6:

CRIMINAL RESPONSIBILITY

1 Introduction

The *Penal Code* is the statute that sets out:

- those acts or omissions which should be regarded as a criminal offences in the Fiji Islands;
- the party(s) which should be held criminally responsible for those acts or omissions; and
- rules as to when a person can be excused from criminal responsibility.

Part IV *Penal Code* sets out the rules as to criminal responsibility. Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

Generally, a defendant's case will either be that:

- the prosecution has not proved all the elements beyond reasonable doubt; or
- he or she has a specific defence, specified in the actual offence (e.g. "lawful excuse"); or
- that he or she was not criminally responsible, relying on one of the sections under Part IV of the *Penal Code*.

In the case of a defence under Part IV, the defendant must point to some evidence to support such a defence: *R v Rakaimua* [1996] SBHC 13; Criminal Case No. 24 of 1995 (14 March 1996). Then, it is the **prosecution** that bears the burden of proving that such evidence should be excluded and that the defendant **was** criminally responsible for his or her act(s) or omission(s).

The exception is **insanity**. In this case, it is for the defendant to prove, on the balance of probabilities, that they were insane at the time of the offence and therefore, did not have the required *mens rea* for the offence.

The rules in Part IV *Penal Code* can be divided into two categories:

1. Those rules that relate to a denial of the *mens rea* of the offence or to a denial that the defendant was acting voluntarily:
   - Honest claim of right;
   - Intention;
   - Automatism;
   - Accident
   - Mistake;
   - Insanity;
   - Intoxication; and
   - Immature Age.

2. Those rules that relate to excuses or circumstances which justify, in law, the conduct of the defendant:
    - Compulsion; and
    - Defence of person or property.

2 Rules Relating to the *Mens Rea* of an Offence and to Involuntary Acts

2.1 Ignorance of the Law: *s7 Penal Code*

Ignorance of the law does **not** afford any excuse for any act or omission which would constitute an offence, unless knowledge of the law by the offender is expressly declared to be an element of the offence: *s7 Penal Code*.

The fact that a defendant did not know that his or her act or omission was against the law at the time of the offence is not a valid excuse to avoid criminal responsibility. Therefore, it cannot be raised as a defence by the defendant and the prosecution is not required to prove the defendant's knowledge of the **law** in order to prove his or her case.

The exception to this rule, set out in *s7 Penal Code*, is when knowledge of the law is a required element of an offence. If knowledge of the law is **expressly** set out in a statute as being an element of an offence, then:

- the defendant can raise evidence that they did not know that their acts or omissions were against the law at the time of the offence; and
- the prosecution is required to prove beyond reasonable doubt that the defendant had such knowledge of the law.

2.2 Bona-fide Claim of Right: *s8 Penal Code*

A person is not criminally responsible for an offence relating to property, if the act or omission with respect to the property was done in the exercise of an honest claim or right **and** without an intention to defraud: *s8 Penal Code*.

For this defence to be successful:

- the offence must relate to property;
- there must be an honest claim of right; and
- there must be no intention to defraud.

An honest claim of right is when a person honestly asserts what he or she believes to be a lawful claim relating to property, even though it may be unfounded in law or in fact: *R v Bernhard* (1938) 26 CrAppR 137.

Honesty, rather than reasonableness, is what is required for asserting a claim of right: *Toritelia v R* [1987] SILR 4.

The defendant must raise evidence that he or she had no intention of depriving the owner of the property.

This is a question of fact, so whether there was an intention to deprive or defraud the owner will differ, depending on the circumstances of the case.

How the property is dealt with is also relevant as to intention to defraud. A person who intends to, and has the ability to, restore or return the property **may** successfully argue that they did not intend to defraud, even if they cannot return it before the charge. Again, this will depend on the circumstances of each case: *Toritelia v R* [1987] SILR 4.

2.3 Intention, Involuntary Acts and Accident: *s9 Penal Code*

Subject to the express provisions of the *Penal Code* relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his or her will or for an event which occurs by accident: *s9 Penal Code*.

Negligent acts or omissions

Sections 237 to 243 of the *Penal Code* deals with acts or omissions that are criminally negligent.

