

**16:**

**COMMON OFFENCES**



## False Pretences Under s309(a)

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**Section** *s309(a) Penal Code (Cap. 17)*

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**Description** Any person is guilty of a misdemeanour, who, by false pretence and with intent to defraud, either:

- obtains from any other person any chattel, money, or valuable security; or
- causes or procures any money, chattel or valuable security to be delivered to him or herself or to any other person,

for the use, benefit or on account of him or herself or any other person.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant falsely promised;
- The defendant him or herself, or through another either:
  - obtained any chattel, any money, or valuable security; or
  - caused or procured any money to be paid, or any chattel or valuable security to be delivered to him or herself or another;
- The property was for the use or benefit of the defendant or some other person;
- The defendant did this with an intention to defraud.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who falsely pretended.

False pretence

False pretence is defined as any “representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows it to be false, or does not believe to be true”: *s308 Penal Code*.

Intent to defraud

See general rules on intent in *s9* of the *Penal Code*. The intent to defraud may be inferred from the facts of the case.

A fraud is complete once a false statement is made by a defendant who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Obtains

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

Money

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

Valuable security

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

Use or benefit of

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

Induces any other person

The false pretence must induce the victim to part with his or her property.

Case law

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

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum five years imprisonment.

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## False Pretences Under s309(b)

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**Section** *s309(b) Penal Code (Cap. 17)*

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**Description** Any person is guilty of a misdemeanour who by false pretences, with intent to defraud or injure any other person, fraudulently causes or induces any other person to either:

- execute, make, accept, endorse or destroy the whole or any part of any valuable security; or
- write, impress, or affix upon any paper or parchment:
  - ⊖ his or her name;
  - ⊖ the name of any other person; or
  - ⊖ the seal of any body corporate or society,

in order that the same may be afterwards made or converted into, or used or dealt with as, a valuable security.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant falsely promised;
- The defendant fraudulently caused or induced any other person to:
  - ⊖ execute, make, accept, endorse or destroy any part of any valuable security; or
  - ⊖ write, impress, or affix upon paper or parchment, his or her name or the name of any other person or the seal of any body corporate or society, in order to be made, converted into, or used or dealt with as a valuable security.
- The defendant did this with intent to defraud or injure any person.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

### Identification

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

The prosecution must provide evidence to prove that it was the defendant who falsely pretended.

### False pretence

False pretence is defined in the *Penal Code* as any “representation made by words, writing or conduct, of a matter of fact, either past or present, which representation is false in fact, and which the person making it knows it to be false, or does not believe to be true”: s308 *Penal Code*.

### Intent to defraud

See general rules on intent in s9 of the *Penal Code*.

The intent to defraud may be inferred from the facts of the case.

A fraud is complete once a false statement is made by a defendant who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

### Use or benefit of

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

### Induces any other person

The false pretence must induce the victim to part with his or her property.

### Case law

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

### Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the defendant may still have a legal defence. The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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## **Sentence**

Maximum five years imprisonment.

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## Simple Larceny (Theft)

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**Section** *s259(1) Penal Code (Cap. 17)*

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**Description** A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with the intention (at the time of such taking) to permanently to deprive the owner of the thing.

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

Burden and standard of proof

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

Identification

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

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

Capable of being stolen

*Section 258* defines what things are capable of being stolen.

### Takes

The expression “takes” includes obtaining possession:

- by any trick;
- by intimidation;
- under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or
- by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps: *s259(2)(a)*.

### Carries Away

The expression “carries away” includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached: *s259(2)(b)*.

### Owner

Under *s259(2)(c)*, the expression “owner” includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence. See *Inoke Rainima* [1985] Fj Cr App. 62/85.

### Bailee / part-owner

Such person may be guilty of stealing any such thing notwithstanding that he or she has lawful possession of the thing, if, being a bailee or part-owner of the thing, he or she fraudulently converts the thing to his or her own use or the use of a person other than the owner: *s259(1) Penal Code*.

### Without Claim of right made in good faith

See definition of bona fide claim of right in *s8* of the *Penal Code*. An defendant may have a valid defence where he or she has an honest belief that he or she has a legal right to take the goods in question.

