5. Evidence

5.1 Relevant legislation (including amendments)

- Child Protection and Welfare Act 2016 (CPWA)
- Crimes Act 2016 (CA)
- Criminal Evidence Act 1898, UK (CEA 1898), Criminal Evidence Act 1965, UK (CEA 1965);
- Criminal Procedure Act 1865, UK (CPA, UK)
- Criminal Procedure Act 1972 (CPA), Criminal Procedure (Amendment) Act 2020 (CPAA), Criminal Procedure (Amendment) No 2 Act 2020 (CPAA No 2, 2020)
- Custom and Adopted Laws Act 1971 (CALA)
- District Court Act 2018 (DCA), District Court (Amendment) Act 2020 (DCAA)
- Evidence Act 1843, UK (EA)

5.2 Introduction

Evidence is the information used to prove or disprove the facts in issue that are relevant to the case before the court. Evidence includes:

- oral evidence or what the witnesses say in court
- written evidence such as any documents produced
- real evidence or physical items such as a knife used in a criminal offence.

When real or documentary evidence is introduced in court, it becomes an exhibit.

In criminal trials, the prosecution generally bears the burden of proving or disproving the facts in issue, to establish the guilt of the defendant, unless an enactment specifically provides otherwise.

Evidence rules have been established to assist the court as to what evidence the court may (or may not) consider or accept (admissible). The key point with evidence is relevance.

You may either:

- **admit evidence**: accept and act on such evidence as you think sufficient (and relevant) whether such evidence is or is not admissible or sufficient at common law: s 176(5) CPA (as amended by s 9 CPAA 2020); or
- **reject evidence**: refuse to receive evidence whether admissible or not at common law, which you consider irrelevant or needless, or unsatisfactory as being hearsay or other secondary evidence.

The hearsay rule is that a statement made by a person, other than a person giving oral evidence at trial, is inadmissible as evidence to prove the truth of some fact that has been asserted (see the paragraph below on the Hearsay rule).

The Criminal Procedure Act 1972 (CPA) is the principal statute dealing with evidence. Section 158 (as amended by s 8 CPAA 2020) applies certain evidence provisions relating to the Supreme Court to the District Court. These include:

- evidence of the accused's previous convictions (s 193)
- cross-examination of prosecution witnesses by the defence (s 198)
- opening and evidence by the defence (s 202)
- extra witnesses may be called for the defence if they have relevant evidence (s 203)
- evidence in reply by the prosecution (s 204).

Also, section 4 of the Custom and Adopted Laws Act 1971 (CALA) applies the UK laws of evidence (amongst others) in force in England on the 31st day of January 1968 (and the Judges' Rules) to the extent that they are not repugnant to or inconsistent with the provisions of CALA or any other Nauru legislation or Australian legislation that has been expressly applied in, or adopted as the law of, Nauru: ss 4 and 5 CALA.

5.3 Classification of evidence

In a criminal trial you should understand how evidence is classified to properly apply the rules of evidence and take into account both the form of evidence and the content of the evidence. For example, oral evidence (the form) given during a trial may be direct or circumstantial (the content).

5.3.1 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**: is 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 statements, or representation of facts, made by witnesses.

5.3.2 Classification by content

Classification by content refers to the way the evidence is relevant to the facts in issue and evidence is split into three categories:

1. **Direct evidence**: is evidence which, if believed, directly establishes a fact in issue. Direct evidence is evidence given by a witness who claims 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. It 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. It often works cumulatively in that there may be a set of circumstances

that, individually, is insufficient 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 is not relevant to 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). It should come from another independent source, eg: an analyst or medical report.

5.4 Documentary evidence

This is information that is contained in written documents. These documents may include:

- public documents (statutes, Parliamentary material, judicial documents of Nauru, the UK and Australia)
- private and local acts
- plans, books, maps, drawings and photographs
- statements in documents produced by computers (note that certain rules may apply to this form of documentary evidence)
- tape recordings
- photographs.

Documentary evidence consists of 'out of court' statements or representations and therefore the question of whether the document making the statement or representation is hearsay evidence will always arise.

Often, documentary evidence will only be admissible under a common law exception to the hearsay rule, or it will be admissible by statute as follows:

- s 1 of the Criminal Evidence Act 1965 (CEA), UK (business and trade records)
- s 146 CPA (proof by written statement)
- s 147 CPA (proof by formal admission)
- s 147A CPA (general admissibility of hearsay statements)
- s 176(5) CPA (discretion to allow admission of any evidence as you deem fit).

