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EVIDENCE

1 Introduction

Evidence refers to the information used to prove or disprove the facts in issue in a trial. In criminal trials, it is generally the prosecution that bears the burden of proving or disproving the facts in issue, in order to establish the guilt of the defendant.

The subject of evidence, and the rules related to it, is a complex area of law. This chapter provides a brief introduction to the subject of evidence and outlines some of the rules of evidence that you may encounter in a criminal trial. It should not replace in-depth study of the rules of evidence and their application in criminal trials in the Magistrate's Court.

In order to properly apply the rules of evidence in a criminal trial, it is important to understand how evidence is classified.

2 Classification of Evidence

Evidence is generally distinguished by reference to the form it takes or by reference to its content. You must take into account both the form of evidence and the content of the evidence in a criminal trial. For example, oral evidence (which is a form of evidence) given during a trial may be direct or circumstantial (which is the content of the evidence).

2.1 Classification by Form

Classification by form refers to the way evidence is presented in Court and it is divided into three main categories.

1. Documentary evidence:

- consists of information contained in written or visual documents.

2. Real evidence:

- is usually some material object or thing (such as a weapon) that is produced in Court and the object's existence, condition or value is a fact in issue or is relevant to a fact in issue.

3. Oral evidence:

- is the most important category of evidence in criminal cases; and
- consists of the statements or representation of facts given by witnesses.

2.2 Classification by Content

Classification by content refers to the way the evidence is relevant to the facts in issue. This method of classification divides evidence into three categories.

1. Direct evidence:

- is evidence which, if believed, directly establishes a fact in issue. For example, direct evidence would be given by a witness who claimed to have personal knowledge of the facts in issue.

2. Circumstantial evidence:

- is evidence from which the existence or non-existence of facts in issue may be inferred;
- is circumstantial because, even if the evidence is believed, the information or circumstances may be too weak to establish the facts in issue or to uphold a reasonable conviction; and
- often works cumulatively and there may be a set of circumstances which, individually, would not be enough to establish the facts in issue but taken as a whole would be enough to do so.

3. Corroborating or collateral evidence:

- is evidence which does not bear upon the facts in issue either directly or indirectly but is relevant for the credibility or admissibility of other evidence in the case (either the direct or circumstantial evidence); and
- should come from another independent source, e.g., an analyst or medical report.

3 Documentary Evidence

This is information that is contained in written documents. These documents may include:

- public documents (statutes, parliamentary material, judicial documents, public registers);
- private documents (business records, agreements, deeds, see *s4 Evidence Act*);
- plans and reports (see *s191 CPC*);
- certificates;
- statements in documents produced by computers (note that certain rules may apply to this form of documentary evidence);
- tape recordings; and
- photographs.

By definition, documentary evidence will always consist of 'out of Court' statements or representations of facts, and therefore the question of whether the document is hearsay evidence will always arise. Often, documentary evidence will only be admissible under an exception to the hearsay rule, or it may be admissible under *s2 Interpretation Act*, under the *CPC*, or under the *Evidence Act* as a trade or business record.

It is best if the documents produced at the trial are the originals. If the original cannot be produced, then copies may be ruled admissible depending on the circumstances: *State v Vincent Lobendhan* (1972) 18 FLK 1.

Carbon copies are admissible as the original: *Durston v Mercuri* (1969) V.R. 507.

See *State v Maika Soqonaivi* Crim Case No 0f 1996; *Wayte* (1982) 76 Cr App R110.

Secondary evidence

Secondary evidence refers to evidence that is not original. It may not be given as much weight as original evidence.

Examples of secondary evidence include:

- shorthand writing;
- photocopy; or
- fax copy.

4 Real Evidence

Real evidence usually refers to material objects or items which are produced at trial.

Documents can also be real evidence when:

- contents of the document are merely being used to identify the document in question or to establish that it actually exists; or
- where the document's contents do not matter, but the document itself bears fingerprints, is made of a certain substance, or bears a certain physical appearance.

The following may also, in some circumstances, be regarded as real evidence.

- a person's behaviour;
- a person's physical appearance; and/or
- a persons demeanour or attitude, which may be relevant to his/her credibility as a witness, or whether he/she should be treated as a hostile witness.

