Kiribati Magistrates' Bench Book

Produced by the Pacific Judicial Education Programme, in collaboration with the Kiribati National Judicial Education Committee, and with generous assistance from the governments of Australia, New Zealand and Canada.

Australian Government
AusAID

nzaid

CANADA FUND FOR LOCAL INITIATIVES

Foreword

This Bench Book is a welcome assistance for Magisterial work. It is intended to be a practical, user-friendly and informative guide to many aspects of the Magistrates' Courts. I ask every Magistrate to use it often, to add to it and become part of developing and improving it further in the years ahead.

The Bench Book is an important milestone in the work of the National Judicial Education Committee. It will lead to greater uniformity and consistency in the approach of Magistrates Courts throughout Kiribati.

I acknowledge the initiative and commitment on the part of the Pacific Judicial Education Programme (PJEP) to produce this Bench Book, and the financial backing by the Governments of Australia and New Zealand through their respective aid agencies, AusAID and NZAID. I also acknowledge the assistance provided by the Government of Canada through the Canada Fund, the Department of Foreign Affairs and International Trade as well as the University of Saskatchewan Native Law Centre.

I thank Erite Awira, Paul Logan and Tina Pope, the team who produced the Bench Book. I appreciate the valuable contributions to the Bench Book of PJEP Co-ordinator, Afioga Tagaloa Enoka Puni and PJEP Administration Manager, Mrs Vere Bakani; and the National Judicial Education Committee.

The Bench Book has been produced in loose leaf format to enable on-going revision and improvement. Comments are invited and should be referred to Erite Awira.

This joint effort has resulted in a Bench Book with which we can be pleased and which should go a long way towards improving the standard of justice and the quality of service given by the Magistrates' Courts to the people of Kiribati.

Robin Millhouse
Chief Justice

Table of Contents

4: Judicial Conduct

5: Evidence

6: Criminal Responsibility

9: Pre-Trial Matters

10: First Appearance

11: Defended Hearings: The Trial

12: Judgment

13: Sentencing

16: Appeals/Cases Stated/Reviews

Appendix A: Common Offences

Assault Causing Actual Bodily Harm
Assault with Intent to Commit Felony or Resist/ Prevent Apprehension or Detention
Throwing Objects
Unlawful Wounding
Drunk and Incapable
Drunk and Disorderly

Appendix B: Clerks' Handbook

Pacific Judicial Education Programme

BENCHBOOK PROJECT 2003/2004

Team Members

Tagaloa Enoka Puni (Samoa)	**Project Director**
Erite Awira (Kiribati)	**Co-author**
Tina Pope (New Zealand)	**Consultant, Editor and Co-author**
Paul Logan (Canada)	**Researcher and Co-author**
Verenaisi Bakani (Fiji)	**Logistics and Support Services**

The kind assistance of the New Zealand Institute of Judicial Studies is also acknowledged and appreciated.

Chapter 1

Constitutional and Court Framework

1 The Constitutional Framework of Kiribati

1.1 The Constitution of the Republic of Kiribati

The *Constitution of Kiribati* was provided as part of the *Kiribati Independence Order* made on 12 July 1979. It outlines the basic structure of government in Kiribati, details the requirements of citizenship, and guarantees the rights and freedoms for individuals in Kiribati.

1.2 The Branches of Government

The *Constitution* provides for three branches of government: the Executive, Legislative and Judicial.

The Executive

Executive authority in Kiribati is exercised through the Cabinet: *s45 Constitution*. Through the Cabinet, the Executive is responsible for carrying out all government business.

Cabinet is composed of the Beretitenti, Kauoman-ni-Beritenti, appointed Ministers and the Attorney-General.

Beretitenti

The Beretitenti is President of Kiribati and serves as both the Head of State and Head of Government: *s30(2) Constitution*.

The Beretitenti is elected from the 3 or 4 candidates nominated by the Maneaba. The Beretitenti may only serve a maximum of three terms: *s32(5) Constitution*.

Powers of Beretitenti

In exercising any function of the office, the Beretitenti, unless otherwise provided, must act using his or her own judgement and need not follow the advice of any other person or authority: *s46(1) Constitution*.

Where the Beretitenti is required to exercise any function with the advice of another person or authority, he or she may once refer the matter back to the person or authority for reconsideration before acting: *s46(2) Constitution*.

The Beretitenti may withhold assent to a Bill from the Maneaba, if he or she is of the opinion that the Bill, if assented to, would be inconsistent with the *Constitution*. In certain instances, a Bill may be referred to the High Court for a ruling on whether it is consistent with the *Constitution*: *s66(3)(5)*.

Prerogative of Mercy
The Beretitenti, acting in accordance with the advice of Cabinet, may:

- grant a pardon, with or without lawful conditions, to any person concerned in or convicted of any offence in Kiribati;
- grant a respite, either indefinitely or for a specified period, from the execution of any punishment for an offence to any person;
- substitute a less severe form of punishment for any punishment imposed on a person for any offence;
- remit the whole or part of any punishment, penalty or forfeiture otherwise due to the Government on account of any offence: *s50 Constitution*.

Kauoman-ni-Beretitenti
The Kauoman-ni-Beretitenti serves as Vice-President of Kiribati. He or she is appointed by the Beretitenti from among the Ministers.

If the Beretitenti is removed from office by failure on a vote of confidence, the Council of State performs the functions of Beretitenti until the next election of a Beretitenti, following a general election. In all other cases of vacancy of the office of Beretitenti, the Kauoman-ni-Beretitenti assumes the office of Beretitenti: *s35 Constitution*.

Similarly, in cases of illness, accident or absence, the Kauoman-ni-Beretitenti may discharge the functions of the office of Beretitenti. For the specific requirements, see *s36 Constitution*.

Like all other Ministers, the Kauoman-ni-Beretitenti is responsible for such business of the Government (including administration of any Department) as assigned to him or her by the Beretitenti: *s47(1) Constitution*.

Cabinet
The Cabinet consists of the Beretitenti, the Kauoman-ni-Beretitenti, not more than 10 other Ministers and the Attorney-General: *s40 Constitution* as amended by *s2 Constitution (Amendment) Act 1995*.

The Ministers are appointed by the Beretitenti from among the members of the Maneaba ni Maungatabu: *s41(1) Constitution*.

The Beretitenti summons Cabinet and must, as far as practicable, attend and preside at all meetings of Cabinet: *s48(1)(2) Constitution*. The Beretitenti also decides what business to consider at any Cabinet meeting: *s48(5) Constitution*.

Attorney-General
The Attorney-General is part of Cabinet and acts as the principal legal advisor to the Government: *s42(1) Constitution*.

The Attorney-General is appointed and removed from office by the Beretitenti: *s42(2) Constitution*.

The Attorney-General has the power and discretion to:

- institute and undertake criminal proceedings before any Court in Kiribati against any individual;
- intervene in, take over and continue criminal proceedings that have been instituted or undertaken by any other person or authority; and
- discontinue any criminal proceedings instituted or undertaken by him or herself or any other person or authority, at any stage before judgment is delivered: *s42(4) Constitution*.

When exercising the above powers, the Attorney-General must follow his or her own discretion and must not be subject to the direction or control of any other person or authority: *s42(8) Constitution*.

The Attorney-General must also exercise all other functions conferred on the office by law: *s42(5) Constitution*.

Intervening in, taking over, continuing or discontinuing any criminal proceedings must be done by the Attorney-General him or herself. All other powers may be exercised by subordinates acting in accordance with the instructions of the Attorney-General: *s42(6) Constitution*.

The Legislature

The Legislature in Kiribati is known as the Maneaba ni Maungatabu, consisting of a single chamber: *s52 Constitution*.

The role of the Maneaba is to pass laws, "for the peace, order and good government" of Kiribati.

The Maneaba consists of:

- 35 elected members;
- the member for the Banaban community under *s117 Constitution*; and
- if not an elected member, the Attorney-General as an ex officio member: *s53(1) Constitution*.

The *Constitution* details a number of rules regarding tenure of office, vacation of seat, membership, and elections. See *Chapter V Constitution*.

The Judiciary

The Judiciary:

- interprets and applies the Maneaba's laws;
- creates and interprets case law;
- settles disputes of fact and law between individuals and between individuals and the State.

The Judiciary is composed of the Magistrates' Courts, the High Court, the Court of Appeal and, in limited instances, the Judicial Committee of the Privy Council.

2 The Court System

2.1 General Characteristics of the Court System

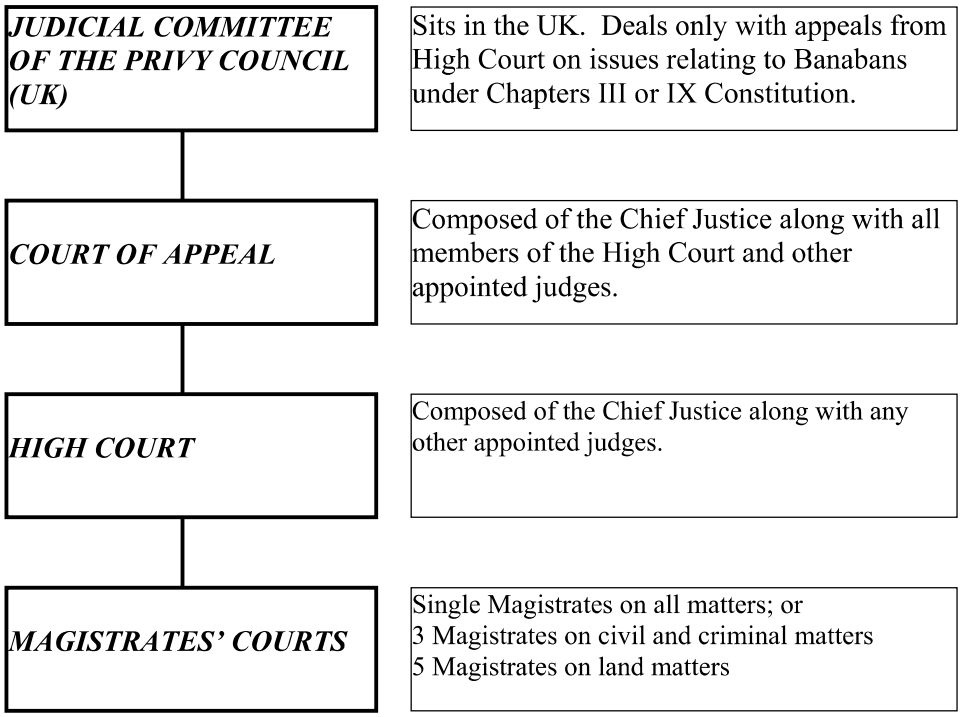
Kiribati has four types of Courts:

- the Judicial Committee of the Privy Council (only on issues involving Banaban rights under *Chapters III and IX Constitution*);
- the Court of Appeal;
- the High Court; and
- the Magistrates' Courts.

2.2 The Structure of the Kiribati Court System

The diagram on the next page shows the structure of the Court system.

Structure of the Court System



2.3 A Brief Description of the Courts

The Privy Council

The Privy Council has jurisdiction to hear appeals from the High Court on matters involving the constitutional rights of Banabans under *Chapter III* or *IX* of the *Constitution*.

The Court of Appeal

The Court of Appeal is a superior Court of record composed of:

- the Chief Justice;
- the other Judges of the High Court; and
- those who are appointed by the Beretitenti acting in accordance with the advice of the Chief Justice sitting with the Public Service Commission: *s90 Constitution*. Such people must be qualified under *s81(3) Constitution*.

The President of the Court of Appeal is appointed by the Beretitenti, acting with the advice of Cabinet after consultation with the Public Service Commission: *s91(3) Constitution*.

Although they are required to consult with others on such appointments, neither the Beretitenti nor the Cabinet need actually follow the advice given by those parties: *s139 Constitution*.

The President of the Court of Appeal may be the Chief Justice: *s91(7) Constitution*.

Any 3 Judges of the Court of Appeal may exercise all the powers of the Court. All judgments must be by majority: *s91(4)(5) Constitution*.

The Court of Appeal normally has one sitting each year, usually lasting a week so that the Court of Appeal can consider appeals from High Court decisions.

Jurisdiction

The Court of Appeal hears all criminal and civil appeals from the High Court on questions of law. The Court of Appeal also hears all appeals from the High Court in land matters.

The Court of Appeal can also hear criminal appeals from the High Court not involving a question of law:

- with leave of the Court of Appeal; or
- on sentence, unless it is one fixed by law.

The High Court

The High Court is a superior Court of record composed of the Chief Justice and a number of other Judges as may be prescribed: *s80 Constitution*.

The Chief Justice is appointed by the Beretitenti, acting with the advice of the Cabinet after consultation with the Public Service Commission. All other Judges of the High Court, if any, are appointed with the advice of the Chief Justice sitting with the Public Service Commission: *s81(1)(2) Constitution*.

Where not enough Judges are available for the High Court to sit, the Beretitenti, acting in accordance with the advice of the Chief Justice sitting with the Public Service Commission, may appoint a barrister or solicitor in Kiribati as a Commissioner of the High Court: *s84 Constitution*.

Subject to any limitations and conditions in the instrument of appointment, Commissioners of the High Court may perform:

- all or any of the functions of the High Court either generally or in respect of any particular case or class or cases; or
- such functions of a Judge of the High Court as it appears to the Commissioner are necessary to be performed without delay.

Jurisdiction

The High Court has unlimited **original** jurisdiction in civil and criminal cases. This means that, as of right, it is capable of hearing all civil and criminal matters that the Magistrates' Court may hear.

The High Court also has **appellate** jurisdiction in civil, criminal and land cases coming from the Magistrates' Court: *s67(1) Magistrates' Courts Ordinance*.

The High Court also deals with cases stated and reviews from Magistrates' Courts: *s285(1) Criminal Procedure Code; s81(2) Magistrates' Courts Ordinance*.

Magistrates' Courts

The Magistrates' Courts are established as Courts of summary jurisdiction, subordinate to the High Court: *s3(1) Magistrates' Courts Ordinance*.

Magistrates' Courts are Courts of record and returns of the records must be given as required by the *Ordinance* or by the Chief Justice: *ss3(4), 15 Magistrates' Courts Ordinance*.

The Minister by the Beretitenti appoints Magistrates on the recommendation of the Chief Justice, and declares who will be the presiding Magistrate and who will be the ordinary Magistrates: *s7(2) Magistrates' Courts Ordinance*.

In cases of vacancy due to the incapacity of a Magistrate, the Minister by the Beretitenti may, on the recommendation of the Chief Justice, appoint any person to be a temporary Magistrate to fill the vacancy: *s7(2) Magistrates' Courts Ordinance.*

Jurisdiction

The Magistrates' Court deals with the majority of all civil and criminal matters, although the most serious crimes and civil suits take place in the High Court.

The Magistrates' Courts have original jurisdiction to deal with all land matters.

For detailed information on the jurisdiction of the Magistrates' Court, see Chapter 7 Jurisdiction.

Chapter 2

The Law

1 Sources of Law

There are 5 sources of law in Kiribati. They are:

- the *Constitution*;
- every Ordinance and every Act and all subsidiary legislation made under an Ordinance or Act;
- customary law;
- the common law of Kiribati;
- every applied law: *s2 Laws of Kiribati Act*.

1.1 The Constitution

The *Constitution* is the supreme law of Kiribati: *s2 Constitution; s4(1) Laws of Kiribati Act*.

Any law inconsistent with the *Constitution* is void to the extent of the inconsistency: *s2 Constitution*.

Among other things, the *Constitution*:

- sets out the basic structure of government;
- outlines requirements of citizenship;
- protects fundamental rights and freedoms;
- provides protection and representation for Banabans.

Procedures for amending the *Constitution* are different than for other Acts. See *ss69, 124 Constitution*.

1.2 Legislation

The legislation of Kiribati is made up of all Acts and Ordinances (also known as Statutes and enactments) made by the Maneaba ni Maungatabu, as well as any subsidiary legislation created under the Acts or Ordinances.

For example, several sections in the *Magistrates' Courts Ordinance* provide for the creation of subsidiary legislation in the form of Schedules or Rules.

Schedules and other Rules are valid legislation and must be followed.

1.3 Customary Law

Customary law is recognised in Kiribati by the *Laws of Kiribati Act*.

Customary law is made up of the customs and usages, existing from time to time, of the natives of Kiribati: *s5(1) Laws of Kiribati Act*.

The rules for determining and recognising customary law are governed by *Schedule 1, Laws of Kiribati Act*.

Civil Cases

The rules for dealing with customary law in civil cases can be found in *s4 Schedule 1, Laws of Kiribati Act*.

Land Cases

The rules for dealing with customary law in civil cases can be found in decisions of the High Court and Court of Appeal on appeal from the Magistrate's Courts.

Criminal cases

Customary law may only be taken into account in criminal cases to:

- ascertain the existence of a state of mind of a person;
- decide the reasonableness of an act, default or omission of a person;
- decide the reasonableness of an excuse;
- decide, in accordance with any other enactment, whether to convict a guilty party; or
- determine the penalty (if any) to be imposed on a guilty party: *s3 Schedule 1, Laws of Kiribati Act*.

Inquiring into Questions on Customary Law

All questions regarding the existence, application or relevance of customary law are questions of law and you may raise them yourself, even if no party has raised them: *s1(1) Schedule 1, Laws of Kiribati Act*.

If such a question arises you should:

- ask the parties or their counsel to make submissions, and consider the submissions;
- consult reported cases, legal text books or other similar sources; if a doubt still remains
- conduct an inquiry as part of the proceedings in the manner you consider expedient if doubt still remains: *ss1(2),(3) Schedule 1, Laws of Kiribati Act*.

In conducting such an inquiry, you:

- do not have to follow strict legal procedure or technical rules of evidence;

- may call such evidence or require the opinions of people you think fit;
- must admit and consider available evidence (including hearsay and opinion evidence);
- must otherwise inform yourself as you think fit;
- must consider submissions on the question made on behalf of the parties;
- may consult reported cases, books, treaties, works of reference, official reports or statements made by local government councils;
- may accept any matter or thing stated in such sources as evidence on the question: *s1(4) Schedule 1 Laws of Kiribati Act*.

1.4 Common Law

Common law is law made and developed by Judges and Magistrates through their decisions. Under common law, each Court is bound by the decisions of superior Courts through the doctrine of judicial precedent.

Judicial Precedent

All Courts in Kiribati must follow any decision of the Judicial Committee of the Privy Council on questions of law in relation to appeals from Kiribati. If decisions are made in other countries, these are of persuasive authority only: *s13(1) Laws of Kiribati Act*.

All Courts in Kiribati must follow any decision on a question of law of a Court which is superior Court in relation to it: *s13(3) Laws of Kiribati Act*. The Magistrates' Court must follow the decisions of the High Court, Court of Appeal and Privy Council.

Common Law of Kiribati

The common law of Kiribati is made up of the rules comprised in the common law of England, (including the doctrines of equity) as applied in the circumstances in Kiribati: *s6(1) Laws of Kiribati Act*. These rules are known as "inherited rules".

Kiribati has taken the inherited rules and now adds to them through legislation and its own Court decisions. For this reason, many of the inherited rules do not apply in Kiribati. Because of this:

- rules that were made for England that are not appropriate to Kiribati do not apply as part of the inherited rules;
- laws of England made after 1 January 1961 are not applicable to Kiribati, unless Kiribati chooses to adopt them: *s6(2) Laws of Kiribati Act*.

The common law of Kiribati has full effect, except if it is inconsistent with:

- the *Constitution*;
- an enactment or applied law; or
- the application of customary law in respect of that matter: *s6(3) Laws of Kiribati Act*.

1.5 Applied Law

Applied law in Kiribati is made up of the English law existing in Kiribati at the time of independence. Such laws continued in force after independence, with all necessary modifications to make them applicable: *s5 The Kiribati Independence Order 1979*.

In order to patriate the legislation, the Attorney-General may make any changes necessary to ensure the legislation is appropriate to the circumstances in Kiribati and not in conflict with the *Constitution*, any other enactment or customary law: *s8 Laws of Kiribati Act*.

Once the process of adapting the legislation is complete, the transcript is presented to the Maneaba ni Maungatabu for approval. Once all changes are made and approved by the Maneaba it is published and becomes part of the law of Kiribati.

2 Interpreting Legislation

It is your job to interpret and apply the legislation. Generally, a Statute contains a section at the start which defines the meaning of certain words and phrases. If the word or phrase is not defined, then it may be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- any relevant definitions in the *Interpretation Act*;
- a dictionary;
- how it has been used in the particular Act and section (i.e. the context it has been used in);
- what purpose Parliament had in passing the law.

When an Act says the Court "may" do something, that means the power may be exercised or not, at your discretion.

When an Act says you "shall" do something, this means you must. You have no choice.

If you have any doubt about the meaning of any section or words in these Acts, contact the Chief Registrar, who can provide guidance. You may also seek help from a member of the Judiciary or a lawyer appearing before you.

3 Legal Terms

Term	Meaning
Adjournment	When a case is put off to another date.
Balance of probabilities	The standard of proof required in civil and family cases. The person bringing the claim has to prove it on the balance of probabilities. This means "more likely than not".
Beyond reasonable doubt	The standard of proof required in criminal cases. The prosecution has to prove all the elements of the offence beyond reasonable doubt. This means you are left in no real doubt at all that the person is guilty.
Burden of proof	This means, who has the responsibility to prove something? In a criminal case, the prosecution has the burden of proving the accused is guilty, beyond reasonable doubt. In a civil case, it is the person bringing a claim who must prove it, on the balance of probabilities.
Cause of action	In civil cases, the type of claim brought by a person against another person, and which explains why that other person should pay money or do something.
Charge	In a criminal case, this is the allegation which the Police make against the accused.
Civil wrong	An act or omission which gives rise to a dispute between individuals or companies. Not a crime.

Common law	Law developed by the Courts through their decisions.
Contested or defended hearing	In a criminal case, a hearing in front of Magistrate(s), where the prosecution tries to prove the accused is guilty. A defended hearing follows on from a not guilty plea. In a civil case, a hearing in front of Magistrate(s), where the applicant tries to prove their claim. It follows on from the other party not admitting the claim.
Contract	An agreement between two or more people. It can be oral or written.
Crime	An act forbidden by the laws of Kiribati.
Customary law	Cultural practice which is relevant to an issue before you.
Decision	The formal process of saying, at the end of the case, what the result is, and what your reasons are.
Discharge	When someone is guilty of a charge, but you do not want to enter a conviction.
Fine	A sum of money you may order an offender to pay in a criminal case, and this must not be more than $500 on a particular charge.
Hearsay evidence	Indirect, usually second hand evidence.

Identification	The formal process of showing that the person before the Court is the correct person.
Impartial/Impartiality	Being free of any interest or bias in a case.
Jurisdiction	The lawful power to hear a case, and act.
Lawful justification or excuse	A defence to having done a crime, which is allowed for in Statute or the common law.
Legislation	Law passed by the Maneaba ni Maungatabu, called statutory law, Acts, Ordinances, enactments or Statutes.
Litigant	A person who is involved as a party to the case before you.
Plea	In a criminal case, the formal statement as to whether the person admits or denies the charge. Will be either guilty or not guilty.
Plea in mitigation	The speech given before sentence, by an offender, or by the offender's lawyer, in which they will give reasons to try to justify a lesser sentence.
Precedent	Previous decisions of the higher Courts which are binding.
Previous convictions	When, at an earlier time, an offender has been found guilty **and** been convicted of a charge.
Right of appeal	In any case you hear, and after your decision has been given, the right a person has to come before a higher Court and have the matter reconsidered.

Sentence, and sentencing	The penalty that an offender must pay or do. You pass sentence after you have either found someone guilty, or that person has pleaded guilty. Usually a fine or imprisonment.
Standard of proof	In criminal cases, the standard of proof is beyond reasonable doubt. In civil cases, the standard of proof is on the balance of probabilities (more likely than not).
Summary offences	Lower type of offences, usually heard by the Magistrates' Courts.
Summons	A formal document advising someone to come to Court.
To convict	The formal process of recording the guilt of the accused after either a guilty plea or decision of guilt by you.

Chapter 3

Criminal Law and Human Rights

1 Introduction

The *Constitution* sets out numerous fundamental rights and freedoms that are guaranteed to all persons in Kiribati. This chapter focuses on the particular rights which have bearing on the criminal law.

It is the responsibility of all Judges and Magistrates to ensure that these rights are respected in the administration of justice.

Some of the rights particularly important to your role as a Magistrate are:

- the right to personal liberty;
- protection from inhuman treatment;
- protection from deprivation of property;
- protection for privacy of home and other property; and
- right to secure protection of law: *ss5, 7, 8, 9* and *10 Constitution.*

2 Right to Personal Liberty

No person in Kiribati may be deprived of his or her personal liberty, except:

- as a result of his or her unfitness to plead to a criminal charge;
- in execution of the sentence or order of a Court in Kiribati or some other country in respect of a conviction for a criminal offence;
- in execution of a Court order punishing him or her for contempt of Court;
- in execution of a Court order made to secure the fulfilment of that person's obligations under the law;
- for the purposes of bringing the person before a Court in execution of a Court order;
- upon reasonable suspicion of the person having committed or being about to commit a criminal offence under the law of Kiribati;
- in the case of a person under 18 years, with the consent of a parent or guardian or under Court order for the purpose of his or her education or welfare;
- for preventing the spread of infectious or contagious disease;
- for the purpose of treatment or protection of the community in the case of a person who is reasonably suspected of being of unsound mind, addicted to alcohol or drugs or is a vagrant;

- for the purpose of preventing unlawful entry of persons into Kiribati or for effecting removal of that person or restricting movement while being conveyed through Kiribati; or
- to such extent as may be necessary in the execution of a lawful order for restricting movement as may be reasonably justifiable where his or her presence would otherwise be unlawful: *s5(1) Constitution*.

2.1 Procedure on Arrest

The very strong protections of personal liberty in Kiribati require certain procedural steps to be followed during arrest or detention. You should make yourself aware of these so that you can ensure that all Police and Court procedures obey the *Constitution*.

Any person who is arrested or detained must be informed as soon as reasonably practicable of the reasons for his or her arrest or detention, in a language he or she understands: *s5(2) Constitution*.

Any person arrested or detained in execution of a Court order or on reasonable suspicion of having committed or being about to commit a criminal offence who is not released, must be brought without undue delay before a Court: *s5(3) Constitution*.

After being brought before a Court on suspicion of having committed or being about to commit an offence, if not tried within a reasonable time, then he or she must be released unconditionally or upon reasonable conditions to ensure that he or she appears at a later date for trial: *s5(3) Constitution*.

Any person unlawfully arrested or detained is entitled to compensation from that other person: *s5(4) Constitution*.

3 Protection from Inhuman Treatment

No person may be subject to torture or to inhuman or degrading punishment or other treatment: *s7(1) Constitution*.

This does not extend to any punishment (such as whipping) which was lawful at the time immediately before Independence: *s7(2) Constitution*.

It is a good idea to keep this particular right in mind so that you can ensure that Police and prisons officers treat all persons in accordance with the *Constitution*.

4 Protection from Deprivation of Property

For the purposes of criminal law, exceptions to the protection from deprivation of property mostly arises:

- in situations which concern public safety, public order, public morality or public health;
  - this includes confiscating illegal weapons, obscene materials, etc; and
- in situations which concern payment of Court ordered penalties;
  - this includes fines, compensation, or warrants for distress to pay fines on default, etc: *s8 Constitution*.

For the full range of protections and exceptions from the protection from deprivation of property, see *s8 Constitution*.

5 Protection for Privacy of Home and Other Property

For the purposes of criminal law, no person is subject to the search of his or person or property or the entry by others on his or her premises without consent, except:

- in the interests of public safety, public order, public morality;
- for the purpose of protecting the rights and freedoms of others;
- for the purpose of authorising entry onto premises in pursuance of a Court order for enforcing a judgment or Court order; or
- for the purpose of authorising entry onto premises for preventing or detecting criminal offences: *s9 Constitution*.

For the full list of exceptions to the right of privacy of home and property, see *s9 Constitution*.

The right of individuals to the protection for privacy of home and other property will most commonly arise when dealing with search warrants.

Because constitutional protection of this right is so strong, you should be mindful when granting search warrants. Demand a high level of professionalism from the Police in applying for and executing search warrants and ensure all proper procedures are followed.

6 Right to Secure Protection of Law

The right to secure protection of law in *s10 Constitution* has within it a number of rights which are crucial to ensuring justice in all criminal cases. For this reason you should become very familiar with *s10* and the important rights it confers. These relate to:

- the presumption of innocence;
- the right to be informed of the nature of the offence charged;
- the right to adequate preparation of a defence;
- the right to present a defence, either personally or through an advocate;
- the right to call and examine witnesses;
- the right to an interpreter, if necessary;
- the right to be present during trial;
- the right to a copy of the proceedings;
- protection against retrospective laws;
- the right not to be tried twice for the same offence;
- the right against self-incrimination;
- the right to an independent and impartial adjudicator; and
- the right to a public hearing: *s10 Constitution*.