5.4.1 Business and trade records

In any criminal proceedings, any statement made by a person in the original document that establishes that fact, is admissible if:

- the document is (or is part of) a record relating to any trade or business and was made in the course of that trade or business, from information supplied (whether directly or indirectly) by persons who have (or may reasonably be supposed to have) personal knowledge of the matters dealt with in the information they supply; and
- the person who supplied the information is:

- dead, or beyond the seas, or unfit by reason of their bodily or mental condition to attend as a witness, or
- cannot with reasonable diligence be identified or found, or
- cannot reasonably be expected (because of the time passed since they supplied the information and the circumstances) to have any recollection of the matters dealt with in the information they supplied: s 1(1) CEA (UK).

Relevant definitions for this provision are:

- "statement" is any representation of fact, whether made in words or otherwise;
- "document" includes any device by means of which information is recorded or stored; and
- "business" includes any public transport, public utility or similar undertaking carried on by a local authority and the activities of the Post Office: s 1(4) CEA (UK).

In deciding on the admissibility of a document, you may draw any reasonable inference from the form or content of the document in which the statement is contained: s 1(2) CEA (UK).

In deciding whether a person is fit to attend as a witness, you may act on a certificate of a medical officer: s 1(2) CEA (UK).

When you are deciding on the weight, if any, to be attached to a statement which is admissible you may consider:

- all the circumstances from which any inference can reasonably be drawn as to the accuracy or otherwise of the statement;
- whether the statement was made at the same time as the facts occurred or their existence; and
- whether the maker of the statement had any incentive to conceal or misrepresent facts: s 1(3) CEA (UK).

5.4.2 Proof by written statement

In any criminal proceedings, a written signed statement by any person is admissible as it if were oral evidence where:

a) the maker cannot conveniently attend before the court; and

b) the statement has a declaration by that person that it is true to the best of their knowledge and belief and that they made the statement knowing they would be liable to prosecution if they wilfully stated in it anything which they knew to be false or did not believe to be true; and

c) before the trial, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and

d) none of the other parties, or their lawyers if any, within seven days from the service of the copy of the statement, serves on the party a notice objecting to the statement: s 146(1)-(2) CPA.

However, the conditions above do not apply if the parties agree before or during the hearing that the statement may be tendered: s 146(2) CPA.

Other conditions that also may apply include:

a) if the maker is under the age of twenty-one, the statement must give their age;

b) if the maker cannot read, the statement must be read to them before signing it with a declaration by the person who read the statement that this was done;

c) if another document is referred to it must be attached as an exhibit and translated if necessary; and

d) the statement may have to be translated into the accused's native language: s 146(3) CPA.

All or part of the admissible written statement must be read aloud at the hearing unless you direct otherwise, or an oral account of so much of any statement that is not read aloud: s 146(4) CPA.

Any document or object identified in the written statement is treated as if it had been produced as an exhibit and identified in court by the maker of the statement: 146(5) CPA.

Methods of service include: personal delivery, or to their lawyer; or addressed to them and left at their residence or place of business; or if a company or body corporate, by serving the document on their secretary, local manager or other principal officer or in such other manner as the court may direct: s 146(6) CPA.

5.4.3 Proof by formal admission

Any fact (if oral evidence may be given of this fact) may be admitted before or at the trial, by or on behalf of either the prosecution or accused and is admissible as conclusive evidence of the fact admitted: s 147(1) CPA. It is also admissible for any subsequent criminal proceedings related to that matter, retrial or any appeal: s 147(3) CPA.

If not made in court, then the admission must be in writing and signed by the accused or (by their counsel and countersigned), or by a director, manager or secretary if the accused is a body corporate: s 147(2) CPA.

The admission may be withdrawn with your leave: s 147(4) CPA.

5.5 General admissibility of a written hearsay statement

A hearsay statement is admissible in any proceeding, where the circumstances relating to the statement provides the reasonable assurance of the reliability of the statement and:

- the maker of the statement is unavailable to attend court to testify as a witness; or
- the court considers that undue expense and delay would be caused if the maker of the statement is required to attend as a witness to testify in court: s 147A(1) CPA.

This does not apply to a witness, whose unavailability is caused or occasioned by the party, which is seeking to adduce such statement: s 147A(6) CPA.

Hearsay statement means a written statement that:

- was made by a person other than a witness; and
- is offered in evidence at the proceeding to prove its contents: s 147A(2) CPA.

The party proposing to rely on the hearsay statement must give notice at least 14 days before the date fixed for trial to the other party of their intention to rely on the hearsay statement: s 147A(3)(a) CPA. This is essential to provide timely notice to the other party to be able to file any objection and for the court to rule on the matter if there is any objection filed.

