# Chapter 6

# Criminal Responsibility

# 1 Introduction

The *Penal Code* is the main Statute that sets out those acts or omissions which should be regarded as criminal offences and the rules related to the criminal law in Kiribati.

This chapter will discuss the:

- important principles of the criminal law which govern the conviction of criminal offences in Kiribati;
- defences that can be raised which excuse an accused from criminal responsibility; and
- parties which should be held criminally responsible for those acts or omissions;
- attempts to commit an offence; and
- lesser and different offences.

# 2 Principles of Criminal Law

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

If, at the end of the prosecution's case, the prosecution has not produced evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at producing evidence of all the elements of the offence, then the defence has a chance to present its case and you must then decide whether the prosecution has proved its 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, after hearing the defence evidence (if any), you have a reasonable doubt on any of the elements, then the prosecution has failed.

## 2.3 Beyond Reasonable Doubt

This means you are sure the accused is guilty of the charge, based on the evidence that has been presented by the prosecution, and there is no doubt in your mind.

If you are uncertain in any way, you must find the accused not guilty. If you have doubts, this means that the prosecution has not proved the charge beyond reasonable doubt.

## 2.4 What Must be Proved

All offences involve the:

- *actus reus*; and
- *mens rea*.

### *Actus Reus*: The Physical Act or Omission

This is the physical conduct or action, or an omission:

- which is not allowed by law; or
- for which the result is not allowed by law.

These acts or omissions are the physical elements of the offence, **all** of which must be proved by the prosecution.

An offence may consist of one act or omission or a series of acts or omissions. The failure by the prosecution to prove the act(s) or omission(s), and any accompanying conditions or circumstances means there can be no conviction.

### *Mens Rea*: Mental Capacity

Most offences require the prosecution to prove the accused had a particular state of mind in addition to the act and its consequences. This is called the *mens rea*.

This could be:

- intention: the accused means to do something, or desires a certain result;
- recklessness: the accused foresees the possible or probable consequences of his actions and although does not intend the consequences, takes the risk;
- knowledge: knowing the essential circumstances which constitute the offence;
- belief: mistaken conception of the essential circumstances of the offence; or
- negligence: the failure of the accused to foresee a consequence that a reasonable person would have foreseen and avoided.

The two main presumptions regarding *mens rea* that operate in the criminal law are:

- *mens rea* is an essential element of every offence, unless specifically excluded; and
- individuals intend the natural consequences of their actions.

*Mens Rea* as an Eessential Element of Every Offence
*Mens rea* is presumed to be an element of every offence. This principle was settled in the English case of *Sherras v. De Rutzen* (1985) 1QB 918. Even if words normally associated with *mens rea*, such as "knowingly" are not used in an offence section, it is still presumed that some mental element must accompany the act to make it criminal.

The only exception is where there is specific language in the offence which clearly shows that this presumption does not operate and committing the *actus reus* alone will be enough.

Individuals intend the natural consequences of their actions
It is the burden of the prosecution to prove every element of an offence through direct or circumstantial evidence. Nevertheless, you can presume that individuals intend the natural consequences of their actions: See *R v Lemon* [1979] 1 All ER 898.

# 3 General Exemptions to Criminal Responsibility

Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

*Part IV* of the *Penal Code* sets out the exemptions to criminal responsibility. It may also be necessary from time to time to refer to the *Criminal Procedure Code* when dealing with issues of criminal responsibility.

Generally, an accused will argue that he or she should not be punished for an offence because:

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

Where the accused is arguing one of the defences from *Part IV Penal Code*, he or she must point to some evidence to support such a defence. Then it is the prosecution that bears the burden of proving that such evidence should be excluded or that the accused was criminally responsible for his or her act or omission.

The exception is **insanity**. In this case, it is for the accused 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.

# 4 Specific Exemptions to Criminal Responsibility from *Part IV Penal Code*

## 4.1 Ignorance of the Law

Generally speaking, ignorance of the law is not a valid defence. This is because if knowledge of the law was necessary for conviction, it would encourage people to ignore the law.

