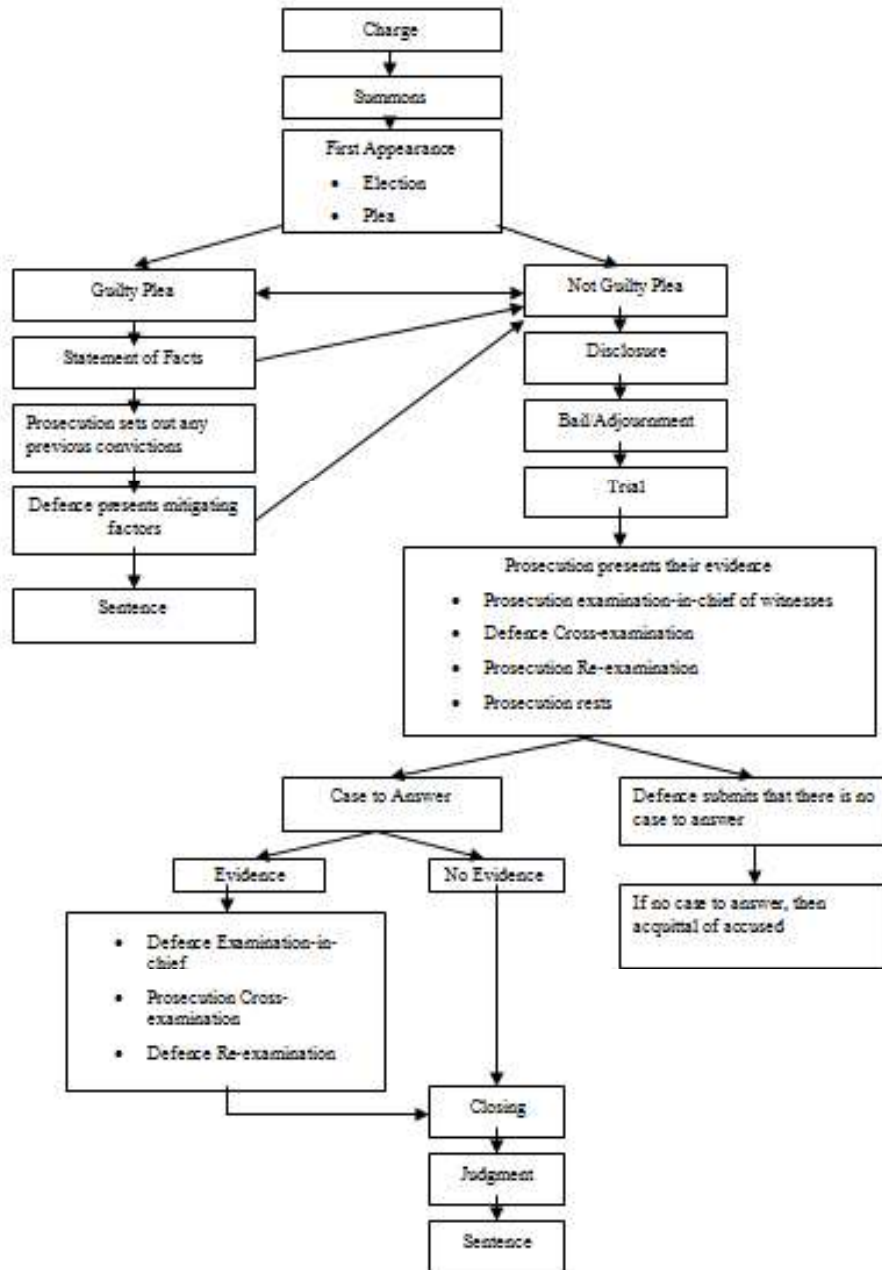


8:

PRE-TRIAL MATTERS

1 The Criminal Process

The following diagram shows the general process of a criminal case from when it enters the Court process to its final adjudication.



Criminal proceedings may be instituted by either:

- making a complaint to the Magistrate; or
- bringing before the Magistrate a person believed to have committed an offence, who is under arrest without warrant: *s78(1) CPC*.

Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint or bring the person before the Magistrate: *s78(2) CPC*.

A complaint may be made orally or in writing. If made orally, you should put it in writing. All complaints should be signed by the complainant and yourself: *s78(3) CPC*.

If not already done so, you should draw up or ask the Clerk to draw up, a formal charge containing a statement of the offence with which the defendant is charged, and sign it: *s78(4) CPC*.

In most cases, the Police will make the complaint, and they will present a signed formal charge, which is deemed to be a complaint: *s78(3) CPC*.

Initial steps

How the defendant is dealt with by the Police will determine the steps that are taken by the Court.

The defendant may be:

- issued with a Police Notice, under *s78 CPC*;
- charged and released on Police bail; or
- in Police custody.