The other party may object to the tendering of such statement by giving a notice of objection to the other party intending to rely on such statement; and if so, you have a residual discretion to admit such statement: s 147A(3)(b)-(c) CPA.

Circumstance in relation to the statement by a person who is not a witness, includes:

- its nature and contents and when the statement was made;
- the reasonable credibility of the statement; and
- any circumstance that relate to the accuracy of the observation of the person: s 147A(4) CPA.

A person is unavailable as a witness to attend court to testify in a proceeding if they are:

- deceased; or
- outside the Republic and it is not reasonably practicable for them to attend court as a witness or tender evidence in person through digital or electronic means including audio or visual links; or
- certified by a medical practitioner as unfit to give evidence due to age, physical or mental condition or impairment; or with reasonable diligence cannot be traced: s 147A(5) CPA.

You have a residual discretion to decide what weight to give to this evidence: s 147A(7) CPA. See *Republic v Bill* [2020] NRSC 35; Criminal Case 13 of 2017 (22 September 2020). The Supreme Court of Nauru considered sections 147 and 147A. The Court noted that the drawback of s 147 that once a fact is admitted it is conclusive evidence against that party, compared to s 147A which gives the court a discretion as to any weight to be given to that hearsay evidence.

The court referred to *R v Baker* [1989] 1NZLR 738 (Court of Appeal) per Cooke P said the question to ask is "whether in the particular circumstances it is reasonably safe and of sufficient relevance to admit the evidence notwithstanding the dangers against which the hearsay rule guards. Essentially the whole question is one of degree."

This approach was subsequently codified in section 18 of Evidence Act 2006 (NZ).

5.6 Real evidence

Real evidence usually refers to material objects or items which are produced at trial.

Documents can also be real evidence when:

- the contents of the document are only used to identify the document in question or to establish that it actually exists; and
- 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 facts about a person may also, in some circumstances, be regarded as real evidence:

- their behaviour,
- their physical appearance, or
- their conduct or attitude, which may be relevant to their credibility as a witness, or whether they 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.

5.7 Exhibits

When real or documentary evidence is introduced in court, it becomes an exhibit.

5.7.1 Checklist for exhibits

Has:

- the witness seen the item
- the witness been able to identify the item to the court
- the party
- king to have the item become an exhibit formally asked to tender it to the court
- the other party been made aware of the exhibit before the trial or hearing has started?

Once an item has become an exhibit, the court must:

- keep the exhibit safe from loss or damage if the court retains the exhibit; or
- if the prosecutor or the police are entrusted with the item, ensure that the defence is given reasonable access to it for inspection and examination.

5.8 Oral evidence

Oral evidence 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. This includes oral evidence provided a witness (or through an interpreter) who is overseas or a prisoner on remand or in custody who gives evidence by audio visual link without having to attend court in the Republic of Nauru: ss 149A and 149D CPA.

Otherwise, if a witness wants to mention in their testimony a statement which they or somebody else, made outside of the court, the witness is making an 'out of court' statement.

The difference between 'in court' statements and 'out of court' statements is important. If a witness wants to refer to 'out of court' statements in their 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 is 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 outward behaviour of the witness; their delivery, tone of voice, body language and attitude towards the parties.

Where any evidence is given in a language not understood by the accused it must be interpreted to them in open court into a language they understand: s 149(1) CPA.

Likewise, where documents are admitted these may need to be interpreted for the accused in whole or in part as you think necessary: s 149(2) CPA.

See also *Benjamin v Republic* [1975] NRSC 9; [1969-1982] NLR (D) 44 (25 November 1975). The Nauru Supreme Court held that oral evidence of a confession by the accused which has been made in Nauruan but recorded in English was "improper" if the interpreter able to record the confession in Nauruan. This appeal was allowed and the conviction quashed.

All oral evidence (or as much as you think is material) given before the District Court, is recorded in writing in the form of a narrative and not questions and answers: s 44(1)-(2) DCA. But you may in your discretion take down, or cause to be taken down, any specific question and answer: s 44(3) DCA.

Oral evidence includes evidence provided through audio visual link or any other electronic or digital form which the Registrar my keep securely so that it may not be edited, modified, erased or copied and is able to be retrieved and produced when required: s 44(4)-(5) & (8) DCA.

It is an offence for anyone else present including a party, legal representative or witness to make a record of any such virtual proceeding or allow someone else to do so and you may stop any such proceeding immediately if this happens: s 44(6)-(7) & (9) DCA.

Any breach of section 44 is a contempt of court under Section 8 of the Administration of Justice Act 2018: s 44(10) DCA.