6.1 The Presumption of Innocence

Every person who is charged with a criminal offence is presumed innocent until he or she is proved or pleads guilty: *s10(2)(a) Constitution*.

While all accused persons are innocent until proved guilty, the law may still impose on an accused the burden of proving particular facts: *s11(a) Constitution*.

6.2 The Right to be Informed of the Nature of the Offence Charged

Every person who is charged with a criminal offence must be informed as soon as reasonably practicable of the nature of the offence charged in detail and in a language he or she understands: *s10(2)(b) Constitution*.

This is an important right because only by knowing and understanding the offence with which he or she is charged may an accused be able to properly provide a defence.

6.3 The Right to Adequate Preparation of a Defence

Every person who is charged with a criminal offence must be given adequate time and facilities for the preparation of his or her defence: *s10(2)(c) Constitution*.

Allowing adequate time and facilities acts as a counterbalance to the power of the State (which has resources to investigate and prosecute criminal offences) and gives an accused the chance to present their best case. What facilities and how much time are necessary will depend on the circumstances, including the complexity of the case, the need to consult with an advocate and the quality of the evidence.

6.4 The Right to Present a Defence Personally or Through an Advocate

Every person who is charged with a criminal offence must be permitted to defend himself or herself before the Court in person or, at his or her own expense, by a chosen representative: *s10(2)(d) Constitution*.

For serious cases, advise the accused of his or her right to an advocate and encourage him or her to seek assistance from the People's Lawyer.

6.5 The Right to Call and Examine Witnesses

Every person who is charged with a criminal offence must be afforded facilities to examine all witnesses called by the prosecution in Court in person or through a representative. Any person charged must also be permitted to obtain and carry out examination of his or her own witnesses on the same conditions as those of prosecution witnesses: *s10(2)(e) Constitution*.

The adversarial system is based on each side having the opportunity to present its evidence and to question the evidence of the other side through cross-examination. To maintain this balance, the accused has the right to call and examine witnesses on the same terms as the prosecution. To do otherwise would disadvantage the accused and would disrupt justice.

6.6 The Right to an Interpreter

Every person who is charged with a criminal offence must be provided a free interpreter if he or she cannot understand the language used at the trial: *s10(2)(f) Constitution*.

The right to an interpreter is very important because, without the ability to understand the proceedings, the accused will be unable to mount a proper defence. If you believe that an accused does not sufficiently understand the proceedings, stop the proceedings and use the clerk, or find another interpreter to help the accused.

6.7 The Right to be Present During Trial

Except with the accused's consent, the trial of a criminal offence must not take place in his or her absence unless:

- the accused's conduct renders the continuance of the proceedings in his or her presence impracticable; and
- the Court has ordered his or her removal and the trial to proceed in the accused's absence: *s10(2) Constitution*.

6.8 The Right to a Copy of the Proceedings

When a person is tried for any criminal offence, the accused or anyone authorised by the accused must be given, upon payment of a reasonable fee, a copy of any record of the Court proceedings: *s10(3) Constitution*.

The Court is a public place and so are the proceedings unless the Court has been closed for exceptional reasons, which are rare. As a consequence the Court record should be available for examination.

6.9 Protection against Retrospective Laws

No person may be found guilty of any criminal offence that did not, at the time of the act or omission, constitute an offence: *s10(4) Constitution*.

This rule against retrospective laws prevents a person from being held criminally liable for an act which was not criminal at the time the act was done.

No penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed at the time the offence was committed: *s10(4) Constitution*.

Justice demands that individuals know or be able to find out the penalty for an offence beforehand. For this reason, if legislation increases the penalty for a particular offence between the time it was committed and the time of sentencing, the earlier lesser penalty must be applied to the offender.

6.10 The Right Not to be Tried Twice for Same Offence

No person who shows that he or she has been tried for a criminal offence by a competent Court, and either convicted or acquitted, may be tried again for that offence or for any other offence of which he or she could have been convicted at trial.
There are only two exceptions:

- the order of a new trial by a superior Court in the course of appeal or review proceedings of the conviction or acquittal: *s10(5) Constitution*.
- a Court may try a member of a disciplined force for a criminal offence although the accused has already been tried under the disciplinary law of that force, but the Court must take into account any sentence given under the disciplinary law when sentencing upon conviction: *s11(c) Constitution*.

No person may be tried for a criminal offence if he or she shows that he or she has been pardoned for that offence: *s10(6) Constitution*.

Often referred to as the "rule against double jeopardy", a person convicted or acquitted of a criminal offence must normally not be tried again for the same offence.

If several charges stem from the same set of facts or form part of the same series of offences, a person may be tried for one offence after being convicted or acquitted of one of the other offences: *ss118(1), 122 Criminal Procedure Code*.

6.11 The Right against Self-Incrimination

No person being tried for a criminal offence may be compelled to give evidence at the trial: *s10(7) Constitution*.

It is a long-standing principle of the adversarial system of criminal justice that no person can be compelled to testify against himself or herself at trial. This is because it is up to the prosecution to prove all elements of the offence.

Of course, if an accused chooses to testify at trial, the prosecution is allowed to cross-examine the accused as with any other witness.

Chapter 4

Judicial Conduct

1 Chief Justice's Guidelines for Judicial Conduct

In 2002 the Chief Justice circulated Guidelines for Judicial Conduct, as seen below. They should be followed at all times:

Published by the Chief Justice for the guidance of judicial officers and for the information of lawyers and the people of Kiribati.

A Code of Conduct for Judicial Officers in Kiribati,
being the Judges and Commissioner of the High Court,
the Chief Registrar,
Single Magistrates and Magistrates

1. The prime duty of a judicial officer is to present before the public an image of justice

2. A judicial officer must be a person of integrity and act accordingly.

3. A judicial officer administers justice to all without prejudice or favour.

4. A judicial officer executes official duties objectively, competently and with dignity, courtesy and self control.

5. A judicial officer acts at all times both in an official and private capacity in a manner which upholds and promotes the good name, dignity and esteem of the office of judicial officer and the administration of justice. In particular a judicial officer shall be punctual and be in court on time, mindful of the formal courtesies, careful to preserve the dignity of the Court, while maintaining equal respect towards all litigants as well as their lawyers.

6. A judicial officer obeys the laws of the land.

7. A judicial officer does not accept any gift, favour or benefit of whatsoever nature which may possibly influence him or her in the execution of official duties or create the possible impression that this is the case.

8. A judicial officer refrains from acting in an official capacity, especially sitting in court, in any matter wherein he or she has a direct or indirect interest.

9. A judicial officer does not discuss any confidential information which has come to his or her knowledge in an official capacity, except in so far as it is necessary in the execution of duty.

10. A judicial officer executes official duties diligently, thoroughly and speedily. A judicial officer should not long delay in delivering judgment.

11. A judicial officer maintains good order in court and requires dignified conduct from litigants, witnesses, court staff, lawyers and the public.

12. A judicial officer shall report unprofessional conduct on the part of lawyers or prosecutors to the Chief Justice.

13. A judicial officer shall refrain from public support for any political party or grouping.

14. A judicial officer shall not act to the detriment of the discipline or the efficiency of the administration of justice.

15. In judicial work, and in his relations with others a judicial officer should act always for the maintenance of harmony. Disagreement with the opinion of any other judicial officer whether of equal or inferior status, should be expressed in terms of courtesy and restraint.

July 2002, Chief Justice

2 Ethical Principles

Upon appointment as a Magistrate you have sworn the following oath:

"I,……., do swear by Almighty God that I will well and truly serve the Independent and Sovereign Republic of Kiribati as a judicial officer, and will do right to all manner of people after the laws and usages of Kiribati, without fear or favour, affection or ill will. So help me God.": *s5 Oaths Ordinance*.

The Oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

2.1 "Well and Truly Serve"

Diligence

You should be diligent in the performance of your judicial duties. This means you should:

- devote yourself to your judicial duties, including presiding in Court, making decisions and carrying out other tasks essential to the Court's operation;
- bring to each a case a high level of competence and preparation; and
- take steps to enhance your knowledge and skills necessary for your role.

Serving diligently also requires you to deliver decisions to the best of your ability, but also with regard to avoiding any unnecessary delay. To ensure this, you should:

- be familiar with common offences, the extent of your jurisdiction and Court procedures; and
- prepare as much as possible before sitting in Court.

2.2 "Do Right"

Integrity
You should conduct yourself with the utmost integrity to sustain and enhance public confidence in the judiciary.

This means you should:

- make every effort to ensure that your personal and public conduct is above reproach;
- not engage in conduct incompatible with the discharge of your role; and
- encourage and support your judicial colleagues to observe the same high standards.

2.3 "All Manner of People"

Equality
You should conduct yourself and proceedings before you so as to ensure equality according to the law.

This means you should:

- carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination;
- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background;
- avoid membership in any organisation that you know currently practices any form of discrimination that contravenes the law;
- in the course of proceedings before you, disassociate yourself from and disapprove of clearly irrelevant comments or conduct by Court staff, counsel, or any other person subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

2.4 "After the Laws and Usages of Kiribati"

Lawfulness

You must always act within the authority of the law. This means you should:

- not take into account irrelevant considerations when making decisions. Your decisions should only be influenced by legally relevant considerations;
- not abdicate your discretionary powers to another. **You** must make the decision;
- defend the constitutionally guaranteed rights of the people of Kiribati.

2.5 "Without Fear or Favour, Affection or Ill Will"

Judicial Independence

An independent Judiciary is indispensable to justice under the law. You should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

You must:

- exercise your judicial functions independently and free from irrelevant influence;
- reject any attempts to influence your decisions outside of the Court;
- uphold arrangements and safeguards to ensure judicial independence;
- promote high standards of judicial conduct.

Impartiality

Justice requires you not only to be impartial, but also to **appear** to be impartial in your decision making.

Impartiality requires you to refrain from hearing cases in which you have a personal involvement, either through the parties involved or through the subject of the case.

To ensure impartiality, you should:

- not allow your decisions to be affected by:

  bias or prejudice; or

  personal or business relationships or interests;
- as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions where it will be necessary to disqualify yourself from hearing cases.

Impartiality touches on several different aspects of your conduct.

1. Judicial Demeanour

At all times you should maintain firm control of Court processes and ensure all people in the Court are treated with courtesy and respect.

2. Civic and Charitable Activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

- Avoid any activity or association that could interfere with the performance of your judicial duties or could reflect on your impartiality.
- Do not use your judicial office to advance the causes of others.
- Avoid involvement in causes or groups likely to be involved in litigation.
- Do not give legal advice.

3. Political Activity

You should refrain from conduct which, in the mind of a reasonable, fair-minded and informed person, would undermine confidence in your impartiality with respect to matters that could come before the Courts.

Specifically, you should refrain from:

- membership in political parties and political fundraising;
- attendance at political gatherings;
- contributing to political parties or campaigns;
- taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the judiciary or fundamental aspects of the administration of justice.

4. Conflict of Interest

In any case in which you believe you will be unable to act impartially, you must disqualify yourself.

It is impossible to list with certainty each situation where you should disqualify yourself but, as a general rule, you should never hear a case where close family members or friends are parties, witnesses or have an interest in the outcome.

For more distant family or friends, you should ask yourself whether your relationship with the person is one that could lead to bias, or that a reasonable, fair-minded and informed person would have a suspicion of bias. If so, you should disqualify yourself.

For example, you should not sit in a case involving a very distant relative if you have a very close relationship with that person.

You must also not preside over any case where you may have or appear to have preconceived or pronounced views relating to:

- issues;
- witnesses; or
- parties.

For example, if you witness an accident, do not preside over any case arising out of that accident as you may prefer your own memory over that of the evidence lawfully presented in Court.

Disqualifying yourself is **not** appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification;
- no other Magistrates are available to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

If you must disqualify yourself, procedures are in place for your replacement so that the case can be heard in accordance with the law and without the possibility of real or perceived bias. See *s11 Magistrates' Courts Ordinance*.

Alternatively, if it appears impossible to hear a case in the jurisdiction because too many Magistrates must disqualify themselves, report the matter to the Chief Justice.

3 Conduct in Court

3.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with.

Have the relevant legislation at hand.

Criminal Jurisdiction

- Consider the offences – make sure you know what elements must be proved.
- Be prepared for interlocutory applications that may arise in the course of proceedings.
- Be prepared to deliver rulings at short notice.

Civil Jurisdiction

- Study the file, affidavits, etc.
- Identify the issues in dispute and the relief sought.

3.2 Principle that Affected Parties have the Right to be Heard

It is a well established principle of natural justice, evolved from the common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made.

This principle focuses on the *procedural* steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to:

- allowing the person sufficient notice to prepare his or her case;
- allowing sufficient time to enable the person to collect evidence to support his or her case;
- allowing sufficient time to enable the person to collect evidence to be able to rebut or contradict the other party's submissions.

Note that a person may be heard, but the view they have expressed need not prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of their submissions are to be determined by you.

There are three aspects to the principle of being heard:

Prior Notice

- You should be satisfied that adequate notice has been given, as prescribed by law.
- If the accused or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.
- You will need proof of service of the warrant or summons.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow them more time.

Fair Hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with any new and relevant issues that arise.
- The principle always requires you to ensure you have all the relevant facts and materials before deciding a case.

Relevant Material Disclosed to Parties

Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

Before a hearing is concluded, you should ask yourself, "*has each party had a fair opportunity to state his or her case?"*

3.3 Courtroom Conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the judiciary:

- Be punctual, sit at the time appointed, do not be late.
- Be courteous and patient.
- Be dignified.
- Be humble:

  If a mistake is made you should apologise - there is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper:

  The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.
- Never make fun of a party or witness.

  A matter which may seem minor to you, may be very important to a party or witness.
- Show appropriate concern for distressed parties and witnesses.

- Never state an opinion from the Bench that criticises features of the law:

  Your duty is to uphold and administer the law, not to criticise it.

  If you believe that amendments should be made, discuss the matter with the Chief Justice.
- Never say anything or display conduct that would indicate you have already made your decision before all parties have been heard.
- Do not discuss the case or any aspect of it outside of the judiciary.

3.4 Maintaining the Dignity of the Court

Ensure that all people appearing before the Court treat it with respect by:

- keeping order in Court;
- being polite and respectful and expecting the same from all people in Court.

Deal effectively with unruly accused persons, parties, witnesses and spectators by:

- being decisive and firm;
- dealing promptly with interruptions or rudeness;
- clearing the Court or adjourning if necessary.

3.5 Communication in Court

Speaking

- Use simple language without jargon.
- Make sure you know what you want to say before you say it.
- Avoid a patronising and/or unduly harsh tone.
- Generally, do not interrupt counsel or witnesses.
- Always express yourself simply, clearly and audibly. It is important that:

  the party examined and every other party understands what is happening in the Court and why it is happening;

  the Court Clerk is able to hear what is being said for accurate records; and

  the public in the Court are able to hear what is being said.

Actively Listening

- Be attentive and be seen to be attentive in Court.
- Take accurate notes.
- Maintain eye contact with the speaker.

Questioning

You may ask a witness questions to clear up ambiguities in the evidence, but do not conduct the case for the parties. Each party should have the opportunity to re-examine the witness after your questions, and if necessary, the parties should be given an adjournment to prepare for the re-examination: *s133 Criminal Procedure Code.*

Criminal Cases

You have a wide-ranging power to ask questions but should you use it sparingly as the criminal justice system is based on an adversarial procedure, which requires the prosecution to prove the case. Your role is not to conduct the case for the parties, but to listen and determine.

You should generally not ask questions while the prosecution or defence are presenting their case, examining, cross-examining or re-examining witnesses.

You may ask questions at the conclusion of cross-examination or re-examination, but only to attempt to clarify any ambiguities appearing from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised.

Never ask questions to plug a gap in the evidence.

Civil

You may ask questions. If parties are unrepresented, you might do this to indicate what is needed to satisfy you and clarify what they are saying.

Be careful to be neutral when asking questions. Your questions must not show bias to either side.

Avoid interrupting during submissions. If possible, wait until the party has finished their submissions.

Dealing with Parties who do not Understand

You may frequently be confronted with unrepresented accused persons and parties who do not appear to understand what the proceedings are about.

It is your responsibility to ensure that the accused understands:

- the criminal charges faced (criminal) or matters in issue (civil); and
- the procedures of the Court.

When dealing with unrepresented accused persons, you should explain to them:

- the nature of the charge;
- the legal implications of the allegations, including the possibility of a prison term if he or she is convicted;
- that legal representation is available;
- that he or she has an obligation to put his or her case.

4 Actions Against Magistrates

As a Magistrate, you are protected from civil actions for any act you do or order in the discharge of your judicial duty, whether the act was within your jurisdiction or not, if you were acting on a good faith belief that you had the jurisdiction to do the act: *s14 Magistrates' Courts Act*.

5 Working with the Court Clerk

The Court Clerk is a vital member of the Court system and should be treated with respect and dignity. By working together with the clerk and honestly discussing issues that do arise, you will be a better Magistrate and you will help make justice in Kiribati stronger.

While the clerk is under your immediate direction while in Court, they also have a responsibility to obey the rules issued to them by the Chief Registrar and Chief Justice.

Sometimes a clerk will interrupt you to correct a problem in Court, or give you advice about law or procedure. This is not a sign of disrespect but is simply the clerk doing his or her job. Always carefully consider the clerk's advice even if you do not agree.

5.1 Duties of the Clerk

Some of the most important duties are:

- to keep accurate minutes of all proceedings in the Court and to record minutes of all evidence, judgment, convictions and orders of the Court;
- to fill all summonses, warrants, orders, convictions, recognisances, writs of execution, and other documents and to submit these for signing to you;
- to attend all sittings of the Magistrates' Court;
- to take all fees, fines, penalties, and other money paid or deposited in respect of proceedings and to keep records of these transactions;
- to translate legislation and other materials into I-Kiribati; and
- to perform other duties as assigned by the Chief Justice: *s12(2) Magistrates' Courts Act*.

These are only some of the many duties which a clerk is required to perform. For further reference, see the Appendix B: Clerks' Handbook.

There are also many things a clerk cannot do. Most importantly, the clerk must not decide or even suggest any decision in a case. Deciding guilt or innocence and the sentence on conviction are matters only you may decide. The clerk may only explain the law and offer advice.

6 Sitting in Panels

Sitting in panels of three Magistrates for criminal matters presents its own difficulties. At times you may not agree with the other Magistrates on a particular point or on the whole decision.

In order to maintain the dignity of the Court, you should always do your best to present a unified front. The following advice will assist:

- Although you may not be the Presiding Magistrate, you still have an equal role in the decision. It is not the Presiding Magistrate alone who is responsible for the decision.
- If you are the Presiding Magistrate, encourage the other Magistrates to be actively involved in the decision. They must be attentive and engaged in the case.
- If you are sitting as a Magistrate, pass your questions to the Presiding Magistrate to ask, or wait until your turn to ask questions.
- Do not argue in public. If necessary, adjourn the case so that all the Magistrates can discuss any disagreements in private.

- When drafting a judgment, do so in private. Failing unanimous agreement, the decision is of the majority: *s8 Magistrates' Courts Act*. Once the judgment is drafted, it is final and there should be no arguing when it is presented.
- Refer to procedure in Chapter 13 Sentencing to avoid disagreements on sentence.

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.

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.

6.2 Punishment

Use the following rules for the punishment of attempts:

- if applicable, use the punishment for a conviction of an attempt specifically set out in the offence section, for example, attempts to commit arson are punishable by maximum 14 years imprisonment: *s313 Penal Code;*
- if the offence attempted is a felony punishable by 14 years imprisonment or more, the offender is guilty of a felony and is liable to imprisonment for up to 7 years; .
- all other attempts to commit a felony or misdemeanour are misdemeanours: *ss372, 373 Penal Code*.

7 Lesser Offences

An accused may be convicted of a lesser offence though not specifically charged with it, when:

- the offence charged consists of several particulars;
- a complete lesser offence consists of a combination of only some of those particulars; and
- the evidence proves only the combination of the fewer particulars and not all particulars of the larger offence: *s157(1) Criminal Procedure Code*.

For example, if an accused is charged with assault causing actual bodily harm but the evidence proves only common assault, the accused may still be convicted of the common assault.

In the same way, when an accused is charged with an offence and the facts proved reduce it to a lesser offence, he or she may be convicted of the lesser offence though not charged with it: *s157(2) Criminal Procedure Code*.

8 Different Offences in Some Situations

The *Criminal Procedure Code* also provides for the possibility of conviction for an offence not specifically charged through specifically outlining a different offence. These different offences may have quite different particulars from the offence charged. See *ss159-173 Criminal Procedure Code*.

For the Magistrates' Court, the most important of such offences are:

- an accused charged with stealing may be convicted of receiving, embezzling, obtaining by false pretences or, of possessing or conveying stolen property: *s169 Criminal Procedure Code*;
- an accused charged with obtaining by false pretences may be convicted of stealing: *s170 Criminal Procedure Code*;
- an accused charged with embezzlement may be convicted of stealing: *s172 Criminal Procedure Code*.

For all these offences, the accused may be convicted of the different offence although not charged with it, so long as the evidence wholly proves the different offence.

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.

Chapter 8

Management of Proceedings

1 General Organisation for Court

Before going to Court:

- ensure your clerk has prepared the case list for the day;
- try to have a Police orderly present, (this is desirable although not essential);
- if there are Chamber matters, deal with them quickly so that Court can start at the appointed time.

In Court, start Court on time and rise at the expected time. This is not only for your benefit but also for counsel, the prosecutors and Court staff.

2 Order of Calling Cases

Dealing with cases in the exact order they appear on the case list, while simple, is often not the best use of time for the Court, the Police and the public. By dealing first with those cases which require little time or that keep a number of individuals tied up in Court, you will improve the efficiency of the justice system.

The following are some suggestions for calling cases. This is not a strict order you need follow but some considerations you should keep in mind while dealing with the case list.

- Find out if there are any young offender cases. If possible, try to deal with these in a way that ensures the youth's privacy, either by adjourning them to the end of the day so that all adult cases have been dealt with or excluding people from the Court.
- Deal first with those cases which you expect to take less time. For example, a speeding offence to which the accused is pleading guilty can be expected to take less time than an arson case where the accused is pleading not guilty.
- Try to call cases where the accused is in custody early, to free up Police and prison officers.
- If counsel are present for more than one matter, try to deal with those matters consecutively so they can get away.

3 Bail

The subject of bail is extremely important as it deals with the individual's constitutionally guaranteed right to liberty: *s5(1) Constitution*. For this reason, you should be familiar with the procedure for granting bail and ensure that you and the Police follow it precisely.

3.1 Bail after Arrest Without Warrant

For situations when the police may arrest a person without a warrant, see *ss18, 51 Criminal Procedure Code*.

On the arrest of a person without warrant for an offence (other than murder or treason), a police officer must, without unnecessary delay bring the person before:

- a Magistrates' Court having jurisdiction in the case;
- a Police officer of or above the rank of Sergeant; or
- the officer in charge of the nearest police station: *s20 Criminal Procedure Code*.

Arrested Person Brought Before Magistrate
If the person is brought before you, and is prepared to give bail, you may use your discretion to admit the person to bail, with or without sureties: *s106(1) Criminal Procedure Code*.

- If you allow bail, the amount must not be excessive and must be determined with regard to the circumstances of the case: *s106(2) Criminal Procedure Code*.
- Before releasing anyone on bail, you must take the recognisance of the person and his or her sureties (if any). The recognisance must direct the person to appear at the time and place mentioned in the recognisance: *s107 Criminal Procedure Code*.

Once the recognisance has been entered into, the person must be released, unless the person is being held on some other matter: *s108(1) Criminal Procedure Code*.

Arrested Person Brought Before Police
If the person is brought before a Police officer (of the rank of Sergeant or above or the officer in charge of the police station) for an offence other than murder or treason, the officer must, if it does not appear practicable to bring the person before a Magistrates' Court within 24 hours after being taken into custody, inquire into the case: *s23 Criminal Procedure Code*.

Unless it appears to the Police officer that the offence is serious, the officer must release the person upon entering into a recognisance, with or without sureties, to appear before a Magistrates' Court at a time and place named in the recognisance: *s23 Criminal Procedure Code*.

If, after due inquiry, the Police officer is of the opinion that there is insufficient evidence on which to proceed with the charge, the officer may release the person: *s23 Criminal Procedure Code*.

If the person is released, the police officer authorising the release must report the release to the nearest Magistrates' Court as soon as reasonably possible: *s24 Criminal Procedure Code*.

3.2 Bail after Arrest on Warrant

Upon arrest of a person under a warrant, the person must be brought before the Magistrates' Court that issued the warrant: *Rule 11(1) Magistrates' Courts Rules*.

Upon being brought before you, he or she must be:

- committed to prison by warrant; or
- committed to the custody of the apprehending police officer by your oral order;
- committed to other safe custody as you think fit;
- admitted to bail on such conditions as you order: *Rule 11(1) Magistrates' Courts Rules*.

You may then order the person to be brought before you at a certain time and place and, if so, you shall give notice of this time and place to the person who laid the charge: *Rule 11(1) Magistrates' Courts Rules*.

No matter which method of committal you choose, the period must not be longer than seven days: *Rule 11(1) Magistrates' Courts Rules*.

You also have the power to hear and determine the matter immediately when the arrested person appears before you, provided that:

- the person who brought the charge requests it; and
- the arrested person consents: *Rule 11(2) Magistrates' Courts Rules*.

3.3 Bail on Appeal

Occasionally, an individual convicted of an offence will appeal the conviction and you will have to deal with bail. You may:

- order that he or she be released on bail, with or without sureties; or
- deny bail: *s277(1) Criminal Procedure Code*.

If you deny bail, you must order that the execution of the sentence or order being appealed against be suspended until the determination of the appeal, if the convicted person requests: *s277(1) Criminal Procedure Code.*

3.4 Relevant Factors for Bail

There are a number of factors relevant to the grant of bail. These include:

- the protection of the right to personal liberty contained in *s5(1) Constitution*;
- whether the accused will abscond while on bail;
- the nature and circumstances of the offence charged, including the possibility of a sentence of imprisonment;
- the weight of the evidence against the accused, bearing in mind the presumption of innocence;
- the history and characteristics of the accused, including character, physical and mental condition, family ties, employment, financial resources, length of residence in community, community ties, past conduct, criminal history and record concerning appearances at Court proceedings;
- whether at the time of the current offence or arrest, the accused was subject to a sentence or awaiting trial;
- the nature and seriousness of any possible danger to any person or the community if the accused is released;
- whether the accused will interfere with prosecution witnesses and Police investigation;
- the possibility of a repetition of the offence or of further offences;
- any danger posed by the accused to the alleged victim;
- the accused's record of past convictions and any evidence indicating prior failure to appear for scheduled Court hearings;
- the length of any delay;
- the family needs of the accused.

4 Adjournments

4.1 Adjourning the Court

Every Magistrates' Court has the power to adjourn the Court from day to day or to any convenient day: *s45(1) Magistrates' Courts Ordinance*.

If sitting in a panel and one or more of the Magistrates required is not present, the sitting may be adjourned to some other time by oral or written public notice. All persons bound to be present at the adjourned sitting are then bound to be present at the time appointed by the public notice.

If none of the required Magistrates are present, any officer of the Court or authorised person may adjourn the sitting to some other time by oral or written public notice. All persons bound to be present at the adjourned sitting are then bound to be present at the time appointed by the public notice.

4.2 Adjourning a Case

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*.

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*.

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 if the parties have 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.

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.**

5 The Mentally Ill Accused

If, at any time during the case, you have reason to believe that the accused is of unsound mind making him or her incapable of making a defence, stop the proceedings and inquire into whether the accused is of unsound mind: *s144(1) Criminal Procedure Code*.

If you are of the opinion that the accused is of unsound mind, you must postpone further proceedings in the case: *s144(2) Criminal Procedure Code*.

If an accused raises an insanity defence at trial, stop the proceedings and seek guidance on criminal responsibility from the *Penal Code* and *s146 Criminal Procedure Code*. If necessary, contact the Chief Registrar for guidance.

6 Victims

Victims of crime are usually the main prosecution witnesses. There is no specific legislation dealing with victims, but Magistrates are expected to treat them with courtesy and compassion.

In particular, you should restrain defence lawyers from humiliating victims of crime in Court. Especially vulnerable witnesses, such as the very young, very old, or disabled, are entitled to special measures when they are giving evidence. Consider allowing a family member or friend to sit with a child victim or elderly victim while giving evidence.

6.1 Consideration of Victim's Statement

Ensure that you acknowledge any statements by the victim in your sentencing remarks. A brief summary is appropriate.