The only time that ignorance of the law is a valid defence is if knowledge of the law is expressly declared to be an element of the offence: *s7 Penal Code*.

## 4.2 *Bona fide* Claim of Right

For offences related to property, an accused is not criminally responsible if the act was done with an honest claim of right and without an intention to defraud: *s8 Penal Code*.

For example, if Anatatia takes a mat from Bureti, believing it to be the one she lent to him, Anatatia is not criminally responsible for theft.

This defence requires the accused to point to some evidence to make out his or her defence, which the prosecution must then overcome to secure a conviction.

## 4.3 Intention

**Accident**

With the exception of offences which specifically exclude *mens rea* as an element (absolute liability offences), an accused is not criminally responsible for an act which occurs independently of his or her free will or through an accident: *s9(1) Penal Code*.

For example, if Anatatia is pushed into Bureti, Anatatia does not have the intention to assault Bureti and is therefore not guilty of the offence.

**Intending Result**

Intention also relates to intending a particular result of an act. Unless expressly declared to be an element of an offence, the result intended by the accused is immaterial: *s9(2) Penal Code*. For example, if Bureti tickles Anatatia hard, intending her to laugh and play fight back, and Anatatia suffers a broken rib, then the fact that Bureti intended an innocent result does not matter. He is guilty of an assault causing actual bodily harm.

**Motive**

Unless expressly declared to be an element of an offence, the reason or motive an accused has for doing an act is immaterial: *s9(3) Penal Code*.

Even in cases where the accused is acting out of a good motive, the motive does not diminish responsibility, although it may have a bearing on the sentence imposed. For example, if Anatatia steals from a store in order to feed her children, it does not diminish Anatatia's criminal responsibility for the theft.

## 4.4 Mistake of Fact

Unless specifically provided, where an accused acts (or omits to do an act) under an honest and reasonable but mistaken belief in any state of things, he or she is not criminally responsible to any greater extent than if that mistaken belief was true: *s10(1) Penal Code*.

This is because the law tries to punish only blameworthy acts, not those where the accused is acting honestly, even if the accused is mistaken.

For example, if Anatatia takes a mat from Bureti, believing honestly and reasonably, but incorrectly, that Bureti consented to her taking the mat, Anatatia is not guilty of theft.

For some offences, the defence of mistake of fact is not available. For example, a reasonable but mistaken belief as to the age of the complainant for most sexual offences is immaterial: See *s160 Penal Code*.

## 4.5 Insanity

An accused is not criminally responsible by reason of insanity if, by reason of a disease of the mind at the time of the act in question, he or she was incapable of understanding the nature of the act or knowing that the act was wrong: *s12 Penal Code*.

The *Penal Code* presumes every person is sane until proved otherwise: *s11 Penal Code*. For a successful insanity defence, the accused must prove on the balance of probabilities that he or she was insane at the time of the offence and therefore did not have the required *mens rea* for the offence.

If the accused had a disease of the mind but the disease did not in fact render the accused incapable of understanding the nature or wrongfulness of the act, then he or she may still be found criminally responsible: *s12 Penal Code*.

**Insanity Defence**

If an accused is found to be not criminally responsible by reason of a disease of the mind, you must make a special finding that the accused is guilty of the act charged but was insane at the time: *s146(1) Criminal Procedure Code.*

When you make such a finding, you must:

- order the accused to be kept in custody as a criminal lunatic in a place and manner you direct; and
- report the case to the Beretitenti who will then be responsible to order the person confined to a mental health hospital, prison or other suitable place of custody: *ss146(2),(3) Criminal Procedure Code*.

See Chapter 8 Management of Proceedings for how to deal with an accused who appears to be suffering from mental disease.

## 4.6 Intoxication

Intoxication will serve as a defence to criminal responsibility only if the intoxication made the accused incapable of knowing what he or she was doing or knowing the act was wrong, **and**:

- the state of intoxication was caused **without** his or her consent by the malicious or negligent act of another person; or
- the accused was, by reason of intoxication, insane at the time of the act in question: *s13 Penal Code*.