5.9 Evidentiary issues relating to witness testimony

There are several issues that may arise related to witness testimony during a criminal trial including:

- the competence and compellability of witnesses including spouses, children, the defendant and co-defendant
- examination of witnesses
- leading questions
- refreshing memory
- lies
- corroboration
- warnings to witnesses against self-incrimination
- identification evidence by witnesses.

5.9.1 Competent and compellable witnesses

A witness is competent to give evidence if they may lawfully be called to testify. The general rule is that any person is a competent witness in any proceedings unless they fall under one of the exceptions under statute or common law.

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, if it appears to be essential to the just decision of the case: s 100 CPA.

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

Privilege is a rule of evidence that allows the holder of the privilege to refuse to disclose information or provide evidence about a certain subject or to bar such evidence from being disclosed or used in a judicial or other proceeding.

5.9.2 The defendant and co-defendant

The general rule is the defendant is not a competent or compellable witness for the prosecution: Articles 10(3)(a), 10(7) and 10(8) of the Constitution. This means that the defendant cannot be called by the prosecution to give evidence against themselves, nor can the court require the defendant to do so.

A defendant is a competent witness for the defence but cannot be compelled to give evidence in their defence at trial unless they choose to: s 1 CEA 1898. If they do choose to give evidence, then they may be cross-examined like any other witness, even if it might incriminate them.

A co-defendant is a competent witness for the prosecution or defence: s 1 CEA 1898 (UK). They are a compellable witness for the prosecution if:

- a nolle prosequi is entered, or

- a verdict of acquittal is given, or
- the co-defendant has pleaded guilty, or
- the co-defendant is tried separately from the persons with whom they are jointly indicted. See *Winsor v R* (1866) LR 1 QB 390, *Townsend v Strathern* 1923 SC (J) 66, and *R v Boal* [1965] 1 QB 402; [1964] 3 All ER 269.

5.9.3 Silence does not mean guilt

Sometimes before or after a defendant is charged with a crime, they are asked by the police what they have to say in response to the charge. Some defendants reply and if it is relevant, is admissible in court as an exception to the hearsay rule. Some defendants refuse to say anything in response according to their right to remain silent.

Generally, someone accused of a crime is entitled to say to the prosecution, "You charged me, you prove it", and say nothing further in response. It is for the prosecution to prove beyond reasonable doubt the defendant is guilty.

This approach is emphasised by a warning that the police are obliged to give to a person suspected of a crime when the police ask the suspect make a statement. The warning is in these words or similar:

> "You do not have to say anything but anything you do say may be recorded and may be given in evidence."

When a defendant refrains from giving evidence as a witness, this cannot be held against the defendant.

5.9.4 Spouses

A spouse is a competent and compellable witness for the defence and only the defendant may apply to call their spouse to give evidence: s 106(b) CPA.

The spouse of the defendant shall be a competent but not compellable witness for the prosecution, without the consent of the defendant, unless called to give evidence for various offences including:

- an offence under Chapter XXII or section 360 of the Criminal Code; or
- the defendant is charged with an offence affecting the person or property of the wife or husband of the accused or the children of either of them; or
- the law specifically provides for a spouse to be called without the consent of the defendant: s 105 CPA.

> **Note:** no person is the wife or husband of any other person unless they are lawfully married to one another.

Section 106(c) CPA states that a spouse will not be compellable in any proceeding to disclose any communication made to each other during the marriage.

5.9.5 Children

Children can be competent witnesses in a criminal trial, even in cases where they might not understand the implications of swearing an oath.

Section 54 of the Child Protection and Welfare Act 2016 (CPWA) sets out the special rules that apply to investigations and inquiries involving children under the age of 18 years (s 3(1)). See *Republic v LD* [2020] NRSC 31; Criminal Case 5 of 2019 (20 October 2020). At all stages of the investigation or inquiry, the best interests of the child must be the primary consideration.

Section 55 sets out the rules that apply to proceedings involving children under the age of 18 years: Of these, the evidentiary rules include:

- promote and apply child-friendly court procedures, including alternative arrangements for giving testimony such as the use of screens, video-taped evidence and closed circuit television: s 55(1)(f);
- give children the right to effectively participate in any proceedings that affect them, to express their views, and to have those views given due weight: s 55(1)(h);
- no corroboration of a child's evidence in criminal proceedings for sexual assault is to be required: s 55(1)(k);
- expert evidence regarding patterns of disclosure or behaviour of children in cases involving sexual abuse is to be automatically admissible: s 55(1)(m).

See the chapter on Juvenile Crime to find out more.

