Chapter 5

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 the prosecution that bears the burden of proving or disproving the facts in issue, in order to establish the guilt of the accused, unless an enactment specifically provides otherwise.

The subject of evidence and the rules related to it are 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 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);
- plans and reports;
- 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.

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. The *Evidence Act* deals in great detail with the many different situations where documentary evidence is admissible. See *Part II Evidence Act*.

Secondary evidence

Secondary evidence refers to evidence that is not original.

Examples of secondary evidence include:

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

In specific instances the *Evidence Act* does provide for copies to be treated in the same manner as originals without having to prove the truth of the copy. See *s18 Evidence Act*.

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 or her credibility as a witness, or whether he or 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.

When it is inconvenient or impossible to bring some evidence to Court, you may inspect a material object out of Court.

When the inspection of any real or personal property may be material to the determination of the case, you may order the inspection of the property and give directions for the inspection: *s54 Magistrates' Courts Ordinance*.

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 check:

- 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 clerk for safekeeping.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage; and
- that if 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 made outside of the Court, the other statement is 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 should be classified as hearsay evidence and will generally be ruled inadmissible, under 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 demeanour of the witness;
- the delivery;
- the tone of voice;
- the body language; and
- the attitude towards the parties.

You must ensure that at every stage of the proceedings, you or the Clerk takes 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, children and the accused;
2. examination of witnesses;
3. leading questions;
4. refreshing memory;
5. lies;
6. corroboration;
7. warnings to witnesses against self incrimination; and
8. identification evidence by witnesses.

7.1 Competence and Compellability of Witnesses

A witness is **competent** if he or she may be lawfully called to testify. In Kiribati, all witnesses are competent unless they fall under one of the few exceptions outlined below.

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 certain just exceptions.

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

The Accused

The accused is considered a competent witness, except where the contrary is expressly provided for in an enactment, **but** he or she is not a compellable witness.

This means that an accused cannot be called by the prosecution to give evidence against himself or herself.

Spouses

Definition of Spouse

In order to promote strong marital relations, the law has developed to prevent spouses from having to testify against one another in Court, except in specific circumstances.

For this reason, the terms "husband", "wife" and "married" refer to the parties and to relationships like marriage such as:

- common law marriages; or
- domestic partnerships between a male and female recognised by local custom, joint care of children or stability of the union as having the character of marriage: *s2(9) Evidence Act*.

By the same reasoning, where a person is no longer married to the accused or is irreconcilably separated from the accused, he or she is competent and compellable to give evidence as if he or she was never married to the accused: *s2(5) Evidence Act*.

Evidence for the Accused

The wife or husband of an accused is competent to give evidence for the accused or for any person jointly charged with the accused: *s2(1) Evidence Act*.

Where the husband and wife are jointly charged an offence, neither is competent or compellable for the accused unless the spouse is no longer liable to be convicted of that offence as a result of pleading guilty or for any other reason: *s2(4) Evidence Act*.

In all other circumstances, the wife or husband of the accused is compellable to give evidence on behalf of the accused: *s2(1) Evidence Act*.

Evidence for the Prosecution

In the Magistrates' Court, the wife or husband of the accused are compellable to give evidence for the prosecution or on behalf of any person jointly charged with the accused only if the offence involves an assault, injury or threat of injury to:

- the wife;
- the husband;
- a person who was under 16 years of age at the time of the offence; or
- a person dependent upon or residing with one or both of the spouses: *s2(3) Evidence Act*.

Where the husband and wife are jointly charged an offence, neither is competent or compellable for the prosecution unless the spouse is no longer liable to be convicted of that offence as a result of pleading guilty or for any other reason: *s2(4) Evidence Act*.

All other instances where a spouse may be compelled by the prosecution to give evidence have to do with sexual offences under *Part XVI Penal Code*, which is outside your hearing jurisdiction.

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

If, in your opinion, a child under the age of 14 years does not understand the nature of an oath or affirmation, you may allow him or her to give evidence not on oath, if the child:

- has sufficient intelligence to justify the reception of the evidence; and
- understands the duty of speaking the truth: *s3(1) Evidence Act*.