If the issue is whether the accused was, by reason of intoxication, insane at the time of the act, the question to consider is, was the accused's mind was so intoxicated that he or she could not have formed the intention to do the act or that the mind of the accused was so affected by alcohol that he or she did not know what he or she was doing at the time.

Intoxication includes states produced by narcotics or drugs: *s13(5) Penal Code*.

If the accused is not criminally responsible through intoxication caused by the malicious or negligent acts of another, the accused must be discharged.

If the accused is not criminally responsible through intoxication amounting to insanity, he or she must be dealt with according to the provisions for insanity: *s13(3) Penal Code*. See 4.5 above.

Intoxication must also be taken into account for the purpose of determining whether an accused had formed an intention, specific or otherwise, in the absence of which he or she would not be guilty of the offence: *s13(4) Penal Code*.

## 4.7 Immature Age

**Under 10 Years of Age**

Because the law only seeks to punish those who do wrongful acts, a child under 10 years is not criminally responsible for any act or omission: *s14(1) Penal Code*. This is because the law treats children under 10 years as being incapable of knowing right from wrong.

**Under 14 Years of Age**

A child under the age of 14 years is not criminally responsible for an act or omission unless it is proved that, at the time of the act in question, he or she had capacity to know the act was wrong: *s14(2) Penal Code*.

**Sexual Intercourse**

A male under 12 years is presumed to be incapable of having sexual intercourse: *s14(3) Penal Code*.

## 4.8 Judicial Officers

In order to allow judicial officers to do their job fearlessly, judicial officers are not criminally responsible for any act or omission in the exercise of judicial functions, unless specifically prohibited by the *Penal Code*: *s15 Penal Code*.

## 4.9 Compulsion

Generally, those forced to do acts by another person are not held criminally responsible as they are not acting of their own free will.

Specifically, an accused is not criminally responsible if:

- an offence is committed by two or more offenders; and
- the act is done only because, during the whole of the time of the act, the accused is compelled to do the act by threats from one or more of the other offenders; and
- the threats are to instantly kill or cause grievous bodily harm to the accused if he or she refuses to do the act: *s16 Penal Code*.

This is a very complicated defence and it is worthwhile to become familiar with its limits through a criminal textbook such as *Criminal Laws of the South Pacific* by Mark Findlay.

**Compulsion by Husband**

If the offence is not treason or murder, a woman may not be criminally responsible if she proves the offence was committed in the presence of and under the coercion of her husband: *s19 Penal Code*.

For this defence, the accused must prove that she was under the coercion of her husband. It is not enough to simply prove the offence was done in his presence.

## 4.10 Defence of Person or Property

The common law recognises a right for individuals to defend themselves and their property from others. For this reason, what would otherwise be offences such as assault or murder may not be if the accused was acting in defence of himself or herself or property.

The use and limits of this defence in Kiribati are the same as the principles of English common law, subject to any other law in operation in Kiribati: *s17 Penal Code*.

**Principles**

- A person may use such force as is reasonable in the circumstances if he or she honestly believes them to be in the defence of him or herself or another: *Beckford v The Queen* [1988] AC 130.
- What force is necessary is a matter of fact to be decided on consideration of all the surrounding factors.
- The state of mind of the accused should also be taken into account. This is a subjective test: *R v Whyte* (1987) 85 CrAppR 283.
- 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.
- The onus is on the prosecution to prove that the accused did **not** act in self-defence or in defence of property, once the issue has been raised by the accused and evidence has been presented: *Billard v R* (1957) 42 CrAppR 1; *R v Moon* [1969] 1 WLR 1705.

# 5 Parties

The law recognises that there can be more than one person connected to a criminal offence. This includes:

- those who actually commit the offence (principal offenders);
- those who somehow contribute to the commission of the offence through encouragement, advice or assistance (accessories);
- those who conspire to commit an offence; and
- those who aid an offender after the commission of the offence (accessories after the fact).

## 5.1 Principal Offenders

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

It must be proved that the accused 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 Anatatia punches Bureti on the face, Anatatia would be considered the principal offender for the offence of assault.