In assessing the evidence of a child witness, you must be guided by two important considerations namely, the child's competency and their credibility. Refer to:

- Republic of Nauru v Namaduk [2018] NRSC 42; Criminal Case 29 of 2017 (22 August 2018).
- See also: *Republic v Kam* [2020] NRSC 18; Criminal Case 22 of 2019 (28 May 2020) where the Nauru Supreme Court noted that there are no special rules to be applied when considering the evidence of children.

In any particular case, the child's evidence is given at your discretion and will depend upon the circumstances of the case and upon the child themselves.

See the chapter Juvenile Crime to find out more about the relevant requirements for child offenders and witnesses.

5.10 Examination of witnesses

5.10.1 Examination-in-chief

The purpose of a party calling and examining a witness is to gain evidence in support of that party's case (examination-in-chief).

Examination-in-chief must be conducted using the general rules of evidence such as those relating to hearsay, opinion and the character of the defendant.

Usually, a party is not allowed to attack the credibility of a witness they have called. However, if a witness acts in an adverse (hostile) manner which frustrates the party calling the witness, they may be treated as a hostile witness and their credibility may be attacked through showing inconsistent statements (see below).

There are also other rules that relate to examination-in-chief including:

- the prosecution must call all their evidence before the close of their case;
- leading questions are not permitted; and
- refreshing memory (see below).

5.10.2 Cross-examination

The purpose 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
- in appropriate circumstances, to draw questions as to the credibility of the witness.

> **Note:** Browne v Dunn (1893) 6 R 67 (HL) applies as a rule of practice to allow a fair trial. It requires counsel to "put the case" of their client to the witnesses called by opposing counsel. If you are asking the tribunal of fact to disbelieve the evidence-in-chief of a witness, contradictory material, or at least the essence of it, normally had to be put to the witness so that they might have an opportunity of explaining the contradiction. Failure to do so might be held to imply acceptance of the evidence-in-chief.

It does not displace the other rules of practice that when you put something to a witness, you must provide evidence of what you are proposing. The purpose of the rule is to:

- ensure fairness to the party and the witness whose evidence is contradicted; and
- promote accurate fact-finding by ensuring the trier of fact has the benefit of the witness's response. The duty is not intended to protect the interests of the party cross-examining the witness.

See *Republic v Jeremiah* - Judgment [2018] NRDC 1; Criminal Case 32 of 2018 (14 September 2018) – Nauru District Court.

5.10.3 Inconsistent statements by witnesses

A party producing a witness is not allowed to impeach their credit by general evidence of bad character. But they may if the witness proves adverse (hostile) in your opinion:

- contradict them by other evidence; or
- with your leave prove that the witness has made at other times a statement inconsistent with their present testimony; and
- if the witness after being given the circumstances of that statement does not admit that they made such statement, proof may be provided that they did in fact do so: ss 3 and 4 CPA UK.

A cross-examining party may seek to attack the witness' credibility by asking the witness if they made any prior statements inconsistent with present testimony without showing them the writing. If the witness after being given the circumstances of that statement does not admit that they made such statement, proof may be provided that they did in fact do so: s 5 CPA UK.

You may also at any time require the writing to be produced for inspection and make such use of it for the purposes of the trial as you think fit: s 5 CPA UK.

See *Republic v Thoma* [2020] NRSC 13; Criminal Case 17 of 2019 (8 May 2020).

5.10.4 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 for:

- formal or introductory matters, for example, the name, address and occupation of the witness;
- facts which are not in dispute or introductory questions about facts which are in dispute; or
- the purpose of identifying a witness or object in court.

5.10.5 Refreshing memory

While giving evidence, a witness may refer to their notes to refresh their memory if the notes were made:

- by the witness or under their supervision; and
- at the time of the incident or almost immediately after the incident occurred.

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 practicable course is to allow the witness to read them.

If the defendant or their lawyer wishes to see the notes, there is a right to inspect them.

5.10.6 Lies

If it is established that the defendant lied (ie: told a deliberate lie as opposed to making a genuine error), this is relevant to their credibility as a witness.

It does not necessarily mean, however, that the defendant is guilty.

Experience demonstrates that lies are told for a variety of reasons, and not necessarily to avoid guilt. As with a defendant, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

5.10.7 Corroboration

Where corroboration is required (evidence must be backed up by at least one other source) you must look for it in the prosecution's evidence.

If, at the end of the hearing, you find that the complainant's evidence does not have support from another witness, but you were still convinced that the complainant was telling the truth, you may still convict the defendant.

You must make it clear on the record or in your judgment that you were aware of the danger of convicting on the uncorroborated evidence of the complainant alone but were still satisfied beyond reasonable doubt that the defendant was guilty of the offence charged.