Be careful about "blaming" the victim, for example, if she was drunk, unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

7 Child Witnesses

For the provisions on dealing with oaths and affirmations of children appearing as witnesses, see *s3 Evidence Act*.

In order to ensure that a child witness is best able to give evidence, special steps may be taken to ensure the child is not distracted or frightened.

For example, a parent or guardian may be allowed to sit with the child while the child gives evidence, or you may ask the child to face you rather than look at the accused.

When cross-examination of the child is conducted, you are expected to be sensitive to the child's special vulnerability in deciding whether or not you should allow the questions to be asked.

8 The Accused

The accused is entitled to be present in Court during the whole of his or her trial. Although a party may be represented by counsel, he or she must still appear in Court, unless personal appearance is specifically dispensed with.

Where an accused is required to appear in Court, but fails to do so, you may:

- issue a warrant for his or her arrest; or
- adjourn the proceedings to such time and conditions as you think fit: *ss21, 31 Magistrates' Courts Act*.

9 The Unrepresented Accused

Most litigants appear in Magistrates' Court on their own. Most have little or no idea of Court procedures and rely on the Court system to assist to some extent.

If possible, all accused persons charged with an offence carrying imprisonment as a penalty should be legally represented. However, if legal representation is not available, then you should ensure the accused understands:

- the charge(s); and
- if found guilty, whether there is a probability of an imprisonment term.

To assist in the smooth running of any hearing, you should give an initial explanation outlining:

- the procedure;
- the obligation to put their case;
- the limitation of providing new evidence;
- the need to ask questions and not make statements; and
- any issues arising out of the evidence.

See the additional considerations for an unrepresented accused in Chapter 11 Defended Hearings.

10 The Prosecution

The criminal justice system relies on the adversarial model to find justice. Only by both sides vigorously putting their cases can a just outcome be reached. With such considerations, a high level of professionalism is expected from Police prosecutors.

In order to ensure the fairness and effectiveness of the prosecution, prosecutors should strive to co-operate with other Police force members, the Courts, the legal profession and other government agencies or institutions.

You should expect the prosecutor to be prepared when he or she appears before you in Court. If the accused or a witness does not show up, the prosecutor should be prepared to prove service.

Asking for a new summons instead of proving service the first time wastes Court and Police time and must be strongly discouraged, simply reading the facts from the charge sheet is not a vigorous prosecution

The prosecutor should know the elements of the offence and have evidence to prove each element. The facts should be complete enough so you do not have to ask too many questions.

If you must ask a lot of questions to establish the prosecution's case, it could appear you are conducting the case for the prosecution and that you may be biased.

The prosecutor should have a basic understanding of Court procedure and be prepared to deal with issues that commonly arise. The prosecutor has a duty to faithfully represent the Republic of Kiribati and should only give a strong prosecution on the facts.

The prosecutor should not try to help the accused by making the offence appear more minor than it was, nor should they embellish the facts to make the offence sound worse than it was.

At sentencing, the prosecutor should have previous convictions ready and be ready to prove them if denied by the accused, as well as any reports or statements of aggravating or mitigating factors:

11 Misbehaviour in Court

11.1 Contempt of Court

Occasionally, it may consider it necessary to find a witness, accused or member of the public in contempt of Court.

As a Magistrate, you have the same powers to deal with contempt as the High Court: *s6 Magistrates' Court Ordinance*.
In addition to your power to deal with contempt in the same manner as the High Court, there are also a number of offences relating to the administration of justice under *Parts XI* and *XII Penal Code*.

Contempt is established when any person:

- by words or actions, shows disrespect for the proceedings of the Court or to any Magistrate within the premises or nearby the place of Court;
- fails, without good cause, to appear on the date and time specified in a Court summons, the proof of showing good cause is on the person failing to appear;
- refuses to be sworn or to make an affirmation when called upon to give evidence;
- refuses without lawful excuse to answer a question or produce a document in his or her power to produce, once they have been sworn or affirmed;
- if they are in attendance as a witness, remains in the room after all witnesses have been ordered to leave;
- causes an obstruction or disturbance during a judicial proceeding;
- makes use of any speech or writing misrepresenting any pending judicial proceeding or capable of prejudicing any person for or against any parties to such proceeding or calculated to lower the authority of any person before whom such proceeding is being taken; or
- commits any act of intentional disrespect to any judicial proceeding or to any Magistrate: *s115(1)(a), (b), (c), (d), (e), (f), (g)* and *(l) Penal Code*.

All the above acts of contempt are punishable by one months imprisonment if proved by a prosecutor at trial. If, however, the offence is committed in view of the Court, you may order the offender to be detained in custody, and at any time before the rising of the Court that day, you may sentence the offender to a fine of $40 or in default of payment, imprisonment for one month: *s115(1)(2) Penal Code*.

Less common instances of contempt occur when any person:

- publishes a report of the evidence taken in any judicial proceeding which has been directed to be held in private;
- attempts wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he or she has given evidence;
- dismisses an employee or servant for giving evidence on behalf of a party to a judicial proceeding; or
- wrongfully retakes possession of land from any person who has recently obtained possession by Court order: *s115 (h), (i), (j)* and *(k) Penal Code*.

Unlike the earlier types of contempt, you cannot deal with these immediately in Court if you witness them. These types of contempt are punishable by 3 months imprisonment only after prosecution: *s115(1) Penal Code*.

11.2 Refractory Witness

A refractory witness is any person who has been verbally called upon by the Court to give evidence, and without sufficient excuse:

- refuses to be sworn;
- having been sworn, refuses to answer any lawful question;
- refuses or neglects to produce any document or thing required to be produced; or
- refuses to sign his or her deposition: *ss135(1) Criminal Procedure Code*.

When dealing with a refractory witness you may adjourn the case for up to eight days and may commit the witness to prison unless he or she sooner consents to do what is required: *s135(1) Criminal Procedure Code*.

If the refractory witness is brought before the Court at the later time and again refuses to do what is required, you may adjourn the case again and commit the witness for another eight days and again from time to time until the person consents to do what is required of him or her: *s135(2) Criminal Procedure Code*.

The power to punish a refractory witness is in addition to any other punishment or proceeding for refusing or neglecting to do what is required of him or her: *s135(3) Criminal Procedure Code*.

Even without the evidence of the refractory witness, if possible you may still dispose of the case based on other sufficient evidence: *s135(3) Criminal Procedure Code*.

12 Particular Orders

In addition to any sentence you may impose as punishment for an offence, there are a number of other orders that may be useful.

12.1 Costs

Costs Against the Accused

If the charge is prosecuted by a private individual, in addition to any other penalty, you may order the offender to pay the prosecutor reasonable costs, up to a maximum of $50: *s152(1) Criminal Procedure Code*.

Costs Against the Prosecution

In cases of frivolous or vexatious charges against the accused which you have dismissed, you may order to the complainant to pay to the accused a reasonable sum as compensation for the trouble and expense to which he or she has been put in addition to his or her costs: *s154 Criminal Procedure Code*.

In certain cases where you have dismissed the charge, you may also order the Republic to pay a reasonable sum to the accused for trouble and expense. See *s154(2) Criminal Procedure Code*.

12.2 Restoration of Property

Property Found on Accused

Where an accused is apprehended and is found with any property, you may order that:

- the property or any part be restored to the person who appears to be entitled to it (including the accused himself or herself); or
- the property or any part be applied to the payment of any fine, costs or compensation ordered to be paid by the accused: *s155 Criminal Procedure Code*.

12.3 Security for Keeping the Peace

Complaint Dismissed

Even if the complaint is dismissed you may still:

- bind both the complainant and the accused, with or without sureties, to keep the peace and be of good behaviour for a period not exceeding one year; and
- order that any person so bound be imprisoned in default of compliance for three months or until such time as he or she complies: *s35(2) Penal Code*.

You may not bind an accused under this section who has been sentenced to more than six months imprisonment, nor may you bind a complainant unless he or she has been given an opportunity to address the Court as to why he or she should not be bound over: *s35(2) Penal Code*.

13 Search Warrants

Although not strictly part of the process of hearing a case, search warrants are a necessary part of the investigation of crime. Search warrants allow the Police to gather evidence the trial. It is important that you are aware of the procedure to follow when a search warrant is sought.

Note that the *Constitution* recognises an individual's right to privacy of home and other property: *s9(1) Constitution*.

The right to privacy is subject to laws permitting search.. The exceptions most applicable to criminal law are those laws which are:

- in the interests of defence, public safety, public order or public morality;
- for the purposes of protecting the rights and freedoms of other persons; or
- for the purposes of preventing or detecting criminal offences: *ss9(2)(a),(b) and (e) Constitution*.

The most common applications for search involve allegations that an individual has another person's goods on his or her property.

13.1 Granting the Search Warrant

You may issue a search warrant when it is proved to you on oath that anything in respect of an offence necessary to the conduct of the investigation can, in fact or on reasonable suspicion, be found in any:

- building;
- ship;
- vehicle;
- box;
- receptacle; or
- place: *s101 Magistrates' Courts Ordinance*.

If anything searched for or any other thing which is reasonably suspected to have been stolen or unlawfully obtained is found, the Police officer conducting the search must seize it and bring it before the Court: *s101 Magistrates' Courts Ordinance*.

Procedure

To apply for a search warrant, the Police officer must swear or affirm the information which provides the grounds for the search warrant. See *Form 36 Magistrates' Courts Ordinance*.

This information should be sworn before you personally by the requesting Police officer.

If you are satisfied on oath that reasonable grounds exist for the search, you should give the authorisation for the search through See *Form 37 Magistrates' Courts Ordinance*.

A person who believes that his or her goods may be found on another person's property should not apply directly to you for a search warrant. He or she should take their complaint to the Police, who will then apply to you for a search warrant if they deem it necessary.

14 Case Management

Maintaining an efficient Court must not interfere with the substantive decisions you make but, where possible, avoiding delay and dealing quickly with cases will improve justice.

Goals

The goals of case management are to:

- ensure the just treatment of all litigants by the Court;
- promote the prompt and economic disposal of cases;
- improve the quality of the litigation process;
- maintain public confidence in the Court; and
- use efficiently the available judicial, legal and administrative resources.

The following points should be kept in mind to improve case-flow management:

- unnecessary delay should be eliminated;
- it is the responsibility of the Court to supervise the progress of each case;
- the Court has a responsibility to ensure litigants and lawyers are aware of their obligations;
- the system should be orderly, reliable and predictable;
- early settlement of disputes is a major aim; and
- procedures should be as simple and understandable as possible.

Chapter 9

Pre-Trial Matters

1 The Criminal Process

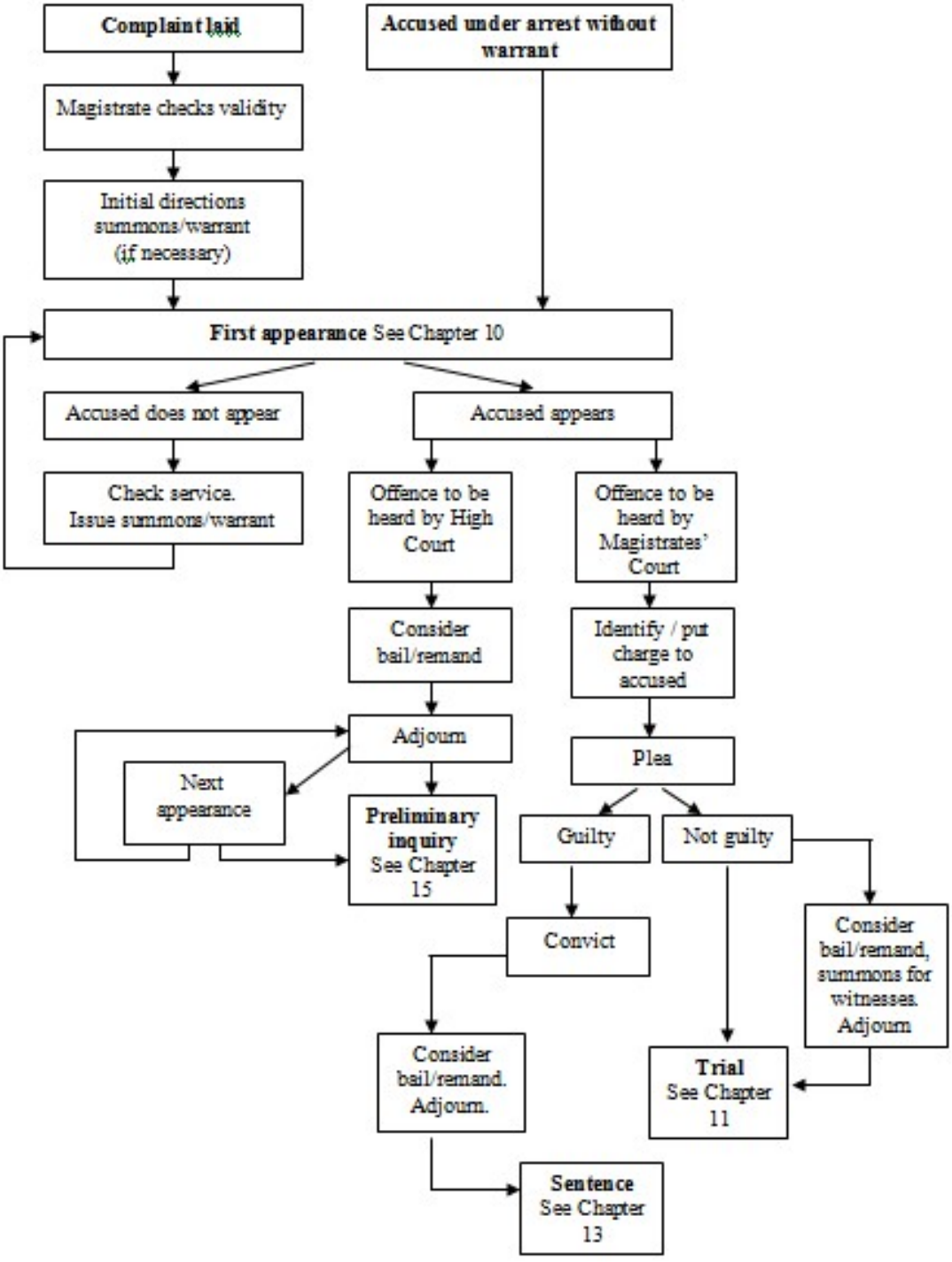
The diagram on the next page shows the general process of a criminal case, to preliminary inquiry (for offences to be heard in the High Court) and trial (for offences to be heard in the Magistrate's Court). Each step is explained in detail over the next three chapters.

This chapter Pre-Trial Matters, explains how a case comes before the Magistrate's Court and the steps to be taken up to the first appearance of the accused.

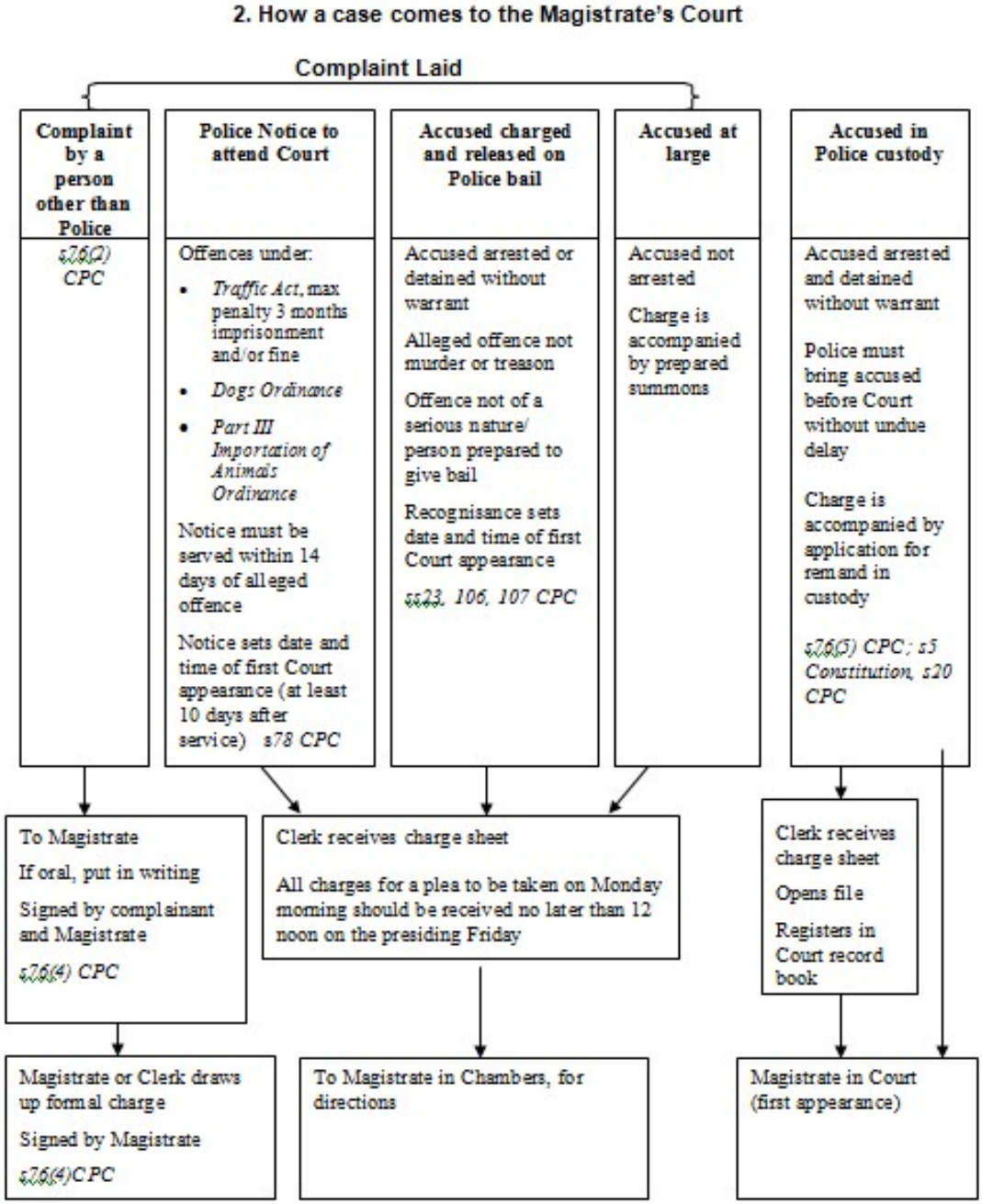
Chapter 10 First Appearance, shows the steps that are taken when the accused appears in front of the Court for the first time.

Chapter 11 Defended Hearings: The Trial, shows the steps to be taken when the accused pleads not guilty and a defended hearing takes place.

1. The Criminal Process at a Glance



2 How a Case Comes to the Magistrates' Court



Criminal proceedings can be instituted by:

- complaint; or
- bringing a person arrested without warrant before the Court: *s76(1) Criminal Procedure Code*.

Any person who believes with reasonable and probable cause that an offence has been committed may make a complaint to a Magistrate: *s76(2) Criminal Procedure Code*.

If instituted by the Police or other public officer in the course of their duty, a formal charge signed by the officer is considered a valid complaint: *s76(3) Criminal Procedure Code*.

If not a formal charge from the Police, the complaint may be made on oath, either orally or in writing. It must be reduced to writing and signed by both you and the complainant: *s76(3) Criminal Procedure Code* / *Rule 3 Magistrates' Courts Rules*.

Once reduced to writing, you must have the complaint drawn up into a formal charge containing a statement of the offence with which the accused is charged: *s76(4) Criminal Procedure Code*.

Initial Steps

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

The accused may be:

- issued with a Police Notice, under *s78 Criminal Procedure Code*;
- charged and released on Police bail;
- at large; or
- in Police custody.

Police Notice to Attend Court – *s78 Criminal Procedure Code*

A Police officer may personally serve a notice upon any person who is reasonably suspected of having committed an offence specified in *s78 Criminal Procedure Code* requiring him or her to:

- attend court at a specified time and place (at least 10 days after service); or
- appear by advocate; or
- enter a written plea of guilty;

and, if he or she does not intend to appear in person, to provide a written consent to the trial taking place in his or her absence: *s78(1) Criminal Procedure Code*.

The Police files a Notice of Prosecution in the Magistrate's Court and serves the Notice on the accused not later than 14 days from the date of the alleged offence: *s78(1) Criminal Procedure Code*.

The Notice should state:

- the place, time and date (not less than 10 days from the date of service) in which the accused is required to appear and answer the charge;
- the full name of the informant and the capacity in which they are acting (e.g. Police Constable);
- the accused's name address, occupation and age;
- the date and nature of the alleged offence; and
- a summary of facts, sufficient to inform the accused fully and fairly of the allegations made.

The printed Notice should also contains notice of the accused's right to enter a plea of guilty in writing. The Court Clerk will insert a date in the Notice (at least 10 days away) by which time the accused must exercise his or her rights: *s78(1) Criminal Procedure Code*.

If the accused does nothing, denies the charge or wishes to appear before the Court, the Court will prepare a summons for the accused. The case then proceeds as any other case.

If the accused pleads guilty in writing, **and** consents to the matter being dealt with in his or her absence, it may be dealt with in the absence of the accused.

The offences to which this process applies are:

- any offence under the *Traffic Ordinance* which is punishable only by a fine or by imprisonment not exceeding 3 months, or both;
- any offence under the *Dogs Ordinance*;
- any offence under *Part III Importation of Animals Ordinance*: *s78(3) Criminal Procedure Code*.

Accused Charged and Released on Bail and/or Recognisance

Where:

- an accused is in custody without a warrant; and
- the alleged offence is not murder or treason; and
- the offence is not of a serious nature; and
- the person is prepared to give bail.

The accused may be released on his or her entering a recognisance, with or without sureties, for a reasonable amount to appear before a Magistrate's Court at a time and place named in the recognisance: *ss23, 106 and 107 Criminal Procedure Code*.

A signed copy of the charge will be forwarded to the Court before the date on which the offence is to be heard.

Accused at Large

A person at large may be served with a summons to attend Court on a specified day to answer to the complaint.

Accused is in Police Custody

Any person who is arrested or detained, without an order or warrant, and not released, must be brought before the Court without undue delay: *s5 Constitution; s20 Criminal Procedure Code.*

The Police should have prepared a charge sheet: *s76(5) Criminal Procedure Code.* Often this will be accompanied by an application for remand in custody. Wherever possible these should be presented in advance to the Clerk, and the Clerk will open a file and register the case in the Court record before putting it to the Magistrate. The Magistrate should hear the matter at the earliest opportunity.

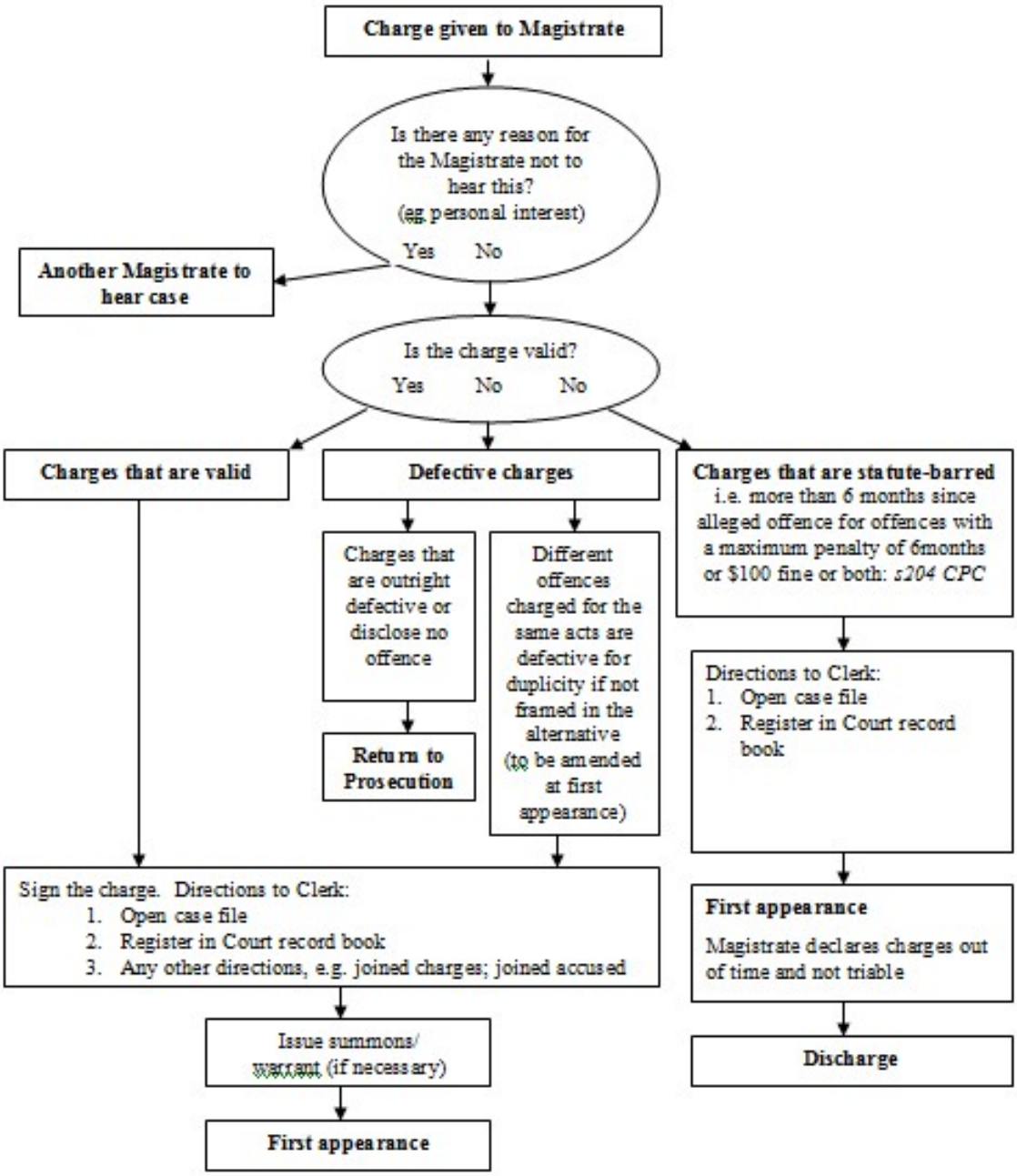
Occasionally, the charge will be put directly to the Magistrate.

See the section on bail in Chapter 8 Management of Proceedings, for dealing with an accused arrested without warrant.

3 Dealing with the Charge

The diagram on the next page shows the process up to the first appearance of the accused in Court.

3. Process up to First appearance



3.1 Personal Interest

At this stage, ask yourself whether there is any reason for you not to hear the matter. You should excuse yourself if you have or appear to have:

- bias or prejudice in the matter;
- a personal or business relationship with the accused or victim/complainant; or
- a personal or financial interest in the matter.

See Chapter 4 Judicial Conduct, paragraph 1.5.

If you must disqualify yourself, procedures are in place for your replacement so that the case can be heard in accordance with the law and without the possibility of real or perceived bias. See *s11 Magistrates' Courts Ordinance*.

Alternatively, if it appears impossible to hear a case in the jurisdiction because too many Magistrates must disqualify themselves, report the matter to the Chief Justice.

3.2 Transferring the Case

If it appears that the cause of the complaint arose outside the district limits of your Court, you may direct the case to be transferred to the Court having jurisdiction: *s65 Criminal Procedure Code*.

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

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

Issue a warrant for that purpose.

If the accused is not to be held in custody, explain to him or her that you have directed the case be transferred to another Court and grant bail on appropriate conditions.

3.3 Validity of the Charge

General Requirements

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

Generally, a charge should be filed:

- at the Court within the district in which the offence is alleged to have been committed (wholly or partly); or
- at the Court within the district in which the accused was apprehended; or
- at the Court within the district in which the accused is in custody or has appeared in answer to a summons: *ss58 - 62 Criminal Procedure Code.*

Every charge must contain:

- a statement of the specific offence or offences with which the accused is charged;
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: *s117 Criminal Procedure Code*.

Section 120 Criminal Procedure Code sets out how a charge is to be framed. However, unless the Court considers that there has been a miscarriage of justice, you should not quash, hold invalid or set aside any information or complaint only because of any defect, omission, irregularity or want of form: *s77(2) Criminal Procedure Code*.

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

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

Where there is more than one count, they should be numbered consecutively, and may be put in the alternative: *s118 Criminal Procedure Code.*

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

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

Generally, people and property should be reasonably identified, although names need not be given where they are not known.

There is a time limit for laying a charge for certain summary offences in the Magistrates' Court.

Offences carry a maximum penalty of six months imprisonment, or a fine of $100, or both.

Offences cannot be tried by a Magistrate unless the charge is laid within:

- six months from the date the alleged offence was committed; or
- a longer time if specially allowed by law: *s204 Criminal Procedure Code*.

Check Validity
Check that the charge sheet:

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

Refer to *ss58 – 62, 117, 120 and 204 Criminal Procedure Code*.