### Intent at the time of taking to permanently deprive

See general rules regarding intent in *s9* of the *Penal Code*.

There must be a coincidence of actus reus and *mens rea* for this element to stand, although issues of continuing trespass against the owner’s property may arise.



The requirement of permanent deprivation disqualifies situations of borrowing or temporary possession: See *Lloyd's Case* [1985] 3 WLR 30 and *Ilai Derenalagi v R* (1970) 16 FLR 130.

#### Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an defendant who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

#### Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

For instance, the defence may raise a belief of honest claim of right which the prosecution must rebut.

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### **Sentence**

Stealing for which no special punishment is provided under the *Penal Code* or any other Act is simple larceny and a felony punishable with a maximum imprisonment of five years.

If any person has been previously convicted of felony, the offence of simple larceny is liable to a maximum imprisonment of 10 years.

If previously convicted of a misdemeanour under *Chapter XXVII* or under *Chapter XXXV*, the offence of simple larceny is punishable by a maximum imprisonment of seven years: *s262 Penal Code*.

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## Conversion Under s279(1)(a)

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

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**Description** Any person is guilty of a misdemeanour who:

- is entrusted solely or jointly with another person with power of attorney to sell or transfer any property; and
- fraudulently sells, transfers or otherwise converts any part of the property to his or her own use or benefit or to the use or benefit of a person other than the person by whom he or she was entrusted.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant was solely or jointly entrusted with power of attorney to sell or transfer any property;
- The defendant sold, transferred, or otherwise converted any part of the property;
- This was done fraudulently;
- This was done for his or her own benefit or the benefit of a person other than the one by whom he or she was entrusted.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

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

Entrusted with power of attorney

“Entrusted” requires a fiduciary element. See *Stephens v The Queen* (1978) 139 CLR, 315.

Property

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

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so.

A fraud is complete once a false statement is made by an defendant who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Useful case law

*State v Isimeli Drodroveivali* Suva High Court HAC007.025.

*Barrick* (1985) 81 Cr. App. R. 78.

*Panniker v State* Suva High Court Crim. App. No 28 of 2000S.

*State v Mahendra Prasad* Suva High Court Cr. Action HAC000.025.

“it is essential that three things should be proved to the satisfaction of the jury; first the money was entrusted to the defendant person for a particular purpose, secondly that he used it for some other purpose and thirdly that the misuse of money was fraudulent and dishonest.” See *R v Boyce* 40 Cr. App. R 62, 63.

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

Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum seven years imprisonment.

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## Conversion Under s279(1)(b)

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

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**Description** Any person is guilty of a misdemeanour who:

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

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**Elements**

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

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

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

Fraudulently

Usually the intent to defraud will consist of an intention to steal but not always so. A fraud is complete once a false statement is made by an defendant who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Useful case law

*State v Isimeli Drodroveivali* Suva High Court HAC007.025.

*Barrick* (1985) 81 Cr. App. R. 78.

*Panniker v State* Suva High Court Crim. App. No 28 of 2000S.

*State v Mahendra Prasad* Suva High Court Cr. Action  
HAC000.025.

Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum seven years imprisonment.

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## Conversion Under s279(1)(c)

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

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**Description** Any person is guilty of a misdemeanour who:

- being entrusted solely or jointly with another person with any property in order that he or she may retain in safe custody, apply, pay or deliver to another any part of the property or proceeds from the property;
- having solely or jointly received any property for or on account of any other person,

fraudulently converts to his or her own use or benefit or the use or benefit of any other person, any part of the property or proceeds.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant was entrusted solely or jointly to, either:
  - ⊖ retain, apply, pay, or deliver any part of the property or proceeds to another; or
  - ⊖ receive property on the account of another;
- The defendant fraudulently converted to his or her own use or benefit or to the use or benefit of any other person any part of the property or proceeds from the property.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

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

Non-application to trustees

*Section 279(2) Subsection (1)(c)* does not apply to or affect any trustee under any express trust created by a deed or will, or any mortgage of any real or personal property, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.

Being entrusted

See *Enesi Yavala v The State* [1996] Fj Cr App. 40J/96B.

