Chapter 11

Defended Hearings: The Trial

1 Introduction

If an accused pleads not guilty, the case proceeds to a defended hearing, otherwise known as a trial.

1.1 Role of Prosecution

The duty of the person prosecuting (usually the Police) is to the Court. They must not mislead or deceive the Court. They must:

- assist the Court to arrive at a conclusion which is in accordance with truth and justice; and
- place the case impartially before the Court, including all relevant facts.

The Police have two distinct roles, which you must be aware of:

- the duty of Police as prosecutor is to present and argue the case for the prosecution; and
- when a Police officer is giving evidence as a witness, they are in no different position from anyone else coming before the Court. Their evidence is judged by the same standards as evidence from other sources – it is no more or less credible.

The prosecution must prove all elements of the offence beyond reasonable doubt.

For further information on the behaviour expected of prosecutors, see Chapter 8 Management of Proceedings.

1.2 Defence Counsel

A defence lawyer has a duty to the Court. They must not mislead or deceive the Court, but remember that a defence lawyer's interests are those of the accused, and they are under no duty to be impartial.

2 Proving an Offence

2.1 Innocent Until Proved Guilty

One of the most important principles in criminal law is that the accused is innocent until proved guilty. Unless and until the prosecution proves that the accused is guilty of all the elements of the offence, he or she is innocent in the eyes of the law. You must always remember this.

2.2 Burden and Standard of Proof

The prosecution has the burden, or responsibility, of proving its case. It must prove all the elements of the offence, beyond reasonable doubt.

If you decide that the prosecution has not proved all the elements of the offence beyond reasonable doubt, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at that stage, then the defence has a chance to present its case and again you must decide whether the prosecution has proved their case beyond reasonable doubt, taking into account what the defence has shown.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If the evidence of the defence casts a reasonable doubt on any of the elements, then the prosecution has failed.

Beyond Reasonable Doubt

This means you are sure the accused is guilty of the charge, and there is no doubt in your mind. If you are uncertain in any way, you must find the accused not guilty.

Lawful excuse

In some cases, once the prosecution has established facts to support all the elements, the burden of proof is then on the accused to satisfy the Court that he or she acted with lawful excuse, good reason or lawful justification. For example, *section 334(1) Public Order Ordinance* which provides for the offence of possession of a weapon allows a defence of lawful excuse in some instances.

The standard of proof for the defence to prove is not as high as it is for the prosecution. The defence has to prove this "on the balance of probabilities", which means that what the defence is seeking to prove is more likely than not.

3 Open Court

To ensure the transparency of justice, it is a long standing principle of the common law that hearings be conducted in open Court, wherever possible. In Kiribati, proceedings in closed Court or in Chambers are only permitted when authorised by law: s*47 Magistrates' Courts Ordinance*.

When necessary, you may order any particular person or the public generally to be excluded from the Court: *s64 Criminal Procedure Code*.

Exceptions
Closing the Court depends on the circumstances of the case. The general rule is that the Court should only be closed if necessary to save hurt or embarrassment to a witness.

4 Legal Representation

***Any person accused of any offence before any criminal Court may be defended by an advocate or, with leave of the Court, by any person:* s176 Criminal Procedure Code.**

However, in most cases before the Magistrates' Court, the accused will be unrepresented.

Whenever an accused is unrepresented, you must take special care to ensure that his or her rights are respected and that justice is done. It is not your responsibility to conduct the case for the accused, but you must ensure that the trial is fair.

> "In all cases the duty of the magistrate is to ensure that an unrepresented person charged with a criminal offence understands both the charge and the proceedings and also that, if he has a defence, he has an opportunity to present it…Once the Court is satisfied the accused understands the charge he faces and that he has admitted it, the magistrate should proceed to hear the facts and mitigation…" *Cocker v Police Department* Criminal Appeal Case #Cr.App.1251 of 1998.

In the following explanation of trial procedure, almost all functions of the accused such as cross-examination or addressing the Court may be carried out by an advocate.

