender is the guardian of such female, to remove the offender from such guardianship, and in any such case to appoint any person or persons willing to take charge of such female, to be the guardian or guardians of such female during the minority or any less period, and the court may at any time vary or rescind the order by the appointment of any other person as such guardian, or in any other respect.'

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[42.13] Related Offences

Refer to '*Offences Against Morality*' as provided for in Part XVI of the *Penal Code* (Ch. 26) from section 136 to 168.

The offences of:

- '*Rape*' and '*Attempted Rape*', section 137 of the *Penal Code* (Ch. 26) are examined commencing on page **629**;
- '*Indecent Assault*', section 141(1) of the *Penal Code* (Ch. 26) is examined commencing on page **642**;
- '*Defilement*', sections 142 & 143 of the *Penal Code* (Ch. 26) is examined commencing on page **647**; and
- '*Incest By Females*', section 164 of the *Penal Code* (Ch. 26) is examined commencing on page **662**.

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INCEST BY FEMALES

[43.0] Introduction

This chapter will examine the offences of '*Incest By Females*', as provided for by section 164 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Sexual Offences Act* 1956 (UK), section 11.

Section 167 of the *Penal Code* (Ch. 26) states:

> 'When a person is charged with an offence under section 164 of the Penal Code and the court is of the opinion that he is not guilty of that offence but that he is guilty of an offence under one of the sections 142 ['*Defilement of Girls Under Thirteen Years Of Age*'] and 143 ['*Defilement of Girls Between Thirteen And Fifteen Years Of Age, Idiots & Imbeciles*'] of the Penal Code, he may be convicted of that offence although he was not charged with it.' [words in brackets added]

See also: *Criminal Procedure Code* (Ch. 7), sections 159 & 175.

Section 166 of the *Penal Code* (Ch. 26) states:

> 'No prosecution for an offence under sections 163 or 164 shall be commenced without the sanction of the Director of Public Prosecutions.'

In that regard refer also to the section which examines '*Decision To Institute Proceedings*' commencing on page **112**.

[43.1] Offence

Section 164 of the *Penal Code* (Ch. 26) states:

> 'Any female person of or above the age of fifteen years who with consent permits her grandfather, father, brother or son to have sexual intercourse with her (knowing him to be her grandfather, father, brother or son, as the case may be) shall be guilty of a felony, and shall be liable to imprisonment for seven years.'

[43.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**] [**of **or** above**]** the age of fifteen years with consent did permit her **[**grandfather, father, brother **or** son**]** namely **[**specify the name of the **(**grandfather, father, brother **or** son**)]** to have sexual intercourse with her knowing that **[**Insert the name of the Defendant**]** was her **[**grandfather, father, brother **or** son**]**.'

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[43.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Of; or
[ii] Above
The Age Of Fifteen Years

E. Consent

F. Permit

G. [i] Grandfather;
[ii] Father;
[iii] Brother; or
[iv] Son

H. Sexual Intercourse With Her

I. Who Was To Her Knowledge Her
[i] Grandfather;
[ii] Father;
[iii] Brother; or
[iv] Son

[43.4] Dates Of Offences

The element regarding the '*Dates Of Offences Of A Sexual Nature*' is examined commencing on page **668**. The law relating to '*Dates Of Offences Generally*' is examined commencing on page **85**.

[43.5] Permit

The term '*Permit*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* to allow or to give permission.

[43.6] Sexual Intercourse

The element '*Sexual Intercourse*' is examined on page **631**.

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[43.7] Proof Of Relationship

Section 165 of the *Penal Code* (Ch. 26) states:

> 'In the two last preceding sections the expressions "brother" and "sister" respectively include half – brother and half – sister, and the provisions of the said sections shall apply whether the relationship between the person charged with an offence and the person with whom the offence is alleged to have been committed is or is not traced through lawful wedlock'.

[43.8] Proof Of Age

The law relating to '*Proof Of Age*' is examined commencing on page **702**.

[43.9] Corroboration

The law relating to the need for '*Corroboration*' in respect of 'offences of sexual nature generally' is examined commencing on page **668**.

[43.10] Young Complainants

The law relating to the evidence of '*Young Complainants Generally*' is examined commencing on page **699**.

[43.11] Evidence Of Spouses

The law relating to the '*Competency Of Spouses*' is examined commencing on page **282**.

[43.12] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Incest By Females*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[43.13] Related Offences

Refer to '*Offences Against Morality*' as provided for in Part XVI of the *Penal Code* (Ch. 26) from section 136 to 168.

The offences of:

- '*Rape*' and '*Attempted Rape*', section 137 of the *Penal Code* (Ch. 26) are examined commencing on page **629**;
- '*Indecent Assault*', section 141(1) of the *Penal Code* (Ch. 26) is examined commencing on page **642**;

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- '*Defilement*', sections 142 & 143 of the *Penal Code* (Ch. 26) is examined commencing on page **647**; and

- '*Incest By Males*', section 163 of the *Penal Code* (Ch. 26) is examined commencing on page **655**.

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SEXUAL OFFENCES GENERALLY

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SEXUAL OFFENCES GENERALLY

[44.0] Introduction

This chapter will examine issues which relate to '*offences of a sexual nature*'.

[44.1] Dates Of Offences

A specific date of offences of a sexual nature *may* be difficult to prove:

- if the complainant is young; *and / or*
- when it is alleged that multiple offences have occurred.

Therefore, the prosecution *must* be particularly careful when alleging the date of such offences. The law relating to the '*Dates Of Offences Generally*' is examined commencing on page **85**.

In *S v R* (1989) 64 ALJR 126 the High Court of Australia held that defendants are entitled to know precisely the offences for they are charged. It was held per Dawson J at pages 129 – 130:

> 'Each indictment charged only one offence and gave rise to no duplicity. Had the evidence revealed only one offence in each of the years in question [, as specified in the indictments,] there could have been no complaint about the form of the indictment.
>
> *But the evidence disclosed a number of offences during each of those years, any one of which fell within the description of the relevant count.* Because of this there was what has been called a "latent ambiguity" in each of the counts […]. That ambiguity required correction if the applicant was to have a fair trial.' (emphasis added) [words in brackets added]

The correction required would have amounted to the prosecution identifying the specific offence which related to each count or charge.

The law relating to '*Joinder Of Charges*' is examined commencing on page **91**.

[44.2] Corroboration

[44.2.1] Introduction

What is corroboration? Corroboration is independent evidence which affects the accused by connecting him/her with the crime. It must be evidence that implicates him/her, that is, which confirms in some material particular not only the evidence that the offence had been committed, but also that the defendant committed it, see *James v R* (1971) 55 CrAppR 299 at page 302.

In *Peter Townsend v George Oika* [1981] PNGLR 12 Greville Smith J, as a member of the Supreme Court, stated at page 19:

> 'In the English edition of *Cross on Evidence* (4th ed., 1974), pp. 184, 185, the learned author says as follows:

> "'Corroboration' is not a technical term, it simply *means* 'confirmation' or 'support'. But, in all cases in which it is required in law or practice, it must take the form of a separate item of evidence implicating the person against whom the testimony is given in relation to the matter concerning which corroboration is necessary. This means that many things that show, or might be though to show, that a witness is speaking the truth do not corroborate him in law."'

In *R v Baskerville* (1916) 12 CrAppR 81 [[1916] 2 KB 658] Lord Reading CJ stated at page 91 that '*corroboration*' *must* be:

> 'Independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, it must be evidence which implicates him, that is which confirms some material particular not only the evidence that the crime has been committed but also that the defendant committed it.'

R v Olaleye (1986) 82 CrAppR 337 Watkins LJ, delivering the judgment of the Court, stated at page 340:

> 'Lord Morris of Borth-y-Gest in DIRECTOR OF PUBLIC PROSECUTIONS v HESTER (1973) 57 CrAppR 212, 229; [1973] AC 296, 315 [… stated:] "The essence of corroborative evidence is that one creditworthy witness confirms what another creditworthy witness has said … The purpose of corroboration is not to give validity or credence to evidence which is deficient or suspect or incredible but only to confirm and support that which as evidence is sufficient and satisfactory and credible …"
>
> If complainant's evidence is, in the minds of the jury, unbelievable, corroboration is valueless. It is only when, in giving it, she is believable, that corroboration can have the effect of confirming or supporting what she has said. If it had that effect, the jury is fortified in accepting the complainant as a reliable and trustworthy witness.'

In *R v Willoughby* (1988) 89 CrAppR 91 Saville J, delivering the judgment of the Court, held at page 94:

> 'In such a case as the present, where the crime but not the involvement of the defendant is admitted, there is of course no need for corroborative evidence that the crime has been committed, for there is nothing suspect from the witness in that regard. What is then needed is independent evidence corroborating any testimony of the suspect witness with regard to identity. Conversely, where the involvement of the defendant, but not the crime, is admitted (eg. On a charge of rape where consent is in issue), the need is for independent evidence corroborating any testimony of the suspect witness that the crime was committed. If neither the crime nor the involvement of the defendant is admitted, then the independent evidence, to amount to corroboration, must be such as to show or tend to show that the testimony of the suspect witness with regard to those matters is reliable.'

In *Hunt* (1994) 76 ACrimR 363 Fitzgerald P of the Queensland Court of Appeal observed at page 364:

> 'Corroboration is defined in evidentiary terms. Evidence accepted by the jury from a source other than the complainant (or other witness whose evidence is to be corroborated) must make "more probable" the complainant's evidence that the offence was committed and that the accused was the offender: *Doney* (1990) 171 CLR 207 at 211; 50 ACrimR 157 at 159.

> On analysis, the requirement that the evidence from one source make other evidence from another source "more probable" is concerned with the matters to which the evidence relates. *The matter established from a source other than the complainant must make "more probable" the matters to which the complainant's evidence materially relates, ie., that the offence was committed and that the accused was the offender*.' (emphasis added)

In *R v Sakail* [1993] 1 QdR 312 Macrossan CJ, with whom the other members of the Court of Criminal Appeal concurred, stated at page 317:

> '*Circumstantial evidence can constitute corroboration*: *R v Baskerville* [1916] 2 KB 658 and *R v May* [1962] QdR 456. The courts have stated on numerous occasions that in looking for corroboration the search is not for complete independent proof of the matters charged, that is for evidence sufficient, if it stood alone, to prove the Crown case. It may indeed amount to this, but corroboration may consist of no more than "confirmation from some other source that the suspect witness is telling the truth in some part of his story which goes to show that the accused committed the offence which he is charged" per Lord Diplock in *R v Hester* [1973] AC 296. See also the reasons in the same case of Lord Morris at 315 and Lord Pearson at 321, and *R v Baskerville* at 664 and *R v May.*'

In *R v Hills* (1988) 86 CrAppR 26 Lord Lane CJ, delivering the judgment of the Court, stated at pages 30 – 31:

> 'Corroboration is not infrequently provided by a combination of pieces of circumstantial evidence, each innocuous on its own, which together tend to show that the defendant committed the crime. For example, in a rape case, where the defendant denies he ever had sexual intercourse with the complainant, it may be possible to prove (1) by medical evidence that she had had sexual intercourse within an hour or so prior to the medical examination, (2) by other independent evidence that the defendant and no other man had been with her during that time, (3) that her underclothing was torn and that she had injuries to her private parts. None of those items of evidence on their own would be sufficient to provide the necessary corroboration, but the judge would be entitled to direct the jury that if they were satisfied so as to feel sure that each of those three items had been proved, the combined effect of the three items would be capable of corroborating the girl's evidence.
>
> In *Director of Public Prosecutions v Kilbourne* (1973) 57 CrAppR 381, 409, [1973] AC 729, 750 Lord Reid said:
>
> "There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."
>
> […]
>
> It is therefore always important to consider: (1) what are the real issues in the case; (2) what the evidence being put forward as corroboration does in fact prove. The proof may of course come from several sources, and in that sense corroboration may be cumulative as already illustrated; (3) whether that evidence: (a) comes from a source or sources independent of the accomplice; (b) goes some significant part of the way towards showing that the offence was committed and that the accused committed it.'

See also: *R v Chance* (1988) 89 CrAppR 398; *R v Sailor* [1994] 2 QdR 342 at page 344 & *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 at page 12.

The test to be applied in respect of cases based solely on *circumstantial evidence*, ie., where there are no admissions, *must* be that the only rational inference open to the Court to find in the light of the evidence *must* be that the defendant intended to commit the alleged offence, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

Such circumstances *may include*:

- evidence of a '*fresh complaint*', although such evidence alone does *not* amount to corroboration, see *Director of Public Prosecutions v Kilbourne* (1973) 57 CrAppR 381 at page 403 [[1973] AC 729; [1973] 2 WLR 254; [1973] 1 AllER 440; [1973] CrimLR 235]; and / or

- evidence of the '*distressed condition*' of the complainant / prosecutrix; and / or

- evidence in respect of '*Leaders and people from a community turning in a defendant*'; and / or

- evidence in respect of the '*location and circumstances*' of the alleged offence; and / or

- '*medical evidence*'; and / or

- evidence of '*accomplices*'; and / or

- evidence that proves that the defendant '*lied*' in respect of the alleged offence; and / or

- evidence of '*flight*', ie., when a defendant leaves the location of the alleged offence for no apparent reason.

Those circumstances are examined commencing on page **673**.

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

[44.2.2] Need For Corroboration

It is *not* necessary that every fact spoken to by the complainant should be corroborated, see *R v Goulding* (1908) 1 CrAppR 121 at page 124.

In *R v Wilson Iroi* (Unrep. Criminal Case No. 17 of 1991) Muria J stated at page 5:

> 'On the question of corroboration, I warn myself of the danger of convicting the accused on the uncorroborated evidence of the complainant. It has been a well settled rule that has the force of law that in cases of sexual nature it is dangerous to convict on the testimony of a complainant alone. However if after considering this warning most carefully the court is completely sure that the complainant is telling the truth it may convict on the evidence of the complainant alone: *R v Gere* (1980/81) SILR 145.'

In *R v Gere* [1980 – 81] SILR 145 Daly CJ stated at pages 145 – 146:

> 'Before I turn to the details the allegation I *must* remind myself of two important matters of law. The first is that the burden of proof of all elements of the charge is on the prosecution. Before I can convict the accused the prosecution *must* make sure that he is guilty. The second is that this is a complaint of a sexual nature made by a 16 year old girl. I *must* therefore give myself a strong warning of the dangers of convicting an accused on the testimony of such a complainant in the absence of what I prefer to call supporting evidence. *That is evidence from a source independent of the complainant which supports her account as to the matters in dispute.* I *must* look carefully for such evidence. However even if I find there is no such supporting evidence if, after considering the warning I have given myself most carefully, I am completely sure that the complainant is telling the truth then I may nevertheless convict on her evidence alone.' (emphasis added)

Refer also to the law relating to the '*Evidence Of Young Complainants*' commencing on page **699**.

In *R v Selwyn Sisiolo* (Unrep. Criminal Case No. 5 of 1998) Lungole – Awich J stated at pages 3 – 4:

> 'In rape cases, as in other sexual cases, the court has to take special care to ensure that the testimony of a complainant is safe. Usually the court does that by looking for corroboration in other testimonies or other sources of evidence. It is, however, not a requirement, but the court, if acting on the complainant's uncorroborated testimony, must warn itself of the danger of convicting without corroboration. The evidence to be corroborated is about the sexual intercourse, which is, penetration, and about the absence of consent. In this case it is only the absence of consent that the court is to consider whether it has been corroborated or can be relied upon without corroboration. Accused has admitted having had sexual intercourse with the complainant on both occasions at Naha. I proceed to assess the total evidence in the case bearing in mind that rule of practice that requires me to look for corroboration of absence of consent, although I may act on uncorroborated testimony, if I am mindful of the danger and still consider the uncorroborated testimony safe to act on.'

In *Lanemua v R* (Unrep. Criminal Case No. 27 of 1992) Palmer J stated at page 4:

> 'The danger of convicting on uncorroborated evidence in sexual offences cannot be minimised.
>
> In *R –v- Henry and Manning* (1969) 53 CrAppR 150, per Lord Justice Salmon at page 153 he said:
>
> "*What the judge has to do is to use clear and simple language that will without any doubt convey to the jury that in cases of alleged sexual offences it is really dangerous to convict on the evidence of the woman or girl alone. This is dangerous because human experience has shown that in these courts girls and women do sometimes tell an entirely false story which is very easy to fabricate, but extremely difficult to refute. Such stories are fabricated fro all sorts of reasons, which I need not now enumerate, and sometimes for no reason at all. The judge should then go on to tell the jury that, bearing that warning well in mind, they have to look at the particular facts of the particular case and if, having given full weight to the warning, they come to the conclusion that in the particular case the woman or girl without any real doubt is speaking the truth, then the fact there is no corroboration matters not at all; they are entitled to convict*."

The above comments are applicable to this case although they were directions to a jury. The direction or warning that a magistrate who is judge of fact and law should consider is not minimised. It is the same.

In *R –v- Gammon* (1959) 43 CrAppR 155 at page 160, the same caution is brought out.

"*It is always the duty of the tribunal in offences of this nature to invite the jury to look for corroboration and to warn them that they should be careful not to convict in the absence of corroboration unless the evidence completely satisfies them of the guilt of accused*."

In the present case the magistrate warned himself as follows:

"*As a matter of practice, I remind myself of the danger of convicting in offences of sexual nature without corroborative evidence*."' (emphasis added)

The Court should specify what evidence it is relying on as corroborative evidence, see *R v Goddard & Goddard* (1962) 46 CrAppR 456.

See also: *William Tebounapa v R* (Unrep. Criminal Appeal Case No. 2 of 1999; Court of Appeal; at page 5); *R v Taku* (Unrep. Criminal Case No. 36 of 1987; Ward CJ; at page 3); *R v Elizer Mezer* (Unrep. Criminal Case No. 12 of 1990; Ward CJ; at page 2); *R v Okea & Kenikaesia* (Unrep. Criminal Case No. 5 of 1991; Ward CJ; at pages 3 & 4); *R v Ensor* [1989] 2 AllER 586; [1989] 1 WLR 497; [1989] CrimLR 562; (1989) 89 CrAppR 139; *R v Midwinter* (1971) 55 CrAppR 523 & *R v Burgess* (1956) 40 CrAppR 144.

[44.2.3] Circumstances Amounting To Corroboration

[A] Fresh Complaint

Ideally, a '*fresh complaint*' is recorded:

- in the 'first person', ie., the actual words spoken and not a summary, ie., the third person. The person who took the 'fresh complaint' should also say what he/she said in the 'first person'; and

- *as soon as possible* after the making of the complaint.

Furthermore, *more* than one person may take a '*fresh complaint*'.

The following is a summary of the principles examined in this subsection:

- A '*fresh complaint*' is a 'complaint' made by a complainant / prosecutrix regarding an offence of a sexual nature *and not necessarily rape*, *and it is of course, hearsay evidence*, see *The State v Michael Rave, James Maien & Philip Baule* [1993] PNGLR 85;

- The *purpose* of the admissibility of a '*fresh complaint*' is to support the consistency of the conduct of the complainant / prosecutrix with the story told by her in the witness box, particularly as regards the issue of consent, see *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 at page 110; *Peter Townsend v George Oika* [1981] PNGLR 12; *Jones v R* (1997) 143 ALR 52; *Suresh v R* (1996) 16 WAR 23; *R v Robertson, Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408;

- A '*fresh complaint*' may be given in evidence, *not* as evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box and as negativing consent, see *R v Norton* [1910] 2 KB 496; (1910) 5 CrAppR 7; *R v Whitehead* [1929] 1 KB 99; (1930) 21 CrAppR 23 & *Peter Townsend v George Oika* [1981] PNGLR 12.

- Evidence of a '*fresh complaint*' is *not* an essential matter of proof to be proved in a sexual offence, see *The State v Michael Rave, James Maien & Philip Baule* [1993] PNGLR 85;

- Evidence of a '*fresh complaint*' is *admissible whether or not consent is an issue*, provided it relates to an offence of a sexual nature, see *R v Robertson, Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408;

- Offences of a sexual nature for which the evidence of a '*fresh complaint*' is admissible *involve both male and female complainants*, see *R v Valentine* [1996] 2 CrAppR 213; *Camelleri v R* [1922] 2 KB 122; (1922) 16 CrAppR 162; *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 at page 111; *The State v Bikhet Ngurares Paulo* [1994] PNGLR 335 & *R v Thomas Atu* (1988) 10 QLR 23;

- To constitute a '*fresh complaint*' a complainant / prosecutrix *does not necessarily have to 'complain'*, but may simply say what occurred, see *R v Robertson, Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408;

- A '*fresh complaint*' generally should *not* be made as a consequence of the complainant / prosecutrix being prompted by a question of a leading or suggestive nature, as it should have been made voluntary and spontaneous, see *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 at page 110; *Bernard Touramasong & others v The State* [1978] PNGLR 337 & *R v Robertson, Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408;

- Evidence of a '*fresh complaint*' does *not* amount to corroboration because it is based on what the complainant / prosecutrix says and not on material evidence independent of the evidence of the complainant / prosecutrix, see *Peter Townsend v George Oika* [1981] PNGLR 12 & *Suresh v R* (1996) 16 WAR 23;

- The fact that no '*fresh complaint*' was made is *not* evidence of consent, see *The State v Stuart Hailton Merriam* [1994] PNGLR 104 at pages 111 – 112; *Birch v The State* [1979] PNGLR 75 & *Bernard Touramasong & others v The State* [1978] PNGLR 337;

- To be admissible a '*fresh complaint*' *must* be made at the earliest opportunity, according to the circumstances of the case, see *R v Cummings* [1948] 1 AllER 551; *R v Valentine* [1996] 2 CrAppR 213; *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 at page 110; *Birch v The State* [1979] PNGLR 7; *R v W* [1996] 1 QdR 573; *Suresh v R* (1996) 16 WAR 23 & *R v Robertson, Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408;

- Evidence of a '*fresh complaint*' is *not* admissible if the complainant / prosecutrix fails to give evidence in court, depending on the age and availability of the complainant / prosecutrix, see *R v Norton* [1910] 2 KB 496; (1910) 5 CrAppR 7; *Ugle v R* (1989) 167 CLR 647; (1989) 88 ALR 513; (1989) 43 ACrimR 446; and

- 'Where the prosecutrix goes into the witness box and tells her story, evidence of a complaint made by her can be given although she cannot herself remember what she said', see *R v Braye – Jones* [1966] QdR 296.

In *R v Valentine* [1996] 2 CrAppR 213 Roch LJ, delivering the judgment of the Court of Appeal, stated at pages 220 - 221:

'The leading authority on complaints in cases of sexual offences is *Lillyman* [1896] 2 QB 167, the judgment of the Court of Crown Cases Reserved being delivered by Hawkins J. At p. 170 of the report Hawkings J stated that such evidence:

"*It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought not be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency … of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains*."

[…]

In *Lillyman's* case the principal issue was whether the whole of the alleged complaint should be placed before the jury or whether the evidence should be limited to the bare fact that a complaint had been made.

The court was not considering what amounted to a reasonable time after the fact. In that case the complainant, a girl under the age of 16, complained to her mistress, in the absence of the defendant very shortly after the commission of the acts charged against the defendant. The prosecution were permitted by the trial judge, Hawkins J., to lead evidence from the girl and from her mistress not merely of the fact of the complaint but the details of the complaints made. *Further the decision in Lillyman established that evidence of recent complaint was admissible in cases of sexual offences other than rape.*

In *Osborne* [[1905] 1 KB 551] it was decided that *evidence of recent complaint could be given in a case where consent was not an issue by virtue of the complainant being under the age of consent.* In *Osborne*, Ridley J. cited a passage from *Hale's Pleas of the Crown*, namely:

"'For instance, if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, shewed circumstances and signs of the injury … these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself. But on the other side, if she concealed the injury for any considerable time after she had opportunity to complain, … and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.'"

Ridley J. observed:

"We think these words may be adopted as stating the law accurately, and they indicate that *these complaints are to be admitted, not only because they bear on the question of consent, but also because they bear on the probability of her testimony in a case in which, without such or other corroboration, reliance might not be placed on her testimony*."

It is to be observed that this passage from the judgement suggests that a late complaint could be given in evidence as being relevant to the complainant's credibility at the instigation of the defence, as being favourable to their case.

At the end of the judgement in that case Ridley J. said:

"*We are, at the same time, not insensible of the great importance of carefully observing the proper limits within which such evidence should be given. It is only to cases of this kind that the authorities on which our judgement rests apply; and our judgement also is restricted to them. It applies only where there is a complaint not elicited by questions of a leading and inducing or intimidating character, and only when it is made at the first opportunity after the offence which reasonably offers itself. Within such bounds, we think the evidence should be put before the jury, the judge being careful to inform the jury that the statement is not evidence of the facts complained of, and must not be regarded by them, if believed, as other than corroborative of the complainant's credibility, and, when consent is in issue, of the absence of consent*."

The decision in *Osborne* established the basic criteria for determining which complaints were admissible and which were not. Subsequent cases provide illustrations of the development of the law in this field, for it must be recognised that the trend has been to widen the scope of complaints which are to be admitted in evidence. […]

[…]

A more recent authority is *Cummings* [1948] 1 AllER 551, where the complainant alleged that she had been raped during an evening by Cummings. […].

[…] In the course of giving the judgment of the Court of Criminal Appeal Lord Goddard CJ said at p. 552:

"Who is to decide whether the complaint is made as speedily as could reasonably be expected? Surely it must be the judge who tries the case. There is no one else who can decide it. The evidence is tendered, and he has to give a decision there and then whether it is admissible or not. It must, therefore, be a matter for him to decide and a matter for his discretion if he applies the right principle. There is no question here that Hallett J did apply the right principle. Whether it was reasonable to expect the prosecutrix to complain the moment she got back to the Camp to a man she hardly knew, or whether it was more reasonable that she should wait till the morning and complain to Mrs Watson, her friend, were matters that the learned judge had to take into account. He did take them into account, and he come to the conclusion that in the circumstances the complaint next morning was in reasonable time. *If a judge has such facts before him, applies the right principle, and directs his mind to the right question, which is whether or not the prosecutrix did what was reasonable*, this Court cannot interfere."

We accept that passage as a correct statement of the law and of the approach of this Court to a trial judge's ruling on the admissibility of complaints in cases of sexual offences.

The authorities establish that a complaint can be recent and admissible, although it may not have been made at the first opportunity which presented itself. What is the first reasonable opportunity will depend on the circumstances including the character of the complainant and the relationship between the complainant and the person to whom she complained and the persons to whom she might have complained but did not do so. It is enough if it is the first reasonable opportunity. Further, a complaint will not be inadmissible merely because there has been an earlier complaint, provided that the complaint can fairly be seen to have been made as speedily as could reasonably be expected. This is not to say that it is permissible to allow the Crown to lead evidence that the same complaint has been made by the complainant in substantially the same terms on several occasions soon after the alleged offence, where that would be prejudicial in that it might incline the jury to regard the contents

of individual complaints as evidence of the truth of what they assert. The complaint has to be made within a reasonable time of the alleged offence and on the first occasion that reasonably offers itself for the complainant concerned to make the complaint that was made in the terms in which it was made.

We now have greater understanding that those who are the victims of sexual offences, be they male or female, often need time before they can bring themselves to tell what has been done to them; that some victims will find it impossible to complain to anyone other than a parent or member of their family whereas others may feel it quite impossible to tell their parents or members of their family.' (emphasis added)

In *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 Sakora J, sitting alone, stated at pages 110 – 111:

'*But it does not necessarily follow that the lack or absence of complaint must be evidence of consent.* The two English cases of *R v Lillyman* [1896] 2 QB 167 at 170 and *Sparks v R* [1964] AC 964 at 979 establish the principle that evidence of a complaint at the earliest reasonable opportunity is exceptionally admitted only as evidence of consistency in the account given by the woman claiming to have been raped. That is to say, it is admitted as matter going to her credit.

[…]

[…] So the requirement in sexual offences is only that the complaint be made voluntarily and at the first opportunity reasonably afforded.

The complaint is admissible into evidence as an exception to the hearsay rule only for either or two purposes:

1. to confirm evidence of the complaint relating to the evidence, and / or

2. to rebut or disprove consent on the part of the complainant, if that is an issue in the case.

Whether the complaint was "recent" or not is a question of fact and degree in every case. Certainly, it was not necessary that it was made within the comparatively short period required for admissibility under the res gestae (contemporaneity) rule.

On the other hand, complaint must have been made at the first opportunity which reasonably presented itself. Thus, it is not a question of the length of time *per se*. Applying this to the case here – where we are concerned with the rape of an adult female – the rule becomes more insistent and crucial, as a safeguard against concocted self-serving complaints. Also, it is some guarantee that the complaint has at least some value as evidence of the matters in respect of which it is admissible. For the same reason, it is a requirement that the complaint must have been voluntary and spontaneous.' (emphasis added)

The law relating to '*Res Gestae*' is examined commencing on page **179**.

In *The State v Michael Rave, James Maien & Philip Baule* [1993] PNGLR 85 Doherty J, sitting alone, stated at page 92:

'Fresh complaint is *not* an essential element to be proved in a sexual offence […The evidence of the person giving evidence of the fresh complaint …] is, of course, *hearsay*, but it is indicative of a consistency in the story.' (emphasis added) [words in brackets added]

The law relating to '*Hearsay Evidence*' is examined commencing on page **176**.

In *R v Robertson; Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408 the Court of Criminal Appeal held that the evidence of '*fresh complaint*' was admissible equally whether or not consent was in issue on the offence charged.

Kelly SPJ stated at pages 263 & 409 respectively:

> 'In my view it is apparent from the way in which the basis of admissibility is expressed that there is no reason to limit the admissibility of such evidence to cases in which consent or non – consent is an issue […].'

In *R v Thomas Atu* (1966) 10 QLR 23 the Court examined whether the evidence of a 'fresh complaint' was admissible in respect of offences of a sexual nature involving male complainants. McGuire J, sitting alone, stated at page 26:

> 'There appears to be a limited number of reported cases on the matter. In *R v Camelleri* [1922] 2 KB 122 the English Court of Criminal Appeal was concerned with sexual offences against boys aged 12 and 15. Evidence of recent complaint had been received at the trial. It was argued that such evidence was wrongly received as the rule about the reception of evidence of recent complaint related only to females.
>
> In a short judgment the Lord Chief Justice said (at 124):
>
> "The question is, Does the principle in Osborne's case apply here? In *Lillyman's* case consent was essential to the defence, but that is not so in Osborne's case. *Beatty v Cullingworth* [1905] 1 KB 551 seems to limit the exception to cases of females, but there the true antithesis is between sexual and non – sexual offences (not between female and male). Really, till now the question of today has not been substantially considered, and we see no reason why in this case either the fact or the contents of the boy's complaint should not be admitted. […]"
>
> […]
>
> […] *It seems to me, on principle, that no distinction should be drawn between male and female complainants* […].' (emphasis added)

In *R v Robertson, Ex parte Attorney – General* [1991] 1 QdR 262; (1990) 45 ACrimR 408 Carter J, with whom Kelly SPJ concurred, stated at pages 276 and 421 respectively:

> '*The second ground for rejecting the evidence [of 'fresh complaint'] was that what the young girl had said to her mother was not a "complaint" in that it was not expressed as a grievance or an accusation but rather was merely the recitation by her of what the accused had done to her.* […I]t seems to me that it matters not the form of words chosen or the tone of voice in which they are uttered might be more properly described as narrative rather than the making of an accusation or the ventilation of a grievance. *What is important is what is said because there must be consistency between what is said shortly after the event and what is said in court from the witness box* […].'

At pages 263 & 409 respectively Kelly SPJ also stated:

> 'I would not consider that for […] evidence [of 'fresh complaint'] to be admissible it is necessary that it be a "complaint" in the sense of its being an expression of a grievance or accusation as distinct from being a mere narrative. What is said may be no more than an assertion of what occurred, but provided that this is done at the first reasonable opportunity after the event alleged to constitute the offence and is *not said in answer to a question of a leading or suggestive character* it can nonetheless be a "complaint" for this purpose. In my view insofar as *De B v De B* [1950 VLR 242 might be regarded as authority to the contrary it should not be followed.' (emphasis added) [words in brackets added]

With regard to a complainant's / prosecutrix's failure to make a '*fresh complaint*' of rape until she was prompted, ie., to a question of a leading or suggestive character, the Supreme Court in *Bernard Touramasong & others v The State* [1978] PNGLR 337 at page 342 were not duly concerned in that case. Therefore, this issue must be considered in relation to circumstances of the particular case and that if a '*fresh complaint*' is prompted it is *not* to be automatically excluded from consideration.

In *Peter Townsend v George Oika* [1981] PNGLR 12 Greville Smith J, with whom Pratt and Miles JJ concurred, stated at page 16:

> 'Whilst evidence from a witness or witnesses other than the prosecutrix of a "fresh complaint" is admissible, […], it cannot amount to corroboration. In *R v Whitehead* ([1929] 1 KB 99 at page 102) where the accused was charged with unlawful carnal knowledge of a girl under the age of sixteen years, it was suggested that her evidence might have been corroborated by the fact that she told her mother about it afterwards. Lord Hewart said:
>
> "*In order that evidence may amount to corroboration it must be extraneous to the witness who is to be corroborated. A girl cannot corroborate herself, otherwise it is only necessary for her to repeat her story some twenty – five times in order to get twenty – five corroborations of it*."
>
> […]
>
> The making of recent complaint is not in itself evidence of the facts stated in the complaint. In *Lovell's case* ([1924] 17 CAR 163 at paged 166 – 167) Lord Chief Justice Hewart said:
>
> "In the case of *Lillyman* ([1896] 2 QB 167), it was laid down that, 'Upon the trial of an indictment of rape, or other kindred offence against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part. […]"' (emphasis added)

In *Jones v R* (1997) 143 ALR 52 the High Court of Australia stated at page 53:

> 'It has been clear, at least since R v Lillyman, that upon a trial of rape or a kindred offence, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of the complaint, may be given in evidence. It is not evidence of the facts complained of, but of the consistency of the conduct of the prosecutrix with her account in the witness box of the relevant events including non – consent to the act of sexual intercourse to which she deposes.'

In *Bernard Touramasong & others v The State* [1978] PNGLR 337 the Supreme Court held at page 338:

> '[T]he fact that there is no fresh complaint by a woman alleging rape, is not evidence of consent: Kilby v R [(1973) 129 CLR 461]. […] The failure of a supposedly outraged woman to complain, or her having had the complaint, as it were, wrung from her, is a jury matter, going to the consistency or inconsistency of her alleged non – consent to the admitted intercourse.'

In *R v Ugle* (1989) 167 CLR 647; (1989) 43 ACrimR 446 [(1989) 88 ALR 518] the High Court of Australia stated at pages 649 & 447 respectively:

> *'[E]vidence of complaint goes merely to the credit of the complainant and it follows that such evidence is not admissible unless there is evidence from the complainant*: see *Kilby*, per Menzies J (at 474). See also *Sparks* [1964] AC 964 at 979; *Whitehorn* (1983) 152 CLR 657; 9 ACrimR 107, per Murphy J (at 661; 109) and per Deane J (at 666 – 667; 112 – 113).' (emphasis added)

In *R v W* [1996] 1 QdR 573 the Court of Appeal held at pages 574 – 576:

> '[A …] ground of appeal is that this complainant should not have been admitted because it was not made "at the earliest opportunity": *Kilby v R* (1973) 129 CLR 460; *R v Osborne* [1905] 1 KB 551 at 561. […]
>
> […]
>
> [A 'fresh complaint' is admissible if,] having regard to the circumstances surrounding the complaint, including the time which had elapsed since the alleged commission of the offence, the complaint is capable of supporting the credibility of the complainant as a witness. Its function is "to negative any effect 'the alleged victim's silence might have on her credibility"': *M v R* (1994) 181 CLR 487 per Gaudron J at 514. The circumstances such as her age, any reason for her not having made the complaint before she did (*R v Sailor* [1994] 2 QdR 342 per McPherson JA at 343 – 344) and whether it was made spontaneously or only after direct inquiry or prompting or even threats or an inducement (*R v Adams* [1965] QdR 255). Whether or not, having regard to those circumstances, the evidence is capable of supporting the complainant's credibility is a question [… of law for the court to decide].' [words in brackets added]

In *Suresh v R* [1996] 16 WAR 23 the substance of the appeal relating to the admissibility of evidence of '*fresh complaint*' was:

- The '*fresh complaint*', which was simply that the complainant was being sexually abused by her uncle, could not be connected to any of the charges; and

- The proximity of the '*fresh complaint*' to the offences charged was such that the seven (7) month delay between the last charge and the first of the complaints to her school friends, could not be treated as 'fresh' and ought not to have been admitted under the rules relating to prompt and spontaneous complaint.

With regard to the first point Anderson J, with whom Rowland and Franklyn JJ concurred, stated at page 34:

> 'It must be remembered that evidence of complaint is admissible as *evidence of consistency of behaviour, not as evidence of the facts complained of:* see *R v Lillyman* [1896] 2 QB 167. *It is admitted as a matter going only to the credit of the complainant:* see *Kilby v R* (1973) 129 CLR 460 at 466, per Barwick CJ. Therefore, I think as long as the accusations could relate to the sexual assault or assaults charged against the accused it is not precisely charge the offence alleged to have been committed.' (emphasis added)

With regard to the second point Anderson J relied upon the following passage by Barwick CJ in *Kilby v R* (1973) 129 CLR 460 at page 472:

> 'Whatever the historical reason for the exception, the admissibility of that evidence in modern times can only be placed, in my opinion, upon the consistency of statement or conduct which it tends to show, the evidence having itself no probative value as to any fact in contest but, merely and exceptionally constituting a buttress to the credit of the woman who has given evidence of having been subject to the sexual offence.'

Anderson J continued at pages 34 – 35:

> '*This statement of the rule supports the view that the test of admissibility can never be reduced to precise temporal terms such as an hour, a day or a week; and that the true test of admissibility is whether the evidence shows consistency of conduct on the part of the complainant.* That is a judgement that must be made in each case upon the circumstances of the case and was pointed out by Gaudron J in *M v R* (1994) 181 CLR 487:
>
> " … *circumstances vary greatly and there may be different views as to what is normal and, also, as what constitutes reasonable opportunity.*"
>
> There will be cases, no doubt, where a delay of even a few hours will deprive the complainant of any buttressing effect. The test was expressed in *R v Freeman* [1980] VR 1 at 8 in the following terms:
>
> "Accepting that the complaint, to be admissible, must have been made at the first reasonable opportunity, the words 'reasonable opportunity' require consideration. In determining whether the opportunity is the 'first reasonable opportunity', the learned trial Judge must have regard to all the circumstances … '*Reasonable' must, we think, take into account the subjective situation in which the prosecutrix was placed, and have regard to such factors as were operating on the material time after the events.*"
>
> *Relevant circumstances would include the youthfulness of the complainant, the existence of any cogent reason for not making immediate complaint and the circumstances under which the complaint came to be made, that is, whether it was truly spontaneous.*' (emphasis added)

In considering what may be the '*first reasonable opportunity*' for a child victim, Anderson J observed at page 35:

> ' … it is common experience in the criminal courts to hear *young children* say that they put up for quite a long time with unwelcome sexual molestation at the hands of an adult within the family environment because they were frightened, confused, reluctant to cause trouble, feared that they themselves would be blamed, had been told by the molester not to say anything, and so on. It is also the court's experience that in many cases the disclosure is made to a best friend or close playmate rather than to a parent or guardian or sibling, and it is well understood that there may be many reasons why it happens like this and, in particular, why the first disclosure may be delayed.' (emphasis added)

See also: *M* (2000) 109 ACrimR 530 at pages 534 – 535; *R v Islam* [1999] 1 CrAppR 22; *R v Lee* (1911) 7 CrAppR 31 at page 33; *R v Lovell* (1923) 17 CrAppR 163; *R v Wannell* (1922) 17 CrAppR 53; *R v Wilbourne* (1917) 12 CrAppR 280; *Corkin* (1989) 40 ACrimR 162; *R v McNamara* [1917] NZLR 382 & *R v Greenwood* [1962] TasSR 319.

[B] Distressed Condition

The statements of *all* witnesses who see the prosecutrix / complainant soon after the alleged commission of the offence of a sexual nature, and *not* just the witness/es who received the '*fresh complaint*', should indicate their observation of his/her physical *and* emotional condition, ie., distressed condition.

Furthermore,

- if the clothes worn by the complainant / prosecutrix were dirty or damaged as a result of the commission of the offence then such clothing should be taken possession of by the investigating officer with the consent of the complainant / prosecutrix and then produced to the court as an exhibit; and

- if the complainant / prosecutrix was injured then admissible evidence proving such injuries should be produced to the court

If the clothing can *not* be produced then an explanation should be given to the court by the investigating officer in that regard. The law relating to '*Missing Exhibits*' is examined on page **238**.

In *R v Redpath* (1962) 46 CrAppR 319 Lord Parker CJ, delivering the judgment of the Court, held at pages 321 – 322:

> 'It seems to this court that the distressed condition of a complainant is quite clearly capable of amounting to corroboration. Of course, the circumstances will vary enormously, and in some circumstances quite clearly no weight, or little weight, could be attached to such evidence as corroboration. Thus, if a girl goes in a distressed condition to her mother and makes a complaint, while the mother's evidence as to the girl's condition may in law be capable of amounting to corroboration, quite clearly, the jury should be told that they should attach little, if any weight to that evidence, because it is all part and parcel of the complaint.'

In *R v Knight* (1966) 50 CrAppR 122 [[1966] 1 AllER 647; [1966] 1 WLR 230] Lord Parker CJ, delivering the judgment of the Court, stated at page 125:

> '[T]he distress shown by a complainant must not be over – emphasised in the sense that juries should be warned that except in special circumstances little weight ought to be given to that evidence.'

In *R v Wilson* (1974) 58 CrAppR 304 Edmund Davies LJ, delivering the judgment of the Court, held at page 311:

> '[U]nless there are very special circumstances […], the distressed condition of a complainant may simply fail to implicate the accused in the offence charged.'

In *John Jaminan v The State* (No 2) [1983] PNGLR 318 Pratt J, with whom Amet J concurred, stated at page 327:

> 'In his judgement the learned trial judge found that the complainant was in the room and that "she came out of that room crying later in the evening and the accused being there …". The distressed state of the complainant, would not, I think, amount to any corroboration in the circumstances of this particular case. *There must be exceptional circumstances before such condition can amount to corroboration […] although evidence of the condition of the complainant is admissible as direct evidence which goes to show a consistent course of conduct, (and it usually part of the evidence dealing with recent complaint).* In the present trial however it seems to me that the learned trial judge was referring more to the evidence of the other witnesses as being corroborative of the girl's presence in the room rather than that she was crying.' (emphasis added)

In *Peter Townsend v George Oika* [1981] PNGLR 12 Greville Smith J, with whom Pratt and Miles JJ concurred, stated at page 16:

> 'A distressed condition can amount to corroboration *but except in very special circumstances it should be given very little weight.*' (emphasis added)

In *Bernard Touramasong & Others v The State* [1978] PNGLR 337 the Supreme Court stated at page 342:

> '[E]vidence as to distress can be corroborative of the version given by the prosecutrix. It is evidence that has to be viewed warily, this for obvious reasons. In many cases it might have little weight.'

In *R v Sailor* [1994] 2 QdR 342 McPherson JA of the Court of Appeal, with whom Bryne J concurred, stated at pages 344 – 346:

> '*To constitute corroboration there must be independent evidence that confirms the testimony of the complainant in a material particular. Distress that is observed in a complainant after the happening of the alleged incident has been held to be capable of satisfying this requirement*: see *Redpath* (1962) 46 CrAppR 319; *R v Flannery* [1969] VR 586, 590. These and some other reported decisions suggest it is a state or condition to which ordinarily little weight should be allowed as corroboration. *The need for caution is sometimes said to lie in the danger that distress may be readily feigned (ie., pretended)*: cf *R v Knight* [1966] 1 WLR 230, 233; *or because it is "equivocal", which in this context seems to mean that it may be due to any one or more of variety of causes other than the incident alleged*: See *R v Berrill* [1982] QdR 508, 527. It would ordinarily be for the jury to decide matters like these; but there is a question of law at the threshold, which is whether the inference can be drawn that the distress is causally related to the incident: *R v Flannery* [1969] VR 586, 591. *If on the evidence the apparent connection between the two is at most tenuous and remote, then evidence of distress should not be submitted to the jury as a circumstance capable of affording corroboration*: *R v Roissetter* [1984] 1 QdR 477, 481 – 482.
>
> […]
>
> *The basic weakness of distress [is that …] its value or cogency as independent evidence diminishes rapidly with the passing of time. The longer the interval from the original event, the more difficult it is to be sure that a condition of distress not manifested or observed until well after that event is not due to some other intervening and unrelated cause*. *Eventually a stage in time is reached where, without resorting to testimony of the complainant, it ceases to*

be possible to link the distress with its alleged cause. Once it ceases to be independent evidence of its cause, the complainant's distress is no longer capable of corroborating her testimony.

The interval of time that lapses between the incident and the distress is plainly, therefore, an important factor in deciding whether or not they are causally related: *R v Flannery* [1969] VR 586, 591, where, as has been noticed, as interval of about an hour was considered too long. Although the period involved in *R v Roissetter* [1984] 1 QdR 477, 480 – 482, was even longer, the distressed condition observed in that case was practically continuous throughout the period.' (emphasis added) [words in brackets added]

See also: *Peter Sade Kaimanisi v R* (Unrep. Criminal Appeal No. 3 of 1995; Court of Appeal; per Muria CJ at page 3); *R v Okoye* [1964] CrimLR 416; *R v Luisi* [1964] CrimLR 605 & *The State v Dickson Wape* [1994] PNGLR 558 at page 566.

[C] Community Turning In Suspects

In *The State v Anis Noki* (Unrep. N1166; 11 & 12 August 1993; Papua New Guinea) Woods J, sitting alone, stated:

'In his evidence the investigating officer said that the suspects were named to him and brought to him by the local Councillor and villages. I find this a very important piece of evidence. So how do I take and assess that piece of evidence.

[…]

[W]hen the community works to participate in the legal process the courts must accept this participation and not disregard it. When anything happens in a traditional community that community appears as a rule to face the event together. They are all entitled to participate in the benefits, and they all have to share in the losses. So in a dispute they all feel involved.

This is where the coming forward of the Leaders and people of the community to hand over the suspects must be duly recognised. Of course it should be seen in and with the evidence. There must be other evidence. It becomes a matter of evidence which must be admissible, it is very relevant in the eyes of the people and must therefore be considered.

Again the communal nature of PNG Society makes one realise there can be very few secrets, when something happens everyone soon knows. There are no strangers in the night.

So if the village leaders have come forward with their own knowledge and "made" people surrender there must be some weight in that. Surely in such a communal society elders are not going to blame their own line for something the neighbouring lines have done -- if the neighbouring lines did it people would know.

[…]

[…] *Of course just because the leaders turn in some suspects should not be the end of the case, such must be supported by the evidence. In fact the turning in supports and corroborates the other evidence.* One must be sure that the leaders are not just marking some trouble makers to get them out of the way. Also one must be sure that the victims did not merely identify the accused after they learnt the leaders and community has handed over the suspects, thus identifying by suggestion.' (emphasis added)

See also: *The State v Bikhet Ngurares Paulo* [1994] PNGLR 335.

Obviously, the Leaders and the people in the community should be questioned to determine the reason for turning in a suspect or a defendant.

[D] Location & Circumstances

In *Jones v Thomas* [1934] 1 KB 323 Lawrence J, with whom Avory J concurred, stated at page 333:

> 'Mere opportunity alone does not amount to corroboration, but two things may be said about it. One is, that the opportunity may be of such a character as to bring in the element of suspicion. *That is, that the circumstances and locality of the opportunity may be such as in themselves to amount to corroboration*. The other is, that the opportunity may have a complexion put upon it by statements made by the defender which are proved to be false. It is not that a false statement made by the defender proves that the pursuer's statements are true, but it may give to a proved opportunity a different complexion from what it would have been had no such false statement been made.' (emphasis added)

The law relating to the '*Lies Of Defendants*' is examined commencing on page **185**.

In *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 Sakora J, sitting alone, stated at pages 110 – 112:

> 'The requirement for reporting or complaining, usually expressed as recent complaint, is normally associated with sexual offences such as rape. The basic reason for the emergence of this requirement may lie in some early recognition of the undoubted suspicion – in the intensely and traditionally chauvinistic cultures of yesteryear -- which fell at common law on a woman who failed to complain within a short time of an outrage perpetrated upon her. *And this was necessitated, in part, by the fact that, by their very nature, offences of this nature would be very unlikely to produce direct eye – witness evidence.*
>
> […]
>
> *It has been said that sexual offences, by their very nature, are almost always committed in "secret", in the absence of third parties. This is contrasted with street and traffic offences, which can have any number of eye – witnesses.* Thus, reporting or detection of sexual offences, especially of incest and child sexual abuse cases, often occur after the incidents. It is a truism that the younger the victim the less chance there is of the perpetrator being caught.' (emphasis added)

In *The State v Simon Ganga* [1994] PNGLR 323 Sevua J, sitting alone, stated at pages 332 – 333:

> 'Whilst this Court acknowledges that in this case there was no independent witness to give corroborative evidence, this Court also acknowledges that most sexual offences are not committed in public, so there is that secretive atmosphere pertaining to them. Given that factor, one cannot expect independent eye witnesses. In *State v Kalabus* [1977] PNGLR 87 at 94, reference was made to a number of cases. I wish only to cite part of the quotation there pertaining to *R v Day* [1964 – 65] NSWLR 40, as I consider it applicable in the case before me.

> "… External evidence concerning the nature of the place and circumstances, under which sexual relations admittedly occurred, may provide corroborative evidence, of a circumstantial type, of lack of consent, although the only direct evidence thereof be of the complainant."
>
> *In my view, evidence of the nature and circumstances of the place and time amounted to corroborative evidence of the circumstantial type* referred to above. The time was about 6pm or thereafter. The place was an isolated, disused airstrip. No one resided nearby. It was on a track not accessible to the public. The prosecutrix and the accused were by themselves. All these are circumstances which, in my view, amounted to corroboration.' (emphasis added)

In *The State v Michael Rave, James Maien & Philip Baule* [1993] PNGLR 85 Doherty J, sitting alone, stated at page 92:

> '[*The evidence of the prosecutrix regarding the issue of consent* …] *has been corroborated by the circumstances of the case.* In this I refer to the case of *Kalabus v The State* [1977] PNGLR 87 at 94, where it was said that evidence concerning the place and the circumstances in which sexual relations admittedly occurred may provide corroborative evidence and may give substantial evidence of lack of consent. This was referred to also, indirectly, in the case of *Touramasong v The State* [1978] PNGLR 337].' (emphasis added) [words in brackets added]

In *Bernard Touramasong & Others v The State* [1978] PNGLR 337 the Supreme Court stated at page 339:

> *'As is not unusual in these cases, the prosecutrix put herself in a dangerous situation through rashness or stupidity if the fact is that she never envisaged or consented to intercourse*. […]
>
> [The prosecutrix's …] conduct in going to this party has been strongly criticised. Prima facie it is strange that a woman who had been raped by four men, a rape that involved trickery early, verbal threats later, then some physical violence, should have attended the function. *However, one must remember the hour. It was dark. The girl was far away from her residential college. Accepting her story, she might well have decided that the men had had their fill, and would harm her no more, and that she was better off going with them.'* (emphasis added) [words in brackets added]

In that case 'the events giving rise to the incident complained of occurred over quite a long period of time', see *The State v Peter Yama* (Unrep N817; 8, 9 & 16 March 1990; Jalina AJ; sitting alone).

In *The State v Peter Yama* (Unrep N817; 8, 9 & 16 March 1990) Jalina AJ; sitting alone, stated:

> 'From the evidence of the victim, it can be seen that she was abducted from her boyfriend very late at night by the accused and his friends who were total strangers to her, taken in their vehicle under a pretext of going to the police station to settle matters arising out of an accident involving her boyfriend's vehicle and the vehicle the accused was in, and taken to a secluded spot near Moitaka with a view to each of them taking turns at having intercourse with her.
>
> […]

> During the time the victim was with the accused and three others and then subsequently with the accused alone, she did not scream or try to escape. The reason she gives for this is that it was late at night, in the middle of nowhere coupled with the accused having a gun, she did not want to risk her life trying to run away and also that she acted in the way she did so that she could get them to a place where help could be sought and police could be contacted. In fact that was exactly what she did to the accused.'

See also: *Credland v Knowles* (1951) 35 CrAppR 48 at page 55.

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

[E] Medical Evidence

In *R v Paul Misiata* (Unrep. Criminal Case No. 35 of 1997) Muria CJ stated at pages 4 – 5:

> 'The evidence of injuries and torn clothing are important where the issue of consent, in a rape case, is raised. Such evidence would tend toward showing resistance or force. But such evidence can also be present even in cases of consensual sexual intercourse. There is also the evidence from the victim herself that when she ran onto the reefs, she stumbled and fell on the stones which confirmed PW2's conclusion on the causes of the injuries. So the Court must carefully scrutinize such evidence*. It is therefore essential that the prosecution, upon whom the burden lies of excluding consent, not only lead admissible evidence on such physical condition of the victim but must also tender material evidence of such condition.* Neither the records of the injuries said to be kept at Atoifi Hospital nor the alleged torn skirt was produced in this case. This is not satisfactory at all especially in the circumstances of this case. I find that the evidence seeking to establish that the injuries were caused as a result of force exerted by the accused upon the victim very unsatisfactory and cannot be reliably accepted by the Court. As such they lack corroborative evidence.' (emphasis added)

Medical evidence *may* not be capable of corroborating the evidence of a complainant in respect of cases of 'Rape', unless it is capable of proving that the intercourse had taken place without her consent, see *James v R* (1971) 55 CrAppR 299 at page 303.

In *Epeli Davinga v The State* [1995] PNGLR 263 the Supreme Court stated at page 266:

> 'There is no doubt that it is open to both prosecution and defence to agree on the admission of certain facts, and this is often done where there is no doubt or no challenge to the facts. And with the costs of justice and the pressure to make courts and trials more efficient, such agreements on the admission of uncontroverted facts would be part of any efficient court system [such as] *medical reports, where there is no challenge or doubts as to the condition of the patient, are tendered by consent* […]. And when such matters are tendered, it is done by consent, as both parties agree that they are relevant, and it is then other evidence from the respective parties which affects the issue of guilt or innocence. Of course, a trial Judge should always consider carefully whether there can be prejudice to a fair trial by the admission of such evidence.' (emphasis added) [words in brackets added]

Although medical evidence is capable of corroborating the evidence of a complainant / prosecutrix it is *not* essential evidence to prove whether or not a complainant / prosecutrix has consented. The fact that some complainants / prosecutrixs do not:

- seek medical attention soon after the commission of an offence of a sexual nature; *or*
- suffer injuries not consistent with being the victim of an offence of a sexual nature,

does *not* necessarily mean:

- that such complainants / prosecutrixs should not be believed; *or*
- that the offence in question can not be proven.

In *The State v Paul Talip Kambio Wasma* (Unrep N1327; 13, 14 & 20 March 1995) Injia J, sitting alone, stated:

> 'The Medical Report presents some problem because the victim was taken to the hospital some two weeks later. I do not think that is conclusive of indecent assault not occurring. *The important fact being that the victim complained to her mother and Yere of the accused's actions.* By this time, the visible signs of interference with the vagina would have precipitated anyway.' (emphasis added)

In *The State v Peter Yama* (Unrep N817; 8, 9 & 16 March 1990) Jalina AJ, sitting alone, stated:

> 'One of their major arguments was that there was no mention of physical violence or nervous or psychological effects in the medical evidence and as such there was consent. The Supreme Court had this to say [in *Bernard Touramasong & Others v The State* [1978] PNGLR 337] at page 341 regarding consent:
>
> "The prosecutrix was not a virgin and was mature, so presumably would have been capable of receiving the male organ without any difficulty under normal conditions. Of course, conditions were not normal if it was rape. However, assuming it was, it certainly was not one of those hideously wild affairs that we have all heard of, where so often, serious physical injury is caused. *And we have no doubt that sensible women, seeing their inevitable fate, give in, and relax at the critical moment, thus reducing the risk of injury. This is not to say that they consent. We have all tried cases of rape and carnal knowledge where serious physical and nervous damage resulted. But we have also tried cases where the undoubted victims emerged unscathed, sometimes even when sexually very immature."*
>
> Applying that passage to the present case, there is no doubt that in the circumstances of this case the prosecutrix has been a sensible woman and as she stated in her evidence, she did not want to risk her life by screaming, or running away and therefore at the end of the whole episode, she gave in to the accused and ended up with no physical injuries both 'to her person as well to her private parts. *That is not to say she consented.'* (emphasis added)

The law relating to '*Opinion Evidence -- Experts*' is examined commencing on pages **202**.

See also: *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995) Palmer J stated at pages 16 – 17 & *R v Cooper* (1914) 10 CrAppR 195.

[F] Accomplices

In *The State v Bike Guma* [1976] PNGLR 10 Raine J, sitting alone, stated at pages 12 – 13:

> '[A]s a tribunal of fact, so it is said, I must be wary of accepting the uncorroborated evidence of a prosecutrix and of an accomplice.
>
> […]
>
> [… T]he same principles apply as in the case of the uncorroborated evidence of accomplices as do in the case of the uncorroborated evidence of a prosecutrix.
>
> […]
>
> [… W]ith accomplices their evidence should be treated with extreme caution.
>
> But the situation here is different. *I see no reason why the prosecutrix should not be corroborated by an accomplice of the accused, and the accomplice by the prosecutrix.'* (emphasis added)

The law relating to the evidence of '*Accomplices*' is also examined commencing on page **298**.

[G] Lies Of Defendants

If the prosecution is able to prove that a defendant did lie; either:

- during the course of a record or interview; *and / or*
- in giving evidence,

then such evidence can amount to '*corroboration*'.

In *Edwards v R* (1993) 178 CLR 193 Deane, Dawson and Gaudron JJ of the High Court of Australia, in a single judgement, stated at pages 208 – 209:

> 'Ordinarily the telling of a lie will merely affect the credit of the witness who tells it. A lie told by an accused may go further and, in limited circumstances, amount to conduct which is inconsistent with innocence, and amount therefore to an implied admission of guilt. In this way the telling of a lie may constitute evidence.
>
> […]
>
> When the telling of a lie by an accused amounts to an implied admission the prosecution may rely upon it as independent evidence to convert what would otherwise be insufficient into sufficient evidence of guilt or as corroborative evidence. But not every lie told by an accused provides evidence probative of guilt. It is only if the accused is telling a lie because he perceives that the truth is inconsistent with his innocence that the telling of a lie may constitute evidence against him.'

See also: *Jones v Thomas* [1934] 1 KB 323.

The law relating to '*Lies Of Defendants*' is examined commencing on page **185**.

[H] Flight Of Defendants

The '*Evidence of Flight*' refers to the *sudden departure* of a defendant from the location where the alleged offence occurred for no apparent reason. Such behaviour *may* provide evidence to prove the guilt of a defendant *provided* that *guilt was the only reasonable explanation for that departure or 'flight'.* However, to prove a charge '*beyond reasonable doubt*' more evidence than that of 'flight' is obviously required.

In *R v Melrose* [1989] 1 QdR 572; (1987) 30 ACrimR 332 it was held:

> *Evidence of flight, and the defendant's statements in relation thereto might give rise to an inference of guilt and might provide corroboration of the evidence of the complainant.*

Shepherdson J stated at pages 577 – 579 & 336 – 338 respectively:

> '*Wigmore on Evidence, 3rd ed. Para 276* being part of a section headed "Conduct as evidence of guilt" says:
>
> "*It is universally conceded today that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself."*
>
> […] There remain only a few details that can be open to comment:
>
> (a) It is occasionally required that the accused should have been aware that he was charged or suspected. This is unnecessary; it is the act of departure that is itself evidential; ignorance of the charge is merely a circumstance that tends to explain away the guilty significance of the conduct.
>
> The limitation has also been advanced that flight is not admissible where the evidence of the offence is direct evidence; but this notion is groundless to the point of absurdity.
>
> (b) It has sometimes been said that an unexplained flight is the admissible evidence. But this is obviously unsound. The prosecution cannot be expected to negative beforehand all conceivable innocent explanations. The fact of flight is of itself significant; it becomes most significant when after all no explanation is forthcoming.
>
> (c) The flight of another person is relevant so far only as the accused has connived at it; and may then also become relevant as an act of suppression of testimony.
>
> (d) Whether the fact of flight raises a presumption of law is a question of the rules of presumption.
>
> (e) [… T]he accused may always endeavour to destroy the adverse significance of his conduct by facts which indicate it to be equally or more consistent with such other hypothesis than that of a consciousness of guilt. […]
>
> (f) An attempt at suicide may be construed as an attempt to flee and escape forever from the temporal consequences of one's misdeed. That it is evidential has been usually conceded.' (emphasis added)

In *R v El Adl* [1993] 2 QdR 195 the principles enunciated in *R v Melrose* (*supra*) were examined by the Court of Appeal. At page 198 that Court stated:

> 'A sudden departure by a person who ordinarily stays close to home may give rise to quite different inferences from those which could be drawn from a journey by one who commonly moves about the country. The nature of the reasons, if any, given for the journey may also bear upon the proper conclusion to be drawn. […*T*]*he judge said that flight can be an indication of guilt. That statement is correct and is plainly inconsistent with the notion that the appellant's flight was conclusive of guilt.'* (emphasis added)

In *R v Tamcelik* [Unrep CA 312 of 1993; 18 March 1994] the Queensland Court of Appeal applied the principles relating to the *evidence of flight*. In that case the defendant absconded after being released on bail for the offence in question. He decamped to New South Wales and was not re-arrested for approximately twelve months. The Court stated:

> 'In reaching a verdict of guilty the jury were entitled to rely on the appellant's departure to New South Wales, but they could do so *only if guilt was the only reasonable explanation of that departure or "flight".'* (emphasis added)

See also: *Power & Power* (1996) 87 ACrimR 407 at page 409.

The law relating to the evidence of '*Flight*' is examined commencing on page **187**.

[I] Admissions

In *R v Gere* [1981] SILR 145 Daly CJ held that an '*admission*' can amount to evidence of '*corroboration*'.

In *R v Willoughby* (1988) 89 CrAppR 91 Saville J, delivering the judgment of the Court, held at page 94:

> 'In such a case as the present, where the crime but not the involvement of the defendant is admitted, there is of course no need for corroborative evidence that the crime has been committed, for there is nothing suspect from the witness in that regard. What is then needed is independent evidence corroborating any testimony of the suspect witness with regard to identity. Conversely, where the involvement of the defendant, but not the crime, is admitted (eg. On a charge of rape where consent is in issue), the need is for independent evidence corroborating any testimony of the suspect witness that the crime was committed. If neither the crime nor the involvement of the defendant is admitted, then the independent evidence, to amount to corroboration, must be such as to show or tend to show that the testimony of the suspect witness with regard to those matters is reliable.'

An admission made by a person when drunk may not be weighty as if he/she was sober, but it is some '*corroboration*', see *R v Hedges* (1909) 3 CrAppR 262 at page 265.

See also: *R v Rolfe* (1952) 36 CrAppR 4 at page 6 & *R v Siedofsky* [1989] 1 QdR 655; (1988) 34 ACrimR 268.

[44.3] Complainant / Prosecutrix Failure To Give Evidence

In *The State v Bonny Yaka Benson* (Unrep N1549; 9 & 10, 17 & 18 September 1996) Passingan AJ, sitting alone, stated:

> '*The second issue arises out of the fact that the prosecutrix was not called to give evidence in the trial. The reasons were not disclosed by the State.*
>
> Mr Sakumai for the accused submits that in the absence of the oral testimony of the prosecutrix there is no evidence either of rape or unlawful carnal knowledge, and therefore his client should be acquitted.
>
> In my view, this is an unusual course taken by the State in a rape trial. In the absence of any reason given why the prosecutrix is unable to give evidence and the fact that she is only a child of about 11 years of age, the Court will proceed and deal with the matter as if the prosecutrix was found unfit to take the oath or affirmation. That even if she was present, because of her age she could not or would not speak.
>
> I adopt the case of *The State v Sugueri Sipi* [1987] PNGLR 357.' (emphasis added)

The defendant was found guilty of rape.

In *The State v Sugueri Sipi* [1987] PNGLR 357 the Court considered a case which involved the complainant, an eight year old child who did *not* give evidence.

Brown AJ, sitting alone, stated at page 360:

> '[…I]t seems to me that the mother's evidence, which I have accepted, and which describes the positions in which she saw her daughter and the accused when naked and when the accused had an erection, really leaves open no other inference than that he was about to engage in some form of carnal knowledge of the girl.'

His Honour's ruling in respect of corroboration should be examined in light of the cases previously quoted commencing on page **668**.

In *R v Ugle* (1989) 167 CLR 647; (1989) 88 ALR 518; (1989) 43 ACrimR 446 the High Court of Australia stated at page 447:

> '[E]vidence of [fresh] complaint goes merely to the credit of the complainant and *it follows that such evidence is not admissible unless there is evidence from the complainant:* see *Kilby*, per Menzies J (at 474). See also *Sparks* [1964] AC 964 at 979; *Whitehorn* (1983) 152 CLR 657; 9 ACrimR 107, per Murphy J (at 661; 109) and per Deane J (at 666 – 667; 112 – 113).' (emphasis added) [words in brackets added]

Refer also to the law relating to:

- the '*Prosecution's Discretion To Call Witnesses*' commencing on page **120**; and
- the '*Evidence of Young Complainants*' commencing on page **699**.

[44.4] Evidence Of Sexual Relationship

[44.4.1] Introduction

In *R v Krausz* (1973) 57 CrAppR 466 [[1973] CrimLR 581] Stephenson LJ, delivering the judgment of the Court, stated at page 472:

> 'It is settled law that she who complains of rape or attempted rape can be cross – examined about (1) her general reputation and moral character; (2) sexual intercourse between herself and the defendant on other occasions, and (3) sexual intercourse between herself and other men; and that evidence can be called to contradict her on (1) and (2) but that no evidence can be called to contradict her denials of (3) […].'

[44.4.2] With Defendant

The following is a summary of the principles examined in this subsection:

- A complainant *may* be cross-examined as regards his/her sexual relationship with the defendant, prior to and after the commission of the offence/s charged;
- The evidence of a sexual relationship:
  - ♦ may make the complainant's allegation more credible;
  - ♦ can place the offence/s charged in a true and realistic context; and
  - ♦ can establish the defendant's 'guilty' passion, ie, sexual feeling, for the complainant;
- The weight to be afforded to the evidence of *subsequent* sexual activity will be *less* than that to be afforded to *prior* sexual activity;
- The remoteness, ie, the length of period before and after the dates of the alleged offence/s, will determine the weight to be given to such evidence;
- As regards sexual activity which has taken place over a long period of time the prosecution should charge the defendant with a number of 'representative' incidents which sufficiently reflect the total criminality involved, spread over the whole of the period in question; and
- The evidence of sexual activity does *not* amount to '*similar fact or propensity evidence*' if it is *not* sought to be admitted to show the propensity, ie., tendency, of the defendant to commit the offences charged, but simply to show the sexual relationship between the parties involved.

In *R v Massey* [1997] 1 QdR 404 McPherson JA and Demack J of the Court of Appeal, in a single judgement, stated at pages 407 – 411:

> '*There is authority that on a charge of an offence of a sexual character, it is open to the prosecution to lead evidence of prior sexual acts between the same parties.* The leading decision is *R v Ball* [1911] AC 47 (a case of incest), which has been followed in Australia on

many subsequent occasions. See *R v Gellin* (1913) 13 SR(NSW) 271; *R v Allen* [1937] StRQd 32; *R v Witham* [1962] QdR 49; *Bradley* (1989) 41 ACrimR 297; *R v Sakail* [1993] 1 QdR 312. The basis for admitting evidence of similar acts on occasions other than that or those specifically charged has been variously stated. In *R v Ball* [1911] AC 47 at 71, Lord Loreburn LC said it was admissible to establish "a guilty passion towards each other". That explanation was adopted in some of the later cases: see, for example, *R v Witham* [1962] QdR 49, at 77. *R v Ball* was a case of incest between brother and sister, where evidence of a mutual sexual passion might be thought to go far to proving an offence of that kind. On occasions it has been rationalised as tending to show the existence of an unnatural or unexpected relationship of sexual intimacy, as in the case of incest and sodomy between father and daughter: *R v Witham*, at 81.

In the same case, Stable J, concluded that the true basis of admission is that the evidence forms "part of a chain of relevant circumstances explaining the prisoner's conduct and the exclusion of which would render the other evidence unintelligible or make it impossible for the jury to obtain a proper appreciation of the events of a particular day" (*R v Witham* [1962] QdR 49, at 82).

[…]

The notion that evidence of similar acts, facts or events on other occasions is admitted to explain and lend verisimilitude to what would or might otherwise appear in the complainant's evidence as an isolated and possibly incredible incident also enjoys the high authority of Willes J in *R v Rearden* (1864) 4 F & F 76, at 80; 176 ER 473, at 476, where that learned judge said:

"It has repeatedly appeared to me in cases of this sort, that the man, by a threat of violence, deters the child from complaining, and thus acquires a species of influence over her by terror which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction, which makes such evidence properly admissible."

[…]

[I]t is clear that evidence of similar acts and transactions is admissible as tending to the proof of the offence charged. Where the evidence of one or more of those acts is confirmed by independent evidence, it is also capable of corroborating the testimony of the complainant with respect to the particular incident or occasion that is charged as the offence. […]

[…]

The authorities make no distinction between similar acts taking place before, and those taking place after, the act charged. R v Rearden is a case in point. On a charge of raping a 10 year old child on a Thursday, Willes J admitted evidence that the accused had also had sexual intercourse with the child again on the following Saturday and Monday. In *R v TJW Ex parte Attorney – General* [1988] 2 QdR 456, the Court of Criminal Appeal, on a reference under section 669A of the *Criminal Code*, held that the decision in *R v Witham*, that evidence of acts of indecency by an accused person upon a complainant "before and after" the alleged sexual offence was admissible, had not been overruled by later decisions. The specific point raised here, which is whether corroborated evidence of an act of indecency or sexual misconduct on another occasion is capable also of corroborating evidence of the complainant about similar acts on an earlier occasion or occasions, has been considered in Australia on at least two occasions. In *R v McCann* [1972] TasSR (NC) 3, on a charge of defiling a girl under 18, there was evidence of an admission by the accused of sexual intercourse with the

girl on dates subsequent to those charged. Crawford J overruled an objection that the admission was incapable of corroborating any particular act of intercourse. […]

The second decision of relevance is of the Court of Criminal Appeal in *R v Sakail* [1993] 1 QdR 312. [… Macrossan CJ, with whose reasons Ryan and Byrne JJ concurred, stated at page 316:]

"A particular application of the principle is to be seen when someone is accused of committing sexual offences with a single complainant. Circumstances which place the sexual side of the two persons' relationship in perspective may be admitted in evidence. Proof of similar activity or of activity of a related kind both before and after the specific acts charged may be given as showing the relationship between the two persons (in some contexts referred to as 'the guilty passion'). This evidence may be given because, when known, it can be persuasive that the act charged actually occurred and it can do this directly by making the allegations seem more likely or (if, indeed, this is a difference) by providing a helpful context for decision upon the matter."