Useful case law

*State v Isimeli Drodroveivali* Suva High Court HAC007.025.

*Barrick* (1985) 81 Cr. App. R. 78.

*Panniker v State* Suva High Court Crim. App. No 28 of 2000S.

*State v Mahendra Prasad* Suva High Court Cr. Action HAC000.025.

See *Chapter IV* of the *Penal Code*, which sets out the general rules of criminal responsibility and defences.

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum seven years imprisonment.

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# Burglary

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**Section** *s299 Penal Code (Cap. 17)*

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**Description** Every person is guilty of a felony, who in the night;

(a) breaks and enters the dwelling-house of another with intent to commit any felony in there; or

(b) breaks out of the dwelling-house of another, having either:

- entered the dwelling-house with intent to commit any felony in there; or
- committed any felony in the dwelling-house.

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**Elements**

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

(a):

- The defendant broke and entered the dwelling-house of another; and
- The defendant intended to commit any felony in there.

(b):

- The defendant broke out of the dwelling-house of another, having either:
  - ⊖ entered the dwelling-house with intent to commit any felony; or
  - ⊖ committed any felony in the dwelling-house

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who broke and entered the dwelling-house of another with intent to commit a felony or having committed a felony therein.

**(a):**

Night

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

Breaks and Enters

Minimum interference with the building constitutes breaking. See the definition of “breaking and entering” in *s297* of the *Penal Code*.

Dwelling-House

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

Intent to commit felony

Defendant need not have actually committed a felony: See *Mohammed Sahid v The State* [1997] Fj Cr App 46/97.

It has been held that this offence requires the *mens rea* of specific intent: See *DPP v Solomone Tui* (1975) 21 FLR 4.

**(b):**

Entered with intent

See *Mohammed Sahid v The State* [1997] Fj Cr App 46/97.

Felony

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

Useful case law

See *R v Collins* [1973] QB 100.

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**Sentence**

Maximum life imprisonment.

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## Abuse of Office

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**Section** *s111 Penal Code (Cap. 17)*

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**Description** Any person is guilty of an offence who, while employed in the public service, does or directs to be done any arbitrary act prejudicial to rights of another, in abuse of the authority of his or her office.

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- Elements**
- The person named in the charge is the same person who is appearing in Court;
  - The defendant was employed in the public service;
  - The defendant did or directed to be done any arbitrary act;
  - The act was in abuse of the authority of his or her office;
  - The act was prejudicial to the rights of another.
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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who did or directed the arbitrary act.

DPP sanction required to bring prosecution

A prosecution for this offence may only be brought with the sanction of the Director of Public Prosecutions.

Person employed in the public service

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

See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s (8th January, 1999).

Arbitrary act

See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s (8th January, 1999).

Abuse of authority

See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s (8th January, 1999).

For the purpose of gain

See *Naiveli v State* [1995] FJSC 2; CAV0001u.94s.

Prejudicial to rights

See *Tamaibeka v State* [1999] FJCA 1; Aau0015u.97s.  
*Naiveli v State* [1995] FJSC 2; CAV0001u.94s.

Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

If act was not done for the purpose of gain, it is a misdemeanour punishable by maximum two years imprisonment.

If the act was done for the purpose of gain, it is a felony with maximum three years imprisonment.

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## Acts Intended to Cause Grievous Harm or Prevent Arrest

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**Section** *s224 Penal Code (Cap. 17)*

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**Description** Every person is guilty of a felony who, with intent to maim, disfigure or disable any person or to do some grievous harm to any person or to resist or prevent the lawful arrest or detention of any person:

- unlawfully wounds or does any grievous harm to any person by any means whatsoever; or
- unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife, or other dangerous or offensive weapon; or
- unlawfully causes any explosive substance to explode; or
- sends or delivers any explosive substance or other dangerous or noxious thing to any person; or
- causes any such substance or thing to be taken or received by any person; or
- puts any corrosive fluid or any destructive or explosive substance in any place; or
- unlawfully casts or throws any such fluid or substance at or upon any person, or otherwise applies such fluid or substance to the person of any person.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant had the intent to:
  - ⊖ maim, disfigure or disable any person; or
  - ⊖ do some grievous harm to any person; or
  - ⊖ resist or prevent the lawful arrest or detention of any person;
- The defendant:
  - ⊖ unlawfully wounded or grievously harmed any person by any means whatsoever; or