It is important to watch the witness as well as recording details of facts. You may want to:

- record how they give their evidence;
- record any inconsistencies within their evidence, or with their evidence and another witness's evidence; and
- see whether they avoid giving straight answers in areas of importance.

See *Republic v Bill* [2021] NRSC 14; Criminal Case 13 of 2017 (15 April 2021) which cited *Davies v DPP* [1954] AC 378.

> "In a criminal trial, where a person who is an accomplice gives evidence on behalf of the prosecution it is the duty of the judge to warn (himself) that, although (he) may convict on his evidence, it is dangerous to do so unless it is corroborated. This rule, although a rule of practice, now has the force of a rule of law."

5.10.8 Self-incrimination

A witness may refuse to answer any question which may incriminate them: Art 10 (8) of the Constitution.

Be aware of self-incriminatory statements by a witness. If a question is asked of a witness, the answer to which could be self- incriminatory, you should:

- warn the witness to pause before answering the question;
- explain to the witness that they may refuse to answer the question; and
- explain that any evidence the witness gives in court that is self- incriminating could be used to prosecute them for a crime.

The warning against self-incrimination does not apply to a question asked of a defendant, where the question relates to the offence being considered by the court.

5.10.9 Identification by a witness

The visual identification of the defendant by witnesses needs to be treated with some caution. Honest and genuine witnesses have made mistakes regarding the identity of defendants. The weight to be given to such evidence is determined by the circumstances under which the identification was made. See *R v Turnbull and Others* [1977] QB 224 where the UK Court made the following guidelines for visual identification:

- how long did the witness observe the defendant for
- at what distance and in what light
- was their view blocked in any way, eg: by passing traffic or a crowd
- had the witness ever seen the defendant before
- how often and if only occasionally, had they any special reason for remembering the defendant
- how long was the time before the original sighting and the subsequent identification to the police
- was there any major difference between the description of the defendant given to the police by the witness when first seen by them and their actual appearance?

5.11 Rules of evidence

5.11.1 Introduction

Rules of evidence have been established by both the common law and by statute. Rules relating to evidence in criminal trials can be found in the Criminal Procedure Act 1972 (CPA).

The important rules of evidence are generally:

- evidence must be relevant to the issues before the court;
- the best evidence must be produced;
- hearsay evidence is not admissible;
- statements of opinion cannot be given unless that person is an expert; and
- evidence and the law must be interpreted and understood by all parties to a case. These rules of evidence are discussed in more detail below.

5.11.2 Burden and standard of proof

There are two kinds of burden of proof: the legal burden and the evidential burden.

5.11.3 Legal burden of proof

The legal burden is the burden imposed (or responsibility) 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 defendant.

The burden of proof has a general rule that proof is adduced through oral or documentary evidence. It may also be established by conduct or statutory presumption or provisions such as judicial notice or admitted facts. See *Republic v Chen Jian Ping* - Judgment [2016] NRDC 19; Criminal Case 30 of 2015 (31 March 2016) – Nauru District Court.
The prosecution bears the legal burden of proving all the elements in the offence beyond reasonable doubt (the standard of proof): s 25(1) and (3) CA. They will do that by calling evidence from witnesses and using exhibits. The defendant does not have to prove they did not commit the offence.

A good explanation of what is reasonable doubt is offered by the New Zealand Court of Appeal in *R v Wanhalla* [2007] 2 NZLR 573. In that case, the Court stated:

> "Proof beyond reasonable doubt is a very high standard of proof which the Crown will have met only if, at the end of the case, you are sure that the accused is guilty.
>
> It is not enough for the Crown to persuade you that the accused is probably guilty or even that he or she is very likely guilty. On the other hand, it is virtually impossible to prove anything to an absolute certainty when dealing with the reconstruction of past events and the Crown does not have to do so.
>
> A reasonable doubt is an honest and reasonable uncertainty left in your mind about the guilt of the accused after you have reviewed all the evidence."

The defendant will try to establish a reasonable doubt on one or more elements of the charge or to prove a defence and may call and lead evidence to do so.

In some charges, the prosecution is required to prove something but the burden of proving a particular matter shifts to the defendant because the statute requires the defendant to prove "reasonable excuse"; "reasonable cause"; or "lawful justification".

If the legal burden is on the defendant, the standard of proof required is on the balance of probabilities. For example, if the defendant raises a defence of insanity, they have the onus/burden to establish the defence on the balance of probabilities.

The term balance of probabilities means that you must find that it is "more probable than not" that a contested fact exists. This standard of proof is lower than proof beyond reasonable doubt.