Criminal negligence is where the defendant's act or omission, which constitutes the offence, fails to comply with the standards of the **reasonable** person. This is a different standard of fault than most criminal offences, which require proof of the defendant's state of mind.

Therefore, a person can be found criminally negligent for something, even if it is an accident, if a reasonable person would have been aware of the risks of that conduct in the same situation.

Involuntary acts and automatism

A person is not criminally responsible for an act or omission that occurs independently of the exercise of his or her will: *s9 Penal Code*.

Most criminal offences require that the defendant's acts or omissions be 'willed' or 'voluntary'.

Involuntary Acts

A defendant will not be criminally responsible for acts or omissions that are involuntary, not only because there is a lack of the required *mens rea* for the offence but also because involuntary movements cannot constitute the necessary *actus reus* of any offence.

An example of an involuntary act would be if Sami was thrown out of a shop window by his enemies and landed on a car window. Sami would not be criminally responsible for the damage to the car because it was not Sami act that led to the damage of the car.

Automatism

Automatism is when a defendant is not consciously in control of his or her own mind and body.

This defence is limited to cases where there is a total loss of voluntary control. Impaired or reduced control is not enough.

The defence of automatism **may** be invalid when the defendant is at fault for falling into the condition in the first place. The prosecution would have to prove the defendant was reckless as to what would happen if he or she fell into the condition for it not to be a defence.

The state of automatism can arise from:

- concussion;
- sleep disorders;
- acute stress;
- some forms of epilepsy;
- some forms of neurological and physical ailments.

The prosecution bears the legal burden of proving that the actions of the defendant were voluntary and that the defence of automatism does not apply. However, the defendant must give sufficient evidence to raise the defence that his or her actions were involuntary: *Bratty v Attorney-General for Northern Ireland* (1961) 46 CrAppR 1, 21.

The evidence of the defendant will rarely be enough to raise the defence of automatism. Expert medical evidence is required: *Bratty v Attorney-General for Northern Ireland* (1961) 46 CrAppR 1, 21.

Accidents

A person is not criminally responsible for an event that occurs by accident: *s9 Penal Code*.

The event must not be intended by the defendant. An event is an accidental outcome of the willed act, which then leads to a result.

To raise a defence of accident, it is the **event** which must be proved to be accidental and not that the result was accidental: *R v Rakaimua* [1996] Criminal Case No. 24 of 1995; *Timbu-Kolian v The Queen* (1968) 119 CLR 47.

The event must not have been able to be easily foreseen by the defendant under the circumstances.
Would such an event have been easily foreseen by an ordinary person in the same circumstances.

The prosecution bears the burden of proving that the act or omission was not an accident, beyond a reasonable doubt. However, when the defence of accident is raised by the defendant, he or she must point to some evidence in support of the defence.

Points to note from *s9 Penal Code*
Unless intention to cause a particular **result** is expressly declared to be an element of the offence committed, the result intended to be caused by an act or omission is immaterial: *s9 Penal Code*.

- A person cannot raise as a defence that they did not intend a certain result when they do an act or omit to do an act.
- Also, intention as to the result of an act or omission does not have to be proven as an element of an offence unless it has been expressly provided to be an element of the offence.

Unless expressly declared, the **motive** by which a person acts or omits to do an act, or to form an intention, is immaterial so far as it regards criminal responsibility:

- The underlying reasons (motive) for why a person has done an act or omission or why they have formed an intention to commit an offence does not need to be considered when determining criminal responsibility.
- A person cannot use lack of motive as a defence, nor does the prosecution have prove motive as an element of an offence, unless it has been expressly declared to be an element of an offence.

2.4 Mistake of Fact: *s10 Penal Code*

A person who acts or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if things were as he or she believed them to exist: *s10 Penal Code*.

This rule may be excluded by the express or implied provisions of the law relating to the subject: *s10 Penal Code*.

For the defence of mistake of facts to succeed:

- the defendant must have been under an honest, but mistaken, belief as to the existence of any state of things; and
- the offence must have been committed while holding the honest and reasonable, but mistaken, belief.

Whether the defendant was under an honest, but mistaken, belief is a **subjective** test.

The test to be applied is, from the evidence presented, did the defendant **actually** have a genuine and honest belief as to the state of things, even though he or she was mistaken in that belief?