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

If the charge is defective raise it with the prosecution at the first appearance, for amendment or withdrawal.

If the only issue is that it is out of time according to *s204 Criminal Procedure Code*:

- direct that a case file be opened; and
- at first appearance, declare that it is out of time and not triable, according to *s204*; and
- discharge the accused.

3.4 Joined Charges

More than one offence may be charged together in the same charge as long as:

- they are founded on the same facts; or
- they form or are a part of a series of offences of the same or similar character: *Rule 5 Magistrates' Courts Rules; s118(2) Criminal Procedure Code*..

Each offence must each be set out in a separate paragraph in the charge, called a count: *Rule 5 Magistrates' Courts Rules; s118(2) Criminal Procedure Code*.
If an accused is charged with more than one offence in a charge or information, you may order that the offences be tried separately, if you believe that trying the offences together would harm the accused in his or her defence: *s118(3) Criminal Procedure Code*.

3.5 Joined Parties

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

- persons accused of the same offence committed in the course of the same transaction;
- persons accused of an offence and persons accused of abetment or of an attempt to commit the offence;
- persons accused of different offences committed in the course of the same transaction;
- persons accused of different offences provided that all offences arise from the same facts or form or are part of a series of offences of the same or similar character: *s119 Criminal Procedure Code*.

4 Ensuring Attendance of the Accused

Once the charge or complaint is dealt with, you must ensure attendance of the accused at the High Court or a Magistrates' Court through either:

- a summons; or
- a warrant: *s77(1) Criminal Procedure Code* / *Rule 4 Magistrates' Courts Rules*.

4.1 Summons

A summons is a formal means of ensuring the attendance of a person before the Court.

The summons must be directed to the person being summoned and must:

- require him or her to appear before the Court having jurisdiction at a time and place mentioned in the summons;
- state briefly the offence with which the person is charged: *s79(2) Criminal Procedure Code*.

The summons must:

- be in writing, in duplicate;
- be signed by the presiding officer of the Court or by some other officer directed by the Chief Justice;
- be directed to the person summoned and require him or her to appear at a stated time and place; and

- state shortly the offence charged: *s79(1) Criminal Procedure Code;*
- be in *Form 2 – Criminal (Rule 6)* in *Magistrates' Courts Ordinance (Schedule – Forms).*

A summons will **not** be necessary where:

- the accused has been served a Police Notice under *s78 Criminal Procedure Code*; or
- the accused has been released on Police bail or recognisance.

The Police will generally have prepared a summons in advance and attached it to the charge.

Service
Sections 80 – 84 Criminal Procedure Code detail how service may be effected.

4.2 Warrant

While both summonses and warrants serve the same role of ensuring the accused's attendance in Court, a warrant is a more forceful means of ensuring attendance.

Most often a warrant is issued when an accused does not obey a summons, or does not obey a recognisance of bail. You may, however, issue a warrant at this stage, rather than issuing a summons, **only** if you are satisfied that the person to be apprehended is within your jurisdiction when the charge is laid: *Rule 10 Magistrates' Courts Rules*. This would normally only be appropriate where you are satisfied that the accused will not for some reason attend on a summons.

Even if a summons has been issued, you may issue a warrant before the time appointed in the summons, **only** if a complaint has been made on oath: *s87 Criminal Procedure Code*.

Every warrant must:

- briefly state the offence with which the person is charged;
- name or otherwise describe the accused;
- order the person(s) to whom it is directed to apprehend the accused and bring him or her before the Court having jurisdiction to answer the charge;
- be signed by the Judge or Magistrate issuing it: *s89(1)(2) Criminal Procedure Code*.

For an offence other than murder or treason, you may direct the officer to whom the warrant is directed, to take security from the accused and release him or her from custody if the accused executes a bond with sufficient sureties for his or her attendance before the Court at a specified time and thereafter until otherwise directed by the Court: *s90 Criminal Procedure Code*.

You do this by endorsing the warrant. The endorsement must state:

- the number of sureties;
- the amount in which they and the accused are to be respectively bound; and

- the time at which he or she is to attend before the Court: *s90(1) Criminal Procedure Code*.

The officer must forward the bond to the Court: *s90(3) Criminal Procedure Code*.

Every warrant remains in force until it is executed or cancelled by the Court issuing it: *s89(3) Criminal Procedure Code; Rule 9(2) Magistrates' Courts Rules*.

Execution of Warrant

Warrants are normally directed to all Police officers, but if the immediate execution of the warrant is necessary and no Police officer is available, the warrant may be directed to any person or persons: *s91 Criminal Procedure Code*.

When executing a warrant, the Police officer or other person must notify the person being arrested of the substance of the warrant: *s92 Criminal Procedure Code*.

Once arrested, and if not released after providing security under *s90 Criminal Procedure Code*, the person must be brought before the issuing Court without unnecessary delay: *s93 Criminal Procedure Code*.

If arrested outside the district of the Court issuing the warrant, the person arrested must be brought before the Magistrates' Court in that jurisdiction, unless the Court that issued the warrant is closer: *s95(1) Criminal Procedure Code*.

Accused Persons Arrested Under Warrant

Once the accused is brought before you, you may:

- commit him or her to prison by warrant; or
- commit him or her to the custody of the Police orally; or
- commit him or her to other safe custody: *Rule 11(1) Magistrates' Courts Rules*.

In all cases, you must order the accused to be brought before the Court at a certain time and place: *Rule 11(1) Magistrates' Courts Rules*.

In none of the above situations, may the committal exceed seven days: *Rule 11(1) Magistrates' Courts Rules*.

On the request of the person laying the charge and with the consent of the accused, you may also hear and determine the matter immediately: *Rule11(2) Magistrates' Courts Rules*.

Upon request by the accused, bail can be granted in such conditions as you order. See also Chapter 8, 3.2.

5 Ensuring Attendance of Witnesses

5.1 Summons

If it is clear from the charge that material evidence can be given by or is in the possession of any person, you may issue a summons requiring their attendance or requiring them to bring and produce documents as specified: *s127 Criminal Procedure Code*.

Form 6 – Criminal (Rule 12(1) in the *Schedule* relating to *FORMS*, is to be used for summoning a witness.

Where a witness refused to answer to the summons, *Form 7 –Criminal (Rule 12(2))* should be issued to apprehend the witness.

The Police will generally prepare any necessary summonses in advance and attach these to the charge.

5.2 Warrant

Like an accused, a warrant may be issued to compel the attendance of a witness in Court at this stage. You may **only** issue a warrant for a witness at this stage if you are satisfied by evidence on oath that the witness will not attend Court unless compelled to do so: *s129 Criminal Procedure Code*.

Witnesses Arrested Under Warrant

If a witness is arrested under warrant:

- you may order his or her release from custody upon furnishing security by recognisance satisfying you of his or her appearance at the hearing; or
- you may order him or her detained for production at the hearing on failing to furnish security: *s130 Criminal Procedure Code*.

Chapter 10

First Appearance

1 General Matters at First Appearance

An accused, on first appearance, will be present:

- after arrest and in Police custody; or
- after arrest and on Police bail; or
- on summons.

At the first hearing, you will be concerned with some or all of the following:

- your ability to deal with the case;
- the validity of the charge (if not already considered);
- non appearance, therefore summons and warrants;
- legal representation;
- plea, including fitness to plead;
- remands in custody;
- bail; and
- adjournments.

1.1 Complainant (Prosecution) Does Not Appear

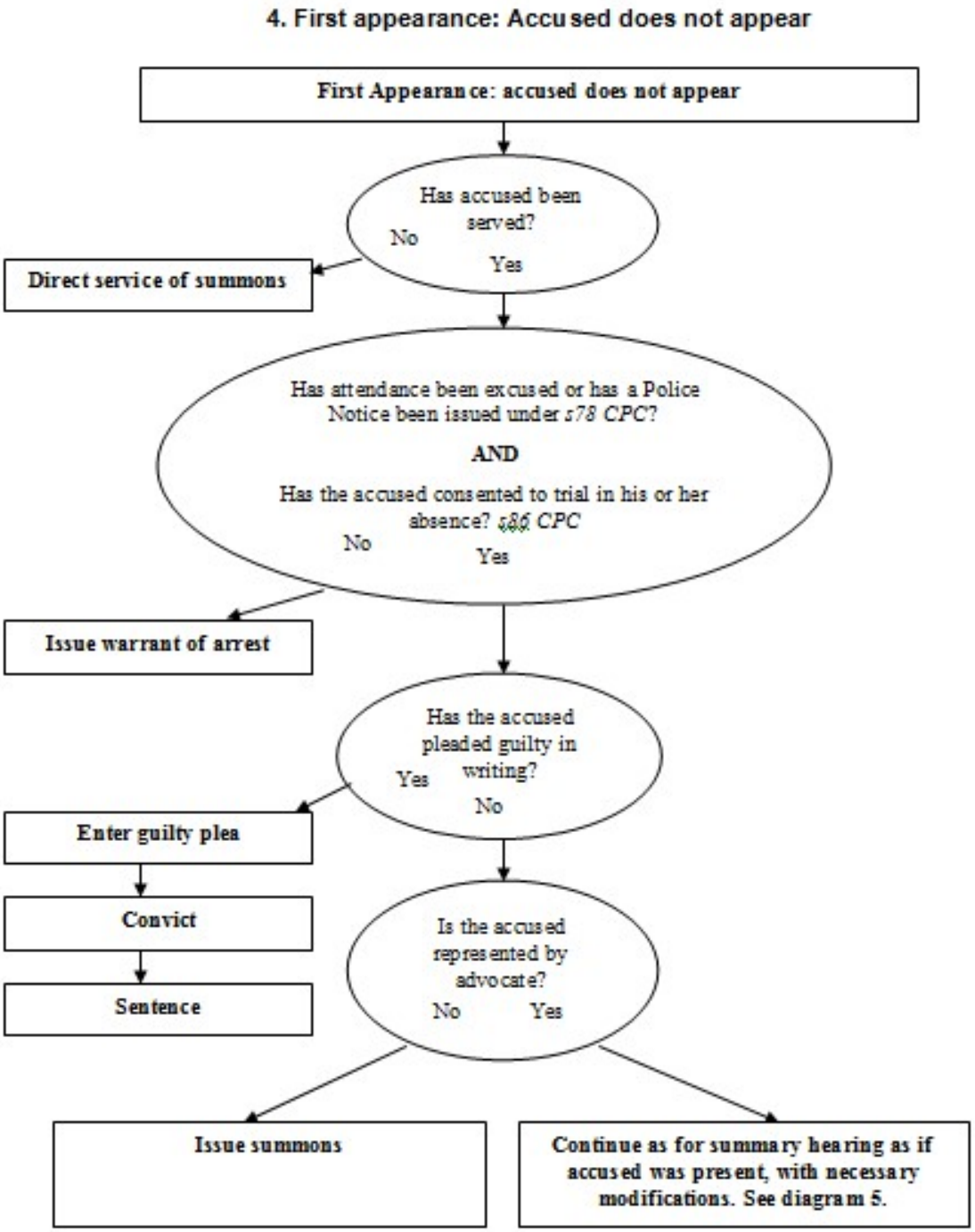
If the complainant does not appear in person or by an advocate (including a public prosecutor):

- check that the complainant has had notice of the time and place of the hearing; and
- if so, dismiss the charge unless you think it proper to adjourn the case upon such terms as you think fit: *s185(1) Criminal Procedure Code*.

If you adjourn the case, you must admit the accused to bail, remand him or her to prison or take security for appearance, as you think fit: *s185(1) Criminal Procedure Code*.

If you dismiss the charge, you may make an order for compensation from the complainant to the accused and his or her witnesses for the loss of time. Such compensation must not exceed $5 per person per day for those to whom compensation is payable: *Rule 14(2) Magistrates' Courts Rules*.

1.2 Accused Does Not Appear



If the accused does not appear, check that the accused has in fact been served:

- if present, the person who served the summons must show on oath that the summons was duly served on the accused in a reasonable time before the trial: *Rule 13 Magistrates' Courts Rules*;
- if the person who served the summons is not present, service may be proved through an affidavit: *s85 Criminal Procedure Code*.

Consider:

- What effort has the Prosecution made to serve the accused?
- Is the failure to serve the accused a result of false information by the accused?
- Does the offence with which the accused is charged carry a term of imprisonment?
- How long after the alleged offence was the summons issued?

If service has been proved, you may:

- dispense with the attendance of the accused in certain cases; or
- issue a warrant to arrest the accused: *s88 Criminal Procedure Code*.

Dispensing with Attendance of Accused

Subject to *s10* of the *Constitution*, there are certain instances where you may dispense with the personal attendance of the accused and proceed in his or her absence:

- for all non-felony offences, you **may** dispense with the personal appearance of the accused if you see reason to do so **and** the accused has pleaded guilty in writing or is represented by an advocate: *s86(1) Criminal Procedure Code*;
- for all offences punishable only by fine and/or by imprisonment not exceeding 3 months, you **must** dispense with the personal appearance of the accused if the accused has pleaded guilty in writing or is represented by an advocate: *s86(1) Criminal Procedure Code*.

Despite having dispensed with the attendance of the accused, you may at any later time direct the personal attendance of the accused and, if necessary, enforce the attendance: *s86(2) Criminal Procedure Code*.

If the accused appears by advocate, then continue as if the accused is present.

If the accused has pleaded guilty in writing, convict and sentence.

If the attendance of the accused is dispensed with, and previous convictions against the accused are alleged and are not admitted in writing or through an advocate, you may adjourn and direct the personal attendance of the accused: *s86(4) Criminal Procedure Code*.

Warrants for Arrest

Where the accused does not appear, and his or her personal attendance has not been dispensed with under *s86 Criminal Procedure Code*, you may issue a warrant to apprehend him or her and have him or her to be brought before the Court: *s88 Criminal Procedure Code*.

Some relevant considerations are:

- What effort has the Prosecution made to serve the accused?
- Is the failure to serve the accused a result of false information by the accused?
- Does the offence with which the accused is charged carry a term of imprisonment?
- How long after the alleged offence was the summons issued?

Every warrant must:

- briefly state the offence with which the person is charged;
- name or otherwise describe the accused;
- order the person(s) to whom it is directed to apprehend the accused and bring him or her before the Court having jurisdiction to answer the charge;
- be signed by the Judge or Magistrate issuing it: *s89(1)(2) Criminal Procedure Code*.

For offences other than murder or treason, you may direct the officer to whom the warrant is directed, to take security from the accused and release him or her from custody if the accused executes a bond with sufficient sureties for his or her attendance before the Court at a specified time and thereafter until otherwise directed by the Court: *s90 Criminal Procedure Code*.

You do this by endorsing the warrant. The endorsement must state:

- the number of sureties;
- the amount in which they and the accused are to be respectively bound; and
- the time at which he or she is to attend before the Court.

The officer must forward the bond to the Court.

Every warrant remains in force until it is executed or cancelled by the Court issuing it: *s89(3) Criminal Procedure Code* / *Rule 9(2) Magistrates' Courts Rules*.

<u>Execution of Warrant</u>

Warrants are normally directed to all Police officers, but if the immediate execution of the warrant is necessary and no Police officer is available, the warrant may be directed to any person or persons: *s91 Criminal Procedure Code*.

When executing a warrant, the Police officer or other person must notify the person being arrested of the substance of the warrant: *s92 Criminal Procedure Code*.

Once arrested, and if not released after providing security under *s90 Criminal Procedure Code*, the person must be brought before the issuing Court without unnecessary delay: *s93 Criminal Procedure Code*.

If arrested outside the district of the Court issuing the warrant, the person arrested must be brought before the Magistrates' Court in that jurisdiction, unless the Court that issued the warrant is closer: *s95(1) Criminal Procedure Code*.

Accused Persons Arrested Under Warrant
Once the accused is brought before you, you may:

- commit him or her to prison by warrant; or
- commit him or her to the custody of the Police orally; or
- commit him or her to other safe custody: *Rule 11(1) Magistrates' Courts Rules*.

In all cases, you must order the accused to be brought before the Court at a certain time and place: *Rule 11(1) Magistrates' Courts Rules*.

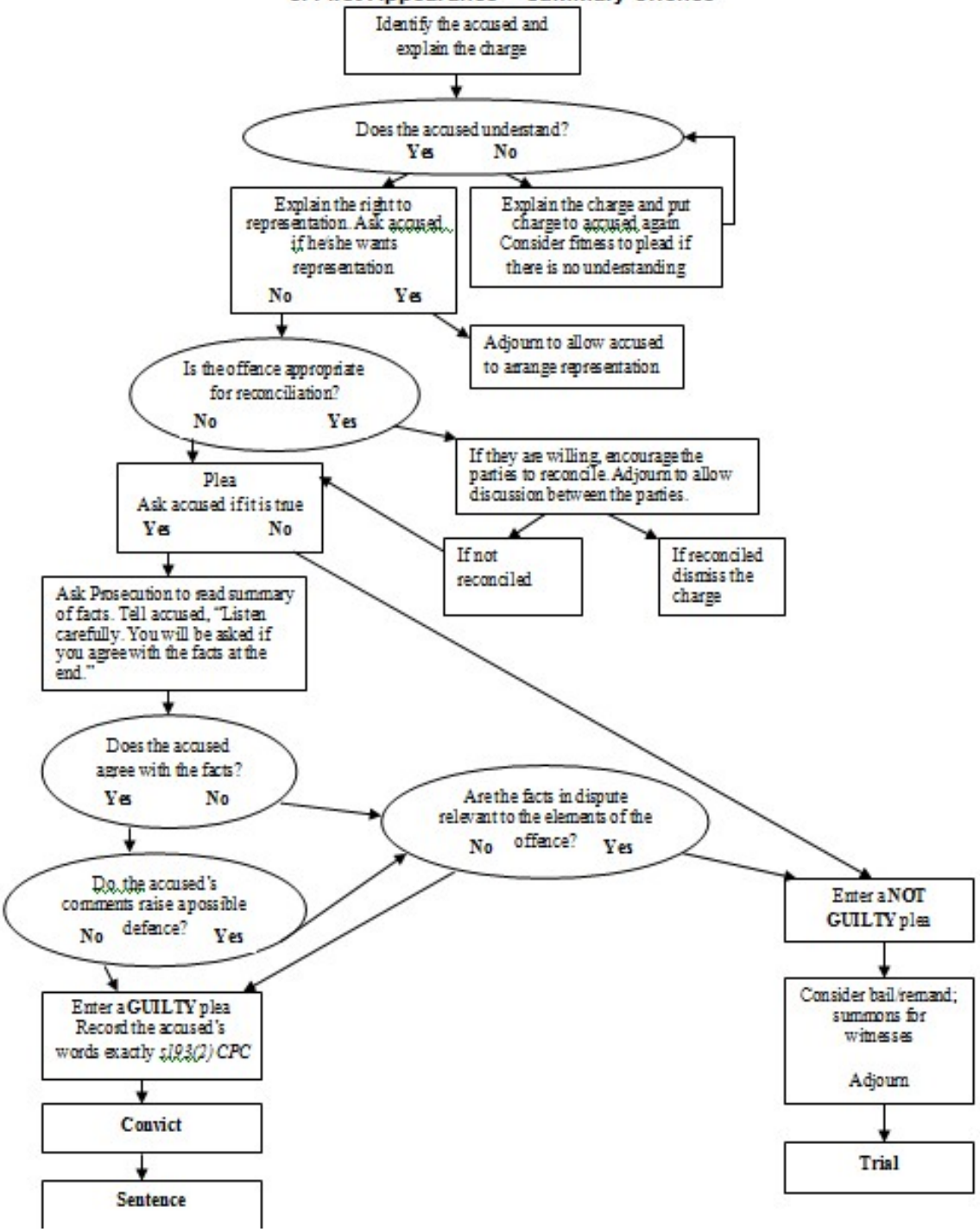
In none of the above situations, may the committal exceed seven days: *Rule 11(1) Magistrates' Courts Rules*.

To consider bail refer to Chapter 8, paragraph 3.2.

2 Offences to be Heard in the Magistrates' Court

The diagram over the page shows the process for offences to be heard in the Magistrates' Court, at the first appearance of the accused.

5. First Appearance – Summary offence



2.1 Identifying the Accused and Putting the Charge

Identification of the Accused

When an accused person is brought before you, you must first ascertain who he or she is. Record his or her:

- full name;
- address; and
- age.

This is very important. More than one person may share the same name. The accused person might be a juvenile and you would want to treat a juvenile differently to adults. See Chapter 14 Young Offenders.

Putting the Charge to the Accused

You must know the elements of the offence charged. The elements are those particulars the prosecutor must prove beyond reasonable doubt to secure a conviction.

Your understanding of the elements of the offence is very important. Unless you know and understand the elements:

- you will not be able to clearly explain them to the accused; and
- you will not be able to decide which evidence is relevant and which is not, affecting admissibility of evidence.

Explain the Charge to the Accused

You must clearly explain the nature of the offence to the accused person. This involves explaining the elements.

Unless the accused clearly understands the nature of the offence with which he or she is charged, he or she will not be able to work out if he or she has a defence. This will affect his or her ability to enter a plea.

Check whether the accused understands the charge. Only when you are sure the accused understands the full nature of the offence charged, should ask the accused how he or she pleads to the charge. Never take for granted that the accused person might have understood your explanation without his or her confirmation.

2.2 Unrepresented Accused

Most accused persons appear in the Magistrates' Court on their own. Most have little or no idea of Court procedures and rely on the Court system to assist to some extent.

Many accused will simply appear and plead guilty without any real understanding of the elements of the offence they are charged with. It is your duty to ensure they understand the charge and the consequences of pleading guilty.

If an accused appears without representation, explain that he or she has a right to be represented, either by a lawyer or, with leave of the Court, some other person. Ask the accused whether he or she wishes to arrange representation. If so, adjourn to allow this.

2.3 Taking a Plea

After you are sure that the accused understands the charge, you then take a plea: *s193 Criminal Procedure Code*.

An accused can plead:

- guilty; or
- not guilty; or
- one of the "special" pleas, e.g. *autrefois acquit* (previous acquittal).

Where the accused is represented, a plea by Counsel is acceptable.

Fitness to Plead

In certain cases, you will need to consider whether the accused is fit to plead. The issue to be determined is whether the accused is under a disability.

An accused is under a disability if he or she cannot:

- plead;
- understand the nature of the proceedings; or
- instruct counsel.

Remand the accused in the custody of the Police and direct them to arrange a medical assessment and report.

See *s144 Criminal Procedure Code*.

Taking the Plea

Ask the accused whether the charge is true or not. If the accused says it is true:

- ask the prosecution to read a brief summary of the facts;
- tell the accused to listen very carefully to this and explain that he or she will be asked at the end whether the facts are true;
- after the prosecution has read the facts, ask the accused whether they are true or not.

If the accused admits the truth of the facts without further comment, this will suffice as a **plea of guilty**.

However, if the accused admits the truth of the charge, but makes some remarks or comments, you must listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this if the accused is unrepresented. If the accused disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence.

Note that a plea of guilty is a plea to the **elements** of the charge not necessarily acceptance of the Police summary of facts. If the facts in dispute are not relevant to the elements, enter a **plea of guilty**.

If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the accused may amount to a defence, you must enter a **plea of not guilty** for the accused.

For example, on a charge of damaging property, one of the elements is actual damage to property. If the accused pleads guilty but disputes the amount of damage (e.g. the prosecution alleges 10 glasses were damaged and the accused says only three were damaged) then the element of damage is not disputed, just the amount. That is relevant to sentence, not guilt, and you should enter a plea of guilty.

On a charge of drunk and incapable, one of the elements is the behaviour must be in a public place. If the accused admits to being drunk and incapable, but says it was in his friend's backyard, that is relevant and you should enter a plea of not guilty for the accused. It is then up to the prosecution to prove he was in a public place.

> "If anything comes up in the statements to the Court by the prosecution or the accused that might suggest a defence, the Magistrate should stop the proceedings and ascertain just what is being asserted. Often a short inquiry will make it plain that the plea is properly entered but in any case where it is not, the Magistrate must enter a plea of not guilty and try it as a contested case." *Cocker v Police Department* Criminal Appeal Case #Cr.App.1251 of 1998.

Accused Denies the Charge

If the accused denies the charge, enter a **plea of not guilty**.

Accused Refuses to Plead

Where the accused refuses to plead, a **plea of not guilty** should be entered: *s193(4) Criminal Procedure Code*.

3 Guilty Plea – Next Steps

Record Words of Accused

An admission by the accused of the truth of the charge should be recorded as nearly as possible in the words used by him or her: *s193(2) Criminal Procedure Code*.

Enter Conviction

Convict the accused and enter this on the record.

Sentence

After convicting the accused, you pass sentence. You should never sentence a person without convicting him or her first.

You may sentence immediately. See Chapter 13 Sentencing.

Alternatively, you may adjourn to consider reports or at the request of one of the parties.

Adjournment

If adjourning before sentencing, you may:

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

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*. If you are adjourning, consider bail/remand.

Remands / Bail After Conviction

You may:

- remand the accused to a sentencing date; or

- release the accused on bail on such condition or conditions that he or she attends the Court at the date and time scheduled.

Record all of the above on the Court record.

Bail
See the section on bail in Chapter 8 Management of Proceedings.

If bail is granted, the terms, if any, should be noted carefully on the Court record.

Reasons must be given for refusing bail

Warrants of Commitment
Ensure all warrants of commitment (remands in custody) are completed before you leave the Court for the day.

Any instructions to the prison should be recorded on the warrant. For example, if the accused is to be kept apart from adult prisoners, there is a need for medication or there is a risk of self-harm.

4 Not Guilty Plea – Next Steps

If the accused has pleaded not guilty, a defended hearing must follow. This can happen straight away, or you may adjourn the matter and hear it later.

4.1 Immediate Hearing

Sometimes all parties are ready to proceed with a defended hearing (including witnesses). In this case, proceed to hear the matter or adjourn the case to later in the day.

4.2 Hearing at a Later Date

Adjournment
If a plea of not guilty is entered and either party is not ready to proceed, you may adjourn the hearing to a certain time and place 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 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, conditional 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*.

Remands / Bail After Plea

Bail

See the section on bail in Chapter 8 Management of Proceedings. If bail is granted, the terms, if any, should be noted carefully on the Court record.

Reasons must be given for refusing bail.

Warrants of Commitment

Ensure all warrants of commitment (remands in custody) are completed before you leave the Court for the day.

Any instructions to the prison should be recorded on the warrant. For example, the accused is to be kept apart from adult prisoners, a need for medication or risk of self-harm.

4.3 Warrants/Summons for Witnesses to Attend

Summons

If it is clear from the charge that material evidence can be given by or is in the possession of any person, you may issue a summons requiring their attendance or requiring them to bring and produce documents as specified: *s127 Criminal Procedure Code*.

Form 6 – Criminal (Rule 12(1)) in the *Schedule* relating to *FORMS* should be used to summon a witness.

Warrant

Like an accused, a warrant may be issued to compel the attendance of a witness in Court at this stage. You may **only** issue a warrant for a witness at this stage if you are satisfied by evidence on oath that the witness will not attend Court unless compelled to do so: *s129 Criminal Procedure Code*.

Witnesses Arrested under Warrant

If a witness is arrested under warrant:

- you may order his or her release from custody upon furnishing security by recognisance satisfying you of his or her appearance at the hearing; or
- you may order him or her detained for production at the hearing on failing to furnish security: *s130 Criminal Procedure Code*.