His Honour added (at 317) that the appellant's admission of sexual intercourse in that instance "may be regarded as circumstantial evidence in proof of the matters charged"; and the circumstantial evidence can constitute corroboration". The evidence of the appellant's admission, his Honour said:

"… was capable of constituting corroboration because it could be regarded as supporting the Crown proof, and, in contrast with the substance of his Honour's direction, it should be said that it supported proof of both charges and not just, at the most, one of them."

With respect, his Honour's reasoning, supported as it is by the authorities he cites some of which have been referred to here, is persuasive and disposes of the present ground of appeal. […]

[…]

The second point concerns the lapse of time between the offences charged in counts 1, 2 and 4 and the date or occasion of the offence charged in count 5. In *R v Sakail* [1993] 1 QdR 312 at 319, Macrossan CJ sounded a caution concerning an admission by a person, who was accused of rape, to the effect that he had been involved with the complainant "many years before" and had forced her to have sexual intercourse with him, "but had not seen her nor had any contact with her for the last ten years …". His Honour said that an instance like that might be regarded as showing nothing about the relationship between the two at a relevant time, and as being not reasonably capable of demonstrating on a circumstantial basis anything touching the likelihood of the occurrence of the matter charged. […] In *McConville v Bayley* (1914) 17 CLR 509, at 512, Griffith CJ said that " … when it is a question of innocence or guilt as to the relations between a man and a woman who are not married, the whole history of the relationship is necessarily involved". To apply that observation without qualification to criminal proceedings may go too far […].' (emphasis added)

In *Beserick* (1993) 66 ACrimR 419 Hunt CJ at CL, with whom the other members of the New South Wales Court of Criminal Appeal concurred, stated at pages 422, 423 & 428 – 430:

'The evidence [of sexual activity between the complainant and the accused other than that which is the subject of the charge] is admissible, first, in order to establish a sexual relationship which makes the complainant's allegation more likely to be true. The "guilty passion" of the adult for the child which such conduct shows may well make more credible the complainant's evidence that the sexual activity took place upon the particular occasion which is the subject of the offence charged was in fact committed: *Martin v Osborne* (1936) 55 CLR 367 at 376 (Dixon J); *Harriman* (1989) 167 CLR 590 at 631; 43 ACrimR 221 at 251 (McHugh J); *B* [(1992) 175 CLR 599] (at 602, 609, 610 – 611, 618; 227, 232, 233, 239 – 240). *Secondly,* the evidence is admissible in order to place the evidence of the offence charged into a true and realistic context, in order to assist the jury to appreciate the full significance of what would otherwise appear to be an isolated act occurring without any apparent reason. […] *Such evidence provides the key to an assessment of the relationship between them, and, as such, constitutes part of the essential background against which the evidence of the complainant and the version of the accused necessarily falls to be evaluated: B* (at 610; 223); see also at 603, 604 – 605; 227, 228 – 229.

Evidence of a sexual relationship between the complainant and the accused other than that which is the subject of the charge is nevertheless frequently of a highly prejudicial nature, in that it tends to show a propensity on the part of the accused to commit crimes of the nature charged or crimes of a similar nature. Its admissibility has therefore always been subject to the well-known discretion in criminal trials to exclude evidence where its probative value is outweighed by its prejudicial effect […].

[…]

A guilty passion, or sexual desire or feeling, is a state of mind. The state of a person's mind – whether the nature of that state of mind be knowledge, intention, malice, guilty passion or whatever – is as much a fact is as that person's state of digestion […].

So far as its *relevance* to the issue of the existence of a guilty passion at the time of the offence is concerned, […], there is hardly any limit as to the time when the other sexual activity between the complainant and the accused may have occurred. But its *admissibility* is a different matter. That is because of the two balancing operations which the judge must undertake in relation to such evidence, to which I referred earlier. The probative value of that evidence of other sexual activity must outweigh any distress, humiliation or embarrassment which the complainant might suffer as a result of its admission. And its probative value must also outweigh the prejudicial effect which the evidence may have of demonstrating a propensity on the part of the accused to commit the crimes of the nature charged or crimes of a similar nature.

[R]emoteness of the other sexual activity from the time of the offence charged goes to the weight of that evidence. The more remote the other sexual activity is, the less will be its weight; and, in general (as a matter of commonsense), the weight to be afforded to subsequent sexual activity will be less than that to be afforded to previous sexual activity.

So far as concerns the second of the balancing operations (the discretion to reject the evidence upon the basis that its probative weight is outweighed by its prejudicial effect), the stage will inevitably be reached where the evidence of other sexual activity between the complainant and the accused will no longer *reasonably* be required either to establish the guilty passion (or the sexual desire or feelings) of the accused for the complainant or to place the evidence of the offence charged into a true and realistic context, and it does little or no more than emphasise that the accused has a propensity for committing crimes of the nature charged or crimes of a similar nature. When that stage has been reached, trial judges should be firm in excluding the evidence tendered.

In *TJW; Ex parte A-G* [1988] 2 QdR 456, […], Thomas J said (at 457):

"… I do not think that it has ever been doubted that in cases involving sexual activity between two persons the whole history of their sexual activity may be relevant."

I fear that that passage has sometimes been taken too literally by some judges. In *Bradley* (1989) 41 ACrimR 297, Thomas J himself made it clear (at 298) that the evidence to which he had been referring is:

"… subject to the discretionary control by the trial judge, and that such evidence should be received only to such extent as is necessary for the fair conduct of the particular trial."

[…]

Obviously enough, no hard and fast rules could be laid down as to how this difficult discretion should be exercised. To some extent, it may depend upon the nature of the issues raised by the accused. Usually, however, it will depend to a very large extent upon how the Crown has framed its case.

Where the sexual activity between the complainant and the accused has taken place over a long period, it is the usual practice of the Crown to charge the accused in relation to a number of "representative" incidents which sufficiently reflect the total criminality involved, spread over the whole of that period. Provided that each such incident is sufficiently specified […], there could be little doubt that in most cases the whole of the sexual activity between them over that period would quite properly be admitted in order both to establish the desire or feelings of the accused for the complainant at the time of each incident giving rise to an offence charged and to place such incident into its true and realistic context. Once evidence is given that the accused has committed a number of offences charged, the *additional* prejudice created by evidence showing that he has committed other offences as well will be much the same whether those other offences be few or many in number. […]

On the other hand, where the Crown does not follow that usual practice (as happened here), and only one offence is charged, the limits upon the proper admission of such evidence must inevitably be greater. […]

[…] *In general, the weight to be afforded to subsequent sexual activity will be less than that afforded to previous sexual activity, hence the proper exercise of discretion will more readily favour the admission of evidence of the previous rather than subsequent kind.'* (emphasis added)

Such evidence is *not* to be considered as '*similar fact or propensity evidence*' *if* it is *not* sought to be admitted to show the propensity, ie., tendency, of the defendant to commit the offences charged, but simply to show the relationship between the parties involved, see *S v R* (1989) 64 ALJR 126, per Toohey J at page 132; *R v Sakail* [1993] 1 QdR 312, per Macrossan CJ at page 316 & *Beserick* (1993) 66 ACrimR 419, per Hunt CJ at CL at page 426.

See also: *J* (1996) 88 ACrimR 399; *Mason v R* (1995) 15 WAR 165 at page 185 & *R v B* [1989] 2 QdR 343.

The law relating to:

- '*Similar Fact Or Propensity Evidence*' is examined on page **188**; and
- '*Joinder Of Charges*' is examined commencing on page **91**.

See also an article by McGuire J on '*Child Sexual Offences – Joinder Of Charges and Similar Facts*' (1995) 15 QLR 181.

[44.4.3] With Other Persons

In *R v Gregory* (1983) 151 CLR 566 the High Court of Australia stated at page 571:

> '*The statement that evidence that the complainant on a charge of rape consented to sexual intercourse with a man other than the accused is not relevant to the question whether she consented to intercourse with the accused, although correct in most cases, is not universally true. Usually, evidence as to the sexual experience of the complainant with other men could, at most, go to her credit,* and if she has been cross-examined on the subject her answers must be accepted, in accordance with the general principle that a party may not impeach the credit of his opponent's witness by calling witnesses to contradict him or her on irrelevant matters.
>
> *In some cases, however, the other acts of consensual intercourse may be so closely connected with the alleged rape, either in time and place, or by other circumstances, that evidence as to those other acts may be relevant to the issues at the trial;* in those circumstances the evidence may not go solely to credit but may be probative of the fact that the complainant consented to have intercourse with the accused, or of the fact that the accused believed that the complainant was consenting. If evidence of this kind is relevant to an issue in the case, and not merely to credit, there is no rule of law that excludes it. The submission that there is some special rule of exclusion applicable to evidence of this kind is misconceived; the evidence of other sexual experience is excluded because, and only when, it is logically irrelevant to a fact in issue." ' (emphasis added)

See also: *R v Voila* [1982] 1 WLR 1138; [1982] 3 AllER 73; (1982) 75 CrAppR 125 & *R v Bashir & Manzur* (1970) 54 CrAppR 1.

[44.5] Closed Court

Section 10 of the *Constitution* states (in part):

> '(9) *Except with the agreement of all the parties thereto*, all proceedings of every court […], including the announcement of the decision of the court […], *shall* be held in public.
>
> (10) *Nothing in the preceding subsection* shall prevent the court or other adjudicating authority from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court or other authority --

(a) may by law be empowered so to do and may consider necessary or expedient in circumstances *where publicity would prejudice the interests of justice* or in interlocutory proceedings *or in the interests of decency, public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings*; or

(b) may by law be empowered or required so to do in the *interests of defence, public safety or public order*.' (emphasis added)

Section 64 of the *Criminal Procedure Code* (Ch. 7) states:

'The place in which any criminal court is held for the purpose of inquiring into or trying any offence shall be deemed an *open court* to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of the inquiry into or trial of any particular case that the public generally or any particular person shall not have access to or be or remain in the room or building used by the court.' (emphasis added)

During the course of a complainant / prosecutrix giving evidence the Court should *not* be open to the public.

The law relating to '*Right To Be Heard In Open Court*' is examined commencing on page **155**.

Refer also to the law relating to the '*Erection Of Screens*' which is examined commencing on page **701**.

[44.6] Young Complainants

[44.6.1] Introduction

In *The State v Stuart Hamilton Merriam* [1994] PNGLR 104 Sakora J, sitting alone, commented on page 111:

'Those who commit sexual offences against children (almost always males) are usually referred to in other jurisdictions as "paedophiles".

It should, therefore, come as no surprise that a large number of sexual offences against children are committed by those who are in a position of tutelage and / or trust.'

In *The State v John Saganu* [1994] PNGLR 308 Doherty J, sitting alone, stated at page 309:

'Children are more susceptible to suggestion, they have shorter memory recall and more vivid imaginations than adults. Care should be taken with their evidence but if court seeing the witness before it considers and finds he is speaking nothing but the truth than the court is entitled to accept it.'

In *R v G* [1994] 1 QdR 540 Pincus JA, as a member of the Court of Appeal, made the following observation at pages 546 – 547:

> 'It seems fairly common for young complainants, speaking of sexual abuse, to give inconsistent or confusing accounts; more generally, ordinary experience of young children suggests that some have difficulty attributing numbers and dates to events and getting sequences right.'

As to the undesirability of calling complainants to give evidence who are five years of age, see *R v Wallwork* (1958) 42 CrAppR 153 at page 161.

The law relating to the '*Competence Of Children To Give Evidence*' is examined commencing on page **284**.

[44.6.2] Need For Corroboration

The law relating to need for corroboration of the evidence of children was examined in *R v Morgan* [1978] 1 WLR 735 Roskill LJ stated at pages 738 – 739:

> 'The relevant law was stated by Lord Goddard CJ in *Reg.v Campbell* [1956] 2 QB 432, a decision affirmed in this respect by the House of Lords in *Reg. v Hester* [1973] AC 296. I need not read one passage from the speech of Lord Morris of Borth – y – Gest in *Reg. v Hester* -- although other parts of the decision in *Reg. v Campbell* were later criticised in Reg. v Kilbourne [1973] AC 729, this part was expressly approved in *Reg. v Hester* [1973] AC 296, 314:
>
> "Though in *Campbell's* case [1956] 2 QB 432 the court was dealing with a case where only sworn evidence was given, it was expressly stated that the court was endeavouring to deal comprehensively with the evidence of children. At the end of the judgment, at p. 438, Lord Goddard CJ summed up the conclusions of the court. They may be stated as follows: (a) The unsworn evidence of a child must be corroborated by sworn evidence; if, then the only evidence implicating the accused is that of unsworn children the judge must stop the case." […] "(b) It makes no difference whether the child's evidence relates to an assault on himself or herself or to any other charge, for example, where an unsworn child says that he saw the accused person steal an article." […] "(c) The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls though they may do so if convinced that the witness is telling the truth. (d) Such warning should also be given where a young boy or girl is called to corroborate the evidence either of another child whether sworn or unsworn or of an adult. …".'

In *R v C B R* [1992] 1 QdR 637 de Jersey J, with whom the other members of the Court of Criminal Appeal concurred, stated at page 639:

> 'It has generally been recognised that a trial judge should warn a jury about the danger of convicting on the uncorroborated evidence of a child. In *Director of Public Prosecutions v Hester* [1973] AC 296, 325 Lord Diplock said that that was because "children … are yet so young that their comprehension of events and of questions put them or their own powers of expression may be imperfect".'

In *B & D* (1993) 66 ACrimR 192 King CJ of the South Australian Court of Criminal Appeal, with whom Duggan J concurred, held at page 194:

> *'The relevant rule of practice requires that where the witness is a young child, the jury should be warned that it is dangerous to convict on the uncorroborated testimony of the child: B* (1992) 175 CLR 599; 63 ACrimR 225, per Dawson and Gaudron JJ (at 616; 238).
>
> *There is no fixed age below which the particular warning should be given and whether the warning should be given in a particular case is a matter for the decision of the trial judge: B* (at 617; 238). The decision of the trial judge is of course reviewable on appeal. A review of the cases indicates that, while *some flexibility has been allowed in the case of older children,* appellate courts have insisted upon the corroboration warning being given in relation to the evidence of younger children.
>
> […]
>
> *I think that the age of the child at the time of giving evidence is the predominant consideration in determining whether a corroboration warning should be given.* The reasons commonly given for the warning, namely susceptibility of children to influence by adults, the tendency to confuse fantasy with fact and youthful irresponsibility, are all directed to the degree of maturity existing at the time of giving evidence.
>
> *It is clear, however, that the judge is entitled to take into account the age of the child at the time of the alleged offence: B* (at 617; 238). *I think too that a relevant consideration is the age of the child at the time of making the first complaint.* Once a false complaint is made a witness tends to be locked into the situation created by the making of the false complaint and may persist with it even though with greater maturity making the complaint is regretted.' (emphasis added)

The Court should specify what evidence it is relying on as corroborative evidence, see *R v Goddard & Goddard* (1962) 46 CrAppR 456.

However, the degree of evidence of corroboration is no greater for children than adults, see *R v Dossi* (1918) 13 CrAppR 158 at pages 160 – 161.

See also: *R v Sawyer* (1959) 43 CrAppR 187; *R v Hatton* (1925) 19 CrAppR 29; [1925] 2 KB 322 & *The State v Kewa Kai* [1976] PNGLR 481 at page 482.

[44.6.3] Erection Of Screens

In *DJX, SCY & GCZ* (1990) 91 CrAppR 36 the Lord Lane CJ, delivering the judgment of the Court of Appeal, held at pages 39 – 41:

> 'It had become apparent from experience that children in cases such as this, not surprisingly, were shown to be reluctant to give evidence at all. Again we are told that there had been cases which had collapsed simply because the child was unwilling or unable to speak as to the facts of which he or she was expected to speak. […]
>
> […]

> […] The Common Serjeant, who was the judge, had taken the precaution of having erected in the court this particular screen, so that counsel and everybody else could see exactly what it was which was entailed. The Common Serjeant, having assembled the court, explained what the situation was, saying that the purpose of have the screen there "is to obscure and indeed prevent the child seeing, or the children who will give evidence, from seeing anyone in the dock in case they might be influenced one way or the other by them, and counsel can plainly see the child, the jury can see the child and I personally can see no objection to that procedure. Do any defence counsel wish to address me?" Defence counsel did. They opposed the idea and submitted that it would not be proper to have the screen in position as was suggested.
>
> […]
>
> The principal ground of the complaint is that it was an unfair and prejudicial act to erect the screen, the suggestion being that the jury might have been unduly influenced, unfairly prejudiced against the defendants by seeing the screen there, and the jury might think that there was a suggestion that the person in the dock had already in some way intimidated the child who was going to give evidence. That would act in a prejudicial way to the defendant in the trial.
>
> The learned judge has the duty on this and on all other occasions of endeavouring to see that justice is done. Those are high sounding words. What it really means is, he has got to see that the system operates fairly: fairly not only to the defendants but also to the prosecution and also to the witnesses. Sometimes he has to make decisions as to where the balance of fairness lies. He came to the conclusion that in these circumstances the necessity of trying to ensure that these children would be able to give evidence outweighed any possible prejudice to the defendants by the erection of the screen.
>
> This Court agrees with him in that view. […]
>
> We have been referred to an earlier decision, the case of *Smellie* (1919) 14 CrAppR 128, in which the appellant's daughter, a young girl, was called to give evidence. The appellant was compelled by the warder by order of the Court to sit on the stairs leading out of the dock out of sight of the little girl when she gave evidence. The Court held that that was a perfectly proper procedure.
>
> We take the view that we do not need authority to confirm us in the view that what the learned judge did in his discretion was a perfectly proper, and indeed a laudable attempt to see that this was a fair trial: fair to all, the defendants, the Crown and indeed the witnesses. That ground of appeal fails.'

[44.7] Proof Of Age

The evidence of the complainant as to his/her age may be sufficient, see *R v Turner* [1910] 1 KB 346 [[(1910) 3 CrAppR 103] at page 362.

If a birth certificate is sought to be tendered there *must* be evidence proving the name of the person on the certificate, see *R v Rogers* [1914] 10 CrAppR 276 at page 278.

In *R v Patrick Billy Kaika Ulio* (Unrep. Criminal Case No. 51 of 1974) Bodilly CJ stated at pages 2 – 3:

> 'There remains the question of the age of Helen Mary at the time of the incident. Mr. Vooght argues that age must be strictly proved and he says that in this case there must be doubt as to the age of Helen Mary because the doctor estimates it as between 12 and 14 years and the mother's memory must be regarded as suspect because she speaks of was probably a baptism certificate. I cannot accept for the purposes of a charge under section 134(1) of the Penal Code that the actual age of a complainant must be strictly proved. All that must be strictly proved is that at the time of alleged offence her age was under 13 years. It is a question of fact to be decided by the court beyond reasonable doubt on the weight of the relevant evidence before it.'

In *R v Raymond Puluhenue* (Unrep. Criminal Case No. 33 of 1991) Muria J stated at pages 2 – 3:

> 'The defence however submitted that there is insufficient evidence to establish that the victim was at the time of the incident a girl under the age of 13 years. Mr. Remobatu submitted that the victim's evidence as to her age cannot be relied upon and it has no value as evidence of her own age. Counsel further argued that, equally the father's evidence of the victim's age cannot be relied on since he failed to produce the record in which he keeps the dates of birth of his children. Further counsel argued that the failure by the father to produce his note book deprived the defence the opportunity to cross – examine as to the authenticity of the entries in that note book. As such, counsel says, the father's evidence must be of little value.
>
> In so far as the victim's evidence regarding her age, I would agree with counsel that such evidence can be of little value but only where the victim has no basis upon which she can reliably ascertain her age. It cannot be said that in all cases the victim's evidence as to her age must be disregarded as having no evidential value. In this case the victim's evidence of her age may well have little weight on its own but I cannot accept that her father's evidence about her age is of little or no value at all. In fact, it is to the contrary.'

See also: *R v David Mani* (Unrep. Criminal Case No. 13 of 1989; Ward CJ); *Olomane v Director of Public Prosecutions* [1990] SILR 114; *The State v Peter Joseph Hayden* [1976] PNGLR 509 at page 510 & *Dwyer v Bridges, Ex parte Bridges, Dwyer v Brough, Ex parte Brough* [1951] StRQd 90 at page 104.

[44.8] Similar Fact Or Propensity Evidence

The law relating to '*Similar Fact Or Propensity Evidence*' is examined commencing on page **188**.

SEXUAL OFFENCES GENERALLY

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RECKLESS OR DANGEROUS DRIVING

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RECKLESS OR DANGEROUS DRIVING

[45.0] Introduction

This chapter will examine the offences of:

[i] '*Causing Death By Reckless Or Dangerous Driving*', as provided for by section 38 of the *Traffic Act* (Ch. 131); and

[ii] '*Reckless Or Dangerous Driving*', as provided for by section 39(1) of the *Traffic Act* (Ch. 131).

For the purpose of consistency the offences under the *Traffic Act* (Ch. 133) should be interpreted

> 'in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith', see section 3 of the *Penal Code* (Ch. 26).

See: *Road Traffic Act* 1960 (UK).

[45.1] Causing Death By Reckless Or Dangerous Driving

[45.1.1] Offence

Section 38 of the *Traffic Act* (Ch. 131) states:

> 'A person who causes the death of another person by the driving of a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be guilty of an offence and liable to imprisonment for five years.'

See: *Road Traffic Act* 1960 (UK), section 1.

[45.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did cause the death of another person namely **[**specify the name of the victim**]** by the driving of a motor vehicle to wit a **[**specify the motor vehicle**]** on a road namely **[**specify the name of the road**] [**recklessly **or (**at a speed **and / or** in a manner**)** which was dangerous to the public**]** having regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the said road by **[**specify the driving of the defendant**]**.'

It is permissible to charge a defendant with 'driving at a speed *and* in a manner dangerous to the public', see *R v Clow* (1963) 47 CrAppR 136.

See also: *R v Wilmot* (1933) 24 CrAppR 63 & *Ben Donga v R* (Unrep. Criminal Appeal Case No. 16 of 1994; Palmer J).

[45.1.3] Elements

A. Defendant

B. Place

C. Date

D. Cause The Death Of Victim

E. Driving

F. Motor Vehicle

G. Road

H. [1] Recklessly; or
[2] [i] At A Speed; or
[ii] In A Manner
Dangerous To The Public

I. Having Regard To All The Circumstances Of The Case Including The Nature, Condition And Use Of The Road, And The Amount Of Traffic Which Is Actually At The Time, Or Which Might Reasonably Be Expected To Be, On The Road

[45.1.4] Related Offence

Section 165 of the *Criminal Procedure Code* (Ch. 7) states:

> 'When a person is charged with manslaughter in connection with the driving of a motor vehicle by him and the court is of the opinion that he is not guilty of that offence, but that he is guilty of an offence under section 39 or section 40 of the Traffic Act he may be convicted of that offence although he was not charged with it.'

As regards the offence of '*Manslaughter*', Lord Roskill in *Government of the United States of America v Jennings & another* (1982) 75 CrAppR 367; [1982] 3 WLR 450 stated at pages 377 & 406 respectively:

> '[… P]rosecuting authorities today would only prosecute for manslaughter in the case of death caused by the reckless driving of a motor vehicle on a road in a very grave case.'

See also: *R v Seymour* (1983) 77 CrAppR 215 at page 219.

[45.1.5] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Causing Death By Reckless Or Dangerous Driving*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of those offences is examined commencing on page **918**, including the '*Disqualification Of Drivers' Licenses'*.

RECKLESS OR DANGEROUS DRIVING

[45.2] Reckless Or Dangerous Driving

[45.2.1] Offence

Section 39(1) of the *Traffic Act* (Ch. 131) states:

> 'If a person drives a motor vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, he shall be guilty of an offence and liable to:
>
> (a) on conviction by the High Court, to a fine of one thousand dollars or to imprisonment for two years or to both such fine and such imprisonment;
>
> (b) on conviction by a Magistrates' Court, to a fine of five hundred dollars or to imprisonment for six months or to both such fine and such imprisonment, or in the case of a second or subsequent conviction to a fine of six hundred dollars or to imprisonment for twelve months or to both such fine and such imprisonment.'

[45.2.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did drive a motor vehicle to wit a **[**specify the motor vehicle**]** on a road namely **[**specify the name of the road**] [**recklessly **or (**at a speed **or** in a manner**)** which was dangerous to the public**]** having regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the said road by **[**specify the driving of the defendant**]**.'

[45.2.3] Elements

A. Defendant

B. Place

C. Date

D. Drive

E. Motor Vehicle

F. Road

G. [1] Recklessly; or
[2] [i] At A Speed; or
[ii] In A Manner
Dangerous To The Public

H. Having Regard To All The Circumstances Of The Case Including The Nature, Condition And Use Of The Road, And The Amount Of Traffic Which Is Actually At The Time, Or Which Might Reasonably Be Expected To Be, On The Road

It is permissible to charge a defendant with 'driving at a speed *and* in a manner dangerous to the public', see *R v Clow* (1963) 47 CrAppR 136.

See also: *R v Wilmot* (1933) 24 CrAppR 63 & *Ben Donga v R* (Unrep. Criminal Appeal Case No. 16 of 1994; Palmer J).

[45.2.4] Jurisdiction

The jurisdiction of the Courts in respect of the offence of '*Reckless Or Dangerous Driving*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of those offences is examined commencing on page **918**, including the '*Disqualification Of Drivers' Licenses'*.

[45.2.5] Related Offences

The following offences are related to the offence of '*Reckless Or Dangerous Driving*':

- '*Careless Or Inconsiderate Driving*', section 40 of the *Traffic Act* (Ch. 133). That offence is examined commencing on page **726**; and
- '*Reckless Or Dangerous Cycling*', section 49 of the *Traffic Act* (Ch. 133).

[45.3] Drive

The term '*Drive*' is defined in section 2 of the *Traffic Act* (Ch. 131) in relation to a motor vehicle as *including*:

> 'the steering of a motor vehicle'.

In *R v McDonagh* [1974] QB 448; [1974] 2 AllER 257 [(1974) 59 CrAppR 55; [1974] 2 WLR 529; [1974] RTR 372; [1974] CrimLR 317] Lord Widgery stated at pages 451 and 258 respectively:

> '[I]n its simplest meaning we think that [… the word 'drive'] refers to a person using the driver's controls for the purpose of directing the movement of the vehicle. It matters not that the vehicle is not moving under its own power, or is being driven by the force of gravity, or even that it is being pushed by other well – wishers. *The essence of driving is the use of the driver's controls in order to direct the movement, however movement is produced*.' (emphasis added) [words in brackets added]

In *Hill v Baxte*r (1957) 42 CrAppR 51 Person J commented at page 60:

> 'In any ordinary case, when once it has been proved that the accused was in the driving seat of a moving car, there is *prima facie* an obvious and irresistible inference that he was driving it.' (emphasis added)

As to the proof of the identity of the driver when two persons are seen to run from the motor vehicle, see *Smith v Mellors & Soar* (1987) 84 CrAppR 279.

See also: *R v Price* (1968) 52 CrAppR 25; *Campbell v Tormey* (1969) 53 CrAppR 99; *Pinner v Everett* [1969] 1 WLR 1266; *R v Jones* (1970) 54 CrAppR 148 at page 152; *McKeon v Ellis* [1987] RTR 26; *Allan v Quinlan, Ex parte Allan* [1987] 1 QdR 213; *Blayney v Knight* (1975) 60 CrAppR 269; *Cooley v Lowe* (1984) 1 MVR 455; *Williams v Urie* (1984) 1 MVR 311; *Tink v Francis* [1983] 2 VR 17; *Bassell v McGuiness* (1981) 29 SASR 508; *Hampton v Martin* [1981] 2 NSWLR 782 at page 796; *Hart v Rankin* [1979] WAR 144; *McNaughton v Garland* [1979] QdR 240 at page 244; *McGrath v Cooper* [1976] VR 518; *R v Clayton* [1973] 2 NZLR 211 & *Caughey v Spacek* [1968] VR 535.

[45.4] Motor Vehicle

The term '*Motor Vehicle*' is defined in section 2 of the *Traffic Act* (Ch. 131) as *meaning*:

> 'any *mechanically propelled vehicle*, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from time to time by regulations under this Act be declared not to be motor vehicles for the purpose of this Act.' (emphasis added)

A vehicle is *not* a '*mechanically propelled vehicle*' *unless* the motor vehicle in question has reached the stage where there is no reasonable prospect of it ever being made mobile again as a mechanically propelled vehicle, then it will remain a mechanically propelled vehicle for its life, see *Binks v Department of the Environment* [1975] RTR 318; *Mc Eachran v Hurst* [1978] RTR 462; [1978] CrimLR 499 & *Reader v Bunyard* (1987) 85 CrAppR 185; [1987] RTR 406; [1987] CrimLR 274.

[45.5] Road

The term '*Road*' is defined in section 2 of the *Traffic Act* (Ch. 131) as *meaning*:

> 'any public road within the meaning of the Roads Act or any Act replacing that Act and *includes* any other road or way, wharf or car park on which vehicles are capable of travelling and to which the public has access, and *includes* a bridge over which a road passes.' (emphasis added)

The term '*Road*' is *not* defined in the *Roads Act* (Ch. 129).

See: *Ling Ainui v Luke Ouki* [1977] PNGLR 11 at page 12; *Clarke v Kato & others* [1997] 1 WLR 208; *Hansen v Appo; Ex parte Appo* [1974] QdR 259 & *O'Mara v Lowe; Ex parte O'Mara* [1971] QWN 34.

[45.6] Recklessly

In *R v Lawrence* (1981) 73 CrAppR 1; [1982] AC 510 [[1981] 1 AllER 974; [1981] 2 WLR 524; [1981] RTR 217; [1981] CrimLR 409] Lord Diplock, with whom Lords Fraser, Roskill & Bridge concurred, held at pages 11 & 526 respectively:

> 'In my view, an appropriate instruction to the jury on what is meant by driving recklessly would be that they must be satisfied of two things: *First, that the defendant was in fact driving the vehicle in such a manner as to create an obvious and serious risk of causing physical injury to some other person who might happen to be using the road or of doing substantial damage to property; and secondly, that in driving in that manner the defendant did so without having given any thought to the possibility of there being any such risk or, having recognised that there was some risk involved had nonetheless gone on to take it*. It is for the jury to decide whether the risk created by the manner in which the vehicle was being driven was both obvious and serious and, in deciding this, they may apply the standard of the ordinary prudent motorist as represented by themselves. ['*Objective Test*'] If satisfied that an obvious and serious risk was created by the manner of the defendant's driving, the jury are entitled to infer that he was in one or other of the states of mind required to constitute the offence and will probably do so; but regard must be given to any explanation he gives as to his state of mind which may displace the inference.' (emphasis added) [words in brackets added]

In *R v Boswell, Elliott, Daley & Rafferty* (1984) 79 CrAppR 277 [[1984] 3 AllER 353; [1984] 1 WLR 1047; [1984] RTR 315; [1984] CrimLR 502] Lord Lane CJ, delivering the judgment of the Court, after referring to the abovementioned statement, stated at page 281:

> 'To be guilty the defendant must have created an obvious and serious risk of injury to person or damage to property and must either have given no thought to the possibility of that obvious risk, or have seen the risk and nevertheless decided to run it, although he had seen it.'

In *R v Clarke* (1990) 91 CrAppR 69 Russell LJ, delivering the judgment of the Court, stated at page 73:

> 'Our understanding of the *Lawrence* direction is as follows. The jury first have to make their findings as to what happened. Once they have done that they ask themselves whether those findings disclose that the vehicle, with the defendant at the wheel, created, adopting reasonable standards, an obvious and serious risk of injury to some other person who might happen to be using the road or of doing substantial damage to property. That is the first limb of the *Lawrence* direction and we are satisfied, contrary to the submissions of Mr. Elias, that it does not involve any consideration of the reason why the defendant was driving so as to create such a risk (save perhaps in those cases where the defendant is not "driving" at all by reason of some physical incapacity, not self – induced, but rendering him incapable of physical control of the vehicle).
>
> […]
>
> If, but only if, the jury answer the first limb in the affirmative, they must then go on to consider the second limb, and it is here in our judgment that the jury may, if they think fit, take into account the effect of drink upon the driver provided always that they are sure that the effect was a real one. The consumption of drink may have so disinhibited the driver that he does not give any thought to the possibility of there being any risk, or he may have taken the risk when he would not have done so had he not been affected by alcohol.
>
> We do not accept that unless and until the consumption of alcohol plays a part in the driving, to the knowledge of the defendant, the jury should eliminate it from their deliberations.'

In *R v Griffiths* (1988) 89 CrAppR 6 Parker LJ, delivering the judgment of the Court, stated at pages 9 – 10:

> 'The result of *R v Lawrence* (*supra*) and the earlier cases is as follows: (1) If the first limb of the test is satisfied and there is nothing more the jury may convict; (2) if the prosecution wish to strengthen the inference which may be drawn from the fact that the first limb is satisfied, or to displace any explanation advanced by the driver, they can do so by any evidence which is admissible; and (3) evidence of alcoholic consumption sufficient to impair control is admissible for this purpose.'

In *R v Crossman* (1986) 82 CrAppR 333 Lord Lane CJ, delivering the judgment of the Court, held at page 336:

> 'The jury could, and no doubt would, have found that the appellant foresaw the high degree of risk that the load would fall off and if it did might injure someone, but nevertheless decided to run that risk. He caused that risk, or put it into operation by driving the vehicle on to the road. He was driving with the knowledge that by doing so, however slowly, however gingerly, however carefully he drove, he was putting other road users at risk of serious injury or death. This seems to us to fall quite clearly as a matter of simple wording under the expression "reckless driving", driving with the knowledge that by moving the vehicle along the road at all, he was running the serious risk of injuring someone. That, in our view, was reckless driving […].'

See also: *R v Woodward* [1995] 2 CrAppR 388 at page 393; *R v Reid* (1990) 91 CrAppR 263; *R v Seymour* [1983] 3 WLR 349; [1983] 2 AllER 1058; [1983] 2 AC 493; [1983] RTR 455; [1983] CrimLR 742; (1983) 77 CrAppR 215; *R v Lamb* (1990) 91 CrAppR 181 & *R v Madigan* (1982) 75 CrAppR 145.

[45.7] Dangerously

In *R v Gosney* (1971) 55 CrAppR 502; [1971] 2 QB 674 [[1971] 3 AllER 220], Megaw LJ, delivering the judgement of the Court of Criminal Appeal, stated at pages 508 & 680 respectively:

> '*In order to justify a conviction there must be, not only a situation which, viewed objectively, was dangerous, but there must also have been some fault on the part of the driver, causing that situation*. 'Fault' certainly does not necessarily involve deliberate misconduct or recklessness or intention to drive in a manner inconsistent with proper standards of driving. Nor does fault necessarily involve moral blame. Thus there is fault if an inexperienced or a naturally poor driver, while straining every nerve to do the right thing, falls below the standard of a competent and careful driver.
>
> *Fault involves a failure, a falling below the care or skill of a competent experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case. A fault in that sense, even though it be slight, even though it be a momentary lapse, even though normally no danger would have arisen from it, is sufficient*. *The fault need not be the sole cause* of the dangerous driving. *It is enough if it is, looked at sensibly, a cause.* Such a fault will often be sufficiently proved as an inference from the very facts of the situation. But if the driver seeks to avoid that inference by proving some special fact, relevant to the question of fault in this sense, he may not be precluded from seeking so to do' (emphasis added)

A momentary disregard of safety precautions or a momentary act of negligence can amount to dangerous driving, see *R v Parker* (1957) 41 CrAppR 134 at page 135.

In *R v Ball & Loughlin* (1966) 50 CrAppR 266 Lord Parker LJ, delivering the judgment of the Court, stated at page 270:

> 'It is, in the opinion of this court, perfectly clear that what is meant by "driving in a manner dangerous" is the manner of the actual driving […]. […] The case of EVANS [(1962) 47 CrAppR 62; [1963] 1 QB 42] now set out quite clearly that the test is a purely objective one and that it matters not why the dangerous situation was caused or the dangerous manoeuvre executed.'

See also: *R v Coventry* (1938) 59 CLR 633; [(1938) 12 ALJ 67] at pages 637 – 639; *Karo Gamoga v The State* [1981] PNGLR 443 at pages 451 – 452 & *R v Webb* [1986] 2 QdR 446.

The defendant *must* have regard *not* only to actual, but also to potential danger, crossroads, bends, etc, see *Durnell v Scott* [1939] 1 AllER 183.

The following are the important considerations in determining whether a defendant was driving 'dangerously':

- The '*test*' to be applied is '*objective*', and *not* '*subjective*';
- Therefore, the opinion of the defendant whether he/she was driving dangerously is *immaterial*;
- *The 'test' to be applied is whether an ordinary or reasonable person would have thought that the defendant was driving dangerously having regard to all the circumstances of the case including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road in question*;
- Driving dangerously may involve causal behaviour *and / or* momentary lapses of attention;
- The danger caused by the driving to the public may be either real *or* potential;
- To drive dangerously *must* involve some 'fault' on the part of the defendant which caused the dangerous situation;
- That '*fault*' of the defendant does *not* need to involve either: [i] deliberate conduct *or* [ii] intentionally driving dangerously; and
- '*Fault*' involves a failure, a falling below the care or skill of a competent experienced driver, in relation to the manner of the driving and to the relevant circumstances of the case.

[45.8] Evidence Of Speed

Excessive speed alone *may* constitute dangerous driving, see *Bracegirdle v Oxley* [1947] KN 349; [1947] 1 AllER 126.

To prove that a defendant drove at a speed dangerous to the public it is necessary for the prosecution to present evidence of a certain speed or range of speeds, either by:

- an observation of the speedometer of the police motor vehicle;
- by an estimation of the speed of the defendant's motor vehicle, see however, section 41(2) of the *Traffic Act* (Ch. 133); or
- an admission by the defendant.

As regards the *accuracy of speedometers* in motor vehicles, it has been held that such technical, if not scientific, instruments are *presumed to function accurately, unless the contrary is shown*, see *Thompson v Kovacs* [1959] ALR 636 & *Peterson v Holmes* [1927] SALR 419.

If it is intended to rely on an estimation of a police officer, the prosecution must lay the basis for such evidence. Refer also to the law relating to '*Opinion Evidence – Lay Persons*' which is examined commencing on page **205**.

Factors which may assist include:

- the types of motor vehicles able to be driven;
- the length of time being the holder of a driver's license; and
- policing experience in the detection of speeding offences.

See also: *Zanker v Modystach* (1990) 54 SASR 183; *Wells v Gill* [1960] SASR 106; *Hogan v Walsh* [1936] SASR 273; *Buckley v Bowes* [1925] VLR 350 & *Kelly v Walsh* [1929] SASR 481.

[45.9] Evidence Of Manner Of Driving

In *R v Ball & Loughlin* (1966) 50 CrAppR 266 Lord Parker LJ, delivering the judgment of the Court, stated at page 270:

> 'It is, in the opinion of this court, perfectly clear that what is meant by "driving in a manner dangerous" is the manner of the actual driving […]. […] The case of EVANS [(1962) 47 CrAppR 62; [1963] 1 QB 42] now set out quite clearly that the test is a purely objective one and that it matters not why the dangerous situation was caused or the dangerous manoeuvre executed.'

Minor traffic infringements do *not* amount to 'dangerous driving', unless there is a danger caused to the public, see *R v Jones* [1978] 3 AllER 1098 [(1978) 67 CrAppR 166] at page 1102.

In *R v Robert Millar (Contractors) Ltd & Robert Millar* (1970) 54 CrAppR 158 Fenton Atkinson LJ, delivering the judgment of the Court, stated at page 165:

> 'In our view, if a driver is sent out by his employer to drive a heavy vehicle, on a trip extending over some hundreds of miles carrying heavy loads with a dangerously defective front off – side tyre, by an employer who knows that the tyre is dangerous, and there is a serious risk of harm resulting to other road – users, then, if that tyre does burst and thereby causes an accident killing somebody, the employer is guilty of counselling and procuring death by dangerous driving. It is no answer to that to say that the driver of the vehicle at the time was said to be doing his best and was steering the vehicle properly, controlling it as well as he could and so on, and that there would have been no accident but for the bursting of the tyre.

> *In our view, a man is driving in a manner dangerous to the public if he drives at some speed on the road a vehicle with a tyre which he knows is dangerous and defective and liable to burst at any moment.*' (emphasis added)

To prove that a defendant drove in a manner dangerous to the public, the prosecution *must* present evidence which outlines the manner in which the defendant drove the motor vehicle, *including*:

- any distance driven on the wrong side of the road;
- whether any pedestrians were forced to take evasive action to avoid the defendant's motor vehicle;
- the speed of the defendant's motor vehicle;
- whether any other vehicles were overtaken in dangerous situations such as on a blind corner;
- any failure to use indicators;
- any failure to use headlamps;
- any disobedience of traffic signs;
- any failure to give 'right of way';
- any intentional collisions with other vehicles or objects;
- any other offence committed under the *Traffic Regulations* (Ch. 131), including defects to the motor vehicle;
- any failure to keep a proper look – out; and
- any potential danger to the public.

Where *actual danger* to the public has been caused the investigating police officer should:

- record the details as soon as possible after the incident; and
- attempt to locate all witnesses and obtain a statement from those persons.

As regards the 'circumstances of the case', evidence should be given regarding:

- the description of the class of road, eg. main street, suburban street, etc.;
- the type of road surface;
- the condition of the road surface;
- whether there were any bisecting roads;
- whether there were any official traffic signs or marking on the road;

- whether there was any street lighting along the route, if applicable;
- the characteristics of the road as to whether it was straight, level, curved, etc.;
- visibility limitations as regards for example, dust, smoke, fog, etc.;
- the weather conditions;
- the speed limit on the road;
- the amount of traffic actually on the road; and
- the amount of traffic reasonably expected to be on the road at the time in question.

A court may however take '*judicial notice*' of a number of those issues. The law relating to '*Judicial Notice*' is examined commencing on page **333**.

A court *may* consider that it would be beneficial to have a '*view*' of the road in question. In *The State v Kevin Daniel Marcellin* (Unrep. N283; 12 December 1980; Papua New Guinea) Narokobi AJ, sitting alone, stated:

> '[H]aving decided that the view is to be limited to seeing the physical condition of the road and the possible location and position of the vehicle at different times, and in the presence of counsel, I see no objection to taking a view of the scene. Furthermore, defence counsel is at liberty to ask any questions on cross – examination relating to the view.'

The law relating to '*View Of Crime Scenes*' is examined commencing on page **335**.

A sketch plan can be an important '*documentary aid*' in assisting the court in determining the guilt of a defendant. However, if it intended to outline the direction travelled by the defendant then the plan should be completed by a witness who made the observation of the driving of the defendant. Otherwise, the plan would be based to some extent on '*hearsay evidence*', see *Frank Norman Hiki v R* (Unrep. Criminal Appeal Case No. 9 of 1979; Davis CJ; at page 2).

The law relating to:

- '*Documentary Aids*' is examined commencing on page **239**; and
- '*Hearsay Evidence*' is examined commencing on page **176**.

[45.10] Evidence Of Alcohol

A defendant should be questioned regarding his/her consumption of alcohol in terms of:

- the *type* of alcohol consumed;
- the *volume* of alcohol consumed;
- the time of the *first drink* of alcohol; *and*
- the time of the *last drink* of alcohol, prior to driving the motor vehicle in question.

In *R v Woodward* [1995] 2 CrAppR 388 Lord Taylor CJ, delivering the judgment of the Court of Appeal, stated at pages 392 – 394:

'The relevance to the offence of evidence that the defendant had taken drink was explained in *McBride* (1961) 45 CrAppR 262, [1962] 2 QB 167. Ashworth J, giving the reserved judgment of the court of five judges said at p. 266 and p. 172 respectively:

"… *if a driver is adversely affected by drink, this fact is a circumstances relevant to the issue whether he was driving dangerously.* Evidence to this effect is of probative value and is admissible in law. In the application of this principle two further points should be noticed. In the first place, the mere fact that the driver had had drink is not of itself relevant: in order to render evidence as to the drink taken by the driver admissible, such evidence must tend to show the amount of drink taken was such as would adversely affect a driver or, alternatively, that the driver was in fact adversely affected. Second, there remains in court an overriding discretion to exclude such evidence if, in the opinion of the Court, its prejudicial effect outweighs its probative value."

That principle was applied in *Thorpe* (1972) 56 CrAppR 293, [1972] 1 WLR 342. At p. 206 and pp. 344, 345, respectively, Lord Widgery, CJ., after quoting the passage cited above, said:

"The principle which is enshrined in that paragraph is quite clearly this. It would be prejudicial and not probative for the prosecution to seek to show merely that the accused had been in a public house on the evening in question or had been seen with a glass of beer in his hand. If evidence of that kind were allowed to be admitted, it might prejudice the mind of the jury and it would have no probative value at all. What this Court was saying in *Mc Bride (supra)* was that such evidence is not admissible unless it goes far enough to show that the quantity of alcohol taken is such that it may have some effect on the way in which the man drives. […]"

Thus, […], there was no doubt that evidence of a substantial quantity of drink taken was admissible on the issue of whether the defendant was driving dangerously. Mc Bride and *Thorpe* have not been overruled.

However, section 50(1) of the Criminal Law Act 1977 substituted a new section 1 in the Road Traffic Act 1972. Causing death by dangerous driving was abolished and the new section 1 contained only the offence of causing death by reckless driving. The recklessness necessary to prove that offence was defined in *R v Lawrence* (1981) 73 CrAppR 1, [1982] AC 510.

Lord Diplock at p. 11 and p. 526 respectively articulated the well – known two – limbed test. […]

[That test is outlined commencing on page **710**.]

In a series of decisions of this Court, evidence that the defendant had been drinking was held to be admissible only in relation to the second limb of Lord Diplock's test, not in relation to the first. [… I]n *Welburn* [(1992) 94 CrAppR 297; [1992] RTR 391], Lord Lane, CJ expressed something less than wholehearted agreement with the authorities he felt bound to follow. He said at p. 300 and p. 394L to 395B respectively:

> "The problem in this case can be stated quite simply and that is this: is the question of drink admissible so far as the first part of Lord Diplock's direction is concerned, or, should it be confined only to the second part of Lord Diplock's analysis? There is a great deal to be said for either point of view. We are told that there is certainly a large body of academic opinion which would favour the applicability of the drink question to part one of the Diplock direction. That may very well be correct academically. But we are concerned with the law as it stands at the moment, and it seems to us that, whatever arguments there may be in the contrary direction, we are bound by a number of decisions which tend to lay down, and in fact do lay down that the problem of drink is not to be regarded under part one of the Diplock direction, but only under part two."
>
> In *Peters* [[1993] RTR 133] this Court held that although *evidence of driving with too much drink does not "of itself" constitute the actus reus of causing death by reckless driving, it may be relevant and therefore admissible to help determine what was the manner of driving where the facts are in issue*.' (emphasis added) [words in brackets added]

See also: *Karo Gamoga v The State* [1981] PNGLR 443 at pages 451.

To prove that the consumption of alcohol did adversely affect a defendant requires evidence from a doctor who can give 'opinion evidence' based on the defendant's admitted consumption of alcohol prior to the time of the alleged offence. Refer also the subsection which examines '*Opinion Evidence – Experts*' commencing on page **202**.

In *R v Newell* (1948) 32 CrAppR 173 Humphreys J, delivering the judgment of the Court, stated at page 180:

> 'Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent expert evidence with the sole desire of assisting the Court.'

See also: *R v Lanfear* [1968] 2 WLR 623; (1968) 52 CrAppR 176; [1968] 2 QB 77; [1968] 1 AllER 683.

A police officer may give '*opinion evidence*' as regards the indicia of the defendant. In *R v Aldridge* (1990) 20 NSWLR 737 the Court held at page 744:

> 'The third ground of appeal complains of admission into evidence of the police officer's opinion that Mrs Ryan was affected by intoxicating liquor at the time when the police were called to her house. Unassisted by authority, and ignoring what has always been permitted in charges of driving under the influence and in personal injury claims, *I would have said that a police officer could give evidence of only the usual indicia upon which an opinion may be founded – smelling of liquor, slurred speech, inability to walk in a straight line, etc – leaving it to the jury (or other tribunal of fact) to draw its own conclusions from their own experience* […].
>
> *The police officer's opinion was therefore admissible, although it should not have been permitted without first obtaining the factual basis for that purpose*.' (emphasis added)

See also: *R v Davies* [1962] 3 AllER 97; [1962] 1 WLR 1111; (1962) 46 CrAppR 292; *Kennedy v Prestwood* (1988) 7 MVR 561; *Himson Mulas v R* [1970 – 71] PNGLR 82 at page 99; *Blackie v Police* [1966] NZLR 910; *Thomas v Snow* [1962] QWN 7; *Warning v O'Sullivan* [1962] SASR 287 at page 289; *R v Kelly* [1958] VR 412; *R v McKimmie* [1957] VR 93 & *R v Whitby* (1957) 74 WN(NSW) 441.

Therefore, for such '*opinion evidence*' to be admissible police officers *must* give the basis of their opinion based on their own experience in dealing with persons affected by liquor both at work and socially.

However, in *Amos v Griffiths* (1987) 5 MVR 430 it was held that an admission by a defendant that he/she had too much alcohol to drink was not an adequate substitute for evidence by a police officer that the defendant was visibly affected by alcohol.

Refer also to the subsection which examines '*Opinion Evidence – Lay Persons*' commencing on page **205**.

Furthermore, the law relating to the admissibility of sobriety tests is examined commencing on page **745**.

[45.11] Cause Death

[45.11.1] Introduction

The fact that a person dies as a consequence of the driving of a motor vehicle does *not* necessarily mean that the driver was driving either recklessly or dangerously. The driver of such a motor vehicle *must* be driving recklessly or dangerously *prior* to the accident.

In *The State v Kevin Daniel Marcellin* (Unrep. N283; 12 December 1980; Papua New Guinea) Narokobi AJ, sitting alone, stated:

> 'Whilst every effort should be made to avoid the temptation to look at death and adduce or infer negligent or dangerous driving, one should not be so cautious that one cannot probe into the quality of driving from the nature of injuries or even death [See *The State v John Koe* [1976] PNGLR 562].'

In *R v Himson Mulas* [1969 – 70] P&NGLR 1 Ollerenshaw J, sitting alone, held at page 5:

> 'The plain questions are: Was the accused person driving a motor vehicle on a road dangerously [or recklessly] that is dangerously [or recklessly] towards the other persons who might reasonably be expected to be on or near the road, and, if he were, did he thereby cause the death of another person?' [words in brackets added]

The reckless or dangerous driving *must* be the *substantial*, although it need *not* have been the sole, cause of the death, see *R v Curphey* (1957) 41 CrAppR 78 at page 80; *R v Gould* (1963) 47 CrAppR 241; *R v Hennigan* [1971] 3 AllER 133; [1971] RTR 305; (1971) 55 CrAppR 262; *The State v Elias Subang* (No. 2) [1976] PNGLR 179 & *The State v Jim Jobaga* Ilivitaro [1977] PNGLR 249.

In *Kuraba Yangesen of Meremanda v The State* [1978] PNGLR 465 the Supreme Court commented at page 468:

> 'That death results as a result of dangerous driving does not alter the quality of the dangerous driving. It only results in a greater maximum sentence. Many dangerous drivers have been caught by police before any harm to them or others was caused at all.'

See also: *The State v Ilivitaro* [1977] PNGLR 249; *The State v Elias Subang (No. 2)* [1976] PNGLR 179; *R v Messulam Wauta* [1973] PNGLR 714 at page 716 & *R v Amos* [1965] QWN 11.

[45.11.2] Points To Prove

In order to prove that a person died as a consequence of reckless or dangerous driving, the prosecution *must* prove the following elements:

- The identity of the deceased;
- That he/she died on a certain date. As regards '*Limitation As To Time Of Death*' section 209 of the *Penal Code* (Ch. 26) states (in part):

  > 'A person is *not* deemed to have killed another if the death of that person does not take place within a year and a day of the cause of death.' (emphasis added)

  That section is examined commencing on page **620**.
- That he/she died from certain injuries;
- That the injuries were suffered as a consequence of the alleged reckless or dangerous driving; and
- That the reckless or dangerous driving was a substantial, *not* necessarily sole substantial, cause of the death.

[45.12] Defences

[45.12.1] Introduction

The onus is on the defendant to '*fairly raise*' the following defences. Upon being fairly raised the onus is on the prosecution to negative such defences '*beyond reasonable doubt*'.

Refer also the chapter which examines '*Proof Of Issues*' commencing on page **68**.

[45.12.2] Extraordinary Emergency

As to whether this defence is available reference should be made to section **[21.0]** commencing on page **428**.

In *R v Spurge* (1961) 44 CrAppR 191 [[1961] 2 QB 205; [1961] 3 WLR 23; [1961] 2 AllER 88] Salmon LJ, delivering the judgment of the Court, held at page 197:

> 'This court desires to emphasise that cases in which a mechanical defect can successfully be relied upon as a defence to a charge of dangerous driving must be rare indeed. *This defence has no application where the defect is known to the driver or should have been discovered by him had he exercised reasonable prudence. To drive a motor - car in such circumstances is manifestly dangerous. The essence of the defence is that the danger has been created by a sudden total loss of control in no way due to any fault on the part of the driver*.' (emphasis added)

In *Migi Barton v The State* (Unrep. SC 213(M); 24 November 1981; Papua New Guinea) Kearney DepCJ and Bredmeyer J, with whom Miles J concurred, stated:

> 'In *Smith v R* [[1976] WAR 97] it was stated, adopting and following *R v Spurge* [(1961) 2 QB 205] and *R v Gosney* [1971] 3 AllER 220]:
>
> "But the offence is not an absolute one; there must be some fault on the part of the driver; accordingly if, for example, a sudden emergency arises from a defect in the vehicle of which the driver was not aware, or from illness or accident of the driver, or from the act of another person, which results in the vehicle being driven with actual or potential danger to the public, then the driver may properly be held not to have been guilty of the offence of dangerous driving."
>
> […]
>
> The grabbing of the wheel by the front seat passenger Clara, which made the driving dangerous, constituted the type of "sudden emergency" mentioned in *Smith v R* (supra); on the facts in this case it was an action which no ordinary man would have anticipated or been ready to deal with. The fault principle applies; full allowance must be made for the appellant's predicament; on the facts as proved in evidence the appellant had to be given the benefit of the doubt that an ordinary person possessing ordinary power of self – control and driving competence and experience could not reasonably have been expected to have acted other than as the appellant, who should accordingly have been acquitted.'

In *Haynes v Swain* [1975] RTR 40 the Court held that if it has been found that the defendant knew or ought to have known of the mechanical defect, he/she *cannot* avail himself/herself of the defence even if the motor vehicle has been subsequently serviced by a garage.

See also: *R v Pius Piane* [1975] PNGLR 52 & *The State v Dela Tami of Yambo* [1977] PNGLR 57.

In *Police v Robertson* (1946) 41 MCR 1 the Court held that while a driver of a motor vehicle whose vision of the road ahead is seriously affected by anything such as a dazzle, glare or fog that person is under a definite obligation to take all steps necessary to avoid a collision with other persons or objects lawfully on the road even though this may involve stopping altogether; the standard of care to be exercised may well vary according to the time and the locality.

To negate a possible defence of sudden sun blindness, evidence should be given as to how the vision of a driver would have been affected along the route when the motor vehicle was being driven recklessly or dangerously. Questions similar to the following should also be asked:

- When and for what distance were you blinded by the sun?;

- On previous occasions have you encountered similar problems on that particular stretch of road?;
- What steps were necessary on prior occasions?;
- Could you see any traffic approaching prior to being blinded by the sun?;
- Did you reduce speed or try to stop?;
- Were you wearing sunglasses?; and
- What was the condition of the windscreen?

See also: *Simpson v Peat* [1952] 2 QB 24; [1952] 1 WLR 469; [1952] 1 AllER 447.

[45.12.3] Intention

Section 9 of the *Penal Code* (Ch. 26) states (in part):

> 'Subject to the express provisions of this Code relating to *negligent acts and omissions*, a person is *not* criminally responsible for *an act or omission which occurs independently of the exercise of his will* […].' (emphasis added)

See also: section 3 of that *Code*.

An act or omission that occurs involuntary and unintentionally, and therefore, independently of the exercise of the will of a defendant, is an act or omission done in a state of '*automatism*'. It appears to be roughly equivalent to what a layman might call a 'blackout'.

In *Broome v Perkins* (1987) 85 CrAppR 321 the defendant was charged with '*Driving Without Due Care And Attention*' and he raised the defence of '*Automatism*'.

Gildewell J, delivering the judgment of the Queens Bench Divisional Court held at page 332:

> 'The question which is posed in the case can be rephrased to ask: "On the evidence, could the justices properly conclude that the defendant was not conscious of what he was doing and that his actions were involuntary and automatic throughout the whole of the five mile journey over which the erratic driving was observed?" If, during a part or parts of that journey, they were satisfied that his actions were voluntary and not automatic, at those times he was driving and clearly the way in which he was driving was such that they should properly have convicted him of driving without due care and attention.
>
> When driving a motor vehicle, the driver's conscious mind receives signals from his eyes and ears, decides on the appropriate course of action as a result of those signals, and gives directions to the limbs to control the vehicle. When a person's actions are involuntary and automatic his mind is not controlling or directing his limbs.'

That test applies equally to the charges of:

[i] '*Causing Death By Reckless Or Dangerous Driving*', as provided for by section 38 of the *Traffic Act* (Ch. 131); and

[ii] '*Reckless Or Dangerous Driving*' as provided for by section 39(1) of the *Traffic Act* (Ch. 131).

In *R v Stubbles* [1959] CrimLR 660 the Court held that the defence of '*automatism*' is only available if the driver was suddenly and unexpectedly deprived of all thought and that such state was not connected with any deliberate acts or conduct on his/her part and arose from a cause which a reasonable person would have no reason to think and the driver did not anticipate, would occur.

In *Cooper v McKenna* [1960] QdR 406 the Court held that post – traumatic '*automatism*' can amount to a defence in a dangerous driving charge, but it is a defence which must be closely scrutinised. That Court also stated that 'blackout' is one of the first refuges of a guilty conscience and a popular excuse.

See also: *Hill v Baxter* [1958] 1 AllER 193; (1957) 42 CrAppR 51; [1958] 1 QB 277; [1958] 2 WLR 76; *R v Atkinson* (1970) 55 CrAppR 1; *Jeminez v R* (1992) 66 ALJR 292 & *R v Carter* [1959] VLR 105.

The law relating to the defence of '*Intention Or Accident*' is examined commencing on page **434**.

[45.13] Parties To Offences

In *R v Robert Millar (Contractors) Ltd & Robert Millar* (1970) 54 CrAppR 158 Fenton Atkinson LJ, delivering the judgment of the Court, stated at page 165:

> 'In our view, if a driver is sent out by his employer to drive a heavy vehicle, on a trip extending over some hundreds of miles carrying heavy loads with a dangerously defective front off – side tyre, by an employer who knows that the tyre is dangerous, and there is a serious risk of harm resulting to other road – users, then, if that tyre does burst and thereby causes an accident killing somebody, the employer is guilty of counselling and procuring death by dangerous driving. It is no answer to that to say that the driver of the vehicle at the time was said to be doing his best and was steering the vehicle properly, controlling it as well as he could and so on, and that there would have been no accident but for the bursting of the tyre. *In our view, a man is driving in a manner dangerous to the public if he drives at some speed on the road a vehicle with a tyre which he knows is dangerous and defective and liable to burst at any moment.*' (emphasis added)

The law relating to '*Parties To Offences Generally*' is examined commencing on page **406**.

[45.14] Alternative Charges Or Convictions

[45.14.1] Causing Death By Reckless Or Dangerous Driving

Section 39(2) of the *Traffic Act* (Ch. 131) states:

> 'If upon the trial of a person for an offence against section 38 ['*Causing Death By Reckless Or Dangerous Driving*'] of the court is *not* satisfied that he driving was the cause of the death but is satisfied that he is guilty of driving as mentioned in subsection (1) [of section 39 of the *Penal Code* (Ch. 26)], it shall be lawful for the court to convict him of an offence under this section, [to wit '*Reckless Or Dangerous Driving*'].' [words in brackets added]

[45.14.2] Reckless Or Dangerous Driving

Section 40(2) of the *Traffic Act* (Ch. 131) states:

> 'Where a person is charged with an offence under section 39 ['*Reckless Or Dangerous Driving*'], and the court is of opinion that the offence is *not* proved, then, at any time during the hearing or immediately thereafter the court may, without prejudice to any other powers possessed by the court, direct or allow a charge for an offence under this section to be preferred forthwith against the person charged and may thereupon proceed with that charge [to wit '*Careless & Inconsiderate Driving*'], so however that such person or his solicitor or counsel shall be informed of the new charge and be given an opportunity, whether by way of cross – examining any witness whose evidence has already been given against the defendant or otherwise, of answering the new charge, and the court shall, if it considers that the defendant is prejudiced in his defence by reason of the new charges being so preferred, adjourn the hearing.' [words in brackets added]

[45.15] Joinder Of Charges

The facts of each particular case determine whether a defendant should be charged with a single charge of '*Reckless or Dangerous Driving*' who during the course of a single journey commits a number of dangerous acts. In that determination a Court will consider the distances driven and the time period between each dangerous act. If the prosecution intends to rely on a single charge involving a number of dangerous acts on different roads then the wording of the charge *must include* the names of such roads.

In *R v Miller* [1986] 2 QdR 518 Williams J, as a member of the Court of Criminal Appeal, stated at page 532:

> 'It may often be just and reasonable for a prosecutor to charge two separate counts of dangerous driving arising from the manner in which a person drove his vehicle at a particular time and place. But it must be remembered, as was approved by this court in *R v Juraszko* [1967] QdR 128, that the one charge of dangerous driving may encompass a number of particulars of driving over a short distance.'

See also: *Whitby v Williams* (1987) 5 MVR 268; *Phillis v Coombe* (1987) 5 MVR 331; *R v Clark* (1986) 4 MVR 245; *Harvey v Lovegrove* (1985) 2 MVR 380; *Horrix v Malam* [1984] RTR 112; *Hayes v Wilson* (1984) 1 MVR 198; *R v Messulam Wauta* [1973] PNGLR 714 & *Ex parte Graham, Re Dowling* [1969] 1 NSWLR 231.

The law relating to '*Joinder Of Charges*' is examined commencing on page **91**.

[45.16] Compared With Driving Without Due Care & Attention Or Reasonable Consideration

Whilst the offences of '*Reckless Or Dangerous Driving*' and '*Driving Without Due Care And Attention Or Reasonable Consideration*' are related to a departure of the standard of driving that is required from a reasonable, competent and prudent driver, the difference lies in the degree of departure from that standard. The offence of '*Driving Without Due Care And Attention Or Reasonable Consideration*' which is examined commencing on page **725** is a '*minor departure*' from that standard, whilst '*Reckless Or Dangerous Driving*' is a '*gross departure*', see *R v Duncan* (1953) 11 SASR 592.

CARELESS OR INCONSIDERATE DRIVING

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CARELESS OR INCONSIDERATE DRIVING

[46.0] Introduction

This chapter will examine the offence of '*Careless Or Inconsiderate Driving*', as provided for by section 40 of the *Traffic Act* (Ch. 131).

For the purpose of consistency the offences under the *Traffic Act* (Ch. 133) should be interpreted

> 'in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith', see section 3 of the *Penal Code* (Ch. 26).

See: *Road Traffic Act* 1960 (UK), section 3.

[46.1] Careless Driving

[46.1.1] Offence

Section 40(1) of the *Traffic Act* (Ch. 131) states:

> 'If a person drives a motor vehicle on a road without due care and attention is guilty of an offence and liable to a fine of five hundred dollars or to imprisonment for six months, and in the case of a second or subsequent conviction to a fine of seven hundred dollars or to imprisonment for six months or to both such fine and such imprisonment.'

[46.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did drive a motor vehicle to wit a **[**specify the motor vehicle**]** on a road namely **[**specify the name of the road**]** without due care and attention by **[**specify the driving of the defendant**]**.'

[46.1.3] Elements

A. Defendant

B. Place

C. Date

D. Drive

E. Motor Vehicle

F. Road

G. Without Due Care And Attention

CARELESS OR INCONSIDERATE DRIVING

[46.2] Inconsiderate Driving

[46.2.1] Offence

Section 40(1) of the *Traffic Act* (Ch. 131) states:

> 'If a person drives a motor vehicle on a road […] without reasonable consideration for other persons using the road and liable to a fine of five hundred dollars or to imprisonment for six months, and in the case of a second or subsequent conviction to a fine of seven hundred dollars or to imprisonment for six months or to both such fine and such imprisonment.'

[46.2.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did drive a motor vehicle to wit a **[**specify the motor vehicle**]** on a road namely **[**specify the name of the road**]** without reasonable consideration for other persons using the said road by **[**specify the driving of the defendant**]**.'

[46.2.3] Elements

A. Defendant

B. Place

C. Date

D. Drive

E. Motor Vehicle

F. Road

G. Without Reasonable Consideration For Other Persons Using The Road

[46.3] Drive

The element '*Drive*' is examined commencing on page **709**.

[46.4] Motor Vehicle

The element '*Motor Vehicle*' is examined on page **710**.

[46.5] Road

The element '*Road*' is examined on page **710**.

[46.6] Without Due Care & Attention

[46.6.1] Introduction

The term '*Without Due Care And Attention*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation and General Provisions Act* (Ch. 85).

In *Idufo'oa v R* [1982] SILR 55 Daly CJ outlined the following '*test*' to be applied in order to determine whether a defendant was '*Driving Without Due Care And Attention*' at pages 55 – 56:

> '*The question for the magistrate was then, have the prosecution made me sure that the appellant departed from the standard of a reasonable, competent and prudent driver in those circumstances*?' (emphasis added)

In *McCrone v Riding* [1938] 1 AllER 157 Lord Hewart CJ, delivering the judgment of the Court, held at page 158:

> 'The words of the section are that it is an offence when a person drives a motor vehicle *without due care and attention* or without reasonable consideration for other persons using the road.
>
> *That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver*.' (emphasis added)

In *Simpson v Peat* [1952] 2 QB 24 [[1952] 1 WLR 469; [1952] 1 AllER 447] Lord Goddard CJ, delivering the judgment of the Court, stated at pages 27 – 28:

> 'It is by no means impossible, and indeed must on occasions happen, that a situation of danger arises in which a motorist is involved but it cannot be said that he caused it by driving dangerously, […], the offence can be committed although no accident takes place; equally because an accident does occur it does not follow that a particular person has driven either dangerously or without due care and attention; but, if he has, it matters not why he did so.
>
> Suppose a driver is confronted with a sudden emergency although no fault of his own; in an endeavour to avert a collision he swerves to his right – it is shown that had he swerved to the left the accident would not have happened; that is being wise after the event and, *if the driver was in fact exercising the degree of care and attention which a reasonably prudent driver would exercise*, he ought not be convicted, even though another and perhaps more highly skilled driver would have acted differently.' (emphasis added)

In determining whether a defendant *departed from the standard of a reasonable, competent and prudent driver in the circumstances* the court will need to examine the circumstances in question.

Therefore, the prosecution should produce evidence of:

- 'speed'; and
- 'manner of driving',

which are examined commencing on page **713**.

In *Ben Donga v R* (Unrep. Criminal Appeal Case No. 16 of 1994) Palmer J stated at pages 1 – 2:

> 'The particulars of the charge read: "*Mr Ben Donga on the 14th day of January 1994 at Honiara in the Guadalcanal Province, drove motor vehicle No.8567 on a road without due care and attention."*
>
> The records of the Magistrate's Court reveal that the accused was unrepresented, and that the charge was read over and explained. What this Court does not know is, what was explained, and how the charge was explained. *The particulars simply stated that the accused drove without due care and attention. The words "due care and attention" are technical terms. Had the accused been represented, then it could possible be acceptable.* However, in the case of this accused, how would he know that what he was being accused of fell below the minimum requirements that the law imposes upon a reasonable, prudent driver? The only way he could understand that is, if it is sufficiently made clear in the particulars of the offence, in what way his driving was careless, or without due care and attention. *As worded, the particulars of the offence are inadequate and therefore bad.*
>
> *Magistrates should be cautious in ensuring that there are sufficient particulars in the information to enable him to put the charge to the accused, and if necessary, to explain it to the accused. Where the particulars are inadequate, then the prosecutor should be required to amend the information and insert the necessary details. It is good practice too to ask the accused if he understood the charge before taking his plea*.' (emphasis added)

See also: *R v Bristol Crown Court; Ex parte Jones; Jones v Chief Constable of Avon & Somerset Constabulary* (1986) 83 CrAppR 109.

[46.6.2] Minor Traffic Accidents

A defendant is *not* driving '*without due care and attention*' simply because as a result of a *minor and common error of judgment* a traffic accident occurs.

In *Lajos v Samuels* (1980) 26 SASR 514 Jacobs J, sitting alone, held at page 517:

> 'To hold that such a minor and common error of judgment [, referring to bumping into a stationary vehicle behind when attempting to reverse into a parking space,] is sufficient to constitute an offence of driving without due care is, in my view, to make a mockery of the law. *Such a common and minor occurrence in modern congested traffic conditions cannot of itself be said to involve any substantial departure from the standard of care expected of a reasonably competent and skilful driver*. Such a test does not appear to have been considered by the learned Special Magistrate, who was more concerned to find whether or not there had been an "accident" *but the fact of an accident cannot of itself be conclusive* (*Simpson v Peat* [1952] 2 QB 24; *Dayman v Gill* [1941] SASR 208).' (emphasis added) [words in brackets added]

[46.6.3] Unexplained Traffic Accidents

An '*unexplained traffic accident*' is an accident for which the defendant refuses to answer questions and there are no witnesses. Depending on the circumstances, the prosecution may be able to prove that such traffic accidents result from defendants driving '*without due care and attention*'. In such cases, the prosecution *must* rely on '*circumstantial evidence*' to prove that offence '*beyond reasonable doubt*'.