The mistaken belief must have been reasonable. Reasonableness is an **objective** test.

The test to be applied is, is the defendant's mistaken belief one which a reasonable person would have or ought to have made?

Although "reasonable, but mistaken, belief" is still included as an element of "mistake of fact" in *s10* of the *Penal Code*, it has been removed in the common law. The traditional requirement that mistakes have to be reasonable was refuted by the House of Lords in *Director of Public Prosecutions v Morgan* [1976] AC 182.

Since *Morgan* (supra), it has been held that :

- the prosecution has the burden of proving the unlawfulness of the defendant's action;
- if the defendant has been labouring under a mistake as to the facts, he or she must be judged according to his or her mistaken view of the facts; and
- if the defendant was or may have been mistaken as to the facts, it is immaterial that on an objective view, that the mistake was unreasonable: *R v Williams (G.)* [1984] CrimLR. 163, CA.

2.5 Insanity: *s11 Penal Code*

Presumption of sanity

Every person is presumed to be of sound mind, and to have been of sound mind at any time which it comes into question, until it is proved otherwise: *s11 Penal Code*.

Proof of insanity

A person will not be criminally responsible for an act or omission at the time of the commission of the act or omission if, through the disease of the mind, he or she is:

- incapable of understanding what he or she is doing; or
- incapable of knowing that he or she ought not to do an act or omission: *s12 Penal Code*.

It is the defendant who bears the onus of proof for a defence of insanity, and the burden of proof is on the balance of probabilities.

Section 12 Penal Code and the common law

There are two differences between *s12 Penal Code* and the common law with regards to insanity:

- *Section 12* refers **any** disease affecting the mind; and
- *Section 12* sets out people as insane if they do not have the **capacity to understand** or a **capacity to know** that they ought not to do the act done or omitted to be done. The common law simply refers to actual knowledge.

Test for insanity

A test for insanity, is set out in the Solomon Islands case of *R v Ephrem Suraihou* (Unrep. Criminal Case No. 33 of 1992) as:

- if, through a disease of the mind, a person could not reason about the matter with a moderate degree of sense and composure, he or she could not know that what he or she was doing was wrong:
  - Wrong is defined according to the every day standards of reasonable people;
- if a disease so governs the mind of the defendant that it is impossible for him or her to reason with some moderate degree of calmness as to the moral quality of what he or she is doing, he or she does not have the capacity to know what he or she does is wrong;
- even if the disease is shown to have **affected** the defendant's mind, it is not enough. He or she must show, on the balance of probabilities, that the disease **deprived** him or her of the **capacity to know** or the **capacity to understand**.

What is disease of the mind?

The meaning of disease of the mind is a legal question for a judge to decide rather than a medical question, even though medical evidence may be required.

The mind refers to the mental faculties of reason, memory and understanding, in the ordinary sense.

If the disease must so severely impair these mental faculties, and lead the defendant not to know the nature and quality of the act that he or she was doing, or that he or she did not know that what he or she was doing was wrong: See the McNaughten rules from *McNaughten* (1843) 10 CL & F 200.

The term 'disease of the mind' has often been defined by what it is not. It is **not**:

- a temporary problem of the mind due to an external factor such as violence, drugs, or hypnotic influences; or
- a self-inflicted incapacity of the mind; or
- an incapacity that could have been reasonably foreseen as a result of doing or omitting to do something, such as taking alcohol with pills against medical advice: *R v Quick & Paddison* (1973) 57 CrAppR 722.

In these cases, the defendant **may not** be excused from criminal responsibility, although there are difficult borderline cases.

Expert evidence

In order to plead a defence of insanity, the defendant should have medical evidence which points to his or her mental incapacity. The defendant's evidence alone will rarely be enough to prove this defence: *Bratty v Attorney-General for Northern Ireland* [1963] AC 386.

The evidence from a psychologist with no medical qualification is not sufficient to raise the defence of insanity: *R v Mackenney & Pinfold* (1983) 76 CrAppR 271.

2.6 Intoxication: *s13 Penal Code*

Intoxication cannot be used as a defence to a criminal charged, except as provided in *s13 Penal Code*.