The accused must act personally only when:

- giving evidence as a witness; or
- making a statement to the Court.

5 Interpretation of Evidence

In accordance with the *Constitution*, whenever the accused is present in person, any evidence is given in a language not understood by the accused must be interpreted to him or her in a language he or she understands: *s182(1) Criminal Procedure Code*.

When documents are introduced in a language that the accused does not understand, you may decide to interpret as much as appears necessary: *s182(2) Criminal Procedure Code*.

6 Non – Appearance

6.1 Prosecution Does Not Appear

See Chapter 10 First Appearance, paragraph 1.1.

6.2 Accused Does Not Appear

See Chapter 10 First Appearance, paragraph 1.2.

6.3 Witness Does Not Appear

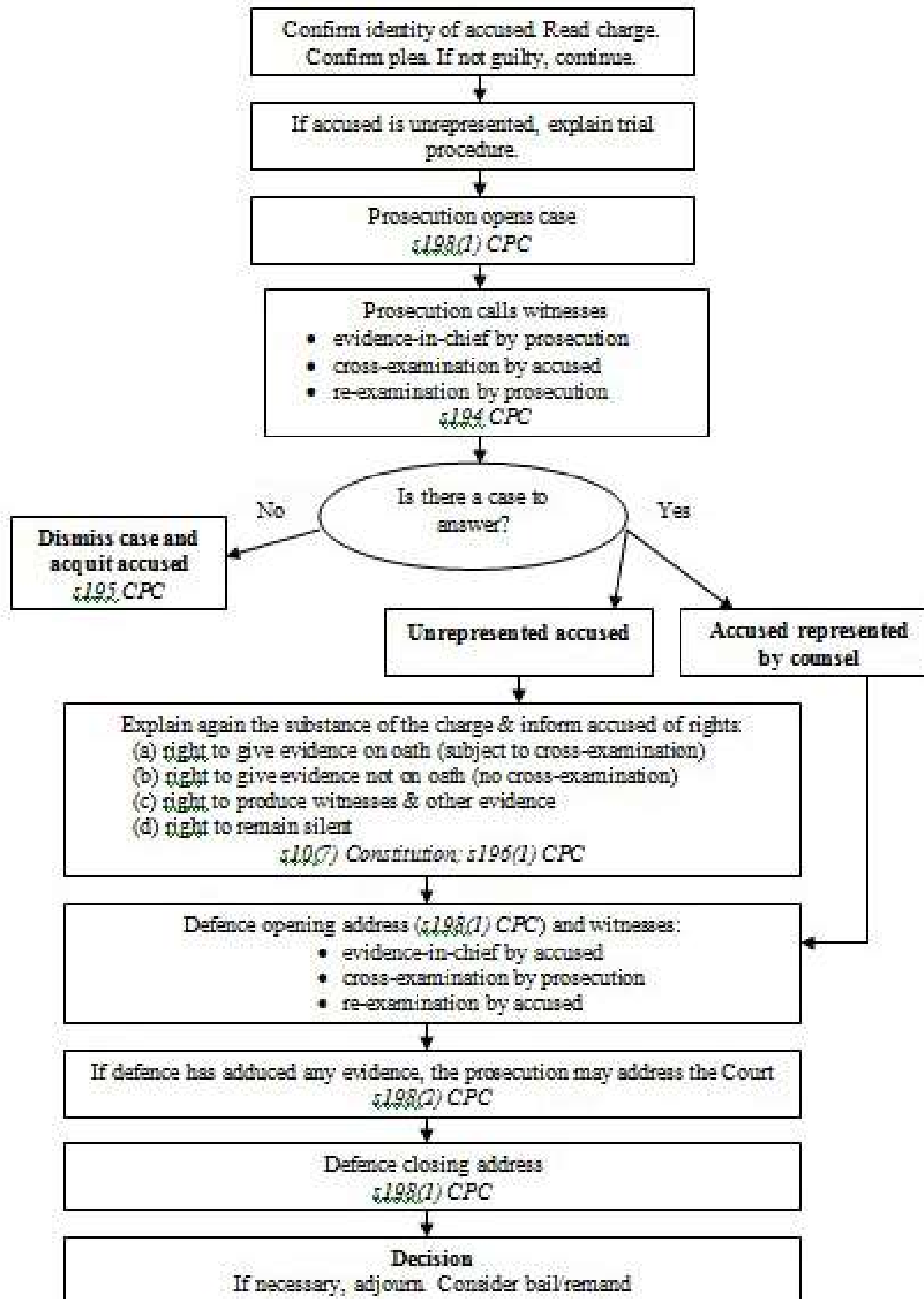
You may issue a warrant for a witness who fails to obey a summons to attend if:

- the witness does not have a sufficient excuse for not attending; and
- there is proof that the summons was properly served on the witness a reasonable time before the appearance date: *s128 Criminal Procedure Code / Rule 12(2) Magistrates' Courts Ordinance*.

You may also order a fine not exceeding $40 if a witness fails to obey a summons or leaves the Court without your permission: *s132(1) Criminal Procedure Code*.

7 Defended Hearing Procedure

The diagram on the next page shows the procedure of a defended hearing.


6. Defended Hearing Procedure
Confirm identity of accused. Read charge. Confirm plea. If not guilty, continue.
If accused is unrepresented, explain trial procedure.
Prosecution opens case
s198(1) CPC
Prosecution calls witnesses
• evidence-in-chief by prosecution
• cross-examination by accused
• re-examination by prosecution
s194 CPC
Is there a case to answer?
No
Yes
Dismiss case and acquit accused
s195 CPC
Unrepresented accused
Accused represented by counsel
Explain again the substance of the charge & inform accused of rights:
(a) right to give evidence on oath (subject to cross-examination)
(b) right to give evidence not on oath (no cross-examination)
(c) right to produce witnesses & other evidence
(d) right to remain silent
s10(7) Constitution; s196(1) CPC
Defence opening address (s198(1) CPC) and witnesses:
• evidence-in-chief by accused
• cross-examination by prosecution
• re-examination by accused
If defence has adduced any evidence, the prosecution may address the Court
s198(2) CPC
Defence closing address
s198(1) CPC
Decision
If necessary, adjourn. Consider bail/remand

The following outline applies where the accused is unrepresented. With necessary modifications, however, it also applies when the accused is represented.

Take care to fully advise an unrepresented accused of the procedure to be followed and to accurately record the advice given to him or her.

The following steps should be followed:

1. Confirm Personal Details of the Accused

It is a good idea to confirm the accused name, age, occupation and address. Make sure these are recorded.

2. Explain the Charge and Confirm Plea

Before the hearing begins, confirm the plea. Explain the charge to the accused and ask whether he or she admits the truth of the charge. Ensure this is recorded on the Court record.

In some cases where advice has been given, the plea may change to guilty. If this happens, record the exact words of the accused, convict the accused, enter this on the Court record and sentence (either immediately or adjourn for reports): *s193(2) Criminal Procedure Code*.

If the accused does not admit the truth of the charge, proceed to hear the case: *s193(3)*.

If the accused refuses to plead, treat it as a plea of not guilty and proceed to hear the case: *s193(4) Criminal Procedure Code*.

3. Exclude Witnesses

Make an order for the exclusion of witnesses and record this.

4. Prepare Accused for Prosecution Case

Request the accused to be seated at one of counsel's tables and have your clerk provide a pen and paper for note taking.

Explain:

- the elements of the charge;
- how the case will proceed; and
- the right to cross-examine witnesses.

5. Prosecution Case: ***s194 Criminal Procedure Code***

The prosecution may make an opening statement: *s198(1) Criminal Procedure Code*.

The prosecutor calls the witnesses individually to give evidence. If there is more than one, the other witnesses must not be present in Court, nor able to hear what is being said.