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:

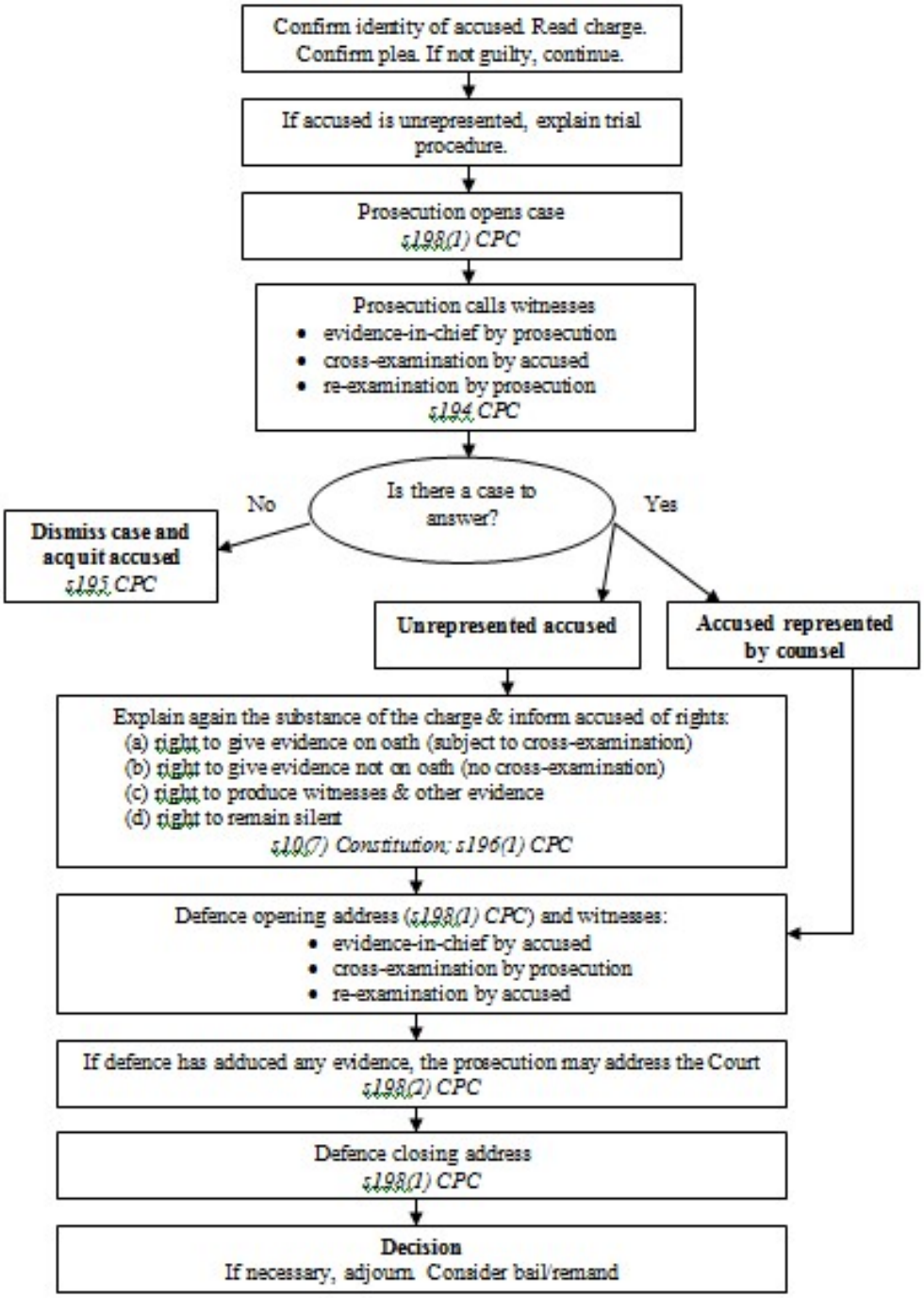
- the witness does not have a sufficient excuse for not attending; and
- there is proof that the summons was properly served on the witness a reasonable time before the appearance date: *s128 Criminal Procedure Code* / *Rule 12(2) Magistrates' Courts Ordinance*.

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



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*.

Chapter 12

Judgment

1 Decision Making

The decision is to be made by a single Magistrate sitting alone or by each Magistrate if sitting in a panel. If you cannot agree, then the majority shall prevail.

Although help as to meaning of the law can be sought from textbooks and legal counsel, the decision cannot be made by anyone other than the Magistrate or Magistrates hearing the case.

1.1 Principles Governing Decision Making

There are three principles which collectively translate into the general duty to act fairly:

- You must act lawfully.
- Affected parties have a right to be heard.
- You must be free from bias.

The principles are intended to ensure:

- the fair, unbiased and equal treatment of all people; and
- the exercise of any discretion only on reasoned and justified grounds.

Adhering to these principles does not guarantee that the Court has made a good decision. It does mean, however, that the Court is likely to have followed a process that is designed to introduce many of the relevant and critical factors, and exclude prejudice and irrelevant material and considerations.

You Must Act Lawfully

This principle is concerned with what the governing legislation or rules require.

There are several aspects to the principle of lawfulness:

- You must act within the authority of the law.
- You must take into account all the relevant considerations and must not take into account irrelevant considerations.
- You must not give away your discretionary power. Only the members of the panel can make the decision.

Ask yourself:

- "Do I have jurisdiction to hear and determine the matter?"
- "What are the considerations I must take into account?"
- Look to the appropriate legislation to work out what you must be satisfied of.
- Each element of the offence will point to the relevant considerations. Factors unrelated to those elements will be irrelevant.
- "Have I taken into account anything irrelevant?"

Affected Parties Have a Right to be Heard

Both the prosecution and defence must have a full and fair opportunity to be heard before the decision is made.

The purpose of this principle is to ensure that the Court considers all relevant information before making its decision.

Throughout the hearing process, ask yourself: "Am I giving each party a fair opportunity to state his or her case?"

You Must be Free from Bias

You should not allow your decision to be affected by bias, prejudice or irrelevant considerations.

You must not have an interest in the matter from which it might be said you are biased.

- It is not necessary to show actual bias, the appearance of bias is sufficient.
- Bias might be inferred where there is a relationship to a party or witness, a strong personal attitude that will affect your decision, or a financial interest in the matter.

Ask yourself: "Is there any factor present which could amount to bias, or the perception of bias, if I hear this matter?"

Consequences of a Breach of the Principles

If these principles are not adhered to, your decision may be reviewed on appeal.

There are other consequences of breaching the principles. These include:

- a person being unlawfully punished or a guilty person getting off without punishment;
- expense, hardship and emotional turmoil;
- a loss of faith in the system of justice.

2 Deliberations

If sitting in a panel, at the end of the formal hearing the panel discusses the evidence produced by parties, it is good practice to retire to discuss the matter and reach a decision. The clerk may assist you if there is a point of law that you wish to be clarified.

This is the last important opportunity for the members of the Court to ensure absolute adherence to the underlying judicial principles of conducting a fair hearing, and to arrive at a just and lawful decision.

The Presiding Magistrate should lead discussions.

You must work in partnership and with understanding and open minds. No one should overpower or force his/her opinion on others.

If you cannot reach agreement, then the majority shall prevail.

3 A Structured Approach to Making a Decision

Decision making is a process of applying the relevant law to the particular facts of the case.

You must not reach a conclusion before all the evidence and arguments have been heard. The way to do this is to employ a structured approach.

There are three tasks involved:

1. Be Clear About What theCourt is Being Asked To Do.

In criminal cases, this is what the accused is charged with and all the essential elements of the offence. For the accused to be found guilty, every element of the offence must be proved beyond reasonable doubt. The essential elements of a number of offences are outlined in the Appendix A: Offences chapter. In all cases, however, you must refer to the applicable legislation.

2. Determine What the Facts of the Case Are.

In criminal cases, the accused is presumed to be innocent and the prosecution must prove that he or she is guilty. This is done by producing evidence

To determine the facts, you will need to assess the credibility of the witnesses and the reliability of their evidence.

<u>Credibility</u>

"Is the evidence believable?" "Can it be believed?" "Is the witness being honest?"

Reliability
"Should I believe the witness?" "Is the evidence accurate?" "Could the witness be mistaken?" "How good is their memory of what happened?"

When considering oral evidence, take into account not only what has been said but also how it has been said. How you assess the demeanour of a witness can be a valuable aid in judging his or her credibility and reliability.

You may accept parts of the evidence of a witness and reject other parts.

A witness may be cross-examined for the sake of disproving their credibility.

Note that in a criminal case, if you accept the prosecution evidence, you must also reject the defence evidence on that matter. If there is a reasonable possibility that the defence evidence is true, and it relates to an essential element, there is reasonable doubt and the accused must be found not guilty.

3. Make Your Decision:

This is done by applying the law to the facts.

You must make the decision. Under no circumstances may the clerk or anyone else decide the matter.

4 Note Taking

You will have to decide between yourself and the clerk who will record the minutes of proceedings. If the clerk records the minutes, it is still advisable that you keep your own personal record to keep track of the evidence.

A suggestion is to note each element of the charge on a separate sheet of paper. As the evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision.

5 Delivering Your Judgment

Under the law you are not required to issue a written judgment.

You must deliver your judgment aloud in every trial in open Court, either immediately at the conclusion of the trial or at some adjourned sitting: *s149(1) Criminal Procedure Code / Rule 15(7) Magistrates' Courts Rules*.

If you reserve your decision to a later date, you must notify the parties when your judgment will be delivered: *s149(1) Criminal Procedure Code*.

The accused person should be present when you deliver your judgment, unless:

- the Court has proceeded to the determination of the case under *s186 Criminal Procedure Code*; or
- the accused's personal attendance has been dispensed with and the sentence is only a fine or it is an acquittal: *s149(2) Criminal Procedure Code*.

All your judgments should contain the following:

- the offence and section of the *Penal Code* or other Act under which the accused was charged;
- the point or points for determination (the issues);
- the decision on each of those points; and
- the reasons for the decision.

The presiding Magistrate must sign and date every judgment in open Court at the time of pronouncing the decision: *s150(1) Criminal Procedure Code*.

In the case of an acquittal, you must direct that the accused person be set at liberty: *s150(3) Criminal Procedure Code*.

In the case of a conviction, draw up a conviction order (*Form 20*). Include the sentence either at the same time or at a later date, as appropriate: *s150(2) Criminal Procedure Code*.

If you impose a term of imprisonment, you must ensure a warrant of commitment is drawn up (*Form 8*) and signed by the presiding Magistrate: *Rule 16 Magistrates' Courts Rules*.

Note, however, that if the accused pleads guilty, your judgment need only contain the finding and sentence or other final order, signed and dated by the Presiding Magistrate: *s150(1) Criminal Procedure Code*.

If the accused applies for a copy of the judgment, a copy must be given to him or her, free of charge and without delay: *s151 Criminal Procedure Code*.

5.1 Judgment Format

The format on the following page is a useful format for making and delivering your decision.

This format must be applied to each charge.

It is a good idea to have the 'losing' party in mind when giving your reasons. Make sure you address all their evidence and submissions thoroughly so they know they have been heard.

Remember that it is important to:

- consider all the evidence given and either accept it or reject it; and
- give reasons.

Criminal Judgment Format

1. Introduction

- The first paragraph must say what the case is all about.

2. Brief summary of the facts

- Set out the material facts of what is alleged by the prosecution.

3. The Law

- Onus and standard of proof.
- What needs to be proved in law?
  - Identify the elements of the offence.

4. Determining proven facts

- Identify relevant facts not in dispute. These are facts that are accepted by the defence.
- Mention the elements that the accepted facts prove.
- Identify relevant facts in dispute. These are usually the issues (points for determination).
- Make rulings on facts in dispute and give reasons
  - Which evidence you prefer and why. Questions of credibility and reliability must be dealt with here.

5. Apply the law to the facts

- Determine what aspects of the applicable law have been proved from the facts.
  - Have all the elements been proved?

6. Conclusion

- What is the end result of the case? Conviction or acquittal?

7. Orders

- What orders, if any, must the Court make?
- Ensure you deal with any procedural orders such as costs, return of exhibits, etc.

Chapter 13

Sentencing

1 Introduction

At the end of a trial, after you have heard and considered all the relevant evidence and have entered a conviction, you must sentence the offender to an appropriate sentence without delay.

The accused will be able to able to ask the Court to take his or her comments into consideration before it passes sentence (known as a plea in mitigation).

You must explain the sentence and your reasons for it so that the accused understands what he or she needs to do.

2 Jurisdiction

A Magistrate may sentence:

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

See Types of Sentences below, for further explanation of these penalties.

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 5 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.

Unless otherwise provided, any misdemeanour is punishable by two years imprisonment and a fine: *s41 Penal Code*.

3 Sentencing Principles

There are five basic sentencing principles to be considered by the Court. These are:

- Deterrence;
- Prevention;
- Rehabilitation;
- Punishment; and
- Restoration.

Deterrence

The sentence is designed to deter the offender from breaking the law again and act as a warning to others not to do the same.

Prevention

The sentence is to prevent the offender from doing the same thing again.

Rehabilitation

The sentence is to assist an offender to reform and not offend again.

Punishment

The sentence is to punish the offender for his or her criminal behaviour.

Restoration

The sentence serves to restore or repair the damage done to others by the offender.

When considering the appropriate sentence, you should have one or more of these principles in mind. Ask yourself which of the sentencing principles apply in this case?

4 Sentencing Discretion

The level of sentence in each case is a matter for you to decide, up to the maximum limit for the offence and within your sentencing jurisdiction. The sentence in each case must be just and correct in principle and requires the application of judicial discretion.

The act of sentencing needs you to balance:

- the gravity of the offence;
- the needs of society; and
- an expedient and just disposal of the case.

4.1 Factors Influencing Sentence

There are a number of factors which will influence you when deciding what sentence to pass.

Some factors will cause you to deal with the offender more harshly – these are called aggravating factors. Some factors will cause you to deal with the offender more lightly – these are called mitigating factors. You need to take all the factors into account when passing sentence.

Aggravating factors include:

- the use of violence;
- persistent offending;
- damage to property;
- age and vulnerability of victim;
- value of property stolen;
- premeditated acts;
- danger to the public; and
- prevalence.

Mitigating factors include:

- guilty plea (but note that the Court cannot penalise an offender for exercising his or her right to plead not guilty);
- genuine remorse;
- reparation;
- reconciliation;
- young offender;

- first offender;
- provocation; and
- no harm or minimal harm to person or property.

There are also a number of factors that float between these two categories, depending on the circumstances. In these cases, you need to evaluate the weight to be given to each of them in terms of the appropriate sentence to be considered by the Court.

These include the following:

- previous good character;
- victim acquiescence;
- family ties;
- custom ties;
- political instability; and
- responsible position.

4.2 Previous Convictions

The prosecution should show the Court any previous criminal convictions that the accused has. This guides you in setting the sentence by helping you to assess the previous character and the likelihood of the offender re-offending.

In assessing previous convictions, you have to be aware of the result and effect of a previous sentence. If, for example, a person is before you having been convicted of being drunk and disorderly, and has a similar offence from 1986, the earlier offence may not be taken into consideration as it has been so many years since then.

If that person is convicted of a similar offence later in the year, then the Court may deal with him or her more harshly.

A previous conviction may be proved by proving the identity of the accused as the person convicted along with:

- a certified extract of sentence or order signed by the officer having records of the Court which entered the conviction;
- a certificate signed by the prison officer where the punishment was inflicted; or
- a warrant of commitment under which the punishment was suffered (*Form 30*): *s125(1) Criminal Procedure Code*.

A certificate in the prescribed form signed by an appointed officer who has compared the fingerprints of the accused with the fingerprints of a person previously convicted is prima facie evidence of the identity of the accused: *s125(2) Criminal Procedure Code*.

There may be more than one way of proving a fact. There is no reason why the Court may not ask the prosecutor if there are previous convictions but it is the responsibility of the prosecution to allege them or not. The Court cannot make the prosecution allege them.

4.3 Plea in Mitigation

Before sentence is given, ask the offender if he or she has anything to say on their own behalf. This is known as a **plea in mitigation**. This can be done by either the offender or, where legal representation is available, by a lawyer.

4.4 Further Information and Reports

Decide whether any further information or reports are necessary. These will give further background and are useful in assessing the sentence to be given.

4.5 Consistency

One of the most common criticisms of the Court is that sentences are inconsistent. Failure to achieve consistency leads to individual injustice.

It is most important that you are consistent when sentencing. You must:

- treat similar cases in the same way;
- treat serious cases more seriously than less serious cases; and
- treat minor cases less seriously than serious cases.

A means of ensuring consistency is to seek continuity in the **approach** to sentencing, both as an individual and with other judicial officers presiding over the matter with you.

5 A Structured Approach to Sentencing

You must develop a systematic method of working through each sentence. Make sure you have as much information as possible by taking into account all applicable reports. The format on the following page is a useful guide for you to work through.

Sentencing Format

Introduction

What the offender has been convicted of.

The relevant facts

If there was a defended hearing, refer to the evidence called.

If there was a plea of guilty, refer to the Summary of Facts.

The law

Statute:
Maximum sentence and any mandatory requirements, such as mandatory disqualification.

Common law:
What do the higher Courts say?

Mitigating and aggravating features

Make sure you address any arguments that the accused or his or her lawyer has put forward.

Relating to the offence:
Aggravating factors, e.g. danger to the public, premeditated attack, major impact on the victim.

Mitigating factors, e.g. no harm to person or property, minor offence.

Relating to the offender:
Aggravating factors, e.g. personal information; previous convictions; lack of remorse.

Mitigating factors, e.g. personal information; age; good character; remorse shown; customary steps taken to restore the damage.

Relevant factors from reports

The Pre-Sentence Report, particularly the recommendation.

Pronounce sentence

Make sure you explain the sentence so the offender understands. Using the headings in this checklist is a good way of covering your reasons. Record your sentence on the Court record.

Advise on rights of appeal

When someone has been found guilty and sentenced following trial, or has pleaded guilty and is sentenced, explain their rights of appeal.

6 Types of Sentences

The *Magistrates' Courts Ordinance* and *Penal Code* provide for:

- dismissal of charge despite evidence to convict;
- payment of compensation;
- security for keeping the peace;
- community service order;
- residence order;
- fine;
- whipping;
- imprisonment; and
- Police supervision order.

6.1 Dismissal of Charge

Even if a charge against an accused is proved, you may make an order dismissing the charge either absolutely or conditionally if you feel it would be better not to inflict punishment, having regard to:

- the character, history, age, health or mental condition of the accused;
- the trivial nature of the offence; or
- any unusual circumstances in which the offence was committed: *s38 Penal Code* and *s25 Magistrates' Courts Ordinance*.

6.2 Payment of Compensation

The two instances where you may order the payment of compensation by an offender are:

- when a victim has been injured by the offender; or
- when payment of money or property has been given to the offender by another person for committing the offence.

The amount of compensation must not exceed $500: *s155B(1) Criminal Procedure Code*.

Injury

When an offender is convicted of an offence under *s181* or *Part XXXV Penal Code*, in addition to or instead of any other penalty, you may order him or her to pay compensation to any person injured by the offence: *s43(2) Penal Code*.

Consider

When an offender:

- was paid in money or property to commit an offence under *ss85, 86, 87, 111, 112* or *367 Penal Code*; and
- has been convicted of that offence,

you may order forfeiture of that money or property, or such sum as you assess to be the value of the property: *s43(1) Penal Code*.

You may direct how the property or sum of money is to be dealt with: *s43(1) Penal Code*.

6.3 Security for Keeping the Peace

For offences with a maximum sentence of no more than six months imprisonment, instead of or in addition to any punishment, you may order that an offender enter into a recognisance: *s35(1) Penal Code*.

The recognisance order:

- may be with or without sureties;
- may be for such amount as you think fit;
- must have the condition that the offender keep the peace and be of good behaviour for a period not exceeding two years; and
- may order the offender imprisoned until the recognisance is entered into but the term of imprisonment for not entering into the recognisance must not exceed six months: *s35(1) Penal Code*.

Complaint Dismissed

Even if you dismiss the complaint you may still:

- bind both the complainant and the accused, with or without sureties, to keep the peace and be of good behaviour for a period not exceeding 1 year; and
- order that any person so bound be imprisoned in default of compliance for three months or until such time as he or she complies: *s35(2) Penal Code*.

Under this section, you may not bind an accused who has been sentenced to more than six months imprisonment, nor may you bind a complainant unless he or she has been given an

opportunity to address the Court as to why he or she should not be bound over: *s35(2) Penal Code*.

6.4 Community Service Orders

A community service order requires an offender to perform unpaid work under the supervision of a public officer. A public officer is any person in the employment of the Government or a local government council: *s46(6) Penal Code*.

You may make an order for community service instead of any other punishment when the offender:

- has been convicted of any offence punishable by imprisonment; or
- is liable to be committed to prison for non-payment of a fine; or
- is liable to be committed to prison for failing to comply with a Court order: *s46(1) Penal Code*.

Before making the order, you must explain the order and the consequences of a failure to comply with the terms of the order and the offender must consent: *s46(3) Penal Code*.

You may order community service for a maximum 300 days: *s46(1) Penal Code* as amended by *s2 Penal Code (Amendment) Act No.10 of 1984*.

If the order is for two or more offences, the days of work for each order may be **concurrent** (at the same time) or **consecutive** (one after the other), but must not exceed 300 days: *s46(4) Penal Code* as amended by *s2 Penal Code (Amendment) Act No.10 of 1984*.

You may make a community service order subject to any requirement (such as a residence requirement) you consider necessary for:

- securing the good conduct of the offender;
- preventing the commission of the same offence; or
- preventing the commission of other offences: *s46(2) Penal Code*.

A copy of the community service order must be sent to the Superintendent of Prisons and to the public officer supervising the offender's community service: *s46(7) Penal Code* as amended by *s2 Penal Code (Amendment) Act No.10 of 1984*.

Failure to Comply

If an offender under a community service order fails to undertake the work, fails to comply with any other requirement of the order, or is otherwise unsatisfactory in his or her conduct, the public officer must apply for a summons or warrant to bring the offender back to the Court which made the order: *s46(5) Penal Code*.

You may then, if you think fit, revoke the order and deal with the offender in any manner originally open to you for that offence: *s46(5) Penal Code*.

6.5 Residence Orders

For any offence for which an offender is liable to imprisonment, in addition to or instead of any other penalty, you may order that:

- the offender be sent to his place or island of origin in Kiribati in which the offender is normally resident; and
- he or she reside there for any period not exceeding one: *s37(1) Penal Code*.

When a residence order is additional to a sentence of imprisonment, the residence order must take effect immediately upon the termination of the term of imprisonment: *s37(2) Penal Code*.

If the offender fails to comply with the residence order, he or she is liable to 6 months imprisonment: *s37(3) Penal Code*.

6.6 Fines

In addition to or instead of imprisonment, you may order a fine up to a maximum of $500: *s24(1)(2) Magistrates' Courts Ordinance* / *s26 Penal Code*.

Note that if the offence specifies a maximum fine of less than $500, you cannot sentence more than that specified maximum fine.

With the exception of offences relating to treason, instigating invasion, piracy and murder, all offences punishable by imprisonment may be punished by a fine instead of or in addition to imprisonment: *s26 Penal Code*.

In the absence of express provisions relating to a fine, the following applies:

- Where no sum is expressed, the amount of the fine is unlimited but must not be excessive (up to your maximum jurisdiction of $500 fine).
- Where the sum is expressed, a lesser fine may be imposed.
- In the case of an offence punishable by imprisonment or fine, the imposition of a fine or a term of imprisonment is at your discretion.

In the case of an offence punishable by imprisonment as well as a fine, or in any case punishable only by a fine, you may direct that in default of payment, the offender should be imprisoned for a certain term for the default, in addition to any other sentence; and issue a warrant for the amount by distress and sale of the movable and immovable property of the offender: *s29 Penal Code*.

When imposing a fine, you may order the whole or any part of the fine to be paid to any person in compensation for any loss, injury, or damage caused by the offence or in defraying the expenses of the prosecution: *s24(8) Magistrates' Courts Act*.

Imprisonment on Default

The term of imprisonment for default of payment of a fine are subject to the following maximums. See *s30(1) Penal Code*.

Amount	Maximum Period
Not exceeding $2	7 days
Exceeding $2 but not exceeding $4	14 days
Exceeding $4 but not exceeding $20	6 weeks
Exceeding $20 but not exceeding $40	2 months
Exceeding $40 but not exceeding $50	3 months
Exceeding $50 but not exceeding $100	6 months
Exceeding $100 but not exceeding $200	12 months

If an offender is imprisoned for default of payment of a fine, he or she must be released as soon as the fine is paid or levied by process of law: *s30(2) Penal Code*.

Distress Warrants

When ordering money to be paid by an accused (or, where relevant, a prosecutor or complainant) as a fine, compensation, costs, expenses or otherwise, the money may be levied on his or her movable and immovable property. If there is sufficient movable property, immovable property must not be sold: *s31(1) Penal Code*.

If a person pays to the officer executing the distress warrant the required sum, the officer must not execute the warrant: *s31(2) Penal Code*.

Distress warrants are subject to a number of complex procedural requirements. See *s31, 33, 34 Penal Code*.

6.7 Whipping

Whipping is only carried out on male young offenders between 10 and 17 years of age. For further guidance, see Chapter 14 Young Offenders.

Normally, whipping is ordered when the offender has committed a serious offence which you believe deserves punishment but imprisonment might be too harsh or would interfere with rehabilitation.

6.8 Imprisonment

You may sentence an offender to a maximum term of imprisonment of five years, in addition to or instead of any fine: *s24(1) Magistrates' Courts Ordinance*.

Note that, if the offence specifies a maximum period of imprisonment of less than five years, you cannot sentence more than that specified maximum period.

With the exception of a few offences triable only by the High Court, an offender liable for imprisonment for life or for any other period may be sentenced to a shorter term: *s25 Penal Code*.

All terms of imprisonment are without hard labour: *s24 Penal Code*.

Ideally, imprisonment should only be considered when no other sentence is appropriate. Ask yourself:

- Is it necessary to impose a sentence of imprisonment?
- Is there a viable alternative sentence available?

Two or More Distinct Convictions

For two or more distinct convictions, you may direct that the sentences shall be served one after the other (consecutively) or at the same time (concurrently): *s24(4) Magistrates' Courts Ordinance*.

Generally, if two or more offences arise from the same actions or set of circumstances, you should direct the sentences to be served concurrently.

Where an offender is convicted of a second offence before being sentenced or while serving a sentence for the first offence, the second sentence must be served consecutively, unless you order that it should be served concurrently: *s27 Penal Code*.

If you do impose consecutive sentences in respect of two or more offences arising out of the same facts, you may sentence up to twice your normal sentencing jurisdiction without sending the matter to the High Court: *s24(5) Magistrates' Courts Ordinance*.

For example, you may impose a sentence for longer than five years imprisonment or $500 fine on two or more offences, but in no circumstances may you impose a period of imprisonment longer than 10 years or $1000 fine: *s9(2) Criminal Procedure Code* / *s24(5) Magistrates' Courts Ordinance*.

Sentence on Default

In addition to the full term of imprisonment for an offence, you have jurisdiction to sentence an offender to a period of imprisonment for default of payment of a fine, costs or compensation: *s24(3) Magistrates' Courts Ordinance*.

For imprisonment on default, the sentence must **not** be served concurrently with a former sentence: *s27 Penal Code*.

6.9 Police Supervision

For repeat offenders, an order of Police supervision may be appropriate.

When any offender is convicted of an offence punishable by three or more years imprisonment is again convicted of any offence punishable by three or more years imprisonment, at the time of the second sentence you may also order that the offender be subject to Police supervision for up to five years from the end of the sentence: s40(1) Penal Code.

Under a Police supervision order, an offender must:

- personally report once each month to the officer in charge of the Police station closest to his or her residence, as directed by applicable regulations or by the Police officer; and
- notify any change of residence, as prescribed by applicable regulations: *s40(3) Penal Code*.

Breach of Police Supervision Order

If any offender refuses or neglects to comply with the applicable regulations, unless the offender proves that he or she tried his or her best to do so, he or she is guilty of an offence and liable to six months imprisonment: *s40(4) Penal Code*.

7 Deferment of Sentence

Deferment of Sentence is a tool that will help you better exercise your discretion in sentencing. Using this tool may help you find out if an offender has made any lasting changes to his or her behaviour which would justify a different sentence before passing sentence.

You may defer passing sentence on an offender so you can consider:

- his or her conduct after the conviction (including making reparations for the offence); or
- any change in his or her circumstances: *s45(1) Penal Code*.

For example, if an offender claims to have stopped drinking alcohol at the time of sentencing, you may consider deferring the sentence to see if the change is permanent and if it solves the problem behaviour.

7.1 Requirements

Any deferment must be no more than six months after the date of conviction and, once a date for deferral has been set, it must not be further deferred: *s45(2) Penal Code*.

You must only defer sentence if you are satisfied that:

- having regard to the nature of the offence and the character and circumstances of the offender, it would be in the interests of justice to defer; and
- the offender consents: *s45(3) Penal Code*.

If necessary, you may issue a summons or warrant to compel the offender to appear to deal with the deferred sentence, either on the date set or on an earlier date if he or she is convicted of another offence: *s45(5) Penal Code*.

7.2 Conviction of Second Offence During Deferment

If an offender is convicted of a second offence while the original sentence is being deferred, you may pass sentence on the original offence at the same time as dealing with the second offence. You do not have to wait until the deferred date: *s45(4) Penal Code*.

8 Suspended Sentences

In some cases, you may order that a term of imprisonment be suspended and not take effect unless the offender commits another offence punishable by imprisonment, at which point the original sentence will take effect.

8.1 Requirements

The requirements for a suspended sentence are:

- the case must be one in which a term of imprisonment would be appropriate;
- the sentence of imprisonment ordered must not be more than two years;
- the period of suspension (the "operational period") must not be less than one year or more than two years;
- you must explain to the offender his or her liability to the full sentence if he or she is convicted of an offence punishable by imprisonment during the operational period: *ss44(1)(2) Penal Code*.