As regards '*circumstantial evidence*' the test to be applied is:

> 'The guilt of the accused *must* be the *only* rational inference open to the Court to find in the light of the evidence', see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

Therefore, the prosecution *must* be able to satisfy the court that the only rational inference that the circumstances of the traffic accident enable it to find was that the defendant was driving '*without due care and attention*'.

The law in relation to '*Circumstantial Evidence*' is examined commencing on page **183**.

[46.7] Without Reasonable Consideration

The term '*Without Reasonable Consideration*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation and General Provisions Act* (Ch. 85).

The prosecution has to prove '*beyond reasonable doubt*' that the defendant departed from the standard of a reasonable, competent and prudent driver in all the circumstances of the case which is an '*objective*' test.

In *McCrone v Riding* [1938] 1 AllER 157 Lord Hewart CJ, delivering the judgment of the Court, held at page 158:

> 'The words of the section are that it is an offence when a person drives a motor vehicle without due care and attention or without reasonable consideration for other persons using the road.
>
> *That standard is an objective standard, impersonal and universal, fixed in relation to the safety of other users of the highway. It is in no way related to the degree of proficiency or degree of experience attained by the individual driver*.' (emphasis added)

In *Dilkes v Bowman Shaw* [1981] RTR 4 the Court held that an actual road user *must* be inconvenienced by the driving of the defendant.

However, a road user *cannot* be inconvenienced if the defendant is complying with the provisions of the *Traffic Act* (Ch. 131) and the *Traffic Regulations* (Ch. 131).

[46.8] Defences

In *Broome v Perkins* (1987) 85 CrAppR 321 the defendant was charged with '*Driving Without Due Care And Attention*' and he raised the defence of '*Automatism*'.

Gildewell J, delivering the judgment of the Queens Bench Divisional Court, held at page 332:

> 'The question which is posed in the case can be rephrased to ask: "On the evidence, could the justices properly conclude that the defendant was not conscious of what he was doing and that his actions were involuntary and automatic throughout the whole of the five mile journey over which the erratic driving was observed?" If, during a part or parts of that journey, they were satisfied that his actions were voluntary and not automatic, at those times

he was driving and clearly the way in which he was driving was such that they should properly have convicted him of driving without due care and attention.

When driving a motor vehicle, the driver's conscious mind receives signals from his eyes and ears, decides on the appropriate course of action as a result of those signals, and gives directions to the limbs to control the vehicle. When a person's actions are involuntary and automatic his mind is not controlling or directing his limbs.'

The law in relation to other defences which may be raised in respect of a charge under section 40 of the *Traffic Act* (Ch. 131) is examined commencing on page **720**.

[46.9] Jurisdiction

The jurisdiction of the Courts for this offence is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of this offence is examined commencing on page **918**, including the '*Disqualification Of Drivers' Licenses'*.

[46.10] Related Offences

The following offences are related to the offence of '*Driving Without Due Care & Attention Or Inconsiderate Driving*':

- '*Reckless Or Dangerous Driving*', section 39(1) of the *Traffic Act* (Ch. 133). Those offences are examined commencing on page **706**; and
- '*Careless Or Inconsiderate Cycling*', section 50 of the *Traffic Act* (Ch. 133).

[46.11] Compared With Reckless Or Dangerous Driving

Whilst the offences of '*Driving Without Due Care And Attention Or Reasonable Consideration*' and '*Reckless Or Dangerous Driving*' are related to a departure of the standard of driving that is required from a reasonable, competent and prudent driver, the difference lies in the degree of departure from that standard. The offence of '*Reckless Or Dangerous Driving*' which is examined commencing on page **706** is a '*gross departure*' from that standard, whilst '*Driving Without Due Care And Attention Or Reasonable Consideration*' is a '*minor departure*', see *R v Duncan* (1953) 11 SASR 592.

CARELESS OR INCONSIDERATE DRIVING

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TAKING VEHICLES WITHOUT AUTHORITY

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TAKING VEHICLES WITHOUT AUTHORITY

[47.0] Introduction

This chapter will examine the offence of '*Taking Vehicles Without Authority*', as outlined in section 59 of the *Traffic Act* (Ch. 131).

That section is almost identical with section 217 of the *Road Traffic Act* 1960 (UK).

For the purpose of consistency the offences under the *Traffic Act* (Ch. 133) should be interpreted

> 'in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith', see section 3 of the *Penal Code* (Ch. 26).

In *R v Flower* (1956) 40 CrAppR 189 Lord Goddard CJ stated at page 192:

> 'I hope that the police and those responsible for prosecutions will remember that it is still open to charge an offender with stealing petrol in such circumstances.'

A defendant should *not* be charged with stealing the same vehicle, see *R v Gibbs* (1959) 44 CrAppR 77.

The law relating to:

- '*Double Jeopardy*' is examined commencing on page **105**; and
- '*Larceny*' is examined commencing on page **460**.

[47.1] Offence

Section 59(1) of the *Traffic Act* (Ch. 131) states:

> 'A person who takes and drives away a vehicle without having either the consent of the owner thereof or other lawful authority shall be liable –
>
> (a) on conviction by the *High Court*, to a fine of five hundred dollars or to imprisonment for six months or to both such fine and such imprisonment;
>
> (b) on conviction by a *Magistrate's Court*, to a fine of two hundred dollars or to imprisonment for three months.' (emphasis added)

[47.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did take and drive away a vehicle to wit a **[**specify the vehicle**]** without having either the consent of the owner thereof namely **[**specify the name of the owner**]** or other lawful authority.'

TAKING VEHICLES WITHOUT AUTHORITY

[47.3] Elements

A. Defendant

B. Place

C. Date

D. Take

E. Drive Away

F. Vehicle

G. Without Having:
[i] Consent Of The Owner; or
[ii] Other Lawful Authority

[47.4] Take & Drive Away

The term '*Take*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* to remove without the consent of the owner or other lawful authority.

The term '*Drive*' is examined commencing on page **709**.

If an employee without his/her employer's permission takes and drives away a vehicle owned by the employer after working hours for his/her own purposes he/she would be guilty of '*taking*' the vehicle within the meaning of section 59(1) of the *Traffic Act* (Ch. 131), see *R v Wibberley* [1966] 2 QB 214; [1965] 3 AllER 718; (1965) 50 CrAppR 51; [1966] 2 QB 214.

See also: *R v Cook* (1964) 48 CrAppR 98; *Mowe v Perraton* [1952] 1 AllER 423; (1952) 35 CrAppR 194; *Shimmell v Fisher & others* (1951) 35 CrAppR 100; *R v Pearce* [1973] CrimLR 321; *R v Miller* [1976] CrimLR 147 & *R v Diggin* [1981] RTR 83; (1981) 72 CrAppR 204; [1980] CrimLR 656.

[47.5] Vehicle

The term '*Vehicle*' is defined in section 2 of the *Traffic Act* (Ch. 131) as *including*:

'a motor vehicle, a trailer and any other conveyance used on the road.'

[47.6] Question Of Consent

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she had either:

- the consent of the owner; or

- other lawful authority,

to take and drive away the vehicle in question.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

Section 59(2) of the *Traffic Act* (Ch. 131) states:

> 'If on proceedings under this section the court is satisfied that the accused acted in the reasonable belief that he had lawful authority, or in the reasonable belief that the owner would, in the circumstances of the case, have given his consent if he had been asked thereof, the accused shall not be liable to be convicted of the offence.'

In *R v Phillips & McGill* (1970) 54 CrAppR 300 the Court of Appeal considered circumstances in which the defendant McGill had been given permission by the owner of a motor vehicle to take and use it for a limited purpose. However, rather than returning it upon completion he used it for his purpose on the belief that the owner would consent to such use.

Fenton Atkinson LJ, delivering the judgment of the Court, stated at pages 303 – 304:

> 'The learned Common Sergeant put it to the jury in this way:
>
> "The allegation against him is that having lawfully borrowed the car with Mr. Larking's consent for a particular purpose and for a particular purpose only, he" – referring there, of course, to Mc Gill – "thereafter did not return the car, and if that is the position, then as from the time he decided not to return the car and drove it off on his own business and after having taken his wife to Victoria Station, or rather brought her back again because she missed the train, as from then, as a matter of law, and common sense, if he did not have Mr. Larking's permission, he took it and drove it away, and it is that subsequent taking and driving that the Crown allege constitutes the offence in this matter."
>
> […]
>
> In our view, the direction of the learned Common Sergeant was perfectly proper and accurate.'

The law relating to '*Honest Claim Of Right*' is examined commencing on page **431**.

If the consent to use a motor vehicle was obtained by intimidation this would be no '*consent*' in law, see *R v Hogden* [1962] CrimLR 563.

See also: *R v Cameron* [1990] 2 QdR 264; (1990) 46 ACrimR 329; *Nabo Tiambo v Gideon Lari* [1979] PNGLR 525 & *Bulage Maule v Meana* [1969 – 70] P&NGLR 280.

[47.7] Liability Of Passengers

The mere fact that a person enters a vehicle which had been taken without the consent of the owner and being driven, does *not* constitute the offence under section 59(1) of the *Traffic Act* (Ch. 131). There *must* also be evidence that the passenger was a 'party' to the original taking, even though he/she was not present when the vehicle was initially taken, see *R v Stally* (1959) 43 CrAppR 5.

TAKING VEHICLES WITHOUT AUTHORITY

See also: *R v Bogacki & others* [1973] 2 WLR 937; [1973] 1 QB 832; [1973] 2 AllER 864; [1973] RTR 384; [1973] CrimLR 385; (1973) 57 CrAppR 593 at page 598 & *R v Phillips & McGill* (1970) 54 CrAppR 300.

[47.8] Alternative Conviction

Section 59(3) of the *Traffic Act* (Ch. 131) states:

> 'If on the trial of a charge of stealing a vehicle the court is of the opinion that the defendant was not guilty of stealing the vehicle but was guilty of an offence under this section, the court may find him guilty of an offence under this section and thereupon he shall be liable to be punished accordingly.'

The law relating to '*Larceny*' is examined commencing on page **460**.

[47.10] Jurisdiction

The jurisdiction of the Courts in respect of this offence is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of this offence is examined commencing on page **918**, including the '*Disqualification Of Drivers' Licenses'*.

[47.11] Related Offences

The following offences are related to the offence of '*Take & Drive Away*':

- '*Unlawful Use Of Animal Or Vessel*', section 290 of the *Penal Code* (Ch. 26); and
- '*Tamper With Motor Vehicle*', section 60 of the *Traffic Act* (Ch. 131).

TAKING VEHICLES WITHOUT AUTHORITY

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UNFIT TO DRIVE

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UNFIT TO DRIVE

[48.0] Introduction

This chapter will examine the offences of:

- '*Driving When Under The Influence Of Drinks Or Drugs*'; and
- '*Being In Charge When Under The Influence Of Drinks Or Drugs*',

as provided for by section 43 of the *Traffic Act* (Ch. 131).

For the purpose of consistency the offences under the *Traffic Act* (Ch. 133) should be interpreted

> 'in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith', see section 3 of the *Penal Code* (Ch. 26).

See: *Road Traffic Act* 1960 (UK), section 6.

[48.1] Unfit To Drive

[48.1.1] Offence

Section 43(1) of the *Traffic Act* (Ch. 131) states (in part):

> 'A person who, when driving or attempting to drive a motor vehicle on a road or other public place, is unfit to drive through drinks or drugs […].'

[48.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**drive **or** attempt to drive**]** a motor vehicle to wit a **[**specify the motor vehicle**]** on a **[**road namely **(**specify the name of the road**) or** public place to wit **(**specify the public place**)]** whilst being unfit to drive through drink or drugs.'

A conviction for driving whilst being unfit to drive through drink or drugs is *not* bad for duplicity, see *Thomson v Knights* [1947] 1 AllER 112; [1947] KB 336.

The law relating to '*Duplicity*' is examined commencing on page **86**.

[48.1.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Drive; or
[ii] Attempt To Drive

E. Motor Vehicle

F. [i] Road; or
[ii] Public Place

G. Whilst Being Unfit To Drive Through Drink Or Drugs

[48.2] In Charge

[48.2.1] Offence

Section 43(2) of the *Traffic Act* (Ch. 131) states:

> 'A person who, when in charge of a motor vehicle which is on a road or other public place (but not driving the vehicle) is unfit to drive through drink or drugs […].'

[48.2.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was in charge of a motor vehicle to wit a **[**specify the motor vehicle**]** which was on a **[**road namely **(**specify the name of the road**) or** public place to wit **(**specify the public place**)]** whilst being unfit to drive through drink or drugs.'

[48.2.3] Elements

A. Defendant

B. Place

C. Date

D. In Charge

E. Motor Vehicle

F. [i] Road; or
[ii] Public Place

G. Whilst Being Unfit To Drive Through Drink Or Drugs

[48.3] Drive

The element '*Drive*' is examined commencing on page **709**.

[48.4] Attempt To Drive

The term '*Attempt To Drive*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* sitting in the driver's seat and

- endeavouring to start the motor vehicle;
- trying to put it the motor vehicle in gear; or
- accelerating the engine of the motor vehicle in order to try to make it go forward, see *R v Farrance* (1977) 67 CrAppR 136.

In *R v Cook* (1964) 48 CrAppR 98 Lord Parker CJ, delivering the judgment of the Court, stated at pages 103 –104:

> 'It is unnecessary to go through the many cases which draw a distinction between what one might call an act preparatory and an act constituting the attempt. So far as this case is concerned, we are quite clear that it is impossible to say that the getting into the driving seat and the passenger seat of this vehicle by Howe and the appellant, respectively, with the clear intention of taking and driving it away, when the full offence would be constituted in a minute, as the appellant said, did not constitute an attempt.
>
> The nearest authority dealing with the taking and driving away and stealing of a motor – vehicle is an Irish case, PRENDERGAST V PORTER [1961] IrJurR 15. There a defendant had attempted to start the car with the handle and twice tried to start it with the handle, then sat in the driver's seat, but failed to start it. It was argued that all that he had done was to attempt to start it, and that he had never got to the stage of attempting to drive it. The court said that "although the process of putting a car in motion by driving involves several steps, yet in the ordinary process these steps are so intimately connected as to occupy a matter of seconds and constitute a practically instantaneous succession of semi – automatic movements. In the instant case the defendant attempted to begin this succession and he would have completed the act of driving, had the car started."'

See also: *McNeall v Croker* (No. 2) (1939) 56 WN(NSW) 149; *Kelly v Hogan* [1982] RTR 352 & *Harman v Wardrop* [1971] RTR 127.

The law relating to '*Attempts To Commit Offences*' is examined commencing on page **398**.

[48.5] In Charge

The term '*In Charge*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Director of Public Prosecutions v Watkins* (1989) 89 CrAppR 112 Taylor LJ with whom Henry J concurred, stated at pages 117 – 118:

> '[There is] no hard and fast all – embracing test [that] can be propounded as to the meaning of the phrase "in charge".

Broadly there are two distinct classes of case. (1) If the defendant is the owner or lawful possessor of the vehicle or has recently driven it, he will have been in charge of it, and the question for the Court will be whether he is still in charge or whether he has relinquished his charge. That is the class to which the *Haines v Roberts* rule was directed. Usually such a defendant will be prima facie in charge unless he has put the vehicle in some else's charge. However he would not be so if in all the circumstances he has ceased to be in actual control and there is no realistic possibility of his resuming actual control while unfit: eg. if he is at home in bed for the night, if he is a great distance from the car or if it is taken by another.

(2) If the defendant is not the owner, the lawful possessor or recent driver but is sitting in the vehicle or is otherwise involved with it, the question for the Court is […] whether he has assumed being in charge of it. In this class of case the defendant will be in charge if, in the circumstances, including his position, his intentions and his actions, he may be expected imminently to assume control. Usually this will involve his having gained entry to the car and evinced an intention to take control of it. But gaining entry may not be necessary if he has manifested that intention some other way, eg. by stealing the keys of a car in circumstances which show he means presently to drive it.

The circumstances to be taken into account will vary infinitely, but the following will be usually relevant:

(i) Whether and where he is in the vehicle or how far he is from it.
(ii) What he is doing at the relevant time.
(iii) Whether he is in possession of a key that fits the ignition.
(iv) Whether there is evidence of an intention to take or assert control of the car by driving or otherwise.
(v) Whether any other person is in, at or near the vehicle and if so, the like particulars in respect of that person.

It will be for the Court to consider all the above factors with any others which may be relevant and reach its decision as a question of fact and degree.' [words in brackets added]

Section 43(2) of the *Traffic Act* (Ch. 131) states:

'A person is deemed for the purposes of this subsection *not* to have been in charge of a motor vehicle *if he proves* –

(i) that at the material time the circumstances were such that there was no likelihood of his driving the vehicle so long as he remained unfit to drive through drink or drugs; and

(ii) that between his becoming unfit to drive as aforesaid and the material time he had not driven the vehicle on a road or other public place.' (emphasis added)

The onus is on the defendant to prove that defence on the '*balance of probabilities*'.

Refer also to the law relating to '*Negative Averments*' commencing on page **83**.

[48.6] Motor Vehicle

The element '*Motor Vehicle*' is examined on page **710**.

[48.7] Road

The element '*Road*' is examined on page **710**.

[48.8] Public Place

Whilst the term '*Public Place*' is *not* defined in the *Traffic Act* (Ch. 131), it is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'every place to which the public are entitled or permitted to have access whether on payment or otherwise'.

In *R v Waters* (1963) 47 CrAppR 149 Lord Parker CJ, delivering the judgment of the Court, held at page 154:

> 'It seems to this court that the question is largely a matter of degree and fact. If only a restricted class of person is permitted to have access or invited to have access, then clearly the case would fall on the side of the line of it being a private place. If, on the other hand, only a restricted class is excluded, then it would fall on the side of the line of it being a public place.'

See also: *Clarke v Kato & others* [1997] 1 WLR 208; [1998] 1 WLR 1647; *Ling Ainui v Luke Ouki* [1977] PNGLR 11 at page 12; *Hansen v Appo, Ex parte Appo* [1974] QdR 259; *O'Mara v Lowe, Ex parte O'Mara* [1971] QWN 34 & *Schubert v Lee* (1946) 71 CLR 589.

[48.9] Unfit To Drive

The term '*Unfit To Drive*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation & General Provisions Act* (Ch. 85).

Section 43(5) of the *Traffic Act* (Ch. 131) states:

> 'For the purposes of this section, a person shall be taken to be unfit to drive if his ability to drive properly is for the time being impaired.'

In *R v Leonard Boaz* (Unrep. Criminal Review Case No. 45 of 1996) Palmer J stated at page 4:

> 'In the review hearing before this Court, learned Counsel for the accused stated that the accused had told him that he was going to plead guilty as he had taken some alcohol. The offence he had been charged with however, is not merely for taking alcohol, but that he was *unfit* to drive as a result. There are two different things involved, one is the taking of alcohol, and the other is the ability to drive as a normal driver. A person may have taken one or two cans of beer, and still be able to drive normally. Another person on the other hand, may not be in a fit position to drive. The test as set out by the learned Author, G.S. Wilkinson in Road Traffic Offences, at page 100 is that, "*his ability to drive properly is for the time being impaired*", through drink or drugs. He also points out that this can be proven by evidence that a car was being driven erratically or that an accident occurred at a spot where there was no hazard for a normal driver.'

See also: *R v Hawkes* (1931) 22 CrAppR 172.

A police officer may give 'opinion evidence' as regards the indicia of the defendant.

In *Himson Mulus v R* [1969 – 70] PNGLR 82 Frost J stated at page 99 that 'no expert qualification is required for a witness to give evidence as to the effect of alcohol upon a person'.

In *R v Aldridge* (1990) 20 NSWLR 737 the Court held at page 744:

> 'The third ground of appeal complains of admission into evidence of the police officer's opinion that Mrs Ryan was affected by intoxicating liquor at the time when the police were called to her house. Unassisted by authority, and ignoring what has always been permitted in charges of driving under the influence and in personal injury claims, *I would have said that a police officer could give evidence of only the usual indicia upon which an opinion may be founded – smelling of liquor, slurred speech, inability to walk in a straight line, etc – leaving it to the jury (or other tribunal of fact) to draw its own conclusions from their own experience* […].
>
> *The police officer's opinion was therefore admissible, although it should not have been permitted without first obtaining the factual basis for that purpose*.' (emphasis added)

Therefore, for such '*opinion evidence*' to be admissible police officers *must* give the basis of their opinion based on their own experience in dealing with persons affected by liquor both at work and socially.

See also: *Kennedy v Prestwood* (1988) 7 MVR 561; *Himson Mulas v R* [1970 – 71] PNGLR 82 at page 99; *Blackie v Police* [1966] NZLR 910; *Thomas v Snow* [1962] QWN 7; *Warning v O'Sullivan* [1962] SASR 287 at page 289; *R v Kelly* [1958] VR 412; *R v McKimmie* [1957] VR 93 & *R v Whitby* (1957) 74 WN(NSW) 441.

Whilst such evidence is admissible, an opinion by a lay person as to whether a defendant is 'unfit to drive' is *inadmissible*, see *R v Davies* [1962] 1 WLR 1111; (1962) 46 CrAppR 292; [1962] 3 AllER 97.

Furthermore, an admission by a defendant that he/she had too much alcohol to drink was not an adequate substitute for evidence by a police officer that the defendant was visibly affected by alcohol, see *Amos v Griffiths* (1987) 5 MVR 430.

Refer also to the subsection which examines '*Opinion Evidence – Lay Persons*' commencing on page **205**.

In *Billy Gatu v R* (Unrep. Criminal Case No. 93 of 1993) Palmer J stated at pages 6 – 7:

> 'The evidence adduced in the Magistrate's Court indicated clearly that the line walking test was used to determine whether the accused was in a fit state to drive or not.
>
> *I note that there is no legal basis for the application of such a test*. I do however observe that such a test had been used it seems as a standard practice by police for sometime.

I accept that the police do not have a police surgeon, or a medical doctor, that is attached on a permanent basis to the Police Department, and who can be called upon in such instances to carry out a medical examination on the suspect, when required. I also do note that previously, such persons would normally have been taken to the Central Hospital, for examination by a doctor or nurse, but that this practice seems to have been discontinued for some reason or other. Perhaps, it was the doctors and nurses who have refused such requests for fear of being physically assaulted by such drunken suspects.

I accept that the police are therefore in a very difficult position in respect of carrying out any recognised tests or examination on such suspects. I do not know how the test applied in this case emerged as a practice adopted by the police, but it would seem to have its origins from the usual medical examinations that are normally performed by medical doctors.

One such good example of this is contained in the book titled 'Road Traffic Offences' by G.S. Wilkins, 4th Edition 1963 at page 394 – 399, and marked Appendix II. This is a model scheme of Medical Examination drawn up by the British Medical Association and published in 1958, as a guide for an examining doctor to use. The requirements imposed are very clear and precise, and when contrasted with the test applied by the police officers, that test I must say, fell well below any minimum standard of acceptability.

One of the sub – headings in this model scheme is headed 'gait', and it is interesting to note that the line walking test applied by the police officers cam under this subheading. I quote:

"The examinee should be asked to walk across the room and the examiner should note:

(a) Manner of walking: is it straight, irregular, over – precise, staggering, reeling or with feet wide apart?

(b) Reaction time to a direction to turn: does the examinee turn at once or continue for one or two paces before obeying?

(c) Manner of turning: does the examinee keep his balance, lurch forward, or reel to one side? Does he correct any mistake in a normal or an exaggerated way?

It is undesirable to ask the examinee to walk along a straight line drawn on the floor or along a carpet edge.'

The first obvious point can be noted from the above quotation is that, the test applied by the police officers was described as 'undesirable'.

Secondly, such a medical examination is carried out only with the consent of the examinee. Thirdly, the walking test stood out as a very crude test; so crude in fact to be virtually unreliable, and accordingly should have been excluded outright. But even if it is to be admitted, its evidential value with respect would be so negligible to be of any significance.' (emphasis added)

Any medical examination of a defendant to determine 'unfitness to drive' must be conducted with the consent of the defendant as there is no legal basis to require a defendant to undertake such an examination.

See also: '*Halsbury's Statutes of England*', 3rd ed., Ch. 28, page 232.

UNFIT TO DRIVE

If defendant is examined for the purpose of determining whether he/she was suffering from an illness or disability and consents to the examination on that basis, the doctor *cannot* be called to give evidence as to his/her opinion regarding the fitness of the defendant to drive, see *R v Payne* (1963) 47 CrAppR 122; [1963] 1 AllER 848; [1963] 1 WLR 637 & *R v Court* [1962] CrimLR 697.

Refer also the law relating to '*Opinion Evidence – Experts*' commencing on page **202**.

[48.10] Drink

The term '*Drink*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Armstrong v Clark* (1957) 41 CrAppR 56 [[1957] 2 QB 391; [1957] 2 WLR 400; [1957] 1 AllER 433] Lord Goddard CJ, with whom Cassels & Lynskey JJ concurred, commented at page 59:

> 'In my opinion, drink *means* alcoholic drink.' (emphasis added)

[48.11] Drug

The term '*Drug*' is *not* defined in the *Traffic Act* (Ch. 131) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Bradford v Wilson* (1978) 84 CrAppR 77 Robert Goff LJ, delivering the judgment of the Court, stated at page 82:

> 'Accordingly, adopting a common sense approach, I would say, without attempting to give a definition, that, as a general rule, a substance which is taken into the human body by whatever means, for example, by inhalation, or by injection, or by mouth – which does not fall within the description "drink" (because that is specifically mentioned in the section) [, referring to section 5(2) of the *Road Traffic Act* 1972 (UK),] and which is not taken as a food, but which does affect the control of the human body, may be regarded as a drug for the purposes of this section. A particular example of such a substance is one which has a narcotic effect on the human body. That provides, I hope, some guidance as to what can properly be regarded as a drug for these purposes.' [words in brackets added]

[48.12] Sentencing

[48.12.1] Unfit To Drive

Section 43(1) of the *Traffic Act* (Ch. 131) states that a defendant found guilty of an offence under that subsection shall be 'liable –

(a) on conviction by the High Court, to a fine of two thousand dollars or to imprisonment for two years or to both such fine and such imprisonment;

(b) on conviction by a Magistrate's Court, to a fine of four hundred dollars or to imprisonment for twelve months or in the case of a second or subsequent conviction to a fine of five hundred dollars or to imprisonment for twelve months.'

[48.12.2] In Charge

Section 43(2) of the *Traffic Act* (Ch. 131) states that a defendant convicted of an offence under that subsection shall be 'liable –

(a) on conviction by the High Court, to a fine of five hundred dollars or to imprisonment for six months or to both such fine and such imprisonment;

(b) on conviction by a Magistrate's Court, to a fine of two hundred dollars or to imprisonment for six months or in the case of a second or subsequent conviction to a fine of three hundred dollars or to imprisonment for six months.'

Section 43(4) of the *Traffic Act* (Ch. 131) states:

'Where a person convicted of an offence under subsection (2) has been previously convicted of an offence under subsection (1), he shall be treated for the purposes of the said subsection (2) as having been previously convicted under that subsection.'

The law relating to '*Sentencing*' in respect of this offence is examined commencing on page **918**, including the '*Disqualification Of Drivers' Licenses'*.

[48.13] Related Offences

The following offence is related to the offence of '*Driving Whilst Unfit To Drive*':

- '*Cycling When Under The Influence Of Drink Or Drugs*', section 51 of the *Traffic Act* (Ch. 131).

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DANGEROUS DRUGS

[49.0] Introduction

This chapter will examine all offences under the *Dangerous Drugs Act* (Ch. 98).

For the purpose of consistency the offences under the *Dangerous Drugs Act* (Ch. 98) should be interpreted

> 'in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith', see section 3 of the *Penal Code* (Ch. 26).

See: *Misuse Of Drugs Act* 1971 (UK).

Section 39(3) of the *Dangerous Drugs Act* (Ch. 98) states (in part):

> 'No person shall be proceeded against under paragraph (a) of subsection (1) [ie., the commission of an act in contravention of or failure to comply with any of the provisions of the *Dangerous Drugs Act* or any rule made under that Act] unless the *proceedings are instituted* by, or with the consent of, the Director of Public Prosecutions.' (emphasis added) [words in brackets added]

Section 76(1) of the *Criminal Procedure Code* (Ch. 7) states:

> '*Proceedings may be instituted* either by the making of a complaint *or* by the bringing before a Magistrate of a person who has been arrested without warrant.' (emphasis added)

Therefore, in order to comply with section 39(3) of the *Dangerous Drugs Act* (Ch. 98), consent of the Director of Public Prosecutions is required to be obtained prior to the institution of proceedings in respect of all offences, other than those relating to sections 32 and 39(1)(b).

However, the consent need *not* be in writing. Upon consent being given it can be assumed that all necessary and proper inquiries were made prior to giving that consent, see *R v Cain & Schollick* [1976] QB 496; (1975) 61 CrAppR 186 [[1975] 3 WLR 131; [1975] 2 AllER 900; [1976] CrimLR 464], per Lord Widgery CJ at pages 502 – 503 and 190 respectively.

Section 44 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'Where the consent of an authority is necessary before any proceedings, whether civil or criminal, are commenced, a document giving the consent and purporting to be signed by the authority is evidence that the consent has been given, without proof that the signature to the document is that of the authority.'

See also: *R v Angel* [1968] 2 AllER 607; [1968] 1 WLR 669; (1968) 52 CrAppR 280.

If such consent is *not* obtained prior to the institution of proceedings, a prosecutor should seek leave of the Court to withdraw the charge.

See also: *R v Robert Maebinua* (Unrep. Criminal Review Case No. 160 of 1999; Kabui J; at page 7) & *R v Fofei Fiuwane* (Unrep. Criminal Review Case No. 355 of 1999; Kabui J).

DANGEROUS DRUGS

The jurisdiction of the Courts in respect of offences under the *Dangerous Drugs Act* (Ch. 98) is examined commencing on page **14**.

Section 39(6) of the *Dangerous Drugs Act* (Ch. 98) states:

> '*Notwithstanding any enactment prescribing the time within such proceedings may be brought*, any such proceedings for an offence against this Act may be brought either within the time so specified or *three months from the date on which evidence sufficient in the opinion of the Director of Public Prosecutions to justify a prosecution for the offence, comes to his knowledge*, whichever is the longer; and for the purposes of this subsection, a certificate purporting to be signed by the Director of Public Prosecutions as to the date on which such evidence as aforesaid comes to his knowledge, shall be conclusive evidence thereof. This provision of this subsection shall apply to proceedings for attempting or soliciting or inciting another person to commit such an offence, as they apply to proceedings for such an offence.' (emphasis added)

It should be noted that section 206 of the *Criminal Procedure Code* (Ch. 7) has *no* application because the maximum punishment for the commission of offences under the *Dangerous Drugs Act* (Ch. 98) is a fine of two thousand dollars or to imprisonment for ten years, or to both such fine and imprisonment, as provided for under section 39(2) of that Act.

Therefore, all offences under the *Dangerous Drugs Act* (Ch. 98) should come to the knowledge of the Director of Public Prosecutions.

Refer also to the law relating to the '*Institution Of Proceedings*' which is examined commencing on page **110**.

[49.1] Importation & Exportation

[49.1.1] Part I

[A] Offences

Section 4(2) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall import or export any of the substances to which this Part of this Act applies.'

[B] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**import **or** export**]** a substance to which Part I of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]**.'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Import; or
[ii] Export

E. A Substance To Which Part I Of The *Dangerous Drugs Act* (Ch. 98) Applies

[49.1.2] Part II

[A] Offences

Section 11 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall import or export any prepared opium, or any pipes or other utensils for use in connection with the smoking of opium, or any utensil for use in connection with the preparation of opium for consumption.'

[B] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**import **or** export**] [**prepared opium, **(**pipes **or** utensils**)** for use in connection with the smoking of opium **or** utensils for use in connection with the preparation of opium for consumption**]**.'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Import; or
[ii] Export

E. [i] Prepared Opium;
[ii] [1] Pipes; or
[2] Utensils
For Use In Connection With The Smoking Of Opium; or
[iii] Utensils For Use In Connection With The Preparation Of Opium For Consumption

[49.1.3] Part III

[A] Offences

Section 14 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall import or export any substance to which this Part of this Act applies, except in accordance with sections 22 to 30.'

[B] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**import **or** export**]** a substance to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]** not in accordance with sections 22 to 30 of the said Act.'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Import; or
[ii] Export

E. Substance To Which Part III of the *Dangerous Drugs Act* (Ch. 98) Applies

F. Not In Accordance With Sections 22 To 30 Of The *Dangerous Drugs Act* (Ch. 98)

[D] Defence

The defendant *must* prove on the '*balance of probabilities*' that he/she was acting in accordance with sections 22 to 30 of the *Dangerous Drugs Act* (Ch. 98).

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.1.4] Export Authorisation

[A] Offence

Section 23 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No dangerous drug to which this Part of this Act applies shall be exported from Solomon Islands unless the exporter is in possession of a valid and subsisting export authorization relating to such drug granted under this Act.'

[B] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** not being in possession of a valid and subsisting export authorization did export from Solomon Islands a dangerous drug to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]**.'

[C] Elements

A. Defendant

B. Place

C. Date

D. Not Being In Possession Of A Valid & Subsisting Export Authorisation

E. Export From Solomon Islands

F. Dangerous Drug To Which Part III Of The *Dangerous Drugs Act* (Ch. 98) Applies

[D] Defence

The defendant *must* prove on the *balance of probabilities* that he/she was in possession of a valid and subsisting export authorisation as provided for by section 22 of the *Dangerous Drugs Act* (Ch. 98).

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.1.5] Exportation Generally

[A] Offences

Section 25 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall export, cause to be exported, or take any steps preparatory to exporting, any dangerous drug from Solomon Islands except in accordance with and in pursuance of the provisions of this Act.'

[B] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**export, cause to be exported **or** take steps preparatory to exporting**]** a dangerous drug to wit **[**specify the 'dangerous drug'**]** other than in accordance with and in pursuance of the provisions of the *Dangerous Drugs Act* (Ch. 98).'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Export;
[ii] Cause To Be Exported; or
[iii] Take Steps Preparatory To Exporting

E. Dangerous Drug

F. Other Than In Accordance With And In Pursuance Of The Provisions Of The *Dangerous Drugs Act* (Ch. 98)

[D] Defence

The defendant *must* prove on the '*balance of probabilities*' that he/she was exporting, etc., in accordance with and in pursuance of the provisions of the *Dangerous Drugs Act* (Ch. 98)

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.1.6] Importation Generally

[A] Offences

Section 30 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall import, cause to be imported, or take any steps preparatory to importing, any dangerous drug to which this Part of this Act applies into Solomon Islands except in accordance with the provisions of this Act.'

[B] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**import, cause to be imported **or** take steps preparatory to importing**]** a dangerous drug to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]** into Solomon Islands not in accordance with the provisions of the said Act.'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Import;
[ii] Cause To Be Imported; or
[iii] Take Steps Preparatory To Importing

E. Dangerous Drug To Which Part III Of The *Dangerous Drugs Act* (Ch. 98) Applies

F. Into Solomon Islands

G. Not In Accordance With The Provisions Of The *Dangerous Drugs Act* (Ch. 98)

[D] Defence

The defendant *must* prove on the '*balance of probabilities*' that he/she was importing, etc., in accordance with and in pursuance of the provisions of the *Dangerous Drugs Act* (Ch. 98)

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.1.7] Seeds Or Portions Of Plants

[A] Offences

Section 5 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall import or export any seed of the opium poppy or any seed of Indian hemp or any seed of the cocoa leaf or any portion of the aforesaid plants.'

[B] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**import **or** export**]** a **[**seed **or** portion**]** of **[**the opium poppy, Indian hemp **or** the cocoa leaf**]**.'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Import; or
   [ii] Export

E. [i] Seed; or
   [ii] Portion

F. [i] Opium Poppy;
   [ii] Indian Hemp; or
   [iii] Cocoa Leaf

[49.1.8] Import

The term '*Import*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'to bring or cause to brought into Solomon Islands *otherwise than in transit*'. (emphasis added)

See: *R v Jackeman* (1983) 76 CrAppR 223.

The term '*In Transit*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'taken or sent from any country and brought into Solomon Islands (whether or not landed or transhipped in Solomon Islands) for the sole purpose of being carried to another country, either by the same or another conveyance'.

[49.1.9] Export

The term '*Export*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'to take or cause to be taken out of Solomon Islands *otherwise than in transit*'. (emphasis added)

[49.1.10] Dangerous Drug To Which Part I Applies

Section 4(1) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'The provisions of this Part of this Act ['*Part I*'] shall apply to *raw opium, coca leaf and Indian hemp* and resins obtained from Indian hemp and preparations of which such resins form the base.' (emphasis added) [words in brackets added]

[49.1.11] Dangerous Drug To Which Part III Applies

Section 13(1) of the *Dangerous Drugs Act* (Ch. 98) states (in part):

> 'The provisions of this Part of this Act ['*Part III*'] shall apply to the following substances –
>
> (a) medicinal opium;
>
> (b) any extract or tincture of Indian hemp;
>
> (c) morphine and its salts and diacetylmorphine (commonly known as diamorphine or heroin) and the other esters of morphine and their respective salts;
>
> (d) cocaine (including synthetic cocaine) and ecgonine and their respective salts and the esters of ecgonine and their respective salts;
>
> (e) any dilution or solution of morphine or cocaine or their salts in an inert substance, whether liquid or solid, containing any proportion of morphine or cocaine; and any preparation, admixture, extract or other substance (not being such a dilution or solution as aforesaid) containing not less than one – fifth per centum of morphine or one – tenth per centum of cocaine or of ecgonine;
>
> (f) any preparation, admixture, extract or other substance containing any proportion of diacetylmorphine;
>
> (g) dihydrohydroxycodeinone, dihydrocodeinone, dihydromorphinone, acetyldihydrocode -- none, dihydromorphine, their esters and the salts of any of these substances and of their esters, morphine–N–oxide (commonly known as genomorphine), the morphine-N-oxide derivatives and any other pentavalent nitrogen morphine derivatives;

(h) thebaine and its salts and (with the exception of methymorphine, commonly known as codeine, and ethylmorphine, commonly known as dionin, and their respective salts) benzylmorphine and other esters of morphine and their respective salts;

(i) any preparation, admixture, extract or other substance containing any preparation of any of the substances mentioned in paragraph (g) or in paragraph (h) of this subsection.' [words in brackets added]

[49.1.12] Proof Of A Dangerous Drug

The term '*Dangerous Drug*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

'any of the substances which may be from time to time subject to the provisions of this Act'.

The following '*dangerous drugs*' are defined in section 2 of the *Dangerous Drugs Act* (Ch. 98):

'cocaine'; 'coca leaf'; 'crude cocaine'; 'diacetylmorphine'; 'ecgonine'; 'Indian hemp'; 'medical opium'; 'morphine'; 'prepared opium' and 'raw opium'.

The prosecution may prove that a drug was a '*dangerous drug*' *beyond reasonable doubt* by:

[i] ***the production of a certificate under the hand of a Government chemist****.*

Section 42 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'In any proceedings under this Act the production of a certificate purporting to be signed by a Government chemist shall be prima facie evidence of the fact therein stated'.

Such a certificate should include:

[a] the academic qualifications for identifying the 'dangerous drug' in question;

[b] the recognised method or methods used for such identification; and

[c] the quantity of the 'dangerous drug' and purity, if applicable.

or

[ii] ***relying on an admission of a defendant in appropriate circumstances.***

A written or oral statement of a defendant *may* be sufficient evidence of proof, provided he/she has sufficient knowledge of the 'dangerous drug' in question from previous experience, see *R v Chatwood* & others (1980) 70 CrAppR 39; [1980] 1 WLR 870; [1980] 1 AllER 467; [1980] CrimLR 46 & *R v Dillon* [1983] 2 QdR 627.

The questions that should be asked are as follows:

[a] What is your knowledge of this 'dangerous drug'?

[b] Have you smoked or taken this 'dangerous drug'?

[c] How did you feel after having smoked or taken this 'dangerous drug'?

[d] Over what period of time is your experience with this 'dangerous drug'?

[e] What 'dangerous drug' do you believe it is?

[49.2] Grow

[49.2.1] Offence

Section 8(a) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Every person growing opium poppy, Indian hemp or cocoa leaf shall be guilty of an offence against this Act.'

[49.2.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did grow **[**opium poppy, Indian hemp **or** cocoa leaf**]**.'

[49.2.3] Elements

A. Defendant

B. Place

C. Date

D. Grow

E. [i] Opium Poppy;
[ii] Indian Hemp; or
[iii] Cocoa Leaf

[49.2.4] Dates Of Offences

The growing of a dangerous drug will invariably be over a period of time. In such circumstances the prosecution should charge the defendant with committing the offence 'between specified dates', ie., between the date that the seed was planted and the date the drug was located by the investigating police officer.

The law relating to charging defendants with '*Between Dates*' is examined on page **86**.

[49.2.5] Grow

The term '*Grow*' is *not* defined in the *Dangerous Drugs Act* (Ch. 98) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* cultivating which involves bestowing labour and attention upon the land in order to promote the growth of the plants. It is a continuing activity which begins with the preparation of the soil before the planting of the seeds and ends with the harvesting of the plant. The watering of plants has been held to constitute cultivation, see *R v O'Dempsey* [1982] QdR 174 & *R v Kirkwood* [1982] QdR 158.

[49.2.6] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[49.3] Possess Or Sell Or Give -- Part I

[49.3.1] Offences

Section 8(b) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Every person found in possession of or selling, or who shall have given or sold to any person any substance to which this Part of this Act applies, shall be guilty of an offence against this Act.'

[49.3.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**] [**was found in possession of **or (**did sell, did give **or** had sold**)** to a person namely **(**specify the name of this person**)]** a substance to which Part I of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]**.'

[49.3.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Was Found In Possession; or
   [ii] [1] Did Sell;
   [2] Did Give; or
   [3] Had Sold
   To Another Person

E. A Substance To Which Part I Of The *Dangerous Drugs Act* (Ch. 98) Applies

[49.3.4] Possession

The terms '*Possession*' and '*Found In Possession*' are *not* defined in either the *Dangerous Drugs Act* (Ch. 98) *or* the *Interpretation and General Provisions Act* (Ch. 85):

In *Director of Public Prosecutions v Brooks* [1974] AC 862; (1974) 59 CrAppR 185 [[1974] 2 WLR 899; [1974] 2 AllER 840; [1974] CrimLR 364] Lord Diplock stated at pages 866 and 187 respectively:

> 'In the ordinary use of the word "possession", one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's own physical control.'

In *R v Boyesen* [1982] AC 768; (1982) 75 CrAppR 51 [[1982] 2 WLR 882; [1982] 2 AllER 161; [1982] CrimLR 596] Lord Scarman stated at pages 773 – 774 & 57 respectively:

> 'Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a drug without knowing or comprehending its nature: *but you do not possess it unless you know you have it*.' (emphasis added)

In *R v Ashton – Rickardt* [1978] 1 AllER 173; [(1977) 65 CrAppR 67; [1978] 1 WLR 37; [1977] CrimLR 424] the Court of Appeal held per Roskill LJ at pages 176 – 177:

> 'In *Warner v Metropolitan Police Commissioner* [1968] 2 AllER 356; [1969] 2 AC 256; [1969] 2 QB 256; (1968) 52 CrAppR 373] it was laid down that there could not be possession of a controlled drug unless the accused person knew that the 'thing' which was alleged to contain the controlled drug is in his possession, that knowledge of the presence of the 'thing' in question was an essential prerequisite to possession and that therefore *the Crown had to prove, as part of its proof of possession of the controlled drug, knowledge that the thing (which was in fact a controlled drug) was there*. As was pointed out, and indeed had been pointed out by Lord Parker CJ, how can you have possession of something of the existence of which you do not know?' (emphasis added)

In *R v McNamara* (1988) 87 CrAppR 246 Lord Lane CJ, delivering the judgment of the Court stated at pages 250 – 251:

> 'Unhappily it is not altogether easy to extract from the speeches of their Lordships [in *Warner v Metropolitan Police Commissioner* [1968] 2 AllER 356; [1969] 2 AC 256; [1969] 2 QB 256; (1968) 52 CrAppR 373] the *ratio decidendi*. But doing the best we can, and appreciating that we may not have done full justice to the speeches, the following propositions seem to us to emerge.
>
> First of all a man does not have possession of something which has been put into his pocket or into his house without his knowledge: in other words something which is "planted" on him, to use the current vulgarism. Secondly, a mere mistake as to the quality of a thing under the defendant's control is not enough to prevent him being in possession. For instance, if a man is in possession of heroin, believing it to be cannabis or believing it perhaps to be aspirin.
>
> Thirdly, if a the defendant believes that the thing is of a wholly different nature from that which in fact it is, then the result, to use the words of Lord Pearce, would be otherwise. Fourthly, in the case of a container or a box, the defendant's possession of the box lends to the strong inference that he is in possession of the contents or whatsoever it is inside the box. But if the contents are quite different in kind from what he believed, he is not in possession of it.

> "… the prima facie assumption is discharged if he proves (or raises a real doubt in the matter) either (a) that he was a servant or bailee who had no right to open it and no reason to suspect that its contents were illicit or were drugs or (b) that although he was the owner he had no knowledge of (including a genuine mistake as to) its actual contents or of their illicit nature and that he received them innocently and also that he had had no reasonable opportunity since receiving the package of acquainting himself with its actual contents."'

In *R v Wright* (1976) 62 CrAppR 169 MacKenna J, delivering the judgment of the Court, held at page 173:

> 'If a person is handed a container and at the moment when he receives it does not know or suspect, and has no reason to suspect, that it contains drugs, and if, before he has time to examine the contents, he is told to throw it away and immediately does so, he cannot, in our opinion, be said to have been in possession of the drugs which happened to be inside the container […]. This so even though the instruction to throw away the container, which he instantly obeyed, made him suspect that there was something wrong about its contents.'

Therefore, a person does *not* have the prerequisite 'knowledge' if he/she:

[i] does *not* know where the thing was; and

[ii] was *not* in position to find out.

In *R v Crabbe* (1985) 156 CLR 464; (1985) 58 ALR 417; (1985) 16 ACrimR 19 the High Court of Australia stated at pages 470, 421 and 23 respectively:

> 'When a person deliberately refrains from making inquiries because he prefer not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may from some purposes be treated as having the knowledge which he deliberately abstained from acquiring.'

In *R v McCalla* (1987) 87 CrAppR 372 May LJ, delivering the judgment of the Court, held at page 379:

> 'We think that the basic principle underlying those cases is that once one has or possesses something, be it an offensive weapon or a drug, one continues to have or possess it until one does something to rid oneself of having or possessing it; that merely to have forgotten that one has possession of it is not sufficient to exclude continuing to have or possess it.'

In *R v Williams* (1978) 140 CLR 591; (1978) 53 ALJR 101 Gibbs and Mason JJ in a single judgment, with whom Jacobs J concurred, stated at pages 600 and 102 respectively:

> '[When an Act creates an] offence of having possession of a dangerous drug or a prohibited plant, without adverting to quantity, it contemplates possession, *not of a minute quantity incapable of discernment by the naked eye and detectable only by scientific means, but possession of such a quantity as makes it reasonable to say as a matter of common sense and reality that it is the prohibited plant or drug of which the person is presently in possession*.' (emphasis added) [words in brackets added]

Murphy J stated at pages 603 and 105 respectively:

> 'Knowledge by the person charged that he has the prohibited substance is *not* enough where the amount of material is so small or so dispersed or mixed with other material that it *cannot* in practice be used in the way contemplated by the Act.' (emphasis added)

In *Donnelly v Rose* [1995] 1 QdR 148 the Court of Appeal held at page 149 that:

- The reference to visibility with the naked eye was *not* intended to be a comprehensive statement of the relevant test as enunciated in *R v Williams* (*supra*);
- Passing the visibility test does *not* necessarily secure success for the prosecution; and
- *R v Williams* (*supra*) should be read as requiring an application of a '*common sense and reality*' test.

Therefore, the prosecution *must* be able to prove '*beyond reasonable doubt*' that as a matter of '*common sense and reality*' the quantity of dangerous drug in the possession of the defendant was capable of being used. That test is *not* satisfied simply because the dangerous drug is able to be seen with the naked eye, see *R v Carver* [1978] 3 AllER 60; [1978] 2 WLR 872.

The quantity of dangerous drug *must* be visible, tangible and measurable, see *R v Boyesen* (*supra*).

See also: *R v Worsell* [1970] 1 WLR 111; (1969) 53 CrAppR 322; [1969] 2 AllER 1183; *R v Frederick* (1969) 53 CrAppR 455; *R v Graham* (1978) 67 CrAppR 357; *Bocking v Roberts* (1978) 67 CrAppR 359; [1974] QB 307; *R v Lewis* (1988) 87 CrAppR 270; [1988] CrimLR 542; *Lockyer v Gibb* [1966] 3 WLR 84; *R v Warneminde* [1982] QdR 49 at page 55 & *Maxwell Arthur Schliebs v H Singh* [1981] PNGLR 364 at pages 369 – 371.

[49.3.5] Dangerous Drug To Which Part I Applies

The element '*Dangerous Drug To Which Part I Applies*' is examined commencing on page **761**.

[49.4] Manufacture Or Sell Or Deal In Or Possess Or Permit Premises Or Manage Premises Or Smokes Or Use Or Frequent Places

[49.4.1] Offences

Section 12(1) of the *Dangerous Drugs Act* (Ch. 98) states:

'If any person –

(a) manufactures, sells or otherwise deals in prepared opium; or

(b) has in his possession any prepared opium; or

(c) being the occupier of any premises, permits those premises to be used for the preparation of opium for consumption or the sale or smoking of prepared opium; or

(d) is concerned in the management of any premises used for any such purposes as aforesaid; or

(e) has in his possession any pipes or other utensils for use in connection with the smoking of opium, or any utensil used in connection with the preparation of opium for smoking; or

(f) smokes or otherwise uses prepared opium, or frequents any place used for the purpose of opium smoking,

he shall be guilty of an offence against this Act.'

[49.4.2] Wording Of Charges

Section 12(1)(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**manufacture, sell **or** deal in**]** prepared opium.'

Section 12(1)(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did have in **[**his/her**]** possession prepared opium.'

Section 12(1)(c)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the occupier of premises situated at **[**describe location**]** did permit the said premises to be used for the preparation of opium for **[**consumption, sale **or** smoking**]** of prepared opium.'

Section 12(1)(d)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being concerned in the management of premises situated at **[**describe location**]** did permit the said premises to be used for the preparation of opium for **[**consumption, sale **or** smoking**]** of prepared opium.'

Section 12(1)(e)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did have in **[**his/her**]** possession a **[(**pipe **or** utensil**)** for use in connection with the smoking of opium **or** utensil used in connection with the preparation of opium for smoking**]**.'

Section 12(1)(f)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**smoke **or** use**]** prepared opium.'

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did frequent a place to wit **[**describe location**]** used for the purpose of opium smoking.'

[49.4.3] Elements

Section 12(1)(a)

A. Defendant

B. Place

C. Date

D. [i] Manufacture;
[ii] Sell; or
[iii] Deal In

E. Prepared Opium

Section 12(1)(b)

A. Defendant

B. Place

C. Date

D. Possession

E. Prepared Opium

Section 12(1)(c)

A. Defendant

B. Place

C. Date

D. Occupier Of Premises

E. Permit The Said Premises

F. To Be Used For The Preparation Of Opium For
[i] Consumption;
[ii] Sale; or
[iii] Smoking

G. Prepared Opium

Section 12(1)(d)

A. Defendant

B. Place

C. Date

D. Management Of Premises

E. Permit The Said Premises

F. To Be Used For The Preparation Of Opium For
   [i] Consumption;
   [ii] Sale; or
   [iii] Smoking

G. Prepared Opium

Section 12(1)(e)

A. Defendant

B. Place

C. Date

D. Possession

E. [i] [1] Pipe; or
   [2] Utensil
   For Use In Connection With The Smoking of Opium; or
   [ii] Utensil Used In Connection With The Preparation Of Opium For Smoking

Section 12(1)(f) [Smoke / Use]

A. Defendant

B. Place

C. Date

D. [i] Smoke; or
   [ii] Use

E. Prepared Opium

Section 12(1)(f) [Frequent]

A. Defendant

B. Place

C. Date

D. Frequent

E. Place Used For The Purpose Of Opium Smoking

[49.4.4] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[49.4.5] Possession

The law relating to the element of '*Possession*' is examined commencing on page **765**.

[49.4.6] Permit Premises

The term '*Permit Premises*' is *not* defined in either the *Dangerous Drugs Act* (Ch. 98) *or* the *Interpretation and General Provisions Act* (Ch. 85):

In *R v Brock & Wyner* [2001] 2 CrAppR 3 [[2001] 1 WLR 1159; [2001] 2 CrAppR(S) 48; [2001] CrimLR 320] the Court of Appeal held per Rose LJ at page 42:

> 'What the prosecution *must* prove to establish the offence of permitting under section 8(b) [of the *Misuse of Drugs Act* 1971] is: (i) knowledge, actual or by closing eyes to the obvious, that heroin dealing is taking place; *and* (ii) unwillingness to prevent it, which can be inferred from failure to take reasonable steps readily available to prevent it.' (emphasis added) [words in brackets added]

[49.4.7] Management Of Premises

The term '*Management Of Premises*' is *not* defined in either the *Dangerous Drugs Act* (Ch. 98) *or* the *Interpretation and General Provisions Act* (Ch. 85).

To be concerned in the management of premises simply requires that the defendant is involved in the day - to - day management of such premises, and *not* necessarily having any legal right as regards ownership of such premises, see *R v Josephs & Christie* (1977) 65 CrAppR 253.

[49.5] Failure To Keep Stock Book

[49.5.1] Offence

Section 16(2) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Any person in possession of any dangerous drug to which this Part of this Act applies, shall keep a stock book in such form as shall be prescribed by rule.'

[49.5.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** who did have in **[**his **or** her**]** possession a dangerous drug to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]** did fail to keep a stock book in the form as prescribed in the rule.'

[49.5.3] Elements

A. Defendant

B. Place

C. Date

D. Possession

E. Dangerous Drug To Which Part III of the *Dangerous Drugs Act* (Ch. 98) Applies

F. Fail To Keep A Stock Book In The Form Prescribed By Rule

[49.5.4] Possession

The law relating to the element of '*Possession*' is examined commencing on page **765**.

[49.5.5] Dangerous Drug To Which Part III Applies

The element '*Dangerous Drug To Which Part III Applies*' is examined commencing on page **761**.

[49.5.6] Stock Book

At this time there is no form for a '*stock book*' prescribed by rule.

[49.6] Delivery Or Withdrawal

[49.6.1] Offences

Section 17 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No dangerous drug to which this Part of this Act applies, shall be delivered or withdrawn from the appointed store except on the written authority of the Permanent Secretary, Ministry of Health & Medical Services or an officer authorized by him as hereinafter provided.'

[49.6.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**deliver **or** withdraw**]** from an appointed store a dangerous drug to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]** without the written authority of **[**the Permanent Secretary, Ministry of Health & Medical Services **or** an officer authorized by the Permanent Secretary, Ministry of Health & Medical Services**]** namely **[**specify the name of this person**]**.'

[49.6.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Deliver; or
[ii] Withdraw

E. Appointed Store

F. Dangerous Drug To Which Part III of the *Dangerous Drugs Act* (Ch. 98) Applies

G. Without Written Authority Of

[i] The Permanent Secretary, Ministry Of Health & Medical Services; or
[Ii] An Officer Authorized By The Permanent Secretary, Ministry Of Health & Medical Services

[49.6.4] Store

The term '*Store*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'a place appointed by the Minister for the storage of any drug to which this Act applies on its arrival in Solomon Islands'.

[49.6.5] Dangerous Drug To Which Part III Applies

The element '*Dangerous Drug To Which Part III Applies*' is examined commencing on page **761**.

[49.6.6] Defence

The defendant *must* prove on the '*balance of probabilities*' that he/she had the written authority of:

- the Permanent Secretary, Ministry of Health & Medical Services; or
- an officer authorized by the Permanent Secretary, Ministry of Health & Medical Services.

Refer also to the law relating to '*Negative Averments*' examined commencing on page **83**.

[49.7] Withdrawal

[49.7.1] Offence

Section 19 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No officer shall authorize the withdrawal of any dangerous drug to which this Part of this Act applies from the store, except to a registered medical practitioner, licensed pharmacist, registered dentist, qualified veterinary surgeon, or to a hospital attendant approved by the Permanent Secretary, Ministry of Health and Medical Services at a plantation hospital, or to a person approved by the Permanent Secretary, Ministry of Health and Medical Services engaged in medical work under the control of a recognized Mission.'

[49.7.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being an officer authorized to withdraw dangerous drugs to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies did authorize the withdrawal of a dangerous drug to wit **[**specify the 'dangerous drug'**]** to a person namely **[**specify the name of this person**]** not being a registered medical practitioner, licensed pharmacist, registered dentist, qualified veterinary surgeon, hospital attendant approved by the Permanent Secretary, Ministry of Health and Medical Services at a plantation hospital, or a person approved by the Permanent Secretary, Ministry of Health and Medical Services engaged in medical work under the control of a recognized Mission.'

[49.7.3] Elements

A. Defendant

B. Place

C. Date

D. Being An Officer Authorised To Withdraw

E. Dangerous Drugs To Which Part III of the *Dangerous Drugs Act* (Ch. 98) Applies

F. Authorise The Withdrawal Of A Dangerous Drug

G. To A Person

H. Not Being A Registered Medical Practitioner, Licensed Pharmacist, Registered Dentist, Qualified Veterinary Surgeon, Hospital Attendant Approved By The Permanent Secretary, Ministry Of Health And Medical Services At A Plantation Hospital, Or A Person Approved By The Permanent Secretary, Ministry Of Health And Medical Services Engaged In Medical Work Under The Control Of A Recognized Mission

[49.7.4] Officer Authorised To Withdraw

Refer to section 18 of the *Dangerous Drugs Act* (Ch. 98).

[49.7.5] Dangerous Drug To Which Part III Applies

The element '*Dangerous Drug To Which Part III Applies*' is examined commencing on page **761**.

[49.8] Storage

[49.8.1] Offences

Section 20 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'When any dangerous drug to which this Part of this Act applies is found in the possession of any person or kept in any place other than the appointed store, such person or the occupier of such place, unless he can prove that such drug was obtained under the authority of this Act, or in accordance with the prescription of a registered medical practitioner, or from a person having authority to sell it, or was deposited there without his knowledge or consent; and also the owner of, or any person guilty of keeping, the said dangerous drug, shall be guilty of an offence under this Act.'

[49.8.2] Possession

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was found in **[**his/her**]** possession a dangerous drug to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]** not having been obtained under the authority of the said Act in accordance with the prescription of a registered medical practitioner or from a person having authority to sell it.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Found In Possession

E. Dangerous Drug To Which Part III of the *Dangerous Drugs Act* (Ch. 98) Applies

F. Authority Of The Said Act In Accordance With The Prescription Of A Registered Medical Practitioner Or From A Person Having Authority To Sell It

[C] Possession

The law in relation to the element '*Possession*' is examined commencing on page **765**.

[D] Dangerous Drug To Which Part III Applies

The element '*Dangerous Drug To Which Part III Applies*' is examined commencing on page **761**.

[E] Defence

The defendant *must* prove on the '*balance of probabilities*' that he/she had obtained the 'dangerous drug' under the authority of the *Dangerous Drugs Act* (Ch. 98) in accordance with the prescription of a registered medical practitioner or from a person having authority to sell it.

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.8.3] Occupier Of Place

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the occupier of a place other than an approved store did keep in the said place a dangerous drug to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]** not having been obtained under the authority of the said Act in accordance with the prescription of a registered medical practitioner or from a person having authority to sell it and the said dangerous drug was not deposited there without **[**his/her**]** knowledge or consent.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Occupier

E. Place Other Than An Approved Store

F. Keep

G. Dangerous Drug To Which Part III of the *Dangerous Drugs Act* (Ch. 98) Applies

H. Authority Of The Said Act In Accordance With The Prescription Of A Registered Medical Practitioner Or From A Person Having Authority To Sell It And The Said Dangerous Drug Was Not Deposited There Without Knowledge Or Consent

[C] Occupier

The term '*Occupier*' is *not* defined in either the *Dangerous Drugs Act* (Ch. 98) *or* the *Interpretation and General Provisions Act* (Ch. 85):

Any person who is able to exclude others from the 'premises' is an 'occupier', see *R v Tao* [1976] 3 WLR 25; [1976] 3 AllER 65; [1977] QB 141; (1976) 63 CrAppR 163.

[D] Store

The term '*Store*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'a place appointed by the Minister for the storage of any drug to which this Act applies on its arrival in Solomon Islands'.

[E] Dangerous Drug To Which Part III Applies

The element '*Dangerous Drug To Which Part III Applies*' is examined commencing on page **761**.

[F] Defence

The defendant *must* prove on the '*balance of probabilities*' that:

[i] he/she had obtained the 'dangerous drug' under the authority of the *Dangerous Drugs Act* (Ch. 98) in accordance with the prescription of a registered medical practitioner or from a person having authority to sell it; or

[ii] the dangerous drug was deposited there without his/her knowledge or consent.

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.8.4] Owner Of Place

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the owner of a place other than an approved store in which a dangerous drug to which Part III of the *Dangerous Drugs Act* (Ch. 98) applies to wit **[**specify the 'dangerous drug'**]** not having been obtained under the authority of the said Act in accordance with the prescription of a registered medical practitioner or from a person having authority to sell it was kept and the said dangerous drug was not deposited there without **[**his/her**]** knowledge or consent.'

[B] Elements

A. Defendant

B. Location

C. Date

D. Owner

E. Place Other Than An Approved Store

F. A Dangerous Drug To Which Part III of the *Dangerous Drugs Act* (Ch. 98) Applies

G. Was Kept

H. Authority Of The Said Act In Accordance With The Prescription Of A Registered Medical Practitioner Or From A Person Having Authority To Sell It Was Kept And The Said Dangerous Drug Was Not Deposited There Without Knowledge Or Consent

[C] Store

The term '*Store*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'a place appointed by the Minister for the storage of any drug to which this Act applies on its arrival in Solomon Islands'.

[D] Dangerous Drug To Which Part III Applies

The element '*Dangerous Drug To Which Part III Applies*' is examined commencing on page **761**.

[E] Defence

The defendant *must* prove on the '*balance of probabilities*' that:

[i] he/she had obtained the 'dangerous drug' under the authority of the *Dangerous Drugs Act* (Ch. 98) in accordance with the prescription of a registered medical practitioner or from a person having authority to sell it; or

[ii] the said dangerous drug was deposited there without his/her knowledge or consent.

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.9] Prohibition Of Trade In New Dangerous Drugs

[49.9.1] Offences

Section 21(1) of the *Dangerous Drugs Act* (Ch. 98) states (in part):

> 'No person shall trade in, or manufacture for the purpose of trade, any products obtained from any of the phenanthrene alkaloids of opium or from the ecgonine alkaloids of the cocoa leaf, not being a product which was, on the thirteenth day of July one thousand nine hundred and thirty – one, being used for medical or scientific purposes.'

[49.9.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**trade in **or** manufacture for the purpose of trade**]** a product obtained from the **[**phenanthrene alkaloids of opium **or** ecgonine alkaloids of the cocoa leaf**]** not being a product which was on the 13th July 1931 used for medical or scientific purposes.'

[49.9.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Trade; or
[ii] Manufacture For The Purpose Of Trade

E. Product Obtained From
[i] Phenanthrene Alkaloids Of Opium; or
[ii] Ecgonine Alkaloids Of The Cocoa Leaf

F. Not Being A Product Which Was On The 13th July 1931 Used For Medical Or Scientific Purposes

[49.9.4] Proof Of A Dangerous Drug

The law relating to '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

The terms '*Ecgonine*' and '*Cocoa Leaf*' are defined in section 2 of the *Dangerous Drugs Act* (Ch. 98).

[49.10] Dangerous Drugs In Transit

[49.10.1] Offence

Section 31(1) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall bring any dangerous drug to Solomon Islands in transit unless –
>
> (a) the drug is in course of transit from a country from which it may lawfully be exported to another country into which such drug may lawfully be imported; and
>
> (b) except where the drug comes from a country not a party to the Convention, it is accompanied by a valid and subsisting export authorization or diversion certificate, as the case may be.'

[49.10.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did bring a dangerous drug to wit **[**specify the 'dangerous drug'**]** to Solomon Islands in transit from a country to wit **[**specify the country**]** from which the said dangerous drug **[**may **or** may not**]** lawfully be exported to another country to wit **[**specify the country**]** into which the said dangerous drug **[**may **or** may not**]** lawfully be imported and not accompanied by a valid and subsisting **[**export authorization **or** diversion**]** certificate.'

[49.10.3] Elements

A. Defendant

B. Location

C. Date

D. Bring A Dangerous Drug

E. To Solomon Islands In Transit

F. From A Country From Which The Said Dangerous Drug
[i] May; or
[ii] May Not
Lawfully Be Exported

G. To Another Country Into Which The Said Dangerous Drug
[i] May; or
[ii] May Not
Lawfully Be Imported

H. Not Accompanied By A Valid And Subsisting
[i] Export Authorization; or
[ii] Diversion
Certificate

[49.10.4] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[49.10.5] In Transit

The term '*In Transit*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'taken or sent from any country and brought into Solomon Islands (whether or not landed or transhipped in Solomon Islands) for the sole purpose of being carried to another country, either by the same or another conveyance'.

[49.10.6] Convention

The term '*Convention*' is defined in section 2 of the *Dangerous Drugs Act* (Ch.98) as *meaning*:

> 'the International Opium Convention signed at The Hague on the twenty – third day of January one thousand nine hundred and twelve (The Hague Convention), the International Opium Convention signed at Geneva on the nineteenth day of February one thousand nine hundred and twenty – five (The Geneva Convention No. 1), and the International Convention for limiting the manufacture and regulating the distribution of narcotic drugs signed at Geneva on the thirteenth day of July one thousand nine hundred and thirty – one (The Geneva Convention No. 2).'

[49.10.7] Defence

The defendant *must* prove on the '*balance of probabilities*' that there was a valid and subsisting:

- '*Export Authorisation Certificate*', refer to section 22 of the *Dangerous Drugs Act* (Ch. 98); or
- '*Diversion Certificate*', refer to section 34 of the *Dangerous Drugs Act* (Ch. 98).

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.11] Removal Licenses

[49.11.1] Offences

Section 32(1) of the *Dangerous Drugs Act* (Ch. 98) states (in part):

> 'No person shall –
>
> (a) remove any dangerous drug from any conveyance in which it is brought into Solomon Islands in transit; or
>
> (b) in any way move any such drug in Solomon Islands at any time after removal from such conveyance;
>
> except under and in accordance with a licence (in the Form D set out in the Schedule and in this Act referred to as a "removal license") issued by the Permanent Secretary, Ministry of Health and Medical Services.'

[49.11.2] Wording Of Charges

Section 32(1)(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** not under or in accordance with a removal licence did remove a dangerous drug to wit **[**specify the 'dangerous drug'**]** from a conveyance in which it was brought into Solomon Islands in transit.'

Section 32(1)(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** not under or in accordance with a removal licence did move a dangerous drug to wit [specify the 'dangerous drug'] after its removal from a conveyance in which the said dangerous drug was brought into Solomon Islands.'

[49.11.3] Elements

Section 32(1)(a)

A. Defendant

B. Place

C. Date

D. Not Under Or In Accordance With A Removal Licence

E. Remove

F. Dangerous Drug

G. Conveyance

H. In Which The Said Dangerous Drug Was Brought Into Solomon Islands

I. In Transit

Section 32(1)(b)

A. Defendant

B. Place

C. Date

D. Not Under Or In Accordance With A Removal Licence

E. Move

F. Dangerous Drug

G. After Its Removal

H. Conveyance

I. In Which The Said Dangerous Drug Was Brought Into Solomon Islands

[49.11.4] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[49.11.5] Conveyance

The term '*Conveyance*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *including*:

> 'ship, aircraft and any other means of transport by which goods may be brought into or taken from Solomon Islands'.

[49.11.6] In Transit

The term '*In Transit*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'taken or sent from any country and brought into Solomon Islands (whether or not landed or transhipped in Solomon Islands) for the sole purpose of being carried to another country, either by the same or another conveyance'.

[49.11.7] Defence

The defendant *must* prove on the '*balance of probabilities*' that the 'dangerous drug' was '*removed*' under or in accordance with a '*removal licence*', as referred to in section 32 of the *Dangerous Drugs Act* (Ch. 98).

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.12] Tampering With Dangerous Drugs

[49.12.1] Offences

Section 33 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall cause any dangerous drug in transit to be subjected to any process which would alter its nature, or wilfully open or break any package containing any dangerous drug in transit, except upon the instructions of the Permanent Secretary, Ministry of Health and Medical Services, and in such a manner as he may direct.'

[49.12.2] Alter Nature

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** not upon the instructions of the Permanent Secretary, Ministry of Health and Medical Services namely **[**specify the name of this person**]** did cause a dangerous drug to wit **[**specify the 'dangerous drug'**]** in transit to be subjected to a process which did alter its nature.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Not Upon The Instructions Of The Permanent Secretary, Ministry Of Health And Medical Services

E. Cause

F. Dangerous Drug

G. In Transit

H. To Be Subjected To A Process Which Did Alter Its Nature

[C] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[D] In Transit

The term '*In Transit*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'taken or sent from any country and brought into Solomon Islands (whether or not landed or transhipped in Solomon Islands) for the sole purpose of being carried to another country, either by the same or another conveyance'.

[E] Defence

The defendant *must* prove on the '*balance of probabilities*' that the 'dangerous drug' was subjected to a process which did alter its nature upon the instructions of the Permanent Secretary, Ministry of Health and Medical Services.

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.12.3] Wilfully Open Or Break Package

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** not upon the instructions of the Permanent Secretary, Ministry of Health and Medical Services namely **[**specify the name of this person**]** did wilfully **[**open **or** break**]** a package containing a dangerous drug to wit **[**specify the 'dangerous drug'**]** in transit.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Not Upon The Instructions Of The Permanent Secretary, Ministry Of Health And Medical Services

E. Wilfully
   [i] Open; or
   [ii] Break

F. Package

G. Containing A Dangerous Drug

H. In Transit

[C] Wilfully

The term '*Wilfully*' is *not* defined in the *Dangerous Drugs Act* (Ch 98) *or* the *Interpretation & General Provisions Ac*t (Ch. 85).