You must record all material evidence in accordance with *s180 Criminal Procedure Code*.

Once the prosecution has finished with each witness, invite the accused to ask questions (cross-examination). Record the accused's questions and the witnesses answers.

The prosecution may re-examine that witness if they feel it necessary to do so. After each witness has given evidence, excuse the witness from further attendance unless the parties object.

If you ask any questions of a witness after re-examination has concluded, you should ask the prosecution and the accused if there are any further matters raised by your questions, which they wish to put to the witness.

When the prosecution have called its final witness, that concludes its case.

6. No Case to Answer: ***s195 Criminal Procedure Code***

The following applies whether the accused is represented or not.

At the close of the prosecution case, if you consider that a case is not made out against the accused sufficiently to require him or her to make a defence, dismiss the case and acquit the accused, with reasons: *s195 Criminal Procedure Code*. This means that the accused may not be brought back to Court on the same set of facts (known as the doctrine of *autrefois acquit*).

A convenient test is found in the Practice Note at (1962) 1 All ER 448:

> ***"A submission that there is no case to answer may properly be made and upheld: when there has been no evidence to prove an essential element in the alleged offence, when the evidence adduced by the Prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it ... if a submission is made that there is no case to answer the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer".***

If you decide that there is a case to answer, announce:

> *"I find that there is a case to answer".*

Sometimes brief reasons are appropriate. Care should be taken to ensure that the accused does not feel that the case is already decided against him or her.

7. Defence Case: *s196 Criminal Procedure Code*

If the prosecution have made their case, the defence may or may not:

- make an opening address;
- call evidence and make submissions; and
- make a closing address.

Tell the accused:

> *"You have three options:*
>
> 1. *You have the right to remain silent, but you have heard what the prosecution have said against you; or*
> 2. *You may make a statement from the witness box and will not be cross-examined by the prosecutor. However whatever you say will not be as worthy of belief as if it is made under oath because you have not promised to tell the truth and the truth about it has not been tested under cross-examination; or*
> 3. *You have the right to give evidence yourself by giving evidence on oath, in the witness box. If you do, you may be cross-examined by the Prosecutor. It is entirely a matter for you to decide. You are not obliged to give evidence, if you do not wish to do so.*
>
> *Do you fully understand what I have said?*
>
> *You also have the right to produce other evidence or call witnesses to give evidence on your behalf. Again, if they give evidence on oath in the witness box, they may be cross-examined by the Prosecutor. You are not obliged to call witnesses - it is entirely a matter for you to decide. Do you fully understand this?"*

Record the fact that you have given this advice and that the accused has understood.

If the accused decides to give evidence, after she or he is sworn, say:

> **"State your full name, occupation and where you live. Now, slowly and clearly, tell the Court the evidence that you wish to give relevant to the charges you are facing".**

It is often helpful to lead the accused through the preliminary matters in order to help provide confidence for him or her to give their own account of the crucial event.

If reference to damaging evidence given by the prosecution is omitted, draw attention to it and enquire if the accused wishes to comment on it.

After the accused has been cross-examined, ask:

> **"Is there any further evidence you wish to give arising out of the questions just put to you by the Prosecutor?"**

Witnesses may be cross-examined by the prosecution and re-examined by the accused.

8. Evidence in Reply: *s197 Criminal Procedure Code*

If the accused adduces evidence introducing new matter which the prosecution could not have foreseen, you may allow the prosecution to adduce evidence in reply to rebut it.

9. Closing Addresses: *s198 Criminal Procedure Code*

If the defence has adduced evidence, the prosecution may address the Court: *s198(2)*. Note that the fact that the accused has been called as a witness does not of itself give the prosecution a right to reply: *s143 Criminal Procedure Code*.

Then ask the accused:

> **"Are there any comments or submissions you wish to make on the evidence?"**

10. Decision

After hearing all submissions on the law and the evidence:

- give your judgment immediately, if straightforward; or
- adjourn briefly to consider the matter or structure your decision and deliver it the same day; or
- reserve your decision, adjourn the matter to a later date for delivery.