8.2 Conviction of Second Offence During Suspension

If an offender is convicted of an offence punishable by imprisonment during the operational period:

- if the suspended sentence was passed in any Magistrates' Court, you may deal with the suspended sentence along with the later offence: *s44(4) Penal Code;*
- if the suspended sentence was passed in the High Court, you must commit the offender to the High Court in custody or on bail: *s44(5) Penal Code*;
- if you did not pass the suspended sentence, you must ensure the clerk notifies the clerk of the Court which passed the sentence of your order regarding the suspended sentence: *s44(7) Penal Code*.

When dealing with the second offence, you may:

- order that the suspended sentence take effect with the original term unaltered;
- order that the sentence take effect with the substitution of a lesser term;
- make a community service order under *s46 Penal Code* instead of the original sentence;
- vary the original order by substituting the operational period with a new period expiring no later than two years from the variation; or
- make no order with regard to the suspended sentence at all: *s44(3) Penal Code*.

Importantly, you must order that the suspended sentence take effect with the original term, unless you are of the opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the later offence. If you do follow another course, you must state your reasons for saying why it would be unjust: *s44(3)(e) Penal Code*.

If you do order that a suspended sentence take effect, either with or without any variation, you may order that the sentence take effect immediately or that it commence at the expiration of the term of imprisonment for the later offence: *s44(6) Penal Code*.

Chapter 14

Young Offenders

1 Dealing with Young Offenders

The following guidelines may help if you are dealing with young people.

When a young person appears before you, and looks as if they may be under 17 years, you will need to find out the age of that young person before you proceed. The Police should know the person's age, as they will have been responsible for the investigation and the decision to charge. If not, then you will need to check the age and its implications. You should verify the age with the person's parents, or by birth records.

Dealing with a Young Person Privately

If you can, deal with the young person a little more privately.

- When the case is called, you do not need to close the whole Court. This may create an impression that you are trying the case secretly.
- It is best to announce that as the case to be called is a young person case, the public will be excluded from the hearing. It should be made clear though that anyone connected with the case, or is part of the Court process, is able to stay.

Assistance for the Young Person

Usually, it is not wise to take a plea without the young person's parent or guardian being present. This is because:

- they can give useful advice to young persons; and
- they usually have valuable information on the young person's position – whether they are attending school, getting into trouble with the Police, and whether they are living at home.

It may be a good idea, when you have called the case, to ask the young person where his or her parents are.

If the young person is quite old, 15 or 16, and the charge is a simple theft, you may wish to deal with the case there and then. But often it is not as simple as that and offending is a sign that things are not well at home. Be careful about this.

Many Courts do not have lawyers who can assist young persons. It is best if a lawyer can be found to give advice and sometimes the case needs to be put off to allow this to happen.

What a young person should have, in view of age, and often a poor understanding of the legal process, is the ability to talk to someone and to have someone speak on their behalf, if this is what they want.

This could be a parent, other relative, social worker or some other official. It is worth finding out if someone like this is available to talk for the young person.

Remember that most criminal charges refer to offences that may be quite hard to understand, even in a young person's own language. Explaining the charge is more important than just reading it out.

Taking a plea is also quite a frightening experience, and technical words are used in recording the plea. However what you need to really know is whether the young person agrees or not with the charge. Is it admitted? If it is, then that is sufficient to record a guilty plea.

Use of simple language is the best practice, in order to make a young person them understand what is going on.

Guilty Plea

See paragraph 2 below.

Not Guilty Plea – Defended Hearing

If the young person says that he or she is not guilty, then the case will proceed as if they he or she were an adult. In other words, a defended hearing will need to occur, for you to determine guilt or innocence.

However, consider asking what the young person has to say about why they believe they are not guilty. Sometimes they simply do not understand that what they have done amounts to a crime. An example might be a larceny where three young persons decide to steal some food, and one is given the task of being the lookout. Sometimes this person pleads not guilty, thinking that as they did not go inside, they have not actually committed the offence. But this may be quite wrong, as a matter of law.

Check why the young person has pleaded not guilty. Is it because they say the Police have charged the wrong person, or is it because they were somewhere else at the time, or is it because they did the crime, but did not intend to do it? Asking questions carefully may in fact resolve the whole case then and there.

You need to be very careful though. Do not give legal advice, and do not ask questions in a formal fashion. The young person may think that the trial has already started.

Is the Defended Hearing a Normal One?

Be conscious that it may be the first time that the young person has ever been in a Court. Also, Courts can be intimidating for all of us, but especially for young persons.

The Police should present their evidence in the usual fashion. But you may help a young person, if there is no lawyer to help, in asking some questions of witnesses.

When it is time for the defence to give evidence, go out of your way to use simple language, and make sure everyone else in Court uses simple language too. You may need to help the young person give their evidence, by asking some questions which gets their story out.

Be careful about what questions you ask though. You have to keep them simple and straightforward by saying things such as:

- Tell me what happened?
- What happened next?
- Why do you say that?

Police may ask questions in cross-examination, but you must make sure that they are reasonable questions, and that the young person understands. At times you may need to interrupt by checking with the young person if they do understand. One way to check if they understand is to ask them to say the question back differently.

2 Sentencing Young Offenders

You must have particular regard when sentencing young offenders because the greatest emphasis is put on rehabilitation of the offender rather than on punishment. Because of this unique situation, a number of provisions exist specifically for the handling of young offenders.

Before deciding how to deal with the convicted young offender, you should obtain any information related to his or her:

- general conduct;
- home surroundings;
- school record; and/or
- medical history.

This information will help you deal with the case in the best interests of the young offender.

2.1 Imprisonment

You may not impose imprisonment on any child (under 14 years): *s26(2) Magistrates' Courts Ordinance*.
You may not impose imprisonment on any young person (between 14 and 17 years), unless:

- he or she is over the apparent age of 15 years; and

- after having obtained and considered information about the circumstances of the offender and his or her age and character, you are of the opinion that no other method of dealing with the young person is appropriate: *s26(3) Magistrates' Courts Ordinance*.

If you do impose imprisonment on a young person, it must not exceed one month: *s26(4) Magistrates' Courts Ordinance*.

2.2 Alternative Sentences

Where an offence is proved but you are of the opinion that the accused is under 16 years and in need of care, protection or control, you may:

- without convicting the young offender, order him or her committed to the care of any fit person (being a relative or not) willing to take care of him or her and, at the same time or a later time, order that the young offender's parent or guardian make a contribution to his or her maintenance; or
- order the young offender's parent or guardian to enter into a recognisance, with or without sureties, to exercise proper care and guardianship: *s39(1) Penal Code*.

A young offender is deemed to be in need of "care, protection or control" when he or she:

- is not receiving such care, protection or control as a good parent or guardian may be expected to give; or
- is beyond the control of his or her parent or guardian: *s39(5) Penal Code*.

A "fit person" may be:

- a relative or not;
- a local government council;
- religious institution;
- welfare association; or
- other organisation.

They must be able and willing to undertake the care, protection or control of the person under the age of 18 years: *s39(5) Penal Code*.

For more detailed procedure on dealing with enforcing such orders, see *ss 31, 33, 34* and *39 Penal Code*.

2.3 Liability of Parents and Guardians

Child (Under 14 Years)

If a child is convicted of an offence for which a fine, damages or costs may be imposed, and you believe that imposing a fine, damages or costs would be appropriate, you **must** order that the fine, damages or costs be paid by the parent or guardian unless:

- the parent or guardian cannot be found; or
- you believe that he or she has not contributed to the commission of the offence by neglecting to exercise due care of the child: *s26(5) Magistrates' Courts Ordinance*.

Young Person (Between 14 and 17 Years)

If a young person is convicted of an offence for which a fine, damages or costs may be imposed, and you believe that imposing a fine, damages or costs would be appropriate, you **may** order that the fine, damages or costs be paid by the parent or guardian unless:

- the parent or guardian cannot be found; or
- you believe that he or she has not contributed to the commission of the offence by neglecting to exercise due care of the child: *s26(5) Magistrates' Courts Ordinance*.

Security

In the case of a child or a young person convicted of an offence, you may order his or her parent or guardian to give security not exceeding $50 for good behaviour, for a period not exceeding one year: *s26(6) Magistrates' Courts Ordinance*.

Attendance

When a child or young person is charged with an offence, you may require any parent or guardian to attend before the Court: *s26(7) Magistrates' Courts Ordinance*.

If the parent or guardian will not attend voluntarily, you may compel his or her attendance in the same manner as a witness: *s26(7) Magistrates' Courts Ordinance*.

2.4 Whipping

Instead of any other sentence for a child or young person, you may order a sentence of whipping with a cane, provided that:

- a sentence of whipping may only be passed on a male child or male young person;
- a child may only be sentenced to a maximum of six strokes;
- a young person may only be sentenced to a maximum of 12 strokes; and
- no sentence of whipping shall be carried out until the period of appeal has been expired or, if an appeal has been filed until discontinued or determined by the High Court: *s26(8) Magistrates' Courts Ordinance*.

All sentences of whipping must be carried out at the prison nearest to the Court by the Superintendent of Prisons or by some authorised officer in the presence of a Magistrate: *s26(8) Magistrates' Courts Ordinance*.

Chapter 15

Preliminary Inquiries

1 Introduction

A preliminary inquiry will be held if:

- before or during the course of a trial in the Magistrate's Court, it appears to the Magistrate that the case should be before the High Court; or
- before the commencement of the trial, the prosecution has made an application that the case be tried in the High Court: *s205 Criminal Procedure Code*.

Purpose of a Preliminary Inquiry

The purpose of the preliminary inquiry is for the Magistrate to determine whether there is a sufficient case, or evidence or grounds, to put the accused on trial before the High Court. In this respect, the Magistrate's Court acts as a gatekeeper and prevents prosecutions which have insufficient evidence from proceeding to the High Court.

All the rules and procedures in respect to a preliminary inquiry are contained in *ss205-238 Criminal Procedure Code.* This chapter is not intended to replace that legislation and it is important that the rules contained in the *Criminal Procedure Code* relating to preliminary inquiries are followed.

2 Role of the Magistrate

In a preliminary hearing, it is **not** the function of Magistrates to:

- determine, or even comment on, the guilt or innocence of the accused;
- believe or disbelieve any of the witnesses;
- disallow any evidence;

The only question to be answered by the Magistrate is: "Would a judge, at the trial, convict the accused on the evidence placed before us, if that evidence were uncontradicted?"

Preliminary inquiries protect the accused from baseless charges because the Magistrate is required to discharge the accused in cases where there is not sufficient evidence to commit the person to trial by the High Court.

3 Forms of Preliminary Inquiry

A preliminary inquiry, in either in the '**long form'** or '**short form'**.

3.1 Short Form Preliminary Inquiry Process

You may commit a person directly to the High Court using the short form preliminary inquiry where:

- you consider it appropriate to do so after looking at the circumstances of the case; and
- an application has **not** been made to the contrary by the accused person, his or her advocate, or by the public prosecutor.

The Process

Reading over the Charge

You shall read over the charge and explain to the accused:

- the charge; and
- the purpose of the proceedings; and
- that he or she will have the opportunity later on in the inquiry to make a statement if he or she chooses to: *s209(1)(a) Criminal Procedure Code*.

Enter a Plea

The accused is then required to enter a plea and you must record the plea.

Statements of Witnesses and Exhibits

After the plea has been entered, notwithstanding that the accused pleads guilty, not guilty or abstains from giving a plea, you shall require the prosecution to:

- tender the statement of any witness whom they intend to call in proof at the trial;
- tender any exhibit which they intend to produce at trial; and
- read every statement of witnesses to the accused: *s209(1)(b) Criminal Procedure Code*.

Statement of the Accused

If you have considered the written statements of witnesses tendered by the prosecution and find that the statements disclose sufficient grounds for committing the accused to trial, you **must**:

- ensure that the accused understands the charge;
- ask the accused if he or she wishes to make any statement in his or her defence;
- ask the accused if he or she wishes to make the statement on oath once they have chosen to make a statement; and

- explain to accused that he or she is not bound to make a statement but if he or she choose to do so, the statement will become part of the evidence at trial: *ss209(2)*, *213(1) Criminal Procedure Code*.

If the accused is unrepresented, you must address the accused with words to the following effect:

> *"Having heard the evidence against you, do you wish to give evidence yourself or to call witnesses? If you give evidence yourself you may be cross-examined. You are not obliged to give or call evidence but if you do that evidence will be taken down and may be given against you at your trial. You should take no notice of any promise or threat that any person may have made to persuade you to say anything. If you do not give evidence in this Court, that fact will not be allowed to be the subject of any comment".*

Everything that the accused person says, either by way of a statement or evidence, must be recorded in full and shown or read back to the accused so that he or she can explain or add to the statement if he or she wishes: *s213(2) Criminal Procedure Code*.

Once the accused has declared his or her statement has been truthfully recorded, you shouldl attest to and certify that the statement or evidence:

- was taken in the presence and hearing of the accused; and
- is the accurate and whole statement of the accused: *s213(3) Criminal Procedure Code*.

After you have attested to and certified the statement of the accused, the accused person shall sign or attest to it by signing or marking the record. If the accused refuses to sign, note his or her refusal and the record may be used as if he or she signed and attested to it: *s213(3) Criminal Procedure Code*.

<u>Evidence and Address in Defence of the Accused</u>
After the accused has made a statement or given evidence, ask him or her if he or she wants to call a witness in his or her own defence: *s214(1) Criminal Procedure Code*.

You will take the accused's witnesses evidence in the same manner as for the prosecution: *s214(2) Criminal Procedure Code*.

Each witness for the accused, who is not merely a character witness for the accused, shall be bound by recognisance to appear and give evidence at the trial of the accused person: *s214(2) Criminal Procedure Code*.

You may adjourn a preliminary inquiry and issue process to compel the attendance of witnesses for the accused when the accused states he or she has witnesses but:

- they are not in Court;
- their absence is not due to any fault or neglect of the accused person; and
- the witnesses could give material evidence on behalf of the accused if they were present: *s213(3) Criminal Procedure Code*.

On the attendance of such witnesses for the accused, take their depositions and bind them by recognisance for the trial: *s214(2) Criminal Procedure Code*.

Accused or Advocate Addressing the Court

In a short form preliminary inquiry, the accused or his or her advocate may address the Court:

- after the reading over of the statement of witnesses; or
- after the statement or evidence of the accused person, if no witnesses for the defence are called: *s214(4) Criminal Procedure Code*.

If the accused or his or her advocate does address the Court, the prosecution will have the right of reply: *s214(5) Criminal Procedure Code*.

Other Witnesses

Ask the accused if he or she intends to call any other witnesses at the trial that have not given statements at the preliminary inquiry. Do this when the accused either:

- reserves his or her defence; or
- at the conclusion of any statement in answer to the charge or evidence presented in the accused's defence.

Get the names and addresses of the witnesses that the accused wishes to call at the trial so that you can record the details and they can be summoned when the trial begins: *s215 Criminal Procedure Code*.

Make an Order on the Retention of Exhibits

See Chapter 5 Evidence for how to deal with exhibits.

Make Your Decision

You must decide whether there is enough evidence to commit the accused for trial or whether he or she should be discharged.

3.2 Long Form Preliminary Inquiry Process

The Process

Reading over the Charge

You shall read over the charge and explain to the accused:

- the charge; and
- the purpose of the proceedings; and
- that he or she will have the opportunity later on in the inquiry to make a statement if he or she chooses to: *s210(1) Criminal Procedure Code*.

Enter a Plea

The accused is then required to enter a plea and you must record the plea.

Statements on Oath of Witnesses (Depositions)

After reading over the charge and explaining the purpose of the preliminary inquiry, take down in writing the statements, on oath, of those who know the facts and circumstances of the case. Also have exhibits tendered by the prosecution at this point: *s210(1) Criminal Procedure Code*.

These statements on oath will be called depositions.

After each of the prosecution's witnesses give their statements on oath, the accused or his or her advocate may put questions to that witness: *s210(2) Criminal Procedure Code*.

If the accused does not have an advocate, you must ask the accused person if he or she wants to put any questions to the witness after the prosecution has examined him or her: s210(3) Criminal *Procedure Code*.

The witness's answers to the accused's questions will become part of the witness's deposition, so you should ensure that the answers are recorded.

After each statement of a witness is completed, it must be read back to him or her in the presence of the accused and corrected if necessary: *s210(4) Criminal Procedure Code*.

You must ensure that the statement is interpreted into a language the witness understands when it has been written down in a language different than how it was given and if the witness does not understand that language: *s210(6) Criminal Procedure Code*.

If any witness denies the correctness of any part of his or her statement when it is read back, do not correct the statement of evidence, but:

- make a memoranda of the objection; and
- add any remarks you think necessary: *s210(5) Criminal Procedure Code*.

Once the deposition of a particular witness is completed, you should ensure that it is signed and dated by the witness: *s210(7) Criminal Procedure Code*.

Statement of the Accused

If you have considered the examination of the witnesses called on behalf of the prosecution and find that the evidence discloses sufficient grounds for committing the accused to trial, you **must**:

- ensure that the accused understands the charge;
- ask the accused if he or she wishes to make any statement in his or her defence;
- ask the accused if he or she wishes to make the statement on oath once they have chosen to make a statement; and
- explain to accused that he or she is not bound to make a statement but if he or she choose to do so, the statement will become part of the evidence at trial: *s213(1) Criminal Procedure Code*.

If the accused is unrepresented, you must address the accused with words to the following effect:

> *"Having heard the evidence against you, do you wish to give evidence yourself or to call witnesses? If you give evidence yourself you may be cross-examined. You are not obliged to give or call evidence but if you do, that evidence will be taken down and may be given against you at your trial. You should take no notice of any promise or threat that any person may have made to persuade you to say anything. If you do not give evidence in this Court, that fact will not be allowed to be the subject of any comment".*

Everything that the accused person says, either by way of a statement or evidence, must be recorded in full and shown or read back to the accused so that he or she can explain or add to the statement if he or she wishes: *s213(2) Criminal Procedure Code*.

Once the accused has declared his or her statement has been truthfully recorded, you shall attest to and certify that the statement or evidence:

- was taken in the presence and hearing of the accused; and
- is the accurate and whole statement of the accused: *s213(3) Criminal Procedure Code*.

After you have attested to and certified the statement of the accused, the accused person shall sign or attest to it by signing or marking the record. If the accused refuses to sign, note his or her refusal and the record may be used as if he or she signed and attested to it: *s213(3) Criminal Procedure Code*.

Evidence and Address in Defence of the Accused

After the accused has made a statement or given evidence, ask him or her if he or she wants to call a witness in his or her own defence: *s214(1) Criminal Procedure Code*.

You will take the accused's witnesses evidence in the same manner as for the prosecution: *s214(2) Criminal Procedure Code*.

Each witness for the accused, who is not merely a character witness for the accused, shall be bound by recognisance to appear and give evidence at the trial of the accused person: *s214(2) Criminal Procedure Code*.

You may adjourn a preliminary inquiry and issue process to compel the attendance of witnesses for the accused when the accused states he or she has witnesses but:

- they are not in Court;
- their absence is not due to any fault or neglect of the accused person; and
- the witnesses could give material evidence on behalf of the accused if they were present: *s214(3) Criminal Procedure Code*.

On the attendance of such witnesses for the accused, take their depositions and bind them by recognisance for the trial: *s214(3) Criminal Procedure Code*.

Accused or Advocate Addressing the Court

In a long form preliminary inquiry, the accused or his or her advocate may address the Court:

- after the examination of witnesses on behalf of the prosecution; or
- after the statement or evidence of the accused person if no witnesses for the defence are called: *s214(4) Criminal Procedure Code*.

If the accused or his or her advocate does address the Court, the prosecution will have the right of reply: *s214(5) Criminal Procedure Code*.

Other Witnesses

Ask the accused if he or she intends to call witnesses at the trial, other than those whose evidence has been taken under the above provisions, when the accused either:

- reserves his or her defence; or
- at the conclusion of any statement in answer to the charge or evidence presented in the accused's defence.

Get the names and addresses of the witnesses that the accused wishes to call at the trial so that you can record the details and they can be summoned when the trial begins: *s215 Criminal Procedure Code*.

Make an Order on the Retention of Exhibits

See Chapter 5 Evidence for how to deal with exhibits.

Make Your Decision
You must decide whether there is enough evidence to commit the accused for trial or whether he or she should be discharged.

4 Whether or Not There is a Case to Answer

A submission that there is no case to answer may be successfully made where:

- no evidence has been presented to support an essential element of the offence; or
- the evidence presented is insufficient for a reasonable jury to find beyond a reasonable doubt that the accused committed the offence.

Note that a finding that there is a case to answer is not an indication that the accused is likely to be guilty of the offence.

5 The Form of the Decision

5.1 Discharging the Accused

After considering the statement (short form) or examination (long form) of witnesses for the prosecution, and after hearing the evidence for the defence (if any), you may find that the case against the accused is not sufficient to put him or her to trial.

If the case is not sufficient to put the accused to trial, you must order him or her to be discharged on the particular charge. You must record the reasons for discharging the accused: *s216 Criminal Procedure Code*.

By discharging the accused, you do not bar any subsequent charge being brought against the accused on the same set of facts: *s216 Criminal Procedure Code*.

On dismissal of one charge, the Court may investigate any other charge that the accused person would have been summoned for, or is alleged to have committed, if:

- if it is expedient to the interests of justice; and
- nothing in the *Criminal Procedure Code* prevents you from proceeding: *s216 Criminal Procedure Code*.

Attorney-General Applying for Committal after a Discharge

In any case where you have discharged the accused in a preliminary inquiry, the Attorney-General can require you to transmit to him or her the record of the proceedings: *s217(1) Criminal Procedure Code*.

If the Attorney-General is of the opinion that the accused person should not have been discharged, he or she can apply to a Judge for a warrant of arrest and committal for trial of the accused: *s217(1) Criminal Procedure Code*.

If the Judge is of the opinion that the case that was presented to you was sufficient to put the accused on trial, it shall be lawful for the Judge to issue the arrest warrant and commit the accused to prison for his or her trial: *s217(1) Criminal Procedure Code*.

An application by the Attorney-General under *s217 Criminal Procedure Code* cannot be made after six months has passed from the date of the discharge: *s217(1) Criminal Procedure Code*.

5.2 Committing the Accused for Trial

If you decide that the case against the accused is sufficient to put him or her to trial:

- commit him or her to trial to the High Court; and
- either admit him or her to bail or send him or her to prison: *s218(1) Criminal Procedure Code*.

When the accused is committed for trial, you must inform him or her that he or she is entitled to a free copy of the statements of witnesses from a short form preliminary inquiry, or to the depositions of witnesses in a long form preliminary inquiry, at any time before the trial: *ss217(4), 222 Criminal Procedure Code*.

Committing Corporations for Trial

If the accused is a corporation and you find there is a sufficient case to put to trial, you may make an order authorising the Attorney-General to file an information against the corporation which will be deemed a committal for trial: *s218(2) Criminal Procedure Code*.

Transmission of Records to the High Court

Once the accused is committed for trial, you must transmit to the Registrar of the High Court the:

- written charge;
- statements or depositions of witnesses;
- statement of the accused (if any);
- summonses or recognisances of witnesses and the complainant;
- recognisances of bail (if any); and
- documents or things which have been produced as exhibits: *s228 Criminal Procedure Code*.

Binding Over Witnesses and Complainants to the High Court

Short Form Preliminary Inquiry

When the accused has been committed for trial upon a short form preliminary inquiry:

- summon the witnesses whose statements were read over to the accused at the preliminary inquiry; and
- bind the witnesses by recognisance to appear at the trial or any further examination relating to the charge, with or without sureties: *s220(1)(a) Criminal Procedure Code*.

If the accused person has pleaded guilty to the charge against him or her in a short form preliminary inquiry, it will not be necessary to summon or bind witnesses unless the Attorney-General or the High Court Judge requests that you do so: *s220(1)(a) Criminal Procedure Code*.

However, nothing in this section will prevent an accused person who has pleaded guilty under *s218(3)* from altering their plea to not guilty once he or she appears before the High Court: *s220(2) Criminal Procedure Code*.

Long Form Preliminary Inquiry

When the accused has been committed for trial upon a long form Preliminary inquiry, bind every witness by recognisance to appear at trial or any further examination relating to the charge, with or without sureties: *s220(1)(b) Criminal Procedure Code*.

Refusal to be Bound Over

If a person refuses to enter into a recognisance when he or she is required to do so under *s220 Criminal Procedure Code*, you may commit him or her to prison or into the custody of any officer of the Court until:

- after the trial; or
- he or she decides to enter into a recognisance: *s221 Criminal Procedure Code*.

Summoning and Conditionally Binding Over a Witness

Short Form Preliminary Inquiry

When the accused is committed for trial and it appears unnecessary that a witness be bound over for trial after the reading of his or her statements to the Court, you may, notwithstanding *s220(1)(a) Criminal Procedure Code:*

- refrain from summoning the witness; and
- transmit to the High Court a statement in writing of the name, address and occupation of the witness who has not been summoned: *s223(1)(a)* and *(c) Criminal Procedure Code*.

Long Form Preliminary Inquiry

When the accused is committed for trial and it appears unnecessary that a witness be bound over for trial after they have been examined, you may:

- bind him or her over conditionally upon notice given to him or her if they have **not** already been bound over; or
- direct that he or she will be treated as having been bound over conditionally, if the witnesses has been bound over already; and
- transmit to the High Court a statement in writing of the name, address and occupation of the witness who is being treated as bound over conditionally: *s223(1)(b)* and *(c) Criminal Procedure Code*.

Even though a witness may not be summoned or is conditionally bound under this section, you must inform the accused of his or her right to require the attendance at the trial of any witness, and of the steps the accused must take to enforce the attendance: *s223(3) Criminal Procedure Code*.

Exhibits

Any documents or articles produced as exhibits by any witness whose attendance is deemed unnecessary under *s223 Criminal Procedure Code* shall be:

- marked as produced by such a witness;
- retained by the Magistrates Court; and
- forwarded to the High Court along with the statements or depositions of such witnesses: *s223(4) CPC*.

5.3 Summary Adjudication

If, at the end or during the preliminary inquiry, you decide that the offence is of such a nature that it falls within your jurisdiction, you may, subject to the other provisions of the *Criminal Procedure Code*, hear the matter and either convict the accused or dismiss him or her: *s219 Criminal Procedure Code*.

If you have conducted a short form preliminary inquiry and found that the offence is in your jurisdiction, the witnesses for the prosecution must be called and evidence taken by them according to *Part 5 Criminal Procedure Code* and the accused must be allowed to cross-examine them: *s219(i) Criminal Procedure Code*.

If you have conducted a long form preliminary inquiry and found that the offence is in your jurisdiction to determine, the accused shall be entitled to have the witnesses for the prosecution recalled for cross-examination or further cross-examination: *s219(ii) Criminal Procedure Code*.

6 Adjournments

You may adjourn the inquiry and warrant the remand of the accused to prison or other place of security for not more than 15 days at any one time, for:

- absence of witnesses; or
- any other reasonable cause: *s212(1) Criminal Procedure Code*.

If the remand is less than three days, order the officer or person who has custody of accused to keep him or her in their custody and then bring him or her to the Court for the continuation of the inquiry: *s212(1) Criminal Procedure Code*.

During a remand, you may order the accused to come before the Court at any time: *s212(2) Criminal Procedure Code*.

You may admit the accused to bail on a remand: *s212(3) Criminal Procedure Code*.

7 Taking Depositions of Dangerously Ill Persons

You may take in writing, on oath or affirmation, the statement of any person who is:

- dangerously ill or hurt;
- not likely to recover; and
- willing to give evidence relating to any offence triable by the High Court and when it is not practicable to take the deposition according to the way set out in other sections of the *Criminal Procedure Code*: *s224 Criminal Procedure Code*.

You must then:

- certify that the statement made by the dangerously ill person is accurate;
- provide a statement of your own for why you have taken such a statement;
- give the date and place of when and where the statement was taken and sign it; and
- preserve the statement and file it for record: *s224 Criminal Procedure Code*.

Chapter 16

Appeals / Cases Stated / Reviews

1 Right of Appeal

The right of appeal from the Magistrates' Court in criminal cases is limited.

A party may only appeal against both conviction and sentence if:

- a conviction has been entered; **and**
- the person has been sentenced to:
  - imprisonment with no option of a fine; or
  - pay any fine in excess of $20; or
  - imprisonment for more than seven days in default of payment of all or part of a fine; or
  - corporal punishment; or
  - community service; **and**
- the sentence is one that is not fixed by law; and
- the person did not plead guilty to the charge: *s67(1) Magistrates' Courts Ordinance*.

If the offender did plead guilty to the charge, he or she may only appeal against sentence: *s67(1) Magistrates' Courts Ordinance* / *s271(1) Criminal Procedure Code*.

No appeal can be made against an order of acquittal except by the Attorney-General, with his or her consent in writing: *s270(1) Criminal Procedure Code*.