Often little weight can be attached to real evidence, unless it is accompanied by testimony identifying the object and connecting it to the facts in issue.

In some cases, the Court may have to inspect a material object out of Court when it is inconvenient or impossible to bring it to Court. Furthermore, you may also make orders for inspection of any real or personal property which may be material to the determination of the matter in dispute: *s59 Magistrates' Courts Act*.

5 Exhibits

When real or documentary evidence is introduced in Court, it becomes an exhibit. When a party is tendering an exhibit in Court, you should consider:

- Has the witness seen the item?
- Has the witness been able to identify the item to the Court?
- Has the party seeking to have the item become an exhibit formally asked to tender it to the Court?
- Has the other party been put on notice about the existence of the exhibit?

Once an article has become an exhibit, the Court has a responsibility to preserve and retain it until the trial is concluded. Alternatively, the Court may mark and record the existence of the item, and entrust the object or document to the police or Director of Public Prosecutions for safekeeping.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage; and
- that if the DPP's office or the police are entrusted with the item, that the defence is given reasonable access to it for inspection and examination.

6 Oral Evidence

Oral testimony consists of statements or representations of fact. These statements may be 'in Court' statements or 'out of Court' statements.

In Court statements are defined as those made by a witness who is giving testimony. If a witness wants to mention in his or her testimony a statement which he or she, or somebody else made outside of the Court, the witness is making an 'out of Court' statement.

The distinction between 'in Court' statements and 'out of Court' statements is very important in the law of evidence. If a witness wants to refer to 'out of Court' statements in his or her testimony, you must decide whether it should be classified as hearsay or original evidence.

If the purpose of the 'out of Court' statement is to prove the truth of any facts asserted, then the out of Court statement is classified as hearsay evidence and will generally be ruled inadmissible, pursuant to the hearsay rule.

If the purpose of mentioning the 'out of Court' statement is simply to prove that the 'out of Court' statement was made, then it should be treated as original evidence and should generally be ruled admissible.

The value of oral evidence is that you can observe:

- the demeanor of the witness;
- the delivery;
- the tone of voice;
- the body language; and
- the attitude towards the parties.

You should ensure that at every stage of the proceedings, you take down in writing oral evidence given before the Court or that which you deem material.

7 Evidentiary Issues Relating to Witness Testimony

There are a number of important issues that relate specifically to witness testimony during the course of a criminal trial. These issues include:

1. the competence and compellability of witnesses including spouses, the defendant and co-defendant;
2. examination of witnesses;
3. leading questions;
4. refreshing memory;
5. lies;
6. corroboration;
7. hostile witnesses;
8. warnings to witnesses against self incrimination;
9. identification evidence by witnesses; and
10. visiting the scene.

7.1 Competence and Compellability of Witnesses

A witness is competent if he or she may be lawfully called to testify. The general rule is that any person is a competent witness in any proceedings unless they fall under one of the exceptions in statute or at common law. Compellability means that the Court can require or compel a witness to testify once they have been found competent. You may compel a witness to give material evidence in a criminal trial, subject to just exceptions: *ss60* and *63 Magistrates' Court Act & s127 CPC*.

Special statutory and common law rules have been developed regarding the competence and compellability of certain kinds of witnesses.

The defendant and co-defendant

The general law rule is the defendant is not a competent witness for the prosecution. This means that a co-defendant cannot be called by the prosecution to give evidence against another, unless certain qualifications are present.

A defendant cannot be compelled to give evidence at his or her own trial: *s10(7) Constitution*.

A co-defendant can only lawfully be called to give evidence for the prosecution when he or she has ceased to be a co-defendant, which is when:

- he or she pleads guilty; or
- he or she is acquitted; or
- he or she is tried separately; or
- the Director of Public Prosecutions puts an end to the proceedings against him or her; or
- he or she has been sentenced.

Every person charged with an offence and their spouse shall be a competent witness for the defence at every stage of the proceedings provided that:

- he or she does so on his or her own application: *s145(a) CPC*;
- his or her failure to give evidence shall not be commented upon by the prosecution: *s145(b) CPC*;
- his or her spouse gives evidence upon his or her application: *s145(c) CPC*;
- no communication between the defendant and his or her spouse during marriage shall be compelled to be disclosed during the proceedings: *s145(d) CPC*;
- he or she is subject to cross-examination by the prosecution: *s145(e) CPC*;
- he or she is not to be questioned on other offences not charged and of bad character unless exceptions apply: *s145(f) CPC*; and
- he or she gives evidence from the box: *s145(g) CPC*.