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.

If the child gives false evidence, such as would constitute perjury if it had been under oath, he or she may be found guilty of a misdemeanor: *s3(2) Evidence Act*.

7.2 Examination of Witnesses

General

At any stage of any inquiry, trial or other proceeding, you **may**:

- summon or call any person as a witness;
- examine any person in attendance though not summoned as a witness; or
- recall and re-examine any person already examined: *s133 Criminal Procedure Code*.

If the evidence of any person appears to be essential to the just decision of a case, you **must** summon, examine, recall and re-examine any such person: *s133 Criminal Procedure Code*.

If a person summoned refuses, without good excuse, to appear or to be examined you have wide powers to deal with them through contempt of Court or treating them as a refractory witness. See Chapter 8 Management of Proceedings for further guidance.

If a witness fails to attend in obedience of a summons or who departs without the permission of the Court, you may also order a fine not exceeding $40: *s132(1) Criminal Procedure Code*.

You may order a prison officer to produce a prisoner for examination in Court: *s133 Criminal Procedure Code*.

All evidence should be taken in the presence of the accused, or if his or her personal attendance has been dispensed with, in the presence of his or her advocate (if any): *s179 Criminal Procedure Code*.

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 accused.

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; and
- in cases where the interests of justice requires it at your discretion.

7.4 Witness Credibility

An important part of both examination-in-chief and cross-examination is establishing or trying to diminish the credibility of the witness being examined.

Previous Convictions

Unless specifically prohibited, any witness may be questioned as to previous criminal convictions. If the witness denies or refuses to answer the question, the party asking the question may prove the conviction: *s6 Evidence Act*.

Examination-in-Chief

Generally speaking, a party is not allowed to attack the credibility of a witness they have called. However, if a witness acts in a manner which frustrates the party calling the witness, he or she may be treated as an adverse witness and his or her credibility may be attacked through showing inconsistent statements.

A party seeking to attack the credibility of their own witness may not use general evidence of bad character: *s7(1) Evidence Act*.

With leave of the Court, the party may attack credibility by proving that the witness made prior statements inconsistent with present testimony. Prior to giving such proof, the party must first mention the circumstances of the prior statement to the witness and the witness must be asked whether he or she made such statement: *s7(1) Evidence Act*.

When deciding whether or not to grant leave, you must consider (among other things):

- whether the witness is adverse or hostile to the party or to the party's interest;
- whether the inconsistency sought to be exposed relates to a matter material to the issues for determination: *s7(2) Evidence Act*.

Cross-Examination

During cross-examination, if any question is put to a witness which is irrelevant other than to injure the witness' character, you must decide whether or not the witness must answer the question. If necessary, you may warn the witness that he or she is not obliged to answer the question: *s10(1) Evidence Act*.

Such questions are proper if they are of such a nature that the truth of the accusation implied by the question would seriously affect the opinion of the Court as to the credibility of the witness on the matter: *s10(2) Evidence Act*.

Such questions are improper if:

- the accusation implied is so remote in time or of such a character that its truth would not affect or would only slightly affect the opinion of the Court as to the witness' testimony on the matter; or
- the accusation made against the witness' character is insignificant when compared to the level of importance or power of his or her evidence: *s10(2) Evidence Act*.

Inconsistent Statements

A cross-examining party may seek to attack the witness' credibility by proving that the witness made prior statements inconsistent with present testimony. Unlike with an adverse witness, however, leave of the Court is not required during cross-examination: *s8 Evidence Act*.

Before giving such proof, the cross-examining party must first mention the circumstances of the prior statement to the witness and the witness must be asked whether he or she made such statement. Only if the witness does not clearly admit making the prior statement may proof of the statement be given: *s8 Evidence Act*.

Normally a witness may be cross-examined on statements reduced to writing without actually showing such writing to the witness. If, however, the purpose of cross-examination on the writing is to contradict the witness, his or her attention must be specifically called to those portions of the writing being used: *s9 Evidence Act*. You may also require the production of such writing for your inspection: *s9 Evidence Act*.