5.11.4 The evidential burden of proof

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 defendant.

Where the defendant bears the legal burden of proving insanity or some other issue, due to an express statutory exception, they will also bear the evidential burden. However, in relation to some common law and statutory defences, once the defendant discharges their evidential burden, then the legal burden of disproving the defence will be on the prosecution: s 25(2) CA.

5.11.5 Judicial notice

The doctrine of judicial notice allows the court to treat a fact as established although 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.

There are two forms of judicial notice that apply to the District Court.

Judicial notice without inquiry

If a fact is of such common knowledge that it requires no proof you may, without relying on other sources of information, take judicial notice of it and direct the court to treat it as an established fact.

Judicial notice without inquiry pursuant to statute

Judicial notice of a fact may be required by statute.
For example, s 3 of the Evidence Act 1845 (UK) & s 11 of the Evidence Act (1851) sets out a list of official documents that you may take judicial notice of (without having to provide evidence) including:

- any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, which is sealed or impressed with a stamp or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective Act under which it is authorised: s 11 EA (1851) (UK); and
- examined or certified copies of public documents: s 14 EA (1851) (UK).

5.11.6 Admissibility of evidence

At any time during proceedings, there may be questions or objections as to the admissibility of evidence. You may admit and receive evidence that you think fit to accept, whether it is admissible or sufficient at common law.

5.11.7 Relevance

If the evidence proposed is relevant to the issues in dispute in the court case before you then, with exceptions (some exclusionary rules), it will be admissible. Evidence is generally admissible if it goes to prove or disprove a relevant fact.

All evidence which is irrelevant or insufficiently relevant to the facts in issue should be excluded. A relevant fact is that which proves or disproves a claim that:

- the prosecution or defence in a criminal case need to prove to establish their case or disprove the other side's case; or
- the claimant or defence in a civil case need to prove to establish their case or disprove the other side's case.

Generally, a statement is only evidence if the person who, for example, saw the event makes a sworn statement as to its truth. And the same generally with a document – the person who made the document or signed the document must also swear the document produced in court is the document made or signed by them (exceptions dealt with later).
Relevance is a question of degree and will have to be determined by you, according to specific facts in the case at hand.

5.11.8 Weight

If you rule that a piece of evidence is admissible, you will then need to determine what weight (the amount of importance) the evidence should be given.

Once you are satisfied that evidence is truthful you will then need to decide if the evidence you have heard is reliable. Of course, a witness can be honest but the evidence they give can be unreliable. You will have to decide what weight you give evidence you have heard when you come to a decision. The more reliable the evidence is, the more weight you give it.

To decide what weight to attach to statements rendered admissible, you should consider:

- all the circumstances to decide on the accuracy of the statement;
- if the statement was made at the same time as the occurrence of the facts stated in the statement; and
- if the maker of the statement was given any incentive to conceal or misrepresent the facts.

Relevant credibility factors include:

- relationships between parties
- alcohol and/or drugs
- performance under cross-examination
- independent evidence
- maximise / minimise role
- statements made before / after / during the incident

- consistency / inconsistency with words or written material
- time between incident and hearing
- memory
- ability to see/observe the incident (lighting, distance etc)
- motive / anger / tension / revenue.

5.12 Summary of approach to admissibility

Ask yourself:

- Is the evidence you have heard relevant to the case before you?
- If yes, is the evidence given truthful?
- If yes, how reliable is the evidence?

5.12.1 Discretion to exclude

You have a judicial discretion to exclude prosecution evidence that has been commonly used in cases where the police or prosecution unlawfully, improperly or unfairly obtained evidence.

5.12.2 The 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.

5.12.3 The hearsay rule

The general rule is that a witness can only give evidence on what they heard and saw but not give evidence of what someone else heard and saw. That is called a hearsay statement - a statement made by a person who is not a witness.

To determine whether evidence is hearsay or not, you must:

- determine the purpose for which the evidence will be used
- ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement, if the prosecution wants to rely on the evidence as being the truth of what is contained in the statement.

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 as follows:

- 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; but

- it would not be hearsay and would be admissible as evidence if, the statement is used to establish, not the truth of the statement itself, but the fact that it was made.

The reason for the hearsay rule is that 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.

The rule against hearsay evidence is qualified by common law and some statutory exceptions. However, you may exclude hearsay evidence, even if it is admissible at common law, if you consider it unsatisfactory as being hearsay.