In *Pukari – Flabu v Hambakon – Sma* [1965 – 66] P&NGLR 348 Frost J, sitting alone, held:

> 'Wilfully' *means* 'intentionally', or 'deliberately' or 'recklessly' or 'maliciously', but not 'accidentally' or 'negligently'.

[D] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[E] In Transit

The term '*In Transit*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'taken or sent from any country and brought into Solomon Islands (whether or not landed or transhipped in Solomon Islands) for the sole purpose of being carried to another country, either by the same or another conveyance'.

[F] Defence

The defendant *must* prove on the '*balance of probabilities*' that the package containing the 'dangerous drug' was willfully opened or broken into upon the instructions of the Permanent Secretary, Ministry of Health and Medical Services.

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.13] Diversion Of Dangerous Drugs

[49.13.1] Offences

Section 34(1) of the *Dangerous Drugs Act* (Ch. 98) states (in part):

> 'No person shall, except under the authority of a diversion certificate in the Form E in the Schedule cause or procure a dangerous drug brought into Solomon Islands in transit to be diverted to any destination other than that to which it was originally consigned.'

[49.13.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** not under the authority of a diversion certificate issued under the *Dangerous Drugs Act* (Ch. 98) did **[**cause **or** procure**]** a dangerous drug to wit **[**specify the 'dangerous drug'**]** to be brought into Solomon Islands in transit.'

[49.13.3] Elements

A. Defendant

B. Place

C. Date

D. Under The Authority Of A Diversion Certificate Issued Under The *Dangerous Drugs Act* (Ch. 98)

E. [i] Cause; or
[ii] Procure

F. Dangerous Drug

G. To Be Brought Into Solomon Islands In Transit

[49.13.4] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[49.13.5] In Transit

The term '*In Transit*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'taken or sent from any country and brought into Solomon Islands (whether or not landed or transhipped in Solomon Islands) for the sole purpose of being carried to another country, either by the same or another conveyance'.

[49.13.6] Defence

The defendant *must* prove on the '*balance of probabilities*' that the 'dangerous drug' was caused or procured to be brought into Solomon Islands under the authority of a diversion certificate issued under the *Dangerous Drugs Act* (Ch. 98), see section 34 of that Act.

Refer also to the law relating to '*Negative Averments*' as examined commencing on page **83**.

[49.14] Approved Ports

[49.14.1] Offences

Section 3 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'No person shall import, export, tranship or divert dangerous drugs except through a port approved for the purposes of this section by the Minister by notice.'

[49.14.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**import, export, tranship **or** divert**]** a dangerous drug to wit **[**specify the 'dangerous drug'**]** other than through the Honiara port or Henderson aerodrome as approved for the purposes of the *Dangerous Drugs Act* (Ch. 98) by the Minister by notice to wit **[**specify the port**]**.'

[49.14.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Import;
[ii] Export;
[iii] Tranship; or
[iv] Divert

E. Dangerous Drug

F. Other Than Through The Honiara Port Or Henderson Aerodrome As Approved For The Purposes Of The *Dangerous Drugs Act* (Ch. 98) By The Minister By Notice

[49.14.4] Import

The term '*Import*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'to bring or cause to brought into Solomon Islands *otherwise than in transit*'. (emphasis added)

See: *R v Jackeman* (1983) 76 CrAppR 223.

The term '*In Transit*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'taken or sent from any country and brought into Solomon Islands (whether or not landed or transhipped in Solomon Islands) for the sole purpose of being carried to another country, either by the same or another conveyance'.

[49.14.5] Export

The term '*Export*' is defined in section 2 of the *Dangerous Drugs Act* (Ch. 98) as *meaning*:

> 'to take or cause to be taken out of Solomon Islands *otherwise than in transit*'. (emphasis added)

[49.14.6] Approved Port

The following places have been approved as '*ports*' for the purposes of section 3 of the *Dangerous Drugs Act* (Ch. 98):

- Honiara port; and
- Henderson aerodrome.

[49.15] Wilfully Delay Or Obstruct Or Fail To Produce Or Conceal Or Attempt To Conceal

[49.15.1] Offences

Section 38(3) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'If any person wilfully delays or obstructs any person in the exercise of his powers under this section, or fail to produce, or conceals, or attempts to conceal, any such books, drugs, stocks or documents as aforesaid, he shall be guilty of an offence against this Act.'

[49.15.2] Wording Of Charges

[A] Wilfully Delay Or Obstruct

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did wilfully **[**delay **or** obstruct**]** a person namely **[**specify rank and full name**]** in the exercise of **[**his **or** her**]** powers under section 38 of the *Dangerous Drugs Act* (Ch. 98).'

[B] Fail To Produce Or Conceal Or Attempt To Conceal

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**fail to produce, conceal **or** attempt to conceal**] [**a dangerous drug to wit **(**specify the dangerous drug**)**, **(**a book, a document **or** stocks**)** relating to the business of a producer, manufacturer, seller or distributor of dangerous drugs**]** namely **[**specify the name of this person**]**.'

[49.15.3] Elements

[A] Wilfully Delay Or Obstruct

A. Defendant

B. Place

C. Date

D. Wilfully
   [i] Delay; or
   [ii] Obstruct

E. Person

F. Exercise Of His/Her Powers Under Section 38 Of The *Dangerous Drugs Act* (Ch. 98)

[B] Fail To Produce Or Conceal Or Attempt To Conceal

A. Defendant

B. Place

C. Date

D. [i] Fail To Produce;
   [ii] Conceal; or
   [iii] Attempt To Conceal

E. [i] Dangerous Drug; or
   [ii] [1] Book;
   [2] Document; or
   [3] Stocks
   Relating To The Business Of A Producer, Manufacturer, Seller Or Distributor Of Dangerous Drugs

[49.15.4] Proof Of A Dangerous Drug

The law relating to the '*Proof Of A Dangerous Drug*' is examined commencing on page **762**.

[49.16] Contravene Or Fail To Comply With Rules

[49.16.1] Offences

Section 39(1)(a) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Any person who –
>
> (a) acts in contravention of or fails to comply with any […] rule made under this Act,
>
> shall be guilty of an offence against this Act.'

There has been no rules made under that Act.

[49.16.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**act in contravention of **or** fail to comply with**]** a rule made under the *Dangerous Drugs Act* (Ch. 98) to wit **[**specify the rule**]**.'

[49.16.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Act In Contravention Of; or
[ii] Fail To Comply With

E. Rule Made Under The *Dangerous Drugs Act* (Ch. 98)

[49.17] Contravene & Fail To Comply With License Conditions

[49.17.1] Offences

Section 39(1)(b) of the *Dangerous Drugs Act* (Ch. 98) states (in part):

> 'Any person who –
>
> (b) acts in contravention of or fails to comply with the conditions of any license or any authority granted under or in pursuance of this Act,
>
> shall be guilty of an offence against this Act.'

[49.17.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**act in contravention of **or** fail to comply with**]** the condition of **[**a license **or** an authority**]** granted **[**under **or** in pursuance of**]** the *Dangerous Drugs Act* (Ch. 98).'

[49.17.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Act In Contravention Of; or
[ii] Fail To Comply With

E. Condition Of
[i] License; or
[ii] Authority
Granted Under Or In Pursuance Of The *Dangerous Drugs Act* (Ch. 98)

[49.18] False Declaration Or Statement

[49.18.1] Offences

Section 39(1)(c) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Any person who –
>
> (c) for the purpose of obtaining for himself or for any other person, the issue, grant or renewal of any such license or authority as aforesaid, makes any declaration or statement which is false in any particular, or knowingly utters, produces or makes use of, any such statement or declaration or any document confirming the same,
>
> shall be guilty of an offence against this Act.'

[49.18.2] Wording Of Charges

[A] Make A False Declaration Or Statement

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did for the purpose of obtaining for **[(**himself/herself**) or** another person namely **(**specify the name of this person**)]** the **[**issue, grant **or** renewal**]** of a **[**license issued **or** authority granted**] [**under **or** in pursuance of**]** the *Dangerous Drugs Act* (Ch. 98) did make a **[**declaration **or** statement**]** which was false in a particular.'

[B] Utter, etc, A False Declaration Or Statement

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did for the purpose of obtaining for **[(**himself/herself**) or** another person namely **(**specify the name of this person**)]** the **[**issue, grant **or** renewal**]** of a **[**license issued **or** authority granted**] [**under **or** in pursuance of**]** the *Dangerous Drugs Act* (Ch. 98) did knowingly **[**utter, produce **or** make use of**]** a **[**declaration, statement **or** document**]** which was false in a particular.'

[49.18.3] Elements

[A] Make A False Declaration Or Statement

A. Defendant

B. Place

C. Date

D. [i] Himself/Herself; or
[ii] Another Person

E. [i] Issue;
[ii] Grant; or
[iii] Renewal

F. [i] License Issued; or
[ii] Authority Granted

G. Under Or In Pursuance Of The *Dangerous Drugs Act* (Ch. 98)

H. Make False
[i] Declaration; or
[ii] Statement

[B] Utter, etc, A False Declaration Or Statement

A. Defendant

B. Place

C. Date

D. [i] Himself/Herself; or
[ii] Another Person

E. Knowingly
[i] Utter;
[ii] Produce; or
[iii] Make Use Of

F. False
[i] Declaration;
[ii] Statement; or
[iii] Document

[49.19] Solicits Or Incites

Section 39(4) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'If any person […] *solicits or incites* another person to commit [an offence against this Act], he shall, without prejudice to any other liability, be liable to the same punishment and forfeiture as if he had committed an offence against this Act.' (emphasis added) [words in brackets added]

[49.20] Liabilities Of Companies, etc

Section 39(5) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'When a person convicted of an offence against this Act is *a company, the chairman and every director and every officer concerned in the management of the company* shall be guilty of the like offence, unless he proves that the act constituting the offence took place without his knowledge or consent.' (emphasis added)

[49.21] Offences Committed Outside Solomon Islands

Section 39(1)(d) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Any person who –
>
> (d) in Solomon Islands *aids, abets, counsels or procures* the commission in any place *outside Solomon Islands* of any offence punishable under the provisions of any corresponding law in force in that place, […],
>
> shall be guilty of an offence against this Act.' (emphasis added)

The term '*Corresponding Law*' *means* 'any law stated in a certificate purporting to be issued by or on behalf of the Government of any place outside Solomon Islands, to be a law providing for the control and regulation in that country of the manufacture, sale, use, import and export of drugs or substances in accordance with the provisions of The Hague Convention, The Geneva Convention No. 1 and The Geneva Convention No. 2; and any such statement in any such certificate as to the effect of the law mentioned in the certificate, or any statement in any such certificate that any facts constitute an offence against that law, shall be conclusive', see section 2 of the *Dangerous Drugs Act* (Ch. 98).

[49.22] General Penalty

Section 39(2) of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Every person guilty of an offence against this Act shall, in respect of each offence for which no penalty is otherwise prescribed, be liable –
>
> (a) on conviction by the court sitting with assessors, to a fine of two thousand dollars, or to imprisonment for ten years, or to both such fine and imprisonment; or
>
> (b) on summary conviction, to a fine of five hundred dollars, or to imprisonment for six months, or to both such fine and imprisonment;
>
> and shall in every case, on conviction for the offence, forfeit to Her Majesty all articles in respect of which the offence was committed; and the court before which the offender was convicted may order the forfeited articles to be destroyed or otherwise disposed of, as the Court deems fit.'

As regards '*forfeiture*' of the dangerous drug, see also sections 6 and 12(2) of that Act.

Section 41 of that Act states:

> 'The court before which any person is convicted for any offence against this Act may direct a portion of the fine actually paid into court, and not exceeding one – half, to be paid to an informer.'

The law relating to:

- '*Informers*' is examined commencing on page **130**; and
- '*Sentencing*' is examined commencing on page **918**.

[49.23] Search Warrant

[49.23.1] Generally

Section 36 of the *Dangerous Drugs Act* (Ch. 98) states:

> '(1) A Magistrate, if satisfied by *information on oath* that any drug or other substance to which this Act applies is being unlawfully kept, landed, conveyed or sold in contravention of this Act, in *any place*, whether a building or not, or in *any ship not having the status of a ship of war*, or in *any vehicle*, may grant a warrant to enter at any time, and if needs be by force, on Sundays as well as any other days, the place, ship or vehicle named in such warrant, and every part thereof to examine and to search for any such drug or other article unlawfully kept therein, and to demand from the owner or occupier thereof the production of the authority for being in possession of the same.
>
> (2) When the officer or other person executing such warrant has reasonable cause to believe that any drug or other article to which this Act applies, found by him in any place, ship or vehicle, is being kept, conveyed, landed or sold in contravention of this Act, he may seize and detain the same until the court has decided whether the same is liable to be forfeited or not.

(3) Proceedings in the court shall be commenced as soon as possible after the seizure.' (emphasis added)

That Act provides that if upon '*information on oath*' a Magistrate is satisfied that any drug or other substance to which the *Dangerous Drugs Act* (Ch. 98) applies is being unlawfully kept, landed, conveyed or sold in contravention of that Act, a '*search warrant*' *may* be granted to search *any place*, whether a building or not, or in *any ship not having the status of a ship of war*, or in *any vehicle*.

The term '*Place*' is *not* defined in either the *Dangerous Drugs Act* (Ch. 98) *or* the *Interpretation & General Provisions Act* (Ch. 85). The natural and ordinary meaning of that term in the context of section 36 of the *Dangerous Drugs Act* (Ch. 98) would *include* parks and other areas of land as distinct from buildings.

Refer also to the '*Issuance Of Search Warrants*' under:

- section 38 of the *Dangerous Drugs Act* (Ch. 98); and
- the *Criminal Procedure Code* (Ch. 7) which is examined commencing on page **259**.

Considering that the forms to be used have *not* been prescribed in either the *Dangerous Drugs Act* (Ch. 98) *or* the *Magistrates' Courts (Forms) Rules*, the following forms have been prepared in compliance with section 36 of the *Dangerous Drugs Act (*Ch. 98):

- '*Information To Ground Search Warrant*', a copy of which is on page **796**; and
- '*Search Warrant*', a copy of which is on page **797**.

INFORMATION TO GROUND SEARCH WARRANT

(Dangerous Drugs Act (Ch. 98), S. 36)

…… of …….
on his/her oath believes that:

- a dangerous drug to wit ……..…… **and / or**
- substance / article to which the *Dangerous Drugs Act* (Ch. 98) applies to wit …….. [cross out what is not applicable]

is being unlawfully kept, landed, conveyed or sold [cross out what is not applicable] in contravention of the *Dangerous Drugs Act* (Ch. 98) in:

- a place to wit ……..…..…….…….. at ……..…. **or**
- a ship namely ……..……..… **or**
- a vehicle to wit.....[cross out what is not applicable]

on the …… day of ……. 200…, and that there are reasonable cause for such belief; for he/she the said ……..……
says that:

Sworn)
this …… day of …….. 200 …..)
Before me:

Magistrate

SEARCH WARRANT
(Dangerous Drugs Act (Ch. 98), S. 36)

To all Police Officers within Solomon Islands

……. of ……
has this day made on oath before me that he/she believes that:

- a dangerous drug to wit ……..… **and / or**
- substance / article to which the *Dangerous Drugs Act* (Ch. 98) applies to wit ……[cross out what is not applicable]

is being unlawfully kept, landed, conveyed or sold [cross out what is not applicable] in contravention of the *Dangerous Drugs Act* (Ch. 98) in:

- a place to wit ……..……..…….. at …… **or**
- a ship namely ……..… **or**
- a vehicle to wit…… [cross out what is not applicable]

And it appears to this Court that there is reasonable cause for such belief.

You are therefore hereby authorised and commanded in Her Majesty's name to enter at any time, and if needs be by force, on Sundays as well as any other days the said place, ship or vehicle [cross out what is not applicable] and every part thereof to examine and to search for the said dangerous drug or other substance / article unlawfully kept therein and to demand from the owner or occupier thereof the production of the authority for being in possession of the same.

And seize and detain the same until the court has decided whether the same is liable to be forfeited or not.

Dated this day of 20 .

Magistrate

[49.23.2] Business Of Producer Or Manufacturer Or Seller Or Distributor

Section 38 of the *Dangerous Drugs Act* (Ch. 98) states (in part):

> '(1) Any Government Medical Officer, officer of Customs and Excise or *police officer*, or other person authorized in that behalf by any general or special order of the Minister, shall, for the purposes of this Act, have *power to enter* the premises of any person carrying on the business of *a producer, manufacturer, seller or distributor of any drug to which this Act applies*, *and to demand the production of, and to inspect*, any books or documents relating to dealings in any such drugs, *and to inspect* any stocks of any such drugs.
>
> (2) If a Magistrate is satisfied by *information on oath* that there is a reasonable ground for suspecting that any drugs to which this Act applies are, in contravention of the provisions of this Act or any rules made thereunder, in the possession of or under the control of any person in any premises, or that any document relating to, or connected with, any transaction or dealing which was, or any intended transaction or dealing which would, if carried out, be an offence against this Act, or in the case of a transaction or dealing carried out or intended to be carried out in any place outside Solomon Islands, an offence against the provisions of any corresponding law in force in that place, is in possession of, or under the control of, any person in any premises; he may grant a *search warrant* authorizing any police office named in the warrant to enter, if need be, by force, the premises named in the warrant, and to search the premises and any person therein; and if there be reasonable grounds for suspecting that an offence has been committed against this Act in relation to any such drugs which may be found in the premises or in the possession of any such persons, or that any document which may be so found is such a document as aforesaid, to seize and detain those substances and that document (as the case may be).
>
> […]
>
> (4) Where any search is made upon a female it shall be conducted by a female.' (emphasis added)

That Act provides that if upon '*information on oath*' a Magistrate is satisfied there is *a reasonable ground for suspecting* that any:

- drugs to which the *Dangerous Drugs Act* (Ch. 98) applies are, in contravention of the provisions of that Act or any rules made thereunder, in the possession of or under the control of any person in any premises, or
- document relating to, or connected with, any transaction or dealing which was, or any intended transaction or dealing which would, if carried out, be an offence against that Act, or in the case of a transaction or dealing carried out or intended to be carried out in any place outside Solomon Islands, an offence against the provisions of any corresponding law in force in that place,

is in possession of, or under the control of, any person in any premises a '*search warrant*' *may* be granted to search the premises named in the warrant, and to search the premises and any person therein.

The police officer applying for the issuance of a '*search warrant*' under section 38 of the *Dangerous Drugs Act* (Ch. 98) *must* be able to satisfy the issuing Magistrate on oath that there is *a reasonable ground for suspecting* that an offence has been committed against that Act in relation to any such drugs which may be found in the premises or in the possession of any such persons, or that any document which may be so found is such a document as aforesaid.

Refer also to the '*Issuance Of Search Warrants*' under:

- section 36 of the *Dangerous Drugs Act* (Ch. 98); and
- the *Criminal Procedure Code* (Ch. 7) which is examined commencing on page **259**.

Considering that the forms to be used have *not* been prescribed in either the *Dangerous Drugs Act* (Ch. 98) *or* the *Magistrates' Courts (Forms) Rules*, the following forms have been prepared in compliance with section 36 of the *Dangerous Drugs Act (*Ch. 98):

- '*Information To Ground Search Warrant*', a copy of which is on page **800**; and
- '*Search Warrant*', a copy of which is on page **801**.

INFORMATION TO GROUND SEARCH WARRANT
(Dangerous Drugs Act (Ch. 98), S. 38)

…… of ……..
on his/her oath suspecting that:

[1] a dangerous drug to which the *Dangerous Drugs Act* (Ch. 98) applies to wit ……..…
is in contravention of the provisions of:

- that Act; **or**
- a rule made that Act,

in the possession or under the control [cross out what is not applicable] of a person namely ……...
in premises to wit …….. at ……... **or**

[2] a document relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would, if carried out, be an offence against the *Dangerous Drugs Act* (Ch. 98) or in the case of a transaction or dealing carried out or intended to be carried out in any place outside Solomon Islands, an offence against the provisions of any corresponding law in force in that place [cross out what is not applicable],

is in possession or under the control [cross out what is not applicable] a person namely ……
in premises to wit ……..…..… at ……..…,

[cross out what is not applicable]

on the …… day of …… 200…, and that there is a reasonable ground for such suspicion; for he/she the said ……..…
says that:

Sworn)
This ……..… day of …….. 200 …..)
Before me:

Magistrate

SEARCH WARRANT
(Dangerous Drugs Act (Ch. 98), S. 36)

To all Police Officers within Solomon Islands

…….. of ……
has this day made on oath before me that he/she suspects that:

[1] a dangerous drug to which the *Dangerous Drugs Act* (Ch. 98) applies to wit ……..….
is in contravention of the provisions of:

- that Act; **or**
- a rule made that Act,

in the possession or under the control [cross out what is not applicable] of a person namely ……...
in premises to wit …….. at …….. **or**

[2] a document relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would, if carried out, be an offence against the *Dangerous Drugs Act* (Ch. 98) or in the case of a transaction or dealing carried out or intended to be carried out in any place outside Solomon Islands, an offence against the provisions of any corresponding law in force in that place [cross out what is not applicable],

is in possession or under the control [cross out what is not applicable] a person namely ……
in premises to wit ……..….. at ……..…,

[cross out what is not applicable]

And it appears to this Court that there is a reasonable ground for such suspicion.

You are therefore hereby authorised and commanded in Her Majesty's name to enter at any time, and if needs be by force, on Sundays as well as any other days the said premises and any person therein.

And if there be reasonable grounds for suspecting that an offence has been committed against the *Dangerous Drugs Act* (Ch. 98) in relation to any drugs found in the said premises or in the possession of any persons therein, or that any document which may be so found is such a document as aforesaid, You are to seize and detain those substances and that document (as the case may be).

Dated this …….. day of …….. 20 ……..

Magistrate

[49.23.3] Power To Enter, Seize, Apprehend & Detain -- Raw Opium Or Indian Hemp Or Cocoa Leaf

Section 9 of the *Dangerous Drugs Act* (Ch. 98) states:

> '(1) Any police officer may, *upon a warrant*, *enter any place* in which there is a reasonable ground for suspicion that *raw opium, Indian hemp or cocoa leaf* is kept or may be found so as to constitute an offence against this Act and may seize any raw opium, Indian hemp or cocoa leaf found there, together with baskets, jars or packages holding the same, and apprehend and detain any person suspected of owning the same.
>
> (2) Any police officer *may without warrant apprehend and detain* any person carrying or conveying any *raw opium, Indian hemp or cocoa leaf.*
>
> (3) Any person apprehended under the provisions of the foregoing subsections shall be taken *as soon as may be possible* before the court to be dealt with according to law.' (emphasis added)

[49.23.4] Power To Arrest

Section 40 of the *Dangerous Drugs Act* (Ch. 98) states:

> 'Any officer of Customs and Excise or *police officer* may *arrest without warrant* any person who has committed or attempted to commit, or is reasonably suspected by an officer of the Customs and Excise or *police officer* of having committed, or attempted to commit, an offence against this Act, if he has *reasonable grounds for believing* that that person will abscond unless arrested, or if the name and address of that person are unknown to him and cannot be ascertained by him.' (emphasis added)

Refer also to the Chapter which examines the '*Power To Arrest*' commencing on page **242**.

LIQUOR ACT

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LIQUOR ACT

[50.0] Introduction

This chapter will examine the following offences under the *Liquor Act* (Ch. 144):

- '*Restriction On Making Liquor*', as provided for by section 50;
- '*Resisting Or Obstructing Police Officers*', as provided for by section 55;
- '*Illegal Sale Of Liquor*', as provided for by section 57;
- '*Liquor For Sale Without License*', as provided for by section 59;
- '*Allowing Unlicensed Sale*', as provided for by section 62;
- '*Consumption Of Liquor In Certain Public Places*', as provided for by section 65;
- '*Consumption Of Liquor In Vehicles*', as provided for by section 66;
- '*Children & Young Persons*', as provided for by section 72; and
- '*Right Of Entry*', as provided for by section 84.

For the purpose of consistency the offences under the *Liquor Act* (Ch. 144) should be interpreted

> 'in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith', see section 3 of the *Penal Code* (Ch. 26).

See: *Liquor Licensing Act* 1964 (UK).

Within six months of the commission of an offence against the *Liquor Act* (Ch. 144), proceedings against such defendants *must* be instituted under section 76 of the *Criminal Procedure Code* (Ch. 7), i.e., by the laying of a complaint or the arrest of the defendant without warrant, see section 93 of the *Liquor Act* (Ch. 144).

The law relating to the '*Institution Of Proceedings*' is examined commencing on page **110**.

It is deemed that employers are equally liable to be punished for offences against the *Liquor Act* (Ch. 144) committed by their employees, see section 87 of that Act.

The jurisdiction of the Courts in respect of offences under the *Liquor Act* (Ch. 144) is examined commencing on page **14**.

LIQUOR ACT

[50.1] Restriction On Making Liquor

[50.1.1] Offences

Section 50(2) of the *Liquor Act* (Ch. 144) states:

> 'Any person who, without the written approval of the Minister –
>
> (a) imports into or sets up in Solomon Islands any still or any machinery, implement or utensil used or intended to be used for brewing or distilling liquor;
>
> (b) has on his premises or in his possession or custody any still, still – head worm, machinery implement or utensil used or intended to be used for brewing or distilling liquor;
>
> (c) makes or assists in making liquor; or
>
> (d) supplies any material for making or working any still,
>
> is guilty of an offence […].'

[50.1.2] Wording Of Charges

Section 50(2)(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without the written approval of the responsible Minister **[**import into **or** set up in**]** Solomon Islands a **[**still **and/or** machinery **and/or** an implement **and/or** a utensil**] [**used **or** intended to be used**]** for **[**brewing **or** distilling**]** liquor.'

Section 50(2)(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without the written approval of the responsible Minister have **[**on **(**his/her**)** premises **or** in **(**his/her**) (**possession **or** custody**)] [**a still **and/or** still-head **and/or** a worm **and/or** machinery **and/or** an implement **and/or** a utensil**] [**used **or** intended to be used**]** for **[**brewing **or** distilling**]** liquor.'

Section 50(2)(c)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without the written approval of the responsible Minister **[**make **or** assist in making**]** liquor.'

Section 50(2)(d)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without the written approval of the responsible Minister supply material for **[**making **or** working**]** a still.'

[50.1.3] Elements

Section 50(2)(a)

A. Defendant

B. Place

C. Date

D. Without Approval Of The Responsible Minister

E. [i] Import Into; or
[ii] Set Up In

F. Solomon Islands

G. [i] Still; and / or
[ii] Machinery; and / or
[iii] Implement; and / or
[iv] Utensil

H. [i] Used; or
[ii] Intended To be Used

I. [i] Brewing; or
[ii] Distilling

J. Liquor

Section 50(2)(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without the written approval of the responsible Minister have **[**on **(**his/her**)** premises **or** in **(**his/her**) (**possession **or** custody**)] [**a still **and/or** still-head **and/or** a worm **and/or** machinery **and/or** an implement **and/or** a utensil**] [**used **or** intended to be used**]** for **[**brewing **or** distilling**]** liquor.'

A. Defendant

B. Place

C. Date

D. Without Approval Of The Responsible Minister

E. [i] On His/Her Premises; or
[ii] In His/Her Possession; or
[iii] In His/Her Custody

F. [i] Still; and / or
[ii] Machinery; and / or
[iii] Implement; and / or
[iv] Utensil

G. [i] Used; or
[ii] Intended To be Used

H. [i] Brewing; or
[ii] Distilling

I. Liquor

Section 50(2)(c)

A. Defendant

B. Place

C. Date

D. Without The Written Approval Of The Responsible Minister

E. [i] Make; or
[ii] Assist In Making

F. Liquor

Section 50(2)(d)

A. Defendant

B. Place

C. Date

D. Without The Written Approval Of The Responsible Minister

E. Supply Material

F. [i] Making; or
[ii] Working

G. Still

[50.1.4] Written Approval

By virtue of section 89(2) of the *Liquor Act* (Ch. 144), upon a prima facie case being established by the prosecution, the onus is on the defendant to prove on the '*balance of probabilities*' that there was a written approval, see section 50.

The law relating to '*Negative Averments*' commencing on page **83**.

[50.1.5] Import

The term '*Import*' is *not* defined in the *Liquor Act* (Ch. 144), but is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *meaning*:

> 'to bring or cause to be brought into Solomon Islands by air or water'.

[50.1.6] Possession

The term '*Possession*' is *not* defined in the *Liquor Act* (Ch. 144) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *R v Boyesen* [1982] AC 768; (1982) 75 CrAppR 51 [[1982] 2 WLR 882; [1982] 2 AllER 161; [1982] CrimLR 596] Lord Scarman stated at pages 773 – 774 & 57 respectively:

> 'Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control.' (emphasis added)

Therefore, a person does *not* have the prerequisite 'knowledge' if he/she:

[i] does *not* know where the thing was; and

[ii] was *not* in position to find out.

In *R v McCalla* (1987) 87 CrAppR 372 May LJ, delivering the judgment of the Court, held at page 379:

> 'We think that the basic principle underlying those cases is that once one has or possesses something, be it an offensive weapon or a drug, one continues to have or possess it until one does something to rid oneself of having or possessing it; that merely to have forgotten that one has possession of it is not sufficient to exclude continuing to have or possess it.'

See also: *Director of Public Prosecutions v Brooks* [1974] AC 862; (1974) 59 CrAppR 185; [1974] 2 WLR 899; [1974] 2 AllER 840; [1974] CrimLR 364.

[50.1.7] Liquor

The term '*Liquor*' is defined in section 2 of the *Liquor Act* (Ch. 144) as *meaning*:

> 'any wine, spirits, beer, or any liquid containing alcohol ordinarily used or fit for use as a beverage, or any other liquid which the Minister may by notice declare to be liquor for the purposes of this Act, but does not include any alcohol or spirits the importation of which is restricted under section 34 of the Customs and Excise Act'.

The term '*Beer*' is defined in section 2 of the *Liquor Act* (Ch. 144) as *including* 'ale, porter, lager beer, cider and perry'.

As provided for by section 86 of the *Liquor Act* (Ch. 144) if it is alleged in a charge that any '*liquid*' is '*liquor*', the onus of proving on the '*balance of probabilities*' that the '*liquid*' is *not* '*liquor*' is on the defendant, *unless* the court otherwise directs.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

In any proceedings under the *Liquor Act* (Ch. 144) a certificate purporting to be signed by a registered pharmacist in the employment of the Government, stating the percentage of alcohol contained in any liquid submitted for his/her examination, shall be admissible in evidence, and in the absence of evidence to the contrary may be accepted by a court as proof of its contents, see section 85 of that Act.

[50.1.8] Sentencing

Section 50 of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of one thousand two hundred dollars or to imprisonment for three years or to both such fine and such imprisonment'.

If any *licensee* is convicted under section 50 of the *Liquor Act* (Ch. 144) the court recording such conviction *may* order the forfeiture of his/her licence and he/she shall thereupon be disqualified for holding a licence for a period of twelve months, see section 80.

Upon conviction,

[i] any liquor seized or forfeited under the provisions of this Act shall be disposed of as the court may direct and if ordered to be sold the proceeds of any such sale shall be paid into the Provincial fund, in accordance with section 92 of the *Liquor Act* (Ch. 144);

[ii] any still, still-head, worm or other machinery, implements or utensils, imported into or used in Solomon Islands, and all liquor brewed or distilled therein contrary to the provisions of this (Part VII – '*Distillation of Liquor*'), shall be forfeited in accordance with section 52 of the *Liquor Act* (Ch. 144); and

[iii] a court may endorse the conviction on the liquor licence and shall inform the Chairman of the licensing authority of the conviction, in accordance with section 81 of the *Liquor Act* (Ch. 144).

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.2] Obstruct Or Resist Police

[50.2.1] Section 51

[A] Offences

Section 51 of the *Liquor Act* (Ch. 144) states:

'(1) When a police officer believes on reasonable grounds that a premises is being used without the written approval of the Minister for brewing or distilling liquor, the police officer may enter upon the premises and seize –

(a) any article, machinery, material, implement or utensil which appears to the police officer as being for use in connection with the brewing or distilling of the liquor; and

(b) any liquor which appears to the police officer to have been brewed or distilled on the premises.

(2) In the exercise of the powers conferred by subsection (1) a police officer may break open doors and use such other force as may be necessary to effect the entry and make the seizure by this section authorised.

(3) *Any person who shall obstruct or resist any police officer in the exercise of any power conferred upon him by this section, shall be guilty of an offence* […].' (emphasis added)

[B] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**obstruct **or** resist**]** a police officer namely **[**specify name and rank of police officer**]** in

- entering upon premises situated at **[**specify the location**]**; **and/or**
- seizing property which appeared to the said police officer as being for use in connection with the **[**brewing **or** distilling**]** of liquor; **and/or**
- seizing liquor which appeared to the said police officer to have been **[**brewed **or** distilled**]** on the said premises.'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Obstruct; or
[ii] Resist

E. Police Officer

F. [I] Entering Upon Premises; and / or
[Ii] Seizing Property Which Appeared To The Said Police Officer As Being For Use In Connection With The
[1] Brewing; or
[2] Distilling
Of Liquor; and / or
[Iii] Seizing Liquor Which Appeared To The Said Police Officer To Have Been
[1] Brewed; or
[2] Distilled
On The Premises

[D] Sentencing

Section 51 of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of four hundred dollars or to imprisonment for one year or to both such fine and such imprisonment'.

If any *licensee* is convicted under subsection (3) of section 51 of the *Liquor Act* (Ch. 144) the court recording such conviction may order the forfeiture of his/her licence and he/she shall thereupon be disqualified for holding a licence for a period of twelve months, see section 80.

Upon conviction, a court may endorse the conviction on the liquor licence and shall inform the Chairman of the licensing authority of the conviction, in accordance with section 81 of the *Liquor Act* (Ch. 144).

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.2.2] Section 55

[A] Offences

Section 55 of the *Liquor Act* (Ch. 144) states:

> 'Any person who resists or obstructs a health officer or police officer in the exercise of his duty under section 53 ['*Duties Of Health Officers*'] or section 54 ['*Duties Of Police Officers*'], as the case may be, shall be guilty of an offence […].' [words in brackets added]

[B] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**resist **or** obstruct**]** a **[**health officer namely **(**specify name of health officer**)** in the exercise of **(**his/her**)** duty under section 53 of the *Liquor* Act (Ch. 144) **or** a police officer namely **(**specify name and rank of police officer**)** in the exercise of **(**his/her**)** duty under section 54 of the *Liquor Act* (Ch. 144)**]**.'

[C] Elements

A. Defendant

B. Place

C. Date

D. [i] Resist; or
   [ii] Obstruct

E. [i] Health Officer In The Exercise Of His/Her Duty Under 53 Of The *Liquor Act*; or
   [ii] Police Officer In The Exercise Of His/Her Duty Under 54 Of The *Liquor Act*

[D] Sentencing

Section 55 of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'for a first offence to a fine of one hundred dollars and for a second or any subsequent offence to a fine of two hundred dollars'.

Upon conviction, a court may endorse the conviction on the liquor licence and shall inform the Chairman of the licensing authority of the conviction, in accordance with section 81 of the *Liquor Act* (Ch. 144).

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.2.3] Obstruct

The term '*Obstruct*' is *not* defined in the *Liquor Act* (Ch. 144) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Hinchcliffe v Sheldon* [1955] 1 WLR 1207; [1955] 3 AllER 406 Lord Goddard CJ stated at pages 1210 & 408 respectively:

> 'Obstructing […] *means* making it more difficult for the police to carry out their duties.' (emphasis added)

In *Willmott v Atack* [1977] QB 498; [1976] 3 AllER 794; (1976) 63 CrAppR 207 the court held that it was *not* sufficient for the prosecution to prove that the defendant had deliberately done an act which had resulted in the obstruction of a police officer; what also had to be shown was that he/she had done the act with the intention of obstructing the officer in the sense of making it more difficult to carry out his/her duty.

In appropriate circumstances, the defendant *must* however be under a legal obligation to comply with the direction of the police officer concerned, see *Ingleton v Dibble* [1972] 1 QB 480; [1972] 1 AllER 275.

See also: *Lewis v Cox* (1985) 80 CrAppR 1 at page 6; *Moore v Green* [1983] 1 AllER 663; *Rice v Connolly* [1966] 2 AllER 649; [1966] 2 QB 414; [1966] 3 WLR 17; *Hills v Ellis* (1983) 76 CrAppR 217 *& Carmichael v Mac Gowan* [1967] WAR 11.

[50.2.4] Resist

Section 18 of the *Penal Code* (Ch. 26) states:

> 'Where any person is charged with a criminal offence arising out of the lawful arrest, or attempted arrest, by him of a person who forcibly resists such arrest or attempts to evade being arrested, the court shall, in considering whether the means used were necessary, or the degree of force used was reasonable, for the apprehension of such person, have regard to the gravity of the offence which had been or was being committed by such person and the circumstances in which such offence had been or was being committed by such person.'

The term '*Resist*' is *not* defined in the *Liquor Act* (Ch. 144) *or* the *Interpretation & General Provisions Act* (Ch. 85).

However, the 'natural and ordinary' meaning of that term in the context of this section would *include* opposing by force some course of action which the police officer resisted is attempting to pursue, see *R v Galvin (No. 2)* [1961] VR 740.

In *Collins v Murray, Ex parte Murray* [1989] 1 QdR 614 the case involved two police officers who each had hold of the defendant, one officer on either side, attempting to effect the defendant's arrest for another offence. The defendant pulled away, screaming and yelling. The defendant was charged with two counts of resisting police in the execution of their duty.

The court held that one bodily movement of twisting and struggling constituted resisting each of the two police officers in the execution of their duty; the one bodily movement on the part of the defendant gave rise to two charges. However, Williams J, with whom the other members of the court concurred, stated at page 618:

> 'In my view […] the second charge is constituted by the "gist or gravemen" of the former and it would be an harassment of the accused to charge him with two several offences. […] The magistrate should have recorded a conviction on one of those charges and forever stayed the other; […] The penalty with respect to the conviction recorded should reflect the overall criminality of the conduct constituting the offence.'

[50.3] Sale Of Liquor Without License

[50.3.1] Offence

Section 57(1) of the *Liquor Act* (Ch. 144) states:

> 'Any person who sell liquor without holding a license authorising the sale thereof shall be guilty of an offence […].'

[50.3.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did sell liquor without holding a licence authorising the sale thereof.'

[50.3.3] Elements

A. Defendant

B. Place

C. Date

D. Sell

E. Liquor

F. Without Holding A License Authorising The Sale Thereof

[50.3.4] Sell

The term '*Sell*' is defined in the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'barter and exchange'.

The term '*Sale*' is defined in section 2 of the *Liquor Act* (Ch. 144) as *including*:

> 'every method of disposition for valuable consideration including barter; and includes the disposition by an agent for sale on consignment; and also includes offering or attempting to sell, or receiving or having in possession for sale, or exposing for sale, or sending or delivery for sale, and also includes disposal by way of raffle, lottery, or other game of chance'.

The delivery of any liquor shall be *prima facie evidence of sale* within the meaning of the *Liquor Act* (Ch. 144), so as to support a conviction, unless satisfactory proof to the contrary is adduced to the court hearing the case, see section 88 of that Act. The onus is therefore on the defendant to prove on the '*balance of probabilities*' that there was *not* a sale.

[50.3.5] Liquor

The element '*Liquor*' is examined commencing on page **810**.

[50.3.6] Proof Of License

The onus of proving that a person is licensed under the *Liquor Act* (Ch. 144) is on the defendant on the '*balance of probabilities*', see section 89(1) of that Act.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[50.3.7] Sentencing

Section 57 of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable:

> [i] for a first offence to a fine of two hundred dollars, and
>
> [ii] for a second or subsequent offence to a fine of four hundred dollars or to imprisonment for one year or to both such fine and such imprisonment,
>
> 'and upon conviction under this subsection, the offender shall forfeit all liquor found in his possession, custody or control, together with the vessels containing such liquor, unless the court for special reasons thinks fit to order that only part or none of such liquor be forfeited. In the case of a second or subsequent offence the offender shall be declared after conviction to be, and shall thereupon be disqualified for holding a licence of any description for the sale of liquor for a period of twelve months from the date of such conviction:
>
> Provided that nothing in this subsection shall apply to a registered pharmacist supplying liquor in quantities not exceeding six ounces on the prescription of a person registered as a medical practitioner under the Medical and Dental Practitioners Act. (Ch. 102)'

LIQUOR ACT

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.4] Liquor For Sale Without License

[50.4.1] Offences

Section 59(2) of the *Liquor Act* (Ch. 144) states:

> 'Any person carrying about, offering or exposing for sale, any liquor without a license shall be guilty of an offence […].'

[50.4.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**carry about, offer **or** expose**]** for sale liquor without a licence.'

[50.4.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Carry About;
[ii] Offer; or
[iii] Expose

E. For Sale

F. Liquor

G. Without A License

[50.4.4] Sale

The element '*Sale*' is examined on page **816**.

Whenever any liquor is alleged to have been carried from one place to another, the burden of proving that the same was not so carried for sale shall rest upon the person so carrying it, ie., the defendant, on the '***balance of probabilities'***, see section 59(3) of the *Liquor Act* (Ch. 144).

[50.4.5] Liquor

The element '*Liquor*' is examined commencing on page **810**.

[50.4.6] Proof Of License

The onus of proving that a person is licensed under the *Liquor Act* (Ch. 144) is on the defendant on the '*balance of probabilities*', see section 89(1) of that Act.

'Whenever any liquor […] shall be carried from one place to another, the burden of proving that the same was not so carried for sale shall rest upon the person so carrying it', see section 59(3) of the *Liquor Act* (Ch. 144).

Therefore, the defendant *must* prove on the '*balance of probabilities*' that he/she was *not* carrying the liquor for sale.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[50.4.7] Sentencing

Section 59 of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable:

[i] for a first offence to a fine of two hundred dollars, and

[ii] for a second or subsequent offence to a fine of four hundred dollars or to imprisonment for one year or to both such fine and such imprisonment,

'and upon conviction under this subsection, all such liquor together with the vessels containing the same shall be forfeited unless the court for special reasons thinks fit to order that only part of none of such liquor shall be forfeited; and in addition, it shall be lawful for the court to order forfeiture of any cart, dray, or motor or other vehicle, and any horse or animal carrying or drawing the same and every vessel conveying the same. In the case of a second or subsequent offence the offender shall be declared after conviction to be, and shall thereupon be, disqualified for holding a licence of any description for the sale of liquor for a period of twelve months from the date of such conviction.'

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.5] Consumption Of Liquor In Certain Public Places

[50.5.1] Offence

Section 65 of the *Liquor Act* (Ch. 144) states:

'Any person found consuming liquor in any street, thoroughfare or place being part of any town area to which the public has access, whether upon payment or otherwise, not being part of any licensed premises, shall be guilty of an offence […].'

[50.5.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was found consuming liquor in a **[**street, thoroughfare **or** place**]** namely **[**specify name of street, thoroughfare **or** place**]** being part of any town area to which the public had access not being part of any licensed premises.'

[50.5.3] Elements

A. Defendant

B. Place

C. Date

D. Found Consuming

E. Liquor

F. [i] Street;
[ii] Thoroughfare; or
[iii] Place

G. Being Part Of Any Town Area To Which The Public Had Access Not Being Part Of Any Licensed Premises

[50.5.4] Liquor

The element '*Liquor*' is examined commencing on page **810**.

[50.5.5] Town Area

The term '*Town Area*' is defined in section 2 of the *Liquor Act* (Ch. 144) as *meaning*:

> 'the area known as Honiara (the boundaries of which are delineated on Plan 1981 deposited in the office of the Commissioner of Lands); and references to the Provincial Executive, in relation to that area, are references to the Municipal Authority'.

[50.5.6] Sentencing

Section 65 of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of two hundred dollars.'

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.6] Consumption Of Liquor In Vehicles

[50.6.1] Offences

Section 66 of the *Liquor Act* (Ch. 144) states (in part):

> '(1) Any person who consumes liquor in a motor vehicle –
>
> (a) when it is being driven on a road or other public place; or
>
> (b) when it is at rest or parked on a road or other public place,
>
> is guilty of an offence.
>
> (2) Where any person is found guilty of any offence referred to in subsection (1), the driver or the person in charge, as the case may be, at the time of the commission of the offence shall, in the absence of a reasonable excuse be treated as being also in contravention of this section and guilty of an offence.'

[50.6.2] Wording Of Charges

Section 66(1)(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did consume liquor in a motor vehicle to wit a **[**specify the motor vehicle**]** when it was being driven on a **[**road **or** public place**]** namely **[**specify name of road **or** public place**]**.'

Section 66(1)(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did consume liquor in a motor vehicle to wit a **[**specify the motor vehicle**]** when it was **[**at rest **or** parked**]** on a **[**road **or** public place**]** namely **[**specify name of road **or** public place**]**.'

Section 66(2)(a)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the **[**driver **or** person in charge**]** without a reasonable excuse did permit a person namely **[**specify name of person**]** to consume liquor in a motor vehicle to wit a **[**specify the motor vehicle**]** when it was being driven on a **[**road **or** public place**]** namely **[**specify name of road **or** public place**]**.'

Section 66(2)(b)

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the **[**driver **or** person in charge**]** without a reasonable excuse did permit a person namely **[**specify name of person**]** to consume liquor in a motor vehicle to wit a **[**specify the motor vehicle**]** when it was **[**at rest **or** parked**]** on a **[**road **or** public place**]** namely **[**specify name of road **or** public place**]**.'

[50.6.3] Elements

Section 66(1)(a)

A. Defendant

B. Place

C. Date

D. Consume

E. Liquor

F. Motor Vehicle

G. Driven On
[i] Road; or
[ii] Public Place

Section 66(1)(b)

A. Defendant

B. Place

C. Date

D. Consume

E. Liquor

F. Motor Vehicle

G. [i] At Rest; or
[ii] Parked

H. [i] Road; or
[ii] Public Place

Section 66(2)(a)

A. Defendant

B. Place

C. Date

D. Without Reasonable Excuse

E. Permit

F. Consumption

G. Liquor

H. Motor Vehicle

I. Being Driven

J. [i] Road; or
[ii] Public Place

Section 66(2)(b)

A. Defendant

B. Place

C. Date

D. Without Reasonable Excuse

E. Permit

F. Consumption

G. Liquor

H. Motor Vehicle

I. [i] At Rest; or
[ii] Parked

J. [i] Road; or
[ii] Public Place

[50.6.4] Liquor

The element '*Liquor*' is examined commencing on page **810**.

[50.6.5] Motor Vehicle

Section 66 of the *Liquor Act* (Ch. 144) states that the expression '*Motor Vehicle*' shall have the meaning assigned to it in the *Traffic Act* (Ch. 131).

The term '*Motor Vehicle*' is defined in section 2 of the *Traffic Act* (Ch. 131) as *meaning*:

> 'any *mechanically propelled vehicle*, excluding any vehicle running on a specially prepared way such as a railway or tramway or any vehicle deriving its power from overhead electric power cables or such other vehicles as may from time to time by regulations under this Act be declared not to be motor vehicles for the purpose of this Act.' (emphasis added)

A vehicle is *not* a '*mechanically propelled vehicle*' *unless* the motor vehicle in question has reached the stage where there is no reasonable prospect of it ever being made mobile again as a mechanically propelled vehicle, then it will remain a mechanically propelled vehicle for its life, see *Binks v Department of the Environment* [1975] RTR 318; *Mc Eachran v Hurst* [1978] RTR 462; [1978] CrimLR 499 & *Reader v Bunyard* (1987) 85 CrAppR 185; [1987] RTR 406; [1987] CrimLR 274.

[50.6.6] Road

Section 66 of the *Liquor Act* (Ch. 144) states that the expression '*Road*' shall have the meaning assigned to it in the *Traffic Act* (Ch. 131).

The term '*Road*' is defined in section 2 of the *Traffic Act* (Ch. 131) as *meaning*:

> 'any public road within the meaning of the Roads Act or any Act replacing that Act and *includes* any other road or way, wharf or car park on which vehicles are capable of travelling and to which the public has access, and includes a bridge over which a road passes.' (emphasis added)

The term '*Road*' is *not* defined in the *Roads Act* (Ch. 129).

See: *Ling Ainui v Luke Ouki* [1977] PNGLR 11 at page 12; *Clarke v Kato & others* [1997] 1 WLR 208; *Hansen v Appo, Ex parte Appo* [1974] QdR 259 & *O'Mara v Lowe; Ex parte O'Mara* [1971] QWN 34.

[50.6.7] Public Place

The term '*Public Place*' is *not* defined in either the *Liquor Act* (Ch. 144), but is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'every place to which the public are entitled or permitted to have access whether on payment or otherwise'.

In *R v Waters* (1963) 47 CrAppR 149 Lord Parker CJ, delivering the judgment of the Court, held at page 154:

> 'It seems to this court that the question is largely a matter of degree and fact. If only a restricted class of person is permitted to have access or invited to have access, then clearly the case would fall on the side of the line of it being a private place. If, on the other hand, only a restricted class is excluded, then it would fall on the side of the line of it being a public place.'

See also: *Clarke v Kato & others* [1997] 1 WLR 208; [1998] 1 WLR 1647; *Ling Ainui v Luke Ouki* [1977] PNGLR 11 at page 12; *Hansen v Appo, Ex parte Appo* [1974] QdR 259; *O'Mara v Lowe, Ex parte O'Mara* [1971] QWN 34 & *Schubert v Lee* (1946) 71 CLR 589.

[50.6.8] Without Reasonable Excuse

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she had a '*reasonable excuse*' for permitting the consumption of liquor as specified by section 66(2) of the *Liquor Act* (Ch. 144).

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[50.6.9] Sentencing

Section 66(3) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of one thousand dollars or to imprisonment for twelve months or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7] Children & Young Persons

[50.7.1] Offences

Section 72 of the *Liquor Act* (Ch. 144) states (in part):

'(1) Any person who knowingly sells or supplies, or any licensee who knowingly allows to be sold or supplied, to any person under the age of twenty – one years, any liquor for consumption on licensed premises or licensed club premises, shall be guilty of an offence […].

(2) Any licensee who knowingly sells or supplies, or who allows to be sold or supplied, or any servant of his who knowingly sells or supplies, any liquor to any person under the age of twenty – one years, shall be guilty of an offence […].

(3) Any person under the age of twenty – one years who shall consume any liquor in any licensed premises or licensed club premises, or who shall purchase or attempt to purchase any liquor in any licensed premises or licensed club premises, shall be guilty of an offence […]

(4) Any person who knowingly shall send a person under the age of twenty – one years, for the purpose of obtaining any liquor, to any licensed club or any licensed premises, shall be guilty of an offence […].'

[50.7.2] Knowingly Sell Or Supply

[A] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did knowingly **[**sell **or** supply**]** to a person namely **[**specify name of person**]** under the age of twenty-one years liquor for consumption on licensed **[**premises **or** club premises**]** namely **[**specify name of premises**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Knowingly

E. [i] Sell; or
[ii] Supply

F. Person Under The Age Of Twenty – One Years

G. Liquor

H. Consumption On Licensed
[i] Premises; or
[ii] Club Premises

[C] Sentencing

Section 72(1) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that subsection, he/she is liable 'to a fine of three hundred dollars or to imprisonment for nine months or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7.3] Licensee Knowingly Allow To Be Sold Or Supplied

[A] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being a licensee did knowingly allow to be **[**sold **or** supplied**]** to a person namely **[**specify name of person**]** under the age of twenty-one years liquor for consumption on **[**his/her**]** licensed **[**premises **or** club premises**]** namely **[**specify name of premises**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Licensee

E. Knowingly

F. Allow To Be
   [i] Sold; or
   [ii] Supplied

G. Person Under The Age Of Twenty – One Years

H. Liquor

I. Consumption On Licensed
   [i] Premises; or
   [ii] Club Premises

[C] Sentencing

Section 72(1) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of three hundred dollars or to imprisonment for nine months or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7.4] Servant Of Licensee Knowingly Sell Or Supply

[A] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being a servant of **[**specify name of licensee**]** the licensee of licensed premises namely **[**specify name of licensed premises**]** did knowingly **[**sell **or** supply**]** liquor to a person namely **[**specify name of person**]** under the age of twenty-one years.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Servant Of Licensee

E. Knowingly

F. [i] Sell; or
   [ii] Supply

G. Liquor

H. Person Under The Age Of Twenty – One Years

[C] Sentencing

Section 72(2) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of three hundred dollars or to imprisonment for nine months or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7.5] Licensee Knowingly Sell Or Supply Or Allow To Be Sold Or Supplied

[A] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the licensee of licensed premises namely **[**specify name of licensed premises**]** did knowingly **[(**sell **or** supply**) or** allowed to be **(**sold **or** supplied**)]** liquor to a person namely **[**specify name of person**]** under the age of twenty-one years.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Licensee

E. Knowingly

F. [i] [1] Sell; or
[2] Supply; or
[ii] Allow To Be
[1] Sold; or
[2] Supplied

G. Liquor

H. Person Under The Age Of Twenty – One Years

[C] Sentencing

Section 72(2) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of three hundred dollars or to imprisonment for nine months or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7.6] Under 21 Years Consume Liquor

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being under the age of twenty-one years did consume liquor in a licensed **[**premises **or** club premises**]** namely **[**specify name of premises**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Under The Age Of 21 Years

E. Consume

F. Liquor

G. Licensed
[i] Premises; or
[ii] Club Premises

[C] Sentencing

Section 72(3) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable **'**to a fine of two hundred dollars or imprisonment for one year'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7.7] Under 21 Years Purchase Or Attempt To Purchase Liquor

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being under the age of twenty-one years did **[**purchase **or** attempt to purchase**]** liquor in a licensed **[**premises **or** club premises**]** namely **[**specify name of premises**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Under The Age Of 21 Years

E. [i] Purchase; or
[ii] Attempt To Purchase

F. Liquor

G. Licensed
[i] Premises; or
[ii] Club Premises

[C] Sentencing

Section 72(3) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of two hundred dollars or imprisonment for one year'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7.8] Knowingly Send Person Under 21 Years To Obtain Liquor

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did knowingly send a person under the age of twenty-one years namely **[**specify name of person**]** for the purpose of obtaining liquor to a licensed **[**club **or** premises**]** namely **[**specify name of premises**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Knowingly

E. Send

F. Person Under 21 Years

G. Purpose Of Obtaining Liquor

H. To A Licensed
[i] Premises; or
[ii] Club Premises

[C] Sentencing

Section 72(4) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of two hundred dollars'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.7.9] Sell

The element of '*Sell*' is examined on page **816**.

[50.7.10] Supply

The term '*Supply*' is *not* defined in the *Liquor Act* (Ch. 144) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean* to '*provide*'.

[50.7.11] Person Under The Age Of 21 Years

The prosecution *must* prove '*beyond reasonable doubt*' that the person involved was under the age of 21 years.

In that regard refer also to the law relating to the '*Proof Of Age*' commencing on page **702**.

[50.7.12] Licensee

The term '*Licensee*' is defined as *meaning* 'a person to whom a licence has been granted', see section 2 of the *Liquor Act* (Ch. 144).

[50.7.13] Licensed Premises

The term '*Licensed Premises*' is defined as *meaning* 'any premises or place in respect of which a licence, other than a club licence, has been granted', see section 2 of the *Liquor Act* (Ch. 144).

[50.7.14] Licensed Club Or Licensed Club Premises

The term '*Licensed Club*' *means* a club which holds a club licence, and '*Licensed Club Premises*' *means* the premises of a licensed club, see section 72(5) of the *Liquor Act* (Ch. 144).

[50.7.15] Liquor

The element '*Liquor*' is examined commencing on page **810**.

[50.8] Employment Of Persons Under 21 Years Or Convicted Of An Offence In Respect Of Liquor

[50.8.1] Offence

Section 73 of the *Liquor Act* (Ch. 144) states:

'(1) Notwithstanding the provisions of any other written law, no licensee shall employ a person under the age of twenty – one years, or knowingly employ a person who has been convicted of an offence under this Act, or any other Act at any time in force regulating the sale of liquor, to sell, control or supervise the sale of liquor or to have the custody or control on any licensed premises.

(2) *Any licensee who contravenes the provisions of this section shall be guilty of an offence* […].' (emphasis added)

[50.8.2] Employ Person Under 21 Years

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the licensee of licensed premises namely **[**specify name of licensed premises**]** did employ a person under the age of twenty-one years namely **[**specify name of person**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Licensee Of Licensed Premises

E. Employ

F. Person Under 21 Years

[50.8.3] Knowingly Employ Person Convicted Of Liquor Offence

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** being the licensee of licensed premises namely **(**specify name of licensed premises**)** did knowingly employ a person namely **(**specify name of person**)** who had been convicted of an offence under **[**the *Liquor Act* (Ch. 144) **or** an Act in force regulating the sale of liquor, to sell, control or supervise the sale of liquor or to have the custody or control of liquor on any licensed premises to wit **(**specify the name of this Act**)]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. Licensee Of Licensed Premises

E. Knowingly

F. Employ

G. Person Who Had Been Convicted Of An Offence Under
   [i] *Liquor Act* (Ch. 144); or
   [ii] An Act In Force Regulating The Sale Of Liquor, To Sell, Control Or Supervise The Sale Of Liquor Or To Have The Custody Or Control Of Liquor On Any Licensed Premises

[50.8.4] Licensed Premises

Notwithstanding the provisions of sections 2 and 46(2), for the purpose of this section, the term '*Licensed Premises*' shall be deemed to *include* premises or a place in respect of which a club licence has been granted, see section 73(3) of the *Liquor Act* (Ch. 144).

[50.8.5] Person Under The Age Of 21 Years

The prosecution *must* prove '*beyond reasonable doubt*' that the person involved was under the age of 21 years.

In that regard refer also to the law relating to the '*Proof Of Age*' commencing on page **702**.

[50.8.6] Licensee

The term '*Licensee*' is defined as *meaning* 'a person to whom a licence has been granted', see section 2 of the *Liquor Act* (Ch. 144).

[50.8.7] Sentencing

Section 73(2) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of two hundred dollars'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.9] Right Of Entry

[50.9.1] Offences

Section 84 of the *Liquor Act* (Ch. 144) states:

'(1) Any police officer may, for the purpose of preventing or detecting the violation of any of the provisions of this Act, at all times enter on any licensed premises or the premises of any club licensed under Part VI ['*Clubs*'].

(2) *If any person by himself or by any person in his employ, or acting by his direction or with his consent, refuses or fails to admit any police officer in the execution of his duty demanding to enter in pursuance of this section, that person shall be guilty of an offence* […].

(3) Any police officer may demand the name and address of any person found on licensed premises within the period when, under the provisions of this Act, they are required to be closed, and, if he has reasonable ground to suppose that the name and address is false, may require evidence of the correctness of such name and address and may, if such person fails upon such demand to give his name and address or satisfactory evidence of the correctness of such name and address, arrest him without warrant.

(4) *Any person required by any such police officer to give his name and address who fails to give the same or gives a false name and address, or makes a false statement with respect to such name and address, shall be guilty of an offence* […].' (emphasis added) [words in brackets added]

[50.9.2] Refuse Or Fail To Allow Entry

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[(**himself/herself**)** **or** by a person namely **[**specify name of person**]** **[**in **(**his/her**)** employ **or** acting **(**by **[**his/her**]** direction **or** with **[**his/her**]** consent**)]** **[**refuse **or** fail**]** to admit a police officer namely **[**specify name and rank**]** in the execution of **[**his/her**]** duty who had demanded to enter a **[**licensed premises **or** club licensed under Part VI of the *Liquor Act* (Ch. 144)**]** namely **[**specify name of licensed premises **or** club**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. [i] Himself/Herself;
[ii] Person In His/Her Employ;
[iii] Person Acting By His/Her Direction; or
[iv] With His/Her Consent

E. [i] Refuse; or
[ii] Fail

F. Admit Police Officer In The Execution Of His/Her Duty Who Had Demanded To Enter
[i] Licensed Premises; or
[ii] Licensed Club Licensed Under Part VI of the *Liquor Act* (Ch. 144)

[C] Sentencing

Section 84(2) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'for a first offence to a fine of fifty dollars and for a second or subsequent offence to a fine of one hundred dollars'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[50.9.3] Fail To Give Name & Address Or Give False Name & Address Or Make A False Statement

[A] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** when required by a police officer namely **[**specify name and rank**]** acting in the execution of **[**his/her**]** duty under the provisions of the *Liquor Act* (Ch. 144) at licensed premises namely **[**specify name of licensed premises**]** to give **[**his/her**]** name and address did **[**fail to give **(**his/her**)** name and address, give a false name and address **or** make a false statement with respect to **(**his/her**)** name and address**]**.'

[B] Elements

A. Defendant

B. Place

C. Date

D. When Required By A Police Officer Acting In The Execution Of His/Her Duty Under The Provisions Of The *Liquor Act* (Ch. 144) At Licensed Premises To Give His/Her Name And Address Did
[i] Fail To Give His/Her Name And Address;
[ii] Give A False Name And Address; or
[iii] Make A False Statement With Respect To His/Her Name And Address

[50.9.4] Sentencing

Section 84(4) of the *Liquor Act* (Ch. 144) provides that if a defendant is found guilty of an offence against that section, he/she is liable 'to a fine of seventy - five dollars'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

LIQUOR ACT

[50.10] Police Powers

[50.10.1] Generally

The following are the relevant '*Police Powers*' under the *Liquor Act* (Ch. 144):

[i] For the purpose of preventing or detecting the violation of *any* of the provisions of the *Liquor Act* (Ch. 144) any police officer may *enter* on any licensed premises *or* the premises of any club licensed under Part VI of the said Act.

(see section 84)

[ii] Any police officer may *demand the name and address* of any person found on licensed premises when it was required to be closed under the *Liquor Act* (Ch. 144).

(see section 84)

[iii] If the person fails to provide his/her name and address, he/she may be *arrested*.

(see section 84)

[iv] If the police officer has reasonable ground to suppose that the name and address provided is false, correctness thereof may be required. If the person fails to provide satisfactory evidence of the correctness of his/her name and address, he/she may be *arrested*.

(see section 84)

[v] A police officer of or above the rank of Sergeant may *enter and inspect* any licensed premises in order to determine whether the licensee is of drunken habits or keeps a disorderly house.

(see section 54)

[vi] Any police officer may *seize and take away* all liquor which he/she reasonably suspects was offered or exposed for sale by a person not holding a licence to sell liquor and every vessel containing or used for drinking or measuring the same, and every cart, dray, or motor or other vehicle, and every horse or animal carrying or drawing the same, and every vessel conveying the same. Such evidence *must* be conveyed to the nearest Magistrate.

(see section 59)

[vii] Any officer may at all reasonable times in the day or the night, *enter* any shop licensed to sell liquor or adjoining building to which the public normally has access in the possession or control of any person owning or managing the shop for the purpose of determining whether the owner or manager of the shop is/has committing / committed an offence against the *Liquor Act* (Ch. 144).

However a *search warrant must* be obtained for such purpose, *unless* the officer has reasonable cause to believe that the delay occasioned in obtaining a search warrant would seriously hinder the officer in the performance of his/her duties.

(see section 63)

[viii] Any police officer who believes on reasonable grounds that a premises is being used without the written approval of the responsible Minister may *enter* using such force as may be necessary any such premises in which it is suspected that there is unlawful brewing or distilling of liquor and *seize* anything used in connection with the unlawful brewing or distilling of liquor and all liquor suspected of having been unlawfully brewed or distilled.

(see section 51)

[ix] Any police officer may *inspect* at all reasonable times during day or night the lists of members, temporary members and visitors to be kept by club secretaries of licensed clubs, as required by section 48(2) of the *Liquor Act* (Ch. 144).

(see section 48)

[x] It is the duty of all police officers, on the demand of a licensee or his/her agent or servant, to *expel or assist in expelling* from licensed premises every person who is drunk, violent, quarrelsome, disorderly, or uses profane or foul language or suffering from a infectious disease.

(see section 69)

[xi] Considering that the only '*cognisable offences*' as provided for by the *Liquor Act* (Ch. 144) are offences against section 84 relating to the provision of a correct name and address and section 50(2) ['*Restriction On Making Liquor*'] defendants *must* therefore be found committing all other offences in the presence of a police officer before such persons can be arrested without warrant, see section 18 of the *Criminal Procedure Code* (Ch. 7).

If a defendant is *not* found offending, proceedings *must* be instituted by the making of a complaint before a Magistrate for the issuance of either a '*Complaint and Summons*' or a '*Warrant of Arrest*', see section 76(1) of the *Criminal Procedure Code* (Ch. 7).

[xii] Any police officer may *seize* and *take away*, and may convey to the nearest Magistrate, all liquor which he/she may reasonably suspect to be carried about, offered or exposed, for sale in any street, road, footpath, booth, tent, store, shed or vessel, or in any other place whatsoever, by any person not holding a license to sell the same therein respectively; and may also seize every vessel containing or sued for drinking or measuring the same, and every cart, dray, or motor or other vehicle, and every horse or animal carrying or drawing the same, and every vessel conveying the same.

(see section 59)

[xiii] When any riot or tumult occurs or is expected to occur in any place, any Magistrate, or any police officer of or above the rank of Inspector may order any licensed premises in or near *such place to be closed* for such time as such Magistrate or police officer may order, and any person carrying out such order may use force as may be necessary for closing such licensed premises.

(see section 83)

Refer also to the Chapter titled '*Power To Arrest*' commencing on page **242**.

[50.10.2] Search Warrant

Section 61 of the *Liquor Act* (Ch. 144) provides that upon complaint on oath before a Magistrate, a '*search warrant*' may be issued to search a *place* at or in which any liquor had been sold although such place was not licensed for such purpose.

The term '*Place*' is *not* defined in either the *Liquor Act* (Ch. 144) *or* the *Interpretation & General Provisions Act* (Ch. 85). The natural and ordinary meaning of that term in the context of the section 61 of the *Liquor Act* (Ch. 144) would *include* parks and other areas of land as distinct from buildings.

Upon the seizure of the liquor, the Magistrate may thereupon issue a summons calling upon the occupier of such place to appear before the court to show how, and for what purpose he/she became possessed of such liquor. Upon him/her so appearing, or if after being so summonsed, he/she should fail to appear, the court should inquire into the matter, and if it is satisfied by reasonable proof that any liquor was in such place for the purpose of being illegally sold, the court may adjudge the same, and also every such vessel, to be forfeited; and the same shall be sold and the proceeds of the sale, after payment thereout of any costs awarded by the court, shall be paid into the Provincial Fund, see section 61 of the *Liquor Act* (Ch. 144).

Forfeiture under section 61 does *not* exempt the occupier of the place in which liquor is found from being prosecuted for selling liquor without a license under section 57(1) of the *Liquor Act* (Ch. 144).

Refer also to the '*Issuance Of Search Warrants*' under the *Criminal Procedure Code* (Ch. 7) which is examined commencing on page **259**.

Considering that the forms to be used have *not* been prescribed in either the *Liquor Act* (Ch. 144) *or* the *Magistrates' Courts (Forms) Rules*, the following forms have been prepared in compliance with section 61 of the *Liquor Act (*Ch. 144):

- '*Complaint To Ground Search Warrant*', a copy of which is on page **838**; and
- '*Search Warrant*', a copy of which is on page **839**.

COMPLAINT TO GROUND SEARCH WARRANT

(Liquor Act S. 61)

of

on his / her oath suspects and believes that liquor had been sold at or in a place not licensed for such purpose at

on the day of 200 , and that there are reasonable grounds for such suspicion and belief; for he / she the said says that:

Sworn)
this day of 200)
Before me:

Magistrate

SEARCH WARRANT

(Liquor Act S. 61)

To all Police Officers within Solomon Islands

of
has this day made on oath before me that he / she suspects and believes that liquor had been sold at or in a place at
not licensed for such purpose.

And it appears to this Court that there is reasonable grounds for such suspicion and belief.

You are therefore hereby authorised and commanded in Her Majesty's name, by day or night, to enter the said place and if entry is not provided within a reasonable time after demand then enter by force.

And therein diligently search for all liquor which is then and there found and every vessel in which the liquor is found.

And bring the said liquor and vessels so found before this Court to be dealt with according to law.

Dated this day of 20 .

Magistrate

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FIREARMS & AMMUNITION ACT

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FIREARMS & AMMUNITION ACT

[51.0] Introduction

This chapter will examine the following offences under the *Firearms & Ammunitions Act* (Ch. 80):

- '*Manufacture Of Firearms & Ammunition*', as provided for by section 4;
- '*Purchasing, Acquiring & Possession Firearm Or Ammunition Without License*', as provided for by section 5;
- '*Prohibition Of Arms In Certain Areas*', as provided for by section 25;
- '*Importation Of Firearms & Ammunition*', as provided for by section 15;
- '*Importation, Manufacture Or Sale Of Imitation Firearms*', as provided for by section 40B;
- '*Going Armed With Imitation Firearm*', as provided for by section 40A;
- '*Carrying Firearm While Drunk Or Disorderly*', as provided for by section 41;
- '*Threatening Violence With Firearm*', as provided for by section 42; and
- '*Discharging Firearm In Public Place*', as provided for by section 44.

For the purpose of consistency the offences under the *Firearms & Ammunitions Act* (Ch. 80) should be interpreted

> 'in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith', see section 3 of the *Penal Code* (Ch. 26).

See: *Firearms Act* 1968 (UK).

The jurisdiction of the Courts in respect of offences under the *Firearms & Ammunition Act* (Ch. 80) is examined commencing on page **14**.

FIREARMS & AMMUNITION ACT

[51.1] Manufacture Of Firearms & Ammunition

[51.1.1] Offence

Section 4 of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> '(1) No person shall manufacture any firearm or ammunition except at an arsenal established with the written approval of the Minister and in accordance with such conditions as the Minister may from time to time specify in writing.
>
> (3) If any person contravenes the provisions of subsection (1), he shall be guilty of an offence […].'

[51.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did manufacture **[**a firearm **or** ammunition**] [**not at an arsenal established with the written approval of the Minister namely **[**specify the name of the Minister**] and/or** in accordance with such conditions as the said Minister specified in writing.'