Appeals may be launched on matters of fact or matters of law: *s270(3) Criminal Procedure Code*. Only in rare instances may appeals be heard on points of form which were not properly followed. See *s298 Criminal Procedure Code*.

In any case, the High Court may hear any appeal from a Magistrates' Court on any terms it thinks just: *s68 Magistrates' Courts Ordinance*.

2 Commencement of an Appeal

A person may commence an appeal, either verbally in Court or by written notice of appeal.

Verbal commencement

In all criminal cases, where the offender has a right of appeal to the High Court, when you announce the sentence, you must immediately inform the offender of his or her right to an appeal

and the time within which such appeal may be brought. If the person then verbally declares his or her intention to appeal, it must be treated the same as a written notice of appeal: *Rule 33(2) Magistrates' Courts Rules*.

Written commencement

To commence an appeal, the appellant must give notice in writing of the intention to appeal within three months after the day the decision in question was given: *Rule 32 Magistrates' Courts Rules* as amended by *s2 Magistrates' Courts (Amendment) Act No. 1 of 1990*.

The High Court may, if it chooses, allow offenders to appeal after the three months has passed, but **you** are bound by the three month rule: *Rule 33(4) Magistrates' Courts Rules*.

A written notice of appeal must be in writing by way of petition by *Form 11 Appeals (Rule 33 & 34)* in the *Magistrates' Courts Schedule* and must:

- clearly state the grounds of appeal; and
- be signed by the appellant: *Rule 34 Magistrates' Courts Rules*; *s272(1) Criminal Procedure Code*.

In order to allow preparation of an appeal petition, the appellant or his or her representative is entitled to inspect the original record of the proceedings as you or the clerk allow: *s273(8) Criminal Procedure Code*.

3 Procedure on Appeal

Once an appeal against your decision has been launched, you still have a role to play before the case is dealt with by the High Court.

3.1 The Record

Ensure that the clerk sends the details of the appeal to the Registrar of the High Court within 24 hours of the clerk receiving the notice of appeal: *s36(1) Magistrates' Courts Rules*.

After sending in the details of the appeal, the clerk must comply with any directions received from the Registrar of the High Court with regard to either sending in or keeping the record in safe custody: *Rule 36(2) Magistrates' Courts Rules*.
Within seven days of receiving the notice of appeal, the clerk must make up and complete a record of appeal, consisting of:

- the notice of appeal;
- the pleadings, if any;

- all documents admitted as evidence in the original proceedings;
- all documents tendered and rejected as evidence in the original proceedings;
- true copies of the notes of the evidence; and
- the judgment or order of the Court: *Rule 37 Magistrates' Courts Rules*.

3.2 Notice to Respondent

Once notified of a criminal appeal, the High Court will give notice to the respondent of the time and place of the hearing and, unless the appeal is against sentence only, provide copies of the records of the appeal to the parties: *Rule 35(2), 45 Magistrates' Courts Rules*.

3.3 Bail

When you receive a notice of appeal from an offender in custody, you may:

- order that he or she be released on bail, with or without sureties; or
- deny bail, however if you do deny bail, you must order that the execution of the sentence or order being appealed against be suspended until the determination of the appeal, if the convicted person requests: *s277(1) Criminal Procedure Code*.

When you receive a notice of appeal from an offender in custody, you may, with or without hearing the parties:

- order the offender be released on bail upon entering into a bond upon his or her own recognisance, with or without sureties; or
- order that the sentence or order under appeal be suspended pending the determination of the appeal: *Rule 46(1) Magistrates' Courts Rules*.

If bail is granted:

- the offender's due appearance at the hearing of the appeal will be a condition of bail; and
- the clerk must send the recognisance to the Registrar of the High Court prior to the day of the hearing of the appeal: *Rule 46(1) Magistrates' Courts Rules*.

When released on bail or during the period of the suspension of the sentence, the time during which the offender is at large must be excluded in computing the term of any final sentence: *Rule 46(2) Magistrates' Courts Rules*.

3.4 Discontinuance of Appeal

An appellant may discontinue an appeal by giving notice in writing to the clerk of the Magistrates' Court, no later than three days before the date of the hearing of the appeal: *Rule 39(1) Magistrates' Courts Rules*.

The clerk must then give notice of the discontinuance to the Registrar of the High Court and to the respondent: *Rule 39(1) Magistrates' Court Rules*.

Once notice of the discontinuance has been given, you may issue any process for giving effect to your earlier decision, subject to any punishment that may have already been carried out: *Rule 39(2) Magistrates' Courts Rules*.

4 Appeal at High Court

4.1 Summary Dismissal of Criminal Appeal

Once the High Court has received the notice of appeal and the record of proceedings, a Judge of the High Court must examine these documents: *s69(1) Magistrates' Courts Ordinance*.

The appeal may be summarily dismissed by order of the Judge if:

- the grounds of appeal, expressly or impliedly, are that:
  - the decision is unreasonable; or
  - the decision cannot be supported by evidence; or
  - the sentence is excessive; and
- it appears to the Judge that the evidence is sufficient to support the conviction and there are no circumstances which would raise a reasonable doubt as to the conviction or to the opinion that the sentence ought to be reduced: *s69(1) Magistrates' Courts Ordinance*. See also *s275(1) Criminal Procedure Code*.

The Judge must certify that he or she has perused the record and is satisfied that the appeal has no sufficient ground of complaint: *s69(2) Magistrates' Courts Ordinance*.

4.2 Hearing of Appeal

If the High Court chooses to hear the appeal, it must first hear the appellant or his or her advocate, take any new evidence it sees fit, and may then:

- confirm the decision; or
- reverse the decision; or
- vary the decision; or

- make any order in the matter as may seem just, and may by the order exercise any power which the Magistrates' Court might have exercised; or
- dismiss the appeal if it considers that no substantial miscarriage of justice has occurred, even if the matter might be decided in favour of the appellant: *ss70(1), 71 Magistrates' Courts Ordinance*.

If the appeal is against sentence and the High Court decides a different sentence should have been passed, it may quash the sentence and substitute any other lawful sentence (more or less severe) as it thinks ought to have been passed: *s70(2) Magistrates' Courts Ordinance / s280(2) Criminal Procedure Code*.

If the High Court decides that there should be a new trial, it may order that the original decision be set aside and that a new trial takes place: *s70(3) Magistrates' Courts Ordinance*.

5 Cases Stated

A' case stated' is a statement of certain relevant portions of the case for the opinion or judgment of another Court. Unlike an appeal, a case stated is limited to the specific issue of whether there has been an excess of jurisdiction or an error on a point of law. Once the issue is decided, the case returns to Magistrates' Court for determination of the case itself.

Any party believing that there has been an excess of jurisdiction or an error on a point of law may apply in writing within one month from the date of the decision in question to state and sign a special case: *s285(1) Criminal Procedure Code*.

A party may not proceed both by appeal and by case stated: *s293 Criminal Procedure Code*.

If you believe the application is frivolous, you may refuse to state a case and if the party requests, you must sign and deliver to the party a certificate outlining your refusal: *s288 Criminal Procedure Code*.

You cannot, however, refuse to state a case if the application comes from the Attorney-General: *s288 Criminal Procedure Code*.

In addition, by your own discretion, you may also reserve any question of law that arises in a trial for the High Court, through a case stated: *s80 Magistrates' Courts Ordinance*.

5.1 Preparing a Case Stated

When preparing a case stated, you must set out:

- the charge, summons, information or complaint;

- the facts found by you to be admitted or proved;
- any submission of law made by or on behalf of the complainant during the trial or inquiry;
- the finding and, for a conviction, your sentence;
- any question(s) of law which you or any of the parties desire to be submitted for the opinion of the High Court; and
- any question of law the Attorney-General requires to be submitted to the High Court: *s294 Criminal Procedure Code*.

5.2 Decision of the High Court on a Case Stated

Upon hearing and determining the questions of law in the case stated, the High Court may:

- reverse the determination on the question;
- affirm the determination on the question;
- amend the determination on the question;
- make another order in relation to the matter; or
- make any order as to costs: *s290(1) Criminal Procedure Code*.

Once the High Court has heard and determined the case stated, it may:

- cause the case to be sent back to you for amendment or restatement, and you must then deliver your judgment in accordance with the amendment or restatement; or
- remit the case back to you for rehearing and determination with directions it deems necessary: *s80 Magistrates' Courts Ordinance* / *s291 Criminal Procedure Code*.

6 Review by High Court

The High Court may review a decision of the Magistrates' Court, either on its motion or on the petition of any person with an interest in the case.

After hearing argument, the High Court may:

- reduce or alter the nature of a sentence, subject to any minimum fixed by law;
- set aside an order or modify an order as it thinks fit, subject to any order fixed by law;
- set aside the conviction;
  - if in custody the person must be set free;
  - if the person has paid a fine, it must be refunded;
  - if security has been required, the person must be released from the security;
- set aside the conviction and convict the accused of any offence from which he or she has not been specifically acquitted, and of which he or she might have been convicted by the Magistrates' Court;
- set aside the conviction and enter a finding that the person was insane and not responsible for his or her actions;
  - the person may be ordered to be kept in custody and the person may be put in a mental hospital;
- set aside the conviction and order a new trial in the Magistrates' Court;
- order further evidence to be taken generally or on any particular point by a Magistrates' Court;
- order the convicted person to be liberated on bail or on his or her own recognisance, while awaiting further evidence; or
- make such order as justice may require and give all necessary and consequential directions: *s81(1)(2) Magistrates' Courts Ordinance*.

The High Court may **not:**

- change a finding of acquittal into one of conviction; or
- increase a sentence: *s81(1)(2) Magistrates' Courts Ordinance*.

The High Court may not exercise these powers of review when a person convicted has also launched an appeal against either conviction or sentence: *s81(2) Magistrates' Courts Ordinance*.

Such reviews by the High Court may only take place within 12 months from the date of the passing of the judgment or sentence: *s81(4) Magistrates' Courts Ordinance*.

To allow the High Court to perform this review role, the clerk is required to send to the Chief Registrar each month, a complete and true list of all causes heard: *s81(5) Magistrates' Courts Ordinance*. This list must set out:

- the names, sex and age of each accused;
- the offence with which he or she was charged;
- brief details of the charge;
- his or her plea to the charge; and
- if convicted, the date of the conviction and the sentence or order in full: *s81(6) Magistrates' Courts Ordinance*.

Appendix A

Common Offences

1 Introduction to Offences

The purpose of this chapter is to assist you in dealing with common offences.

Some of the offences contained in this chapter are indictable offences which normally are triable only in the High Court. However, you must be familiar with these offences because you may have to deal with them in the course of preliminary inquiry or in some cases summarily upon application during a preliminary inquiry.

Each offence contains:

- a reference and description of the offence itself;
- the elements of the offence, which the prosecution is required to prove;
- a commentary, which provides useful information you will need to consider; and
- the maximum sentence you may pass if the accused is found guilty.

1.1 Description

At the top of each offence there is a reference to where the offence is found in legislation, and a description of what the offence is.

1.2 Elements

The elements section lists all the general elements needed to prove any offence, and the specific elements required for the particular offence.

The elements section is very helpful as it provides a guide or method for you to make sure the prosecution has proved all that is required before a person can be found guilty. You should take careful notice that all the numbered elements are proved by the prosecution.

The elements contained in these offences are intended for use as a handy reference on the bench and in no way do they replace careful study of the legislation itself.

When you are hearing an offence which is not listed here, you will need to list your own elements before hearing the case. By checking the legislation and considering what has been done here, you will develop the ability to identify the elements of any offence yourself.

1.3 Commentary

Where appropriate useful case law and other commentary has been added to guide you further.

The commentary contains information about the identification of the accused, what the prosecution and the defence need to prove and to what standard. Generally, the defence does not need to prove anything. Occasionally, the legislation requires the defence to specifically prove something. Where possible, definitions have been provided.

1.4 Sentencing

The sentencing section describes the maximum sentence for each offence. You do not have to pass the maximum sentence – that is reserved for the most serious breaches of the particular offence. Imprisonment should be used only for the most serious breaches and where an alternative sentence is not appropriate.

Cycling Without a Light

Section

Traffic Act 2002, Schedule, Roads Rules, Part X-Bicycles, r.62.

Description

It is an offence for a person to ride a bicycle at night unless the bicycle, or the rider, displays:

- a flashing or steady white light that is clearly visible for at least 200 metres from the front of the bicycle; ***and***
- a flashing or steady red light that is clearly visible for at least 200 metres from the rear of the bicycle; ***and***
- a red reflector that is clearly visible for at least 50 metres from the rear of the bicycle when light is projected onto the reflector from a vehicle's headlight on low beam.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused road a bicycle at night;

5. The accused did not display, either on the bike or on himself or herself, one or more of the following:
   - a flashing or steady white light that was clearly visible for at least 200 metres from the front of the bicycle;
   - a flashing or steady red light that was clearly visible for at least 200 metres from the rear of the bicycle;
   - a red reflector that is clearly visible for at least 50 metres from the rear of the bicycle when light is projected onto the reflector from a vehicle's headlight on low beam.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who road a bicycle without the prescribed reflecting lights.

Night

'Night' is not defined in the *Traffic Act 2002,* however, in previous legislation (*Traffic Ordinances 1998)* in relation to this offence, 'night' was described as the time between sunset and sunrise.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$20 fine.

No Driving Licence

Section

s19 Traffic Act 2002

Description

It is an offence for a person to:

- drive a motor vehicle on any road, unless he or she holds a drivers licence for that class of vehicle; ***or***
- employ or permit any other person to drive a motor vehicle on any road, unless that other person holds a licence which allows them to drive a motor car at that time.

This does not apply if:

- the person holds a learner permit for that class of vehicle; ***and***
- a holder of a driver's licence for the class of vehicle being used at the time is sitting next to the learner driver, (for a vehicle other than a motorbike).

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific under *s19(1)*

4. The accused drove a motor vehicle on a road;

5. The accused did not have either:
   - a learners permit for the class of vehicle he or she was driving; or
   - an accompanying passenger who held a drivers licence

for the particular class of vehicle sitting next to him or her while he or she was driving.

OR

Specific under *s19(2)*:

4. The accused employed or permitted another person to drive a motor vehicle on a road;

5. That other person did not have a driver's licence for that class of vehicle at the time of the offence.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e.

- it was ***the accused*** who did not have a driver's licence; ***or***
- it was ***the accused*** who employed or permitted another person, who did not have a driver's licence, to drive.

Learner drivers

The offence of driving without a licence does not apply to persons who:

- hold a learner's permit, ***and***
- have a person beside them at time at the time of driving (with the exception of those who are learning to drive a motor bike).

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

For offenders found guilty under *s19(1)*:
$500 fine or 1 year imprisonment or both.

OR

For offenders found guilty under *s19(2)*:
$200 fine.

Untidy Premises (Bylaw)

Section

s3 Public Health Regulations r.2; r.15(1)

Description

All houses, buildings and premises, and the land in which they stand, must be kept clean.

For any offence in contravention of this regulation, the person primarily liable shall be the occupier or the person in charge of the house, building, premises or lands. If there is no such occupier or person in charge, the owner of the house, building, premises or land, as the case may be, shall be liable.

Any other person who aids or abets any contravention of the provisions of this regulation, may also be liable under this regulation.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused is:
   - an occupier or person in charge of a house, building, premises or land; ***or***
   - an owner of a house, building, premises or land;

5. The accused did not keep the property clean.

OR

4. The accused aided or abetted another, who was an occupier,

person in charge or owner of a house, building, premises or land, to not keep the property clean at the time of the offence.

5. The occupier, person in charge or owner of the house, building, premises or land, did not keep the property clean.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who did not keep the house, building, premises or land clean, or aided and abetted another to do so.

Clean
An objective standard should be followed in determining whether the house, building, premises or land was clean or not, (i.e. the reasonable person standard).

The prosecution will need to provide evidence that the house, building, premise or land was not clean and that it fell below the objective standard.

Aid or abet
See Chapter 6, Criminal Responsibility, para 5.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.
The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence	$20 fine or, in default of payment, 1 month imprisonment. $50 fine in respect of any subsequent offence or, in default of payment, 3 months imprisonment.

Possession of Admixture

Section

s76 Liquor Ordinance

Description

Every person is guilty of an offence who consumes or has in his or her possession any mixture of sour toddy, other than a mixture of sour toddy and water.

Elements

Every element (i.e numbers 1-4) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. At the time of the offence, the accused had consumed or had in his or her possession, a mixture of sour toddy, which was not a mixture of sour toddy and water only.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who had a mixture of sour toddy that was different to a mixture of sour toddy and water alone.

Sour toddy
An important part of this offence requires the prosecution to prove that the sour toddy mixture that the accused had contained was something other than just sour toddy and water. The prosecution will need to provide evidence of some other substance contained in the sour toddy.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$50 fine.

Selling Liquor Without a Licence

Section

s57 Liquor Ordinance

Description

Any person will be guilty of an offence who sells, or has up for sale, any liquor, without a license authorising the sale of liquor.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused either:
   - sold liquor; ***or***
   - had any liquor up for sale.

5. The accused did not have a licence which authorised him or her to sell liquor.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who sold or had up for sale any liquor.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

First offence:

$100 fine.

Any subsequent offence:

$200 fine and 6 months imprisonment. Additionally, the offender will be disqualified from holding a licence for sale of liquor for 2 years.

Unlawful Assembly

Section

s20 Public Order Ordinance

Description

Any person who takes part in an unlawful assembly commits an offence.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused was among three or more assembled persons;

5. They assembled with an intention to commit an offence.

OR

4. The accused was among three or more assembled persons;

5. The conduct of the assembly intended to, or behaved in a manner likely to, cause another (commonly known as a "bystander") to reasonably believe that the assembled group would either:

   - cause a breach of the peace; ***or***
   - provoke others to breach the peace.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who was among three or more unlawfully assembled people.

It is irrelevant to this offence if the original assembling was lawful if, once they are together, they conducted themselves with a common purpose in such a manner as contained in the enactment.

"Unlawful Assembly" defined

An unlawful assembly occurs when 3 or more people:
assemble with an intent to commit an offence; or once assembled, conduct themselves in a manner intended to, or likely to cause any person to reasonably fear that the assembled persons will commit a breach of the peace or will by their conduct provoke others to commit a breach of the peace.

Breach of the peace

A 'breach of the peace' means an incident that causes anxiety or major concern to one or more people, so that they may feel harm may be caused to them or another.

Bystander's belief

If this ground is relied on, the prosecution must prove that at least one bystander was afraid that the assembly would commit a breach of the peace. The bystander's fear must be reasonable in the circumstances (i.e. any reasonable person in the circumstances would fear that a breach of the peace would be committed).

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$100 fine and 1 year imprisonment.

Disorder in Public

Section

s15(1),(2) Public Order Ordinance

Description

Any person is guilty of an offence who:

- at any public gathering acts, or incites others to act, in a disorderly manner with the aim of preventing the purpose of the public gathering; ***or***
- behaves in a noisy or disorderly manner, with intent to provoke a breach of the peace or where a breach of the peace is likely to be caused; ***or***
- uses, distributes or displays any writing containing threatening, abusive or insulting words, with intent to provoke a breach of the peace or where a breach of the peace is likely to be caused.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific under *s15(1)*

4. The accused behaved in a disorderly manner at a public gathering;

5. The accused did this with the aim of preventing the purpose of the public gathering.

OR

4. The accused incited another to act in a disorderly manner;

5. The accused did this with the aim of preventing the purpose of the public gathering.

Specific under *s15(2)*

4. The accused behaved in a noisy or disorderly manner;

5. The accused either:

   - did this with an intention of provoking a breach of the peace; ***or***
   - was likely to cause a breach of the peace by doing this.

OR

4. The accused used or distributed or displayed writing containing threatening, abusive or insulting words;

5. The accused either:

   - did this with an intention of provoking a breach of the peace; ***or***
   - was likely to cause a breach of the peace by doing this.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who acted in the manner prescribed in the offence.

Public gathering

"Public gathering" means a public meeting, a public procession and any other meeting, gathering or assembly of 10 or more persons in any public place: *s2 Public Order Ordinance*.

Breach of the peace

A breach of the peace means an incident that causes anxiety or major concern to one or more people, so that they may feel harm may be caused to them or another.

With intention to provoke a breach of the peace

If the prosecution relies on this ground, they must show that the accused acted with the intention of provoking a breach of the peace. The prosecution does not have to prove that there actually was a breach of the peace.

A breach of the peace was likely to be caused

Under this ground, the prosecution does not need to prove that the accused intended to cause a breach of the peace. The prosecution needs to show that the conduct by the accused was such that a breach of the peace would likely happen.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence	$100 fine and 1 year imprisonment.

Fighting

Section

s28 Public Order Ordinance

Description

Any person who takes part in an unlawful fight is guilty of an offence.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused took part in an unlawful fight;

5. The accused does not have a lawful defence for taking part in an unlawful fight.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who took part in an unlawful fight.

Fighting

There needs to be clear evidence that the accused was a willing participant in the fight and not merely trying to defend himself or herself against an attack.

Unlawful
The prosecution will need to provide evidence that the fight was unlawful. Only boxing, wrestling and some other sports events would seem to amount to a lawful fight.

Where two or more people agree to fight then this will be unlawful if it threatens public order, creating anxiety for others such that they believe that harm may be caused to them or others,

Place
The fight may be in a public place or it may be on private premises. However, if it is on private premises, the threat to public order needs to be shown.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law. Self defence will be the most common defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$100 fine and 1 year imprisonment.

Possession of a Weapon

Section

s34(1) Public Order Ordinance

Description

Any person is guilty of an offence who, without lawful authority or reasonable excuse, has with him or her any offensive weapon, in any public place.

Elements

Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused was in a public place;

5. The accused had an offensive weapon;

6. The accused does not lawful authority or a reasonable excuse for having an offensive weapon in a public place.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who had an offensive weapon into a public place.

Public place
"Public place" means any place to which for the time being the public or any section of the public are entitled or permitted to have access (whether on payment or otherwise) and, in relation to any meeting, includes any place which is or will be used for a public meeting: *s2 Public Order Ordinance.*

Offensive weapon
An "offensive weapon" means any article made or adapted for use for causing injury to the person, or intended by the person having it with him or her for such use either for themselves or for another: *s2 Public Order Ordinance*.

Lawful authority
A person will have lawful authority only if he or she, at the time of the alleged offence, is on duty as:

- a police officer; or
- a special constable; or
- a police or constabulary officer of another territory present in the Kiribati Islands in response to an application by the Government.

See *s16(3) Public Order Ordinance*.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a reasonable explanation for possessing an offensive weapon in a public place or a defence in legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$100 fine and 1 year imprisonment.

Where any person is convicted of this offence, the Court may make an order for the forfeiture of any offensive weapon in respect of which the offence was committed.

Disobeying Summons

Section

s115(1)(b) Penal Code

Description

Any person is guilty of an offence who, having been summoned by any Court, fails without good cause to appear on the date and at the time of the summons. The proof of good cause lies with the defence.

Elements

Every element (i.e. numbers 1-4) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date or period of time when the offence charged is alleged to have taken place;

Specific

3. The accused had been summoned to Court;

4. The accused failed to appear in Court on the date and at the time specified in the summons.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The prosecution does **not** have to show that there was no good cause for the accused to fail to appear.

Under this offence, it is up to the **accused** to provide evidence of good reasons as to why he or she failed to appear and those good reasons will need to be to your satisfaction and on the balance of probabilities (i.e. more likely than not).

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the***

accused who committed the offence, i.e. it was ***the accused*** who disobeyed the summons.

Summons to Court
The prosecution will need to provide evidence that the accused had been summoned to Court.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

3 months imprisonment.

Arson

Section

s312 Penal Code

Description

Every person is guilty of a felony who wilfully and unlawfully sets fire to:

- any building or structure, whether competed or not; ***or***
- any aircraft, vehicle or vessel, whether completed or not; ***or***
- any stack of cultivated vegetable produce, or of mineral or vegetable fuel; ***or***
- a mine, or the workings, fittings or appliances of a mine.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused set fire to one of the following;
   - any building or structure, whether completed or not; ***or***
   - any aircraft, vehicle or vessel, whether completed or not; ***or***
   - any stack of cultivated vegetable produce, or mineral or vegetable fuel; ***or***
   - a mine, or the workings, fittings or appliances of a mine;

5. The accused set the fire wilfully and unlawfully.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was the accused who set the fire.

Wilfully and unlawfully

"Wilfully and unlawfully" are important elements of this offence. The prosecution will need to provide evidence that the accused wilfully set fire to the property he or she is accused of (i.e. on purpose). It must also show that there was no lawful reason for setting the fire.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

5 years imprisonment.

The offence of arson carries a maximum term of life imprisonment but it may be that you may hear it under an *Order for Extension of Criminal Jurisdiction of the Magistrates' Courts*. You are still bound by your maximum sentencing jurisdiction and cannot sentence any person to more than 5 years imprisonment.

Common Assault

Section

s237 Penal Code

Description

Every person is guilty of a misdemeanour who unlawfully assaults another.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused used physical force on another person;

5. There was no legal excuse for the force being used.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who used physical force.

Definition of assault

The common law defines "assault" as "the merest touching of another in anger".

The context in which the alleged assault occurred is very important and you will need to give careful consideration to:

- what the situation was; and
- where the alleged assault occurred.

If the person assaulted is injured, then a more serious assault charge such as 'assault causing actual bodily harm' under *s238 Penal Code* might be more appropriate.

Unlawfully
The prosecution must prove that there was no lawful reason for the assault.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

If the defence provides a reason for the assault (e.g. self defence), you will need to consider if it has any merit.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

If the assault is not committed in circumstances for which a greater punishment is provided in the *Penal Code* the person will be liable for 6 months imprisonment.

Destroying or Attempting to Destroy Property

Section

s319 Penal Code

Description

Every person is guilty of an offence who wilfully and unlawfully destroys or damages any property (whether it belongs to himself, herself or another), or intends to destroy or damage any property; or is reckless as to whether the property would be destroyed or damaged.

Elements

Every element (ie numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused destroyed or damaged some property;

5. The accused did this wilfully and unlawfully.

OR

4. The accused intended to destroy or damage some property;

5. The accused did this wilfully and unlawfully.

OR

4. The accused destroyed or damaged some property;

5. The accused was reckless as to whether the property would be destroyed or damaged.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. If the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was the accused who damaged or intended to damage the property.

Wilfully and unlawfully

"Wilfully and unlawfully" are important elements of this offence. The prosecution will need to provide evidence that the accused wilfully (i.e. on purpose) and unlawfully (i.e. without lawful excuse) damaged or intended to damage the property.

Reckless

If the prosecution is not able to prove that the accused intentionally (deliberately) destroyed or damaged the property, they will need to prove that the accused recklessly destroyed or damaged the property. A person behaves recklessly when they have no regard for the damage that might be caused by their actions.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum Sentence

$500 fine and 5 years imprisonment.

Threatening Behaviour/Insulting Words

Section

s169(n) Penal Code

Description

Every person is guilty of an offence who, in a public place, uses threatening, abusive or insulting words or behaviour, with intent to provoke a breach of the peace or where a breach of peace may occur.

Elements

Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused was in public place;

5. The accused used threatening, or abusive or insulting words or behaviour;

6. The accused did this:
   - with the intention of provoking a breach of the peace; ***or***
   - in a way that might have caused a breach of the peace.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who used the words or behaviour.

Breach of the peace
A breach of the peace means an incident that causes anxiety or major concern to one or more people, so that they may feel harm may be caused to them or another.

The prosecution does not have to show that a breach of the peace actually occurred as a result of the accused's words or behaviour. It is enough if the accused used words or behaved with the intention of causing a breach of the peace or in a way where a breach of the peace might occur as a result of the words or behaviour.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$10 fine or 1 month imprisonment.

Shouting or Making Unpleasant Noise in Town

Section

s171 Penal Code

Description

Any person is guilty of an offence who, in any village or town area, wilfully and wantonly and after being warned to stop, shouts or beats any drum or tom-tom, or blows any horn or shell, or sounds or plays any musical instrument, or sings or makes any loud or unpleasant noise, to the reasonable annoyance or disturbance of the public.

Elements

Every element (i.e. numbers 1-8) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused was in a village or town;

5. The accused had been warned to stop making disturbing noise;

6. After that warning the accused either:
   - shouted or beat a drum or tom-tom; ***or***
   - blew a horn or shell; ***or***
   - sounded or played a musical instrument; ***or***
   - sang; ***or***
   - made an unpleasant noise;

7. The accused made the noise wilfully and wantonly;

8. A member of the public was reasonably annoyed or disturbed.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who made the noise.

Village
"Village" means any small assemblage of not less than 6 dwelling houses or buildings for business, or both, whether upon regularly laid out streets or roads or not: *s171 Penal Code.*

Town area
"Town area" means any area within the area of authority of a town council and any other area to which the provision of this section may be applied by order of the Minister.