Spouses

The spouse of the defendant shall be a competent witness for the prosecution and defence without the consent of the defendant in any case where:

- the law in force at the time specifically provides for a spouse to be called without the consent of the defendant; or
- the defendant is charged with an offence under *Part XVII* (Offences Against Morality) or *s185* (Bigamy) *Penal Code*; or
- the defendant is charged with an act or omission affecting the person or property of their spouse or the children of the either of them: *s138 CPC*.

Although a spouse is competent to be called to testify for the prosecution in certain cases, whether they can be compelled to do so in those cases is a different question. The English case *R v Pitt* [1983] QB 25, 65-66, sets out a number of points relating to a spouse who is competent but not compellable for the prosecution. These points are:

- the choice whether to give evidence is that of the spouse and the spouse retains the right of refusal; and
- if the spouse waives the right of refusal, he or she becomes an ordinary witness and in some cases, an application may be made to treat the spouse as a hostile witness; and
- although not a rule of law or practice, it is desirable that when a spouse is determined a competent but not a compellable witness, that the judge [or Magistrate] explain that he or she has the right to refuse to give evidence but if he or she does choose to give evidence, he or she will be treated like any other witness.

Children

Every witness in any criminal matter shall be examined upon oath. However, the Court may take without oath the evidence of any person of immature age, provided that the Court thinks it just and expedient to do so (and the reasons are recorded in the proceedings): *s136 CPC*.

This provision provides for the possibility that children can be competent witnesses in a criminal trial, even in cases where they might not understand the implications of swearing an oath.

Regardless of whether a child shall be called to give sworn or unsworn evidence (i.e. is competent) it is at your discretion and will depend upon the circumstances of the case and upon the child who is being asked to give evidence.

7.2 Examination of Witnesses

General

The Court may at any stage of any trial, summon any person as a witness or examine any person in attendance though not summoned: *s135 CPC*.

The Court may adjourn any case for up to 8 days and remand a witness where he or she:

- refuses to be sworn;
- having being sworn, refuses to answer any question;
- refuses or neglects to produce any document or exhibit; or
- refuses to sign his or her deposition: *s137 CPC*.

Where you deem the examination of a witness is necessary for the ends of justice, and the attendance of such witness cannot be procured without unreasonable delay, expense and inconvenience, you may, with the consent of the parties, issue a commission to a Magistrate within the local jurisdiction to take the evidence of the witness: *s139 CPC*.

Examination-in-chief

The object of examining a witness by the party calling him or her is to gain evidence from the witness that supports the party's case.

Examination-in-chief must be conducted in accordance with rules of general application such as those relating to hearsay, opinion and the character of the defendant.

There are also other rules that relate to examination-in-chief including:

- the rule requiring the prosecution to call all their evidence before the close of their case;
- leading questions; and
- refreshing memory.

Cross-examination

The object of cross-examination is:

- to gain evidence from the witness that supports the cross-examining party's version of the facts in issue;
- to weaken or cast doubt upon the accuracy of the evidence given by the witness in examination-in-chief; and
- in appropriate circumstances, to draw questions as to the credibility of the witness.

7.3 Leading Questions

A general rule is that leading questions may not be asked of a witness during examination-in-chief. A leading question is one which either:

- suggests to the witness the answer which should be given; or
- assumes the existence of facts which are in dispute.

Leading questions may be allowed in the following circumstances:

- in regard to formal or introductory matters. For example, the name, address and occupation of the witness;
- with respect to facts which are not in dispute or introductory questions about facts which are in dispute;
- for the purpose of identifying a witness or object in Court;
- in cases where the interests of justice requires it at your discretion.

7.4 Refreshing Memory

In the course of giving his or her evidence, a witness may refer to a document in order to refresh his or her memory. The basic rules are:

- a witness may refresh their memory from notes;
- the notes must have been made by the witness or under their supervision;
- the notes must have been made at the time of the incident or almost immediately after the incident occurred. Notes made after a day or two could not usually be used;
- the witness should not normally read from the notes, but should use them only to refresh their memory. However, if the notes are lengthy and complex, then the only sensible and practicable course is to allow the witness to actually read them; and
- if the defendant or counsel wishes to see the notes, there is a right to inspect them.