[51.1.3] Elements

A. Defendant

B. Place

C. Date

D. Manufacture

E. [i] Firearm; or
[ii] Ammunition

F. [i] Not At An Arsenal Established With The Written Approval Of The Minister; and/or
[ii] In Accordance With Such Conditions As The Said Minister Specified In Writing

[51.1.4] Manufacture

Section 4(2) of the *Firearms & Ammunition Act* (Ch. 80) states:

> 'In this section, the word "*manufacture*", in relation to firearms, does not include the repair of firearms, the conversion into a firearm of anything which has the appearance of a firearm but is so constructed as to be capable of discharging any missile through the barrel thereof, or the alteration, substitution or replacement of any component part of a firearm'. (emphasis added)

[51.1.5] Firearm

The term '*Firearm*' is defined in section 2 of the *Firearms & Ammunition Act* (Ch. 80) as *meaning*:

> 'any lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged, or which can be adapted for the discharge of any such shot, bullet or other missile, and any weapon of whatever description designed or adapted for the discharge of any noxious liquid, gas or other thing dangerous to persons, and *includes* any component part of any such weapon, and any accessory to any such weapon designed or adapted to diminish the noise or flash caused by firing the weapon, *but does not include* an air gun, air rifle or air pistol except where otherwise expressly provided, nor articles designed or adapted solely to discharge spears for spearing fish'. (emphasis added)

The prosecution *must* prove '*beyond reasonable doubt*' that the 'weapon' is capable of discharging a shot, bullet, missile or noxious liquid in order to prove that the 'weapon' is a *'firearm*' within the meaning of section 2 of the *Firearms & Ammunition Act* (Ch. 80).

[51.1.6] Ammunition

The term '*Ammunition*' is defined in section 2 of the *Firearms & Ammunition Act* (Ch. 80) as *meaning*:

> 'ammunition for any firearm as hereinafter defined and *includes* bullets, cartridges, shells or anything designed or adapted for or capable of use with any firearm, and any ammunition containing or designed or adapted to contain any noxious liquid, gas or other thing *but does not include* spears discharged from a firearm solely for the purpose of killing fish nor ammunition in Solomon Islands by any armed forces abandoned during the Second World War or thereafter in consequence of that war'. (emphasis added)

[51.1.8] Sentencing

Section 4(3) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of five thousand dollars or to imprisonment for ten years or to both such fine and such imprisonment'.

Such firearms and ammunition are liable to forfeiture by a court, see section 37 of that Act.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.2] Purchasing, Acquiring & Possession Firearm Or Ammunition Without License

[51.2.1] Offences

Section 5 of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> '(1) Subject to the provisions of this Act, no person shall purchase, acquire or have in his possession any firearm or ammunition unless he holds a firearm license in force at the time.

(2) If any person --

(a) purchases, acquires or has in his possession any firearm or ammunition without holding a firearm license in force at the time […]

(b) […] he shall, subject to the provisions of this Act, be guilty of an offence and liable […].'

[51.2.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**purchase, acquire **or** have in **(**his/her**)** possession**]** a **[**firearm **or** ammunition**]** without being the holder of a current firearm licence.'

[51.2.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Purchase;
[ii] Acquire; or
[iii] Have In His/Her Possession

E. [i] Firearm; or
[ii] Ammunition

F. Without Being The Holder Of A Current Firearm Licence

[51.2.4] Possession

The term '*Possession*' is *not* defined in the *Firearms & Ammunition Act* (Ch. 80) *or* the *Interpretation & General Provisions Act* (Ch. 85).

To prove '*possession*' the prosecution *must* prove '*knowledge*' *and* '*control*'.

In *Director of Public Prosecutions v Brooks* [1974] AC 862; (1974) 59 CrAppR 185 [[1974] 2 WLR 899; [1974] 2 AllER 840; [1974] CrimLR 364] Lord Diplock stated at pages 866 and 187 respectively:

> 'In the ordinary use of the word "possession", one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's own physical control.'

In *R v Boyesen* [1982] AC 768; (1982) 75 CrAppR 51 [[1982] 2 WLR 882; [1982] 2 AllER 161; [1982] CrimLR 596] Lord Scarman stated at pages 773 – 774 & 57 respectively:

> 'Possession is a deceptively simple concept. It denotes a physical control or custody of a thing plus knowledge that you have it in your custody or control. You may possess a drug without knowing or comprehending its nature: *but you do not possess it unless you know you have it*.' (emphasis added)

Therefore, a person does *not* have the prerequisite 'knowledge' if he/she:

[i] does *not* know where the thing was; and

[ii] was *not* in position to find out.

In *R v McCalla* (1987) 87 CrAppR 372 May LJ, delivering the judgment of the Court, held at page 379:

> 'We think that the basic principle underlying those cases is that once one has or possesses something, be it an offensive weapon or a drug, one continues to have or possess it until one does something to rid oneself of having or possessing it; that merely to have forgotten that one has possession of it is not sufficient to exclude continuing to have or possess it.'

In *R v Crabbe* (1985) 156 CLR 464; (1985) 58 ALR 417; (1985) 16 ACrimR 19 the High Court of Australia stated at pages 470, 421 and 23 respectively:

> 'When a person deliberately refrains from making inquiries because he prefer not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may from some purposes be treated as having the knowledge which he deliberately abstained from acquiring.'

See also: *R v Ashton – Rickardt* [1978] 1 AllER 173; (1977) 65 CrAppR 67; [1978] 1 WLR 37;]1977] CrimLR 424; *R v Wright* (1976) 62 CrAppR 169, per MacKenna J at page 173; *R v McNamara* (1988) 87 CrAppR 246 at pages 250 – 251; *R v Holland* [1974] PNGLR 7 at page 19; *R v Iona Griffin* [1974] PNGLR 72 at page 75; *R v Angie – Ogun* [1969 – 70] P&NGLR 36; *Wanganeed* (1988) 38 ACrimR 187 & *Dayman v Newsome, Ex parte Dayman* [1973] QdR 399.

Section 51 of *the Firearms & Ammunition Act* (Ch. 80) states:

> 'Every person who is proved to have had in his possession or under his control anything whatever containing any firearm or ammunition shall, *until the contrary is proved, be deemed to have been in possession* of such firearm or ammunition.' (emphasis added)

Therefore, if the prosecution is able to prove '*beyond reasonable doubt*' that a defendant was in possession of something which contained a firearm or ammunition it is presumed in law that the defendant was also in possession of that firearm or ammunition.

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she was *not* in possession of the firearm or ammunition in such circumstances.

The primary issue to consider in such circumstances is the question of knowledge.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[51.2.5] Firearm

The element '*Firearm*' is examined on page **846**.

As regards dismantled firearms, see *R v Pannell* (1983) 76 CrAppR 53 & *R v Clarke* (1986) 82 CrAppR 308; [1986] 1 AllER 846; [1986] 1 WLR 209; [1986] CrimLR 334.

[51.2.6] Ammunition

The term '*Ammunition*' is examined on page **846**.

[51.2.7] Proof Of License

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she is the holder of a firearm license.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[51.2.8] Firearm License

The term '*Firearm License*' is defined in section 2 of the *Firearms & Ammunition Act* (Ch. 80) as *meaning*:

> 'a license issued under section 6'.

[51.2.9] Sentencing

Section 5(2) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable

> [i] if the offence was committed in a *prohibited area* to a fine of five thousand dollars or to imprisonment for ten years, or to both such fine and such imprisonment; or
>
> [ii] if the offence was committed elsewhere, to a fine of three thousand dollars or to imprisonment for five years or to both such fine and such imprisonment'. (emphasis added)

The term '*Prohibited Area*' is defined in section 2 of the *Firearms & Ammunition Act* (Ch. 80) as meaning:

> 'an area in respect of which the Minister has made an order under section 25(1)'.

An Order was issued by the Minister of Police & National Security under the provisions of section 25 of the *Firearms & Ammunition Act* (Ch. 80) on 26 May 1999 which declares a '*Specified Area*' to mean '*the whole of Honiara City and the Guadalcanal Province*'.

All persons were ordered under the provisions of that Order to immediately deliver all firearms and ammunition in their possession to their nearest police station. A failure to comply with that order renders that person to an order as prescribed by that Order.

That offence is examined commencing on page **850**.

Persons can be charged with that offence and the offence as outlined in section 5 of the *Firearms & Ammunition Act* (Ch. 80) and the law relating to '*Double Jeopardy*' does *not* apply.

The law relating to '*Double Jeopardy*' is examined commencing on page **105**.

A 'suspended term of imprisonment' *cannot* be imposed, see *R v Daniel Upang & Simister Kimisi; R v Cherry Bula* (Unrep. Criminal Appeal Case Nos. 19 & 20 of 1991; Muria J; sitting alone).

Such firearms and ammunition are liable to forfeiture by a court, see section 37 of that Act.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.3] Prohibition Of Arms In Certain Areas

[51.3.1] Offences

Section 25 of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> '(1) Notwithstanding any of the other provisions of this Act, the Minister, if he deems it expedient on account of the prevalence of crimes involving the use of firearms or for any other reason, may be order –
>
> (a) prohibit in any specified area and after a specified date and subject to such exceptions as he may specify, the possession, use or carrying of firearms and ammunition; and
>
> (b) require that all firearms and ammunition within such specified area shall be delivered up to a police station, before a specified date.
>
> (2) *Any person who without reasonable cause, proof whereof shall lie upon him, refuses or neglects to comply with the provisions of such order shall be guilty of an offence* […].' (emphasis added)

[51.3.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without reasonable cause did **[**refuse **or** neglect**]** to comply with the provisions of the *Firearms and Ammunition (Prohibition of Firearms) Order* 1999 issued under section 25 of the *Firearms and Ammunition Act* (Ch. 80) in that the said **[**Name of Defendant**]** not being an exempted person did

- **[**use **or** carry**] [**a firearm **or** ammunition**]** in a specified area to wit the whole of Honiara City and the Guadalcanal Province; **or**
- not immediately deliver **[**a firearm **or** ammunition**]** in **(**his/her**)** possession to **(**his/her**)** nearest police station in Honiara City and the Guadalcanal Province.'

[51.3.3] Elements

[A] Use Or Carry Firearm Or Ammunition

A. Defendant

B. Place

C. Date

D. Without Reasonable Cause

E. [i] Refuse; or
[ii] Neglect

F. Comply With The Provisions Of The *Firearms & Ammunition (Prohibition Of Firearms) Order* 1999 Issued Under Section 25 Of The *Firearms & Ammunition Act* (Ch. 80)

G. Not Being An Exempted Person

H. [i] Use; or
[ii] Carry

I. [i] Firearm; or
[ii] Ammunition

J. Specified Area To Wit The Whole Of Honiara City And The Guadalcanal Province

[B] Not Immediately Deliver Firearm Or Ammunition

A. Defendant

B. Place

C. Date

D. Without Reasonable Cause

E. [i] Refuse; or
[ii] Neglect

F. Comply With The Provisions Of The *Firearms & Ammunition (Prohibition Of Firearms) Order* 1999 Issued Under Section 25 Of The *Firearms & Ammunition Act* (Ch. 80)

G. Not Being An Exempted Person

H. Not Immediately Deliver
[i] Firearm; or
[ii] Ammunition**]**

I. In His/Her Possession To His/Her Nearest Police Station In Honiara City And The Guadalcanal Province

[51.3.4] Order

On 26 May 1999 the Minister for Police & National Security did hereby make the following Order:

‘1. This Order may be cited as the Firearms and Ammunition (Prohibition) Order 1999.

2. (1) The use or carrying of any firearms or ammunition by any person other [th]an an exempted person in any specified are[a], after the coming into operation of the Order is prohibited.

(2) In this Order;

(a) "exempted person" means a police officer, the holder of a firearms license and includes any person exempted under the provisions of section 7 of the Act; and
(b) "specified area" means the whole of Honiara City and the Guadalcanal Province.

3. All persons, within the specified areas who are not exempted persons in terms of the Order are required to immediately deliver all firearms and ammunition in their possession to the nearest police station.

4. Any person who without reasonable cause refuses, neglects or neglects to comply with this Order shall be guilty of an offence and liable to a fine of three hundred dollars or to imprisonment for six months or to both such fine and imprisonment.'

[51.3.5] Without Reasonable Cause

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she had a '*reasonable cause*' for failing to comply with the Order, see section 25(2) of the *Firearms & Ammunition Act* (Ch. 80).

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[51.3.6] Possession

The element '*Possession*' is examined commencing on page **847**.

[51.3.7] Firearm

The element '*Firearm*' is examined on page **846**.

[51.3.8] Ammunition

The element '*Ammunition*' is examined on page **846**.

[51.3.9] Sentencing

Section 25(2) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of three hundred dollars or to imprisonment for six months or to both such fine and such imprisonment'.

Such firearms and ammunition are liable to forfeiture by a court, see section 37 of the Act.

FIREARMS & AMMUNITION ACT

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.4] Importation Of Firearms & Ammunition

[51.4.1] Offence

Section 15(1) of the *Firearms & Ammunition Act* (Ch. 80) states:

> '*No person shall import any firearm or ammunition or parts of firearms or ammunition into Solomon Islands from a place without Solomon Islands unless he holds a license in that behalf*:
>
> Provided that when any firearm is imported into Solomon Islands without an import license or interim license under this section having been obtained authorising the importation thereof, such importation shall not be deemed to contravene the provisions of this section while such firearm on importation is left in the possession of the Department of Customs and Excise.' (emphasis added)

[51.4.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did import **[(**a firearm **or** ammunition**) or** parts of **(**a firearm **or** ammunition**)]** into Solomon Islands from a place without Solomon Islands to wit **[**specify the name of this country**]** not being the holder of a licence in that behalf issued under section 15 of the *Firearms and Ammunition Act* (Ch. 80).'

[51.4.3] Elements

A. Defendant

B. Place

C. Date

D. Import

E. [i] Firearm;
[ii] Ammunition;
[iii] Parts Of A Firearm; or
[iv] Parts Of Ammunition

F. Into Solomon Islands

G. Not Being The Holder Of A Licence In That Behalf Issued Under Section 15 Of The *Firearms And Ammunition Act* (Ch. 80).

[51.4.4] Import

Whilst the term '*Import*' is *not* defined in the *Firearms & Ammunition Act* (Ch. 80), it is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *meaning*:

'to bring or cause to be brought into Solomon Islands by air or water'.

[51.4.5] Firearm

The element '*Firearm*' is examined on page **846**.

[51.4.6] Ammunition

The element '*Ammunition*' is examined on page **846**.

[51.4.7] Proof Of License

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she is the holder of an import license issued under section 15 of the *Firearms & Ammunition Act* (Ch. 80).

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[51.4.8] Sentencing

Section 15(2) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of five hundred dollars or to imprisonment for one year or to both such fine and such imprisonment'.

Such firearms and ammunition are liable to forfeiture by a court, see section 37 of that Act.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.5] Importation Or Sale Of Imitation Firearms

[51.5.1] Offences

Section 40B(1) of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> 'No person shall import into Solomon Islands or sell or display for sale any imitation firearm in any place in Solomon Islands.'

[51.5.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**import into Solomon Islands, sell **or** display for sale**]** an imitation firearm.'

[51.5.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Import Into Solomon Islands;
[ii] Sell; or
[iii] Display For Sale

E. Imitation Firearm

[51.5.4] Import

Whilst the term '*Import*' is *not* defined in the *Firearms & Ammunition Act* (Ch. 80), it is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *meaning*:

> 'to bring or cause to be brought into Solomon Islands by air or water'.

[51.5.5] Sale

The term '*Sell*' is defined in the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'barter and exchange'.

[51.5.6] Imitation Firearm

The term '*Imitation Firearm*' is defined in section 2 of the *Firearms & Ammunition Act* (Ch. 80) as *meaning*:

> 'a replica of a pistol or other firearm which has the appearance of a firearm, but which may not be capable of discharging or being adapted for the discharge of any ammunition in the manner described in the *definition of firearm* and *includes* an air gun, air rifle or toy – guns.' (emphasis added)

The element '*Firearm*' is examined on page **846**.

[51.5.7] Sentencing

Section 40B(3) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of one thousand dollars or to imprisonment for one year or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.6] Manufacture Imitation Firearms For Use Or Sale

[51.6.1] Offence

Section 40B(2) of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> 'No person shall manufacture for use or sale any imitation firearm.'

[51.6.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did manufacture for **[**use **or** sale**]** an imitation firearm.'

[51.6.3] Elements

A. Defendant

B. Place

C. Date

D. Manufacture

E. [i] Use; or
[ii] Sale

F. Imitation Firearm

[51.6.4] Manufacture

The element '*Manufacture*' is examined on page **845**.

[51.6.5] Sale

The term '*Sell*' is defined in the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'barter and exchange'.

[51.6.6] Imitation Firearm

The term '*Imitation Firearm*' is defined in section 2 of the *Firearms & Ammunition Act* (Ch. 80) as *meaning*:

> 'a replica of a pistol or other firearm which has the appearance of a firearm, but which may not be capable of discharging or being adapted for the discharge of any ammunition in the manner described in the *definition of firearm* and *includes* an air gun, air rifle or toy – guns.' (emphasis added)

The element '*Firearm*' is examined on page **846**.

[51.6.7] Sentencing

Section 40B(3) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of one thousand dollars or to imprisonment for one year or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.7] Going Armed With Imitation Firearm

[51.7.1] Offence

Section 40A(1) of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> 'Any person who goes armed with an imitation firearm without lawful excuse is guilty of an offence […].'

[51.7.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did without lawful excuse go armed with an imitation firearm.'

[51.7.3] Elements

A. Defendant

B. Place

C. Date

D. Without Lawful Excuse

E. Go Armed

F. Imitation Firearm

[51.7.4] Without Lawful Excuse

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she had a '*lawful excuse*' for going armed with an imitation firearm.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[51.7.5] Armed

The term '*Armed*' is *not* defined in the *Firearms & Ammunition Act* (Ch. 80) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *R v Jones* (1987) 85 CrAppR 259 [[1987] 2 AllER 692; [1987] 1 WLR 692] Tucker J, delivering the judgment of the Court, held at page 266:

> 'The expression "armed" is an ordinary English word. *Normally, it will involve either physically carrying arms, or it will involve proof that, to his knowledge, a defendant knows that they are immediately available*.' (emphasis added)

See however *Rowe v Conti; Threlfall v Panzera* [1958] VR 547; [1958] ALR 1038.

[51.7.6] Imitation Firearm

The element '*Imitation Firearm*' is examined on page **855**.

[51.7.7] Sentencing

Section 40A(1) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of two hundred dollars or to imprisonment for six months or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.7.8] Related Offence

The law relating to the offence of '*Going Armed In Public*' as provided for by section 83 of the *Penal Code* (Ch. 26) is examined commencing on page **984**.

[51.8] Going Armed With Imitation Firearm & Threatening

[51.8.1] Offence

Section 40A(2) of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> 'Any person who goes armed with an imitation firearm by word of mouth or conduct threatens another person in such manner as to cause fear to that other person is guilty of an offence […].'

[51.8.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did go armed with an imitation firearm and by **[**word of mouth **or** conduct**]** did threaten a person namely **[**specify the name of this person**]** in such a manner as to cause fear to the said person by **[**specify how that person was put in fear**]**.'

[51.8.3] Elements

A. Defendant

B. Place

C. Date

D. Go Armed

E. Imitation Firearm

F. [i] By Word Of Mouth; or
[ii] By Conduct

G. Threaten

H. Complainant

I. In Such A Manner As To Cause Fear To The Complainant

[51.8.4] Armed

The element '*Armed*' is examined on page **857**.

[51.8.5] Imitation Firearm

The element '*Imitation Firearm*' is examined commencing on page **856**.

[51.8.6] Sentencing

Section 40A(2) of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of five hundred dollars or to imprisonment for one year or to both such fine and such imprisonment'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.8.7] Related Offence

The law relating to the offence of '*Going Armed In Public*' as provided for by section 83 of the *Penal Code* (Ch. 26) is examined commencing on page **894**.

[51.9] Carry Firearm Whilst Drunk Or Disorderly

[51.9.1] Offences

Section 41 of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> 'Any person who is drunk, or who behaves in a disorderly manner, while carrying a firearm shall be guilty of an offence […].'

[51.9.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** **[**was drunk **or** did behave in a disorderly manner**]** whilst carrying a firearm.'

[51.9.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Drunk; or
[ii] Behave In A Disorderly Manner

E. Carrying

F. Firearm

[51.9.4] Drunk

The term '*Drunk*' is *not* defined in the *Firearms & Ammunition Act* (Ch. 80) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Neale v RMJE (A Minor)* (1985) 80 CrAppR 20 Robert Goff LJ stated at page 23:

> 'The primary meaning set out in the *Shorter Oxford Dictionary* (1933) is as follows: "*That has drunk intoxicating liquor to an extent which affects steady self – control*." […] In my judgment, that is indeed the natural and ordinary meaning of the word "drunk" in ordinary common speech in 1984.' (emphasis added)

See also: *R v Davies* [1962] 3 AllER 97; (1962) 46 CrAppR 292; [1962] 1 WLR 1111.

It is *not* necessary to prove absolute incapacity, but being drunk *requires* more than proof of being under the influence and a substantial degree of incapacity *must* be proved, see *Brown v Bowden* (1901) 19 NZLR 98 & *R v Ormsey* [1945] NZLR 109.

A police officer may give 'opinion evidence' as regards the indicia of the defendant.

In *Himson Mulus v R* [1969 – 70] PNGLR 82 Frost J stated at page 99 that 'no expert qualification is required for a witness to give evidence as to the effect of alcohol upon a person'.

In *R v Aldridge* (1990) 20 NSWLR 737 the Court held at page 744:

> 'The third ground of appeal complains of admission into evidence of the police officer's opinion that Mrs Ryan was affected by intoxicating liquor at the time when the police were called to her house. Unassisted by authority, and ignoring what has always been permitted in charges of driving under the influence and in personal injury claims, *I would have said that a police officer could give evidence of only the usual indicia upon which an opinion may be founded – smelling of liquor, slurred speech, inability to walk in a straight line, etc – leaving it*

> *to the jury (or other tribunal of fact) to draw its own conclusions from their own experience* […].
>
> *The police officer's opinion was therefore admissible, although it should not have been permitted without first obtaining the factual basis for that purpose*.' (emphasis added)

See also: *Kennedy v Prestwood* (1988) 7 MVR 561; *Himson Mulas v R* [1970 – 71] PNGLR 82 at page 99; *Blackie v Police* [1966] NZLR 910; *Thomas v Snow* [1962] QWN 7; *Warning v O'Sullivan* [1962] SASR 287 at page 289; *R v Kelly* [1958] VR 412; *R v McKimmie* [1957] VR 93 & *R v Whitby* (1957) 74 WN(NSW) 441.

Therefore, for such '*opinion evidence*' to be admissible police officers *must* give the basis of their opinion based on their own experience in dealing with persons affected by liquor both at work and socially.

Refer also to the subsection which examines '*Opinion Evidence – Lay Persons*' commencing on page **205**.

[51.9.5] Disorderly Manner

The term '*Disorderly Manner*' is *not* defined in the *Firearms & Ammunition Act* (Ch. 80) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *mean*:

> 'to act in a manner which contravenes good conduct or proper conduct, and therefore the conduct tends to offend right thinking members of the public', see *Police v Christie* [NZLR] 1109 at page 1113; *King* (1996) 88 ACrimR 150 at pages 155 – 157 & *Austin & others* [1939] SASR 130.

In *Melser v Police* [1967] NZLR 437 McCarthy J commented in relation to the offence of '*Disorderly Conduct*' at page 446:

> 'I agree that an offence against good manner, a failure of good taste, a breach of morality, even though these may be contrary to the general order of public opinion, is not enough to establish this offence. There must be conduct which not only can fairly be characterized as disorderly, but also is likely to cause a disturbance or to annoy others considerably.
>
> […]
>
> *Moreover it seems to me that the test for determining whether or not behaviour is "disorderly" is objective, albeit the conduct in question must, of course, be looked at in all of the circumstances of the case*.' (emphasis added)

[51.9.6] Sentencing

Section 41 of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of five hundred dollars or to imprisonment for twelve months or to both such fine and such imprisonment'.

Such firearms and ammunition are liable to forfeiture by a court, see section 37 of that Act.

FIREARMS & AMMUNITION ACT

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.10] Threatening Violence With Firearm

[51.10.1] Offence

Section 42 of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> 'Any person who, being the owner or having possession of a firearm, with intent to intimidate another person to do or to refrain from doing any act threatens by word of mouth or any other conduct to harm that other person, or any other person whosoever, with the use of the firearm is guilty of an offence […].'

[51.10.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** **[**being the owner **or** having possession**]** of a firearm with intent to intimidate a person namely **[**specify the name of this person**]** to **[**do **or** refrain from doing**]** an act did threaten by **[**word of mouth **or (**his/her**)** conduct**]** to harm **[**the said person **or** a person namely **(**specify the name of this person**)]** with the use of the said firearm.'

[51.10.3] Elements

A. Defendant

B. Place

C. Date

D. [i] Being The Owner; or
[ii] Having Possession

E. Firearm

F. Intent To Intimidate

G. Complainant

H. [i] To Do An Act; or
[ii] Refrain From Doing An Act

I. Threaten

J. [i] By Word Of Mouth; or
[ii] By His/Her Conduct

K. To Harm
[i] Complainant; or
[ii] Another Person

L. With The Use Of The Firearm

[51.10.4] Possession

The element '*Possession*' is examined commencing on page **847**.

[51.10.5] Intent To Intimidate

The prosecution *must* prove '*beyond reasonable doubt*' that the defendant had the *intent to intimidate* another person to do or to refrain from doing any act threatens by word of mouth or any other conduct to harm that other person, or any other person whosoever, with the use of a firearm.

Intention which is a state of mind, can never be proved as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

If there are no admissions, to be found guilty of the offence as outlined in section 301 of the *Penal Code* (Ch. 26), 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant had the *intent to intimidate* another person to do or to refrain from doing any act threatens by word of mouth or any other conduct to harm that other person, or any other person whosoever, with the use of a firearm, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

[51.10.6] Firearm

The element '*Firearm*' is examined on page **846**.

[51.10.7] Police Powers

Section 43(1) of the *Firearms & Ammunition Act* (Ch. 80) states:

> 'Any police officer who has reason to believe that a person has threatened another person in contravention of section 42 may, without warrant, search the premises of the person who made the threat and take possession of any firearms which he may find on the premises.'

Any person who obstruct or hinder a police officer from exercising such powers is guilty of an offence, see section 43(2) of that Act.

[51.10.8] Sentencing

Section 42 of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of one thousand dollars or to imprisonment for two years or to both such fine and such imprisonment'.

Such firearms and ammunition are liable to forfeiture by a court, see section 37 of that Act.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.10.9] Related Offence

The law relating to the offence of '*Criminal Trespass*' as provided for by section 189 of the *Penal Code* (Ch. 26) is examined commencing on page **502**.

[51.11] Discharging Firearm In Public Place

[51.11.1] Offence

Section 44 of the *Firearms & Ammunition Act* (Ch. 80) states (in part):

> 'Any person who, without reasonable excuse, (proof of which lies on him) discharges a firearm in a public place or in any place situated within the boundaries of a town is guilty of an offence […].'

[51.11.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** without reasonable excuse did discharge a firearm in a **[**public place to wit **(**specify the public place**) or** place situated within the boundaries of a town namely **(**specify the name of the town**)]**.'

[51.11.3] Elements

A. Defendant

B. Place

C. Date

D. Without Reasonable Excuse

E. Discharge

F. Firearm

G. [i] Public Place; or
[ii] Place Situated Within The Boundaries Of A Town

[51.11.4] Without Reasonable Excuse

The defendant *must* prove on the '*balance of probabilities*' that he/she had a '*reasonable excuse*' to discharging the firearm.

The law relating to '*Negative Averments*' is examined commencing on page **83**.

[51.11.5] Firearm

The element '*Firearm*' is examined on page **846**.

[51.11.6] Public Place

Whilst the term '*Public Place*' is *not* defined in the Firearms & Ammunition Act (Ch. 80), it is defined in section 16 of the *Interpretation & General Provisions Act* (Ch. 85) as *including*:

> 'every place to which the public are entitled or permitted to have access whether on payment or otherwise'.

In *R v Waters* (1963) 47 CrAppR 149 Lord Parker CJ, delivering the judgment of the Court, held at page 154:

> 'It seems to this court that the question is largely a matter of degree and fact. If only a restricted class of person is permitted to have access or invited to have access, then clearly the case would fall on the side of the line of it being a private place. If, on the other hand, only a restricted class is excluded, then it would fall on the side of the line of it being a public place.'

See also: *Clarke v Kato & others* [1997] 1 WLR 208; *Ling Ainui v Luke Ouki* [1977] PNGLR 11 at page 12; *Hansen v Appo; Ex parte Appo* [1974] QdR 259; *O'Mara v Lowe, Ex parte O'Mara* [1971] QWN 34 & *Schubert v Lee* (1946) 71 CLR 589.

[51.11.7] Sentencing

Section 44 of the *Firearms & Ammunition Act* (Ch. 80) provides that if a defendant is found guilty of an offence against that section, he/she is 'liable to a fine of two hundred dollars or to imprisonment for six months or to both such fine and such imprisonment'.

Such firearms and ammunition are liable to forfeiture by a court, see section 37 of that Act.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[51.12] Police Powers

[51.12.1] Generally

Specific powers of police officers are provided in the following sections under the *Firearms & Ammunition Act* (Ch. 80) as follows:

Section 32 states:

> 'Any police officer may without a warrant enter and remain on any land or premises other than a dwelling – house at and for such time as may be reasonably necessary to enable him to ascertain whether a person carrying or using or in possession of any firearm or ammunition on such land or premises has a license in that behalf.'

Section 48 states:

> '(1) If any person is found carrying or conveying any firearms or ammunition in such a manner or under such circumstances as to afford reasonable grounds for suspicion that the same may be used for any unlawful purpose dangerous to the public peace, any person may without warrant apprehend such person so found and detain him in custody.
>
> (2) Any person apprehended without a warrant shall be dealt with in accordance with the provisions of section 22 ['*Disposal Of Person Arrested By Private Person*'] and 23 ['*Detention Of Persons Arrested Without Warrant*']of the Criminal Procedure Code Act.' [words in brackets added]

Section 49 states:

> 'Any police officer may arrest without warrant any person found committing or attempting to commit or employing, aiding or assisting any person to commit, or whom he reasonably suspects of having committed any offence against, or punishable under, any of the following provisions of this Act, namely, sections 4 ['*Restriction On The Manufacture Of Firearms And Ammunition*'], 5 ['*Purchasing, etc, Firearms Or Ammunition Without Firearm License*'], 9(2) ['*Marking Of Firearms*'], 11(1) ['*Dealer's Licenses*'], 12 ['*Obstructing Inspection Of Stock –In-Trade*'], 14 ['*Provisions As To Shortening Firearms*'], 22 ['*Concealing Unlawfully Imported Firearms And Ammunition*'], 23(3) ['*Minister May Prohibit Importation Or Exportation*'], 25(2) ['*Prohibition Of Arms In Certain Places*'], 26(2) ['*Certain Weapons Prohibited Without Authority Of Minister*'] and 41 ['*Carrying Firearm While Drunk Or Disorderly*'].' [words in brackets added]

Section 50 states:

> 'It shall be lawful for any police officer to stop and to search for firearms or ammunition any person whom he may find in any street or other public place at any hour of the day or night who acts in a suspicious manner or whom he may suspect of having any firearms or ammunition in his possession.'

See also section 43(1) of the *Firearms & Ammunitions Act* (Ch. 80).

Refer also to the Chapter titled '*Power To Enter To Arrest*' commencing on page **247**.

[51.12.2] Search Warrant

Section 30 of the *Firearms & Ammunitions Act* (Ch. 80) states (in part):

> '(1) Whenever a Magistrate has reason to believe that any person residing within the limits of his jurisdiction –
>
> (a) has in his possession any firearm or ammunition without a license or in contravention of the conditions upon which any license is issued or for any unlawful purpose; or
>
> (b) has in his possession any firearm or ammunition whereof he cannot be left in possession without danger to the public peace,
>
> such Magistrate may by warrant directed to any police officer authorise such police officer –
>
> (i) to enter and search the house or premises occupied by such person or any house or premises wherein the Magistrate has reason to believe that such firearm or ammunition is to be found; and
>
> (ii) to seize and take before a court such firearm or ammunition; and
>
> (iii) to arrest any person found in such house or on such premises whom such police officer has reason to suspect to have committed any offence punishable under this Act,
>
> and the provisions of sections 102 ['*Execution Of Search Warrant*'], 103 ['*Persons In Charge Of Closed Place To Allow Ingress Thereto And Egress Therefrom*'], 104 ['*Detention Of Property Seized*'] and 105 ['*Provisions Applicable To Search Warrants*'] of the Criminal Procedure Code Act shall apply, *mutatis mutandis* [ie., 'with the necessary changes'], in relation to a warrant issued under this section as they apply to a warrant issued under section 101 ['*Power To Issue Search Warrants*'] of the Criminal Procedure Code Act.
>
> (2) In the execution of such warrant any person to whom such warrant is directed may employ such assistants as may be necessary.' [words in brackets added]

Refer also to the '*Issuance Of Search Warrants*' under the *Criminal Procedure Code* (Ch. 7) which is examined commencing on page **259**.

Considering that the forms to be used have *not* been prescribed in either the *Firearms & Ammunitions Act* (Ch. 80) *or* the ***Magistrates' Courts (Forms) Rules***, the following forms have been prepared in compliance with section 30 of the *Firearms & Ammunitions Act (*Ch. 80):

- '*Complaint To Ground Search Warrant*', a copy of which is on page **868**; and
- '*Search Warrant*', a copy of which is on page **869**.

INFORMATION TO GROUND SEARCH WARRANT

(Firearms & Ammunitions Act (Ch. 80) S. 30)

[GENERAL TITLE]

of

on his/her oath complains that on the …… day of ……..., that

……..…… of ……..……

(a) has in his/her possession a firearm or ammunition without a license or in contravention of the conditions upon which a firearm license was issued or for an unlawful purpose; or

(b) has in his/her possession a firearm or ammunition whereof he/she cannot be left in possession without danger to the public peace

[cross out what is inapplicable]

and that he/she has reasonable cause to believe, and does believe, that the said firearm or ammunition, [cross out what is inapplicable] is at a house or premises [cross out what is inapplicable] occupied by ……..…
at ……..……...;
for he/she the said ……..…. says that:

Sworn)
this …….day of …….)
Before me:

Magistrate

SEARCH WARRANT

(Firearms & Ammunitions Act (Ch. 80), S. 30)

[GENERAL TITLE]

To all Police Officer within Solomon Islands

…….. of ……..……..……
has this day made on oath before the court that

And it appears to this Court that there is reasonable cause to believe that the firearms or ammunition [cross out what is inapplicable], are concealed as aforesaid. You are therefore hereby authorized and commanded in Her Majesty's name, with proper assistance, by day to enter the said house or premises [cross out what is inapplicable] and if necessary by force, and there diligently to search for the said firearm or ammunition [cross out what is inapplicable], and if the same or any thereof are found on search, to seize and take before this Court, to be dealt with according to law.

Dated this day of .

Magistrate

This Warrant may be executed during the hours of darkness.

Magistrate

FIREARMS & AMMUNITION ACT

Section 30(3) of the *Firearms & Ammunitions Act* (Ch. 80) states:

> 'Whoever, upon a search being made under this section, having in his possession or custody any firearm or ammunition or knowing where any firearm or ammunition is concealed, refuses to produce or point out the same to the person making the search, or intentionally conceals the same, shall be guilty of an offence and liable to a fine of one thousand dollars or to imprisonment for two years or to both such fine and such imprisonment.'

The wording for that charge is as follows:

> '**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** upon a search being made under section 30 of the *Firearms and Ammunition Act* (Ch. 80)
> - having in **[**his/her**] [**possession **or** custody**] [**a firearm **or** ammunition**]**; **or**
> - knowing where **[**a firearm **or** ammunition**]** was concealed
>
> did
> - refuse to **[**produce **or** point out**]** the said **[**firearm **or** ammunition**]** to; **or**
> - intentionally conceal from
>
> the police officer making the search namely **[**specify the name and rank of the officer**]**.'

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[52.0] Introduction

This chapter will examine the offences of:

- '*Drunk & Incapable*', as provided for by section 179 of the *Penal Code* (Ch. 26); and
- '*Drunk & Disorderly*', as provided for by section 175(d) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Criminal Justice Act* 1967 (UK), section 91.

[52.1] Drunk & Incapable

[52.1.1] Offence

Section 179 of the *Penal Code* (Ch. 26) states:

> 'Any person found in a public place drunk so as to be incapable of taking care of himself is guilty of an offence […].'

[52.1.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was found in a public place to wit **[**specify the public place**]** drunk so as to be incapable of taking care of **[**himself/herself**]**.'

[52.1.3] Elements

A. Defendant

B. Place

C. Date

D. Found

E. Public Place

F. Drunk So As To Be Incapable Of Taking Care Of Himself/Herself

[52.1.4] Found

The term '*Found*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Sheehan v Piddington, Ex parte Piddington* [1955] StRQd 574 Macrossan CJ stated at page 581:

> 'I think the phrase "found drunk in a public place" *means* no more than the appellant was in a public place and was drunk and that he was seen in that condition in that place by the constable who arrested him contemporaneously [ie., at that time].' (emphasis added) [words in brackets added]

[52.1.5] Public Place

The term '*Public Place*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any *public way* and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court.' (emphasis added)

The term '*Public Way*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any highway, market place, square, street, bridge or other way which is lawfully used by the public.'

Whether or not a place is a '*public place*' is a *question of fact* for the magistrate, to determine upon the circumstances of the particular case. To proceed to conviction, the magistrate *must* be satisfied '*beyond reasonable doubt*' that the place in question is a '*public place*', see *McAneny v Kearney, Ex Parte Kearney* [1966] QdR 306, per Stable J at page 313.

See also: *Williams v Director of Public Prosecutions* (1992) 95 CrAppR 415 & *In The Appeal of Camp* [1975] 1 NSWLR 452.

[52.1.6] Drunk

The term '*Drunk* is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The prosecution *must* prove '*beyond reasonable doubt*' that the defendant was '*drunk so as to be incapable of taking care of himself/herself*'.

Whether or not a defendant was '*drunk so as to be incapable of taking care of himself/herself*' is a *question of fact* for the magistrate to determine upon the circumstances of the particular case.

It is *not* necessary to prove absolute incapacity, but being drunk *requires* more than proof of being under the influence and a substantial degree of incapacity *must* be proved, see *Brown v Bowden* (1901) 19 NZLR 98 & *R v Ormsey* [1945] NZLR 109.

A police officer may give 'opinion evidence' as regards the indicia of the defendant.

In *Himson Mulus v R* [1969 – 70] PNGLR 82 Frost J stated at page 99 that 'no expert qualification is required for a witness to give evidence as to the effect of alcohol upon a person'.

In *R v Aldridge* (1990) 20 NSWLR 737 the Court held at page 744:

> 'The third ground of appeal complains of admission into evidence of the police officer's opinion that Mrs Ryan was affected by intoxicating liquor at the time when the police were called to her house. Unassisted by authority, and ignoring what has always been permitted in charges of driving under the influence and in personal injury claims, *I would have said that a police officer could give evidence of only the usual indicia upon which an opinion may be founded – smelling of liquor, slurred speech, inability to walk in a straight line, etc – leaving it to the jury (or other tribunal of fact) to draw its own conclusions from their own experience* […].
>
> *The police officer's opinion was therefore admissible, although it should not have been permitted without first obtaining the factual basis for that purpose*.' (emphasis added)

See also: *Kennedy v Prestwood* (1988) 7 MVR 561; *Himson Mulas v R* [1970 – 71] PNGLR 82 at page 99; *Blackie v Police* [1966] NZLR 910; *Thomas v Snow* [1962] QWN 7; *Warning v O'Sullivan* [1962] SASR 287 at page 289; *R v Kelly* [1958] VR 412; *R v McKimmie* [1957] VR 93 & *R v Whitby* (1957) 74 WN(NSW) 441.

Therefore, for such '*opinion evidence*' to be admissible police officers *must* give the basis of their opinion based on their own experience in dealing with persons affected by liquor both at work and socially.

Refer also to the subsection which examines '*Opinion Evidence – Lay Persons*' commencing on page **205**.

[52.1.7] Power To Arrest

Section 179 of the *Penal Code* (Ch. 26) provides the power to arrest without warrant.

Refer also to the Chapter which examines the '*Power To Arrest Generally*' commencing on page **242**.

[52.1.8] Sentencing

The jurisdiction of the Courts in respect of this offence is examined commencing on page **14**.

Section 179 of the *Penal Code* (Ch. 26) provides that upon a defendant being found guilty under that section he/she is 'liable to a fine of twenty dollars'.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[52.2] Drunk & Disorderly

[52.2.1] Offence

Section 175(c) of the *Penal Code* (Ch. 26) states:

> 'The following persons –
>
> […]
>
> (c) any person who is drunk and disorderly in any public place […],
>
> […] is] deemed idle and disorderly persons […].' [word in brackets added]

[52.2.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** was drunk and disorderly in a public place to wit **[**specify the public place**]**.'

[52.2.3] Elements

A. Defendant

B. Place

C. Date

D. Drunk

E. Disorderly

F. Public Place

[52.2.4] Drunk

The element '*Drunk*' is examined commencing on page **873**.

[52.2.5] Disorderly

The term '*Disorderly*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Police v Christie* [1962] NZLR 1109] Henry J said at page 1113:

> 'To behave in a disorderly manner, is accordingly, to act in a manner which contravenes good conduct or proper conduct. The behaviour in respect of which the section speaks is behaviour in a public place, so it becomes simply a question whether or not the behaviour in a public place seriously offends against those values of orderly conduct which are recognised by right – thinking members of the public.

> *There are certain manifestations of conduct in a public place which are an affront to and an attack upon recognised public standards of orderly behaviour which well – disposed persons would stigmatise and condemn as deserving of punishment. The standard fixed ought to be reasonable and such as not unduly to limit freedom of movement or speech or to impose conditions or restrictions that are too narrow. The conduct must be serious enough to incur the sanction of a criminal statute. A conviction ought not to be entered unless the conduct or behaviour is such that it constitutes an attack upon public values that ought to be preserved.* […].' (emphasis added)

In *Melser v Police* [1967] NZLR 437 McCarthy J commented in relation to the offence of '*Disorderly Conduct*' at page 446:

> 'I agree that an offence against good manner, a failure of good taste, a breach of morality, even though these may be contrary to the general order of public opinion, is not enough to establish this offence. There must be conduct which not only can fairly be characterized as disorderly, but also is likely to cause a disturbance or to annoy others considerably.
>
> […]
>
> *Moreover it seems to me that the test for determining whether or not behaviour is "disorderly" is objective, albeit the conduct in question must, of course, be looked at in all of the circumstances of the case*.' (emphasis added)

See also: *King* (1996) 88 ACrimR 150 at pages 155 – 157 & *Austin & others* [1939] SASR 130.

[52.2.6] Public Place

The element '*Public Place*' is examined commencing on page **873**.

[52.2.7] Sentencing

The jurisdiction of the Courts in respect of this offence is examined commencing on page **14**.

Section 175 of the *Penal Code* (Ch. 26) provides that upon a defendant being found guilty under that section is 'liable to imprisonment for two months or to a fine of twenty dollars.'

Refer also to the law relating to '*Residence Orders*' commencing on page **947**.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[52.3] Related Offences

The following are offences which are related to the offence of '*Drunkenness*':

- '*Riotous Or Disorderly Manner*', section 175(d) of the *Penal Code* (Ch. 26) which is examined commencing on page **880**;

DRUNKENNESS

- '*Using Threatening, Abusive, Insulting Words Or Behaviour*', section 178(n) of the *Penal Code* (Ch. 26) which is examined commencing on page **886**;

- '*Threatening Violence*', section 89 of the *Penal Code* (Ch. 26) which is examined commencing on page **906**;

- '*Criminal Trespass*', section 189(1) of the *Penal Code* (Ch. 26) which is examined commencing on page **502**;

- '*Carry Firearm Whilst Drunk Or Disorderly*', section 41 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **859**; and

- '*Affray*', section 87 of the *Penal Code* (Ch. 26).

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RIOTOUS OR DISORDERLY MANNER

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RIOTOUS OR DISORDERLY MANNER

[53.0] Introduction

This chapter will examine the offence of '*Behaving In A Riotous Or Disorderly Manner*' as provided for by section 175(d) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Vagrancy Act* 1824 (UK), section 3.

[53.1] Offences

Section 175(d) of the *Penal Code* (Ch. 26) states:

> 'The following persons –
>
> […]
>
> (d) any person […] who, in any public place, behaves in a riotous or disorderly manner, and every person who in any other place whatsoever assembles together with others and while so assembled behaves in a riotous or disorderly manner,
>
> […] is] deemed idle and disorderly persons […].' [word in brackets added]

[53.2] Wording Of Charges

[53.2.1] Public Place

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did behave in a **[**riotous **or** disorderly**]** manner in a public place namely **[**specify the name of the public place**]**.'

[53.2.2] Any Place

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** assembled with others and while so assembled did behave in a **[**riotous **or** disorderly**]** manner.'

RIOTOUS OR DISORDERLY MANNER

[53.3] Elements

[53.3.1] Public Place

A. Defendant

B. Place

C. Date

D. Behave

E. [i] Riotous; or
[ii] Disorderly Manner

F. Public Place

[53.3.2] Any Place

A. Defendant

B. Place

C. Date

D. Assembled With Others

E. While So Assembled Did Behave
[i] Riotous; or
[ii] Disorderly Manner

[53.4] Riotous Manner

The term '*Riotous Manner*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'natural and ordinary' meaning of that term in the context of this section would *include* any behaviour which uses force or violence.

[53.5] Disorderly Manner

The term '*Disorderly Manner*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Police v Christie* [1962] NZLR 1109] Henry J said at page 1113:

> 'To behave in a disorderly manner, is accordingly, to act in a manner which contravenes good conduct or proper conduct. The behaviour in respect of which the section speaks is behaviour in a public place, so it becomes simply a question whether or not the behaviour in a public place seriously offends against those values of orderly conduct which are recognised by right – thinking members of the public. *There are certain manifestations of conduct in a public place which are an affront to and an attack upon recognised public standards of orderly behaviour which well – disposed persons would stigmatise and condemn as deserving of punishment. The standard fixed ought to be reasonable and such as not unduly to limit freedom of movement or speech or to impose conditions or restrictions that are too narrow. The conduct must be serious enough to incur the sanction of a criminal statute. A conviction ought not to be entered unless the conduct or behaviour is such that it constitutes an attack upon public values that ought to be preserved.* […].' (emphasis added)

In *Melser v Police* [1967] NZLR 437 McCarthy J commented in relation to the offence of '*Disorderly Conduct*' at page 446:

> 'I agree that an offence against good manner, a failure of good taste, a breach of morality, even though these may be contrary to the general order of public opinion, is not enough to establish this offence. There must be conduct which not only can fairly be characterized as disorderly, but also is likely to cause a disturbance or to annoy others considerably.
>
> […]
>
> *Moreover it seems to me that the test for determining whether or not behaviour is "disorderly" is objective, albeit the conduct in question must, of course, be looked at in all of the circumstances of the case*.' (emphasis added)

See also: *King* (1996) 88 ACrimR 150 at pages 155 – 157 *& Austin & others* [1939] SASR 130.

[53.6] Public Place

The term '*Public Place*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any *public way* and any building, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court.' (emphasis added)

The term '*Public Way*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

> 'any highway, market place, square, street, bridge or other way which is lawfully used by the public.'

Whether or not a place is a '*public place*' is a *question of fact* for the magistrate, to determine upon the circumstances of the particular case. To proceed to conviction, the magistrate *must* be satisfied '*beyond reasonable doubt*' that the place in question is a '*public place*', see *McAneny v Kearney, Ex Parte Kearney* [1966] QdR 306, per Stable J at page 313.

See also: *Williams v Director of Public Prosecutions* (1992) 95 CrAppR 415 *& In The Appeal of Camp* [1975] 1 NSWLR 452.

[53.7] Sentencing

The jurisdiction of the Courts in respect of this offence is examined commencing on page **14**.

Section 175 of the *Penal Code* (Ch. 26) provides that upon a defendant being found guilty under that section is 'liable to imprisonment for two months or to a fine of twenty dollars.'

Refer also to the law relating to '*Residence Orders*' commencing on page **947**.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[53.8] Related Offences

The following are offences which are related to the offence of '*Riotous Or Disorderly Manner*':

- '*Drunk & Disorderly*', section 175(c) of the *Penal Code* (Ch. 26) which is examined commencing on page **875**; and
- '*Using Threatening, Abusive, Insulting Words Or Behaviour*', section 178(n) of the *Penal Code* (Ch. 26) which is examined commencing on page **886**;
- '*Threatening Violence*', section 89 of the *Penal Code* (Ch. 26) which is examined commencing on page **906**;
- '*Criminal Trespass*', section 189(1) of the *Penal Code* (Ch. 26) which is examined commencing on page **502**;
- '*Carry Firearm Whilst Drunk Or Disorderly*', section 41 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **859**;
- '*Threatening Violence With Firearm*', section 42 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **862**; and
- '*Affray*', section 87 of the *Penal Code* (Ch. 26).

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THREATENING, ABUSIVE OR INSULTING WORDS OR BEHAVIOUR

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THREATENING, ABUSIVE OR INSULTING WORDS OR BEHAVIOUR

[54.0] Introduction

This chapter will examine the offence of '*Using Threatening, Abusive Or Insulting Words Or Behaviour*', as provided for by section 178(n) of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Public Order Act* 1936 (UK), section 5.

[54.1] Offences

Section 178(n) of the *Penal Code* (Ch. 26) states:

> 'Any person who –
>
> (n) in any public place uses threatening or abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned
>
> is guilty of an offence […]'

[54.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** in a public place namely **[**specify the name of the public place**]** did use **[**threatening, abusive **or** insulting**] [**words **or** behaviour**]** to wit **[**specify the **(**threatening, abusive **or** insulting**) (**words **or** behaviour**)] [**with intent to provoke a breach of the peace **or** whereby a breach of the peace may be occasioned**]**.'

[54.3] Elements

A. Defendant

B. Place

C. Date

D. Public Place

E. [i] Threatening;
[ii] Abusive; or
[iii] Insulting

F. [i] Words; or
[ii] Behaviour

G. [i] With Intent To Provoke A Breach Of The Peace; or
[ii] Whereby A Breach Of The Peace May Be Occasioned

[54.4] Objective Tests

[54.4.1] Introduction

For the prosecution to prove an offence under section 178(n) of the *Penal Code* (Ch. 26) *requires* the satisfaction of *two distinct tests* '*beyond reasonable doubt*'.

The *first test* is whether the words or behaviour of the defendant were threatening, abusive or insulting.

The *second test* is dependant on whether the prosecution is relying on either:

- an intent by the defendant to provoke a breach of the peace; or
- the likelihood of a breach of the peace may be occasioned.

[54.4.2] Threatening, Abusive Or Insulting Words Or Behaviour

The terms '*Threatening*', '*Abusive*' and '*Insulting*' are *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *Utula Samana v Demas Waki* [1984] PNGLR 8 Amet J, sitting alone, held at pages 14 – 15:

> 'The test is, as Miles J said in *Siwi Kurondo's case* [Unrep. N258; 26 September 1980], at 4:
>
> "… whether the speaker as a *reasonable person* should in all the circumstances expect that the recipient would be insulted, and *not merely hurt as to his feelings but insulted to the extent that he was deeply offended or outraged*."
>
> Miles J then at 4 in that case cited a passage from Kerr J in *Ball v McIntyre* (1966) 9 FLR 237 at 241 and considered that passage helpful:
>
> "Conduct which offends against the standards of good taste or good manners, which is a breach of the rules of courtesy or runs contrary to the community accepted social rules, may well not be offensive conduct within the meaning of the section … different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part *I believe that a so – called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions* …"
>
> His Honour Miles J continued at the bottom of 4:
>
> "*In this respect I think his Worship misdirected himself in law in considering that the test of whether the words were insulting was whether the person to whom they were directed was in fact insulted*."
>
> … In the words of Miles J in Siwi Kurondo's case:

> "… *the words must not be considered in isolation from the circumstances* …"
>
> I refer also to Pratt J's judgment in ***Barunke Kaman's case*** at 2. His Honour cited the test as stated by Miles J in ***Siwi Kurando's case*** and continued:
>
> "… It is the duty of the courts to safeguard the fine balance between freedom of speech and a genuine breach of s. 7 of the *Summary Offences Act*."
>
> *The court is not here to enforce standards of conduct or morals which fall short of criminal conduct*.' (emphasis added)

The character of words may depend on the context and manner in which they are spoken, see *Tonny v Iamnan v Gerard Tondambi* (Unrep. SC 716/72; Papua New Guinea).

Insulting words should be not just rude or offensive, but insulting, see *R v Ambrose* (1973) 57 CrAppR 538 at page 540 & *Brutus v Cozens* (1972) 56 CrAppR 799; [1972] 3 WLR 521; [1972] 2 AllER 1297; [1973] AC 854; [1973] CrimLR 56.

The principles relating to how a *reasonable person* would be expected to react in the circumstances apply *equally* to threatening, abusive *or* insulting words *or* behaviour.

Therefore, the *test* to be applied is whether the words *or* behaviour could be considered either threatening, abusive *or* insulting so as to deeply offend *or* outrage a *reasonable person* in the circumstances of the case to thereby constitute criminal conduct within the meaning of section 178(n) of the *Penal Code* (Ch. 26). Considering that the test applies to a *reasonable person* it is *objective* in nature. It is immaterial whether the recipient of the words or behaviour felt either threatened, abused *or* insulted.

[54.4.3] Intent To Provoke A Breach Of The Peace Or Whereby A Breach Of The Peace May Be Occasioned

In *Marsh v Arscott* (1982) 75 CrAppR 211 [[1982] CrimLR 827] McCullough J, with whom Donaldson LJ concurred, stated at page 216:

> 'This section [, referring to section 5 of the *Public Order Act* 1936 (UK),] is describing breaches of the peace which are brought about, or are likely to be brought about, by other words or behaviour occurring earlier, although usually not very long before. The phrase "whereby a breach of the peace is likely to be occasioned" indicates that Parliament was concerned with cause and effect, ie., with conduct which is likely to bring about a breach of the peace and not with conduct which is itself a breach of the peace and no more. Were this the law every common assault occurring in a public place would also be an offence against this section. Many such assaults will in fact be likely to lead very quickly to a breach of the peace, and these will be within the section; but, without more it is not enough that conduct which is threatening, abusive or insulting is of itself a breach of the peace.' [words in brackets added]

In *Anthony Willie v Roger Taro* (Unrep. N526(M); 19 & 20 November 1985) Amet J, sitting alone, held:

> 'Mere use and proof of use of threatening, abusive, insulting words, behaviour or gestures is not sufficient, it *must* be objectively by proper evidence proven that one intended to provoke a breach of peace or whereby a breach of peace was likely to take place. This evidence has to be *objective*, that is, to others looking on, that the person speaking those words or making gestures or behaviour firstly *had the immediate capacity to be able to do an overt act to effect his intention or such as was likely to lead to a breach of the peace*; that he was shaping up and moving toward the person at the receiving end with clenched fists or stick or raised hands or picking up sticks or stones -- any such overt action to manifest intentions or by which it can be inferred that a breach was likely to take place. Where clearly words are just uttered in the heat of argument with nothing more and shortly thereafter the person using the words walks away -- again subjective apprehension is not necessarily sufficient -- then clearly no breach was ever likely to take place.' (emphasis added)

In *Utula Samana v Demas Waki* [1984] PNGLR 8 Amet J, sitting alone, held at pages 16 – 17:

> 'The commission of the offence is not dependent upon what may or could have taken place dependent upon what the reaction of the conduct complained of may have been. Whilst the likelihood of a breach of the peace is further dependent upon whatever the reaction of a recipient may be, then no offence against the section has been committed.
>
> It is not whether a breach of the peace could have or could very well have taken place if [the recipient of the words or behaviour] reacted this way or that way, it is whether it was in fact likely to take place at that precise point in time following the use of the words [or behaviour], from the facts and circumstances prevailing at that point of time …
>
> [… I] accept the meaning of the term "breach of the peace" to be as accepted by Miles J in Siwi Kurondo's case from Carter's Criminal Law of Queensland (5th ed) at 204:
>
> "… *a breach of the peace arise where there is an actual assault, or where public alarm and excitement are caused by a wrongful act. Mere annoyance, and disturbance or insult to a person or abusive language or great and fury without personal violence, are not generally sufficient*."' (emphasis added) [words in brackets added]

In *R v Howell* (1981) 73 CrAppR 31 [[1982] 1 QB 416; [1981] 3 AllER 383; [1981] 3 WLR 501; [1981] CrimLR 697] Watkins LJ, delivering the judgment of the Court, considered that that definition of a '*breach of the peace*' was in parts inaccurate. At page 37 His Lordship stated:

> 'The statement in Halsbury [, which is identical to the statement referred in Carter's *Criminal Law of Queensland* (5th ed) at page 204,] is in parts, we think, inaccurate because of its failure to relate all the kinds of behaviour there mentioned to violence. Furthermore, we think, the word disturbance when used in isolation cannot constitute a breach of the peace.
>
> *We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance*.' (emphasis added) [words in brackets added]

See also: *G v Chief Superintendent of Police, Stroud* (1988) 86 CrAppR 92; [1987] CrimLR 269.

Therefore, the *second objective test* to be applied is whether the 'words or behaviour' of the defendant indicated that either:

- he/she had an intention to provoke a breach of peace; or
- a breach of the peace may be occasioned, ie., 'real' possibility of occurring.

See also: *Reid v Jones & others* (1983) 77 CrAppR 246; *Nicholson v Gage* (1985) 80 CrAppR 40; *R v Oakwell* [1978] 1 AllER 1223; [1978] 1 WLR 32; (1978) 66 CrAppR 174; [1978] CrimLR 168; *R v Simcock & Rhodes* (1978) 66 CrAppR 192; [1977] CrimLR 751 & *R v Edwards & Roberts* (1978) 67 CrAppR 228; [1978] CrimLR 564.

Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of this offence, 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant / accused intended to provoke a breach of the peace, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[54.5] Sentencing

The jurisdiction of the Court in respect of these offences is examined commencing on page **14**.

Section 178(n) of the *Penal Code* (Ch. 26) provides that upon a defendant being found guilty under that section is 'liable to a fine of ten dollars or to imprisonment for one month.'

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[54.6] Related Offences

The following are offences which are related to the offences of '*Threatening, Abusive Or Insulting Words Or Behaviour*':

- '*Drunk & Disorderly*', section 175(c) of the *Penal Code* (Ch. 26) which is examined commencing on page **875**; and
- '*Riotous Or Disorderly Manner*', section 175(d) of the *Penal Code* (Ch. 26) which is examined commencing on page **879**;

THREATENING, ABUSIVE OR INSULTING WORDS OR BEHAVIOUR

- '*Threatening Violence*', section 89 of the *Penal Code* (Ch. 26) which is examined commencing on page **906**;

- '*Criminal Trespass*', section 189(1) of the *Penal Code* (Ch. 26) which is examined commencing on page **502**;

- '*Carry Firearm Whilst Drunk Or Disorderly*', section 41 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **859**;

- '*Threatening Violence With Firearm*', section 42 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **862**; and

- '*Affray*', section 87 of the *Penal Code* (Ch. 26).

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GOING ARMED IN PUBLIC

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GOING ARMED IN PUBLIC

[55.0] Introduction

This chapter will examine the offence of '*Going Armed In Public*', as provided for by section 83 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

[55.1] Offence

Section 83 of the Penal Code (Ch. 26) states:

> 'Any person who goes armed in public without lawful occasion in such a manner as to cause fear to any person shall be guilty of a misdemeanour […].'

[55.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did go armed in public without lawful occasion in a manner that caused fear to **[**a person **or** persons**]** namely **[**specify the name of the person/s**]**.'

[55.3] Elements

A. Defendant

B. Place

C. Date

D. Armed

E. Public

F. Without Lawful Occasion

G. In A Manner That Caused Fear To Complainant

[55.4] Armed

The term '*Armed*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

GOING ARMED IN PUBLIC

In *R v Jones* (1987) 85 CrAppR 259 [[1987] 2 AllER 692; [1987] 1 WLR 692] Tucker J, delivering the judgment of the Court of Appeal, held at page 266:

> 'The expression "armed" is an ordinary English word. Normally, it will involve either physically carrying arms, or it will involve proof that, to his knowledge, a defendant knows that they are immediately available. In our judgment, it is not necessary to prove an intent to use those arms if the situation should require it, though clearly if a defendant does use them, or has used them, then that is an obvious indication that he is armed.'

See also: *Rowe v Conti; Threlfall v Panzera* [1958] VR 547; [1958] ALR 1038.

[55.5] Without Lawful Occasion

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she had a '*lawful occasion*' to go armed in public.

Refer also to law relating to '*Negative Averments*' examined commencing on page **83**.

As regards the defence of '*possible self – defence*' Widgery LCJ, with whom Melford Stevenson & Milom JJ concurred, held in *Evans v Hughes* (1972) 56 CrAppR 813 at pages 816 – 817:

> '[I]t may be a reasonable excuse for the carrying of an offensive weapon that the carrier is in anticipation of imminent attack and is carrying it for his own personal defence, but what is abundantly clear to my mind is that this Act [, referring to the *Prevention of Crimes Act* 1953 (UK),] never intended to sanction the permanent or constant carriage of an offensive weapon merely because of some constant or enduring supposed or actual threat or danger to the carrier. People who are under that kind of continuing threat must protect themselves by other means, notably by enlisting the protection of the police, and, in order that it may be a reasonable excuse to say: "I carried this for my own defence," the threat for which this defence is required must be imminent particular threat affecting the particular circumstances in which the weapon was carried.' [words in brackets added]

The law relating to the '*Defence Of Person & Property*' is examined commencing on page **451**.

[55.6] Sentencing

The jurisdiction of the Courts in respect of this offence is examined commencing on page **14**.

Section 83 of the *Penal Code* (Ch. 26) provides that upon a defendant being found guilty under that section he/she is guilty of a misdemeanour and therefore 'liable to imprisonment for a term not exceeding two years to with a fine or with both', see section 41 of that Code.

The 'arm' may also be forfeited, see section 83.

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[55.7] Related Offences

The following are offences which are related to the offences of '*Going Armed In Public*':

- '*Threatening Violence*', section 89 of the *Penal Code* (Ch. 26) which is examined commencing on page **906**;
- '*Possession Of Weapon*', section 84(2) of the *Penal Code* (Ch. 26) which is examined commencing on page **898**;
- '*Criminal Trespass*', section 189(1) of the *Penal Code* (Ch. 26) which is examined commencing on page **502**;
- '*Carry Firearm Whilst Drunk Or Disorderly*', section 41 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **859**;
- '*Threatening Violence With Firearm*', section 42 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **862**; and
- '*Affray*', section 87 of the *Penal Code* (Ch. 26).

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POSSESSION OF WEAPON

[56.0] Introduction

This chapter will examine the offence of '*Possession Of Weapon*', as provided for by section 84 of the *Penal Code* (Ch. 26).

There is no onus on the prosecution to prove any intention by the defendant to cause injury, see *Davis v Alexander* (1970) 54 CrAppR 398.

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

See: *Prevention Of Crimes Act* 1953 (UK), section 1.

[56.1] Offences

Section 84(2) of the *Penal Code* (Ch. 26) states:

> 'Any person who, in a restricted area or place, without reasonable excuse the proof of which shall be on him, carries or has in his possession or under his control any weapon is guilty of a misdemeanour […].'

[56.2] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** in a restricted **[**area **or** place**]** and without reasonable excuse did **[**carry **or** have in **([**his/her**]** possession **or** under **[**his/her**]** control**)]** a weapon to wit a **[**specify the weapon**]**.'

[56.3] Elements

A. Defendant

B. Place

C. Date

D. Restricted
   - [i] Area; or
   - [ii] Place

E. Without Reasonable Excuse

F. [i] Carry;
   - [ii] [1] Possession; or
   - [2] Control

G. Weapon

[56.4] Restricted Area Or Place

Section 84(1) of the *Penal Code* (Ch. 26) states:

> 'For the purposes of this section, the Minister may by order designate any area or place in Solomon Islands, to be a restricted area or place.'

On 26 May 1999 the Minister of Police and National Security issued '*The Penal Code (Designation Of Restricted Area Or Place) XXOrder 1999*' which declared for the purposes of section 84 of the *Penal Code* (Ch. 26), 'all public ways in Honiara City and Guadalcanal Province to be restricted areas or places.

In that Order "public ways" included any highway, market place, square, street, road ridge or other way which is lawfully used by the public.'

[56.5] Without Reasonable Excuse

The onus is on the defendant to prove on the '*balance of probabilities*' that he/she had a '*reasonable excuse*' for carrying or having in his/her possession or control a weapon in a restricted area or place.

Refer also to law relating to '*Negative Averments*' examined commencing on page **83**.

See: *R v Fallows* (1954) 38 CrAppR 52.

[56.6] Carry

The term '*Carry*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'plain and natural' meaning of that term in the context of this section would *mean* to 'knowingly' transport the weapon on the body.

As regards the need for the prosecution to prove the issue of 'knowingly', see *R v Cugullere* (1961) 45 CrAppR 108; [1961] 1 WLR 858; [1961] 2 AllER 843.

[56.7] Possession

The term '*Possession*' is defined in section 4 of the *Penal Code* (Ch. 26) as follows:

> '(a) "be in possession of" or "have in possession" includes not only having in one's own personal possession, but also knowingly having anything in the actual possession or custody of any other person, or having anything in any place (whether belonging to or occupied by oneself or not) for the use or benefit of oneself or of any other person;

(b) if there are two or more persons and any one or more of them with the knowledge and consent of the rest has or have anything in his or their custody or possession, it shall be deemed and taken to be in the custody and possession of each and all of them.'

To prove '*possession*' the prosecution *must* prove '*knowledge*' *and* '*control*'.

In *Director of Public Prosecutions v Brooks* [1974] AC 862; [1974] 59 CrAppR 185 Lord Diplock stated at pages 866 & 187 respectively:

'In the ordinary use of the word "possession", one has in one's possession whatever is, to one's own knowledge, physically in one's custody or under one's own physical control.'

In *R v Boyesen* [1982] AC 768; (1982) 75 CrAppR 51 Lord Scarman stated at pages 773 – 774 & 53 – 54 respectively:

'Possession is a deceptively simple concept. It denotes a physical control *or* custody of a thing *plus* knowledge that you have it in your custody or control. You may possess a thing without knowing or comprehending its nature: but you do *not* possess it *unless* you know you have it.' (emphasis added)

A person does *not* have '*knowledge*' of property if he/she:

- does not know where the property was; and
- was not in position to find out.

In *R v Russell* (1985) 81 CrAppR 315 [[1985] CrimLR 231] Jupp J, delivering the judgment of the Divisional Court, stated at pages 318 – 319:

'We were referred to the case of CUGULLERE (1961) 45 CrAppR 108; [1961] 1 WLR 858, brought under the same section of the Prevention of Crime Act 1953, in which the Court of Criminal Appeal said, at the bottom of p.110 and p.860 respectively: "This court is clearly of the opinion that the words 'has with him in any public place' must mean 'knowingly has with him in any public place'. If some innocent person has a cash slipped into his pocket by an escaping rogue, he would not be guilty of having it with him within the meaning of the section, because he would be quite innocent of any knowledge that it had been put into his pocket. In the judgment of this court, the section cannot apply in circumstances such as those. *It is, therefore, extremely important in any case under this section for the judge to give a careful direction to the jury on the issue of possession. The first thing the jury have to be satisfied about, and it is always a question for the jury, is whether the accused person knowingly had with him the alleged offensive weapon*."

The facts in CUGULLERE were that three pick–axe handles were found in the back of a stolen motor van which the appellant was driving. His defence was that he had no idea the van had been stolen, and had no idea that the implements were in the back of the van, implying that someone had put them there without his knowledge.

The appellant's defence in this case is not that, having a cash slipped under his driving seat by some third party, he was innocent of any knowledge that it had been put there. It is that he himself put the cash under the driving seat, but until the police found and showed it [to] him, he had forgotten all about it. […]

[…]

> *In our judgment, the Court in CUGULLERE, in saying that the words of the statute must be construed as "knowingly had with him", were not merely dealing with the situation where a defendant has an offensive weapon put within his reach by a stranger without knowing it. They were applying the general principle of criminal responsibility which makes it incumbent on the prosecution to prove full mens rea* [see *Sweet v Parsley* (1969) 53 CRAppR 221, 225, [1970] AC 132]].
>
> *It would in our judgment be wrong to hold that a man knowingly has a weapon with him if his forgetfulness of its existence or presence in his car is so complete as to amount to ignorance that it is there at all*. This is not a defence which juries would in the ordinary way be very likely to accept, but if it is raised it should be left for their decision.' (emphasis added) [words in brackets added]

See also: *R v Ashton – Rickardt* [1978] 1 AllER 173; (1977) 65 CrAppR 67; [1978] 1 WLR 37;]1977] CrimLR 424; *R v Wright* (1976) 62 CrAppR 169, see MacKenna J at page 173; *R v McNamara* (1988) 87 CrAppR 246 at pages 250 – 251; *R v Holland* [1974] PNGLR 7 at page 19; *R v Iona Griffin* [1974] PNGLR 72 at page 75; *R v Angie – Ogun* [1969 – 70] P&NGLR 36; *Wanganeed* (1988) 38 ACrimR 187 & *Dayman v Newsome, Ex parte Dayman* [1973] QdR 399.

[56.8] Control

The term '*Control*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The 'plain and natural' meaning of that term in the context of this section would *include* having the power to deal with the weapon as the defendant wishes.

In *McCarthy & Ryan* (1993) 71 ACrimR 395 Hunt CJ at CL, with whom the other members of the New South Wales Court of Criminal Appeal concurred, stated at page 400:

> 'What must be shown is some form of *physical possession or dominion (control) over the property*: *Saleam* (1989) 41 ACrimR 108 at 114. The possession will be sufficient even if the property is in the actual physical possession over whom the accused has sufficient control, or with whom the accused has such a relationship (…), that the property will be handed over to the accused at his request: *Cottrell* [1983] VR 143 at 148 – 149.' (emphasis added)

Therefore, a person may have control over the weapon, although the weapon is *not* actually in his/her physical possession.