See Chapter 12 Judgment.

If you convict the accused, you must then pass sentence or make an order against the offender: *s201 Criminal Procedure Code*. See Chapter 13 Sentencing.

8 Minor Offences Procedure

Section 206 Criminal Procedure Code provides a 'short' procedure for hearing minor offences.

A minor offence is one which has a maximum penalty of no more than $100 fine, six months imprisonment, or both: *s206(1) Criminal Procedure Code*.

If the prosecution requests, you may deal with the offence in the following way (so long as the accused is at least 16 years old).

The maximum penalty that you may impose under this procedure is a fine of $10 (or one month imprisonment in default of payment): *s206(7) Criminal Procedure Code*.

Basically, the procedure is the same as for regular defended hearings, except certain "shortcuts" may be made, as follows:

Recording Evidence

It is enough for you to record the names of witnesses and take notes of the evidence as you consider desirable: *s206(3) Criminal Procedure Code*.

Plea

Where the accused makes a statement admitting the truth of the charge, it is enough to simply enter a plea of guilty in the record, rather than the exact words of the accused: *s206(4) Criminal Procedure Code*.

Judgment

It is enough to record your finding and sentence or other final order. You do not have to record the points for determination and reasons: *s206(5) Criminal Procedure Code*.

However, it is a good idea to note your reasons briefly on the file because:

- if requested by either party, you must record a sufficient note of any question of law and of any relevant evidence relating to it; and
- you may be required by a Judge to give reasons in writing: *s206(5), (6) Criminal Procedure Code.*

9 Amending the Charge

If, at any stage before the close of the prosecution case, it appears that the charge is defective in substance or form, you may make an order for the alteration of the charge, either by:

- amending it;
- substituting one charge for another; or
- adding a new charge: *s199(1) Criminal Procedure Code*.

You must:

- clearly explain to the accused the difference in the essential ingredients of the former charge and the altered charge;
- put the amended charge to the accused and take a plea; and
- allow the accused to recall witnesses to give their evidence afresh or be further cross-examined (and be re-examined by the prosecution): *ss199(1)* and *(2) Criminal Procedure Code*.

You may adjourn the hearing if:

- you think the accused has been misled or deceived; or
- either party requests more time to prepare a case on the altered charge: *s199(3) Criminal Procedure Code*.

Make sure you record the amendment of the charge and the plea.

If the amended charge is heard by you, evidence already given on the original charge is deemed to have been given for the purposes of the amended or substituted charge, but with rights for further examination, cross examination or re-examination if the amendment has substituted one charge for another.

Check whether the new charge falls within the time limits in *s204 Criminal Procedure Code*: *s199(2) Criminal Procedure Code*.

Note that if the defect in the charge relates to the day on which the alleged offence was committed, this is immaterial and does not require an amendment: *s199(2) Criminal Procedure Code*.

10 Withdrawal of Complaint

The prosecutor may apply to withdraw the charge at any time before the final order is passed: *s188(1) Criminal Procedure Code*.

The withdrawal is done by the Attorney-General entering a "*nolle prosequi*" by stating in Court or by informing the Court in writing of the intention to discontinue: *s68(1) Criminal Procedure Code*.

It is your duty to ascertain whether the grounds for the application to withdraw are reasonable. If not, you may exercise your discretion to refuse the application.

The time that the charge is withdrawn is important:

- If it is withdrawn **before** the accused is called upon to make his or her defence, then you **may** either:
  - acquit the accused; or
  - discharge the accused: *s188(2)(b)(ii) Criminal Procedure Code* although this does allow the prosecution to recharge the accused at some later date: *s188(3) Criminal Procedure Code*.
- If it is withdrawn **after** the accused is called upon to make his or her defence, then you **must** acquit the accused: *s188(2)(a) Criminal Procedure Code*.
- The doctrine of *autrefois acquit or autrefois convict* applies. This means that the accused may not be brought back to Court on the same set of facts under which he or she has been previously acquitted or convicted.