- ⊖ unlawfully attempted in any manner to strike any person with any kind of projectile or other dangerous or offensive weapon; or
  - ⊖ unlawfully caused an explosion of some explosive substance; or
  - ⊖ sent or delivered an explosive, dangerous or noxious thing to any person; or
  - ⊖ caused any explosive, dangerous or noxious thing to be taken or received by any person; or
  - ⊖ put any corrosive, destructive or explosive substance in any place; or
  - ⊖ unlawfully cast, threw or otherwise applied any such fluid or substance upon or to the person of any person.
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## Commentary

### Burden and standard of proof

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

### Identification

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

The prosecution must provide evidence to prove that it was the defendant who committed any of the prohibited acts mentioned.

### Maim

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

### Wound

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

### Offensive or Dangerous Weapon

An offensive weapon means any article made or adapted for use for causing injury to the person, or intended by the person having it with him or her for such use: *s96(3) Penal Code*.

### Grievous Harm

See definition in *Chapter II* of *Penal Code*.  
See *DPP v Smith* (1961) AC 290.

### Caselaw

*Derek Anthony Legge* (1988) Cr. App. R. (S) 208.

Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum life imprisonment.

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## Robbery

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**Section** *s293(1)(a) Penal Code (Cap. 17)*

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**Description** Any person is guilty of a felony who robs or assaults with intent to rob any person while:

- armed with any offensive weapon or instrument; or
- together with one other person or more.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant was:
  - ⊖ armed with any offensive weapon or instrument, or was together with one or more persons;
- The defendant either:
  - ⊖ robbed a person; or
  - ⊖ assaulted a person, with intent to rob.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who robbed or assaulted with intent to rob any person.

Offensive weapon or instrument

An offensive weapon means any article made or adapted for use for causing injury to the person, or intended by the person having it with him or her for such use: *s96(3) Penal Code*.

Robs

Robbery combines the offences of assault and larceny.

### Intent to rob

The defendant need not actually rob the victim if the intent to rob is present.

The *mens rea* for robbery is the intent to obtain property by violence or the threat of violence, at the time of the violence or threat: See *Pollock* [1967] 2 QB 195.

The victim need not actually feel threatened by the violence or threat of violence. It is only required that the defendant intended to do so.

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## **Sentence**

Maximum five years imprisonment for assault with intent to rob.

Maximum 14 years imprisonment for actual robbery.

*Practice Direction No. 2 of 2003* offers starting point sentences depending on the type of robbery which can be reduced or increased.

- Large-scale organised robberies, sentences should start at 8 years imprisonment;
  - Robberies involving the threat or use of firearms and other lethal weapons, sentences should start at 8 years imprisonment;
  - Robberies involving financial institutions or where a large sum of money has been stolen (>\$10000), sentences should start at 8 years imprisonment;
  - Robbery of taxi drivers, service stations and small business premises, sentences should start at 8 years imprisonment;
  - Street muggings and opportunist robberies of householders, sentences should start at 6 years imprisonment.
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## Robbery (with Violence)

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**Section** *s293(1)(b) Penal Code (Cap. 17)*

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**Description** Any person is guilty of a felony who robs any person and, at the time of or immediately before or immediately after such robbery, uses or threatens to use any personal violence to any person.

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- Elements**
- The person named in the charge is the same person who is appearing in Court;
  - The defendant robbed any person;
  - The defendant used or threatened to use personal violence on any person immediately before or immediately after such robbery.
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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who used or threatened to use personal violence immediately before or after a robbery.

Robs

Robbery combines the offences of assault and larceny. It is essential that the person assaulted is also the person robbed and that the party or parties committing the assault are the same as those committing the robbery.

The *mens rea* for robbery is the intent to obtain property by violence or the threat of violence, at the time of the violence or threat: See *Pollock* [1967] 2 QB 195.

Uses or threatens personal violence

The victim need not actually feel threatened by the violence or threat of violence. It is only required that the defendant intended to do so.