[56.9] Weapon

Section 84(6) of the *Penal Code* (Ch. 26) states:

> 'In this section "weapon" *means* any article or instrument capable of causing injury to any person *and without restricting the generality of this subsection shall include* any knife, bushknife, club, firearm or explosive.' (emphasis added)

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[56.10] Police Powers

[56.10.1] Specific Power

Section 84(3) of the *Penal Code* (Ch. 26) states:

> 'Any police officer who has reason to believe that a weapon is being concealed or carried on any person or vehicle in a restricted area or place may, without warrant or other written authority, search and detain any such person or vehicle and take possession of such weapon.'

Refer also to the chapter which examines the '*Power To Enter & Search Generally*' commencing on page **256**.

[56.10.2] Offences

Section 84(4) of the *Penal Code* (Ch. 26) states:

> 'Any person who obstructs or hinders any police officer from lawfully exercising any powers conferred on him by subsection (3) of this section shall be guilty of a misdemeanour.'

[56.10.3] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**obstruct **or** hinder**]** a police officer namely **[**specify the name and rank of the officer**]** from lawfully exercising powers conferred on the said police officer by subsection (3) of section 84 of the *Penal Code* (Ch. 26).'

[56.10.4] Elements

A. Defendant

B. Place

C. Date

D. [i] Obstruct; or
[ii] Hinder

E. Police Officer

F. Lawfully Exercising Powers Conferred By Section 84(3) Of The *Penal Code*

[56.10.5] Obstruct Or Hinder

The terms **'***Obstruct*' and '*Hinder*' are *not* defined in either the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

POSSESSION OF WEAPON

In *Hinchcliffe v Sheldon* [1955] 1 WLR 1207; [1955] 3 AllER 406 Lord Goddard CJ stated at pages 1210 & 408 respectively:

> 'Obstructing […] *means* making it more difficult for the police to carry out their duties.' (emphasis added)

In *Willmott v Atack* [1977] QB 498; [1976] 3 AllER 794; (1976) 63 CrAppR 207 the court held that it was *not* sufficient for the prosecution to prove that the defendant had deliberately done an act which had resulted in the obstruction of a police officer; what also had to be shown was that he/she had done the act with the intention of obstructing the officer *in the sense of making it more difficult to carry out his/her duty.*

In appropriate circumstances, the defendant *must* however be under a legal obligation to comply with the direction of the police officer concerned, see *Ingleton v Dibble* [1972] 1 QB 480; [1972] 1 AllER 275.

To '*obstruct*' *means* to *hinder*, impede, retard or delay, see *Carmichael v Mac Gowan* [1967] WAR 11.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

See also: *Lewis v Cox* (1985) 80 CrAppR 1 at page 6; *Moore v Green* [1983] 1 AllER 663; *Rice v Connolly* [1966] 2 AllER 649; [1966] 2 QB 414 & *Hills v Ellis* (1983) 76 CrAppR 217.

[56.11] Sentencing

The jurisdiction of the Courts in respect of these offences is examined commencing on page **14**.

Section 84(1) & (4) of the *Penal Code* (Ch. 26) provides that upon a defendant being found guilty of either offence under that section he/she is guilty of a misdemeanour and therefore 'liable to imprisonment for a term not exceeding two years to with a fine or with both', see section 41 of that Code.

The weapon may also be forfeited, see section 84(5).

The law relating to '*Sentencing Generally*' is examined commencing on page **918**.

[56.12] Related Offences

The following are offences which are related to the offences of '*Possession Of Weapon*':

- '*Threatening Violence*', section 89 of the *Penal Code* (Ch. 26) which is examined commencing on page **906**;
- '*Criminal Trespass*', section 189(1) of the *Penal Code* (Ch. 26) which is examined commencing on page **502**;

POSSESSION OF WEAPON

- '*Carry Firearm Whilst Drunk Or Disorderly*', section 41 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **859**;

- '*Threatening Violence With Firearm*', section 42 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **862**;

- '*Prohibition Of Arms In Certain Areas*', section 25 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **850**; and

- '*Affray*', section 87 of the *Penal Code* (Ch. 26).

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THREATENING VIOLENCE

[57.0] Introduction

This chapter will examine the offence of '*Threatening Violence*', as provided for by section 89 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

[57.1] Offences

Section 89 of the *Penal Code* (Ch. 26) states:

> 'Any person who –
>
> (a) with intent to intimidate or annoy any person, threatens to break or injure a dwelling – house; or
>
> (b) with intent to alarm any person in a dwelling – house, discharges loaded firearms or commits any other breach of the peace,
>
> shall be guilty of a misdemeanour, and shall be liable to imprisonment for one year.
>
> If the offence is committed in the night the offender shall be liable to imprisonment for two years.'

[57.2] Intent To Intimidate Or Annoy

[57.2.1] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** with intent to **[**intimidate **or** annoy**]** a person namely **[**specify the name of the person**]** did threaten to **[**break **or** injure**]** a dwelling-house.'

Circumstance Of Aggravation

Include the word 'night' in the charge.

[57.2.2] Elements

A. Defendant

B. Place

C. Date

D. Intent To
   [i] Intimidate; or
   [ii] Annoy

E. Complainant

F. Threaten
   [i] Break; or
   [ii] Injure

G. Dwelling - house

[57.2.3] Intent To Intimidate Or Annoy

The term '*Intent To Intimidate Or Annoy*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The prosecution *must* prove '*beyond reasonable doubt*' that the defendant had the *intent* to intimidate or annoy a person by threatening to break or injure a dwelling – house.

Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of this offence, 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to intimidate or annoy a person by threatening to break or injure a dwelling - house, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence '*Intoxication*' is examined commencing on page **444**.

[57.3] Intent To Alarm

[57.3.1] Wording Of Charges

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** with intent to alarm a person namely **[**specify the name of the person**]** in a dwelling-house did **[**discharge a loaded firearm **or** commit a breach of the peace**]**.'

Circumstance Of Aggravation

Include the word 'night' in the charge.

[57.3.2] Elements

A. Defendant

B. Place

C. Date

D. Intent To Alarm

E. Complainant

F. Dwelling - house

G. [i] Discharge A Loaded Firearm; or
[ii] Commit A Breach Of The Peace

[57.3.3] Intent To Alarm

The term '*Intent To Alarm*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

The prosecution *must* prove '*beyond reasonable doubt*' that the defendant had the *intent* to alarm a person by discharging a loaded firearm or committing any other breach of the peace.

Intention, which is a state of mind, can never be proven as a fact, it can only be inferred from other facts which are proved, see *Sinnasamy Selvanayagam v R* [1951] AC 83 at page 87, if there are no admissions.

If there are no admissions, to be found guilty of this offence, 'the only rational inference open to the Court to find in the light of the evidence' *must* be that the defendant intended to alarm a person by discharging a loaded firearm or committing any other breach of the peace, see *R v Dudley Pongi* (Unrep. Criminal Case No. 40 of 1999; Muria CJ; at page 22).

The law relating to '*Circumstantial Evidence*' is examined commencing on page **183**.

Intentional *or* unintentional intoxication may be considered for the purpose of determining whether the defendant had the necessary '*intent*' at the time of the commission of the offence, see section 13(4) of the *Penal Code* (Ch. 26).

The defence of '*Intoxication*' is examined commencing on page **444**.

[57.3.4] Breach Of The Peace

The term '*Breach Of The Peace*' is *not* defined in the *Penal Code* (Ch. 26) *or* the *Interpretation & General Provisions Act* (Ch. 85).

In *R v Howell* (1981) 73 CrAppR 31 [[1982] 1 QB 416; [1981] 3 AllER 383; [1981] 3 WLR 501; [1981] CrimLR 697] Watkins LJ, delivering the judgment of the Court, stated at page 37:

'We are emboldened to say that there is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.'

[57.4] Dwelling - house

The term '*Dwelling - house*' is defined in section 4 of the *Penal Code* (Ch. 26) as *including*:

'any building or structure or part of a building or structure which is for the time being kept by the owner or occupier for the residence therein of himself, his family or servants or any of them, and it is immaterial that it is from time to time uninhabited; a building or structure adjacent to or occupied with a dwelling – house is deemed to be part of the dwelling – house.'

A motel unit occupies for a week was held to be a dwelling – house, see *R v Halloran & Reynolds* [1967] QWN 34.

[57.5] Night

The term '*Night*' is defined in section 4 of the *Penal Code* (Ch. 26) as *meaning*:

'the interval between half – past six o'clock in the evening and half – past six o'clock in the morning.'

[57.6] Sentencing

The jurisdiction of the Courts in respect of these offences is examined commencing on page **14**.

Section 89 of the *Penal Code* (Ch. 26) provides that upon a defendant being found guilty under that section he/she is guilty of a misdemeanour and is liable to:

- imprisonment for one year, if the offence were not committed at 'night'; and
- imprisonment for two years, if the offence were committed at 'night'.

The law relating to '*Sentencing Generally*' commencing on page **918**.

[57.7] Related Offences

The following are offences which are related to the offences of '*Threatening Violence*':

- '*Criminal Trespass*', section 189(1) of the *Penal Code* (Ch. 26) which is examined commencing on page **502**;
- '*Threatening Violence With Firearm*', section 42 of the *Firearms & Ammunition Act* (Ch. 80) which is examined commencing on page **862**;

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- '*Riotous Or Disorderly Manner*', section 175(d) of the *Penal Code* (Ch. 26) which is examined commencing on page **879**;

- '*Going Armed In Public*', section 83 of the *Penal Code* (Ch. 26) which is examined commencing on page **894**; and

- '*Affray*', section 87 of the *Penal Code* (Ch. 26).

DEMANDING PROPERTY WITH MENACES

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DEMANDING PROPERTY WITH MENACES

[58.0] Introduction

This chapter will examine the offence of '*Demanding Property With Menaces*', as provided for by section 295 of the *Penal Code* (Ch. 26).

When interpreting any section of the *Penal Code* (Ch. 26), section 3 *must* be considered. That section states:

> 'This Code *shall* be interpreted in accordance with the *Interpretation and General Provisions Act and the principles of legal interpretation obtaining in England*, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching to them in English criminal law and shall be construed in accordance therewith.' (emphasis added)

Whilst section 30 of the *Larceny Act* 1916 (UK) is the offence of '*Demanding Property With Menaces*', it has the additional element of 'with intent to steal'.

[58.1] Offence

Section 295 of the *Penal Code* (Ch. 26) states:

> 'Any person who with menaces or by force demands of any person anything capable of being stolen is guilty of a felony, and shall be liable to imprisonment for five years.'

[58.2] Wording Of Charge

'**[**Name of Defendant**]** at **[**Place**]** on **[**Date**]** did **[**with menaces **or** by force**]** demand of a person namely **[**specify the name of this person**]** a thing capable of being stolen to wit a **[**specify the thing**]** the property of **[**the said person **or** a person namely **(**specify the name of this person**)]**.'

[58.3] Elements

A. Defendant

B. Place

C. Date

D. [i] With Menaces; or
[ii] By Force
Demand

E. Complainant

F. Thing Capable Of Being Stolen

G. Property Of Complainant

DEMANDING PROPERTY WITH MENACES

[58.4] Demand With Menaces Or By Force

In *Treacy v Director of Public Prosecutions* (1971) 55 CrAppR 113 [[1971] 2 WLR 112; [1971] 1 AllER 110; [1971] AC 537] Lord Morris commented at page 130:

> 'The offence is committed […] if a person "makes any unwarranted demand with menaces". The act which is made an offence involves the making of a demand. How, then, does a person make a demand? He does so by communicating a request. He may do this by speaking to someone. He may do it in other ways. But the notion of making an unwarranted demand with menaces involves that the demand is made to or of someone who could comply with it and who could be influenced by the menaces that accompany the demand. The act of making the demand is not, in my view, committed until it is communicated to the person who is being unjustifiably menaced. There must be contact between the demander and the victim.'

There is no such offence as '*Attempting To Demand With Menaces*', see *R v Moran* (1952) 36 CrAppR 10.

[58.5] Things Capable Of Being Stolen

[58.5.1] Statutory Provision

Section 257(1) of the *Penal Code* (Ch. 26) states:

> 'Every inanimate thing which has value and is the property of any *person*, and if adhering to the realty then after severance therefrom, is capable of being stolen:
>
> Provided that, save as hereinafter expressly provided with respect to fixtures, growing things, and minerals as defined in the Mines and Minerals Act [Ch. 42], anything attached to or forming part of the realty is not capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof.' (emphasis added)

That section also outlines other '*things*' capable of being stolen.

See: *Billing v Pill* (1953) 37 CrAppR 174.

[58.5.2] Specific Rules

Section 120 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> 'The following provisions *shall* apply to all charges and information and, notwithstanding any rule of law or practice, a charge or information *shall*, subject to the provisions of this Code, *not* be open to objection in respect of its form or contents if it is framed in accordance with the provisions of this Code –
>
> […]

(c)(i) *the description of property in a charge or information shall* be in ordinary language, and such as to indicate with reasonable clearness the property referred to, and, *if the property is so described, it shall not be necessary* (except when required for the purpose of describing an offence depending on any special ownership of property or special value of property) to name the person to whom the property belongs or the value of the property;' (emphasis added)

[Therefore, provided the property in question has been described with as much detail as possible, it is *not* necessary to state the name of the owner of the property or its value, unless such details are required to prove a specific offence.]

[…]

(iv) *coin and bank notes may be described as money; and any allegation as to money, so far as regards the description of the property*, *shall* be sustained by proof of any amount of coin or of any bank or currency note (although the particular species of coin of which such amount was composed or the particular nature of the bank or currency note, shall not be provided); and in cases of stealing, embezzling and defrauding by false pretences, by proof that the accused person dishonestly appropriated or obtained any coin or any bank or currency note, or any portion of the value thereof, although such coin or bank or currency note may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same or to any other person and such part shall have been returned accordingly.' (emphasis added) [words in brackets added]

[58.6] Sentencing

The jurisdiction of the Courts in respect of the offence of '*Demanding Property With Menaces*' is examined commencing on page **14**.

The law relating to '*Sentencing*' in respect of that offence is examined commencing on page **918**.

[58.7] Related Offences

The following offences are related to the offence of '*Demanding Money With Menaces*':

- '*Robbery*', section 393 of the *Penal Code* (Ch. 26) which is examined commencing on page **602**; and
- '*Assault With Intent To Rob*', section 293(3) of the *Penal Code* (Ch. 26).

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[59.0] Introduction

In *Gerea & others v Director of Public Prosecutions* [1984] SILR 161 Pratt JA commented at pages 174 – 175:

> '[I]n Deaton v The Attorney General & The Revenue Commissioners (1963) IR 170 […] their Honours say at p. 181: -
>
> "*It is common ground that it is for the Legislature, when it creates an offence, to prescribe what punishment shall attach to the commission of such offence.* It is also common ground that the legislature may for a particular offence prescribe a single or fixed penalty, or a maximum penalty, or a minimum penalty, or alternative penalties or a range of penalties."
>
> *Their Honours then go on to develop the argument that the selection of the actual penalty to be imposed on the particular perpetrator before the Court is a matter for the judicial arm where a choice is open to them*. They expressed the conclusion in the following terms at p. 183:
>
> "In my opinion the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive […]
>
> Judicial power is exercised on matters of guilt or innocence and is also exercised, "in determining the punishments to be inflicted upon persons found guilty of offences charged against them, which punishments it then becomes the obligation of the Executive Department of Government to carry into effect" […].' (emphasis added)

Section 8(1) of the *Criminal Procedure Code* (Ch. 7) states:

> 'Any court may pass any lawful sentence combining any of the sentences which is authorised by law to pass.'

The law relating to the '*Criminal Jurisdiction Of The Courts*' is examined commencing on page **14**.

Section 49 of the *Interpretation & General Provisions Act* (Ch. 85) states:

> 'When a penalty for an offence is prescribed in an Act, the offence is punishable by a penalty not exceeding the penalty prescribed.'

See also: section 50 of that Act.

Furthermore, courts should *not* impose a penalty in excess of the maximum penalty prescribed by law, see section 10(4) of the *Constitution* and *R v Tuto* [1980 – 81] SILR 19.

By virtue of section 41 of the *Penal Code* (Ch. 26) if no punishment is specifically provided in that Code for any misdemeanour, 'it shall be punishable with imprisonment for a term not exceeding two years or with a fine or with both'.

Daly CJ commented in *Wanga v R* [1983] SILR 53 at page 54:

> 'This court and magistrates courts *must* be left to decide sentences in all the circumstances of a case as they see them.'

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In *Peter Sade Kaimanisi v R* (Unrep. Criminal Appeal Case No. 3 of 1995) Muria CJ, with whom Kapi and Williams JJA concurred, stated at pages 5 – 6:

> 'The Courts are obliged to have regard to and to uphold the fundamental principles which we embody under our supreme law, the Constitution, such principles as respect for human dignity as well as enhancing that dignity, see *Preamble to the Constitution*. Our Society has survived because of respect for such principles and those who defy such harmonious rules will be met with sanctions imposed by the society. That power of the society to impose sanctions has been shared with the Courts who must exercise it on behalf of the society and to impose sanction on those who violate principles which are designed for the respect of each other's human dignity and the harmony of society as a whole.'

When sentencing '[t]he court has to consider the factors which make the offence as committed by an accused so bad [ie., the '*aggravating factors*'], and of course the factors which mitigate and call for leniency [ie., the '*mitigating factors*']. Those factors must include accused's personal circumstances', as commented by Lungole – Awich J in *R v Christopher Saungao* (Unrep. Criminal Case No. 30 of 1995; at page 10). [words in brackets added]

Customary considerations should be taken into account by a court when sentencing, in appropriate circumstances, see *Berekame v DPP* [1985 – 86] SILR 272.

In *David Ironimo v R* (Unrep. Criminal Case No. 3 of 1998) Kabui J stated at page 3:

> 'There is no hard and fast rules about the process of sentencing. There are many relevant factors involved. The position was nicely put by Ward CJ in *Joel Likilia & Allen Kokolabu v R* [1998/89] SILR at page 149 and I quote, "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*." (emphasis added)

The law relating to '*Comparative Sentences*' is examined commencing on page **979**.

See also: *Kaboa v R* [1980 – 81] SILR 43, per Spreight JA at page 45; *Sau v R* [1982] SILR 65 at page 69 & *Johnson Tariani v R* [1988 – 89] SILR 7, per Kapi JA at page 13.

In *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996) Palmer J commented at page 15:

> 'Whilst it may be easy on one hand to pick up and point out all the good and bad points and things about these accused and the offences committed, *it is not as easy on the other hand to try and balance out justice and to impose the right sentence in the circumstances of this case or any other case.*' (emphasis added)

'[E]ach case *must* be decided according to its own facts and circumstances to find where justice is to be applied in each case', as commented by Kabui J in *R v Craig A'Aron* (Unrep. Criminal Case No. 14 of 1998; at page 4).

See also: *George Westerhuis v R* (Unrep. Criminal Case No. 144 of 1999; Muria CJ; at page 1) & *R v Stephen Asipara* (Unrep. Criminal Case No. 25 of 1994; Palmer J; at page 1).

'This is why the law gives the courts discretion in the sentencing process', as commented by Muria CJ in *R v Don Rector Nonga* (Unrep. Criminal Appeal Case No. 32 of 1996; at pages 2 – 3).

In *John Votaia v R* (Unrep. Criminal Appeal Case No. 14 of 1991) Ward CJ commented at page 2:

> 'It is not possible to law down a hard and fast rule as to the exercise of any judicial discretion because once that is done the discretion will be fettered: *The Friedeberg* 10 PD 112. However this clearly does not mean the court may act capriciously and it will exercise its discretion on judicial grounds and for substantial reasons, *Re Taylor* 4 Ch D. 160.'

A court should *not* indicate what sentence would be imposed if a plea of guilty was entered, see *R v Plimmer* (1975) 61 CrAppR 264; *R v Grice* (1978) 66 CrAppR 167; *R v Turner* (1970) 54 CrAppR 352; [1970] 2 QB 321 & *R v Ryan* (1978) 67 CrAppR 177.

Sentencing should *not* be postponed in order to allow a defendant to assist police in recovering property, see *R v Collins* (1969) 53 CrAppR 385.

If a defendant wishes to assist the police to recover property or to attend to community work a plea should be taken and the charge should be adjourned.

Courts should *not* be used for political statements whether during course of sentencing or otherwise, see *R v King & Simpkins* (1973) 57 CrAppR 696; [1973] CrimLR 380.

In *Michael Buruka v R* (Unrep. Criminal Appeal Case No. 31 of 1991) Muria J stated at page 2:

> 'It has been a well established rule that an appellate court will not interfere with the trial judge's discretion in passing sentence unless it is manifestly insufficient because the trial judge has acted on a wrong principle or has clearly overlooked or understated or overstated or misunderstood some salient feature of the evidence.'

See also: *Berekame v DPP* [1985 – 86] SILR 272; *Rojumana v R* [1990] SILR 132 & *Richard Selwyn v R* (Unrep. Criminal Case No. 25 of 1991; Muria J).

The law relating to '*Appeals Against Sentence*' is examined commencing on page **14**.

[59.1] Role Of The Prosecution

It is the duty of the prosecution and defence to know what the maximum sentence that can be imposed by the Court, see *R v Clarke* (1974) 59 CrAppR 298.

A duty of the '*prosecution*' is to 'assist [… the Court] in the task of passing sentence by an adequate presentation of the facts, *by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand*, and by a fair testing of the defence case so far as it appears to require it' as stated by Kapi J in *Acting Public Prosecutor v Uname Aumane & others* [1980] PNGLR 510 at page 544. (emphasis added) [words in brackets added]

In *R v Kelly Dennie, Kenazo Maeka & Teddy Weba (Waiba)* (Unrep. Criminal Appeal Case No. 12 of 1998) Kabui J commented at page 5:

> 'The Court believes it is upon the Prosecution to produce all the relevant facts to the Court as Officers of the Court. This burden is heavier when the accused persons are not represented by Counsel and are pleading guilty to serious offences under the Penal Code. Justice requires that this be done.'

Whilst the defence will invariably stress the '*mitigating factors*' of a particular case which a court should take into account when passing sentence, the prosecution is expected to ensure that the court does not overlook the '*aggravating factors*'. However, if a defendant is 'unrepresented' a prosecutor as an 'officer of the court' is expected to bring to the court's notice both the '*mitigating and aggravating factors*', see *R v Van Pelz* (1942) 29 CrAppR 10; [1943] 1 AllER 36; [1943] KB 157.

The prosecution should also bring to the court's notice whether a particular offence is prevalent at that time and the public's view as to the seriousness of the particular offence, in appropriate circumstances, see *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997; Lungole – Awich J; at page 21).

In *R v David Leliana* (Unrep. Criminal Review Case No. 6 of 1998) Palmer J commented at page 1:

> 'Time and again this Court has reiterated that Magistrates should take time to consider and familiarise themselves with the relevant laws so that unnecessary omissions are not committed.'

However, prosecutors have the responsibility in bringing to the attention of the courts relevant statutory provisions, so that such oversights or inadvertent errors are minimized and that '*objectionable*' disparity in sentencing is also minimised, see *R v Francis Hori* (Unrep. Criminal Review Case No. 118 of 1993; Palmer J; at page 3).

[59.2] Entering Of Plea

[59.2.1] General Principles

In *R v Jack Faununa* (Unrep. Criminal Case No. 10 of 1997) Lungole – Awich J commented at page 7:

> 'A plea of guilty is an unequivocal admission of the commission of the offence. *Accused's admission must necessarily encompass all the unambiguous facts that constitute the offence, that is, all the elements of the offence*. It follows that the court must take care to ensure that the accused understands the charge, and to understand what his answer amounts to. In my view, it is to be left to the judge or magistrate to decide in each case, how he will ensure that the accused understands the charge and what the accused's answer amounts to.' (emphasis added)

'[A] plea of guilty is an admission of the essential facts of the charge. That prevents the pleas of guilty being equivocal', see *Gua v R* [1990] SILR 129 at page 130.

Therefore, a defendant *must* admit '*the truth of the charge*' otherwise 'the court shall proceed to hear the witnesses for the prosecution and other evidence (if any)', see section 195(1) of the *Criminal Procedure Code* (Ch. 7). (emphasis added)

'A plea of guilty *must* […] come from the defendant himself otherwise what follows is void', see *R v Paul Maenu'u & Augustine Tuita* (Unrep. Criminal Appeal Case No. 11 of 1998; Lungole – Awich J; at page 7). (emphasis added)

'[A] guilty plea can be altered to a plea of not guilty *at any time before the passing of sentence* by the Court. However, upon the imposition of an appropriate sentence, the court *cannot* change the plea to that of not guilty', see *John Solo v R* (Unrep. Criminal Appeal Case No. 89 of 2000; Kabui J; at page 6).

A plea of guilty is not considered a conviction until a sentence is passed, see *R v Cole* (1965) 49 CrAppR 199; [1965] 2 AllER 29; [1965] 3 WLR 263; [1965] 2 QB 388.

See also: *R v Godfrey Foasi* (Unrep. Criminal Review Case No. 44 of 1996; Palmer J); *R v James Kaukui* (Unrep. Criminal Case No. 23 of 1988; Ward CJ) & *R v Golathan* (1915) 11 CrAppR 79 at page 80.

[59.2.2] Taking Of Plea

Section 195 of the *Criminal Procedure Code* (Ch. 7) states (in part):

> '(1) The substance of the charge or complaint shall be stated to the accused person by the court, and he shall be asked whether he admits or denies *the truth of the charge*.
>
> (2) *If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary.*
>
> (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as hereinafter provided.
>
> (4) If the accused person refuses to plead, the court shall order a plea of "not guilty" to be entered for him.' (emphasis added)

In *R v Jack Faununu* (Unrep. Criminal Case No. 10 of 1997) Lungole – Awich J stated at pages 7 – 8:

> 'Both sections [, referring to sections 256 (now 257) and 194 (now 195) of the *Criminal Procedure Code* (Ch. 7),] do not make it peremptory to convict straight away on the answer of the accused that he pleads guilty. In my view that is acknowledgment of the role of the magistrate or judge to, first, satisfy himself that the admission is unequivocal and safe to act on. If he doubts it he should not convict; he should enter a plea of guilty. A plea of guilty is an unequivocal admission of the commission of the offence. *Accused's admission must necessarily encompass all the unambiguous facts that constitute the offence, that is, all of the elements of the offence*. It follows that the court *must* take care to ensure that the accused understands the charge, and to understand what his answer amounts to. In my view, it is to be left to the judge or magistrate to decide in each case, how he will ensure that accused understands the charge and what the accused's answer amounts to.' (emphasis added) [words in brackets added]

In *Rachel Tobo v Commissioner of Police* (Unrep. Criminal Case No. 17 of 1992) Muria ACJ held at pages 1 – 3:

'*The law requires that when an accused person is brought before the court charged with an offence, the substance of the charge must be put to the accused person and that the accused person must be asked whether he admits or denies the truth of the charge*. If the accused person admits the charge, the court shall convict him and pass sentence on him "*unless there shall appear to it sufficient cause to the contrary*". Where the accused person denies the charge the court must proceed and hear the evidence. That basically is what section 194 (new section 195), Criminal Procedure Code requires.

While the courts must be mindful of the rights of an unrepresented accused person brought before it, charge[d] with an offence, the court's duty as envisaged under section 194, Criminal Procedure Code and section 10 of the Constitution is to afford the accused a fair hearing. It is not the court's duty to ensure that an accused person is accorded legal aid. The function of providing legal aid, advice and assistance is to be performed by the Public Solicitor as provided under section 92(4) of the Constitution. The court must not, however, deny the accused person the opportunity to have access to legal aid, advice or assistance.

[…]

The court has the power under section 194(2), Criminal Procedure Code to not pass sentence upon an accused who pleaded guilty to a charge. That power may be exercised by the court where "*there shall appear to it sufficient cause to the contrary*". One such sufficient cause must be where the accused person pleaded guilty but the accused raised a possible defence in law during mitigation.

In such a situation the court must enter a plea of not guilty and the case must proceed as a contested hearing.

It is, however, another thing to insist that upon a plea of guilty made by an accused person, the court should investigate that plea to ensure that it was the correct plea to the offence. I do not think the court should engage itself with such investigatory course of action. All that it is incumbent on the court to do when a person is brought before it charged with an offence, is to put the charge to the accused person, explain the substance of the charge to him and having satisfied itself that the accused understands the charge, ask the accused person if he or she admits the charge.' (emphasis added)

In *Ben Donga v R* (Unrep. Criminal Appeal Case No. 16 of 1994) Palmer J commented at pages 2 - 3:

'Magistrates should be cautious in ensuring that there are sufficient particulars in the information to enable him to put the charge to the accused, and if necessary, to explain it to the accused. Where the particulars are inadequate, then the prosecutor should be required to amend the information and insert the necessary details. It is good practice too to ask the accused if he understood the charge before taking his plea.

[…]

Normally, after the facts are read out, the accused should be asked if he agreed with the facts. If he does not agree, then he/she should be further asked as to what part of the facts he/she did not agree with. By doing this the court should be placed in a better position to decide if the plea of the accused was equivocal. This sort of inquiry would not be necessary where the accused is represented, as it would be safe for the court to rely on the skill of the accused's advocate to advice the accused as to the contents of the information.

[…]

The usefulness of this practice in the case of an unrepresented accused is that it helps the court to cross – check with the facts as produced by the prosecution, and to check if there may be a possible defence or matters of mitigation which the accused may have omitted to mention, either when he was asked if he agreed with the facts or when giving his mitigation.'

See also: *Fanasia v Director of Public Prosecutions* [1985 – 86] SILR 84.

Whilst a '*plea of not guilty*' is *not* to be considered as an '*aggravating factor*', see *R v Spinks* (1980) 2 CrAppR(S) 335; *R v Scott* (1983) 5 CrAppR(S) 90; *R v Hercules* (1987) 9 CrAppR(S) 291 & *R v Evans* (1986) 8 CrAppR(S) 197, a '*plea of guilt*' is to be considered as a '*mitigating factor*' when sentencing.

The law relating to a '*Plea Of Guilty As A Mitigating Factor*' is examined commencing on page **970**.

In *R v Turner* (1970) 54 CrAppR 352 [[1970] 2 QB 321] comments were made in respect of '*plea – bargaining*'. Parker LCJ, delivering the judgment of the Court of Appeal, stated at pages 360 – 361:

'1. Counsel must be completely free to do what is his duty, namely to give the accused the best advice he can and if need be, advice in strong terms. This will often include advice that a plea of Guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence that would otherwise be the case. Counsel, of course, will emphasise that the accused must not plead Guilty unless he has committed the acts constituting the offence charged.

2. The accused, having considered counsel's advice, must have a complete freedom of choice whether to plead Guilty or Not Guilty.

3. There must be freedom of access between counsel and judge. Any discussion, however, which takes place must be between the judge and both counsel for the defence and counsel for the prosecution. If a solicitor representing the accused is in the court, he should be allowed to attend the discussion, if he so desires.

   This freedom of access is important because there may be matters calling for communication or discussion, which are of such a nature that counsel cannot in the interests of his client mention them in open court. Purely by way of example, counsel for the defence may by way of mitigation wish to tell the judge that the accused has not long to live, is suffering maybe from cancer, of which he is and should remain ignorant.

   Again, counsel on both sides may wish to discuss with the judge whether it would be proper, in a particular case, for the prosecution to accept a plea to a lesser offence.

   It is of course imperative that so far as possible justice must be administered in open court. Counsel should, therefore, only ask to see the judge when it is felt to be really necessary and the judge must be careful only to treat such communications as private where, in fairness to the accused person, this is necessary.

4. The Judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that on a plea of Guilty he would impose one sentence but that on a conviction following a plea of Not Guilty he would impose a severer sentence is one which should never be made. This could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential. Such cases, however, are in the experience of the Court happily rare. What on occasions does appear to happen however is that a judge will tell counsel that, having read the depositions and antecedents, he can safely say that on a plea of Guilty he will for instance, make a probation order, something which may be helpful to counsel in advising the accused. The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of Not Guilty. Even so, the accused may well get the impression that the judge is intimating that in that event a severer sentence, maybe a custodial sentence, would result, so that again he may feel under pressure. This accordingly must also not be done.

   The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that whatever happens, whether the accused pleads Guilty or Not Guilty, the sentence will or will not take a particular form, eg. a probation order or a fine, or a custodial sentence.

   Finally, where any such discussion on sentence has taken place between judge and counsel, counsel for the defence should disclose this to the accused and inform him of what took place.'

See also: *R v Atkinson* [1978] 2 AllER 460.

[59.2.3] Unrepresented Defendants

In *Yaneo v Director of Public Prosecutions* [1985 – 86] SILR 199 Ward CJ held at page 201:

'Clearly the court is under a duty to ensure the accused understands the charge to which he is being asked to plead but it is no part of the courts duty to explain each possible defence to him. To do so would cast an impossible burden on the magistrate both in time and in deciding how far he needs to go. Similarly there is a risk an accused person who does not understand fully the role of the magistrate may feel he is suggesting the accused should offer a defence that is inappropriate or untrue in his case.

As the facts are outlined on a plea of guilty, and, in particular, as the accused mitigates, the court must be careful to see that, if any matter arises which suggests the plea is wrongly made, they should enter a plea of 'not guilty'.

The position is set out clearly in the judgment of Widgery J in R v Blandford Justices ex parte G (an infant) (1966) 1 AER 1021 at 1026 as quoted in Fanasia's case. However, the passage quoted in that report, although accurately expressing the point, is incomplete and I feel it should be read as a whole.

At risk of appearing pedantic and repeating to magistrates a matter of which they are fully aware, I quote the passage in full:-

> "In every instance where a magistrate receives the reply "guilty" to the common form question asking the accused to plead, it is necessary for the magistrate to consider whether it is safe to accept the plea and to enter a conviction. Of course, in many cases the question is not a difficult one. If the accused is represented, if the accused …. is a man of mature years who clearly understands what is being put to him, it may well be that he can regard it as being a satisfactory plea on which he can safely act without further enquiries. *In cases, however, where the accused is not represented or where the accused is of tender age or for any other reasons there must necessarily be doubts as to his ability finally to decide whether he is guilty or not, the magistrate ought, in my judgment to, accept the plea as it were provincially, and not at that stage enter a conviction. He ought …. in these cases to defer a final acceptance of the plea until he has had a chance to learn a little more about it and to see whether there is some undisclosed factor which may render the unequivocal plea of guilty a misleading one. I have no doubt that experienced magistrates in fact do in these cases wait until they have heard the facts outlined by the prosecution and wait until they have heard something of what the accused has to say. If at that stage the magistrate feels that nothing has been disclosed to throw doubts on the correctness of the plea of guilty, he properly accepts it, enters a conviction and that is an end of the matter so far as this point is concerned. If, however, before he reaches that stage he finds there are elements in the case which indicate that the accused is really trying to plead not guilty or, as Lord Goddard put it, "guilty but …..", then the magistrate has, in my judgment, no discretion but must treat the plea as what it is, namely, a plea of 'not guilty'*."' (emphasis added)

In *Gua v R* [1990] SILR 129 Ward CJ held at page 130:

> 'The Appellant was unrepresented in the lower court. In such a case, it is part of the duty of the Magistrate to ensure the accused understands the charge before he pleads to it. Equally, it is his duty to ensure that, when the facts are outlined, an offence is disclosed and the accused is clearly admitting that offence.'

In *Luke Misitana v R* (Unrep. Criminal Appeal Case No. 7 of 1996) Muria CJ held at page 2:

> '*It must be pointed out that where the accused is not legally represented and he pleads guilty to a charge, it is absolutely essential that the Court must ensure that the accused understands the elements of the offence contained in the charge to which he pleads guilty*. If having done so, the Court ascertains that the accused has wrongly or mistakenly pleaded guilty, the trial magistrate of judge should permit the accused to alter his plea so long as it is before judgment or sentence but not after.' (emphasis added)

In *John Solo v R* (Criminal Appeal Case No. 8 of 2000) Kabui J stated at pages 2 – 8:

> '[W]here the accused person is unrepresented by Counsel, it is incumbent upon the Magistrate to explain to the accused person the elements of the offence, particularly where there is a defence available to the accused person. […]
>
> […]
>
> […] The Magistrate after explaining the charge should have been careful to see whether or not the facts presented by the Prosecutor did support each of the elements of the offence […]. Local persons whose knowledge of the legal system in this country is lacking can often compromise their rights to a fair hearing by simply pleading guilty. [… T]he concern of the Court is to ensure as far as possible that those who are punished are in fact guilty of the charges brought against them. I think this is the bottom – line requirement expected by the community of all Magistrates and Judges.'

In *Rachel Tobo v Commissioner of Police* (Unrep. Criminal Case No. 17 of 1992) Muria ACJ held at page 1:

> 'While the courts must be mindful of the rights of an unrepresented accused person brought before it, charge[d] with an offence, the court's duty as envisaged under section 194, Criminal Procedure Code and section 10 of the Constitution is to afford the accused a fair hearing. It is not the court's duty to ensure that an accused person is accorded legal aid. The function of providing legal aid, advice and assistance is to be performed by the Public Solicitor as provided under section 92(4) of the Constitution. The court must not, however, deny the accused person the opportunity to have access to legal aid, advice or assistance.'

[59.3] Dispute As To Facts

When considering the sentence to be imposed, a Court *must* consider the version of facts given by the defendant, see *Saukoroa v R* [1983] SILR 275 at page 277.

In *Martin Apa v R* (Unrep. Criminal Case No. 42 of 1992) Palmer J stated at page 3:

> '[W]here the facts as presented by prosecution are disputed then that should put the Magistrate on alertness as to whether the plea of guilty is to be treated as an unequivocal admission of guilt. This was one of the matters that the learned Chief Justice Ward referred to in his judgment in the case of *Yaneo v DPP 1985 – 86 SILR 199 at page 200* where he said:
>
> "There must be something at the earlier hearing that suggests the plea was not an unequivocal admission of guilt. Usually this will only be apparent on the record but, in exceptional circumstances, the court will consider other matters that may be thought to show some equivocation."'

In *R v Paul Takopi* (Unrep. Criminal Review Case No. 200 of 1994) Palmer J held at pages 1 – 3:

> 'What is important to note is that the opinion of a magistrate as to whether the facts as read by the prosecutor constitute an offence or not should be formed when the facts have been read out by the prosecutor. The crown's case against the accused is as summarised in the facts read out by the prosecutor. If, after hearing the facts a magistrate is not satisfied that an offence has been made out as contained in the charge, then he should raise the matter with the prosecutor straight – away.
>
> The reason why an accused is asked if he agrees with the facts is two – fold. First, it is to enable the court to ascertain if the accused does in fact understand the charge made against him. Secondly, it is to assist the court in the case where the accused is unrepresented by a lawyer, to ascertain whether there may be a possible defence, and thereby to change the plea from guilty plea to a not guilty plea. Most of the accused who come before the courts are unrepresented and un – schooled in the law, and therefore may not be aware of their legal rights, and whether there exist a defence to the charge made against them. By giving them an opportunity to indicate to the court whether they agree with the facts or not, the court may be assisted by what they may say in response. For instance, if the accused says that he does not agree with the facts, then he should specifically be asked to point out what part of the facts were not agreed to.
>
> […]

> Once it is clear that there is conflict in what the facts say and what the accused says, and that there is a possible defence in what the accused says, then the magistrate should change the plea to a not guilty plea and adjourn the case for a trial to be held. At other times, there may not be a defence but simply a difference in the facts which would be material for sentencing purposes; that is, *if the version given by the accused is to be accepted by the court then it would be material in mitigation in favour of the accused*. In such instances, a plea of guilty should be maintained, but a trial be held on the facts or matters in dispute. The sentence can then be passed after the issues of fact that are in dispute have been ruled upon by the court.' (emphasis added)

The law in relation to '*Mitigating Factors*' is examined commencing on page **970**.

In *R v Leonard Boaz* (Unrep. Criminal Review Case No. 45 of 1996) Palmer J stated at page 3:

> 'Where the facts are not agreed to, then the presiding Magistrate would have to decide whether, evidence would need to be heard on those disputed matters and a finding made, or whether the Prosecutor wishes to amend the facts to incorporate the matters disputed by the accused.'

In *R v Tolera* [1999] 1 CrAppR 29 [[1998] CrimLR 425] Lord Bingham CJ, delivering the judgment of the Court of Appeal, held at page 32:

> 'If the defendant wishes to ask the court to pass sentence on any other basis than that disclosed in the Crown Case, it is necessary for the defendant to make that quite clear. If the Crown does not accept the defence account, and if the discrepancy between the two accounts is such as to have a potentially significant effect on the level of sentence, then consideration must be given to the holding of a *Newton* hearing to resolve the issue. The initiative rests with the defence which is asking the court to sentence on a basis other than that disclosed by the Crown case.
>
> […]
>
> [… W]here the defendant, having pleaded guilty, advances an account of the offence which the prosecution does not, or feels it cannot, challenge, but which the court feels unable to accept, whether because it conflicts with the facts disclosed in the Crown case or because it is inherently incredible and defies common sense. In this situation it is desirable that the court should make it clear that it does not accept the defence account and why. There is an obvious risk of injustice if the defendant does not learn until sentence is passed that his version of the facts is rejected, because he cannot then seek to persuade the court to adopt a different view. The court should therefore make its views known and, failing any other resolution, a hearing can be held and evidence called to resolve the matter. That will ordinarily involve calling the defendant and the prosecutor should ask appropriate questions to test the defendant's evidence, adopting for this purpose the role of an *amicus* [ie., 'friend of the court'] exploring matters which the court wishes to be explored. It is not generally desirable that the prosecutor, on the ground that he has no evidence to contradict that of the defendant, should simply fold his hands and leave the questioning to the judge.' [words in brackets added]

A '*Newton Hearing*' (see *R v Newton* (1983) 77 CrAppR 13; (1982) 4 CrAppR(S) 388; [1983] CrimLR 198) is a hearing in which evidence is called in the normal fashion when there is a dispute as the facts which will impact on the sentence is to be imposed. The normal standard of proof on the prosecution applies, ie., '*beyond reasonable doubt*', see *R v McGrath & Casey* (1910) 5 CrAppR(S) 460. As a consequence of such a hearing being conducted and the version of the defendant rejected, the impact of the '*plea of guilty*' by the defendant as a '*mitigating factor*' should be reduced, see *R v Hassell* [2000] 1 CrAppR(S) 67.

See also: *R v Jack Faununu* (Unrep. Criminal Case No. 10 of 1997; Lungole - Awich J); *Ben Donga v R* (Unrep. Criminal Appeal Case No. 16 of 1994; Palmer J); *Martin Apa v R* (Unrep. Criminal Case No. 42 of 1992; Palmer J; at page 3); *R v Taylor & Taylor* (1987) 84 CrAppR 202; *R v Ahmed* (1985) 80 CrAppR 295; [1985] CrimLR 250 & *R v Beswick* [1996] 1 CrAppR 427.

[59.4] General Sentencing Principles

In *R v Timothy Sulega* (Unrep. Criminal Review Case No. 113 of 1999) Palmer J commented at page 2:

> 'The Police are doing their part in arresting, charging and bringing such offenders to court, the public are crying out for tougher penalties, *the courts however must continue to maintain a balanced approach, and that includes balancing the sentence to be imposed*.' (emphasis added)

In *Johnson Tariani v R* [1988 – 89] SILR 7 Kapi JA commented at pages 12 – 13:

> 'Where the law simply provides a maximum sentence, the Courts are given a very wide discretion to determine the appropriate penalty in each case. The courts have developed principles of sentence which guide the exercise of this discretion. The Courts have developed theories of sentence which may be described as deterrence, separation, rehabilitation and retribution. I have described these theories in the Papua New Guinea case of *Acting Public Prosecutor v Uname Aumane & other* [1980] PNGLR 510 at 537 – 538. At p. 538, I said :-
>
> "The agonizing task for the sentencing judge is to evaluate which of these theories of sentencing should be achieved if he chooses one theory of sentencing he is likely to frustrate the other theories. In some cases, a judge will need to give a balanced consideration to all theories of sentencing. In others, a judge will want to emphasise or achieve one theory of sentencing more that the other in certain classes of offences."
>
> Even if a judge applies the proper sentencing principles, how is he to arrive at the appropriate term of imprisonment? There is no mathematical or scientific method of arriving at the appropriate term. *It is therefore important to bear in mind that a sentencing tribunal should aim to achieve consistency in the approach or principles of sentence, rather than to achieve consistency in the actual term of imprisonment* [or the use of any other sentencing option]. See *Bibi* (1980) 71 CrAppR 360. However, sentencing in a particular class of offences over a number of years will lead to a range of sentences which may be a guide in determining appropriate terms of imprisonment [or other sentencing options].' (emphasis added) [words in brackets added]

The law relating to '*Comparative Sentences*' is examined commencing on page **979**.

In *R v Sargeant* (1975) 60 CrAppR 74 Lawton LJ, delivering the judgment of the Court, commented at pages 77 - 78:

> 'What ought the proper penalty to be? We have thought it necessary not only to analyse the facts, but to apply to those facts the classical principles of sentencing. Those classical principles are summed up in four words: retribution, deterrence, prevention and rehabilitation. Any judge who comes to sentence ought always to have those four classical principles in mind and to apply them to the facts of the case to see which of them has the greatest importance in the case with which he is dealing.
>
> I will start with retribution. The Old Testament concept of an eye for an eye and tooth for tooth no longer plays any part in our criminal law. There is, however, another aspect of retribution which is frequently overlooked: it is that society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand court must not disregard it. Perhaps the main duty of the court is to lead public opinion. […]
>
> […]
>
> I now turn to the element of deterrence, because it seems to us the trial judge probably passed this sentence as a deterrent one. There are two aspects of deterrence: deterrence of the offender and deterrence of likely offenders. Experience has shown over the years that deterrence of the offender is not a very useful approach, because those who have their wits about them usually find the closing of prison gates an experience which they do want again. If they do not learn that lesson, there is likely to be a high degree of recidivism anyway. So far as deterrence of others is concerned, it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well by put off by deterrent sentences. […]
>
> We come now to the element of prevention. Unfortunately, is it one of the facts of life that there are some offenders for whom neither deterrence nor rehabilitation works. They will no on committing crimes as long as they are able to do so. In those cases the only protection which the public has is that such person should be locked up for a long period. […]
>
> Finally, there is the principle of rehabilitation. Some 20 to 25 years ago there was a view abroad, held by many people in executive authority, that short sentences were of little value, because there was not enough time to give in prison the benefit of training. That view is no longer held as firmly as it was.'

In *R v Maeli Rinau* (Unrep. Criminal Review Case No. 18 of 1996) Palmer J commented at page 3:

> '[T]he element of deterrence should […] have been borne in mind by the learned Magistrate when passing sentence. Whilst the Police and other interested persons are seeking to make the message plain and clear to the public, the Courts must be seen to be providing the necessary support base, or taking corresponding action, to ensure that the message is not trumpeted around in vain but that it does have teeth.'

In balancing the '*public interest*' the question which courts invariably have to consider depending on the seriousness of the particular case is as follows:

> '[I]s it the protection of the public, *retribution and deterrence* of the appellant and others from committing offences of this sort that the public interest primarily requires in this case, *or* is it the *reformation* of the individual offender' as commented by Davis CJ in *Anna Langley v R* (Unrep. Criminal Appeal Case No. 17 of 1978). (emphasis added)

Whilst the '*reformative approach*' to punishment can benefit both society and each individual defendant, the suitability of such an approach depends on the circumstances of each case, see *R v Don Rector Nonga* (Unrep. Criminal Appeal Case No. 32 of 1996; Muria CJ; at page 4).

In *R v Ball* (1951) 35 CrAppR 164 Hilbery J, delivering the judgment of the Court of Criminal Appeal, commented at pages 165 - 166:

> 'In deciding the appropriate sentence a Court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition, that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living' as referred to in *Anna Langley v R* (supra).'

In *R v Rex Topilu* (Unrep. Criminal Case No. 35 of 1995) Palmer J stated at page 2:

> 'One of the primary goals in sentencing is to look beyond the element of punishment, to setting the accused on the right path when he/she comes out of prison (rehabilitate and reform). There are basically two types of punishment system in this jurisdiction; fines or imprisonment. Both do not necessarily guarantee that a person will change or be reformed once he completes his sentence or punishment.'

[59.5] Sentencing Generally

Generally, a conviction *must* be entered before passing sentence, see *Ben Tioti v R* (Unrep. Criminal Appeal Case No. 26 of 1998; Palmer J). However, if a Court intends to impose a conditional or unconditional discharge under section 35 of the *Penal Code* (Ch. 26), a conviction should *not* be recorded, see *R v Derick Waeho* (Unrep. Criminal Case No. 34 of 1996; Lungole – Awich J; at page 3).

Courts should record their reasons when sentencing, see *R v Maeli Rinau* (Unrep. Criminal Review Case No. 18 of 1996; Palmer J; at page 3). In that regard refer also to section 10 of the *Magistrates' Courts Act* (Ch. 20).

Sentences *must* be imposed for each offence and a '*general sentence*' which relates to all offences should *never* be imposed, see *R v Don Rector Nonga* (Unrep. Criminal Appeal Case No. 32 of 1996; Muria CJ; at page 6).

When imposing a sentence a Court should take into account the sentences imposed on other defendants in similar circumstances so that there is no '*objectionable disparity*' in the sentencing.

SENTENCING

The law relating to:

- '*Disparity In Sentencing*' is examined commencing on page **961**; and
- '*Comparative Sentencing*' is examined commencing on page **979**.

In *R v Maeli Rinau* (Unrep. Criminal Review Case No. 18 of 1996) Palmer J commented at page 3:

> 'Magistrates must record whether there are previous convictions or not. If none was available, at the hearing, then an adjournment should be made and the prosecutor required to produce them. The issue of previous convictions is important when passing sentence and also when considering the question of disqualification under section 28 of the Traffic Act.'

In that regard refer also to section 10 of the *Magistrates' Courts Act* (Ch. 20).

A Court may disregard '*previous convictions*' due to the length of time since such convictions, see *R v John Foreman Sukina* (Unrep. Criminal Case No. 31 of 1995; Lungole - Awich J).

When sentencing a defendant in his/her '*absence*', a court:

[i] should be very cautious as regards the production of previous convictions and *unless* there is:

  [a] an '*admission*' by the defendant as to the previous convictions; or

  [b] '*strict proof*' of the previous convictions in accordance with either subsection (1) or (2) of section 125 of the *Criminal Procedure Code* (Ch. 7),

  the previous convictions should be ignored; and

[ii] should *not* impose a sentence of imprisonment or as an alternative to a fine without having giving the defendant the opportunity to be heard, see section 86(3) of the *Criminal Procedure Code* (Ch. 7) & *R v Tuto* [1980 – 81] SILR 19.

[59.6] Options Available In Sentencing

Whilst the penalty which may be imposed is as prescribed for the offence, see *Howard Haomae v R* (Unrep. Criminal Appeal Case No. 106 of 2001; Palmer J) & *Alphonsus Kopana v R* (Unrep. Criminal Case No. 5 of 1996; Muria CJ), a Court has a discretion in imposing what is appropriate for the defendant in the circumstances, see *R v Craig A'Aron* (Unrep. Criminal Case No. 14 of 1998; Lungole – Awich J; at page 4); *George Westerhuis v R* (Unrep. Criminal Case No. 144 of 1999; Muria CJ; at page 1) & *R v Stephen Asipara* (Unrep. Criminal Case No. 25 of 1994; Palmer J; at page 1).

As regards offences committed by '*body corporates*', refer to section 51 of the *Interpretation & General Provisions Act* (Ch. 85).

If appropriate, a medical report should be obtained prior to sentencing, see *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J).

However, in respect of '*multiple offences*', the Court *must* take into account the '*totality' principle*', see *Augustine Laui v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 11 of 1987; Ward CJ; at pages 2 – 3).

The law relating to the '*Totality Principle*' is examined commencing on page **941**.

Whilst '[j]udges, like everyone, do have sense of mercy, but they have a duty to reflect how serious the law would like an offence to be regarded and punished for', as commented by Lungole – Awich J in *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997; at page 21).

See also: *Joy Folanto v R* (Unrep. Criminal Appeal Case No. 119 of 1999; Palmer J) & *Suiga v R* (Unrep. Criminal Case No. 38 of 1990; Ward CJ).

Depending on the circumstances the options in '*sentencing*' which may be imposed include:

[i] '*Imprisonment*'.

The law in relation to the imposition of '*Imprisonment*' is examined commencing on page **934**;

[ii] '*Suspended Sentences*'.

The law in relation to the imposition of '*Suspended Sentences*' is examined commencing on page **936**;

[iii] '*Fines*'.

The law in relation to '*Fines*' is examined commencing on page **943**;

[iv] '*Good Behaviour Bond*'.

The law in relation to the imposition of a '*Good Behaviour Bond*' is examined commencing on page **945**;

[v] '*Binding Over Order*'.

The law in relation to the imposition of a '*Binding Over Order*' is examined commencing on page **946**;

[vi] a '*Residence Order*'.

The law in relation to the imposition of a '*Residence Order*' is examined on page **947**;

[vii] a '*Compensation Order*'.

The law in relation to the imposition of a '*Compensation Order*' is examined commencing on page **948**;

[viii] '*Absolute Or Conditional Discharge*'.

The law in relation to the imposition of a '*Absolute Or Conditional Discharge*' is examined on page **950**;

[ix] '*Police Supervision*'.

The law in relation to the imposition of '*Police Supervision*' is examined on page **951**;

[x] '*Property Orders*'.

The law in relation to the imposition of '*Property Orders*' is examined commencing on page **951**; and

[xi] '*Disqualification Of Drivers Licenses'*.

The law in relation to the imposition of '*Disqualification Of Drivers Licenses*' is examined commencing on page **954**.

A sentence may commence [see *R v Craig A'Aron* (Unrep. Criminal Case No. 14 of 1994; Kabui J; at page 5)] *or* conclude with the '*Rising of the Court*' [see *Gerea & others v Director of Public Prosecutions* [1984] SILR 161, per Pratt JA at page 174].

Section 35 of the *Magistrates' Courts Act* (Ch. 7) also provides for '*reconciliation*'. The law in relation to '*Reconciliation*' is examined commencing on page **952**.

See also: sections 49 to 51 of the *Interpretation & General Provisions Act* (Ch. 85).

Refer also to:

- the chapter which examines the law relating to the '*Criminal Jurisdiction Of The Courts*' commencing on page **14**; and
- sentencing of '*Juveniles*' is examined commencing on page **963**.

[59.7] Imprisonment

[59.7.1] Penal Code

Section 24 of the *Penal Code* (Ch. 26) states (in part):

'(1) All imprisonment for an offence shall be without hard labour.

(2) A person liable to imprisonment for life or any other period may be sentenced for any shorter term.

(3) A person liable to imprisonment for an offence may be sentenced to pay a fine in addition to or instead of imprisonment.

(4) Where a person after conviction for an offence is convicted of another offence, either before sentence is passed upon him under the first conviction or before the expiration of that sentence, any sentence of imprisonment which is passed upon him under the subsequent conviction shall be executed after the expiration of the former sentence, unless the court directs that is shall be executed concurrently with the former sentence or any part thereof:

Provided that it shall not be lawful for a court to direct that a sentence of imprisonment in default of payment of a fine shall be executed concurrently with a former sentence.'

[59.7.2] General Principles

In *R v Monica Melody* (Unrep. Criminal Review Case No. 119 of 1993) Palmer J stated at page 5:

'Magistrates must not be frightened of sending an offender to prison, if the case so warrants it.'

The '*purpose*' of '*imprisonment*' is to:

[i] *deter* defendants from re – offending; and

[ii] *rehabilitate* defendants, see *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J; at page 24).

In *R v Goldie Pitakaka* (Unrep. Criminal Appeal Case No. 5 of 1982) Daly CJ stated:

'This is a case for what used to be called "the short sharp shock" and has now become "the clang of the prison gates" approach, that is, for a custodial sentence of such a duration as to awake an accused sharply to the stupidity of criminal conduct of this kind. The sentence, to have effect in the case of a man of good character, can be of quite a short duration'.

In *R v Francis Hori* (Unrep. Criminal Review Case No. 118 of 1993) Palmer J stated at page 3:

'[M]itigating factors should be considered prior to making the decision whether to impose a custodial sentence or not.'

As regards the sentencing of '*youthful defendants*' to '*imprisonment*' refer to:

[i] the law relating to '*Youthfulness*' as a 'mitigating factor' which is examined on page **974**; and

[ii] the law relating to the sentencing of '*Juveniles*' commencing on page **963**.

A sentence of '*imprisonment*' combined with the payment of a fine may be imposed in appropriate circumstances, see section 24(3) of the *Penal Code* (Ch. 26), section 8 of the *Criminal Procedure Code* (Ch. 7), *Inito v R* [1983] SILR 177 & *Ngina v R* [1987] SILR 35.

Whilst '*mercy*' may be shown when imposing a sentence of '*imprisonment*', see *R v Perter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J; at page 3), courts have a duty to reflect how serious the law would like an offence to be regarded and punished for, see *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997; Lungole – Awich J; at page 21).

As regards the '*imprisonment*' of '*parliamentarians*', refer to *Ngina v R* [1987] SILR 35 & *R v John Foreman Sukina* (Unrep. Criminal Case No. 3 of 1995; Lungole – Awich J).

[59.7.3] Suspended Sentences

[A] Penal Code

Section 44 of the *Penal Code* (Ch. 26) states:

> '(1) *Subject to the provisions of subsections (2) and (3) of this section*, a court which passes a sentence of imprisonment on any offender for a term not more than two years for any offence, may order –
>
> (a) that the sentence shall not take effect during a period specified in the order; or
>
> (b) that after the offender has served part of the sentence in prison, the remainder of the sentence shall not take effect during a period specified in the order,
>
> unless during the period specified in the order, the offender commits another offence punishable with imprisonment and a court thereafter order under section 45 that the original sentence shall take effect:
>
> Provided, that the period specified in the order *shall not* be less than one year or more than two years.
>
> (2) The provisions of subsection (1) of this section *shall not* apply where the offence involved the use or the illegal possession of a weapon.
>
> (3) A court *shall not* deal with an offender by means of a suspended sentence *unless* the case appears to the court to be one in respect of which a sentence of imprisonment would have been appropriate in the absence of any power to suspend such a sentence by an order under subsection (1) of this section.
>
> (4) A court which passes a suspended sentence on an offender for an offence *shall not* make a probation order in respect of another offence of which he is convicted before the court or for which he is dealt with by the court on the same occasion.
>
> (5) Where a court passes a suspended sentence on an offender in respect of an offence and a term of imprisonment in respect of another offence the court *shall* direct that the suspended sentence be concurrent with the term of imprisonment.
>
> (6) On passing a suspended sentence the court *shall* explain to the offender in ordinary language his liability under section 45, if during the period of suspension he commits a subsequent offence punishable by imprisonment.' (emphasis added)

See also: sections 45 ['*Subsequent offence during period sentence is suspended*']; 46 ['*Discovery of further offence*'] & 47 ['*Suspended sentence supervision order*'] of the *Penal Code* (Ch. 26).

[B] General Principles

Sentences should *not* be suspended on the basis that a prison is not fit to hold prisoners, see *R v Sogavari Sione* (Unrep. Criminal Review Case No. 139 of 2000 consolidated with Criminal Review Cases Nos. 138 of 2000; 164 of 2000 & 35 of 2001; Kabui J; at page 8).

SENTENCING

In Criminal Case No. 710 of 1991 (Untitled) Muria J stated at pages 1 – 2:

> 'The whole object of a suspended sentence is to avoid sending the accused to prison. Now by making a suspended sentence to take effect at the end of an existing prison sentence will not guarantee that during the period of suspension the accused will not be sent to prison. It may well be that within the period of suspension the accused faces another prison sentence. Such a situation cannot be said to be compatible with the spirit and intention of the 1987 Act which creates the provisions for suspended sentences.
>
> It is therefore in keeping with the spirit and intention of the Act that *it would be bad sentencing practice to make a suspended sentence consecutive to an existing prison sentence*. In the U.K. the Court of Appeal has repeatedly held that it is not a proper sentencing practice to impose a suspended sentence to be consecutive to an effective prison sentence: *Sapiano* (1968) 52 Cr App R 674; *Alan Flanders* (1968) 52 Cr App R 676; *Baker* (1971) 55 Cr App R 182 and *Butters and Fitzgerald* (1971) 55 Cr App R 515. It will be seen from those English cases that under the Criminal Justice Act, 1967, sc.39, there is no statutory bar to passing two sentences of imprisonment either concurrent or consecutive, one of which is to take effect immediately and the other of which is to be suspended nor is there any bar as a matter of law upon passing sentences of imprisonment one to follow the other consecutively the one immediate and the other suspended. *But all those cases clearly laid down what must be, not a matter of law, but a matter of good sentencing practice when the courts are considering suspended sentences.*
>
> In Solomon Islands, the Court should in my opinion bear in mind the principles expounded in those cases when considering suspended sentences. However, when the courts are considering passing a suspended sentence on an accused person for an offence and a term of imprisonment in respect of another offence the courts in Solomon Islands are obliged as a matter of law to direct that the suspended sentence be made to run concurrent with the term of imprisonment. This is expressly laid down in S.43A(5) [now section 44] which states:
>
> "(5) *where a court passes a suspended sentence on an offender in respect of an offence and a term of imprisonment in respect of another offence the courts shall direct that the suspended sentence be concurrent with the term of imprisonment*."
>
> The above provision is mandatory and courts must, not only as a matter of practice but as a matter of law observe.' (emphasis added) [words in brackets added]

In *R v Monica Melody* (Unrep. Criminal Review Case No. 119 of 1993) Palmer J stated at page 5:

> 'Magistrates must not be frightened of sending an offender to prison, if the case so warrants it. The use of suspended sentences of the other hand should be very carefully considered.
>
> […]
>
> […] It is wrong in principle to increase the length of the sentence simply because the court intends to suspend it. (Trowbridge [1975] CrimLR 295, Webb [1979] CrimLR 466).
>
> No reason too is given by the learned magistrate as to the reason for suspension. Again it is important to state clearly on the record, the reasons for the suspension.'

SENTENCING

In *R v Sogovari Sione* (*supra*) Kabui J stated at pages 6 – 7:

> 'The term of imprisonment imposed for each offence did reflect the leniency attitude shown by the Court towards the prisoner having pleaded guilty, being a youth misguided by others and being unemployed despite having served a previous term of imprisonment for simple larceny. Suspending the terms of imprisonment imposed for two years was an act of further leniency. D. A. Thomas, in his article Current Developments in Sentencing – The Criminal Justice Act in Practice at page 211 in the Criminal Law Review, May, 1969, discusses some approaches by the Courts in the sentencing process in criminal law. He says one approach to dealing with suspended sentences was as stated by Lord Parker, CJ. In R v O'Keefe [1969] 1 AER 426. At pages 427 – 428, His Lordship said "This court would like to say as emphatically as they can that suspended sentences should not be given when, but for the power to give a suspended sentence, a probation order was the proper order to make. After all, a suspended sentence is a sentence of imprisonment. Further, whether the sentences comes into effect or not, it ranks was a conviction, unlike the case where a probation order is made, or a conditional discharge is given. Therefore, it seems to the court that before one gets to a suspended sentence at all, the court must go through the process of eliminating other possible courses such as [an ab]solute discharge, conditional discharge, probation order, fines, and then say to itself: this is a case for imprisonment and the final question, it being a case for imprisonment, is immediate imprisonment required, or can I give a suspended sentence?"
>
> The other approach is that there can be no suspension until a custodial sentence has been imposed (See R v Wallance) [1969] Cri[m] Law Review at 211). In other words, the normal principles of sentencing applies as regards imprisonment for less than 2 years before the Court decides the suspension of the operation of the sentence. There are however limiting factors. First is where the offender has already served a sentence of imprisonment in the recent past. The Court would be reluctant to suspend the sentence for a subsequent offence on the basis that the offender has not learned from a previous prison experience. The absence of previous prison sentence matters most because suspended sentence have been imposed where previous convictions results in a fine or a conditional discharge. Second is where the offender has committed a serious of offences, or the offence involved an element of planning or it involved breach of trust or where substantial allowance has already been made for the basis for a suspended sentence. Third is where the offender is typically a person of good character with minor previous convictions. The Court would normally opt to suspend the prison sentence imposed. There are of course cases which fall in between these categories of cases. There were also cases which showed that the Courts have shifted to another basis for deciding the imposition of suspended sentences as opposed to the earlier position described above. That is to say, there have been cases where suspended sentences were ordered solely on the ground that the offender was a very good character and that offending again was a remote possibility.'

In *Edward Fuiadi v R* [1988 – 89] SILR 150 Ward CJ held at page 152:

> '[I]n cases of breach of trust, the deterrent aspect of the sentence [… is] an important factor. The enormous majority of honest employees who resist the temptation to steal their employer's property must see that those who succumb are punished. *It is, therefore, only in the most exceptional circumstances that it would be appropriate to suspend a sentence of imprisonment imposed for larceny by servant*.' (emphasis added) [word in brackets added]

A Court may impose a suspended sentence and a fine, see *R v King* (1970) 54 CrAppR 362 [[1970] 2 AllER 249; [1970] 1 WLR 1016] at page 363.

[C] Use Of Weapons

Section 44(2) of the *Penal Code* (Ch. 26) states:

> 'The provisions of subsection (1) of this section *shall not* apply where the offence involved the use or the illegal possession of a weapon.' (emphasis added)

In *R v Daniel Upang & Simister Kimisi & R v Cheery Bula* (Unrep. Criminal Appeal Case Nos. 19 & 20 of 1991) Muria J held at page 4:

> 'When one turns to section 43A(1) [now section 44(2)], it can be seen that the court has the power subject to subsections (2) and (3) to suspend a sentence of imprisonment imposed on any offender for a term not more than two years for any offence. However Parliament intended that a particular offence must be excluded when the court is exercising its powers under subsection (1). Subsection (1) was therefore enacted so that the court's power to suspend sentences does not apply "*where the offence involved the use or illegal possession of a weapon*". (emphasis added) [words in brackets added]

In *R v Francis Hori & R v Monica Melody* (Unrep. Criminal Review Case Nos. 118 & 119 of 1993) Palmer J stated at page 1:

> '[A] court has no power of suspension [under section 44 of the *Penal Code* (Ch. 26)] where a weapon is used in the commission of the offence.' [words in brackets added]

See also: *R v Misiben* (Unrep. Criminal Review Case No. 15 of 1994; Palmer J).

[D] Cases In Which Suspended Sentences Have Been Imposed

The following are cases in which a '*suspended sentence*' had been imposed:

- *R v Fred Gwali & John Morrison* (Unrep. Criminal Case Nos. 21 of 1997 & 1 of 1998; Kabui J) [Stealing Postal Packets];
- *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J) [Forgery / Receiving / Obtaining Money By False Document];
- *Joy Folanto v R* (Unrep. Criminal Appeal Case No. 119 of 1999; Palmer J) [Pregnant Defendant];
- *R v Robert Mani* (Unrep. Criminal Appeal Case No. 29 of 1997; Palmer J) [Break and Enter];
- *R v Craig A'Aron* (Unrep. Criminal Case No. 14 of 1998; Kabui J) [Defilement of a girl under 13 years];
- *R v Wilson Iroi* (Unrep. Criminal Case No. 17 of 1991; Muria J) [Defilement of a girl under 13 years];
- *R v Don Rector Nonga* (Unrep. Criminal Appeal Case No. 32 of 1996; Muria CJ) [Simple Larceny & Forgery];
- *R v Nelson Ta'au* (Unrep. Criminal Case No. 95 of 1993; Lungole – Awich J) [Conversion];
- *Richard Selwyn v R* (Unrep. Criminal Case No. 25 of 1991; Muria J) [Simple Larceny];
- Untitled (Unrep. Criminal Case No. 710 of 1991; Muria J) [Larceny from Warehouse];
- *R v John Palmer* (Unrep. Criminal Case No. 10 of 1991; Ward CJ) [Threatening Violence];
- *Joel Likilua & Allen Kokolobu v R* [1988 – 89] SILR 148 [Break & Enter];

- *Hola, Tome & Lai v R* (Unrep. Criminal Case No. 15 of 1992; Muria ACJ) [Break & Enter];
- *Annette Quila v R* (Unrep. Criminal Case No. 19 of 1995; Palmer J) [Break & Enter];
- *R v Muliolo Takoa* (Unrep. Criminal Case No. 115 of 1993; Muria CJ) [Embezzlement];
- *R v Salome Lamtoa Irobako* (Unrep. Criminal Case No. 24 of 1991; Muria ACJ);
- *Director of Public Prosecutions v Maesala* [1988 – 89] SILR 145 [Incest];
- *Director of Public Prosecutions v Jones* (Unrep. Criminal Appeal Case No. 37 of 1990; Ward CJ) [Fraudulent Conversion]; &
- *R v Maesala* (Unrep. Criminal Case No. 39 of 1988; Ward CJ) [Incest].

[E] Reactivating Suspended Sentences

R v Munday (1972) 56 CrAppR 220 Sachs LJ, delivering the judgment of the Court, held at page 223:

> 'Whilst, of course, it is never part of the function of a court which may have to consider activating a suspended sentence in any way to review its propriety, nonetheless there are cases where justice cannot be done without fitting into the pattern of events leading to the further conviction the facts which led to the suspended sentence. To that extent, therefore, it may then be necessary on the second occasion for the court to inform itself of the circumstances in which the suspended sentence was passed in order that such proper assessment may be made of the overall position so as to determine the sentence to be passed and make plain the grounds on which it is acting.'

[59.7.4] Concurrent Or Consecutive Sentences

[A] Criminal Procedure Code

Section 9 of the *Criminal Procedure Code* (Ch. 7) states:

> '(1) When a person is convicted at one trial of two or more distinct offences the court may sentence him, for such offences, to the several punishments prescribed therefore which such court is competent to impose; *such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishment shall run concurrently.*
>
> (2) In the case of consecutive sentences it *shall not* be necessary for a Magistrates' Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court:
>
> Provided that the aggregate punishment *shall not* exceed twice the amount of punishment which such Magistrates' Court is competent to impose in the exercise of its ordinary jurisdiction.
>
> (3) For the purposes of appeal or confirmation the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.' (emphasis added)

The law relating to the '*Criminal Jurisdiction Of The Courts*' is examined commencing on page **14**.