## 5.2 Accessories

Anyone who commits any of the following acts may be charged with, and found guilty of actually committing the offence:

- anyone who does any act for the purpose of enabling or aiding another person to commit the offence;
- anyone who aids or abets another person in committing the offence; and
- any person who counsels or procures any other person to commit the offence: *s21(1) Penal Code*.

An accessory may be found criminally responsible for all offences unless it is expressly excluded by Statute.

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

- aiding, abetting, counselling and procuring;
- 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: he or she must know at least the essential matters which constitute the offence; and
- intention: he or she have 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 accused must have done something (or omitted 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 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 principal 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 man for his thoughts unaccompanied by any other physical act beyond his 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 accused 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 the minds between the secondary party and the principal offender regarding the offence.

## 5.3 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)* and *(2) 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(3) 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 accused 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:

  for example, if Anatatia counsels Bureti to murder Kotoa by shooting, Anatatia can still be found guilty of murder if Bureti uses a knife to kill Kotoa;

- the offence is committed in the way counselled or in a different way:

  for example, if Anatatia counsels Bureti to murder Kotoa, but Bureti only caused grievous bodily harm, Anatatia can be found guilty of causing grievous bodily harm.

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; and
- The accused counselled the principal to commit an offence; and
- The principal acted within the scope of his or her authority: *R v Calhaem* [1985] 2 AllER 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, 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(4) Penal Code*.

**The Elements for Procuring**

- An offence must have been committed by the principal; and
- The accused procured the principal to commit an offence; and
- 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.

## 5.4 Offences Committed in Prosecution of Common Purpose

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

If during the course of the robbery, Anatatia assaults the shopkeeper, Anatatia will be liable as the principal offender for assaulting the shopkeeper.

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

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

### The Elements for Prosecution of a Common Purpose

- A common intention between the accused;
- 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.

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

## 5.5 Conspiracy

**Conspiracy to Commit a Felony**

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 Kiribati 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:

  seven years if no other punishment is provided for; or

  if the punishment for the person convicted of the felony is less than seven years, then that lesser punishment: *s376 Penal Code*.

**Conspiracy to Commit a Misdemeanour**

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 Kiribati 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: *s377 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 Rreus* of Conspiracy

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 accused may be charged and convicted of conspiracy even if the identities of his or her fellow conspirators are unknown.

*Mens Rea* of Conspiracy

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**

The elements of conspiracy are as follows:

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

## 5.6 Accessories After the Fact

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: *s379(1) 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: *s380 Penal Code*.

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

A woman does **not** become an accessory after the fact for an offence of her husband if she:

- receives or assists her husband in order to help him escape punishment; or
- receives or assists, in the presence and authority of her husband, another person who is guilty of an offence the husband took part in: *s379(2) Penal Code*.

**The Elements for Accessories After the Fact**

The elements for accessories after the fact are as follows:

- the principal offender was guilty of a felony; and
- the defendant knew of the principal offender's guilt; and

- the defendant received or assisted the principal offender; and
- 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 accused knew that an offence had been committed by the principal offender.
- 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).

## 5.7 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 their has been a change of mind;
- withdrawal should be communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn;
- 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.

# 6 Attempts

A person may be held criminally responsible for attempting to commit an offence.

This is because the basis of criminal responsibility is the punishment of blameworthy behaviour coupled with a blameworthy state of mind.

In addition to any specific charge for attempt, any accused charged with an offence may be convicted of attempt for that offence, although not specifically charged with the attempt: *s158 Criminal Procedure Code*.

## 6.1 Definition of Attempt

An attempt to commit an offence is an overt act done in execution of the offence, with the intention to commit an offence: *s371(1) Penal Code*.

An attempt requires:

- some actual act or omission that forms part of the full offence; and
- intent to commit that offence; and
- interruption of the offence either voluntarily by the offender or otherwise.

It does not matter (except as to regards punishment) whether or not:

- the offender does everything necessary to complete the commission of the offence; or
- the offender is prevented by outside circumstances or from his or her own motion from carrying out his or her intention to commit the offence: *s371(2) Penal Code*.