7.5 Lies

If it is established that the defendant lied (i.e. told a deliberate falsehood as opposed to making a genuine error), this is relevant to his or her credibility as a witness. It does not necessarily mean, however, that the defendant is guilty. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

As with a defendant, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

As to proper direction on lies, see *Amina Koya v State* FCA Crim App No. AAU 0011/96.

7.6 Corroboration

Where corroboration is required as a matter of practice, as in the prosecution of sexual offence cases, you must look for it in the prosecution evidence. If at the end of the hearing, you find that the complainant's evidence does not have support from another witness but you were nevertheless convinced that the complainant was telling the truth, you may still convict the defendant.

You must make it clear on the record or in your judgment that you were aware of the danger of convicting on the uncorroborated evidence of the complainant alone, but were nevertheless satisfied beyond reasonable doubt that the defendant was guilty of the offence charged.

It is important to watch the witness as well as recording details of facts. You may want to:

- record how they give their evidence;
- record any inconsistencies within their evidence, or with their evidence and another witness' evidence; and
- see whether they avoid giving straight answers in areas of importance.

As to corroboration warning, see *Mohammed Kasim v Reg* 22FLR 20; *Mark Mutch v State* FJCA Crim App AAU0060/99; *Daniel Azad Ali v State* Crim App AAU 53/99S.

As to whether a corroboration warning in sexual cases is still law, see *R v Gilbert* (2000) 5LRC 606: "the corroboration rule is only a rule of practice and has now outlived it's purpose".

7.7 Hostile Witnesses

The general rule is that a party is not entitled to impeach the credit of his or her own witness by asking questions or introducing evidence concerning such matters as the witness's bad character, previous convictions, bias or previous inconsistent statements.

In the case where the witness appears to be hostile, the general rules are:

- the party calling the witness may, by leave of the Magistrate, prove a previous inconsistent statement of the witness;
- at common law, the party calling the witness may cross-examine him or her by asking leading questions.

It is important to remember that the discretion of the Magistrate is absolute with respect to declaring a witness as hostile. The following guidelines are suggested:

- The prosecutor or defence who has called the witness must apply to have the witness declared hostile, and must state the grounds for the application. The grounds for asking that a witness be declared hostile should be based on definite information and not just on speculation.

- Sometimes the witness will show such clear hostility towards the prosecution that this attitude alone will justify declaring the witness hostile.
- The mere fact that a witness called by the prosecution gives evidence unfavourable to the prosecution or appears forgetful, is not in itself sufficient ground to have them declared hostile.
- You should show caution when declaring a witness hostile. The effect of the declaration can be to destroy the value of that witness's evidence.

See *Armogami Ranjit Singh & Anr v State* FCA Crim App No. AA4032 of 2002.

7.8 The Warning to a Witness against Self Incrimination

You will need to be constantly vigilant about self-incriminatory statements by a witness. If a question is asked of a witness, the answer to which could be self-incriminatory, you should:

- warn the witness to pause before answering the question;
- explain to the witness that they may refuse to answer the question; and
- explain that any evidence the witness gives in Court that is self- incriminating could be used to prosecute them for a crime.

The warning against self-incrimination does not apply to a question asked of a defendant, where the question relates to the offence being considered by the Court. See *R v Coote* (1873) LR 4PC 599.

7.9 Identification Evidence by Witnesses

The visual identification of the defendant by witnesses needs to be treated with caution. Honest and genuine witnesses have made mistakes regarding the identity of the defendant.

The fundamental principal of identification evidence is that the weight to be assigned to such evidence is determined by the circumstances under which the identification was made.

The authority on the issue is the English case of *R v Turnbull and Others* [1977] QB 224, where the Court made the following guidelines for visual identification:

- How long did the witness have the defendant under observation?
- At what distance?
- In what light?
- Was the observation impeded in any way, as, for example, by passing traffic or a press of people?
- Had the witness ever seen the defendant before?