Section 13 Penal Code allows intoxication to be used as a defence to any criminal charge in the following situations:

1. If at the time of the offence, the defendant did not know that the act or omission was wrong or he or she did not know what he or she was doing because his or her state of intoxication was caused without consent, due to the malicious or negligent act of another person: *s13(2)(a) Penal Code*.
   - This is referred to as involuntary intoxication.
   - If the defence above is established, you must discharge the defendant: *s12(3) Penal Code*.
   - Involuntary intoxication is not a defence if the defendant forms the necessary *mens rea* of the offence, either because of or despite the intoxication: *R v Kingston* [1994] 3 WLR 519.

2. If at the time of the offence, the defendant did not know the act or omission was wrong or he or she did not know what he or she was doing because intoxication caused him or her to be insane, temporarily or otherwise: *s13(2)(b) Penal Code*. This defence is referred to as voluntary intoxication.

Compulsion by threats

Compulsion by threat is when a defendant commits an act or omission in order to **comply** with the demands of the person threatening him or her.

Type of Threat

- There must be threats of death or grievous bodily harm.
- Serious psychological injury is not enough of a threat: *R v Baker and Wilkins* [1997] Crim LR, 497.
- Threats of death or grievous bodily harm made to third parties, especially close relatives, may be enough of a threat to give a defence: *R v Oritz* (1986) 83 Cr App R 173.

Reasonableness

- The fact that the defendant believed that a threat of death or grievous bodily harm would be carried out is **not** sufficient. It is whether a person of reasonable firmness sharing the characteristics of the defendant would not have given way to the threats.

The test for compulsion by threats

1. Were there two or more parties to the offence?

2. Was the defendant driven to act as he or she did because he or she had a reasonable belief, because of what the other party did or said, that if he or she did not act, the other party would kill or cause grievous bodily harm to him or her?

3. If the defendant had such reasonable belief, has the prosecution proven that a person of reasonable firmness, sharing the characteristics of the defendant, would **not** have responded the same as the defendant if that person reasonably believed what was said or done by the other party to the offence?

Compulsion by circumstances

Compulsion by circumstances is when a defendant does an act or omission in order to **escape** from the threats of the other person.

This defence is available only if, from an objective standpoint, the defendant was acting reasonably and proportionately in order to **avoid** a threat of death or grievous bodily harm.

Compulsion by spouse

For any offence except murder or treason, it is be a good defence that an offence was committed in the presence of **and** under the **coercion** of the defendant's spouse: *s19 Penal Code*.

The spouse should provide evidence that his or her will was overcome by the wishes of his or her spouse because of:

- physical force; or
- a threat of physical or moral force.

3.2 Defence of Person or Property: *s17 Penal Code*

Subject to the express provisions in the *Penal Code* or any other law in operation in Fiji, criminal responsibility for the use of force in defence of person or property is determined according to the principles of English common law: *s17 Penal Code*.

Legislation

The *Constitution*

Section 4 of the *Constitution* sets out, in part, that a person shall not be regarded as having been deprived of his or her life in contravention of *s4* if:

- he or she dies from the use of force; and
- that force is reasonably justifiable for the defence of any person from violence or for the defence of property; and
- in such circumstances as provided by law.

Section 204 Penal Code

A person who, by an intentional and unlawful act, causes the death of another person, the offence committed shall be manslaughter, not murder, if it is proved that:

- he or she was justified in causing harm to the other person; and
- in causing the person harm in excess of what was justified, he or she acted from such terror or immediate death or grievous harm that it deprived him or her of self-control.

Principles

- It is lawful to use such force as is reasonably necessary in order to defend oneself or one's property or any other person. See *State v Waisele Tuivuya* HAC 015/02.
- The question to be answered is whether the force used was **reasonable** in all circumstances, which is an objective test: *Rachel Tobo v Commissioner of Police* (Unrep. Criminal Appeal No. 1 of 1993).
- What force is necessary is a matter of fact to be decided on a consideration of all the surrounding factors: *R v Zamagita & Others* [1985-86] SILR 223.
- The state of mind of the defendant should also be taken into account. This is a subjective test: *R v Zamagita & Others* [1985-86] SILR 223; *R v Whyte* (1987) 85 CrAppR 283; *Jimmny Kwai v R* (Unrep. Criminal Appeal No. 3 of 1991).