### Case law

*R v Moananui* (1983) NZLR 537.

*Josefa Lui v State* Cr. App. AAV 005/975.

*State v Cava* [2001] FJHC 19; Hac0007j.00s (19th April, 2001)

### Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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## **Sentence**

Maximum life imprisonment.

*Practice Direction No. 2 of 2003* offers starting point sentences depending on the type of robbery which may be reduced or increased.

- Large-scale organised robberies, sentences should start at 8 years imprisonment;
  - Robberies involving the threat or use of firearms and other lethal weapons, sentences should start at 8 years imprisonment;
  - Robberies involving financial institutions or where a large sum of money has been stolen (>\$10000), sentences should start at 8 years imprisonment;
  - Robbery of taxi drivers, service stations and small business premises, sentences should start at 8 years imprisonment;
  - Street muggings and opportunist robberies of householders, sentences should start at 6 years imprisonment.
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## Rape

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**Section** *s149 Penal Code (Cap. 17)*

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**Description** Every person is guilty of a felony who has unlawful carnal knowledge of a woman or girl:

- without her consent; or
- with her consent if the consent is obtained by force, threats or intimidation of any kind, by fear of bodily harm, by false representations as to the nature of the act, or in the case of a married woman, by personating her husband.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant had unlawful carnal knowledge of a woman or girl without her consent, or with her consent if that consent is obtained by:
  - ⊖ force, threats or intimidation;
  - ⊖ fear of bodily harm;
  - ⊖ false representations as to the nature of the act; or
  - ⊖ personating her husband in the case of a married woman.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who had unlawful carnal knowledge of a woman or girl.

#### Unlawful carnal knowledge

Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

“Two main elements are required for rape: proof of penetration of the vagina by the penis, and lack of consent. Presently, if a woman is unable to establish penetration, or if the assailant only ejaculated near her vagina, the offence of rape is **not** proved and the activity constitutes attempted rape and/or indecent assault both carrying lesser sentences” *Fiji Law Reform Commission, Sexual Offences Report, 1999 at 12*.

#### Consent and mens rea

The defendant must not only the basic intent to have carnal knowledge of the woman but must also know or be reckless of the woman’s lack of consent to the act: See *Iliatia Koroiciri v R* [1979] Fj Cr App. 43/79. See *S v Bechu*, Magistrates’ Court, Levuka, 2 Dec, 1999.

#### Consent

The current law does not clearly define “consent” or “lack of consent”: *Fiji Law Reform Commission Sexual Offences Report, 1999 at 19*.

“It is sometimes felt that rape is the only crime where the onus of proof appears to shift to the victim; ie. the victim must prove that she did not give her consent.” *Sexual Offences Report at 18*. Therefore, when ascertaining whether consent was obtained, it is important to maintain focus on the acts of the defendant and not on the level of resistance offered by the victim.

#### Consent obtained by force, threats, intimidation

See *R v Olugboja* (1981) 73 Cr App. 344.

#### False representations

See *R v Case* (1885) DEN 580.

#### Impersonating woman’s husband

See *R v Papadimitropoulos* (1957) 98 CLR 249 and *R v Leonard Laule* (1976) SI Crim Case 29/76.

### Corroboration

In all sexual offences a corroboration warning must be given. This is not part of the statutory provisions, but has developed as a requirement under the rules of common law. It requires that the judge when directing the jury, instruct them that it is dangerous to convict the defendant on the uncorroborated evidence of the complainant: See *Mark Lawrence Mutch* Crim. App. AAV0060 of 1999, and *Waisake Navunigasail v The State* FCA AA0012/1996S.

It is important, however to remember that due to the often private nature of the act, corroboration for sexual offences are much more difficult to secure than for other offences: *Sexual Offences Report, Fiji Women's Rights Movement Draft Sexual Offences Legislation at 12.*

### Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

### Mistake of fact re consent

See general rules regarding mistakes of fact in *s10* of the *Penal Code*.

In *DPP v Apimileki Madraitabua* (1982) Fiji, at page 13, the Fiji Court of Appeal confirmed that *s10* of the *Penal Code* added the requirement of "reasonable" to "honest belief". In Fiji, therefore, the defendant's belief must not only be genuine (honest), but also reasonable: *Sexual Offences Report* at 23.