- How often?
- If only occasionally, had they any special reason for remembering the defendant?
- How long elapsed before the original observation and the subsequent identification to the police?
- Was there any material discrepancy between the description of the defendant given to the police by the witness when first seen by them and his or her actual appearance?

See *Siga v Lesumailau & Anr* Crim App AAU 0023/2000S; *Josefa Tale v State* Crim App HAA0078/2001S.

7.10 Visiting the Scene

A visit to the *locus in quo* must include all the parties.

As to how to conduct a visit, see *State v Luisa Wakeham* HAA40/03.

8 Rules of Evidence

8.1 Introduction

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence can be found in the *Magistrates' Courts Act*, the *Criminal Procedure Code*, and the *Penal Code*.

The rules of evidence are many and complicated. A brief overview of some of the important rules of evidence that will arise in defended criminal proceedings in the Magistrate's Court follow.

8.2 Burden and Standard of Proof

There are two principal kinds of burden of proof: the legal burden and the evidential burden.

Legal burden

The legal burden is the burden imposed on a party to prove a fact or facts in issue. The standard of proof required to discharge the legal burden varies according to whether the burden is borne by the prosecution or the defendant.

If the legal burden is borne by the prosecution, the standard of proof required is 'beyond reasonable doubt.'

If the legal burden is borne by the defendant, the standard of proof required is 'on the balance of probabilities.'

The term balance of probabilities means that the person deciding a case must find that it is more probable than not that a contested fact exists.

The general rule is that the prosecution bears the legal burden of proving all the elements in the offence necessary to establish guilt. There are only three categories of exception to the general rule.

Insanity
If the defendant raises this defence, he or she will bear the burden of proving it, on the balance of probabilities.

Express statutory exceptions
Where a statute may expressly cast on the defendant the burden of proving a particular issue or issues.

Implied statutory exceptions
Where a statute, on its true construction, may place the legal burden of proof on the defendant.

You must decide whether a party has discharged the legal burden borne by them at the end of the trial, after all the evidence has been presented.

Evidential burden

The evidential burden is the burden imposed on a party to introduce sufficient evidence on the fact or facts in issue to satisfy you that you should consider those facts in issue.

Generally, the party bearing the legal burden on a particular issue will also bear the evidential burden on that issue. Therefore, the general rule is that the prosecution bears both the legal and evidential burden in relation to all the elements in the offence necessary to establish the guilt of the defendant.

Where the defendant bears the legal burden of proving insanity or some other issue, by virtue of an express or implied statutory exception, they will also bear the evidential burden. However, in relation to some common law and statutory defences, once the defendant discharges his or her evidential burden, then the legal burden of disproving the defence will be on the prosecution.

8.3 Judicial Notice

The doctrine of judicial notice allows the Court to treat a fact as established in spite of the fact that no evidence has been introduced to establish it. The purpose of this rule is to save the time and expense of proving self-evident or well-established facts. As an example, the judiciary may treat the political events of May 19, 2000 as well-known and dispense with proof of them in each case.

8.4 Admissibility of Evidence

At any time during the course of the proceedings, there may be questions or objections as to the admissibility of evidence.

If there are questions or objections to the admissibility of evidence, the parties will be called upon to make submissions to the Court and it is up to you to rule on whether the evidence should be admitted or excluded, according to the common law and statutory rules which have been developed.

The submissions on the admissibility of evidence should be dealt with in the following manner:

- The party objecting must state the grounds of the objection.
- The other party must be given an opportunity to reply.
- In cases where the defendant is unrepresented, you should instruct him or her to try and see a solicitor to represent him or her on this matter.
- You should then rule on the objection.
- If you disallow the objection, counsel may ask that the objection be noted.
- If you allow the objection and hold that evidence to be inadmissible, you must take great care to disregard that part when making your decision at the conclusion of the hearing.
- In your decision at the conclusion of the case, you should record the objections to evidence and whether you ruled the evidence admissible or inadmissible and on what basis.

Hearings on the *voir dire*

In some circumstances, a *voir dire* will be required to determine the admissibility of evidence. *Voir dire* literally means a trial within a trial. It is the procedure whereby the Court stops the main proceedings to hold a special hearing to determine whether certain items of evidence are admissible for the purpose of proving or disproving disputed facts.