- Force may include killing the aggressor, but there must a reasonable necessity for the killing or at least an honest belief based on reasonable grounds that there is such a necessity.
- It would only be in the most extreme circumstances of clear and very serious danger that a Court would hold that a person was entitled to kill simply to defend his or her property, as there are many other effective remedies available: *R v Zamagita & Others* [1985-86] SILR 223.
- The onus is on the prosecution to prove that the defendant did **not** act in self-defence or in defence of property, once the issue has been raised by the defendant and evidence has been presented: *Billard v R* (1957) 42 CrAppR 1; *R v Moon* [1969] 1 WLR 1705.

4 Parties

According to the law, different people can be held criminally responsible for an offence, as parties.

In Fiji, parties to offences include:

- principal offenders and accessories under *s21 Penal Code*;
- joint offenders who are in prosecution of a common purpose under *s22 Penal Code*;
- accessories after the fact under *Chapter XLIII Penal Code*; and
- conspirators under *Chapter XLII Penal Code*.

4.1 Principal Offenders and Accessories: *s21 Penal Code*

There are two categories of persons who are deemed in law to have criminal responsibility for an offence:

- principal offenders; and
- accessories.

Principal offenders
A Principal offender is the person(s) whose actual conduct satisfies the definition of the particular offence in question.

Section 21(a) Penal Code states that every person who actually does the act or makes the omission that constitutes the offence is:

- deemed to have taken part in committing the offence and to be guilty of the offence; and

- may be charged with actually committing it.

It must be proved that the defendant had both the *mens rea* and *actus reus* for the particular offence that they have been charged with in order to be a principal offender.

In cases where there is only one person who is involved in the offence, he or she will be the principal offender.

For Example:
If a person punches another on the face causing injury, that person would be considered the principal offender for the offence of assault.

Accessories

An accessory is a person who:

- enables or aids;
- aids or abets; or
- counsels or procures,

the commission of an offence.

Although an accessory is not a principal offender, he or she can be charged and convicted of the actual offence, as if he or she had been the principal offender.

An accessory may be found criminally responsible for all offences, unless expressly excluded by statute.

The *actus reus* of an accessory involves two concepts:

- aiding, enabling, abetting, counselling or procuring; and
- the offence.

The mental element (*mens rea*) for an accessory is generally narrower and more demanding than that required for a principal offender. The mental element for principal offenders includes less culpable states of mind such as recklessness or negligence, while the mental elements required for an accessory are:

- knowledge: the accessory must know at least the essential matters which constitute the offence; and
- intention: the accessory must have had an intention to aid, abet, enable, counsel or procure. This does not necessarily mean that he or she had the intention as to the principal offence that was committed. Note that a common intention is not required for procuring.

Enabling or Aiding: *s21(1)(b) Penal Code*
Every person who does or omits to do any act for **the purpose of** enabling or aiding another person to commit the offence is:

- deemed to have taken part in committing the offence and to be guilty of the offence; and
- may be charged with actually committing it: *s21(1)(b) Penal Code*.

Enabling or aiding is different from aiding and abetting in two respects:

- criminal responsibility is attached to those who do not **in fact** aid in the commission of an offence but who engage in conduct **for the purpose** of aiding or enabling. Therefore, the person could be found guilty for an offence because they **tried to aid** even though they did not actually succeed in aiding. See, for example, *R v William Taupa Tovarula & Others* [1973] PNGLR 140; and
- a person can be found guilty for an offence by **failing or omitting to do something** that enables or aids the person committing an offence.

Elements for Enabling or Aiding

- An offence must have been committed by the principal.
- The defendant must have done something (or ommitted to do something) for the purpose of assisting or encouraging the principal offender (but need not in fact have assisted or encouraged the principal offender).

Aiding or Abetting: *s21(1)(c) Penal Code*
Every person who aids or abets another person in committing the offence is:

- deemed to have taken part in committing the offence and to be guilty of the offence; and
- may be charged with actually committing it: *s21(1)(c) Penal Code*.

The term "to aid and abet" generally means to give assistance and encouragement at the time of the offence.