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## **Sentence**

Maximum life imprisonment.

The penalty for attempted rape is maximum seven years.

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## Indecent Assault on a Female

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**Section** *s154 Penal Code (Cap. 17)*

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**Description** Every person is guilty of a felony who unlawfully and indecently assaults any woman or girl.

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- Elements**
- The person named in the charge is the same person who is appearing in Court;
  - The defendant assaulted a woman or girl;
  - The assault was unlawful and indecent.
- 

**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the defendant who indecently assaulted a woman or girl.

Indecent

The term indecent is not defined in legislation, but it has generally been taken to mean “offensive to the contemporary standards of modesty and privacy”: See *R v Court* [1988] 2 All ER 221.

Mens rea

The *mens rea* necessary for indecent assault is that the defendant intended to commit an assault which is indecent by the community standards.

Corroboration

In all sexual offences a corroboration warning must be given. This is not part of the statutory provisions, but has developed as a requirement under the rules of common law. It requires that the judge when directing the jury, instruct them that it is dangerous to convict the defendant on the uncorroborated evidence of the complainant.

See *Mark Lawrence Muteh* Crim. App. AAV0060 of 1999, and *Waisake Navunigasail v The State* FCA AA0012/1996S.

It is important, however to remember that due to the often private nature of the act, corroboration for sexual offences are much more difficult to secure than for other crimes: *Sexual Offences Report, Fiji Women's Rights Movement Draft Sexual Offences Legislation at 12.*

#### Case law

See *DPP v Saviriano Radovu* Crim. App. No 0006 of 1996, *Ratu Penioni Rokota v The State* Crim. App. HAA 068 of 2002.

#### Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Proof of consent to the act of indecency is no defence to the charge if the girl is under sixteen years: *s154(2) Penal Code.*

It shall be a sufficient defence for the charge of indecent assault on a girl under sixteen years to prove that she consented to the act of indecency and the person so charged had reasonable cause to believe and did in fact believe that the girl was of or above sixteen years: *s154(3) Penal Code.*

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### **Sentence**

Maximum five years imprisonment.

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## Indecently Insulting or Annoying a Female

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**Section** *s154(4) Penal Code (Cap. 17)*

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**Description** Every person is guilty of a misdemeanour who:

- intending to insult the modesty of any woman or girl, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen by such woman or girl; or
- intrudes upon the privacy of a woman or girl by doing an act of a nature likely to offend her modesty.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant uttered a word, made a sound gesture or exhibited an object;
- The defendant intended the act to be heard or seen by the woman;
- The defendant intended to insult the modesty of the woman or girl.

**OR**

- The person named in the charge is the same person who is appearing in Court;
- The defendant intruded upon the privacy of a woman;
- The act was of a nature likely to offend her modesty.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who uttered any word, made any sound or gesture, or exhibited any object, or intruded upon the privacy of a woman or girl.

Utter

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

Case law

See *State v PC Uttesh Chandra and Others* Crim. App. 018/03.

Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum one year imprisonment.

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## Defilement of Girl under Thirteen Years

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**Section** *s155 Penal Code (Cap. 17)*

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**Description** Every person is guilty of a felony who unlawfully and carnally knows any girl under the age of thirteen years.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
  - The defendant had unlawful carnal knowledge of the girl;
  - The girl was under thirteen years of age.
- 

**Commentary**

Burden and standard of proof

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

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was the defendant who had carnal knowledge of the girl.

Carnal knowledge

Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

Defences

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

The defendant will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum life imprisonment.

The attempt is a misdemeanour with maximum five years imprisonment.

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## Defilement of Girl between Thirteen and Sixteen Years

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**Section** *s156(1)(a) Penal Code (Cap. 17)*

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**Description** Every person is guilty of a misdemeanour who has, or attempts to have, unlawful carnal knowledge of any girl above the age of thirteen and below the age of sixteen.