In addition to undermining credibility, a witness proved to have made inconsistent or contradictory statements may be guilty of an offence under *s105 Penal Code*.

7.5 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 accused or counsel wishes to see the notes, there is a right to inspect them.

7.6 Lies

If it is established that the accused 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 accused is guilty. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

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

In addition, a witness found to be lying may be guilty of perjury under *s96 Penal Code*.

7.7 Self Incriminating Evidence

It may happen that a witness will object to giving evidence on any particular matter on the grounds that it would prove that he or she committed an offence in Kiribati or any foreign country or would make him or her liable to a civil penalty.

The witness may be required to answer the question, but is protected from the use of the evidence against himself or herself through a certificate of protection.

If the witness gives the evidence, any information, document or thing obtained as a direct or indirect consequence of the person having given the evidence cannot be used against the person (with the exception of an offence for giving false evidence): *s5(5) Evidence Act*.

If there are reasonable grounds for a witness' objection to giving some evidence, you must inform the witness:

- that if he or she gives the evidence, the Court will issue a certificate; and
- the effect of the certificate: *s5(2)(b) Evidence Act*.

Once the witness gives the evidence, ensure that the certificate of protection is given to the witness in respect of the evidence so given: *s5(3) Evidence Act*.

Application to Accused

The provisions for issuing a certificate of protection do not apply to an accused giving evidence on:

- the doing of an act which is a fact in issue; or
- the state of mind of the accused which is a fact in issue: *s5(6) Evidence Act*.

7.8 Identification Evidence by Witnesses

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

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

8 Rules of Evidence

8.1 Introduction

Rules of evidence have been established by both common law and Statute.

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 follow.

8.2 Burden and Standard of Proof

There are two 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 accused.

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

Express Statutory Exceptions

The accused must prove any exception, exemption, proviso, excuse or qualification to an offence that is expressly specified in legislation. No proof on behalf of the complainant is required on any of these matters: *s200 Criminal Procedure Code*.

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 accused.

Where the accused 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 accused discharges his or her evidential burden, then the legal burden of disproving the defence will be on the prosecution.

8.3 Presumptions

Certain facts may be proved through the operation of a presumption. Presumptions speed up the conduct of a trial by acknowledging well-known or sometimes hard to prove facts. Some presumptions are conclusive and cannot be challenged while other presumptions are rebuttable by contrary evidence.

Judicial Notice

The doctrine of judicial notice is a particular brand of presumption. It 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. Anything of which the Judge has personal knowledge of and which is also of general knowledge in the community may have the doctrine of judicial notice applied to it.

Evidence of *Mens Rea*

It is always upon the prosecution to prove the required state of mind of the accused for criminal conviction.

8.4 Admissibility of Evidence

You have the discretion to admit, receive and act on such evidence as you think fit.

Despite this discretion, 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.

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;
- 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; and
- 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.

If you allow such submissions, it is up to you to rule on whether the evidence should be admitted or excluded. You may want to consider the common law rules regarding admissibility of evidence as they may help you in your discretion.

Relevance

You may refuse to receive any evidence, whether it is admissible or not at common law, which you consider irrelevant or needless.

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. In order to ensure that the accused receives a fair hearing, you have discretion under the common law to exclude otherwise admissible prosecution evidence if, in your opinion, it is gravely prejudicial to the accused.

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.

8.6 Hearsay Rule

Evidence given by a person who did not see or hear the original matter is called hearsay evidence.

An example of hearsay evidence would be a witness telling the Court what his friend told him about what she saw the accused do. The witness did not see the accused do anything. It was his friend who saw it, and who should give evidence.

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 the 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.

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.

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 accused in any form.

Therefore, the previous convictions of the accused 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 accused 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 accused puts his or her character in issue, evidence of bad character may be admitted at common law; or
- where the accused gives evidence, he or she may in certain circumstances face cross-examination on his character.

Admissibility of Evidence of Good Character

An accused 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 accused 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 accused, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the accused upon conviction of an offence.