In a *voir dire* hearing, evidence should be limited to matters relevant to the admissibility of the disputed evidence. In trials for indictable offences, a *voir dire* may be held to determine:

- the competency of a witness; or
- the admissibility of a confession or some other variety of admissible hearsay such as a dying declaration; or
- the admissibility of a tape recording; or
- the admissibility of a plea of guilty against a defendant who subsequently changes his or her plea to not guilty.

As to how to conduct a *voir dire* in the Magistrate's Court, see *Vinod Kumar v State* FCA Crim App AAU 0024/00, which set out the following procedures:

- Obtain from the defendant at the beginning of the trial the precise nature of the disputed statement.
- The prosecution calls its witnesses regarding the taking of the caution statement.
- The defendant is given the opportunity to give evidence exclusively on the taking of the caution statement.
- The defendant calls his or her witnesses.
- The Court rules on admissibility.
- The prosecution is invited to close its case – no case to answer submission.
- If there is a case to answer, the defendant does not lose the right of election.
- Determine what weight is to be placed on the evidence as a whole, including the interview statement.
- Deliver judgment.

As to the test for admissibility of confessions, see *Simon Mow v State* Crim App 60/2000; *State v Mul Chand* Crim Case 3/99; *Suren Singh & Ors* Crim App 79/2000; *R v Smith* (1991) 1SCR 714; *R v Black* (1989) 2SCR 138.

Relevance

The cardinal rule regarding the admissibility of evidence is that, subject to the exclusionary rules, all evidence that is sufficiently relevant to the facts in issue is admissible, and all evidence which is irrelevant or insufficiently relevant to the facts in issue should be excluded.

Relevant evidence means evidence which makes the matter which requires proof more or less probable. Relevance is a question of degree and will have to be determined by you, according to the common law rules of evidence and according to specific facts in the case at hand.

Weight

Upon evidence being ruled admissible, you must then determine what weight (i.e. the amount of importance) the evidence should be given.

Discretion to exclude at common law

Every person charged with a criminal offence has the right to a fair trial before a Court of law: *s29(1) Constitution*. In order to ensure that the defendant receives a fair hearing, you have discretion according to the common law to exclude otherwise admissible prosecution evidence if, in your opinion, it is gravely prejudicial to the defendant.

The discretion to exclude evidence has developed on a case by case basis in relation to particular types of otherwise admissible evidence. The judicial discretion to exclude prosecution evidence has been most commonly used in cases where evidence was unlawfully, improperly or unfairly obtained by the police or prosecution.

8.5 Best Evidence Rule

The best evidence rule relates to the use of documents as evidence. The rule is that if an original document is available and can be produced without any difficulty, it should be produced.

If the original has been lost or destroyed, or there is some other good explanation as to why the original cannot be produced, a copy may be produced as it is the best evidence that is now available.

As to admission of copies, see *Kanito Matanigasau v State* Crim App No. HAA 108 of 2002.

8.6 Hearsay Rule

The general rule is that an assertion that is made by a person other than the one giving oral evidence in a proceeding is inadmissible as evidence to prove the truth of some fact that has been asserted.

Despite the general rule, in order to determine whether evidence is hearsay, you must:

- determine the purpose for which the evidence will be used before ruling it hearsay evidence:
  - for example, a statement made to a witness by a person who is not called to be a witness may or may not be hearsay;
  - it would be hearsay and inadmissible if the object of the evidence would be to establish the truth of what is contained in the statement;
  - it would not be hearsay and would be admissible when the statement is used to establish not the truth of the statement itself, but the fact that it was made;

- ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement if prosecution relies on the evidence as being the truth of what is contained in the statement.

The reason for the hearsay rule is because the truthfulness and accuracy of the person whose words are spoken to another witness cannot be tested by cross examination because that person is not or cannot be called as a witness. See *Teper v R* [1952] 2 All ER 447 at 449.

Although the rule against hearsay evidence is fundamental, it is qualified by common law and, in some cases, statutory exceptions.

Exceptions to the hearsay rule

Some of the exceptions to the hearsay rule which exist at common law include:

- confessions;
- dying declarations;
- *res gestae* (certain statements made in the course of, or soon after, a transaction that is the subject of the Court's inquiry); and
- telephone conversations.