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- Elements**
- The person named in the charge is the same person who is appearing in court;
  - The defendant had, or attempted to have, unlawful carnal knowledge of a girl;
  - The girl was above the age of thirteen and below the age of sixteen.
- 

**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who had or attempted to have carnal knowledge of the girl.

It shall be a sufficient defence to any charge under subsection (a) if it shall be made to appear to the Court that the person so charged had reasonable cause to believe and did in fact believe that the girl was or above the age of sixteen: *s156 Penal Code*.

No prosecution for this offence shall be commenced more than twelve months after the commission of the offence: *s156(2) Penal Code*.

It is no defence to prove that the girl consented to the act: *s156(3) Penal Code*.

### Carnal knowledge

Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

### Case law

See *Elia Donumainasuva v The State* Crim. App. HAA 032 of 2001, *R v Taylor and Others* 64 Cr. App. R. 182, *State v Meli Rogica and Others* Crim. App. HAA 037 of 2002S.

### Defences

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

The defendant may claim honest and reasonable belief as to the complainant being above the age of 16 years.

The defendant will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

### Reasonable cause to believe

This may arise on the basis of evidence that the complainant told the defendant that she was over the age of 16 years.

### Did in fact believe

Such evidence may arise if the defendant believed the complainant when she told him she was over the age of 16 years, or that she looked over the age of 16 years. This is a matter of credibility.

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## **Sentence**

Maximum five years imprisonment.

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## Defilement of Female Under Severe Abnormality

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**Section** *s156(1)(b) Penal Code (Cap. 17)*

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**Description** Every person is guilty of a misdemeanour who has, or attempts to have, unlawful carnal knowledge of any female person suffering from severe subnormality under circumstances which do not amount to rape but which prove that the offender knew at the time of the commission of the offence that the woman or girl was suffering from severe abnormality.

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- Elements**
- The person named in the charge is the same person who is appearing in Court;
  - The defendant had or attempted to have unlawful carnal knowledge or attempted to, of the female person;
  - The female suffered from severe subnormality;
  - The circumstances do not amount to rape;
  - The circumstances prove that the defendant knew of the female's subnormality.
- 

**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who had carnal knowledge or attempted to have carnal knowledge of the female.

Carnal knowledge

Whenever, upon the trial for any offence punishable under this Code, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed to constitute carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only: *s183 Penal Code*.

Severe subnormality

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

Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum five years imprisonment.

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## Dangerous Drugs

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**Section** *s8(b), 41(2) of the Dangerous Drugs Act (Cap. 114) as amended by Decree No 4 of 1990 and Amendment Decree No 1 of 1991*

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**Description** Any person is guilty of an offence who:

- is found in possession of or selling; or
- has given or sold to any person,

any substance to which *Part II* applies.

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**Elements**

- The person named in the charge is the same person appearing in Court;
- The defendant:
  - ◻ was found in possession of any substance to which *Part II* of the *Dangerous Drugs Act* applies; or
  - ◻ was found selling any substance to which *Part II* of the *Dangerous Drugs Act* applies; or
  - ◻ gave or sold any substance to which *Part II* of the *Dangerous Drugs Act* to any person.

---

**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who had possession of, was selling, or had given or sold any prohibited substance under *Part II*.

Possession

See *Luisa Wakeham v State* Crim App No. HAA040 of 2003S.  
*Warner v Metropolitan Police Commissioner* (1969) 2 AC 256.

### Substances

The offences of Part II apply to raw opium, coca leaf, and Indian hemp, and resins obtained from Indian hemp and preparations of which such resins form the base: *s4(1) Dangerous Drugs Act*.

### Raw opium

Raw opium means the product of raw opium obtained by a series of special operations, especially by dissolving, boiling, roasting and fermentation, designed to transform it into an extract suitable for consumption, and includes dross and all other residues remaining after opium has been smoked: *s2 Dangerous Drugs Act*

### Coca leaf

Coca leaf means the leaf of the *Erythroxylon coca* Lamarck and the *Erythroxylon novo-granatense* (Morris) Hieronymus and their varieties belonging to the family *Erythroxylaceae* and the leaf of other species of this genus from which it may be found possible to extract cocaine either directly or by chemical transformation: *s2 Dangerous Drugs Act*.

### Indian hemp

Indian hemp means either of the plants *Cannabis sativa* or *Cannabis indica* or any portion thereof: *s2 Dangerous Drugs Act*.