Asked to stop
The offence does not commence until after the accused has been asked to stop, therefore the prosecution will need to provide evidence that the accused was asked to stop making the noise. Only after that does the behaviour become an offence.

Wilfully and wantonly
"Wilfully and wantonly" are important elements of this offence. The prosecution will need to provide evidence that the accused wilfully (i.e. on purpose) and wantonly (i.e. wanting to annoy or disturb) made the noise after being asked to stop.

Reasonable annoyance or disturbance
The prosecution must show that at least one member of the public was actually annoyed or disturbed. That annoyance or disturbance must be reasonable, i.e. a reasonable person would be annoyed or disturbed in the circumstances.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$10 fine or 1 month imprisonment.

Criminal Trespass

Section

s182(1) Penal Code

Description

Any person is guilty of a misdemeanour, who:

- enters another person's property with intent to commit an offence, or intimidate or annoy that person; ***or***
- having lawfully entered another person's property, unlawfully remains there with intent to intimidate, insult or annoy that person or commit an offence; ***or***
- unlawfully persists in coming or remaining upon another person's property after being warned not to come on to leave the property.

Elements

Every element (i.e. numbers 1- 6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific under *s182(1)(a)*

4. The accused entered in or on to property;

5. The property was in lawful possession of another;

6. The accused entered with the intention of either:
   - committing an offence; ***or***
   - intimidating or annoying the other person.

OR

Specific under *s182(1)(b)*

4. The accused lawfully entered in or on to a property;

5. The property was in lawful possession of another;

6. The accused then unlawfully remained there with the intention of:
   - intimidating or annoying the other person; ***or***
   - committing an offence.

Specific under *s182(1)(c)*

4. The accused continued to come onto property after being warned not to;

5. The property was in lawful possession of another;

6. The accused did not have a lawful right to come onto the property.

OR

4. The accused remained upon property after being warned to leave;

5. The property was in lawful possession of another;

6. The accused did not have a lawful right to remain on the property.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence i.e. it was ***the accused*** who unlawfully trespassed.

Property in the possession of another

This will include ownership and lease and any other kind of possession. The possession must be lawful. You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

Charges under s182(1)(a)

Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused'' intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person -–intention to do so is enough.

Charges under s182(1)(b)

Lawful entering

The accused must have entered the property for a lawful purpose. This includes being invited onto the property by the other person, entering to deliver something or other good reason.

Unlawfully remaining

The prosecution must prove that there was no lawful reason for remaining. If the other person asks the accused to leave and he or she does not, the accused is unlawfully remaining. If the lawful entering was something like making a delivery, as soon as that as been done, the accused should leave the property, otherwise he or she is unlawfully remaining.

Intention
The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused'' intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person -–intention to do so is enough.

Charges under s182(1)(c)
Unlawfully persists or remains
The prosecution must prove that:

- the accused was warned not to come onto, or to leave, the property; ***and***
- there was no lawful reason for coming onto or remaining on the property.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

3 months imprisonment, ***except*** where the property in which the offence is committed is a building, tent or structure used as a human dwelling, or as a place of worship, or a place for the custody of property, then the offender shall be liable to 1 year imprisonment.

Theft (Simple Larceny)

Section

ss250, 251, 254 Penal Code

Description

Every person is guilty of an offence who steals something.

A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with intent at the time of such taking to permanently to deprive the owner of the thing.

Elements

Every element (i.e. numbers 1-8) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused took and carried away something that did not belong to him or her;

5. That thing was capable of being stolen;

6. The accused did this without the consent of the owner;

7. The accused did this fraudulently and without a claim of right made in good faith;

8. The accused intended to permanently deprive the owner of the thing.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who stole the thing.

Takes

The expression "takes" includes obtaining possession:

- by any trick;
- by intimidation;
- under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or
- by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps: *s251(2)(a)*.

Carries away

The expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached: *s251(2)(b)*.

A thing capable of being stolen

The prosecution must provide evidence to identify the thing. The thing taken must be capable of being stolen. See *s250* for a list of the things that are capable of being stolen.

Owner did not consent

Under *s251(2)(c)*, the expression "owner" includes any part owner, or person having possession or control of, or a special property in, anything capable of being stolen.

Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence. The prosecution must also prove that the owner did not consent to the thing being taken.

Bailee / part-owner

Such person may be guilty of stealing any such thing

notwithstanding that he or she has lawful possession of the thing, if, being a bailee or part-owner of the thing, he or she fraudulently converts the thing to his or her own use or the use of a person other than the owner: *s251(1) Penal Code*.

Fraudulently and without claim of right made in good faith
The accused must have had an intention to defraud or steal and no good claim to the thing. Usually the intent to defraud will consist of an intention to steal but not always so. A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Consider why the accused took it and whether there was an honest intention. An accused may have a valid defence where he or she has an honest belief that he or she has a legal right to take the goods in question (i.e. the accused honestly believed that the goods belonged to him or her).

Intention to permanently deprive the owner
The prosecution must prove that the accused had the intention of keeping the thing and using it as his or her own. If the accused later sells or gives it away, he or she has used it as his or her own. The prosecution must show that the accused intended this **at the time he or she took the thing**. It is the accused's intention that is important. You may have to infer this from the circumstances.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

Stealing for which no special punishment is provided under *s254 Penal Code* or any other Ordinance is simple larceny and a felony punishable with 5 years imprisonment.

If any person has been previously convicted of a felony, the offence of simple larceny is 10 years imprisonment. However, you cannot sentence more than 5 years imprisonment.
If previously convicted of a misdemeanour under *Part XXVII* or under *Part XXXV Penal Code*, the offence of simple larceny is punishable by a maximum imprisonment of seven years: *s254(3) Penal Code.* Again, you cannot sentence more than 5 years imprisonment.

Simple Conversion

Section

s271(c) Penal Code

Description

Any person is guilty of a misdemeanour who fraudulently converts to his or her own use or benefit or the use or benefit of any other person, any part of property or proceeds, having:

- been entrusted solely or jointly with another person with the property in order that he or she may retain in safe custody, apply, pay or deliver to another any part of the property or proceeds from the property; ***or***
- solely or jointly received the property for or on account of any other person.

Elements

Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused was entrusted solely or jointly to, either:
   - retain, apply, pay, or deliver any part of the property or proceeds to another; ***or***
   - receive property on the account of another;

5. The accused converted any part of the property or proceeds from the property to his or her own use or benefit or to the use or benefit of any other person;

6. The accused did this fraudulently.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence i.e. it was ***the accused*** who fraudulently converted another person's property.

Non-application to trustees: *s271(2) Penal Code*

This sub-section does not apply or affect any trustee under any express trust created by a deed or will, or any mortgage of any real or personal property, in respect of any act done by the trustee or mortgagee in relation to the property comprised in or affected by any such trust or mortgage.

Fraudulently

The accused must have had an intention to defraud. A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

7 years imprisonment. Note that you may not sentence to more than 5 years imprisonment.

Assault Causing Actual Bodily Harm

Section

s238 Penal Code

Description

Every person who commits an assault, which results in actual bodily harm, is guilty of a misdemeanour.

Elements

Every element (i.e. numbers 1 – 5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused used physical force on another person;

5. As a result of the force used, actual bodily harm was caused to that person.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who used force (assault), which caused the actual bodily harm.

Causing actual bodily harm
The person assaulted must be injured. This will require medical evidence to establish actual bodily harm. The injury caused need not be severe, but it must be more than just a bruise or soreness. The skin or a bone may be broken.

Intention
The intention of the accused is not relevant.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

5 years imprisonment.

Assault with Intent to Commit a Felony or Resist/Prevent Apprehension or Detention

Section

s240(a) Penal Code

Description

Any person is guilty of a misdemeanour who assaults another person, with an intent to:

- commit a felony; ***or***
- resist or prevent the lawful apprehension or detention of himself or herself or another person for any alleged offence.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused used physical force on another person;

5. The accused intended to:
   - commit a felony; ***or***
   - resist or prevent the lawful apprehension or detainment of himself, herself or any other person for an alleged offence.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who assaulted another with intent to do one of the prohibited actions.

Intent
It is important to remember that the assault must be done with the intent to commit a felony, or to resist apprehension or detention. The prosecution must prove that the accused intended to commit a felony, ***or*** resist or prevent detention of himself or herself or another.

It is the intention of the accused that is important – you may have to infer this from the circumstances.

Felony
"Felony" means any offence that is declared by law to be a felony, or if not declared to be a misdemeanour, is punishable, without proof of previous conviction with imprisonment for 3 years or more. See definition in *s4 Penal Code*.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

2 years imprisonment.

Throwing Objects

Section

s83A Penal Code

Description

Any person is guilty of a misdemeanour who wilfully throws or in any other way projects any object, fluid or substance at any dwelling house, vehicle or person.

Elements

Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused threw or projected, either:
   - an object; ***or***
   - fluid; ***or***
   - substance;

5. The throwing or projecting of the object, fluid or substance was at a dwelling house, vehicle or person;

6. The accused did this action wilfully.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence, i.e. it was ***the accused*** who threw or projected the thing.

Wilful
It is important to remember that the offence in this instance requires 'wilfully throwing' or 'wilfully projecting' therefore the prosecution will need to prove that the accused threw or projected the object on purpose.

Object, fluid or substance
The prosecution must provide evidence of the thing thrown or projected.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

2 years imprisonment and a fine: see *s41 Penal Code*.

Unlawful Wounding

Section

s223 Penal Code

Description

Any person who unlawfully wounds another person is guilty of a misdemeanour.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused wounded another person;

5. The accused does not have a lawful reason to have wounded that other person.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution will need to provide evidence that a person other than the accused was wounded, and that it was ***the accused*** who committed the offence, i.e. it was the accused who wounded the other person unlawfully.

No intention required

The prosecution does not need to prove the accused intended to wound the other person, just that the other person was wounded.

Unlawfully wounds
The injury must be more than mere bruising or soreness. The skin or organ must be broken. The prosecution must provide evidence to prove the wound and that the accused did not have a lawful reason for wounding that other person in those circumstances.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

5 years imprisonment.

Drunk and Incapable

Section

s170 Penal Code

Description

Every person who is found in a public place drunk, so as to be incapable of taking care of himself or herself, is guilty of an offence.

Elements

Every element (i.e. numbers 1-6) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused was found in a public place;

5. The accused was drunk at the time;

6. The accused was sufficiently drunk as to not be able to take proper care of himself or herself.

Commentary

Purpose

This section should not be used by the Police to arrest and remove anyone who has been drinking in public and who is making a nuisance of themselves. It is aimed at alcoholics, vagabonds and others whose drinking is so excessive that they are a danger to themselves, and it is usually applied to people who are asleep on the road.

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who was found drunk in a public place.

Found drunk as to be incapable of taking care of him or herself
The prosecution must prove more than just that the accused was affected by alcohol or had been drinking. They must prove that the accused was drunk and good evidence of drunkenness must be given. The effect of the drunkenness must be such as to mean that the person was not in control and could not manage for themselves.

Public place
The prosecution must prove by evidence that it was a public place that the accused was found in. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

See the definition of a public place in *s4 Penal Code*.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$20 fine.

Drunk and Disorderly

Section

s167(d) Penal Code

Description

Any person is guilty of being an idle and disorderly person, who:

- is drunk and disorderly in any public place; ***or***
- behaves in a riotous or disorderly manner on the premises of any Police station; ***or***
- assembles together with others and while so assembled behaves in a riotous or disorderly manner in any place.

Elements

Every element (i.e. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court;

2. There is a date and/or period of time when the offence charged is alleged to have taken place;

3. There must be a place where the offence is alleged to have been committed;

Specific

4. The accused was in a public place;

5. The accused was drunk and disorderly.

OR

4. The accused was in a Police station;

5. The accused behaved in a riotous or disorderly manner.

OR

4. The accused was assembled with others in any place;

5. While assembled, the accused behaved in a riotous and disorderly manner.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who behaved in the prescribed manner.

Public place

"Public place" includes any public way and any buildings, place or conveyance to which, for the time being, the public are entitled or permitted to have access either without any condition or upon condition of making any payment, and any building or place which is for the time being used for any public or religious meetings or assembly or as an open court: *s4 Penal Code*.

The prosecution must prove by evidence that it was a public place that the accused was found in. Often a description of the place may be sufficient because you may know it. Otherwise it needs to be proved that the place was public in nature.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (i.e. more likely than not).

Maximum sentence

$20 fine or 2 months imprisonment.

If the offender is not usually living in the area in which the offence took place, you can add or replace any fine or imprisonment imposed and can order that the offender must stay in the place he or she usually resides for a period up to 1 year. You must specify this time in the order.

Appendix B

Clerks' Handbook

1 Introduction

Your role as clerk is indispensable to the proper functioning of the Court. Performing your duties faithfully and with care will ensure the advancement of justice in Kiribati.

Supervision

As a clerk, you have three aspects of responsibility; by appointment, general supervision and immediate direction.

Appointment

Your appointment as a clerk comes from the Chief Justice: *s12(1) Magistrates' Courts Act*.

General supervision

As a clerk, you are subject to the general supervision of the Chief Registrar: *s12(1) Magistrates' Courts Act*.

Any directions that come from the Chief Registrar must be followed in the course of your duties. This will ensure procedural consistency throughout Kiribati. If you do not understand any instructions, contact the Chief Registrar to clarify the matter.

You are also under an obligation to report any habitually absent Magistrates or those who do not properly carry out their functions to the Chief Registrar.

Immediate direction

As a clerk you are to serve the Magistrates' Court to which you are attached. For this reason, most of your immediate direction and control will come from the Magistrates' Court you are attached to for the time being.

While you are under the direction of the Magistrates, your role will sometimes require you to interrupt them, give them advice or correct them. Do not be afraid to do this, for the law and justice require it. When fulfilling this role, always be respectful but be firm. Explain the law as clearly as possible and do your best to help the Court avoid making unnecessary mistakes.

1.2 Personal Conduct

Be aware of the Magistrates' role and assist by being professional at all times. By acting in a professional manner, you will add to the efficiency and order of the Court's business and will help promote respect for the Court.

Professionalism as a clerk includes:

- performing your tasks promptly when asked;
- maintaining a dignified personal appearance;
- not socialising when work is to be done; and
- displaying respectful behaviour in all your public functions.

2 Duties

The *Magistrates' Courts Act* sets out a number of duties for clerks. These are:

- to attend all sittings of the Magistrates' Court;
- to keep true and accurate minutes of all proceedings in the Court and to record minutes of all evidence, judgment, convictions and orders of the Court, if the Court or Presiding Magistrate does not do so;
- to fill or cause to be filled all summonses, warrants, orders, convictions, recognisances, writs of execution, and other documents and to submit these for signing to the Presiding Magistrate or as otherwise required;
- to issue civil processes as the law mandates;
- to receive or cause to be received all fees, fines, penalties, and other money paid or deposited in respect of proceedings and to keep true and accurate records of these transactions; and
- to perform other duties as assigned by the Chief Justice: *s12(2) Magistrates' Courts Act*.

In addition to the duties set out in the legislation, you must be familiar with your handbook and with all the 'Instructions to Clerks' that come from the Chief Registrar or Chief Justice.

Daily Activities

The following is a checklist of activities that you should conduct in the course of a day in criminal court. Such a list cannot take into account every possible situation that might arise, but it should act as a general guideline for your daily duties.

Case list

1. Sometime during the day you should receive a list of cases from the Police to be heard three days later.

2. Give the case list to the Magistrates as early as possible. This will give the Magistrates time to look over the list and determine whether there is any case where they must be excused for bias.

3. If a Magistrate excuses himself or herself for bias, fix a new date for hearing that case when another Magistrate will be available. This will prevent problems on the day the case was to be heard.

4. Look at the case list yourself. If there are any unfamiliar charges, take the opportunity to look over the applicable legislation or procedure.

The day of Court – before Court

5. Look over the case list again to refresh yourself. If the offence itself or procedure is dealt with in the Bench Book, be ready to refer to it quickly.

6. If necessary, make out payment vouchers for Magistrates. This will avoid problems at the end of the day's hearing when a Magistrate may leave soon after.

7. Prepare the Court for hearing. Ensure general tidiness of the Court, and set up pens, paper and anything else the Magistrates may require. Open the room or set up the Maneaba for witnesses and public to enter.

8. Prepare yourself for the day's activities.
    - Ensure you are presentable and that you have your handbook, relevant legislation and other required materials with you.

In Court

9. When the Magistrates are ready, step into the Court, call (in I-Kiribati) "All rise. Silence in Court, the Magistrates' Court is now in Session." Let the Magistrates take their seats.

10. Call out the first case from the case list you prepared earlier.
    - Refer to the guidance on the suggested order in which you should call cases in the Bench Book chapter on Management of Proceedings.
    - Read out the matter. This is done by reading out the full name of the accused.
    - As a matter of good practice ensure each case heard in Magistrates' Court is within their jurisdiction. Familiarise yourself with the criminal jurisdiction of Magistrates to contained in *Schedule 2 Magistrates' Courts Act*.

11. Ensure identity. Ask "Are you……..?"

12. Read out the charge. Ensure the accused understands the charge, by asking "Do you understand the charge?" If not, explain it again.
13. Ask the accused for his or her plea, by asking "Are you guilty or not guilty of the offence charged?" If the accused pleads not guilty, ask if they are ready to proceed. (Ensure you take down minutes while performing this task.)

14. In a criminal matter, the prosecution will present their case first. If the prosecution calls any witnesses, administer the oath or take a solemn affirmation before they give any evidence.

15. During all witness testimony, take down minutes.

16. If a Magistrate has questions, he or she may stop the proceedings and ask you questions.

    - If the question relates to a section of legislation, translate it as nearly as possible, word for word. If it is still unclear, you may give the Magistrate your opinion on what the section means.
    - For questions on procedure, go to the relevant legislation and find out.
    - When a panel of Magistrates disagree, clearly explain the relevant sections and give some advice. Note the advice you give and whether or not it is followed.

17. After all testimony has been given on both sides, the matter will be adjourned for judgment. Call "All rise." Wait for the Magistrates to retire.

Judgment

18. Join the Magistrates in chambers.

19. Explain any more legal questions that may arise while taking down minutes.

20. Particularly for complicated cases, Magistrates may look to you to help with the decision.

    - You must only explain the law and offer advice.
    - You must not make the decision for them or even suggest a decision on guilt or innocence or on punishment.
    - Be aware of Magistrates taking outside evidence into account. If they are taking into account information that was not part of the evidence in Court, explain that the law requires that they base their decision only on in-court evidence.
    - If a Magistrate goes off track, stress applicable law again and keep a record.

21. Once the decision has been reached, draft the judgment.
    - The judgment should have the decision on guilt or innocence, reasons for the decision and, for a finding of guilt, the punishment.

22. When the judgment is ready, return to Court. Call "All rise. Silence in Court, the Magistrates' Court is now in Session." Either you or the Presiding Magistrate may read out the judgment.
23. Make out any applicable orders and have the Magistrate sign them.

After Judgment

24. Ensure the Police or other prosecuting authority takes note of the sentence, if any, so that they have accurate records for the future.

25. In the case of a conviction, inform the offender of his or her right to an appeal, if the Court fails to do so.
    - Appeals on conviction are only available if the accused entered a plea of not guilty.
    - Inform the offender that he or she has 3 months within which to appeal the conviction or sentence.
    - If he or she chooses to appeal, he or she must file their notice of appeal with you or in your absence, the Presiding Magistrate.
    - After 3 months the offender must apply to the High Court for permission to launch an appeal.

26. Call the next case and repeat the above procedure.

End of Court

27. In cases where imprisonment is ordered, all copies of records, exhibits, charge sheets and all other relevant documents should be forwarded to the High Court immediately.
    - Sending these in immediately allows the Chief Justice to review the conviction and sentence.

28. Send to the Registrar the driving licence of any person whose licence has been suspended as a result of a conviction.

29. Collect all fines, issue receipts and record payments in the Court Cash Book.

30. Prepare warrants for non-payment of any fines. Have the Presiding Magistrate sign any such warrants, then give them to the Police.

31. Enter all the day's cases into the Criminal Register.

32. Return all legislation, books, and other materials to their proper location.

33. Clean up and close the room or clear the Maneaba.

2.2 Minutes of Proceedings

In inquiries or trials, all witness evidence or material portions of the evidence must be recorded:

- in writing in the language of the Court;
- in the form of a narrative rather than as question and answer, unless the Magistrate directs otherwise: *s180 Criminal Procedure Code*.

One of your most important duties is the keeping of an accurate and true record of the proceedings. This will help the Magistrates make the best decisions on the evidence and also make any review and appeal processes more efficient.

At certain points in every criminal case you are required to record very specific phrases or to take down the exact words of the accused. Precisely following these rules for recording is vital to ensuring that the record is unambiguous and that all procedure has been followed.

For example, if you record "Accused found guilty", but forget to write the phrase, "Accused Convicted as charged" after conviction, it may be unclear to the High Court on review if the proper procedure was followed.

Accompanying this handbook is a Taking the Minutes format which has these particular phrases and other notes on recording at each stage of procedure. By following the format, you should be able to quickly and accurately determine which rules of recording are necessary.

Custody of records

After records are made in court, you must keep them in safe custody. Not only must they be cared for to prevent damage, but you must prevent them from being removed from the Court building.

If the Presiding Magistrate grants a party permission to examine the record, you should only allow the examination under close supervision to ensure the record is not tampered with: *Chief Justice's Instructions and s54 MCO*

Custody of Exhibits

Take custody of any exhibits presented in Court. Ensure these are marked with correct exhibit numbers. These should not be removed from the Court in case they are needed for an appeal.

Maintain custody of the exhibits until a Court orders either return or disposal.

2.3 Other Duties

In addition to your daily duties in Court, you have a number of other ongoing duties. Faithfully attending to these will make daily procedures easier and will help improve the work of the Courts.

Monthly Returns

Monthly returns of all cases (criminal, civil and land) must be sent to the High Court near the end of each month. These returns should be as clear as possible to enable quick and accurate review of the decisions.

Orders and Judgments from the High Court

Any orders or judgments sent to you from the High Court must also be read to the Magistrates and then filed appropriately. This will keep them up to date on new law and will prevent inconsistency. Once filed, they can easily be referred to when necessary.

Justice of the Peace

As a clerk you are also a Justice of the Peace:

All the powers and functions of Justices of the Peace are set out in *s17 Magistrates' Courts Act*.

Those most important to your role are:

- taking oaths on the swearing of affidavits;
- issuing summons and warrants for the purposes of compelling the attendance in Court of accused persons and witnesses;
- signing documents, witnessing signatures, ages and that the signatories are alive; and
- the swearing in of Magistrates and other officers who have be to sworn in law before a Justice of the Peace, a Magistrate or a Judge: *s17 Magistrates' Courts Act*.

Sitting Allowance

It is up to you to ensure that Magistrates sign the necessary forms to be paid. It is recommended that you take care of this before the beginning of proceedings each day to avoid problems later. If there are any outstanding fees to be paid to a Magistrate, arrange for payment.

Fines

To the best of your ability you should recover all outstanding court fines. Fines should be paid within the time specified by the Court or other measures taken to ensure the accused pays the fine. If a fine is not paid within the allowed time, a warrant of commitment to prison should be issued immediately.

When a conviction has been entered and a fine ordered for a guilty plea in the absence of the accused. The Clerk should arrange for the police to serve the notice.

Appeals

In addition to informing an offender of the right to appeal, you have other duties once a notice of appeal in writing has been filed with you.

Within 24 hours of receiving the notice of appeal, you must send the details of the appeal to the Registrar of the High Court: *s36(1) Magistrates' Courts Rules*.

The Record

After sending in the details of the appeal, you must comply with any directions you receive from the Registrar of the High Court about either sending in the record or keeping it in safe custody: *s36(2) Magistrates' Courts Rules*.

Within 7 days of receiving the notice of appeal, you must make up and complete a record of appeal, consisting of:

- the notice of appeal;
- the pleadings, if any;
- all documents admitted as evidence in the original proceedings;
- all documents tendered and rejected as evidence in the original proceedings;
- true copies of the notes of the evidence; and
- the judgment or order of the Court: *s37 Magistrates' Courts Rules*.

3 Dealing with Common Problems

Occasionally, problems will arise in Court. Ultimately, the Presiding Magistrate is responsible for the proper conduct of the Court, but as the person most familiar with the legislation it may sometimes easier for you to handle these problems.

3.1 Court Sittings

It is expected that hearings in the Magistrates' Court begin each morning at 9.00am. Starting promptly at this time will give the Magistrates, other Court staff and the public more certainty in their planning. Being constantly late can show a lack of seriousness in the Court and has the possibility of diminishing respect for the Court.

In order to ensure a prompt start, you should perform all your pre-Court matters as early as possible and work with the Magistrates to have them ready for the start of Court.

3.2 Inappropriate Conduct

Dress

Sometimes parties may not understand the importance of Court and might turn up inappropriately dressed. If it is a serious matter such as a person not wearing a shirt, you should tell them to go home and change and return when dressed. If it is a less serious matter, you may simply explain to the person the importance of Court and warn them of what is appropriate.

Arguments

Court procedure gives each party an opportunity to make their case and respond to the other party's evidence. If one party interrupts another party, or an argument develops between the parties, take control of the situation, and tell the parties to stop.

Other Disturbances

Be alert to noise or other disturbances that may be going on outside the Court which may interfere with the proceedings. If necessary, ask the Presiding Magistrate to stop the proceedings for a few minutes so that you can deal with the interference.

3.3 Incorrect Procedure

If proper procedure is not followed, proceedings may become too informal resulting in a lack of respect for the authority of the Court. As the person most familiar with the legislation, you are in the best position to guard the proper procedure. By doing so you will ensure all cases are conducted in a legal and just manner.

If you notice that there has been a shortcut in procedure, stop the proceedings and tell the Magistrate what the proper procedure to follow is. For example, if something has not been read out to the accused that should have been, it is up to you to immediately stop the proceedings and ensure it is read out to the accused before going any further.

In cases where you believe the procedure has been improper, and your advice is not followed, you must report the matter to the Chief Registrar so that a determination of the correct procedure can be made.

4 Taking the Minutes

In addition to recording the material evidence at every stage of proceedings, you must also record certain information or particular phrases at different points in the trial.

1. At the beginning of the case, record in the following order:
   - the Magisterial district;
   - the date;
   - the case number;
   - the names of the Magistrates;
   - your name;
   - the heading of the case, eg. "Republic v ……"; and
   - the offence charged.

2. Record the accused's plea exactly as he or she says it. If a guilty plea, write "Guilty" in brackets after the exact words used by the accused. If not guilty, simply record the words "Not guilty".

3. Record the name of the Prosecutor and the name of each witness. Record whether a witness was sworn using "Duly Sworn on the Bible" or "D.S.O.B" or affirmed using "Duly affirmed" or "D. Aff".

4. Evidence-in-chief should be recorded as a story and all material matters must be recorded. Remember to record all the facts so that the High Court can understand the record on its own. It must be such that a person who was not in the Court and does not know the parties can understand exactly what was said.

5. Cross-examinations should be noted with "XX" and should be recorded in question and answer format.

6. When the prosecution has finished, write "Prosecution closes its case."

7. After the Court determines if there is a case to answer, write either:
   - "The accused was discharged as he/she had no case to answer."
   - "The accused has a case to answer and the three choices were explained."
   - "Case to answer – *Rule 15(4)* complied with."

8. Record the accused's name and whether he or she was sworn or affirmed, made a statement not on oath or said nothing at all. If he or she gives evidence, record as with any other witness. If the accused makes a statement from the dock, record it word for word.

9. Record whether or not the accused calls any witness and record their evidence.

10. On the judgment, record the reasons for the decision. Have it signed and dated by the Magistrates.

11. If the accused is acquitted, write "Acquitted." and if found guilty, write "Accused found guilty." After a finding of guilt, ensure the Magistrates convict him or her and then record, "Accused Convicted as charged."

12. Record any of the accused's previous convictions from the sheet given to you by the Police Prosecutor or as they are read out.

13. Record whether the accused agrees that with the existence of the previous convictions. Write either:
    - "Accused agrees with each of the previous convictions."
    - "Accused does not agree that he/she was previously convicted."
    - "Accused agrees that he/she was convicted of ……on.……at……but does not agree that he/she was convicted of.……on……..at……."

14. Record anything the accused says before being sentenced.

15. Record the sentence in its exact terms.

16. If the accused has a right of appeal, advise him or her and record it.

17. In the case of a guilty plea, then record the facts of the case in detail. Record whether the accused agrees with the facts by writing "Accused agrees with the facts" or "Accused does not agree/disputes the facts."

18. If the accused agrees with the facts, the case moves to sentencing. Record as for sentencing. If the accused does not agree with the facts, the case moves to trial. Record "Plea Changed to NOT GUILTY – Trial commences." and record as for trial.