8.7 Opinion Evidence

The rule on opinion evidence is that witnesses may only give evidence of facts they personally observed and not evidence of their opinion. A statement of opinion is only an inference drawn from the facts.

Sometimes the borderline between fact and opinion is a very narrow one, and you must exercise ordinary common sense in deciding whether or not the evidence is admissible and (if so) what weight you should give it.

There are two exceptions to the rule on opinion evidence.

- experts;
- non-experts or lay persons.

Experts

Expert witnesses are allowed to give opinion evidence if:

- they are qualified to do so; and
- if the matter requires such expertise.

In order to give opinion evidence, an expert witness must relate to the Court his or her background, qualifications and experience, to establish their credentials to speak as an expert in a specific field. Having done that, as a general rule they should be allowed to give their opinion on all relevant matters within their competency.

Expert opinion should only be admitted where the Court has been shown that an issue of fact requires the application of knowledge, experience and understanding that is beyond that of ordinary persons.

Some examples of expert opinion evidence include:

- a registered medical practitioner giving an opinion about the health of a patient;
- a registered architect giving an opinion about the structure of a building; and
- a qualified motor mechanic giving an opinion about the condition of a motor vehicle.

In the case of reports written by expert witnesses, it is the general rule that they are not admissible if the expert is not called as a witness, unless they fall under *s19 CPC*, or *s4 Evidence Act*.

Any document which is a plan by a surveyor, a report of an analyst or geologist employed by the government, or a report by a medical practitioner can be presumed to be genuine and be used as evidence in any inquiry subject to the Code: *s191 CPC*.

The Court is given the discretion whether to call these experts as witnesses or let their reports and plans stand on their own as evidence: *s191(3) CPC*.

Non-experts

Non-experts may give a statement of opinion on a matter in order to convey relevant facts personally perceived by him or her.

In order for a non-expert or layperson to give evidence of opinion, there must be a factual basis for their opinion. The witness should be asked to describe the persons or circumstances prior to being asked for his or her opinion.

For example, non-experts have given evidence of opinion in regards to:

- the identity of an object;
- the handwriting of which he or she was familiar;
- a person's age;
- the speed of a vehicle;
- the weather;
- whether relations between two persons appear to be friendly or unfriendly.

8.8 Character Evidence

Admissibility of evidence of bad character

As a general rule, it is not open to the prosecution to introduce evidence of the bad character of the defendant in any form.

Therefore, the previous convictions of the defendant may not form part of the case against him or her, nor may his previous misconduct, his disposition towards wrong doing or immorality, or his or bad reputation in the community in which he or she lives.

The only way that evidence of bad character of the defendant can be introduced is by exceptions to the rule. Some of the exceptions to this rule at common law are:

- if evidence of other misconduct forming part of the same transaction of the offence charged is also be admissible at common law; or
- if the defendant puts his or her character in issue, evidence of bad character may be admitted at common law; or
- where the defendant gives evidence, he or she may in certain circumstances face cross-examination on his character.

When the defendant is called as a witness for the defence, the previous convictions and the bad character of the defendant can be admitted as evidence under *s145(f) CPC* where:

- the proof that he or she has committed or been convicted of the other offence is ruled admissible as evidence to show he or she is guilty of the charge now being determined; or
- if the defendant has personally or by his or her lawyer asked a question of a prosecution witness in order to establish his or her own good character; or
- if the defendant has him or herself given evidence as to his or her own good character; or
- part of the defence case involves impugning the character of the complainant or witnesses; or
- when the defendant has given evidence against any other person charged with the same offence.

The cross-examiner may call evidence to prove the conviction if the witness:

- denies having been so convicted; or
- does not admit a conviction; or
- refuses to answer.

See *Josateki Cama v State* Crim App HAA 082/2001S; *Jenkins* 31 Cr App R 1; *Selvey v DPP* (1970) AC 1,Cr App 591.

Note that when the prosecution wishes to adduce evidence of bad character, they should apply to lead the evidence and a ruling should be made.

Admissibility of evidence of good character

A defendant may introduce evidence to show that he or she is of good character. By doing so, however, they put their character in issue and the prosecutor may cross-examine witnesses or, in some cases, the defendant about their character and about any previous convictions.

The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the defendant, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the defendant upon conviction of an offence.