**Impossibility**
In some cases, it would be impossible for the offender to commit the full offence, as he or she intended. Mere impossibility alone is not enough to acquit the offender: *s371(3) Penal Code*.

For example, if Anatatia puts her hand into Bureti's pocket intending to steal, Anatatia is guilty of an attempt to steal although there is nothing in the pocket.

# Chapter 7

# Jurisdiction

# 1 Jurisdiction Defined

Jurisdiction means the authority to hear and determine a particular matter. Courts may only act within their legally defined jurisdiction. If a Court acts outside its jurisdiction, it is said to be acting *ultra vires* (outside the power) which makes the Court's decision invalid on that matter.

An example where a Court would be acting outside its jurisdiction would be if the Magistrates' Court heard a murder case, which can only be heard by the High Court.

## 1.1 Original Jurisdiction

Original jurisdiction means that a Court is given power to hear certain kinds of cases **in the first instance**, for example:

- the High Court has original jurisdiction to hear murder and treason cases;
- the Magistrates' Court has original jurisdiction to hear some criminal and civil cases and all land matters: *s34 Magistrates' Courts Ordinance*.

## 1.2 Territorial Jurisdiction

Territorial jurisdiction refers to the geographic area in which a particular Court has competence.

For example, every Magistrates' Court may only exercise jurisdiction within the limits of the district in which it is situated: *s4(1) Magistrates' Courts Ordinance*. This jurisdiction also extends over any adjacent territorial waters and over lagoon and inland waters within or adjacent to the district: *s4(2) Magistrates' Courts Ordinance*.

## 1.3 Appellate Jurisdiction

This is the right of a Court to hear appeals from a lower Court.

The Court of Appeal and the Judicial Committee of the Privy Council each have some type of appellate jurisdiction under the *Constitution* as does the High Court under the *Magistrates' Courts Ordinance*.

## 1.4 Criminal Jurisdiction

A crime (also called an offence) is the commission of an act that is forbidden by legislation or the omission of an act that is required by legislation.

The *Penal Code* sets out most crimes in Kiribati. Other Statutes, such as the *Public Order Ordinance* and the *Traffic Act*, also set out a number of offences you will deal with.

## 1.5 Civil Jurisdiction

This covers disputes between individuals and between individuals and the state, that are not criminal matters.

# 2 Jurisdiction of the Magistrates' Court

## 2.1 Territorial Jurisdiction

Subject to the express provisions of any Act, a Magistrates' Court must only exercise jurisdiction within the limits of its district, including any territorial, lagoon or inland waters within or next to its district: *s4 Magistrates' Courts Ordinance*.

The Chief Justice may:

- provide for delimitation of districts;
- direct how many Magistrates' Courts will be in a district; and
- distribute business between Magistrates' Courts within a district: *ss3(2), 4(1) Magistrates' Courts Ordinance*.

There are currently 25 Magisterial districts in Kiribati. To determine your district, see the *Delimitation of Districts Order 1978*.

**Vessels**

If an offence is committed or a civil matter arises on a vessel, a Magistrates' Court has jurisdiction to try the case if it is an offence or civil matter it is normally allowed to hear, and:

- the offence is committed or the matter arises while the vessel is in its district; or
- the vessel calls at its district after the offence was committed or the matter arose: *s29 Magistrates' Courts Ordinance*.

## 2.2 Criminal Jurisdiction

Criminal cases are normally heard by a panel of 3 Magistrates sitting together, but the Chief Justice has exercised his power to create Courts where single Magistrates sit alone: *s7(3)(5) Magistrates' Courts Ordinance*.

There are two aspects to criminal jurisdiction:

- jurisdiction to hear a matter; and
- jurisdiction to sentence upon conviction.

**Hearing**

*Schedule 2* of the *Magistrates' Courts Ordinance* sets out the jurisdiction of the Magistrates'' Court in criminal cases: *s23(1) Magistrates' Courts Ordinance*.