5.12.4 Exceptions to the hearsay rule

Some of the exceptions to the hearsay rule which exist at common law or by statute are:

- confessions
- signed written statements of persons who are unavailable to give evidence at trial: s 146 CPA
- business and trade records: s 1 of the Criminal Evidence Act 1965 (CEA)
- proof by written statement: s 146 CPA (see Documentary evidence above)
- proof by formal admission: s 147 CPA (see Documentary evidence above)
- hearsay statements: s 147A CPA (see Documentary evidence above)
- discretion to allow admission of any evidence as you deem fit: s 176(5) CPA
- dying declarations
- res gestae (certain statements made during or soon after, a transaction that is the subject of the court's inquiry)
- telephone conversations.

Confessions are where the defendant has made a statement to another person out of court about the crime they are charged with. This statement is hearsay but it is admissible. The statement can be made to anyone – a police person, friend, relative, anyone. That person however must come to court and tell the court what the defendant has said to them. Sometimes what the defendant has to say will be in writing, for example, in a police statement. The confession can either admit or deny in whole, or in part, the charge. If the statement meets these conditions it will generally be admissible, even though it is a hearsay statement.

A defendant may give evidence in court either denying they made the statement or admitting the statement was made but saying it was untrue. You will need to resolve this issue in your decision. Sometimes a defendant may challenge a statement they made to the police saying it was unfairly obtained and should not be admitted in evidence. Again, you will need to resolve this challenge and decide if the evidence should not be admitted under.

5.12.5 Opinion evidence

The rule on opinion evidence is that witnesses may only give evidence of facts they have seen, heard or done and not give evidence of their opinion on what they think or believe: this is irrelevant and not admissible.

There are two exceptions to the rule on opinion evidence:

- expert opinion evidence on matters within their expertise; and
- non-experts' opinion evidence.

Expert witnesses may give opinion evidence if:

- they are qualified to do so (provide their background, qualifications and experience to establish their competence and authority to speak as an expert in the specific field); and
- the matter (issue of fact) requires such expertise beyond that of ordinary persons.

In the case of reports written by expert witnesses, it is the general rule that they are not admissible if the expert is not called as a witness.

Non-experts may give a statement of opinion on a matter to state relevant facts personally known by them and based on facts. The witness should be asked to describe the persons or circumstances prior to being asked for their opinion.

Examples of non-experts' opinion evidence:

- the identity of an object
- the handwriting of which they are familiar
- a person's age
- the speed of a vehicle
- the weather
- whether relations between two persons appeared to be friendly or unfriendly.

Sometimes it is hard to tell difference between fact and opinion. Therefore, use your common sense in deciding if the evidence is admissible, and if so, what weight you should give it.

5.13 Character evidence

5.13.1 Admissibility of evidence of bad character

The defendant:

Admissibility of evidence of bad character is not admissible if relates to the defendant. Police may not give evidence of the defendant's:

- previous convictions or previous misconduct
- bad character: s 106(e) CPA.

Exceptions:

But the defendant may in certain circumstances face cross-examination on their character where:

- the proof that they have committed or been convicted of another offence is admissible evidence to show that they are guilty of the offence they are currently charged with; or
- the defendant asked questions of any witness with a view to establishing their own good character; or has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the complainant or the witnesses for the prosecution; or
- the defendant has given evidence against any other person charged with the same offence: s 106(e) CPA.

Witnesses:

A party producing a witness cannot discredit the witness by using general evidence of bad character but may contradict the witness by other evidence.

A witness may be questioned about prior conviction(s) and the cross examiner may call evidence to prove the conviction(s) if the witness denies, does not admit or is silent as to the conviction: s 6 CPA UK.

You must decide if a witness should be compelled to answer a question on cross-examination (not relevant to the case but goes to their credibility):

- proper if the truth of their allegations would seriously affect the credibility of the witness on the matters relevant to the issues; or
- improper if:
  - on matters so remote in time or of no importance; or
  - there is a large gap between the charge made against the witness's character and the importance of their evidence.

In exercising your discretion, you may decide that:

- such questions **are proper** if the truth of their allegations would seriously affect the opinion of the court as to the credibility of the witness on the matter they are giving evidence about.
- such questions **are improper** if:
  - they relate to matters so remote in time or are of such character that even if true they would not (or only slightly) affect the opinion of the court; or
  - there is a large gap between the importance of the charges made against the witness's character and the importance of their evidence.

5.13.2 Admissibility of evidence of good character

A defendant may provide evidence of good character but doing so puts their character in issue: s 106(e) CPA. The prosecution may then cross-examine witnesses or the defendant about their character and any previous convictions.

The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the defendant, and to point to the improbability of guilt. Evidence of good character also becomes important when sentencing the defendant upon conviction of an offence.