Police notice to attend Court: *s80 CPC*

A Police officer may personally serve a notice upon any person, who is reasonably suspected of having committed an offence, requiring him or her to:

- attend Court at a specified time and place (not being less than 10 days from the date of such service);
- appear by advocate; or
- enter a written plea of guilty.

The notice shall be regarded as a summon and shall be served not later than 14 days from the date which the offence is alleged to have been committed: *s80(1)(2) CPC*.

In the event of a person whom such a notice is served fails to comply with the requirements of the notice, you may issue a warrant of arrest: *s80(2) CPC*.

The summons should:

- be signed by the Police officer preferring the charge;
- be directed to the person summoned; and
- be placed before the Court at least 7 days before the time for hearing.

This section applies to all offences punishable by:

- fine;
- imprisonment, with or without a fine, for a term not exceeding 3 months; and
- disqualification from holding or obtaining a drivers' license.

2 The Charge

2.1 General Requirements

A formal charge is an accusation of the commission of an offence.

The following persons may be joined in one charge and maybe tried together:

- persons accused of the same offence committed in the course of the same transaction;
- persons accused of an offence and persons accused of abatement, or of an attempt to commit such offence;
- persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of offences of the same or similar character; and
- persons accused of different offences committed in the course of the same transaction: *s121 CPC*.

A charge should be filed:

- at the Court within the district in which the offence is alleged to have been committed (wholly or partly);
- at the Court within the district in which the defendant was apprehended; or
- at the Court within the district in which the defendant is in custody or has appeared in answer to a summons: *ss56 - 64 CPC*.

Every charge must contain:

- a statement of the specific offence or offences with which the defendant is charged; and
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: *s119 CPC*.

Section 122 CPC sets out how a charge is to be framed. However, unless the Court considers that there has been a miscarriage of justice, you may not quash, hold invalid or set aside any information or complaint only because of any defect, omission, irregularity or want of form.

For case law on the elements of a charge, see *Mohammed Saiyad v State* Labasa High Court Crim. App. No. 0046 of 1997.

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms, wherever possible.

The charge should include:

- a statement of offence. It is not necessary that all the essential elements of the offence be included;
- a reference to the section of the enactment creating the offence; and
- particulars of the offence, unless specifically not required by enactment.

Any offences may be charged together in the same charge or information if the offences charged:

- are founded on the same facts or form; or
- are part of, a series of offences of the same or similar character.

Where there is more than one offence charged, a description of each offence shall be set out in a separate paragraph of the charge called a count: *s120(2) CPC*.

At any time, before or during trial, you may direct that a count or counts be tried separately. This is particularly desirable if you are of the opinion that the defendant will be embarrassed in his or her defence by the counts being tried together: *s120(3) CPC*.

2.2 Validity of the Charge

Check that the charge sheet:

- is sworn;
- is within time; and
- sets out the offence, section and particulars of the offence sufficiently.

Ensure that the charge sheet is accurately completed before you sign it.

If the charge is defective:

- return it to the prosecution without directing a case file be opened; or
- raise it with the prosecution at the first appearance, for amendment or withdrawal.

If the only issue is that it is out of time according to *s219 CPC*, at first appearance, declare that it is out of time and not triable, according to *s219*, and discharge the defendant.

2.3 Duplicity

Check that the charge does not improperly charge more than one offence for the same action (duplicity), unless put in the alternative. For example, separate counts for common assault and assault causing actual bodily harm arising from the same set of facts would have to be put in the alternative. If not, the charge will be defective for duplicity and will have to be amended at the first appearance.

Note the exception as regards continuous offences where the defendant may be charged for a series of similar offences committed over a period of time: see *Hodgetts v Chiltern District Council* [1983] 2AC 120.

For a brief discussion on duplicity, see *Sailosi Lewai v State* Suva High Court Crim. App. No. HAA0038 of 1997.

For a discussion on procedure in alternative counts, see *Shell Fiji Ltd & Mobil Oil v State* Lautoka High Court Crim. App.No. HAA001/00L.

The charge need not go into any exceptions or exemptions to the offence.

Generally, people and property should be reasonably identified, although names need not be given where they are not known: *s122(c)(d) CPC*.

There is a time limit for laying a charge for certain summary offences in the Magistrate's Court. Offences that carry a maximum penalty of 6 months imprisonment, or a fine of \$100, or both, cannot be tried by a Magistrate unless the charge is laid within 6 months from the date the alleged offence was committed: *s219 CPC*.

3 Processes to Compel the Appearance of Defendants

3.1 Summons

Under *s81 CPC*, every summons issued under the *CPC* must:

- be in writing;
- be in duplicate;
- be signed by the presiding officer of the Court;
- be directed to the person summoned;
- state the place, time and date in which the defendant is required to appear and answer the charge; and
- state the nature of the alleged offence.