Under *Schedule 2*, Magistrates' Courts may hear:

- any offence which carries a maximum penalty of $500 fine and/or 5 years imprisonment; and
- any offence in an Ordinance or Act in which jurisdiction is expressly conferred on the Magistrates' Court; and
- offences under *ss118, 254, 262, 271, 292, 293, 294, 295, 306, 307, 348(5), 349(1)(b), 376 Penal Code*; and
- all offences in the *Penal Code*, **except** *Part VII, Part VIII, Part XVI* and *ss64 to 80*: *Schedule 2 Magistrates' Courts Ordinance*.

The Chief Justice may increase or decrease the jurisdiction of Magistrates to hear criminal matters by:

- amending or deleting any part of *Schedule 2*: *s23(2) Magistrates' Courts Ordinance*.
- making an order extending the criminal jurisdiction of the Magistrates' Court: *s28 Magistrates' Courts Ordinance*.

For this reason, you should read all Orders from the Chief Justice.

As at March 2004, under order of the Chief Justice, Magistrates' Courts may also hear:

- *s312 Penal Code (Arson)*;
- *s313 Penal Code (Attempted arson)*;
- *s314 Penal Code (Setting fire to crops and plants)*;
- *s315 Penal Code (Attempting to set fire to crops and plants)*;
- *s319(1) Penal Code (Destroying or attempting to destroy property)*;

- *s319(5)(a) Penal Code (Attempting to destroy or damage property)*; and
- *s47 Customs Act*: *Orders for Extension of Criminal Jurisdiction of Magistrates' Courts (30 July 2003), (20 September 2001), (10 January 2003)*.

Magistrates' Courts may **not** hear:

- *Part VII, Part VIII, Part XVI* and *ss64 to 80 Penal Code*;
- any Ordinance which specifically excludes the jurisdiction of the Magistrates' Court: *Schedule 2 Magistrates' Courts Ordinance*.

**Sentencing**

Where an accused is convicted, the Magistrates' Court may sentence him or her to:

- imprisonment up to a maximum of 5 years;
- a fine up to a maximum of $500;
- both imprisonment up to a maximum of 5 years **and** fine up to a maximum of $500;
- any sentence or order authorised by law;
- any lawful sentence combining any of the sentences or orders: *s24(1)(2) Magistrates' Courts Ordinance*.

Note that there are a number of offences which you may hear, but the maximum penalty set out for the offence is greater than your sentencing jurisdiction. For example, although you may hear an arson case which carries a maximum penalty of life imprisonment, upon conviction you are still limited to a sentence of 5 years imprisonment and $500 fine or both.

Two or More Offences Arising Out of the Same Facts

For two or more distinct convictions, a Magistrates' Court may pass **consecutive** sentences of imprisonment (to be served one after another), unless it directs that the sentences should run **concurrently** (at the same time): *s24(4) Magistrates' Courts Ordinance*.

A Magistrates' Court may impose consecutive sentences for two or more offences arising out of the same facts, up to a total of twice their normal sentencing jurisdiction, that is, 10 years imprisonment, or $1,000, or both.

For example, you may impose a sentence for longer than five years imprisonment or $500 fine on conviction for two or more offences, but in no circumstances may you exceed twice your ordinary sentencing jurisdiction: *s9(2) Criminal Procedure Code*. This means that you may **not** impose a period of imprisonment longer than 10 years or $1000 fine.

For more information on sentencing see Chapter 13 Sentencing.

## 2.3 Civil Jurisdiction

The civil jurisdiction of the Magistrates' Courts is set out in *Schedule 1* of the *Magistrates' Courts Ordinance*: *s23(1) Magistrates' Courts Ordinance*.

Civil cases are normally heard by a panel of three Magistrates sitting together, but the Chief Justice has exercised his power to create Courts where single Magistrates sit alone: *s7(3)(5) Magistrates' Courts Ordinance*.

A Magistrates' Court may:

- hear any action in **contract or tort** if:
  - the value claimed is under $3000; and
  - the accused lives in the Court's district or the cause of action arose in the district: *s1(b) Schedule 1 Magistrates' Courts Ordinance*;
- hear **divorce** matters under the *Native Divorce Ordinance*, if:
  - the petitioner lives in the Court's district; and
  - both the petitioner and respondent are domiciled in Kiribati: *s1(a) Schedule 1 Magistrates' Courts Ordinance*.
- grant **injunctions** (upon application by a party to a suit) to:
  - preserve the status quo; or
  - prevent the subject matter of a claim from being interfered with, or destroyed: *s3 Schedule 1 Magistrates' Courts Ordinance*.