To prove the offence of aiding and abetting to another person in the commission of an offence it must be established that he or she:

- is present (actual or constructive); and
- knows the facts necessary to constitute the offence; and
- is actively encouraging or in some way assisting the other person in the commission of the offence.

Actual knowledge of, or wilful blindness towards the circumstances which constitute the offence is required. This does not mean the same mental state as that required by the principle party in the commission of the substantive offence. Rather, the secondary party must know of the principal's mental state and the facts which would make his or her purpose criminal.

In *Attorney-General Reference* (No. 1 of 1975) [1975] 2 All ER 684, it was found that some sort of mental link is required between the principal offender and the secondary party in order for there to be aiding and abetting. This requires that the principal offender and the secondary party were together at some stage discussing the plans made in relation to the alleged offence.

In *Wilcox v Jeffrey* [1951] 1 All ER 464, the Court held that mere presence alone is insufficient to act as an encouragement. There must, on behalf of the secondary party, be an intention to encourage, or actual encouragement, beyond an accidental presence at the scene of the crime.

In *R v Allan* [1965] 1 QB 130, the Court held that, to be a principal in the second degree to an affray, there must be some evidence of encouraging those who participated. Courts cannot convict a person for his or her thoughts unaccompanied by any other physical act beyond his or her presence.

See also: *Johnson v Youden* [1950] 1 KB 554, per Lord Goddard; *Gillick v West Norfolk and Wisbeach Area Health Authority* [1986] 1 AC 112; *R v Clarkson* [1971] 3 All ER 344.

Elements for Aiding or Abetting

- An offence must have been committed by the principal.
- The defendant was acting in concert with the principal offender (encouragement in one form or another is a minimal requirement).
- There was some sort of mental link or meeting of minds between the secondary party and the principal offender regarding the offence.

Counselling or Procuring: *s21(1)(d) Penal Code*

Every person who counsels or procures any other person to commit an offence is:

- deemed to have taken part in committing the offence and to be guilty of the offence; and
- may be charged with actually committing it or may be charged with counselling or procuring its commission: *s21(1)(d) Penal Code*.

A conviction of counselling or procuring the commission of an offence entails the same consequences as a conviction for the offence as a principal offender: *s21(2) Penal Code*.

The term "to counsel or procure" generally describes advice and assistance given at an earlier stage in the commission of the offence.

Counselling

The normal meaning of counsel is to incite, solicit, instruct or authorise.

Counselling does **not** require any causal link. As long as the advice or encouragement of the counsellor comes to the attention of the principal offender, the person who counselled can be convicted of the offence. It does not matter that the principal offender would have committed the offence anyway, even without the encouragement of the counsellor: *Attorney-General v Able* [1984] QB 795.

The defendant must counsel **before** the commission of the offence.

When a person counsels another to commit an offence and the offence is committed, it is immaterial whether:

- the offence actually committed is the same as the one that was counselled or a different one; or
- the offence is committed in the way counselled or in a different way: *s23 Penal Code*.

The one who counselled will be deemed to have counselled the offence actually committed by the principal offender, provided the facts constituting the offence actually committed are a **probable consequence** of the counselling: *s23 Penal Code*.

See *R v Calhaem* [1985] 2 All ER 226.

The Elements for Counselling

- An offence must have been committed by the principal.
- The defendant counselled the principal to commit an offence.
- The principal acted within the scope of his or her authority: *R v Calhaem* [1985] 2 All ER 267.

Procuring

To procure means to bring about or to cause something or to acquire, provide for, or obtain for another.

Procuring must occur prior to the commission of the offence.

Procuring was defined in *Attorney-General's Reference (No. 1 of 1975)* [1975] 2 All ER 684:

- Procure means to produce by endeavour.
- You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening.
- You cannot procure an offence unless there is a causal link between what you do and the commission of the offence.
- There does not have to be a common intention or purpose but there must be a causal link.

Any person who procures another to do or omit to do any act that, if he or she would have done the act or made the omission themselves and that act or omission would have constituted an offence on his or her part:

- is guilty of the offence of the same kind; and
- is liable to the same punishment as if he or she had done the act or made the omission; and
- may be charged with doing the act or the omission: *s21(3) Penal Code*.

The Elements for Procuring

- An offence must have been committed by the principal.
- The defendant procured the principal to commit an offence.
- There is a causal link between the procuring and the commission of the offence.