(Note that, if you find that there is no case to answer, *s195 Criminal Procedure Code* requires that you acquit the accused.)

The Chief Justice of the Solomon Islands has held in a case under the exact same provision that:

> "When the Magistrate is satisfied there should be withdrawal and it is before the accused has been called upon to make his defence, he must decide the appropriate order under subsection (2)(b). Where there is no evidence, or the wrong charge has been laid or the wrong person charged, the order should be one of acquittal. In all other cases, the appropriate order is one of discharge under (2)(b)(ii)." *DPP v Clement Tom* (1988/89) SILR 118, Ward CJ.

If the accused is not before the Court when the withdrawal is made, the Clerk must give notice to:

- the officer of the prison if the accused is in custody; and
- the Magistrates' Court to which the accused was committed, who must then give notice to all witnesses: *s68(2) Criminal Procedure Code*.

Sometimes, the Police will make a request to withdraw a complaint. This often occurs when parties have reconciled and compensation has been paid for minor offences. It is good policy to inquire into the reason for the withdrawal to ensure that justice has been done in the case.

11 Adjournments

Before or during the hearing of any case, you may adjourn the hearing to a certain time and place then appointed and stated in the presence and hearing of the parties or their advocates: *s189 Criminal Procedure Code*.

Before fixing the date:

- inform the accused of his or her right to legal counsel (if unrepresented);
- advise the accused to prepare for hearing the case; and
- set a date after considering the time the parties need to prepare their cases and enter it into the Court diary.

You may then:

- allow the accused person to go at large;
- commit the accused to prison; or
- release the accused upon a recognisance with or without sureties, conditioned on his or her reappearance at the adjourned time and place: *s189 Criminal Procedure Code*.

Record all of the above on the Court record.

If the accused has been committed to prison, the adjournment must be for no longer than 15 days and in all other cases 30 days (the day after the adjournment being counted as the first day): *s189 Criminal Procedure Code*.

Adjourning a case has a useful role if used properly. It allows parties to prepare themselves to present their best case and recognises that delays do sometimes happen.

Adjourning a case should not be used merely as a delaying tactic for parties who have are not been diligent in their preparation.

The most common reasons for adjourning a case are:

- the person making the charge does not appear;
- the witnesses of one of the parties do not appear;
- legal representation is being sought;
- a new issue has been raised and a party needs time to prepare a response.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

- the interests of the accused to a fair trial;
- the interests of the public in ensuring efficient prosecutions;
- the reasons for the adjournment; and
- any fault causing the delay.

Non-Appearance after Adjournment

Subject to the *Constitution*, if the accused does not reappear at the adjourned time and place, and the offence is not a felony, you may proceed to hear the case as if the accused were present: *s190(1) Criminal Procedure Code*.

Subject to the *Constitution*, if the accused does not reappear at the adjourned time and place for a felony charge, or you decide to not hear the case in the absence of the accused, you must issue a warrant for the apprehension of the accused to be brought before the Court: *s190(2) Criminal Procedure Code*.

If the complainant does not reappear at the adjourned time and place, you may dismiss the case with or without costs: *s190(1) Criminal Procedure Code*.

12 Civil Jurisdiction in Criminal Cases

When hearing a criminal case you may, if requested in writing, hear a person having a civil claim arising out of the criminal offence: *s53(1) Magistrates' Courts Ordinance*.

If requested you may:

- hear the person and his or her witnesses; and
- allow the person to cross-examine the witnesses for both the prosecution and accused on civil aspects: *s53(1) Magistrates' Courts Ordinance*.

Whether the accused is convicted of the offence or not, you may make an award in damages against the accused civilly if the matter is proved on a balance of probabilities: *s53(1) Magistrates' Courts Ordinance*.

For further information on the proper procedure when dealing with civil claims in criminal proceedings, see the *Magistrates' Courts (Civil Claims in Criminal Proceedings) Rules*.