### Defences

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

The defendant will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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## **Sentence**

No minimum mandatory sentence. Mandatory minimum terms for minor possession of dangerous drugs was declared unconstitutional. See *Harris Ramswaroof* HAA 014, 2003. *State v Pickering* Misc Act No. HAM 007 of 2001S.

Maximum sentence as per Schedule.

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## Causing Death by Reckless or Dangerous Driving

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**Section** *s238(1) Penal Code*

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**Description** Every person is guilty of a misdemeanour who causes the death of another person by driving a motor vehicle on a road:

- recklessly; or
- at a speed or manner dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road.

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**Elements**

- The person named in the charge is the same person appearing in Court;
- The defendant caused the death of another person by driving a motor vehicle on a road:
- The defendant was driving on a road:
- recklessly; or
- at a speed or in a manner which was dangerous to the public having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic actually on the road or reasonably expected to be on the road.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

The prosecution must provide evidence to prove that it was the defendant who caused the death of another by driving that was either reckless or dangerous to the public.

Motor Vehicle

See the *Land Transport Act* for definitions.

Speed or manner dangerous to the public

See definition of “public” in *Chapter II* of the *Penal Code*.

Relation to the Traffic Act

The provisions of *s30, 31, 32* and *42* of the *Traffic Act* relating to disqualifications from holding or obtaining a driving licence; the endorsement of holding driving licences and restrictions on prosecution shall apply to prosecutions under *s238(1)* of the *Penal Code*.

Case law

See *Nand Kumar v The State* Crim. App. No HAA 115/2002L, *Ajanesh Kumar v The State* Crim. App. No AAV 0014 of 2002S, *Semisi Lasike v The State* Crim. App. No HAA 058 of 2002, *Sefanaia Narau v The State* Crim. App. No 79 of 1990, *R v Guilfoyle* (1973) 57 Cr. App. R. 549.

For dangerous driving generally, see *Eroni Turagatautoka v The State* Crim App No. HAM058.03S

Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**

Maximum five years imprisonment.

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## Receiving Stolen Property

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**Section** *s313(1) Penal Code*

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**Description** Every person is guilty of an offence, who receives any property knowing it had been:

- stolen; or
- obtained in any way whatsoever under circumstances which amount to felony or misdemeanour.

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**Elements**

- The person named in the charge is the same person who is appearing in Court;
- The defendant received any property;
- The property was stolen or obtained in circumstances amounting to felony or misdemeanour;
- The defendant knew of this.

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**Commentary** Burden and standard of proof  
The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

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

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

Possession

See definition in *Chapter II* of the *Penal Code*.  
Receiving must be into the possession of the defendant.

Mens rea

The *mens rea* for receiving stolen property is the intent to receive. The defendant must also know that the goods were stolen or otherwise obtained by criminal circumstances.

#### Proceedings despite no action against principal offender

A prosecution may be proceeded with and an defendant may be convicted on this charge whether or not the principal offender has or has not been convicted, or is or is not amenable to justice: *s313(3) Penal Code*.

#### Evidence of similar fact

For the charges of receiving property knowing it to have been stolen or for having possession of stolen property, for the purposes of proving guilty knowledge, evidence may be given at any stage of the proceedings:

- of the fact that other property stolen within the period of 12 months preceding the date of the offence charged was found or had been in the defendant's possession; and
- of the fact that within the five years preceding the date of the offence charged the defendant was convicted of any offence involving fraud or dishonesty, if:
  - ◻ seven days notice in writing has been given to the offender that proof of such previous conviction is intended to be given; and
  - ◻ evidence has been given that the property in respect of which the offender being tried was found or had been in his possession: *s315 Penal Code*.

#### Felony

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

#### Misdemeanour

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

#### Useful case law

See *Griffiths Case* (1974) 60 Cr App R 40.

#### Defences

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

The defendant will have to establish any defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

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**Sentence**Like Degree

The conviction for this offence is of the like degree as the means in which the property was obtained, whether by felony or misdemeanour: *s313 Penal Code*.

Maximum 14 years imprisonment for conviction on felony.

Maximum seven years imprisonment for conviction on misdemeanour.

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