For other case law on parties see *John v R* (1980) 143 CLR 108; *R v Clarkson* (1971) 55 Cr App R 455; *Ferguson v Weaving* (1951) 1KB 814; *National Coal Board v Gamble* (1958) 3 All ER 203.

See *Bharat Dwaj Duve v The State* Criminal Appeal No HAA0049 of 2001S High Court of Fiji, which discusses how to deal with non-principal offenders procuring an offence: "it is advisable in the interests of fairness for the prosecution to particularise the real case against the defendant in the Particulars of Offence".

Withdrawal

Sometimes there may be a period of time between the act of an accessory and the completion of the offence by the principal offender. An accessory **may** escape criminal responsibility for the offence if they change their mind about participating and take steps to withdraw their participation in the offence.

What is required for withdrawal varies from case to case but some of the common law rules set down are:

- withdrawal should be made before the crime is committed;
- withdrawal should be communicated by telling the one counselled that there has been a change of mind:
  - this applies if the participation of counsellor is confined to advice and encouragement;
- withdrawal should be communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn; and
- withdrawal should give notice to the principal offender that, if he or she proceeds to carry out the unlawful action, he or she will be doing so without the aid and assistance of the one who withdrew.

See *R v Becerra and Cooper* (1975) 62 Cr App R 212.

4.2 Prosecution of a Common Purpose: *s22 Penal Code*

When two or more persons form a common intention to carry out an **unlawful** purpose with one another and, in carrying out that unlawful purpose, an offence is committed that was the probable consequence of carrying out that unlawful purpose, each of them is deemed to have committed the offence: *s22 Penal Code*.

Section 22 Penal Code does **not** apply in circumstances where the offenders form a common intention to commit an offence and in fact do nothing further than commit the offence. In this case, *s21 Penal Code* would be applied because both are equally culpable for the offence that was proposed and committed.

Section 22 Penal Code applies when, during the commission of the intended, original offence, an additional offence is carried out.

Example:
Steven and Mosese decide to commit a robbery. Steven is inside the store taking the money while Mosese is holding the door and making sure no one comes into the bank. Steven will be liable for the offence of robbery as the principal offender under *s21(a)*, while Mosese will be liable for the offence of robbery as a secondary party under *s21(c)*.

However, if during the course of the robbery, Steven shoots and kills the shopkeeper, Steven will be liable as the principal offender for killing the shopkeeper.

Whether Mosese will be held liable for killing the shopkeeper, which was not part of the common purpose of robbing the shop, will depend on whether Mosese knew or ought to have known that killing the shopkeeper would be a probable consequence of robbing the shop.

If Mosese knew or ought to have known that killing the shopkeeper was a probable consequence of carrying out the common purpose of robbing the shop, he will be liable for the killing as a secondary party under *s22 Penal Code*. Both Mosese and Steven will be jointly charged with murder under *s22 Penal Code* and the relevant provisions for murder.

The Elements for Prosecution of a Common Purpose

- A common intention between the defendant.
- Carrying out an unlawful purpose.
- An offence is committed while carrying out that unlawful purpose.
- The offence is a probable consequence arising from carrying out the unlawful purpose.

Points to note from *R v Peter Fitali* (Unrep. Criminal Case No. 39 of 1992) are:

- there should be a joint enterprise or unlawful purpose; and
- the defendants were all parties to the joint enterprise; and
- the acts of the defendant were done in furtherance of that joint enterprise.

Points to note from *R v Ben Tungale & Others* (Unrep. Criminal Case No. 12 of 1997) are:

- each person involved in the joint enterprise is criminally responsible for the acts of the others when the acts are done in the pursuance of the joint enterprise;
- criminal responsibility extends to any unusual consequences which arise out of the joint enterprise; and
- each one is **not** liable if one of them acts beyond what was expressly or tacitly agreed to as part of the joint enterprise.

See also *R v Anderson and Morris* (1966) 1QB 110; *Police v Faisaovale and others (1975) WSLR 118; Chan Wing-sui v R* [1984] 3 All ER 877; *R v Hyde* [1990] 3 All ER 892.