The Chief Justice may, by notice, amend or delete any part of *Schedule 1* to increase or decrease your jurisdiction: *s23(2) Magistrates' Courts Ordinance*. For this reason, you should read all Orders from the Chief Justice.

## 2.4 Lands Jurisdiction

Magistrates' Courts hear all land cases at first instance.

Land cases are normally heard by a panel of five Magistrates sitting together, but the Chief Justice has exercised his power to create Courts where single Magistrates sit alone: *s7(4)(5) Magistrates' Courts Ordinance*.

Of the five Magistrates on the panel, at least three must be on the Lands Magistrates' Panel for the district in which the matter arose or the land in question is situated: *s7(4) Magistrates' Courts Ordinance*.

The High Court may transfer lands cases to another Magistrates' Court or to the High Court. See *s23(3) Magistrates' Courts Ordinance*.

## 2.5 Other Jurisdiction

Magistrates have jurisdiction to carry out many other tasks to assist them to carry out their judicial functions.

Subject to any Act, the Rules of Court or any order of the Chief Justice, Magistrates have the power to:

- issue writs of summons;
- administer oaths and take affirmations and declarations;
- receive production of books and documents;
- make decrees and orders;
- issue process; and
- exercise judicial and administrative powers in relation to the administration of justice: *s30 Magistrates' Courts Ordinance*.

Magistrates are also Justices of the Peace: *s16(2) Magistrates' Courts Ordinance*. As such, they may:

- issue summonses and warrants for compelling any accused or witness to attend Court;
- exercise any other powers and rights as conferred or imposed by Rules of Court made under the *Magistrates' Courts Ordinance* or any other Act not involving the trial of causes or the holding of preliminary investigations into criminal matters: *s17 Magistrates' Courts Ordinance*.

Magistrates also have the same powers as the High Court to deal with contempt: *s6 Magistrates' Courts Ordinance*.

# 3 Transfer of Cases

In some instances, you may realise that a criminal case is outside your jurisdiction. For example, this could occur:

- when the offence appears to have taken place in another district;
- where one offence was charged but it becomes clear that a more serious charge beyond your jurisdiction should have been laid; or
- where you feel an offence which you can properly hear deserves a higher penalty than you can give.

In these instances, the case must be transferred to another Magistrates' Court which has jurisdiction or to the High Court.

## 3.1 Territorial Jurisdiction Problems

Generally, a case should be heard in the jurisdiction in which the offence is alleged to have been committed or the accused was apprehended or has appeared in answer to a summons: *s58 Criminal Procedure Code.*

If, during an inquiry or trial, it appears that the offence occurred outside your district:

- stay the proceedings; and
- submit the case with a brief report to the High Court: *s66 Criminal Procedure Code*.

## 3.2 Hearing / Sentencing Jurisdiction Problems

If it appears that the offence is one outside your hearing jurisdiction, use the following procedure:

- By your own motion or on the application of any person concerned, report to the Chief Justice any cause or matter which you believe should be transferred to another Magistrates' Court or to the High Court: *s37 Magistrates' Courts Ordinance*.
- The Chief Justice will then order in what mode and where the case will be heard.
- Once the case has been ordered for transfer, you must:
  - stop all applicable processes and proceedings in the Magistrates' Court; and
  - send an attested copy of all entries in the books of your Court to the Court where the case is transferred: *s39(1) Magistrates' Courts Ordinance*.

This could occur, for example, when an accused was originally charged with assault, but during the hearing it appears to you that the accused should have properly been charged with indecent assault.

This could also occur if you find that your sentencing jurisdiction is not enough to deal with a serious crime for which you have hearing jurisdiction. For example, this could happen when you are hearing an arson case that turns out be much more serious than it originally appeared.