[B] General Principles

In *R v Daniel Upang & Simister Kimisi & R v Cherry Bula* (Unrep. Criminal Appeal Case No. 19 & 20 of 1991) Muria J stated at page 2:

> 'It is plain from section 9(1) that in Solomon Islands when a person is convicted of two or more distinct offences and the court sentences him to imprisonment for the offences the court is empowered to order the imprisonment sentences to commence one after the expiration of the other. In other words, it can order the prison sentences to run consecutively "*unless the court directs that such punishment shall run concurrently*".
>
> The intention of section 9(1) must be that while empowering the court to pass imprisonment sentences to run consecutively where a person is convicted of several offences at one trial, the court is also given the power to direct sentences passed on those several offences to run concurrently. As such, the underlying duty thrown upon the court is to state clearly whether the sentences should run consecutively or concurrently. The Practice Direction (1962) 46 CrAppR 119 and subsequent cases clearly support this view. It was stated in R v Anthony [1962] CrimLR 259 that sentences imposed in respect of each count and whether those sentences were to run concurrently or consecutively should be expressed with clarity.'

However, if a defendant is sentenced to a term of imprisonment and a suspended sentence, the suspended sentence *must* be imposed concurrent to the term of imprisonment, see section 44(5) of the *Penal Code* (Ch. 26).

In *Stanley Bade v R* [1988 – 89] SILR 121 Ward CJ stated at page 125:

> '*When considering sentence for a number of sentences, the general rule must be that separate and consecutive sentences should be passed for the separate offences*. It is trite to point out that a man who commits, say, five offences should receive a heavier sentence than a man who only commits one of them.
>
> *However, there are two situations where this rule must be modified. The first, that where a number of offences arise out of the same single transaction and cause harm to the same person there may be grounds for concurrent sentences*, does not concern this appeal save to say that the learned magistrate correctly applied this principle in ordering a concurrent term for the malicious damage caused to Solo Lae's house during the burglary. *The second occasion for modifying the general rule arises where the aggregate of sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case.* 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 the 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] CrimLR 124. Equally, if the total sentence, although not offending that test, would still in the particular circumstances of the person being sentenced, be a crushing penalty, the court should also consider a reduction of the total.
>
> *Having decided the proper penalty for each individual offence but feeling the total is too high, it is better to achieve a reduction by making some or all concurrent rather than to reduce the length of the individual sentences whilst leaving them consecutive. The former course results in sentences that still reflect the gravity of each individual charge*.' (emphasis added)

In *Augustine Laui v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 11 of 1987) Ward CJ held at pages 2 – 3:

> 'When sentencing at the one time for two or more offences, the court will always need to consider whether to make the sentences concurrent or consecutive. The question that must be decided by the court in this regard is whether or not the offences were committed in the course of a single transaction. If they were, the sentences should be concurrent, if not then consecutive sentences are appropriate subject to the overall total.
>
> The test of a single transaction is not a matter of time but whether the offences really form part of a single attack on some other person's right. Thus, two separate offences even if occurring close together in time, for example, taking a vehicle without consent and then driving it dangerously, would merit consecutive sentences. On the other hand, the sentences for a series of assaults against the same person even though spread over a lengthy period of time should properly be made concurrent.
>
> […]
>
> *The so – called totality principle referred to by counsel applies in two ways. Where concurrent sentences have been passed because of the single transaction principle, the court must ensure that the gravity of the offence is properly represented by the sentence for the principal offence. Where consecutive sentences are passed for a number of offences, the court must not just consider whether each sentence is appropriate for each offence but look also at the total to ensure it is not out of proportion to the overall circumstances.* Where it does appear to be too great, the court should reduce the total term of imprisonment by making some or all the sentences concurrent and not by reducing the individual sentences below an appropriate level for the particular offence for, by so doing, the impression given on the subsequent record of conviction is of a series of relatively minor offences.
>
> An exception to this single transaction rule, and one that does not arise in this appeal, is where the maximum sentence for a particular offence is clearly inadequate. Such a situation could arise, for example, in sentencing a series of takings of motor vehicles especially where the offender has been convicted of the same offence previously. In such a case the court may well feel it is appropriate to ensure a proper total by making the sentences consecutive.' (emphasis added)

See also: *Sau v R* [1982] SILR 65 & *R v Sogavari Sione* (Unrep. Criminal Review Case No. 139 of 2000 consolidated with Criminal Review Cases Nos. 138 of 2000; 164 of 2000 & 35 of 2001; Kabui J; at pages 4 – 5).

[59.7.5] Remissions

Defendants may be granted a '*one – third good behaviour remission*', see *R v Daniel Upang & Simister Kimisi & R v Cherry Bula* (Unrep. Criminal Appeal Case Nos. 19 & 20 of 1991; Muria J) & *R v Misiben* (Unrep. Criminal Review Case No. 15 of 1994; Palmer J).

Division 6 of *The Prisons Regulations* (Ch. 111) is titled, '*Remission of Sentence & Release on License*'.

Section 114(1) of those *Regulations* states:

> 'Convicted criminal prisoners sentenced to imprisonment, whether by one sentence or consecutive sentences, for a period exceeding one month, may for industry and good conduct be granted a *remission of one – third of their sentence or sentences*:
>
> Provided that in no case shall –
>
> (i) any remission granted result in the release of a prisoner until he has served one month;
>
> (ii) any remission be granted to a prisoner sentenced to imprisonment for life or to be detained during the Her Majesty's pleasure.' (emphasis added)

A court determining sentence should *not* increase the sentence in order to take account of the possibility of '*remission*', see *R v Ouless & Ouless* [1986] CrimLR 702.

See also: *R v Stephen Asipara* (Unrep. Criminal Case No. 25 of 1994; Palmer J; at page 2) & *R v Maguire & Enos* (1957) 40 CrAppR 92.

[59.7.6] Discretionary Life Sentences

In *Johnson Tariani v R* [1988 – 89] SILR 7 Connolly P and Savage JA, in their joint judgment, held at page 11 that the proper criteria to be followed when considering whether to impose a '*discretionary life sentence*' is as follows:

> '(1) where the offence or offences are in themselves grave enough to require a very long sentence; (2) where it appears from the nature of the offences or from the defendant's history that he is a person of unstable character likely to commit such offences in the future; and (3) where if the offences are committed the consequences to others may be specially injurious, as in the case of sexual offences or crimes of violence', [see *R v Hodgson* (1967) 52 CrAppR 113].'

See also: *Attorney General's Reference No. 32 of 1996; R v Whittaker* [1997] 1 CrAppR(S) 261; *Attorney General's Reference No. 76 of 1996; R v Baker* [1997] 1 CrAppR(S) 81; *R v Chapman* [2000] 1 CrAppR 77; *R v Willoughby* [1999] 2 CrAppR(S) 18; *R v Baker* [1997] 1 CrAppR(S) 81; *R v Hatch* [1997] 1 CrAppR(S) 22; *R v Picker* [1970] 2 QB 161; [1970] 2 WLR 1038; [1970] 2 AllER 226; (1970) 54 CrAppR 330; *R v Thornton* (1994) 15 CrAppR(S) 51; *R v Pither* (1979) 1 CrAppR(S) 209; *R v Wilkinson* (1983) 5 CrAppR(S) 105; *R v Morgan* (1988) 86 CrAppR 307; *R v O'Dwyer* (1988) 86 CrAppR 313 & *R v Dempster* (1987) 85 CrAppR 176.

[59.8] Fines

[59.8.1] Penal Code

The following sections of the *Penal Code* (Ch. 26) should be considered regarding the imposition of a '*fine*' generally:

Section 25 states:

> 'Where a fine is imposed under any law, then in the absence of express provisions relating to such fine in such law the following provisions shall apply –

(a) *where no sum is expressed to which the fine may extend, the amount of the fine which may be imposed is unlimited, but shall not be excessive*;

(b) where the sum to which the fine may amount is expressed, any lesser fine may be imposed;

(c) in the case of an offence punishable with a fine or a term of imprisonment the imposition of a fine or a term of imprisonment shall be a matter for the discretion of the court;

(d) in the case of an offence punishable with imprisonment as well as a fine in which the offender is sentenced to a fine with or without imprisonment and in every case of an offence punishable with fine only in which the offender is sentenced to a fine the court in passing sentence may, in its discretion --

(i) direct by its sentence that in default of payment of the fine the offender shall suffer imprisonment for a certain term, which imprisonment shall be in addition to any other imprisonment to which he may have been sentenced or to which he may be liable under a commutation of sentence; and also

(ii) issue a warrant for the levy of the amount on the immovable and movable property of the offender by distress and sale under warrant:

Provided that if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default, no court shall issue a distress warrant.' (emphasis added)

Section 26 states:

'(1) The term of imprisonment to which a person may be sentenced by a court in default of payment of a fine shall be such term as in the opinion of the court will satisfy the justice of the case but *shall not* exceed the maximum fixed by the following scale –

Amount	*Maximum Period*
Not exceeding $2	7 days
Exceeding $2 but not exceeding $4	14 days
" $4 " $20	6 weeks
" $20 " $180	2 months
" $80 " $200	3 months
" $200	6 months

(2) The imprisonment which is imposed in default of payment of a fine shall terminate whenever the fine is either paid or levied by process of law.' (emphasis added)

See also: sections 28 ('*Distress*'); 29 ('*Suspension of execution of sentence of imprisonment in default of fine*'); 30 ('*Commitment in lieu of distress*'); 31 ('*Payment after commitment*') & 38 ('*Payment of fine or compensation by parent or guardian of offender under sixteen years of age*').

[59.8.2] General Principles

A Court can *not* impose a fine in excess of the maximum penalty prescribed by law, see *R v Tuto* [1980 – 81] SILR 19.

A fine as an alternative to a term of imprisonment *must* be a true alternative, see *R v Hall* (1968) 52 CrAppR 736 at page 738.

Generally in cases in which a defendant does not have the means of making the payment of a fine his/her family will provide financial support.

In *Inito v R* [1983] SILR 177 Daly CJ commented at page 178:

> 'The order for payment of a large fine as well as imprisonment […] has a part to play in Solomon Islands because of […] the customary support system**.** In Solomon Islands this happens at all levels of society. In return for that support the appellant will owe a duty towards those who have contributed and that, in itself, is an effective sanction against further misdemeanour.'

See also: *Konare v Director of Public Prosecutions* [1984] SILR 33.

A sentence of imprisonment combined with the payment of a fine may be imposed in appropriate circumstances, see section 24(3) of the *Penal Code* (Ch. 26), section 8 of the *Criminal Procedure Code* (Ch. 7), *Inito v R* (*supra*) & *Ngina v R* [1987] SILR 35.

A '*default period*' for a fine should *not* be imposed in the absence of a defendant, see section 86(3) of the *Criminal Procedure Code* (Ch. 7) & *R v Tuto* (*supra*) at page 22.

[59.9] Good Behaviour Bond

The following sections of the *Penal Code* (Ch. 26) should be considered regarding the imposition of a '*Good Behaviour Bond*':

Section 32(1) states:

> 'A person convicted of an offence may, instead of or in addition to any punishment to which he is liable, be ordered to enter into his own recognisance, with or without sureties, in such amount as the court thinks fit, conditioned that he shall *keep the peace and be of good behaviour* for a time to be fixed by the court, not exceeding two years, and may be ordered to be imprisoned until such recognisance, with sureties if so directed, is entered into; but so that the imprisonment for not entering into the recognisance shall not extend for a term longer than six months:
>
> *Provided that no order shall be made under this section where the person convicted has been sentenced to a term of imprisonment of more than six months.*' (emphasis added)

Section 33 states:

> '(1) In any case in which a person is convicted before any court of any offence, if it appears to the court before which he is convicted that having regard to the circumstances including the nature of the offence and the character of the accused it is expedient to release the offender on probation, the court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, and during such period (not exceeding two years) as the court may direct, to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour.
>
> (2) If at any time the court which convicted the offender is satisfied that the offender has failed to observe any of the conditions of his recognisance, it may issue a warrant for his apprehension.
>
> (3) An offender when apprehended on any such warrant shall be brought forthwith before the court by which the warrant was issued and such court may either remand him in custody until the case is heard or admit him to bail with a sufficient surety conditioned for his appearing for sentence. Such court may, after hearing the case, pass sentence.'

By virtue of section 34 of the *Penal Code* (Ch. 26), the provisions of sections 111 ['*Discharge of sureties*'], 112 ['*Death of sureties*'] & 114 ['*Forfeiture of recognisance*'] of the *Criminal Procedure Code* (Ch. 7) apply *mutatis mutandis*, ie., with any necessary changes, to recognisances taken under sections 32 or 33 of the *Penal Code* (Ch. 26).

See: *R v Marlow Justices, Ex parte O'Sullivan* [1984] 2 WLR 107; [1984] QB 381; [1983] AllER 578; (1984) 78 CrAppR 13.

[59.10] Binding Over Order

Section 32(2) of the *Penal Code* (Ch. 26) states:

> 'In addition to the powers conferred by subsection (1) of this section any Judge or Magistrate shall have power in any trial before him, *whether or not the complaint be dismissed*, to *bind both the complainant and defendant* with or without sureties, to keep the peace and be of good behaviour for a period not exceeding one year and may order any person so bound, in default of compliance with the order, to be imprisoned for three months or until such earlier time as he so complies:
>
> *Provided that a defendant who has been sentenced to more than six months' imprisonment shall not be bound over under this subsection*:
>
> *And provided further that a complainant shall not be bound over under the powers contained in this subsection unless he shall have been given an opportunity to address the court personally or by an advocate as to why he should not be bound over*.' (emphasis added)

No other conditions other than those specified should be imposed, see *R v Randall* (1986) 8 CrAppR(S) 433; [1987] CrimLR 254.

The '*Binding Over Order*' of a defendant to keep the peace is not a sentencing option, see *Director of Public Prosecutions v Glass; Director of Public Prosecutions v Kuper & Kuper v Director of Public Prosecutions* [1984] SILR 28.

In *R v Maybilyn Oli* (Unrep. Criminal Review Case No. 623 of 1996) Palmer J stated at page 1:

> 'I note […] in the record of proceedings that the learned Magistrate indicated that he had intended to impose a good behaviour bond on the victim as well, but could not because of her absence. I do not think that should be an impediment. What he can do in these circumstances, is to adjourn the case and issue a summons for the victim to attend court on the adjournment date to show cause why she should not be bound over as well.'

In *Shaw v Hamilton* (1982) 75 CrAppR 288 [[1982] 2 AllER 718; [1982] 1 WLR 1308; [1982] CrimLR 442] Donaldson LJ, delivering the judgment of the Court, stated at page 290:

> 'In order to justify making the binding – over order in the first instance the magistrates had to satisfy themselves on admissible material before them that unless steps were taken to prevent it there might be a breach of the peace in the future. A binding – over order is a preventative order, but it has to be justified by existing evidence.'

In *R v South Molton Justices, Ex parte Ankerson & others* (1990) 90 CrAppR 158 Taylor LJ stated at pages 161 – 162:

> 'When justices have it in mind to order a binding over, before they do so
> (1) there should be material before them justifying the conclusion that there is a risk of a breach of the peace unless action is taken to prevent it.
> (2) They must indicate to the defendant their intention to bind him over and the reasons for it so that he or his lawyer can make representations.
> (3) They must obtain consent to the bindover from the defendant himself.
> (4) Before fixing the amount fo the recognizance they should inquire as to the defendant's means.
> (5) The binding over should be for a finite period.' (emphasis added)

See also: *R v James Rasim & four others* (Unrep. Criminal Case No. 25 of 1990; Ward CJ); *Veater v Glennon & others* [1981] 1 WLR 567; [1981] 2 AllER 304; [1981] CrimLR 563; (1981) 72 CrAppR 331; *South West London Magistrates' Court, Ex parte Brown* [1974] CrimLR 313; *R v Marylebone Metropolitan Stipendiary Magistrate, Ex parte Okunnu* (1988) 87 CrAppR 295; *R v Central Criminal Court, Ex parte Boulding* [1984] 2 WLR 321; [1984] QB 813; [1984] 1 AllER 766; (1984) 79 CrAppR 100 & *Lansbury v Riley* [1911 – 13] AllER Rep 1059; [1914] 3 KB 229.

[59.11] Residence Order

A person convicted under sections 175 ['*Idle & disorderly persons*'] and 176 ['*Rogues & vagabonds*'] of the *Penal Code* (Ch. 26) may *in addition to or in lieu of any other penalty*, be directed by a Magistrate to be conveyed to:

[i] his/her place or province in Solomon Islands; or

[ii] the place or province in Solomon Islands in which he/she is ordinarily resident,

and reside there for such period not exceeding three years as may be specified in the order.

If any such order is made additional to a sentence of imprisonment the order shall take effect forthwith upon the termination of such sentence.

If the defendant fails to comply with the provisions of such order he/she shall be guilty of an offence and shall be liable to imprisonment for six months.

Furthermore, section 177 of the *Penal Code* (Ch. 26) states:

> '(1) Where the Magistrate makes an order under sections 175 or 176, he may in the order direct that the person convicted be subject to the supervision of a suitable person nominated for the purpose by the court, for such period as may be specified in the order, not exceeding the period under which the convicted person is required to reside in the place or province.
>
> (2) The person nominated pursuant to subsection (1) of this section shall be responsible to the supervision of the convicted person and submit to the court such reports and information as may be required in terms of the order.'

'Residence orders are an *additional* penalty for offences of an antisocial nature […]. […] A '*residence order*' is intended to remove troublemakers from the area where they are causing trouble. It is, at the same time, a protection for the community and a punishment for the offender. It is certainly not an order that the offender may try and, if he doesn't enjoy what he finds, simply ignore', see *Iro v R* [1990] SILR 194 at pages 195 – 196. (emphasis added)

[59.12] Compensation Order

[59.12.1] Statutory Provisions

The following sections of the *Penal Code* (Ch. 26) should be considered regarding the imposition of a '*Compensation Order*':

Section 27 states:

> 'Any person convicted of an offence may be ordered to make compensation to any person *injured* by his offence and such compensation may be either in addition to or in substitution for any other punishment.' (emphasis added)

Section 28(1) states:

> 'When a court orders money to be paid by an accused person […] for compensation […], the money may be levied on the movable and immovable property under warrant. If he shows sufficient movable property to satisfy the order his immovable property shall not be sold.'

See also: sections 30 ['*Commitment in lieu of distress*']; 31 ['*Payment after commitment*'] & 38 ['*Payment of fine or compensation by parent or guardian of offender under sixteen years of age*'].

[59.12.2] General Principles

In *R v Paul Rakaimua* (Unrep. Criminal Case No. 24 of 1995) Muria CJ commented at page 5:

> 'Compensation is part of the sanctions used in custom among the people of this country to settle grievances and to make peace. It is also a form of punishment for committing wrongs against a person or community or tribe. It is therefore appropriate in cases such as the present that some form of reparation is made.'

See also: *R v Muliolo Takoa* (Unrep. Criminal Case No. 115 of 1993; Muria CJ).

All complainants are entitled to be re – imbursed as a consequence of the commission of an offence. Otherwise, defendants will *not* be properly sentenced and complainants will *not* be given the opportunity to be re – imbursed for their loss. In the case of multiple defendants, the loss incurred for each offence is to be divided equally among all of the defendants. Whether a defendant can pay '*Compensation*' is *not* a consideration of the RSIP, but an issue for the Court to consider.

Prosecutors are to:

[i] make applications for '*Compensation*', after ensuring that all relevant information has been collected by the respective Arresting / Investigating Officer; and

[ii] advise their respective Officer – in – Charge if such information is not provided.

All communication in respect of '*Compensation*' is to be recorded in the 'Diary Of Action Taken'.

[59.12.3] Compensation Factors

The following factors should be taken into account in respect of applications for '*Compensation*':

[i] Nature of the Injuries

- [a] Clearly outline the extent of the injuries;
- [b] Specify the duration of any pain or discomfort; and
- [c] Outline how the injury affected the complainant's life.

[ii] Mental Anguish Caused

Outline whether the complainant has suffered mental anguish as a direct result of the commission of the offence.

[iii] On – Going Problems

- [a] Outline as per medical and / or dental advice;
- [b] Be Specific as to the extent of such problems, duration of the problems and what treatment will be required in the future; and
- [c] Outline medical and / or dental expenses currently incurred and to be incurred in the future.

[iv] Wages

- [a] Specify any loss of wages?;
- [b] Explain why the complainant could not work;
- [c] Specify what was the amount of money lost?; and
- [d] Specify the expected loss of wages in the future.

[v] Type Of Property

[a] Detail the property in question;
[b] Specify the condition of the property prior to the commission of the offence; and
[c] Specify the value of the property prior to the commission of the offence.

[vi] Damage / Destruction

[a] Specify the extent of the damage or destruction; and
[b] Explain how the property was damaged or destroyed as a result of the commission of the offence.

[vii] Repair Costs

[a] Explain what has to be done to ensure that the property is in the same condition as it was prior to the commission of the offence; and
[b] Outline the cost of the repair.

[viii] Insured Property

[a] Specify whether the property insured?;
[b] Specify whether the complainant paid out by the insurance company?;
[c] Specify the amount of such payment?;
[d] Specify any excess borne by the complainant?; and
[e] If the complainant has been paid out, specify what amount was paid out by the complainant?

See: *R v Church* (1971) 55 CrAppR 65.

[59.13] Absolute Or Conditional Discharge

Section 203 of the *Criminal Procedure Code* (Ch. 7) states:

> 'The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or may, pursuant to the provisions of section 35 of the Penal Code, *without proceeding to conviction*, if it is of opinion that it is not expedient to inflict any punishment notwithstanding that it thinks the charge against the accused it proved, make an order dismissing the charge either absolutely or conditionally.' (emphasis added)

Section 35 of the *Penal Code* (Ch. 26) states:

> 'Where, in any trial, the court thinks that the charge against the accused person is proved but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the accused, or to the trivial nature of the offence or to the extenuating circumstances in which the offence was committed, it is not expedient to inflict any punishment, the court may, *without proceeding to conviction*, make an order dismissing the charge either absolutely or conditionally.' (emphasis added)

[59.14] Police Supervision

Section 40 of the *Penal Code* (Ch. 26) states:

'(1) When any person, having been convicted of any offence punishable with imprisonment for a term of three years or upwards, is again convicted of any offence punishable with imprisonment for a term of three years or upwards, the court, may, if it thinks fit, at the time of passing sentence of imprisonment on such person, also order that he shall be subject to police supervision as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) Every person subject to police supervision, and who is at large in Solomon Islands, shall

(a) report himself personally once in each month to the officer in charge of the police station nearest to his place of residence at such time as may be directed by such police officer, or as may be prescribed by rules under this section; and

(b) notify the place of his residence and any change of such residence at such time and place as in such manner and to such person as may be prescribed by rules under this section.

(4) If any person subject to police supervision who is at large in Solomon Islands refuses or neglects to comply with any requirement prescribed by this section or by any rule made thereunder, such person shall unless he proves to the satisfaction of the court before which he is tried that he did his best to act in conformity with the law, be guilty of an offence and liable to imprisonment for six months.

(5) The Chief Justice may make rules for carrying out the provisions of this section.'

[59.15] Property Orders

Section 157 of the *Criminal Procedure Code* (Ch. 7) states:

'Where, upon the apprehension of a person charged with *an offence*, any property is taken from him, the court before which he is charged *may* order –

(a) that the property or a part of thereof be restored to the person who appears to the court to be entitled thereto, and, if he be the person charged, that it be restored, either to him or to such other person as he may direct; *or*

(b) that the property or a part thereof be applied to the payment of any fine or any costs or compensation directed to be paid by the person charged.' (emphasis added)

Section 158 of the *Criminal Procedure Code* (Ch. 7) states (in part):

'(1) *If any person guilty of any offence as is mentioned in Parts XXVII to XXXIV*, both inclusive, of the Penal Code, in stealing, taking, obtaining, extorting, converting, or disposing of, or in knowingly receiving any property, is prosecuted to conviction by or on behalf of the owner of such property, *the property shall be restored to the owner or his representative*.

(2) *In any case in this section referred to, the court before whom such offender is convicted shall have power to award writs of restitution for the said property or to order the restitution thereof in a summary manner*:

Provided that nothing in this section shall apply to the case of any valuable security which has been in good faith paid or discharged by some person liable to the payment thereof, or, being a negotiable instrument, has been in good faith taken or received by transfer or delivery by some person for a just and valuable consideration without any notice or without reasonable cause to suspect that the same has been stolen.

(3) On the restitution of any stolen property if it appears to the court by the evidence that the offender has sold the stolen property to any person, that such person has had no knowledge that the same was stolen, and that any moneys have been taken from the offender on his apprehension, *the court may, on the application of such purchaser*, order that out of such moneys a sum, not exceeding the amount of the proceeds of such sale, be delivered to the said purchaser.

(4) The operation of any order under this section shall (unless the court before which the conviction takes place directs to the contrary in any case in which the title to the property is not in dispute) be *suspended* --

(a) in any case until the time for appeal has elapsed; and

(b) in a case where an appeal is lodged, until the determination of the appeal,

and in cases where the operation of any such order is suspended until the determination of the appeal, the order shall not take effect as to the property in question if the conviction is quashed on appeal.' (emphasis added)

As regards defendants convicted under sections 91 ['*Official corruption*'], 92 ['*Extortion by public officers*']; 93 ['*Public officers receiving property to show favour*']; 117 ['*Compounding felonies*'] or 118 ['*Compounding penal actions*'] of the *Penal Code* (Ch. 26), refer to section 43 of that Code ['*Forfeiture*'].

[59.16] Reconciliation

[59.16.1] Magistrates' Courts Act

Section 35(1) of the *Magistrates' Courts Act* (Ch. 20) states:

'In criminal cases a Magistrates' Court may promote *reconciliation* and encourage and facilitate the settlement in an amicable way of proceedings *for common assault, or for any offence of a personal or private nature not amounting to felony* and not aggravated in degree, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.' (emphasis added)

[59.16.2] Practice Direction

When a Magistrate is considering '*reconciliation*', he/she should comply with *Practice Direction No. 1 of 1989* issued by Ward CJ as follows:

Reconciliation under section 35(1) Magistrates' Courts Act

'When a magistrate is considering reconciliation of a criminal case under section 38(1) [now section 35] of the Magistrates' Courts Act, it is essential that he satisfies himself the reconciliation is genuine and has been freely accepted by the complainant. In order to do this, it will usually be necessary for the complainant to attend and to be questioned by the court. It is only in the most exceptional circumstances that reconciliation should be accepted without the attendance of the complainant and then only where there is clear evidence from the complainant of his agreement.

The scope of reconciliation is limited by the section to cases of common assault and "any offence of a personal or private nature not amounting to felony and not aggravated in degree." The practice of allowing reconciliation in aggravated cases must stop. Examples of cases where reconciliation should not be accepted include assaults causing actual bodily harm by more than one person or involving the use of weapons. Criminal trespass by night should not be reconciled where there is any evidence of an intention to steal and simple larceny is, of course, excluded because it is a felony.

Reconciliation should never be allowed automatically on the application of the complainant or the prosecution and should only follow a consideration of the relevant facts.

In cases where compensation is requested or offered, the decision is entirely one for the court. Thus it must hear sufficient facts to decide whether it is a suitable case and, if so, the sum that would be appropriate. Equally, when a sum has already been paid, the court must still decide whether it is sufficient or proper and act accordingly.

It should not agree to reconciliation until it has clear evidence of the payment. The fact compensation has been paid and accepted by the complainant does not make that case suitable for reconciliation if it was otherwise unsuitable although it may, of course, still be a matter of mitigation.

In cases where compensation is ordered, payment should be made to the complainant in open court or there should be clear evidence of payment and receipt. No order of reconciliation should be made until this is done and this may frequently require a short adjournment. *The fact of payment in court must be recorded in the court file and no receipt is then necessary.*

In every case where reconciliation is allowed, the court must state whether the proceedings are terminated or stayed. Where it is satisfied the reconciliation has finally settled the matter, the case should be terminated but, if there is any concern that bad feeling may continue, it may be wise to consider ordering a stay only. In this case, a period must be set (usually a period of up to 12 months would be appropriate) and it must be explained to the defendant that he is liable to arrest and trial for the offence should he continue or repeat his misconduct within that period.

Whilst many cases of matrimonial violence are suitable for reconciliation, the court should be especially careful before it is satisfied the victim has really agreed. In the majority of such cases, the appropriate order would be to stay proceedings. The court may also consider in such cases whether to bind over one or both parties under section 32(2) of the Penal Code subject, of course, to the complainant's right to be heard first.

All the matters referred to in this direction must be noted in the record of proceedings.' (emphasis added) [words in brackets added]

The law relating to '*Binding Over Orders*' is examined on page **946**.

[59.17] Disqualification

[59.17.1] General Principles

In *Howard Haomae v R* (Unrep. Criminal Appeal Case No. 106 of 2001) Palmer J commented at page 1:

> '*[T]he presiding Magistrate did not pass any sentence on the Appellant. It appears the order for disqualification was used as the penalty. This is not the correct approach.* […] *The correct approach is first, to determine the appropriate penalty to be imposed, then go on next to consider whether an order for disqualification is mandatory under Part I or discretionary under Part II of the Schedule*. If discretionary, he should then go on to consider the period of disqualification to be imposed taking into account the circumstances of the case, including the nature of the offence, the antecedents of the appellant or accused, and the possible effects on his job. For instance, if a person drives to earn his living, such as a bus driver or a taxi – driver, instead of ordering him to be disqualified for 12 months, the court might impose an order for disqualification for say 9 months, or instead of 6 months, 3 months.' (emphasis added)

See also: *R v Brown & Taylor, Ex parte Metropolitan Police Commissioner* (1962) 46 CrAppR 218.

In *R v David Leliana* (Unrep. Criminal Review Case No. 6 of 1998) Palmer J commented at page 1:

> 'Magistrates must get used to thinking about whether to impose an order for disqualification or not whenever any traffic offence is being dealt with.'

Unless an offence is specified in the *Schedule* to the *Traffic Act* (Ch. 131) there is *no* power to disqualify a defendant, see *Howard Haomae v R* (*supra*).

Section 29(1) of the *Traffic Act* (Ch. 131) specifies a *minimum* period of '*disqualification*', see *R v Timothy Sulega* (Unrep. Criminal Review Case No. 133 of 1999; Palmer J; at page 2) & *R v Matthew Iroga* (Unrep. Criminal Review Case No. 8 of 1998; Palmer J; at page 1).

A period of disqualification commences from the moment it is pronounced, see *Aloyscius Votu v R* (Unrep. Criminal Appeal Case No. 19 of 2002; Kabui J).

The issue of '*previous convictions*' is important when considering the question of '*disqualification*'.

In *R v Maeli Rinau* (Unrep. Criminal Review Case No. 18 of 1996) Palmer J stated at page 3:

> 'Magistrates must record whether there are previous convictions or not. *If none was available, at the hearing, then an adjournment should be made and the prosecutor required to produce them*. The issue on previous convictions is important when passing sentence and also when considering the question of disqualification under section 28 of the Traffic Act.' (emphasis added)

However, by virtue of the application of section 31 of the *Traffic Act* (Ch. 131) any period of disqualification imposed of *less than two years* is in effect '*two years*'. Such defendants *can not* apply to have such disqualification removed for at least two years. Therefore, when courts are considering the imposition of a disqualification period in respect of an offence for which such an order is '*discretionary*', the application of section 31 of the *Traffic Act* (Ch. 131) should also be considered.

The law relating to:

- the '*Removal Of Disqualification*' is examined commencing on page **959**; and
- the '*Proof Of Previous Convictions*' is examined commencing on page **305**.

See also: *R v Jack Lae (*Unrep. Criminal Review Case No. 72 of 1992; Muria J); *Peter Baru v R* [1988 – 89] SILR 132; *R v Ramofaua* (Unrep. Criminal Review Case No. 5799 of 1999; Palmer J) & *Charles Fosala v R* [1988 – 89] SILR 139.

[59.17.2] Traffic Act

Section 29 of the *Traffic Act* (Ch. 131) states:

'(1) Where a person is convicted of an offence specified in Part I of the Schedule the court *shall* order him to be disqualified for such period *not less than* twelve months as the court thinks fit *unless* the court for *special reasons* thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified. ['*Obligatory Disqualification*']

(2) Where a person is convicted of an offence specified in Part II of the said Schedule, the court *may* order him to be disqualified for such period as the court thinks fit. ['*Discretionary Disqualification*']

(3) Where a person convicted of an offence specified in the said Part I or the said Part II has *within the three years immediately preceding the commission of the offence and since the commencement of this Act been convicted on not less than two occasions of an offence specified in those Parts and particulars of the conviction have been ordered to be endorsed in accordance with section 36*, the court *shall* order him to be disqualified for such period not less than six months as the court thinks fit, unless the court is satisfied, having regard to all the circumstances, that there are grounds for mitigating the normal consequences of the conviction and thinks fit to order him to be disqualified for a shorter period or not to order him to be disqualified.

(4) Where a person convicted of an offence under section 43(1) (driving or attempting to drive while under the influence of drink or drugs) has within the ten years immediately preceding the commission of the offence been convicted of such an offence, subsection (1) of this section *shall* apply in relation to him with the substitution of three years for twelve months.

(5) The period of any disqualification imposed under subsection (3) of this section or on a conviction of an offence under section 35(b) (driving while disqualified) *shall* be in addition to any other period of disqualification imposed (whether previously or on the same occasion) in Solomon Islands whether under this Act or otherwise.

(6) The foregoing provisions of this section *shall* apply in relation to a conviction of an offence committed by aiding, abetting, counselling or procuring, or inciting to the commission of an offence specified in the said Part I as if the offence were specified in the said Part II.

(7) Where a person is convicted of an offence specified in the said Part I or II the court *may*, whether or not he has previously passed *a test of competence to drive* under this Act or under any Act repealed by this Act, and whether or not the court makes an order under the foregoing provisions of this section, order him to be disqualified until he has, since the date of the order, passed that test; and a disqualification by virtue of an order under this subsection shall be deemed to have expired on production to a licensing officer of satisfactory evidence, that the person disqualified has, since the order was made, pass that test.

(8) In this section "disqualified" means disqualified for holding or obtaining a licence to drive a motor vehicle granted under this Part and "disqualification" shall be construed accordingly.

(9) The Minister may by order amend or replace the Schedule and in doing so may provide for the insertion or addition of offences relating to the driving, use or control of motor vehicles under any law or Act having effect in Solomon Islands.' (emphasis added) [words in brackets added]

[59.17.3] Obligatory Disqualification

In *R v Matthew Iroga* (Unrep. Criminal Review Case No. 8 of 1998) Palmer J stated at page 1:

> 'Section 28(1) [now section 29] requires the court to disqualify a person convicted under section 42(1) [now section 43(1) and the other offences specified in Part I of the Schedule] for a minimum period of twelve months *unless* there are *special reasons* which the court thinks fit not to do so. What this means is that unless there are special reasons given and accepted by the court, it is required to impose an order for disqualification of not less than twelve months. If the court finds there are special reasons, it must then go on to decide whether it should exercise its discretion to disqualify for the minimum period or for a lesser period.' (emphasis added) [words in brackets added]

The standard of proof on the defendant to prove that there are '*special reasons*' for a disqualification period less than twelve months is on the '*balance of probabilities*', see *Pugsley v Hunter* [1973] 2 AllER 10; [1973] RTR 284; [1973] 1 WLR 578; [1973] CrimLR 247.

In *R v George Ale* (Unrep. Criminal Case No. 525 of 1996) Palmer J stated at page 1:

> 'A clear definition of what is a "special reason" is, can be found in the text "Road Traffic Offences" by G. S. Wilkinson, Fourth Edition, 1963, chapter VI. At page 312, the learned Author states:
>
> "*A special reason is one special to the facts of the particular case, ie., special to the facts which constitute the offence. It is a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence and one which the court ought properly to take into consideration when imposing punishment*."' (emphasis added)

In *Whittall v Kirby* [1946] 2 AllER 552 [[1947] KB 194] Lord Goddard defined the term '*special reason*' at page 555 as follows:

> 'A "special reason" within the exception is one which is special to the facts of the particular case, that is, special to the facts which constitute the offence. *It is, in other words, a mitigating or extenuating circumstance, not amounting in law to a defence to the charge, yet directly connected with the commission of the offence, and one which the court ought properly to take into consideration when imposing punishment*.' (emphasis added)

A circumstance peculiar to the offender as distinguished from the offence is *not* a '*special reason*' within the exception, see *Andrew Dora v R* (Unrep. Criminal Appeal Case No. 3 of 1976; Davis CJ; at page 3).

An short distance driven may in appropriate circumstances amount to a '*special reason*', see *James v Hall* [1972] 2 AllER 59 & *Coombes v Kehoe* [1972] 2 AllER 55.

In *R v Daeolo Wale* (Unrep. Criminal Review Case No. 23 of 1997) Palmer J held at page 2:

> 'Employment and family needs are not directly connected with the commission of the offence of driving whilst under the influence of drink and hence do not amount to "special reasons"'.

Unless the relevant facts sought to submitted in order to substantiate the '*special reasons*' are admitted by the prosecution, evidence *must* be given, see *Brown v Dyerson* (1968) 52 CrAppR 630; [1968] 3 WLR 615; [1969] 1 QB 45.

See also: *R v Ben Ramofaua* (Unrep. Criminal Review Case No. 5799 of 1999; Palmer J); *R v Fred Noda* (Unrep. Criminal Case No. 9 of 1996; Palmer J); *Anna Langley v R* (Unrep. Criminal Appeal Case No. 17 of 1978; Davis CJ); *R v Enley Honimae* (Unrep. Criminal Review Case No. 42 of 1996; Palmer J); *David Billy Aete'e v R* (Unrep. Criminal Appeal Case No. 3 of 1980; Daly CJ); *R v Wilkins* (1958) 42 CrAppR 236; *Delaroy – Hall v Tadman, Earl & Lloyd & Watson v Last* (1969) 53 CrAppR 143; *Brewer v Metropolitan Police Commissioner* (1969) 53 CrAppR 157; *R v Scott* (1968) 53 CrAppR 319; *R v Jackson & Hart* (1968) 53 CrAppR 341; *R v Baines* (1970) 54 CrAppR 481; *R v Messom* (1973) 57 CrAppR 481; *Taylor v Rajan* [1974] 2 WLR 385; [1974] 1 AllER 1087; [1974] QB 424; [1974] CrimLR 188; (1974) 59 CrAppR 11; *Fraser v Barton* (1974) 59 CrAppR 15 & *Director of Public Prosecutions v Feeney* (1989) 89 CrAppR 173; [1989] RTR 112.

[59.17.4] Discretionary Disqualification

Section 29(2) of the *Traffic Act* (Ch. 131) states:

> 'Where a person is convicted of an offence specified in Part II of the said Schedule, the court *may* order him to be disqualified for such period as the court thinks fit.' (emphasis added)

The prospects of employment is one factor which should be taken into account by a court in determining whether to impose a period of disqualification, see *R v Weston* (1982) 4 CrAppR(S) 5.

[59.17.5] Driving Test

The power to make an order that a defendant *must* pass a '*driving test*' in order to have the disqualification of his/her drivers license removed after serving the period of disqualification ordered by the court *should not be used punitively*, see *R v Donnelly* (1975) 60 CrAppR 250.

It should be used where there is reason to question the offender's general competence to drive. It may also be appropriate where the offender is disqualified for a substantial period so that he/she may become familiar with changing traffic conditions by the time his/her disqualification has expired, see *R v Guilfoyle* (1973) 57 CrAppR 549.

See: *R v Murphy* (1989) 89 CrAppR 176; [1989] RTR 236.

[59.17.6] Schedule

SCHEDULE
(*Section 29*)

Part I

Offences Involving *Obligatory* Disqualification

1. An offence under section 35(b) (driving while disqualified).

2. Manslaughter by the driver of a motor vehicle.

3. An offence under section 38 (causing death by dangerous driving).

4. An offence under section 39 (dangerous driving, etc.) committed within three years after a previous conviction of an offence under that section or under section 38 thereof.

5. An offence under section 43(1) (driving, etc., under the influence of drink or drugs).

Part II

Offences Involving *Discretionary* Disqualification

6. An offence of driving without a license contrary to section 20, committed by driving a motor vehicle in a case where either no license authorising the driving of that vehicle could have been granted to the offender or, if a provisional (but no other) license to drive it could have been granted to him, the driving would not have complied with the conditions thereof.

7. An offence under section 23(3) (failure to comply with conditions of provisional license).

8. An offence under section 39 (dangerous driving, etc.) committed otherwise than as mentioned in paragraph 4 of this Schedule.

9. An offence under section 40 (careless driving, etc.)

10. An offence mentioned in section 41(1) (speeding).

11. An offence under section 42 (driving, or causing or permitting a person to drive, a motor vehicle in contravention of the provisions of the Act relating to the minimum age for driving motor vehicles).

12. An offence under section 43(2) (being in charge of a motor vehicle while under the influence of drink or drugs).

13. An offence under section 46 (using a vehicle which is in a defective condition or overloaded) committed by using a vehicle on a road or causing or permitting a vehicle to be so used either --

    (a) so as to cause, or to be likely to cause danger by the condition of the vehicle or its parts or accessories, the number of passengers carried by it or the weight, distribution, packing or adjustment of its load; or

    (b) in breach of a requirement as to brakes, steering gear or tyres.

14. An offence under section 47 (racing, etc.).

15. An offence under section 48(2) (carrying passengers on motor cycle in contravention of the section).

16. An offence under section 53 (failure to comply with traffic directions) committed in respect of a motor vehicle by a failure to comply with a direction of a police officer or an indication given by a traffic sign.

17. An offence under section 55 (leaving vehicle in dangerous position) committed in respect of a motor vehicle.

18. An offence under section 59 (taking, etc., motor vehicle without authority).

19. An offence under section 63 (failure to stop, etc., after accident).

20. An offence under section 8 of the Motor Vehicles (Third – Party Insurance) Act (use of motor vehicle not insured against third – party risks).

21. An offence under section 66 of the Liquor Act (consuming liquor in a vehicle).

[59.17.7] Application To Remove Disqualification

Section 31 of the *Traffic Act* (Ch. 131) states:

> '(1) Subject to the provisions of the section, a person who by an order of a court is disqualified for holding or obtaining a license may apply to the court by which the order was made to remove the disqualification, and on any such application the court may, as it thinks proper, having regard to the character of the person disqualified and his conduct subsequent to the order, the nature of the offence, and any other circumstances of the case, either by order remove the disqualification as from such date as may be specified in the order or refuse the application.

(2) No application shall be made under the foregoing subsection for the removal of a disqualification before the expiration of whichever is relevant of the following periods from the date of the order by which the disqualification was imposed, that is to say --

(a) two years, if the disqualification is for less than four years;

(b) one half of the period of the disqualification, if it is for less than ten years but not less than four years;

(c) five years in any other case;

and in determining the expiration of the period after which under this subsection a person may apply for the removal of a disqualification, any time after the conviction during which the disqualification was suspended or he was disqualified shall be disregarded.

(3) Where an application under subsection (1) is refused, a further application thereunder shall not be entertained if made within three months after the date of the refusal.

(4) If under this section a court orders a disqualification to be removed, the court shall cause particulars of the order to be endorsed on the license, if any, previously held by the applicant and the court shall in any case have power to order the applicant to pay the whole or any part of the costs of the application.

(5) The foregoing provisions of this section shall not apply where the disqualification was imposed under section 29(3).'

In *R v Timothy Sulega* (Unrep. Criminal Review Case No. 133 of 1999) Palmer J stated at page 3:

'Subsection 31(1) of the Traffic Act does provide for an application to be made to the court for removal of the disqualification imposed. However, and this is the crucial part, subsection (2) imposes limits under which an application can be made. A disqualified driver therefore does not have right to apply at any time, and the court does not have right to entertain any such application unless it falls within those limits set by law. What are those limits?

The limit set under paragraph 31(2)(a) and which is the relevant part here is that, a person can only be qualified to apply under section 31(1) if at least two years of his disqualification period had expired, and provided his order for disqualification was less than four years. So if a person has been disqualified for say three years, the minimum period of two years must have expired before he can apply under section 31. But what if his disqualification period is 18 months? The same rule applies. He must have had two years before he can apply. It follows a person disqualified for anything less than two years cannot apply for removal of his disqualification (see Wilkinson's Road Traffic offences Eight Edition page 646). There is no discretion involved. If the accused disagrees his only recourse is by way of appeal to this Court.'

[59.18] Co - defendants

In *Adifaka v Director of Public Prosecutions* [1984] SILR 44 White ACJ stated at page 50:

> '[N]ot all disparities in sentence result in reductions and that it was necessary to show that the disparity was such as to justify "a real and genuine grievance." The principles are stated by the Court of Appeal in Magu v R [1980/81] SILR 40, 42.
>
> […]
>
> Bearing in mind the salutary provisions of S. 21 of the Penal Code, making all persons who take part in offences as there stated guilty of the offence committed, it is necessary to examine "the relevant considerations affecting the individual appellant", *the general rule being that where two or more offenders are concerned in the same offence a proper relationship should be established between the sentences passed on each offender* […].' (emphasis added)

In *Magu v R* [1980 – 81] SILR 40 Spreight JA, on behalf of the Court of Appeal, held at page 42:

> 'The principles relating to disparity are well known. Where one prisoner has received a sentence which is disproportionately low, that is no ground for reducing a proper sentence on another. *But where it is shown that the sentence under review is very heavy and out of proportion to the majority of punishments for comparable offences it is the duty of the Court to ensure that there is a degree of consistency*. In comparable cases the level of punishment to be meted out should not ebb or flow in a marked way otherwise there will be room for prisoners who have been heavily and disproportionately sentenced to have a legitimate grievance and this encourages resentment and lack of confidence in the judicial system among the public at large.' (emphasis added)

For the disparity to be '*objectionable*' it *must* be shown that one of the two or more defendants received a more severe sentence than the other and that the difference is not justified by any relevant distinction in their culpability or personal circumstances, see *R v Alulu & others* (Unrep. Criminal Review Case No. 147 of 1991; Muria ACJ).

In *R v Coffey* (1982) 74 CrAppR 168 Lawton LJ, delivering the judgment of the Court, stated at pages 170 – 171:

> 'There was an unreasonable disparity between the two men. The problem arises whether it is the kind of disparity which should be considered by this Court. There are two ways of looking at disparity. One is to ask the question: "What would right – thinking members of the public think about this particular case? Would they take the view that something had gone wring with the administration of justice?" The other is to ask the question: "Will this man have to service his sentence suffering from a justifiable sense of grievance?"

See also: *R v Robert Mani* (Unrep. Criminal Case No. 29 of 1997; Palmer J; at page 3) & *R v Coe* (1969) 53 CrAppR 66; [1969] 1 AllER 65; [1968] 1 WLR 1950.

Therefore, if '*mitigating factors*' which only apply to one defendant result in a reduced sentence, the co - defendant/s should *not* be given that same benefit, see *Attorney General's References Nos. 62, 63 & 64 of 1995; R v O'Halloran & others* [1996] 2 CrAppR(S) 233 & *Attorney General's Reference No. 73 of 1999; R v Charles* [2000] 2 CrAppR(S) 210.

In considering whether there is '*objectionable*' disparity the question to be asked is "Would right – thinking members of the public, with full knowledge of the relevant facts and circumstances, learning of the sentence consider that something had gone wrong with the administration of justice?", see *R v Fawcett* (1983) 5 CrAppR(S) 158.

It is immaterial that proceedings have *not* been instituted against all defendants.

In *Jack Igi & others v R* (Unrep. Criminal Appeal Case No. 47 of 1996) Palmer J held at pages 3 – 4:

> The fact that there may have been hundreds others who have never been arrested and charged does not alter the fact that that these Appellants had taken part in a grave criminal offence. Lord Justice Sachs in R v Caird [(1970) 54 CrAppR 499] describes this ground as the "Why pick on me?" argument. He states:
>
> "It has been suggested that there is something wrong in giving an appropriate sentence to one convicted of an offence because there are considerable numbers of others who were at the same time committing the same offence, some of whom indeed, if identified and arrested and established as having taken a more serious part, could have received heavier sentences. This is a plea which is almost invariably put forward where the offence is one of those classed as disturbances of the public peace – such as riots, unlawful assemblies and affrays. It indicates a failure to appreciate that on these confused and tumultuous occasions each individual who takes an active part by deed or encouragement is guilty of a really grave offence by being one of the number engaged in a crime against the peace. It is, moreover, impracticable for a small number of police sought to be overwhelmed by a crowd to make a large number of arrests. It is indeed all the more difficult when, as in the present case, any attempt at arrest is followed by violent efforts of surrounding rioters to rescue the person being arrested.
>
> … If this plea were acceded to, it would reinforce that feeling which may undoubtedly exist that if an offender is but one of a number he is unlikely to be picked on, and even if he is so picked upon, can escape proper punishment because others were not arrested at the same time. Those who choose to take part in such unlawful occasions must do so at their own peril."'

As regards '*Wilful Damage by Rioters*', see *Solomon Keto & 6 others v R* (Unrep. Criminal Appeal Case No. 9 of 1982; Daly CJ).

See also: *R v Robert Mani* (Unrep. Criminal Appeal Case No. 29 of 1997; Palmer J; at page 3); *R v Tremarco* (1979) 1 CrAppR(S) 286 & *R v Strutt* (1993) 14 CrAppR(S) 56.

[59.19] Conspiracy

In *Verrier v Director of Public Prosecutions* (1966) 50 CrAppR 315 [[1966] 3 WLR 924; [1967] AC 195; [1966] 3 AllER 586] Lord Pearson stated at page 326:

> 'Normally it is not right to pass a higher sentence for conspiracy than could be passed for the substantive offence: it can be justified only in very exceptional cases.'

See also: *R v Smith* (1988) 87 CrAppR 393.

[59.20] Attempts To Commit Offences

Section 379 of the *Penal Code* (Ch. 26) states:

> 'Any person who attempts to commit a felony or misdemeanour is guilty of an offence, which, unless otherwise stated, is a misdemeanour.'

Section 380 of the *Penal Code* (Ch. 26) states:

> 'Any person who attempts to commit a felony of such a kind that a person convicted of it is liable to the punishment of imprisonment for a term of fourteen years or upwards, with or without other punishment, is guilty of a felony, and shall be liable, if no other punishment is provided, to imprisonment for seven years.'

In *Koraua & Kaitira v R* [1988 – 89] SILR 4 the Court of Appeal commented at pages 5 – 6:

> 'Generally speaking, an attempt is to be punished with a lesser sentence than that for the completed offence, but there may be some circumstances in which an attempt will be more severely punished than a complete offence.'

[59.21] Juveniles

There is *no* power to impose any other punishment under section 16 of the *Juvenile Offenders Act* (Ch. 14), other than that is what prescribed, see *Wallace Campbell v R* [1988 – 89] SILR 137 at page 138.

Section 16 states:

> 'Where a child or young person charged with any offence is tried by any court, and the court is satisfied of his guilt the court shall take into consideration the manner in which, under the provisions of this or any other Act or law enabling the court to deal with the case, the case should be dealt with, and, subject to such provisions, may deal with the case in any of the following manners or combination thereof, namely –
>
> (a) by dismissing the case; or
>
> (b) by discharging the offender on his entering into a recognizance, with or without sureties; or
>
> (c) by dealing with the offender under the provisions of the Probation of Offenders Act; or
>
> (d) by committing the offender to the care of a relative or other fit person; or
>
> (e) by ordering the offender to pay a fine, damages or costs; or
>
> (f) by ordering the parent or guardian of the offender to pay a fine, damages or costs; or
>
> (g) by ordering the parent or guardian of the offender to give security for his good behaviour; or
>
> (h) by directing that he be released on his entering into a bond to appear and receive sentence when called upon; or

(i) by committing the offender to custody in a place of detention; or

(j) where the offender is a young person, by sentencing him to imprisonment; or

(k) by dealing with the case in any other manner in which it may be legally dealt with:

Provided that nothing in this section shall be construed as authorising the court to deal with any case in any manner in which it could not deal with the case apart from this section.'

Section 12 of the *Juvenile Offenders Act* (Ch. 14) states:

'(1) No child shall be sentenced to imprisonment or be committed to prison in default of payment of a fine, damages or costs.

(2) No young person shall be sentenced to imprisonment if he can be suitably dealt with in any other way specified in section 16.

(3) A young person sentenced to imprisonment shall not, so far as is practicable, be allowed to associate with prisoners not being children or young persons.'

See: *R v Paul Rakaimua* (Unrep. Criminal Case No. 24 of 1995; Muria CJ; at pages 3 - 4) & *B & another v R* [1982] SILR 38.

The term '*Child*' '*means* a person who is, in the opinion of the court having cognisance of any case in relation to such person, under the age of fourteen years', see section 2 of that Act. (emphasis added)

The term '*Young Person*' '*means* a person who is, in the opinion of the court having cognisance of any case in relation to such person, fourteen years of age or upwards and under the age of eighteen years', see section 2 of that Act. (emphasis added)

See also: section 29 of the *Magistrates' Courts Act* (Ch. 20) ['*Committal of persons under the age of 16 to care of fit person*'] and sections 36 ['*Committal of offenders under the age of 16 to care of fit persons; binding over parent or guardian to exercise proper care*'], 37 ['*Interpretation of "care, protection or control" and "fit person"*'] & 38 ['*Payment of fine or compensation by parent or guardian of offender under 16 years of age*'] of the *Penal Code* (Ch. 26).

'In all cases where a juvenile appears before the court without his parent or guardian present, the court should ask the police whether they have complied with section 10(2). If they have not but the parents or guardians could be found the reasons for their failure should be noted in the record, the case adjourned and a summons issued for their attendance. At the adjourned hearing, if the parents still fail to appear, the court must hear evidence that they were served and, if so, can proceed in their absence. A warrant should then be issued for their failure to attend and this will provide an opportunity to examine them if they are to pay a fine', see *R v Sasae* (Unrep. Criminal Review Case No. 87 of 1979).

Section 10(2) of the *Juvenile Offenders Act* (Ch. 14) states:

'Where a child or young person is arrested, the police officer by whom he is arrested or the officer in charge of the police station to which he is brought shall, if the parent or guardian lives within a reasonable distance and can be found, cause him to be warned to attend at the court before which the child or young person will be brought.'

Juveniles who are from respected families should be sentenced to perform community service like any other juveniles. The fact that it may be demeaning to such families is immaterial, see *Wallace Campbell v R* (*supra*).

As regards the unavailability of a '*detention centre*', see *B & another v R* (*supra*) & *Belama v Director of Public Prosecutions* [1984] SILR 37.

As regards '*comparative sentencing*', refer to:

- *Wallace Campbell v R* (*supra*) [Simple Larceny];
- *R v Paul Rakaimua* (*supra*) [Manslaughter];
- *B & another v R* (*supra*) [Break & Enter];
- *Belama v Director of Public Prosecutions* (*supra*) [Larceny in Dwelling House];
- *R v Kelly Dennie, Kenazo Maeka & Teddy Weba (Waiba)* (Unrep. Criminal Appeal Case No. 12 of 1998; Kabui J) [Burglary];
- *Wilikai v R* [1980 – 81] SILR 81 [Driving Whilst Disqualified];
- *John Lui v R* (Unrep. Criminal Appeal Case No. 7 of 1979; Davis CJ) [Unlawful Wounding];
- *R v Stephen Ariki* (Unrep. Criminal Case No. 23 of 1990; Ward CJ) [Rape]; &
- *R v Sanga* (Unrep. Criminal Case No. 67 of 1985; Wood CJ) [Manslaughter].

[59.22] Aggravating Factors

[59.22.1] Introduction

Courts *must* consider '*mitigating factors*' of *equal importance* to '*aggravating factors*', see *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J; at page 3).

Whilst the Court should advise the defendant that the '*mitigating factors*' will result in a reduced sentence [see *R v Aroride* [1999] 2 CrAppR(S) 406 & *R v Fearon* [1996] 2 CrAppR(S) 25], it should also advise the defendant that the '*aggravating factors*' will result in a more severe sentence than would otherwise be imposed.

'*Aggravating factors*' *include*:

[i] the seriousness of the offence generally;

[ii] the modus operandi in committing the offence;

[iii] the use of weapons;

[iv] the defendant's level of culpability;

[v] a breach of trust;

[vi] previous convictions;

[vii] repeated commission of offences;

[viii] period of which offences are committed;

[ix] whether the offence was committed in the night – time; and

[x] consumption of alcohol.

[59.22.2] Seriousness Of The Offence Generally

Whilst prima facie the '*seriousness of offences*' is reflected by what the law imposes as the maximum punishment, see for example, *Susan Tamara v R* (Unrep. Criminal Case No. 15 of 1995; Muria CJ) & *Hola, Tome & Lai v R* (Unrep. Criminal Case No. 15 of 1992; Muria ACJ), the other applicable '*aggravating factors*' and any '*mitigating factors*' will assist the court in determining the degree of seriousness for the offence in question.

The law relating to '*Mitigating Factors*' is examined commencing on page **970**.

In that case a '*mandatory*' fixed penalty may be prescribed, see *Gerea & others v Director of Public Prosecutions* [1984] SILR 161.

In *Paroke & Kuper v R* (Unrep. Criminal Case No. 21 of 1992) Muria ACJ stated at page 2:

> 'In cases of serious crimes, and housebreaking is such a crime, the courts must reflect the seriousness of crimes in the sentences they pass even upon a young first offender.'

The '*value of property*' involved in the commission of offences reflects the '*seriousness*' of such offences, see *R v Rex Topilu* (Unrep. Criminal Case No. 35 of 1995; Palmer J).

The 'extent and nature of injuries suffered by complainants as a consequence of the commission of such offences reflects the 'seriousness' of such offences, see *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996; Palmer J) & *Dickson Kwaifanabo & Sale Kwatebeo v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 16 of 1984; Ward CJ).

[59.22.3] Modus Operandi

The '*modus operandi*' in committing an offence may be an '*aggravating factor*' in appropriate circumstances.

In *R v John Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993) Palmer J stated:

> '[T]he manner in which the offences were committed *involved forethought, planning and trickery*. The Accused were prepared to use their skills, knowledge and understanding, pooled together to commit those offences. They were prepared to bid their time, even waiting for up to two or three weeks to carry out their criminal actions. The time element therefore is material, and the usual argument of a spur of the moment act would not assist most of the Accuseds here.
>
> [T]he offences were committed by a group of people, pooling their resources, skills and knowledge together. Whereas if it had been an individual or a smaller group involved, then the others may not have had the courage to commit those offences. In a group however, each obtained support and comfort and committed those offences.' (emphasis added)

In *Dence Jim, Reggie Gordon & Talet Timothy v R* (Unrep. Criminal Case No. 18 of 1988) Ward CJ stated at page 2:

> 'I say immediately that the learned magistrate was right to take the view that any attack by more than one on a single victim merits immediate imprisonment.'

See also: *Joel Likilua & Allen Kokolobu v R* [1988 – 89] SILR 148; *Koraua & Kaitira v R* [1988 – 89] SILR 4; *Stanley Bade v R* [1988 – 89] SILR 121 at page 125; *R v Kaimanisi* [1985 – 86] SILR 260; *R v Rex Topilu* (Unrep. Criminal Case No. 35 of 1995; Palmer J); *David Ironimo v R* (Unrep. Criminal Appeal Case No. 6 of 1996; Muria CJ); *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996; Palmer J) & *Dickson Kwaifanabo & Sale Kwatebo v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 16 of 1984; Ward CJ).

[59.22.4] Use Of Weapons

In *Kingi Pepe v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 4 of 1987) Ward CJ commented at pages 2 – 3:

> 'The courts have repeated with almost monotonous regularity that people who carry knives are likely, under provocation, to use them. The only way to avoid that risk is to cease to carry a knife. Anyone who carries one for no good reason must be assumed to realise and accept that risk. Equally commonplace are the courts' warnings on the dangers of excessive drinking especially when the drunken man has a weapon. Anyone who fails to heed these warnings must face the consequences.'

Courts is Solomon Islands *always* consider imprisonment when a weapon is used, see *Saukoroa v R* [1983] SILR 275 at page 277 (Court of Appeal) & *Michael Buruka v R* (Unrep. Criminal Appeal Case No. 31 of 1991; Muria J; at page 4).

In *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994) Williams JA, sitting as the Court of Appeal, commented at page 3:

> 'Whilst intoxication is not a mitigating factor, in cases where the act was the direct result of the intoxication is not accompanied by element of deliberation which makes the use of a weapon more serious.'

In *Dence Jim, Reggie Gordon & Talet Timothy v R* (Unrep. Criminal Case No. 18 of 1988) Ward CJ stated at page 2:

> 'I say immediately that the learned magistrate was right to take the view that any attack by more than one on a single victim merits immediate imprisonment. Similarly an attack with a weapon on an unarmed man whether singly or in concert demands a sentence of imprisonment.'

See also: *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997; Lungole – Awich J); *R v Kaimanisi* [1985 – 86] SILR 260; *Maona v R* (Unrep. Criminal Appeal Case No. 8 of 1982; Daly CJ; at page 2) & *R v Durbarree* (1968) 52 CrAppR 238.

[59.22.5] Level Of Culpability

'*Leadership*' in a group responsible for the commission of offences may be considered as an '*aggravating factor*', see *Jimmy Robin Kelly & others v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 1 of 1991; Court of Appeal; at page 5); *Jack Igi & others v R* (Unrep. Criminal Appeal Case No. 47 of 1996; Palmer J); *Joel Likilua & Allen Kokolobu v R* (Unrep. Criminal Case No. 18 of 1989; Ward CJ); *R v Kelly Dennie, Kenazo Maeko & Teddy Weba (Waiba)* (Unrep. Criminal Appeal Case No. 12 of 1998; Kabui J; at page 6) & *R v Belton & Petrow* [1997] 1 CrAppR(S) 215.

[59.22.6] Breach Of Trust

In *Edward Fiuadi v R* [1988 – 89] SILR 150 Ward CJ commented at page 152:

> 'Any offence of dishonesty is serious but, when it is committed by a person in a position of trust in breach of the trust placed in him, it is more serious.
>
> […]
>
> *It must be clearly understood that, in any offence where a breach of trust is involved, a sentence of imprisonment will always be appropriate*.' (emphasis added)

See also: *William Tebounapa v R* (Unrep. Criminal Appeal Case No. 2 of 1999; Court of Appeal) [Rape – customary healer]; *R v Rex Topilu* (Unrep. Criminal Case No. 35 of 1995; Palmer J; at page 1); *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J) [Rape]; *R v Christopher Saungao* (Unrep. Criminal Case No. 30 of 1995; Lungole – Awich J) [employee in the public service]; *R v Naphtali Mule* (Unrep. Criminal Case No. 34 of 1991; Muria J) [Defilement of a girl under 13 years of age]; *Patterson Runikera v Director of Public Prosecutions* (Unrep. Criminal Case No. 14 of 1987; Ward CJ) [Forgery & related offences]; *R v Litani* (Unrep. Criminal Case No. 45 of 1987; Ward CJ) [employee in the public service]; *Rojumana v R* [1990] SILR 132; *R v Farobo* (Unrep. Criminal Case No. 19 of 1986; Ward CJ); *Director of Public Prosecutions v Jones* (Unrep. Criminal Appeal Case No. 37 of 1990; Ward CJ) & *R v Ofai & five others* (Unrep. Criminal Case No. 11 of 1990; Ward CJ).

[59.22.7] Previous Convictions

In *R v Henry Su'Umania* (Unrep. Criminal Case No. 2 of 1987) Ward CJ stated at page 2:

> '*When sentencing persistent offenders the court must make protection of the public the principal consideration in determining the length of sentence.*
>
> *It is well settled, however, that even in such cases the sentence must be still be appropriate to the offence and the court must be careful not to sentence the accused for his previous convictions* as was explained by Spreight JA in Koboa v R (1980/81) SILR 43 at 46. Thus, whilst previous good character may reduce a sentence, previous bad character cannot increase it beyond the proper term but the court can and should consider previous convictions in assessing the character of the man before it and the likelihood of his changing his ways.' (emphasis added)

In *Kaboa v R* (*supra*) the Court of Appeal held per Spreight JA at page 46:

> 'Some mention need also be made of the reliance placed on the appellant's previous conviction. The proper scope for such consideration was discussed by this Court in Peter Rimae v Reginam, Criminal Appeal No. 62 of 1974, Judgment of the Court delivered by Gould P. on 17th March 1975. Reference was made to Betteridge 1943 28 CrAppR 171 and to Casey 1931 NZGLR 289 – *the Court should be careful to see that a sentence of a prisoner previously convicted is not increased beyond what would be appropriate to the facts merely because of previous convictions. Previous convictions are relevant to establish a prisoner's character*.' (emphasis added)

A Court *may* disregard '*previous convictions*' due to the length of time since such convictions, see *R v John Foreman Sukina* (Unrep. Criminal Case No. 31 of 1995; Lungole – Awich J; at page 2).

A Court *may* consider the court records of previous cases involving a defendant when deciding the appropriate sentence to impose, see *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J; at page 1).

'*Magistrates must record whether there are previous convictions or not.* If none was available, at the hearing, then an adjournment should be made and the prosecutor required to produce them. The issue of previous convictions is important when passing sentence and also when considering the question of disqualification under section 28 of the Traffic Act', see *R v Maeli Rinau* (Unrep. Criminal Review Case No. 18 of 1996; Palmer J; at page 3). (emphasis added)

As to the need to prove previous convictions, see *R v Finney* (1924) 18 CrAppR 41.

The law relating to '*Proving Previous Convictions*' is examined on page **305**.

Previous convictions in another country may be considered, see *R v Ford* (1921) 15 CrAppR 176.

See also: *Ngina v R* [1987] SILR 35 at page 40; *Luke Misitana v R* (Unrep. Criminal Appeal Case No. 7 of 1996; Muria ACJ; at page 5) & *R v Brown* (1915) 11 CrAppR 90 at page 91.

[59.22.8] Repeated Commission Of Offences

The '*repeated commission of offences*' may be considered as an '*aggravating factor*', in appropriate circumstances, see *R v Rex Topilu* (Unrep. Criminal Case No. 35 of 1995); *R v Joseph Atkin* (Unrep. Criminal Case No. 18 of 1994; Palmer J) & *R v Ofai & five others* (Unrep. Criminal Case No. 11 of 1990; Ward CJ).

[59.22.9] Period Over Which Offences Are Committed

The '*period over which offences are committed*' may be considered as an '*aggravating factor*', in appropriate circumstances, see *R v Rex Topilu* (Unrep. Criminal Case No. 35 of 1995); *R v Joseph Atkin* (Unrep. Criminal Case No. 18 of 1994; Palmer J) & *R v Farobo* (Unrep. Criminal Case No. 19 of 1986; Ward CJ).

[59.22.10] Night - time

The commission of an offence at '*night*' can be considered as an '*aggravating factor*', see *David Ironimo v R* (Unrep. Criminal Appeal Case No. 6 of 1996; Muria CJ; at page 2) & *R v Henry Su'Umania* (Unrep. Criminal Case No. 2 of 1987; Ward CJ; at page 2).

[59.22.11] Consumption Of Alcohol

The consumption of alcohol is *not* a mitigating factor, see *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994; Court of Appeal; at page 3) & *R v Patua, Kukiti, Ngelea & Manegaua* (Unrep. Criminal Case No. 6 of 1989; Ward CJ).

[59.23] Mitigating Factors

[59.23.1] Introduction

In *Morris Bock v R* (Unrep. Criminal Case No. 17 of 1993) Palmer J stated at page 3:

> 'When passing sentence, the *mitigating factors* need to be assessed properly.' (emphasis added)

The Court should advise the defendant that the '*mitigating factors*' will result in a reduced sentence, see *R v Aroride* [1999] 2 CrAppR(S) 406 & *R v Fearon* [1996] 2 CrAppR(S) 25.

A Court should take into consideration '*mitigating factors*' even though the maximum sentence for the offence in question may be considered too low, see *R v Carroll* (1995) 16 CrAppR(S) 488.

In *R v Jack Faununu* (Unrep. Criminal Case No. 10 of 1997) Lungole – Awich J commented at pages 8 – 9:

> 'I need not say much about calling accused to testify in mitigation. In fact any witness may be called, but it is not for the court to insist, it is up to accused to testify or call witness if he insists on asking the court to consider in mitigation facts disputed by the prosecution. […]
>
> […]
>
> […] I must add, however, that the court does not compel accused to testify, but if accused insists on the court taking into account facts not agreed to by the prosecution, the accused has to testify or the court will not take the facts into consideration. He is free to abandon the facts.
>
> […] It is advisable that counsel for accused consults in advance with the prosecution about facts in mitigation that counsel intends presenting from the bar, especially those that are potentially contentious. If he meets with no opposition, he may well state them from the bar, upon advising court that the prosecution does not intend challenging the facts. If counsel meets with opposition, but accused insists on using the particular fact in mitigation, counsel may call accused to testify or advise accused to abandon the fact.'

'*Mitigating factors*' need to be taken into account before making the decision whether to impose a custodial sentence, see *R v Francis Hori* (Unrep. Criminal Review Case No. 118 of 1993; Palmer J) & *R v Robert Mani* (Unrep. Criminal Appeal Case No. 29 of 1997; Palmer J; at page 3).

'*Mitigating factors*' may include:

[i] the entering of a plea of guilty;

[ii] good character generally;

[iii] no / limited previous convictions;

[iv] co – operation with police;

[v] family circumstances;

[vi] youthfulness;

[vii] genuine remorse;

[viii] delay;

[ix] good work record;

[x] payment of compensation;

[xi] acting as an informer;

[xii] level of culpability;

[xiii] health of defendant;

[xiv] period in custody prior to sentencing;

[xv] motive; and

[xvi] risk of repetition.

[59.23.2] Plea Of Guilty

The fact that a defendant may plead '*not guilty*' can *not* be taken into account when he/she is sentenced, see *R v John Bare Maetia* (Unrep. Criminal Case 32 of 1992; Muria CJ; at page 1).

In *R v Jang Rang & Lim Kuen Chik, Lim Loi Fatt, Lim Kuen Pao, Lim Kuen Seng, Hung Nang Shiong, Cheng Swee Ming* (Unrep. Criminal Case Nos. 11 & 12 of 1995) Palmer J stated at page 2:

> 'I give credit for all guilty pleas. I accept that this has saved considerable court time but also expense on all side[s].'

In *Kingi Pepe v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 4 of 1987) Ward CJ commented at page 2:

> 'It is well established that, by a plea of guilty, an accused man saves a trial and demonstrates as plainly as anything could, his remorse and regret for what he has done. *He is entitled to expect a lesser sentence than would otherwise be merited by the facts but there is no precise figure of reduction that can or should be considered to bind the court.* In the usual case where a reduction is made, the amount is entirely in the court's discretion and a court must be free to feel that, in exceptional cases despite a plea of guilty, no reduction should be given.' (emphasis added)

A plea of 'guilty' 'demonstrates very clearly in my view a person who is not only remorseful, and is sorry for all his actions, but is courageous enough to fact up to his own actions and the consequences that normally flow from it', as commented by Palmer J in *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993).