4.3 Accessories After the Fact: *ss388 - 390 Penal Code*

A person is said to be an accessory after the fact to an offence when he or she:

- has knowledge that a person is guilty of an offence; and
- receives or assists another so that he or she is able to escape punishment: *s388 Penal Code*.

Any person who becomes an accessory after the fact to a felony, is guilty of a felony, and shall be liable to imprisonment for three years if no other punishment is available: *s389 Penal Code*.

Any person who becomes an accessory after the fact to a misdemeanour, is guilty of a misdemeanour: *s390 Penal Code*.

A person does **not** become an accessory after the fact for an offence of their spouse if they

- receive or assist the spouse in order to help the spouse escape punishment; or
- receive or assist, in the presence and authority of their spouse, another person who is guilty of an offence the spouse took part in: *s388 Penal Code*.

The Elements for Accessories After the Fact

- The principal offender was guilty of a felony.
- The defendant knew of the principal offender's guilt.
- The defendant received or assisted the principal offender.
- The defendant received or assisted the principal offender in order to enable the principal to escape punishment.

Points to note

- The principal offender received or assisted must have been guilty of a felony.
- The assistance must be given to the felon personally.
- The assistance must be given in order to prevent or hinder him or her from being apprehended or being punished. Assistance given indirectly or for motives other than hindering arrest of the principal offender, such as avoiding arrest him or herself or to make money for him or herself, would not make the person guilty as an accessory after the fact: *Sykes v Director of Public Prosecutions* (1961) 45 CrAppR 230.

- The Court must be satisfied that the defendant knew that an offence had been committed by the principal offender.
- Proof that a felony has been committed is sufficient to prove a person guilty of being an accessory after the fact, even if there has not yet been a conviction of the principal offender: *R v Anthony* (1965) 49 CrAppR.
- An accessory cannot be convicted if the principal offender has been acquitted (*Hui Chi-Ming v R* [1991] 3 All ER 897), so the guilt of the principal offender should be determined before a plea of guilty is taken from an accessory (*R v Rowley* (1948) 32 CrAppR 147).

4.4 Conspiracy: *ss385 – 387 Penal Code*

Any person who conspires with another to commit any felony, or to do any act in any part of the world that if done in Fiji would be a felony and which is an offence in the place where the felony is proposed to be done, is:

- guilty of a felony; and
- liable to imprisonment for:
  - 7 years if no other punishment is provided for; or
  - if the punishment for the person convicted of the felony is less than 7 years, then that lesser punishment: *s385 Penal Code*.

Any person who conspires with another to commit a misdemeanour, or to do any act in any part of the world that if done in Fiji would be a misdemeanour and which is an offence in the place where the misdemeanour is proposed to be done, is guilty of a misdemeanour: *s386 Penal Code*.

Other conspiracies

Any person who conspires with another to effect any unlawful purpose or effect any unlawful purpose by any unlawful means is guilty of a misdemeanour.

Actus Reus

- Agreement is the essential element of conspiracy. It is the actus reus of conspiracy. There is no conspiracy if negotiations fail to result in a firm agreement between the parties: *R v Walker* [1962] Crim LR 458.
  - The offence of conspiracy is committed at the moment of agreement: *R v Simmonds & Others* (1967) 51 CrAppR 316.
  - An intention between two parties is not enough for a charge. What is required is an agreement between two or more to do an unlawful act by unlawful means: *R v West, Northcott, Weitzman & White* (1948) 32 CrAppR 152.

- At least **two** persons must agree for there to be a conspiracy. However, a single defendant may be charged and convicted of conspiracy even if the identities of his or her fellow conspirators are unknown.

Mens Rea

- Conspiracy requires two or more people to commit an unlawful act with the intention of carrying it out. It is the intention to **carry out the crime** that constitutes the necessary mens rea for conspiracy: *Yip Chieu-Chung v The Queen* [1995] 1 AC 111.
- Knowledge of the facts is only material, in so far as such knowledge throws light onto what was agreed to by the parties: *Churchill v Walton* [1967] 2 AC 224.
- Knowledge of the relevant law that makes the proposed conduct illegal need not be proved: *R v Broad* [1997] Crim LR 666.

The Elements for Conspiracy

- There must be an agreement between at least two people.
- There must be an intention to carry out an unlawful act.