Every summons shall, if practicable, be served personally on the person summoned: *s82 CPC*.

Where the person summoned cannot be found, the summons may be served by leaving a copy of it with:

- some adult member of his or her family;
- his or her servant or employee residing with him or her; or
- his or her employer.

Alternatively, the summons can also be served by affixing a copy of it on a conspicuous part of the house in which the person ordinarily resides: *s84 CPC*.

Under *s88(1) CPC*, whenever you issue a summons in respect of any offence, other than a felony, you may dispense with the personal attendance of the defendant, provided that the defendant:

- has pleaded guilty in writing; or
- appears by his or her counsel.

If a fine is imposed on a defendant whose personal attendance has been dispensed with, you may issue a summons to show cause, at the expiry of the prescribed time for payment. If the person disobeys the summons, you may then issue a warrant and commit the person to prison: *s88(4) CPC*.

3.2 Warrant of Arrest

Notwithstanding the issue of a summons, a warrant may be issued at any time before or after the time appointed in the summons for the appearance of the defendant: *s89 CPC*.

A warrant may be issued against a person who has disobeyed a summons from the Court: *s90 CPC*.

Under *s91 CPC*, every warrant shall:

- be under the hand of the Judge or Magistrate;
- state the offence;
- name and describe the person the subject of the warrant
- order the person or persons to whom it is directed to apprehend the person against whom it is issued; and
- be in force until it is executed or it is cancelled by the Court which issued it.

You may direct that security be taken or the defendant executes a bond to ensure his or her attendance before the Court at a specified time. Whenever security is taken, the officer to whom the warrant is directed shall forward the bond to the Court: *s92 CPC*.

A person arrested under warrant shall be brought before the Court without delay: *s95 CPC*.

Where the warrant is executed outside the jurisdiction of the issuing Court, the defendant shall be taken before the nearest Magistrate's Court, which shall direct his or her removal in custody to the issuing Court. If the person is willing to post bail or sufficient security, you may take such bail or security and forward the bond to the Court which issued the warrant: *s97 CPC*.

Irregularities in the warrant either in substance or form shall not affect the validity of any subsequent proceedings unless it has deceived or misled the defendant: *s98 CPC*.

Where the person, the subject of a warrant is in prison, you may issue an order to the officer in charge of such prison requiring him or her to produce the person named in the order before the Court: *s101 CPC*.

Defendant charged and released on bail and/or recognisance

The defendant may be released on his or her entering a recognisance, with or without sureties, for a reasonable amount to appear before a Magistrate's Court at a time and place named in the recognisance where:

- a defendant is in custody without a warrant; and
- the alleged offence is not murder or treason; and
- the offence is not of a serious nature; and

- the person is prepared to give bail.

For a discussion of bail and bail procedures, see the chapter on Bail.

A signed copy of the notice will be kept by the Police and forwarded to the Court on the date on which the offence is to be heard.

When the Clerk receives the charge, he or she will forward it to you for your direction.

Defendant is in Police custody

Any person who is arrested or detained, without an order or warrant, and not released, must be brought before the Court without undue delay and no later than 48 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter: *s27(3)(b) Constitution*.

For an extensive description of the rights of arrested or detained persons, see *s27 Constitution*.

The Police should have prepared a charge sheet. Wherever possible, this should be presented in advance to the Clerk, and the Clerk will open a file and register the case in the Court record before putting it before you.

You should hear the matter at the earliest opportunity.

Occasionally, the charge will be put directly to you.

4 Transfer of Cases

If it appears that the cause of the complaint arose outside the limits of the jurisdiction of your Court, you may direct the case to be transferred to the Court having jurisdiction: *s68 CPC*.

If you think the defendant should remain in custody or be placed in custody, direct that the Police take to the Court having jurisdiction:

- the defendant; and
- the complaint and recognisances taken, if any.

Issue a warrant for that purpose.

If the defendant is not to be held in custody, explain to him or her that you have directed the case be transferred to another Court and bail him or her for appearance at the Court having jurisdiction: *s68(3) CPC*.

If, in the course of trial, the evidence appears to warrant a presumption that the case is one which should be tried by some other Magistrate; you should stay proceedings and submit a report of the case to the Chief Magistrate: *s69 CPC*.

The power to change the venue of any trial rests with the Chief Magistrate: *s70 CPC*.
In exercising the power to change venue, the Chief Magistrate may act:

- on the report of a lower Court;
- on the application of one of the parties; or
- on his or her own initiative.

Every application by an interested party for a change of venue shall be made by motion and supported by affidavit: *s70(3) CPC*.

Every application by a defendant shall give the Director of Public Prosecutions notice in writing of the application and no order shall be made on the merits of the case until 24 hours has elapsed from such notice: *s70(4) CPC*.