'A guilty plea […] is a powerful mitigating factor and should tell in favour of the accused', as commented by Muria CJ in *Misitana v R* (Unrep. Criminal Appeal Case No. 7 of 1996).

The entering of a plea of guilty obviously results in there being no need to call witnesses, if there is no dispute as to the essential facts of the particular case. That is of particular importance in cases involving offences which were particularly stressful to complainants and / or witnesses.

In *R v Ligiau & Dori* [1985 – 86] SILR 214 Ward CJ commented at page 216:

> 'In such cases as this, a plea of guilty will reduce the sentence considerably. It has long been accepted that, by so doing, the accused not only shows remorse and contrition but saves the victim having to go in the witness box and relive such a frightening experience. With such young victims, that is especially important. I also accept you have maintained those admissions despite the realisation that, after a period of more than a year, such children may well have found difficulty in giving an accurate account of such an incident. *As a result I make particular allowance of your plea of guilty.*' (emphasis added)

See also: *Saukoroa v R* [1983] SILR 275 at page 278; *Berekame v Director of Public Prosecutions* [1985 – 86] SILR 272 & *R v Don Rector Nonga* (Unrep. Criminal Appeal Case No. 32 of 1996; Muria CJ).

The law relating to a '*Dispute As To The Facts In The Sentencing Process*' is examined commencing on page **927**.

[59.23.3] Good Character Generally

The age of a defendant is an important consideration in determining for what period of time a defendant has been of '*good character*', see *R v Naphtali Mule* (Unrep. Criminal Case No. 34 of 1991; Muria J; at page 2); *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996; Palmer J; at page 18) & *Berekame v Director of Public Prosecutions* [1985 – 86] SILR 272.

[59.23.4] No Or Limited Previous Convictions

Credit *must* be given to first offenders, see *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J).

'Courts should be hesitant to send first offenders to prison, but that does not mean that if aggravating facts are bad a first offender should still not be sent to prison', as commented by Lungole – Awich J in *R v Christopher Saungao* (Unrep. Criminal Case No. 30 of 1995; at page 10).

Refer also to the law relating to '*Imprisonment*' which is examined commencing on page **934**.

See also: *Saukoroa v R* [1983] SILR 275 at page 278 (Court of Appeal) & *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994; Court of Appeal).

A Court *may* disregard previous convictions due to the length of time since such convictions, see *R v John Foreman Sukina* (Unrep. Criminal Case No. 31 of 1995; Lungole – Awich J; at page 2).

A Court *may* consider the court records of previous cases involving a defendant when deciding the appropriate sentence to impose, see *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J; at page 1).

'*Magistrates must record whether there are previous convictions or not.* If none was available, at the hearing, then an adjournment should be made and the prosecutor required to produce them. The issue of previous convictions is important when passing sentence and also when considering the question of disqualification under section 28 of the Traffic Act', see *R v Maeli Rinau* (Unrep. Criminal Review Case No. 18 of 1996; Palmer J at page 3). (emphasis added)

The law relating to '*Proving Previous Convictions*' is examined on page **305**.

[59.23.5] Co – operation With Police

The fact that a defendant co – operates with the police in the investigation of an offence is a '*mitigating factor*' because that co-operation will have invariably saved a great deal of time and resources for the RSIP, see for example *Adifaka v Director of Public Prosecutions* [1984] SILR 44 at page 50; *David Ironimo v R* (Unrep. Criminal Appeal Case No. 6 of 1996; Muria CJ) & *R v Rex Topilu* (Unrep. Criminal Case No. 35 of 1995; Palmer J; at page 3).

Refer also to the subsection which examines '*Informers*' commencing on pages **130** & **977**.

[59.23.6] Family Circumstances

In *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996) Palmer J stated at page 18:

> 'I do take note of the submissions by Mr. Kwaiga that hardships are bound to be experienced by other members of their families, their spouses for those married, and for their parents. While the court empathises with these natural human emotive feelings and considerations, there is little that this court can do. Those are matters which the accused should have taken into consideration, thought about, before embarking on their unlawful activities.'

In *Gegeo v R* (Unrep. Criminal Case No. 2 of 1991) Ward CJ held at page 1:

> 'I have pointed out many times that the responsibilities for his family and the effect a sentence will have on them is a matter for the man who decides to offend and not the courts. *It is only in the most exceptional case that the court can consider such matters*.' (emphasis added)

See also: *Saukoroa v R* [1983] SILR 275 at page 278 (Court of Appeal).

[59.23.7] Youthfulness

In *Bati v Director of Public Prosecutions* [1985 – 86] SILR 268 the Court of Appeal held that the following principle be applied when considering the age of an offender as a '*mitigating factor*' at page 270:

> '"Youth is one of the most effective mitigating factors. As has been shown the Court strongly favours the use of individualised measures for offenders under 21 […]. Where an offender of this group is sentenced to imprisonment, the sentence will normally be considerably shorter than would be awarded to a man of mature years for the same offence.
>
> […]
>
> Recognition of the mitigating effect of youth does not mean that long sentences are necessarily wrong when imposed on offenders below the age of 21" ['*Principles of Sentencing*'; DA Thomas; 2nd ed.].'

In *Paroke & Kuper v R* (Unrep. Criminal Case No. 21 of 1992) Muria ACJ held at pages 2 – 3:

> 'On the question of sentence, Mr Radclyffe submitted that the appellants are young first offenders and as such imprisonment sentence is inappropriate. I do not accept the suggestion that because an offender is young and a first offender, he should not be sent to prison. *In cases of serious crimes, and housebreaking is such a crime, the courts must reflect the seriousness of crimes in the sentences they pass even upon a young first offender*. I said in *R v Maritino Suilamo, Tome Akwasu'u and Molousafi* Criminal Case No. 3 of 1992 (Judgment given on 5 May 1992) that *the plea of youth is no longer satisfactory answer to serious crime*s.' (emphasis added)

However, a long prison sentence for a young person may result in such a person becoming so institutionalised that he/she may not fit into society again when released, see *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995; Palmer J).

See also: *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994; Court of Appeal; at page 3); *Jimmy Robin Kelly & others v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 1 of 1991; Court of Appeal; at page 5); *Hola, Tome & Lai v R* (Unrep. Criminal Case No. 15 of 1992; Muria ACJ; at page 2) & *Annette Qila v R* (Unrep. Criminal Case No. 19 of 1995; Palmer J).

[59.23.8] Genuine Remorse

Genuine remorse shown by a defendant is a '*mitigating factor*', see *Saukoroa v R* [1983] SILR 275 at page 278 (Court of Appeal) & *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994; Court of Appeal; at page 3). It would be expected that in such circumstances the defendant would also be pleading guilty to the charge/s.

[59.23.9] Delay

In *R v Fred Gwali & John Morrison* (Unrep. Criminal Case Nos. 21 of 1997 & 1 of 1998) Kabui J stated at page 3:

> '[A] long delay in prosecuting criminal cases may have the effect of reducing a custodial sentence imposed by the Court.'

In *Patterson Runikera v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 14 of 1987) Ward CJ commented at page 2:

> 'Delay generally affects the sentence in three way. It increases the anxiety of the accused man who has it "hanging over him" for that time. This will obviously only apply from the time of discovery of the offence – any delay before that is entirely in the hands of the offender. The second factor relates to the plea because any person must realise that, the greater the delay, the more chance the prosecution will be unable to prove their case. Thus, a plea of guilty entered with that knowledge becomes a strong mitigating factor. Finally, it gives the offender a chance, denied to many accused, of showing that he really does intend to reform and stop offending.'

A court *must* consider whatever the cause whether the delay was '*unreasonable*', see *R v Fakatonu* [1990] SILR 97 at page 100.

However, the actions of a defendant in causing such delay should also be taken into account, see *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995; Palmer J; at page 1).

See also: *R v Dalo* [1987] SILR 43 at page 44; *Richard Selwyn v R* (Unrep. Criminal Case No. 25 of 1991; Muria J) & *Berekame v Director of Public Prosecutions* [1985 – 86] SILR 272.

[59.23.10] Good Work Record

The '*good work record*' of a defendant *may* be taken into account as a '*mitigating factor*', in appropriate circumstances, see *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994; Court of Appeal; at page 3) & *Berekame v Director of Public Prosecutions* [1985 – 86] SILR 272.

[59.23.11] Payment Of Compensation

In *Michael Buruka v R* (Unrep. Criminal Appeal Case No. 31 of 1991) Muria J held at page 1:

> 'Custom is part of the law of Solomon Islands and payment of compensation has always been part of the custom of the people in Solomon Islands. As such *payment of compensation must be accepted in Solomon Islands as a relevant matter for consideration in mitigation of sentences in criminal cases.*' (emphasis added)

In *R v Asuana* [1990] SILR 201 Ward CJ held at page 202:

> 'It should always be remembered that compensation is an important means of restoring peace and harmony in the community. Thus the courts should always give some credit for such payment and encourage it in an appropriate case.
>
> Thus, any custom compensation *must* be considered by the court in assessing sentence as a mitigating factor but it is limited in its value. The court *must* avoid attaching such weight to it that it appears to be a means of subsequently buying yourself out of trouble.
>
> *The true value of such payments in terms of mitigation is that it may show genuine contrition and the scale of payment may give some indication of the degree of contrition*.' (emphasis added)

In *Patterson Runikera v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 14 of 1987) Ward CJ held at page 1:

> '[W]here there has been repayment of the sum involved in the offence, the court should be careful to give credit only in proper cases. Clearly, where repayment has occurred before police enquiries begin it is a very strong mitigating [factor] and even when it is only paid shortly before the court hearing. However, here as in this case, it is offered during mitigation on the basis that, with an adjournment, it will be paid, it should have very little effect on sentence. *The importance of repayment is that it shows genuine contrition and a real desire to repair the damage caused by the offence*. If the money is available and the wish to repay is based on these, it would be reasonable to expect it to be repaid before the trial. When, as here, it is offered on the basis of "If the court feels it would help ……" it should have very little effect on the sentence because it is effectively a conditional offer. Whenever an offer is made to repay, the court should give an opportunity to do so but it must be made clear that repayment at that stage may not affect the sentence.' (emphasis added) [word in brackets added]

In *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996) Palmer J stated at pages 17 – 18:

> 'Of significance is the fact that compensation had been paid by the accused's relatives to the victims and their people in custom. The significance of compensation in custom however should not be over – emphasised. It does have its part to play in the community where the parties reside, in particular it makes way or allows the accused to re – enter society without fear of reprisals from the victims relatives. Also it should curb any ill – feelings that any other members of their families might have against them or even between the two communities to which the parties come from. The payment of compensation or settlements in custom do not extinguish or obliterate the offence. They only go to mitigation. The accused still must be punished and expiate their crime. I do give credit however for this.'

Customary '*compensation*' can be taken into consideration in homicide cases, see *R v Sanga* (Unrep. Criminal Case No. 7 of 1985; Wood CJ).

See also: *Rojumana v R* [1990] SILR 132.

[59.23.12] Informers

Information that a defendant was an '*informer*' can be used to reduce the sentence of such a defendant.

The provision of such information is a reflection of the defendant's guilt and remorse, provided the information resulted in the prosecution of other offenders, see *R v Sinfield* (1981) 3 CrAppR(S) 258 & *R v Debbay & Izett* (1990 – 91) 12 CrAppR(S) 733.

The discount in sentence should be greater than that of a plea of guilty, see *R v Wood* [1997] 1 CrAppR(S) 347; [1996] CrimLR 916.

The factors to be taken into account include the quality, quantity and accuracy of the information, whether the defendant is willing to give evidence and the possibility of reprisals on his/her family, see *R v King* (1985) 7 CrAppR(S) 227.

Information that a defendant is an '*informer*' should be written down, *not* read and handed to the Court, see *R v Ealing Justices, Ex parte Weafer* (1982) 74 CrAppR 204 at page 206.

In *X* [1999] 2 CrAppR 125 Hughes J, delivering the judgment of the Court of Appeal, stated at pages 127 – 128:

> 'We consider that the proper principles to be followed in a case of this kind [where the prosecution provided information to the Court that a defendant is an 'informer'] are as follows:
>
> 1. It is convenient to remember that a document of this kind, although supplied by a police officer, is supplied at the request of the defendant.
>
> 2. Except to the extent that the defendant's contention that he has given assistance is supported by the police, it will not generally be likely that the sentencing judge will be able to make any adjustment in sentence. A defendant's unsupported assertion to that effect is not normally likely to be a reliable basis for mitigation.
>
> 3. It follows from that, that court must rely very heavily upon the greatest possible care being taken, in compiling such a document for the information of the judge. The judge will have to rely upon it, without investigation, if police enquiries are not to be damaged or compromised and other suspects, guilty or innocent, are not to be affected.
>
> […]
>
> 4. Except in very unusual circumstances, it will not be necessary, nor will it be desirable for a document of this kind to contain the kind of details which would attract a public interest immunity application. […]
>
> 5. If, very exceptionally, such a document does contain information attracting a public interest immunity consideration. [I]t will of course be a case in which the defence can and should be told of the public interest immunity application.

> 6. Absent any consideration of public interest immunity, which we take to be the general position, a document of this kind should be shown to counsel for the defence, who will no doubt discuss its contents with the defendant. That is not, we emphasise, because it will be necessary to debate its contents, but it is so that there should be no room for any unfounded suspicion that the judge has been told something potentially adverse to the defendant without his knowing about it.
>
> On general principles, a defendant is entitled to see documents put before the trial judge on which he is to be sentenced. Expeditions to the judge's chambers should not be necessary in these cases. There should never normally be any question of evidence being given, nor of an issue being tried upon the question of the extent of the information provided. […]
>
> 7. If the defendant wishes to disagree with the contents of such a document, it is not appropriate for there to be cross – examination of the policeman, whether in court or in chambers. The policeman is not a Crown witness, he has simply supplied material for the judge, at the request of the defendant. It would no doubt be possible, in an appropriate case, for a defendant to ask for an adjournment to allow any opportunity for further consideration to be given to the preparation of the document. Otherwise, if the defendant does not accept what the document says, his remedy is not to rely upon it.' (emphasis added)

See also: *R v Beckett* (1967) 51 CrAppR 180; *R v Lowe* (1978) 66 CrAppR 122; *R v King* (1986) 82 CrAppR 120 & *R v Sivan & others* (1988) 87 CrAppR 407.

The law relating to:

- '*Informers*' is examined commencing on page **130**; and
- '*Public Interest Immunity*' is examined commencing on page **132**.

[59.23.13] Level Of Culpability

When sentencing a number of defendants who have been convicted of committing the same offence, credit should be given to those who are less culpable, see *R v John Mark Tau & 16 others* (Unrep. Criminal Case No. 58 of 1993; Palmer J); *R v Robert Mani* (Unrep. Criminal Appeal Case No. 29 of 1997; Palmer J); *John Ini Lea v R* [1988 – 89] SILR 134 & *R v Belton & Petrow* [1997] 1 CrAppR(S) 215.

[59.23.14] Health Of The Defendant

A serious medical condition of a defendant is a matter of general mitigation, however, there is the need for clear medical evidence, see *Rojumana v R* [1990] SILR 132 & *R v Don Rector Nonga* (Unrep. Criminal Appeal Case No. 32 of 1996; Muria CJ).

[59.23.15] Period In Custody Prior To Sentencing

The '*period in custody awaiting trial*' may be taken into account in sentencing, see *R v Stephen Asipara* (Unrep. Criminal Case No. 25 of 1994; Palmer J); *R v Francis Kutuna* (Unrep. Criminal Case No. 61 of 1993; Palmer J); *R v Robert Mani* (Unrep. Criminal Appeal Case No. 29 of 1997; Palmer J); *R v Toska & Meke* (Unrep. Criminal Case No. 33 of 1986; Ward CJ; at page 6) & *R v Williams (Meirion)* (1989) 11 CrAppR(S) 152.

[59.23.16] Motive

The '*motive*' of a defendant for committing an offence may be considered as a '*mitigating factor*', in appropriate circumstances.

However, in *Annette Qila v R* (Unrep. Criminal Case No. 19 of 1995) Palmer J commented at page 2:

> 'Questions of motive must be treated with great care. It is possible that an offender may come up with a heart – breaking motive for the simple purpose of making a ploy for leniency. The courts therefore must continue to guard against such abuses and excuses, and continue to be vigilant, in detecting and separating the genuine from the false.'

[59.23.17] Risk Of Repetition

The unlikelihood of repetition of the offences is a '*mitigating factor*', see *Attorney – General's Reference No. 4 of 1989* (1990) 90 CrAppR 366 [[1990] 1 WLR 41] at page 370.

[59.24] Comparative Sentences

[59.24.1] Introduction

In *Joel Likilua & Allen Kokolobu v R* [1988 – 89] SILR 148 Ward CJ commented at page 149:

> '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.'

In *Sau v R* [1982] SILR 65 Daly CJ commented at page 69:

> 'I must add one further observation on the sentencing process and on appeals against sentence. There is an increasing practice of reference being made to specific previous cases in court. This was done by the learned magistrate in this case and the dissimilarities give counsel a ready – made ground for argument which they understandably take. Sentencing is not an exact mathematical process; if it were it could be done by a computer. The human element both in the person before the court and the sentencer remain a vital part of the process. *Previous sentences demonstrate principles or parameters of sentence; but they should not be used as binding precedents to reach a sentence in a particular case.* All the judiciary have access to each others sentences and we must rely upon the good sense and experience of the judiciary to reach sentences which reflect not only their own views but also the views of the community.' (emphasis added)

In *R v Ben Tugale, Brown Beu, Nelson Oma, James Sala, Loius Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997) Lungole – Awich J commented at page 21:

> '[P]unishment in one case usually cannot be matched exactly with punishment in another. Circumstances usually differ even if only in details. Public view about how serious an offence is regarded also changes. Prevalence or otherwise of an offence during particular period also counts.'

His Lordship also commented that it is not useful to compare punishments in cases from different jurisdictions.

See also: *David Ironimo v R* (Unrep. Criminal Case No. 3 of 1998; Kabui J; at page 3) & *Johnson Tariani v R* [1988 – 89] SILR 7, per Kapi JA at page 13.

However, the importance of '*comparative sentencing*' is that there should be less '*objectionable*' disparity in sentencing, provided the sentences imposed are within the range provided by the '*comparative sentences*'.

The law relating to '*Comparative Sentencing*' is examined commencing on page **979**.

[59.24.2] Offences Against Property

[A] Larceny Generally

In *R v Christopher Kobi* (Unrep. Criminal Case No. 6 of 1995) Palmer J stated that the guidelines as set out by Lord Lane CJ in *R v Barrick* (1985) 7 CrAppR(S) 142 are relevant in the sentencing of defendants convicted of '*Larceny By Servant*' in Solomon Islands which *included*:

[i] the quality and degree of trust reposed in the offender including his/her rank;

[ii] the period over which the fraud of the thefts have been perpetrated;

[iii] the use to which the money or property dishonestly taken was put;

[iv] the effect upon the victim;

[v] the impact of the offences on the public and public confidence;

[vi] the effect on fellow – employees or partners;

[vii] the effect on the defendant personally;

[viii] the defendant's own history; and

[ix] those matters of mitigation special to the defendant.

In *Edward Fiuadi v R* [1988 – 89] SILR 150 Ward CJ commented at page 152:

> 'It must be clearly understood that, in any offence where a breach of trust is involved, a sentence of imprisonment will always be appropriate.'

In *R v Litani* (Unrep. Criminal Case No. 45 of 1987; Ward CJ) stated at page 1:

> 'Employment frequently involves a considerable degree of trust being placed in the employee. The public, for whom civil servants work, are entitled to expect a high degree of integrity from their public service and, whenever a breach of trust occurs, the officer involved must expect a custodial sentence.'

For '*comparative sentences*', refer to:

- *R v Christopher Kobi* (*supra*) [Larceny By Servant];
- *Edward Fiuadi v R* (*supra*) [Larceny By Servant];
- *R v Fred Gwali & John Morrison* (Unrep. Criminal Case Nos. 21 of 1997 & 1 of 1998; Kabui J) [Postal Packets];
- *R v John Mark Tau & Others* (Unrep. Criminal Case No. 58 of 1993; Palmer J) [Postal Packets];
- *Richard Selwyn v R* (Unrep. Criminal Case No. 25 of 1991; Muria J) [Simple Larceny];
- *R v Ray Kepani* (Unrep. Criminal Case No. 138 of 2000; Palmer ACJ);
- *R v Sogevari Sione* (Unrep. Criminal Review Case No. 139 of 2000 consolidated with Criminal Review Cases Nos. 138 of 2000, 164 of 2000 & 35 of 2001) [numerous offences];
- *R v Christopher Saungao* (Unrep. Criminal Case No. 30 of 1995; Lungole – Awich J) [Larceny By Servant];
- *R v Rex Topilu* (Unrep. Criminal Appeal Case No. 35 of 1995; Palmer J) [numerous offences];
- *Ben Tioti v R* (Unrep. Criminal Appeal Case No. 26 of 1998; Palmer J) [Larceny By Servant];
- *Joy Folanto v R* (Unrep. Criminal Appeal Case No. 119 of 1990; Palmer J) [Larceny By Servant];
- *Geogeo v R* (Unrep. Criminal Case No. 2 of 1991; Ward CJ) [Larceny By Servant];
- *Belama v Director of Public Prosecutions* [1984] SILR 37 [Larceny In Dwelling – House];
- *David Kio v R* (Unrep. Criminal Appeal Case No. 11 of 1977; Davis CJ) [Simple Larceny];
- *Anna Langley v R* (Unrep. Criminal Appeal Case No. 17 of 1978; Davis CJ);
- *Goldie Pitakaka v R* (Unrep. Criminal Appeal Case No. 5 of 1982; Daly CJ) [Larceny By Servant] &
- *Grenville Sotokera v R* (Unrep. Criminal Appeal Case No. 4 of 1982; Daly CJ) [Larceny By Servant].

[B] Embezzlement

In *R v Muliolo Takoa* (Unrep. Criminal Case No. 115 of 1993) Muria CJ stated at page 2:

> 'The offence of Embezzlement is a serious offence as it can be seen from the maximum sentence of 14 years imprisonment for such an offence. It involves a breach of trust put upon the accused. The court is bound to take a serious view of such an offence.
>
> The court must make it absolutely clear that for an offence such an embezzlement which involves a breach of trust, a sentence of imprisonment will always be appropriate.'

For '*comparative sentences*', refer to:

- *R v Muliolo Takoa* (*supra*);
- *Rojumana v R* [1990] SILR 132;
- *Inito v R* [1983] SILR 177; &
- *R v Calvin Billy Farabo* (Unrep. Criminal Case No. 19 of 1986; Ward CJ).

[C] Break & Enter

In *Stanley Bade v R* [1988 – 89] SILR 121 Ward CJ stated at page 125:

> 'Burglary is an extremely serious offence. Anyone who breaks into a private house at night, however careful he may be to try and do it when the house is empty, runs the risk that there is someone inside. The effect on anyone who has been in a house when it is burgled can be extreme and may frequently have the same effect as an act of violence. Even where the house was unoccupied at the time of the burglary, the sense of violation felt by the owners when they return can have very long term effects. […]
>
> When sentencing offences of violence, a court will always consider the effect on the victim in deciding the appropriate sentence. In burglary also, that is an important consideration.
>
> For a normal burglary case, the only appropriate penalty must be an immediate custodial sentence. Where the burglary is not aggravated in any way, the starting point for an adult first offender should be two years imprisonment. From that point, this court should consider any aggravating factors such as committing the offence with the support of others, theft of personal items that can be little or no value to the thief, general ransacking of the house, wanton damage, pre – planning and the degree of breaking necessary to gain entry. If such matters are present they should add to the penalty. Where masks are used, weapons are carried, threats are made or similar excalations in the seriousness of the sentence are present, the penalty should be further increased and it would rarely be appropriate to pass a sentence of less than four years.'

In *Paroke & Kuper v R* (Unrep. Criminal Case No. 21 of 1992) Muria ACJ held at page 2:

> 'I do not accept the suggestion that because an offender is young and a first offender, he should not be sent to prison. In cases of serious crimes, and housebreaking is such a crime, the courts must reflect the seriousness of crimes in the sentences they pass even upon a young first offender.'

In *Hola, Tome & Lai v R* (Unrep. Criminal Case No. 15 of 1992) Muria ACJ stated at pages 1 – 2:

> '[T]here can be no doubt that housebreaking is a serious offence. This is reflective of the fact that the law puts the maximum punishment for such offence at 14 years imprisonment. As such it cannot be said that custodial sentence is wrong in principle in housebreaking cases. What the appellant must show is that there are special circumstances that call for leniency in the sentence imposed.
>
> […] *Custodial sentences may properly be imposed on young offenders in appropriate cases as a measure of deterrence to show disapproval by society of the conduct of the young offenders. The offence of house breaking legitimately falls into this category.*' (emphasis added)

The distress caused to householders should be taken into account, see *R v Luckhurst* (1972) 56 CrAppR 209.

See also: *Annette Qila v R* (Unrep. Criminal Case No. 19 of 1995; Palmer J) & *R v Smith & Woollard* (1978) 67 CrAppR 211.

SENTENCING

In *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996) Palmer J stated at pages 16 – 17:

> '[...] I am satisfied an immediate custodial sentence must be expected and imposed. The message must be made clear and plain that those who venture out at night, armed and break into people's homes and attack people in their homes must expect to be sent to prison. People are entitled to feel safe and secure in their homes (whether they have a fence around and good locks on their doors or not), and to have a good nights sleep and rest without being disturbed. It is plain common sense that a persons house is out of bounds to anyone whether in custom, the law or whatever religious beliefs that one might have. (In English law, an Englishman's home is known as his castle, a place of refuge and safety). It is the same here, and the courts have a duty to protect society from such persons with criminal minds. *The element of deterrence therefore must be borne in mind and applied so that at least persons who are minded to do such things can at least think twice or again before venturing out in such activities full well what they might face if brought to the courts.*
>
> I take note of the submission of learned Counsel for Prosecution in the circumstances of what he described as a trend developing in Honiara of people taking the liberty to break into people's homes, that the Courts must send out a clear and distinct sound to the Public on such matters. However, I do not need to repeat what in my view had been a consistent approach taken by this Court and the lower courts, on such matters. I am not aware that the lower courts may have been taking a less serious view of such offences. *Rather, it is my understanding that the courts have continued to apply a firm hand on such offences and if there is any indication that this may not be the case, then let it now be dispelled that the courts must and will continue to take a firm hand on such offences*.' (emphasis added)

In *R v Robert Mani* (Unrep. Criminal Appeal Case No. 29 of 1997) Palmer J held at page 2:

> 'The offence of "break and enter" contrary to section 293(a) [now section 299(a)] of the Penal Code, carries a maximum penalty of 14 years imprisonment. That without doubt is a serious offence, and *the courts have continually made clear that even first offenders convicted under such offence, must expect to go to prison*. Custodial sentences for first offenders (class in which this prisoner falls under) range from 9 months in some cases to 24 months. Bearing in mind the "criminal climate" of the times, and the statistical figures sought to be released by the Police on a regular basis, and the stance taken by those involved directly in dealing with such activities, the sentence imposed by the learned Chief Magistrate cannot by any standard be regarded as excessive [ie., 22 months].' (emphasis added) [words in brackets added]

See also: *Annette Qila v R* (Unrep. Criminal Case No. 19 of 1995; Palmer J).

For '*comparative sentences*', refer to:

- *Stanley Bade v R* (*supra*) [Dwelling - house];
- *R v Robert Mani* (*supra*) [Dwelling - house];
- *Paroke & Kuper v R* (*supra*) [Dwelling - house];
- *Hola, Tome & Lai v R* (*supra*) [Dwelling - house];
- *R v Sogevari Sione* (Unrep. Criminal Review Case No. 139 of 2000 consolidated with Criminal Review Cases Nos. 138 of 2000, 164 of 2000 & 35 of 2001; Kabui J) [Store];
- *R v Kelly Dennie, Kenazo Maeka & Teddy Weba (Waiba)* (Unrep. Criminal Appeal Case No. 12 of 1998; Kabui J) [Dwelling - house];
- *Luke Misitana v R* (Unrep. Criminal Appeal Case No. 7 of 1996; Muria CJ) [Church];

- *David Ironimo v R* (Unrep. Criminal Appeal Case No. 3 of 1998; Kabui J) [Store];
- *David Ironimo v R* (Unrep. Criminal Appeal Case No. 6 of 1996; Muria CJ) [Store];
- Untitled (Unrep. Criminal Case No. 710 of 1991; Muria J) [Store];
- *Joel Likilua & Allen Kokolobu v R* (Unrep. Criminal Case No. 18 of 1989; Ward CJ) [Warehouse];
- *Bati v Director of Public Prosecutions* [1985 – 86] SILR 268 [Store];
- *Annette Qila v R* (Unrep. Criminal Case No. 19 of 1995; Palmer J) [Dwelling – house];
- *R v Ben Deresa* (Unrep. Criminal Case No. 26 of 1989; Ward CJ) [Dwelling - house];
- *R v Carlos Galofia* (Unrep. Criminal Review Case No. 1293 of 1991; Muria J). [Dwelling - house];
- *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995; Palmer J) [Dwelling - house];
- *R v Henry Su'Umania* (Unrep. Criminal Case No. 2 of 1987; Ward CJ) [numerous offences];
- *William Hebala Gena & Rolland Zorutu Beti v R* (Unrep. Criminal Appeal Case Nos. 12 & 13 of 1982; Daly CJ) [Store]; &
- *Ezekiel Sasafu v R* (Unrep. Criminal Appeal Case No. 11 of 1982; Commissioner Bowran).

[D] Arson

The offence of '*Arson*' can be an extremely serious offence if there was a potential risk to life. A reckless and careless form of '*Arson*' is less serious than if it was deliberate and planned, see *R v Mason* (1981) 3 CrAppR(S) 182.

For a '*comparative sentence*', refer to: *R v Ben Ofoania Mino* (Unrep. Criminal Case No. 4 of 1997; Palmer J).

[E] Wilful Damage

See: *R v Stacey & Wagman* (1968) 52 CrAppR 728

[F] False Pretences

For a '*comparative sentence*', refer to *Wilson Olofua v R* (Unrep. Criminal Appeal Case No. 21 of 1978; Davis CJ) & *John Inu Ela v R* [1988 – 89] SILR 134.

[G] Fraudulent Conversion

In *Director of Public Prosecutions v Jones* (Unrep. Criminal Appeal Case No. 37 of 1990) Ward CJ commented at page 3:

> 'In offences such as these ['*Fraudulent Conversion*'], the amount of money obtained is relevant in measuring the seriousness of the offence but the most important factor is the breach of trust. All employers who entrust their employees with control of money are entitled to expect a high standard of trust. The greater the responsibility of the position, the greater the betrayal of the trust when an offence is committed.' [words in brackets added]

In *R v John Foreman Sukina* (Unrep. Criminal Case No. 31 fo 1995) Lungole – Awich J commented at page 2:

> 'A person who deals dishonestly with public money must get the message of disapproval loud and clear, especially when he is a person in position of trust such as the accused is in. The custodial sentence would usually be substantial.'

For '*comparative sentences*', refer to:

- *R v John Foreman Sukina* (*supra*);
- *Suiga v R* (Unrep. Criminal Case No. 38 of 1990; Ward CJ);
- *R v Nelson Ta'au* (Unrep. Criminal Case No. 95 of 1993; Lungole – Awich J);
- *Director of Public Prosecutions v Jones* (Unrep. Criminal Appeal Case No. 37 of 1990; Ward CJ); &
- *R v Lonsdale Manese* (Unrep. Criminal Case No. 5 of 1982; Daly CJ).

[H] Forgery

In *Susan Tamana v R* (Unrep. Criminal Case No. 15 of 1995) Muria CJ stated at page 1:

> '[F]orgery is a serious offence and one that merits custodial sentence.'

For '*comparative sentences*', refer to:

- *Susan Tamana v R* (*supra*);
- *Rojumana v R* [1990] SILR 132;
- *Magu v R* [1980 – 81] SILR 40;
- *Patterson Runikera v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 14 of 1987; Ward CJ);
- *R v Ofai & five others* (Unrep. Criminal Case No. 11 of 1990; Ward CJ); &
- *R v Ray Kepani* (Unrep. Criminal Case No. 138 of 2000; Palmer ACJ).

[I] Receiving

In *R v Ofai & five others* (Unrep. Criminal Case No. 11 of 1990) Ward CJ commented at page 15:

> '[I]f it was not for the receivers, many crimes would not pay. It is the knowledge that stolen property can be sold to others that makes theft and similar offences pay.'

In *R v Webbe*, *The Times*, June 13, 2001, the Court of Appeal issued guidelines on sentencing those convicted of '*Receiving*'. Where the receiver had knowledge of the original offence, the seriousness of the offence is inevitably linked to the seriousness of that offence. That Court identified the following *specific* '*aggravating factors*' for this offence:

[i] the closeness of the receiver to the primary offence (geographical or temporal);

[ii] the particular seriousness of the primary offence;

[iii] the high value of property, including sentimental value;

[iv] the fact that the property were the proceeds of a domestic burglary;

[v] the level of sophistication in relation to the receiving;

[vi] the provision by the receiver as a regular outlet for stolen property;

[vii] the level of profit made or expected by the receiver;

[viii] any threats of violence or abuse of power other others by the receiver; and

[ix] the commission of an offence whilst on bail.

(See Archbold, *Criminal Pleading, Evidence and Practice*, 2002 ed; page 1871).

See also: *John Inu Ela v R* [1988 – 89] SILR 134.

[59.24.3] Offences Against The Person

[A] Introduction

When sentencing a defendant in respect of an '*Offence Against The Person*' involving violence, the following factors should be taken into account:

[i] the injuries suffered by the complainant / victim, see *Freezer Lausalo v R* (Unrep. Criminal Appeal No. 4 of 1994; Court of Appeal; at page 6);

[ii] whether the complainant / victim was defenceless, see *Freezer Lausalo v R* (Unrep. Criminal Appeal No. 4 of 1994; Court of Appeal; at page 6);

[iii] the motive for the commission of the offence, see *Freezer Lausalo v R* (Unrep. Criminal Appeal No. 4 of 1994; Court of Appeal; at page 6);

[iv] the type of weapon used.

The law relating to the '*Use Of Weapons*' is examined on page **939**; and

[v] whether the defendant was provoked, see *Holmes v Director of Public Prosecutions* (1946) 31 CrAppR 123; [1946] AC 588, per Lord Simon at pages 142 and 601 respectively.

In *Stanley Bade v R* [1988 – 89] SILR 121 Ward CJ commented at page 125:

> 'When sentencing offences of violence, a court will always consider the effect on the victim in deciding the appropriate sentence.'

The following '*Practice Note*' was issued by Davis CJ:

> '[T]he only information about the harm suffered by the victim in this case was the description of the wound given by the prosecutor in recounting the facts of the case. *In all cases of offences involving serious injury to the person (including defilement) a medical report, if available, should be produced to the court, even though the accused has pleaded guilty to the charge*. The prosecutor will usually have to refer to the medical report when describing the injury suffered in giving his account of the facts of the case to the court, and he should

> then hand in the report to the court for inclusion in the court record', see *John Lui v R* (Unrep. Criminal Appeal Case No. 7 of 1979). (emphasis added)

However, '[medical] reports should be properly signed and certified by the nurse or doctor making the report. A failure to do so, can result in a rejection of such report by the court', see *R v Monica Melody* (Unrep. Criminal Review Case No. 119 of 1993; Palmer J; at page 5).

'[P]ersons who deliberately attack police officers in the lawful execution of their duty *must* expect an immediate custodial sentence', as commented by Palmer J in *Michael Waraka & George Apuitau v R* (Unrep. Criminal Appeal Case No. 15 of 1997; at page 3). (emphasis added)

[B] Murder

Section 200 of the *Penal Code* (Ch. 26) states that a person found guilty of '*murder*' '*shall* be sentenced to imprisonment for life'. (emphasis added) That mandatory fixed penalty *must* be imposed, see *Gerea & others v Director of Public Prosecutions* [1984] SILR 161.

See also: *Daniel Samani v R* (Unrep. Criminal Appeal Case No. 2 of 1995; Court of Appeal).

[C] Attempted Murder

For '*comparative sentences*', refer to:

- *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996; Palmer J); &
- *Johnson Tariani v R* [1989 – 89] SILR 7.

[D] Manslaughter

In *R v Stephen Asipara* (Unrep. Criminal Case No. 25 of 1994) Palmer J commented at page 1:

> 'The maximum sentence of punishment that can be imposed on such a charge is [… a] sentence of life imprisonment. However, […], such sentences are normally reserved for the more serious cases of manslaughter.
>
> Any case of manslaughter nevertheless is serious, because it involves the loss of life. However, the Courts have consistently taken the approach of looking at the surrounding circumstances of each case and then deciding whether a severer or lesser sentence should be imposed.' [word in brackets added]

In *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994) Williams JA, delivering the judgment of the Court of Appeal, stated at page 2:

> 'In Solomon Islands, as is the case in comparable jurisdictions, most incidents of death resulting from negligent driving give rise to a charge of dangerous or culpable driving causing death. It is only the most serious of cases which call for a manslaughter charge and even then such a charge is frequently not proven.
>
> As a matter of principle when manslaughter is charged and proven a heavier penalty is called for than would be the case if only the lesser charge was established. But there would need to be proportionally between the level of sentence for each offence.

> Similarly there has to be proportionally between the sentence imposed for a motor manslaughter and the sentences imposed for manslaughter generally. Of course manslaughter covers a variety of situations and in consequence there are usually different ranges of sentencing options for the different types of manslaughter. What is important is that the principle of proportionality is recognised and the sentence is appropriate given the facts of the particular case.
>
> […]
>
> Both counsel referred this court to comparable sentences for manslaughter imposed recently in the High Court, but it was conceded that this was the first motor manslaughter to arise before the court. Manslaughter cases in the domestic situation where no weapon was used have consistently resulted in sentences of imprisonment in the range of 2 to 4 years. Where a weapon was used in one non – domestic situation a sentence of 6 years imprisonment has been imposed.'

As regards medical defects which may have resulted in the death of the victim as a consequence of the offence, see *R v Ruby* (1988) 86 CrAppR 186.

See also: *R v Mitchell* (1989) 89 CrAppR 169; [1989] RTR 186.

For '*comparative sentences*', refer to:

[1] Domestic

- *R v Stephen Asipara* (*supra*) [no weapon];
- *R v Patricia Melvin Kala* (Unrep. Criminal Case No. 17 of 1999; Lungole - Awich J) [weapon used];
- *R v Freda Fagarigia* (Unrep. Criminal Case No. 35 of 1990);
- *R v Gabriel Waiko & Martin Manehai* (Unrep. Criminal Case No. 19 of 1998; Kabui J) [weapon used];
- *R v Tuanitete* (Unrep. Criminal Case No. 29 of 1992; Muria CJ) [weapon used];
- *R v Maclean Lawrence* (Unrep. Criminal Case No. 98 of 1993; Palmer J) [no weapon];
- *R v Sipiriano Hanoroanimae* (Unrep. Criminal Case No. 8 of 1996; Muria CJ) [no weapon];
- *R v Stephen Asipara* (Unrep. Criminal Review Case No. 25 of 1994; Palmer J) [no weapon];
- *R v Peter Aunipuri* (Unrep. Criminal Case No. 25 of 1988; Ward CJ) [no weapon];
- *R v John Waiwai* (Unrep. Criminal Case No. 41 of 1994; Muria CJ); &
- *R v William Erieri* (Unrep. Criminal Case No. 3 of 1993; Palmer J) [no weapon].

[2] Non - Domestic

- *R v Pituvaka* (Unrep. Criminal Review Case No. 22 of 1996; Ward CJ) [weapon used];
- *R v Gabriel Oda* (Unrep. Criminal Review Case No. 66 of 1999);
- *R v Dickson Maeni* (Unrep. Criminal Case No. 117 of 1999; Lungole – Awich J) [weapon used];
- *R v Kwaimani* (Unrep. Criminal Case No. 3 of 1997; Palmer J) [no weapon];
- *R v John Teo'ohu* [1990] SILR 265. [weapon used];
- *R v Ben Tungale, Brown Beu, Nelson Oma, James Sala, Louis Lipa, Charles Meaio & John Teti* (Unrep. Criminal Case No. 12 of 1997; Lungole –Awich J) [weapon used];

- *R v Bandu Pude* (Unrep. Criminal Case No. 37 of 1994; Palmer J) [no weapon used];
- *R v Garuma* [1985 – 86] SILR 192 [non – domestic] [no weapon used];
- *R v Wisely Shem Tiuta* (Unrep. Criminal Case No. 1 of 1985; Wood CJ) [weapon used]; *&*
- *R v Taufe* (Unrep. Criminal Case No. 42 of 1987; Ward CJ) [no weapon].

As regards, '*Vehicular Manslaughter*', refer to:

[i] *Allan Campbell v R* (*supra*); and

[ii] the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[E] Infanticide

In *R v Salome Lamtoa Irobako* (Unrep. Criminal Case No. 24 of 1991) Muria ACJ commented at pages 4 – 6:

> '[S]ection 199 [now section 206] of the Penal Code is designed to give a more realistic legal protection to recently born infants and at the same time to admit a reduced degree of culpability on the part of the mother who has been charged with the killing of her child in the circumstances stated under that section. […]
>
> […]
>
> The offence of infanticide is a very serious offence. The seriousness of the offence lies in the fact that an innocent child has been deprived of the right to life and to reflect that seriousness, the law puts the maximum punishment for the offence to imprisonment for life.' [words in brackets added]

For '*comparative sentences*', refer to:

- *R v Salome Lamtoa Irobako* (*supra*);
- *R v Anna Katea* (Unrep. Criminal Case No. 35 of 1996; Lungole – Awich J); *&*
- *Edwin Tobe v Director of Public Prosecutions* (Unrep. Criminal Case No. 24 of 1987; Ward CJ).

[F] Grievous Harm

For '*comparative sentences*', refer to:

- *Freezer Lausalo v R* (Unrep. Criminal Appeal No. 4 of 1994; Court of Appeal);
- *Saukoroa v R* [1983] SILR 275;
- *Michael Waraka & George Apuitau v R* (Unrep. Criminal Appeal Case No. 15 of 1997; Palmer J);
- *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996; Palmer J);
- *R v Misiben* (Unrep. Criminal Review Case No. 15 of 1994; Palmer J);
- *R v Neemia Boberio* (Unrep. Criminal Review Case No. 24 of 1992);
- *R v Mosi Gasimata* (Unrep. Criminal Review Case No. 114 of 1993; Muria CJ); *&*
- *R v Charles Edward Gasa* (Unrep.Criminal Case No. 5 of 1989; Ward CJ).

[G] Bodily Harm

For a '*comparative sentence*', refer to *R v Fakatonu* (Unrep. Criminal Review Case No. 22 of 1989; Ward CJ).

[H] Unlawful Wounding

For '*comparative sentences*', refer to:

- *R v Nelson Funifaka & others* (Unrep. Criminal Case No. 33 of 1996; Palmer J);
- *Kingi Pepe v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 4 of 1987; Ward CJ);
- *John Lui v R* (Unrep. Criminal Appeal Case No. 7 of 1979; Davis CJ);
- *Dalo v R* [1987] SILR 43;
- *Director of Public Prosecutions v Simeon (No. 2)* [1985 – 86] SILR 147;
- *R v Asuana* [1990] SILR 201;
- *R v Donny Tinoika, Elliot Frank & Warren Bao* (Unrep. Criminal Case No. 46 of 1986; Ward CJ); &
- *Jazeriel Fauniala v R* (Unrep. Criminal Appeal Case No. 10 of 1982; Commissioner Crome).

[I] Common Assault

For '*comparative sentences*', refer to:

- *Frank Paro v R* (Unrep. Criminal Case No. 63 of 1993; Muria CJ);
- *Michael Buruka v R* (Unrep, Criminal Appeal Case No. 31 of 1991; Muria J);
- *Ben Tioti v R* (Unrep. Criminal Appeal Case No. 26 of 1998; Palmer J); &
- *John Formani & Jim Tema* (Unrep. Criminal Appeal Case Nos. 14 & 17 of 1982; Daly CJ).

[J] Armed Robbery

In *R v Lenny Wanefalea* (Unrep. Criminal Case No. 13 of 1992) Muria ACJ stated at page 2:

> 'Small businesses like that of the victim in this case are susceptible to such bullying behaviour, such as those of the accused. They are easy target for people, like the accused who wish to help themselves at other people's hard – work. Small stores such as that concerned in this case, play an important role in providing the needed service to the public in the areas where they are operating. In spite of the ailing economy the country is going through, the victim in this case has done his share in a small but important way through his small store in developing this country. The law must therefore support him and protect him from people like the accused. The only way in which the Court can assure the victim that the law will protect him is to make it clear to people who do commit this sort of offence that inevitably a severe sentence with deterrent element will be imposed on them so that other like – minded robbers, greedy persons will realise that it is not worth taking the chances.'

An '*armed robbery*' where the offender is armed with a knife even if it is not used directly *must* result in a lengthy sentence, see *Alick Fefele v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 5 of 1987; Ward CJ; at page 6). (emphasis added)

Refer also to the law relating to the '*Use Of A Weapon In The Commission Of An Offence*' which is examined on page **939**.

For '*comparative sentences*', refer to:

- *R v Lenny Wanefalea* (*supra*);
- *Alick Fefele v Director of Public Prosecutions* (*supra*);
- *R v Victor Tadakusu* (Unrep. Criminal Case No. 239 of 1999; Palmer J);
- *Jimmy Robin Kelly & others v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 1 of 1991; Court of Appeal);
- *Fafale v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 5 of 1987; Ward CJ); &
- *R v Inisafi Tome & seven others* (Unrep. Criminal Case No. 15 of 1985; Wood CJ).

[K] Attempts To Procure Abortion

For a '*comparative sentence*', refer to *John Flynn v R* (Unrep. Criminal Appeal Case No. 2 of 1998; Court of Appeal).

[L] Demanding Money With Menaces

For '*comparative sentences*', refer to:

- *R v Alick Sura & others* (Unrep. Criminal Case No. 46 of 1993; Palmer J); &
- *Augustine Laui v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 11 of 1987; Ward CJ).

[59.24.4] Offences Of A Sexual Nature

[A] Rape & Attempted Rape

In *Peter Sade Kaimanisi v R* (Unrep. Criminal Appeal Case No. 3 of 1995) Muria CJ, with whom Kapi and Williams JJA concurred, stated at pages 5 – 6:

> 'It must be pointed out that rape is a crime of violence and as such there must be some element of deterrence in the sentence passed for such a crime. Those who are charged with rape and convicted must expect custodial sentence. The severity of such sentence will depend on the seriousness and the nature of the offence.
>
> The Courts are obliged to have regard to and to uphold the fundamental principles which we embody under our supreme law, the Constitution, such principles as respect for human dignity as well as enhancing that dignity, see *Preamble to the Constitution*. Our Society has survived because of respect for such principles and those who defy such harmonious rules will be met with sanctions imposed by the society. That power of the society to impose sanctions has been shared with the Courts who must exercise it on behalf of the society and to impose sanction on those who violate principles which are designed for the respect of each

other's human dignity and the harmony of society as a whole. Rape is a crime of violence and must be condemned as a violent disregard for such principles and one that must be regarded as anti-social, disrespectful for each other's dignity and provide breeding ground for social disharmony. With those principles in mind, the Courts are entitled to take a very stern view of the crime of rape and to reflect that in the type of sentences they imposed.'

In *R v John Auwahau* (Unrep. Criminal Case No. 18 of 1993) Palmer J stated at pages 1 – 2:

'In the case of *R v Ligiau and Dori SILR 1985/86 214* in which two accused were charged for offences of rape and attempted rape, his Honour, Chief Justice Ward adopted the views of Lord Lane in the case of *R v Billam (1986) 1 WLR 349* [(1986) 82 CrAppR 347] as an indication of what the current practice should be in passing sentence on rape cases. I quote the relevant page:

"*For rape committed by an adult without any aggravating or mitigating features, a figure of five years should be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.*

At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime upon a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

The crime should in any event be treated as aggravated by any of the following factors: (1) violence is used over and above the force necessary to commit the rape; (2) a weapon is used to frighten or wound the victim; (3) the rape is repeated; (4) the rape has been carefully planned; (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual kind; (6) the victim is subjected to further sexual indignities or perversions; (7) the victim is either very old or very young; (8) the effect upon the victim, whether physical or mental, is of special seriousness.

Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.

The starting point for attempted rape should normally be less than for the completed offence, especially if it is desisted at a comparatively early stage. But attempted rape may be made by aggravating features into an offence even more serious than some examples of the full offence."' (emphasis added)

In *Koraua & Kaitira v R* [1988 – 89] SILR 4 the Court of Appeal held at page 5:

'We accept that, generally speaking, an attempt is to be punished with a lesser sentence than that for the completed offence, but there may be some circumstances in which an attempt will be more severely punished than a complete rape in other circumstances; further, there may be circumstances when an attempt is almost as serious as the complete rape would be.'

SENTENCING

Evidence of how serious the offence is regarded in the particular community, especially in its custom is important, see *Berekame v Director of Public Prosecutions* [1985 – 86] SILR 272 (Court of Appeal) & *R v Jack Faununu* (Unrep. Criminal Case No. 10 of 1997; Lungole – Awich J; at page 2).

In *Edward Fiuadi v R* [1988 – 89] SILR 150 Ward CJ commented at page 152:

> 'It must be clearly understood that, in *any offence* where a breach of trust is involved, a sentence of imprisonment will always be appropriate.' (emphasis added)

See also: *R v Roberts & Roberts* (1982) 74 CrAppR 242.

For '*comparative sentences*', refer to:

[1] Rape

- *Peter Sade Kaimanisi v R* (*supra*);
- *R v John Auwahau* (*supra*);
- *Berekame v Director of Public Prosecutions* (*supra*);
- *R v Jack Faununu* (*supra*);
- *William Tebounapa v R* (Unrep. Criminal Appeal Case No. 2 of 1999; Court of Appeal) [custom doctor];
- *R v Jacob Waipage* (Unrep. Criminal Case No. 46 of 1996; Lungole – Awich J);
- *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J);
- *R v John Auwahau* (Unrep. Criminal Case No. 18 of 1993; Palmer J);
- *Bollen Toke v R* (Unrep. Criminal Case No. 50 of 1988; Ward CJ);
- *R v Paul Makabo* (Unrep. Criminal Case No. [Not Recorded]; Ward CJ);
- *R v Max Pohirai* (Unrep. Criminal Case No. 14 of 1988; Ward CJ);
- *R v Leonard Laule* (Unrep. Criminal Case No. 29 of 1976; Davis CJ);
- *R v Gere* [1980 – 81] SILR 145;
- *Koboa v R* [1980 – 81] SILR 43;
- *R v Ligiou & Dori* [1985 – 86] SILR 214;
- *R v Willie Abusae* (Unrep. Criminal Case No. 28 of 1995; Palmer J);
- *R v Wilson Ngao'o* (Unrep. Criminal Case No. 9 of 1987; Ward CJ);
- *R v John Maetarau* (Unrep. Criminal Case No. 4 of 1990; Ward CJ);
- *R v Baraniko Bataka* (Unrep. Criminal Case No. 33 of 1987; Ward CJ);
- *R v Dennis Feitei* (Unrep. Criminal Case No. 10 of 1983; Daly CJ); &
- *R v Paulo Sale Kitini* (Unrep. Criminal Case No. 13 of 1982; Daly CJ).

[2] Attempted Rape

For '*comparative sentences*', refer to:

- *Koraua & Kaitira v R* (*supra*); &
- *Dickson Kwaifanabo & Sale Kwatebo v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 16 of 1984; Ward CJ).

[B] Indecent Assault

In *Edward Fiuadi v R* [1988 – 89] SILR 150 Ward CJ commented at page 152:

> 'It must be clearly understood that, in *any offence* where a breach of trust is involved, a sentence of imprisonment will always be appropriate.' (emphasis added)

For '*comparative sentences*', refer to:

- *Tebounapa v R* (Unrep. Criminal Appeal Case No. 2 of 1999; Court of Appeal);
- *R v Lawrence Hiolohaona* (Unrep. Criminal Case No. 11 of 1991; Ward CJ); &
- *R v Molanisau* (Unrep. Criminal Case No. 2 of 1988; Ward CJ).

[C] Incest

In *Philip Hagataku v R* (Unrep. Criminal Case No. 8 of 1993) Palmer J commented at page 1:

> 'The offence of incest in our Penal Code which is derived from the English Law has its roots in the Bible. It is however not altogether foreign and something that was introduced into these islands only when the Christian Gospel was brought to these islands at the turn of this century. In most cultures, incestuous relationships are strictly forbidden in custom. As in the Bible, such relationships will bring a curse into that person's house and family.
>
> So although the defendant may not have been as enlightened as he should be about this offence he should have been aware of the way his society and community would show repugnance and detest at any such activity. It is this customary and religious context that perhaps make such offences to be considered in a more stricter light than say the position is in a westernised society.'

In *Edward Fiuadi v R* [1988 – 89] SILR 150 Ward CJ commented at page 152:

> 'It must be clearly understood that, in *any offence* where a breach of trust is involved, a sentence of imprisonment will always be appropriate.' (emphasis added)

In *Attorney General's Reference No. 1 of 1989* (1990) 90 CrAppR 141; [[1989] 1 WLR 117; [1989] 3 AllER 571] the Court of Appeal laid down guidelines for sentencing in cases of '*Incest*' by a father against a daughter. Apart from the age of the child other '*aggravating factors*' were identified. The Court also identified a number of '*mitigating factors*'.

Lord Lane CJ, delivering the judgment of the Court, stated at pages 147 – 148:

> 'Other aggravating factors, whatever the age of the girl may be, are (*inter alia*) as follows:
>
> 1. If there is evidence that the girl has suffered physically or psychologically from the incest.
> 2. If the incest has continued at frequent intervals over a long period of time.
> 3. If the girl has been threatened or treated violently by or was terrified of the father.
> 4. If the incest has been accompanied by perversions abhorrent to the girl, eg. buggery or fellatio.
> 5. If the girl has become pregnant by reason of the father failing to take contraceptive measures.
> 6. If the defendant committed similar offences against more than one girl.

Possible mitigating factors are (inter alia) the following:

1. A plea of guilty, It is seldom that such a plea is not entered, and it should be met by an appropriate discount, depending on the usual considerations, that is to say how promptly the defendant confessed and his degree of contrition and so on.
2. If it seems that there was a genuine affection on the part of the defendant rather than the intention to use the girl simply as an outlet for his sexual inclinations.
3. Where the girl has had previous sexual experience.
4. Where the girl has made deliberate attempts at seduction.
5. Where, as very occasionally is the case, a shorter term of imprisonment for the father may be of benefit to the victim and the family.'

For '*comparative sentences*', refer to:

- *Philip Hagataku v R* (*supra*);
- *R v Joseph Atkin* (Unrep. Criminal Case No. 18 of 1994; Palmer J);
- *Director of Public Prosecutions v Maesala* [1988 – 89] SILR 145;
- *Peter Roko v R* [1990] SILR 270;
- *Bollen Toke v R* (Unrep. Criminal Case No. 50 of 1988; Ward CJ);
- *R v Maesala* (Unrep.Criminal Case No. 39 of 1988; Ward CJ); &
- *Bebini v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 44 of 1986; Ward CJ).

[D] Defilement Of Girls

In *R v Wilson Iroi* (Unrep. Criminal Case No. 17 of 1991) Muria CJ stated at page 7:

'The purpose of the law in this area is to protect young girls from men as well as to protect them from themselves.'

In *R v Craig A'Aron* (Unrep. Criminal Case No. 14 of 1998) Kabui J stated at page 4:

'This is a case where I must impose a custodial sentence to demonstrate the seriousness of this offence and to reaffirm to the community that the criminal law frowns upon the abuse of young girls in Solomon Islands. This is obviously the intention of Parliament when it stipulates imprisonment for life as a penalty for this offence.'

In *Mulele v Director of Public Prosecutions & Poini v Director of Public Prosecutions* [1985 – 86] SILR 145 the Court of Appeal stated at page 146:

'We were asked to formulate a sentencing policy for future guidance. Each case must depend on its own facts but matters which would be considered amongst others are on the one hand disparity of age, abuse of a position of trust and a subsequent pregnancy and on the other hand the character of the girl herself.'

In *Edward Fiuadi v R* [1988 – 89] SILR 150 Ward CJ commented at page 152:

'It must be clearly understood that, in *any offence* where a breach of trust is involved, a sentence of imprisonment will always be appropriate.' (emphasis added)

For '*comparative sentences*', refer to:

- *Mulele v Director of Public Prosecutions & Poini v Director of Public Prosecutions* (*supra*);
- *R v Wilson Iroi* (*supra*);
- *R v Craig A'Aron* (*supra*);
- *R v Derick Waeho* (Unrep. Criminal Case No. 34 of 1996; Lungole – Awich J);
- *R v Naphtali Mule* (Unrep. Criminal Case No. 34 of 1991; Muria J);
- *R v James Rasini & four others* (Unrep. Criminal Case No. 25 of 1990; Ward CJ).
- *R v Johnson Tome* (Unrep. Criminal Case No. 24 of 1990; Ward CJ);
- *Berekame v Director of Public Prosecutions* [1985 – 86] SILR 272;
- *R v Toska & Meke* (Unrep. Criminal Appeal Case No. 33 of 1986; Ward CJ);
- *R v Peter Taku* (Unrep. Criminal Case No. 3 of 1995; Palmer J);
- *R v Eric Tonda & others* (Unrep. Criminal Case No. 21 of 1989; Ward CJ);
- *R v Nathaniel Laothenga & others* (Unrep. Criminal Case No. 13 of 1985; Wood CJ);
- *Ambrose Ravini v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 28 of 1986; Ward CJ); *&*
- *R v Taylor; R v Simons; R v Roberts* [1977] 3 AllER 527.

[59.24.5] Traffic Offences

[A] Dangerous Or Reckless Driving Causing Death

In *R v Boswell & others* (1984) 79 CrAppR 277 the Court of Appeal laid down guidelines for sentencing in cases of '*Dangerous Driving Causing Death*'.

The following '*aggravating factors*' were identified:

[i] the consumption of alcohol or drugs;
[ii] racing or competitive driving against another motorist; excessive speed; showing off;
[iii] disregard of warnings of passengers;
[iv] a prolonged, persistent and deliberate course of very bad driving;
[v] other traffic offences committed at the same time;
[vi] previous convictions for motoring offences, particularly offences which involved bad driving or the consumption of alcohol;
[vii] more than one person killed as a result of the offence;
[viii] behaviour at the time of the offence such as trying to avoid apprehension by failing to stop; and
[ix] causing death in the course of dangerous driving in an attempt to avoid detection and apprehension.

The following '*mitigating factors*' were identified:

[i] whether the act of dangerous driving was 'one off', ie., a momentary error of judgment;
[ii] a good driving record;
[iii] genuine shock or remorse; and
[iv] whether the victim is either a close relative or a friend when emotional shock will likely be great.

The same '*factors*' would equally apply to the offence of '*Reckless Driving Causing Death*'.

See also: *R v Hudson* (1989) 89 CrAppR 57 *& Attorney – General's Reference Nos. 3 & 5 of 1989* (1990) 90 CrAppR 358.

For a '*comparative sentence*', refer to *Allan Campbell v R* (Unrep. Criminal Appeal Case No. 9 of 1994; Court of Appeal).

Refer also to the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[B] Dangerous Or Reckless Driving

Refer to *R v Boswell & others* (*supra*).

See also: *R v Guilfoyle* (1973) 57 CrAppR 549.

For '*comparative sentences*', refer to:

- *R v George Ale* (Unrep. Criminal Review Case No. 525 of 1996; Palmer J);
- R v Jack Lae (Unrep. Criminal Review Case No. 72 of 1992; Muria J); &
- Untitled (Unrep. Criminal Case No. 30 of 1991; Muria J).

Refer also to the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[C] Driving Without Due Care & Attention Or Reasonable Consideration

In *John Votaia v R* (Unrep. Criminal Appeal Case No. 14 of 1991) Ward CJ stated at page 3:

> '*Whilst the consequences of the driving must always be borne in mind, the court should not attach undue importance to them. The level of sentence must relate to the nature and manner of the driving itself.* It is not unusual for a minor lapse by a driver to have very serious effects but, if the lapse was simply a lack of due care and attention, it remains careless and not dangerous driving. In this case, the failure to give a sufficiently wide berth when overtaking the motor cycle was a bad case of careless driving but it falls well short of the worst such case.
>
> *It is extremely rare to order disqualification, in cases of careless driving and when it is done, it is not normally appropriate to order a long period.* When the Court finds a case is a proper one to order disqualification, it should then consider the period appropriate to the facts of the case before it. The order is part of the punishment but the court should only impose a lengthy term if the driving was such or the defendant's driving record was so bad that there is a need to protect the public from his driving.' (emphasis added)

For a '*comparative sentence*', refer to *William Alegao v R* (Unrep. Criminal Appeal Case No. 18 of 1982; Daly CJ).

Refer also to the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[D] Driving Under The Influence

In *Cheffers v R* (Unrep. Criminal Case No. 11 of 1989) Ward CJ commented at page 3:

> 'Driving whilst under the influence of liquor is extremely serious offence. Anyone who drives in such a state has deliberately than a course of action that puts his own and far more seriously, other people's lives at risk. However carefully he may attempt to drive, his reactions if confronted with an emergency will not be as effective as when he has taken no alcohol.'

In *R v Timothy Sulega* (Unrep. Criminal Review Case No. 133 of 1999) Palmer J stated:

> 'As a guideline the minimum fines to be imposed on drunk driving offences should not be less than $200.00. Only for very good reasons should they go below $200.00 and must be stated in the sentence. For second offenders, I would expect a custodial sentence to be imposed unless there are exceptional reasons for not doing so.'

In *Kausimae v R* (Unrep. Criminal Appeal Case No. 29 of 1988) Ward CJ commented at page 2:

> 'I make it clear that, normally, any person that drives a public service vehicle whilst under the influence of drink must expect an immediate custodial sentence.'

For '*comparative sentences*', refer to:

- *R v David Leliana* (Unrep. Criminal Review Case No. 6 of 1998; Palmer J);
- *R v Enley Honimae* (Unrep. Criminal Review Case No. 42 of 1996; Palmer J);
- *R v Eddie Goni* (Unrep. Criminal Review Case No. 19 of 1996; Palmer J);
- *R v Matthew Iroga* (Unrep. Criminal Review Case No. 8 of 1998; Palmer J);
- *R v Maeli Rinau* (Unrep. Criminal Review Case No. 18 of 1996; Palmer J); &
- *R v Simon Peter Lifuana* (Unrep. Criminal Case No. 6 of 1981; Daly CJ).

Refer also to the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[E] In - Charge Under The Influence

For a '*comparative sentence*', refer to *Kausimae v R* (Unrep. Criminal Appeal Case No. 29 of 1988; Ward CJ).

Refer also to the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[F] Disqualified Driving

In *R v Peter Baru* [1988 – 89] SILR 132 Ward CJ commented at page 132:

> 'Driving whilst disqualified is a serious matter because it shows a flagrant disregard for a court order.'

SENTENCING

Section 35 of the *Traffic Act* (Ch. 131) provides the following penalty in respect of the offence of '*Disqualified Driving*':

> '[L]iable to imprisonment for twelve months, or, if the court thinks that having regard to the *special circumstances* of the case a fine would be an adequate punishment for the offence, to a fine of five hundred dollars or to both such imprisonment and such fine.' (emphasis added)

In *Wilikai v R* [1980 – 81] SILR 82 Daly CJ held at page 84:

> 'It is clear […] that unless the court finds "special circumstances" it is equally obliged to sentence an offender against section 34(b) of the Solomon Islands Traffic Act to imprisonment.
>
> I also agree with Hilbery J who said in Lines v Hersom (ob. sit.) at p. 655):
>
> "I regard the words that the court think a fine would be an adequate punishment for the offence as of some importance as showing that in this section the statute is contemplating, not the offender, but essentially, the offence, and the special circumstances which the court must find are circumstances of the case and not of the offence, disregarding any circumstances special to the offender."
>
> […]
>
> […] The burden of proving "special circumstances" and "special reasons" is on the accused and he must do so by means of evidence and not merely by making statements (see Jones v English (1951) 2 AllER 853.'

Refer also to the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[G] Driving Uninsured Motor Vehicle

'It is my view that driving a motor vehicle which is known to be uninsured is a very serious offence and unless there are good reasons to the contrary a disqualification should follow the conviction', see *Practice Direction No. 2 of 1985* issued by Wood CJ.

In *Kirunwai & Kirunwai v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 29 of 1986) Ward CJ commented at page 2:

> 'Driving without third party insurance is a serious matter because of the consequences that can flow from an accident. Any owner of a vehicle has a responsibility to insure his vehicle for such risks and that must include renewing the insurance to provide continuous cover.'

Refer also to the section which examines the '*Disqualification Of Drivers*' commencing on page **954**.

[H] Unlicensed Driving

For a '*comparative sentence*', refer to *Howard Haomae v R* (Unrep. Criminal Appeal Case No. 106 of 2001).

[59.24.6] Miscellaneous Offences

[A] Unauthorised Sales Of Liquor

In *R v John Fouoto; R v Stanley Ramo Jimmy & R v George Ului* (Unrep. Criminal Review Case No. 251 of 1999) Palmer J commented at page 2:

> '[I] make the following observations:
>
> (1) The maximum fine of two hundred dollars in my respectful view is now too low. It is obvious offenders are fully aware of the risks but are in it for the quick money and profits that can be obtained.
>
> (2) Offences of this nature accordingly have not declined but increased with associated problems.
>
> The Police have worked hard to arrest the culprits and bring them to the courts. Illegal sales of liquor, in particular beer however have continued unabated. *In view of these matters, it is my respectful view, Magistrates across the country must seriously consider imposing the maximum fine of $200-00 unless there are exceptional reasons for not doing so*. […]
>
> The responsible authorities should also not consider a general increase in the penalties prescribed in Part IX of the Liquor Act (Cap. 144).' (emphasis added)

[B] Consuming Liquor in a Public Place

For a '*comparative sentence*', refer to *Alphonsus Kopana v R* (Unrep. Criminal Case No. 5 of 1996; Muria CJ).

[C] Escaping Lawful Custody

In *Harry Rurai v R* (Unrep. Criminal Appeal Case No. 29 of 1991) Muria J stated at page 2:

> 'Sentence on a charge of escaping from prison must as a matter of principle be made consecutive to the prison sentence the prisoner is currently serving. But it is wrong, however, to impose a heavy sentence on a prisoner who while on the run did not commit any other offence.'

See also section 42 of the *Penal Code* (Ch. 26).

[D] Cultivating Dangerous Drug

For a '*comparative sentence*', refer to *Warnecke v R* [1983] SILR 279.

[E] Possession Of Firearms Or Ammunition Without License

For '*comparative sentences*', refer to:

- *R v Daniel Upang & Simister Kimisi & R v Cherry Bula* (Unrep. Criminal Appeal Case Nos. 19 & 20 of 1991; Muria J);
- *R v Victor Tadakusu* (Unrep. Criminal Case No. 239 of 1999; Palmer J); &
- *Von Ralph Panda v R* (Unrep. Criminal Review Case No. 26 of 1991; Ward CJ).

[F] Giving Ammunition To A Person Not Licensed

For a '*comparative sentence*', refer to *R v Hudson Malefo & two others* (Unrep. Criminal Case No. 31 of 1993; Palmer J).

[G] Endangering Safety Of Passengers

For a '*comparative sentence*', refer to *Namona & Namona v R* (Unrep. Criminal Appeal Case No. 1 of 1991; Ward CJ).

[H] Unlawful Damage By Rioters

For a '*comparative sentence*', refer to *Solomon Keto & six others* (Unrep. Criminal Appeal Case No. 9 of 1982; Daly CJ).

[I] Perjury

Perjury is a very serious offence and should attract severe penalties, see *R v Simmonds* (1969) 53 CrAppR 488.

For a '*comparative sentence*', refer to *Tonga v R* (Unrep. Criminal Case No. 4 of 1987; Ward CJ).

[J] Attempted Bribery

In *James Baura v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 38 of 1986) Ward CJ stated at page 2:

> 'Attempting to bribe a police officer is a serious offence. It strikes at the very heart of the system of justice in the country. Anyone who is tempted to try to bribe a public officer must realise he will go to prison.'

[K] Customs & Excise Act

For '*comparative sentences*', refer to:

- *R v John Bare Maetia* (Unrep. Criminal Case No. 32 of 1992; Muria ACJ); &
- *R v Jang Rang, Lim Kuen Kuen Chik, Lim Loi Fatt, Lim Kuen Pao, Lim Kuen Seng, Hung Nang Shiong & Cheng Sivee Ming* (Unrep. Criminal Case Nos. 11 & 12 of 1995; Palmer J).

[L] Fisheries Act

For '*comparative sentences*', refer to:

- *Ngina v R* [1987] SILR 35;
- *R v Jang Rang, Lim Kuen Kuen Chik, Lim Loi Fatt, Lim Kuen Pao, Lim Kuen Seng, Hung Nang Shiong & Cheng Sivee Ming* (Unrep. Criminal Case Nos. 11 & 12 of 1995; Palmer J);
- *R v Heu Fu – You* (Unrep. Criminal Case No. 7 of 1983; Daly CJ);
- *R v Wu Chiang Ching* (Unrep. Criminal Case No. 25 of 1987; Ward CJ);
- *R v Wong Chin Kwee, Approaching International Inc. & Nestor Bele (trading as Resource Development Agency)* (Unrep. Criminal Case No. 3 of 1983; Daly CJ); &
- *R v Sheu Ming Jiee* (Unrep. Criminal Case No. 11 of 1982; Commissioner Crome).

[M] Forest Resources & Timber Utilisation Act

For a '*comparative sentence*', refer to *R v JP Enterprise Limited* (Unrep. Criminal Case No. 298 of 1999; Palmer J).

[N] Passports Act

For '*comparative sentences*', refer to:

- *Morris Bock v R* (Unrep. Criminal Case No. 17 of 1993; Palmer J);
- *R v Rosemary Gillespie* (Unrep. Criminal Case No. 304 of 1993; Palmer J); &
- *R v Francis Kutuna* (Unrep. Criminal Case No. 61 of 1993; Palmer J).