7. Principles of criminal responsibility

- Part 3 (ss 10-53) Crimes Act 2016

7.1 Introduction

In Nauru, every criminal offence is created by a statute, regulation or by-law but not the common law. The Crimes Act 2016 (CA) is the main statute that sets out acts or omissions regarded as criminal offences.
Part 3 of the CA sets out:

- the principles of criminal responsibility,
- the elements of an offence,
- the proof of criminal responsibility, and
- the circumstances where there is no criminal responsibility.

7.2 Principles of criminal law

7.2.1 Presumption of innocence

Article 10(3) Constitution

One of the most important principles in criminal law is that the defendant is presumed innocent until proved guilty according to law: Article 10(3) Constitution.

Unless and until the prosecution proves beyond reasonable doubt that the defendant is guilty of all the elements of the offence, they are innocent in the eyes of the law. Acting on this principle, you may, for example, grant defendants bail allowing them to remain in the community while they await trial (s 4 Bail Act 2018). See the chapter on Bail.

Silence is the right of the defendant. The defendant does not have to give or call any evidence and does not have to establish their innocence. It is for the prosecution to prove beyond reasonable doubt the defendant is guilty.

7.2.2 Defendant cannot be tried twice for the same offence

Clause 10(5) Constitution

Another important principle is that a person cannot be prosecuted and punished for the same crime more than once. This rule prohibits double punishment, but also protects individuals from repeated attempts by the State to prosecute them for the same offence: cl 10(5) Constitution.

7.2.3 Burden of proof

Sections 25-28 CA
The prosecution has the burden, or responsibility, of proving their case. They must prove all the elements of the offence, beyond reasonable doubt. If, at the end of the prosecution case, the prosecution has not provided evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed: s 25.

If the prosecution has provided evidence of all the elements of the offence, then the defence has a chance to present their case and then you must decide whether the prosecution has proved their case beyond reasonable doubt, taking into account what the defence has shown.

The defendant has an evidential burden of presenting or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The defendant also has an evidential burden in relation to any of the following that is provided by a written law creating an offence and on which the defendant wishes to rely:

(a) an exception;

(b) an exemption;

(c) an excuse;

(d) a qualification;

(e) a justification.

If evidence that discharges the burden is presented by the prosecution or the court, then the defendant no longer has the evidential burden.

The prosecution has the legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

If the defence wish to rely on an alibi in their defence the notice must provide details of the place they were at the time of offending and the names and addresses of witnesses. If the defendant does not furnish the prosecution with this notice, the evidence is admissible only with your leave: s 148 Criminal Procedure Act 1972.

If you have a reasonable doubt on any of the elements, after hearing the evidence of the defence (if any) or submissions without evidence, then the prosecution has failed, and the defendant should be found not guilty.

7.2.4 Standard of proof: beyond reasonable doubt

You decide the guilt or innocence of the defendant by reason and not by emotion.

The standard of proof, on which the prosecution must satisfy you, is beyond reasonable doubt. Taking into account the evidence of the prosecution and the evidence (if any) of the defence and the submissions, you must be sure that the defendant is guilty. If you have a reasonable doubt about that then you must acquit the defendant.

See the chapter "Evidence" to find out more about the burden and standard of proof.

7.2.5 What must be proved

Physical act (actus reus)

Most offences require proof of a physical act or series of acts, conduct or omission (actus reus):

- which is not allowed by law; or
- where 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.

See the chapter "Common Offences" for examples of the elements of some common offences.

Mental capacity (mens rea)

Most offences require the prosecution to prove the defendant had a particular state of mind in addition to the actus reus requirement. It is an essential element of every offence, unless specifically not required by the statute creating the offence.

The state of mind could be:

- Intention: the defendant means to do something, or desires a certain result (it can include deliberate or negligent acts or omissions).
- Recklessness: although the defendant does not intend the consequences, the defendant foresees the possible, or probable, consequences of their actions and takes the risk.
- Knowledge: knowing the essential circumstances which constitute the offence.
- Belief: mistaken conception of the essential circumstances of the offence.
- Negligence: the failure of the defendant to foresee a consequence that a reasonable person would have foreseen and avoided.

It is then open to the defendant to point to an absence of intention, knowledge or recklessness (mens rea) or bring sufficient evidence on which a finding of absence of intention could reasonably be based. The defendant does not have to prove that there was no intention, knowledge, or recklessness (mens rea)—it is for the prosecution to prove there was such an intention, knowledge, or recklessness, beyond reasonable doubt.

In most cases, proof that the defendant did the prohibited act is also sufficient on first impression (prima facie) of evidence of intention. You can infer intention from the fact that the defendant committed the essential act, presuming that individuals intend the natural consequences of their actions: see *R v Lemon* [1979] 1 All ER 898.

If the issue is whether an act was accidental, intentional or done with particular knowledge or intention, evidence may be given that the act formed part of a series of similar occurrences, in each of which the defendant was involved.

If, after hearing the defence evidence, you are not satisfied beyond reasonable doubt that the defendant had the necessary mens rea (intention, knowledge, recklessness, etc) then you must dismiss the charge.

7.3 Criminal responsibility

A defendant may be exempt from criminal responsibility if any of the provisions of Division 3.6 (ss 40-53) CA apply (details of these offences are set out below). Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

All common law rules which provide for a justification, excuse or defence still apply to an offence under the CA, or under any other statute, unless they are altered by or are inconsistent with that statute or any other statute.

Generally, a defendant's case will rely on one of the following:

- The prosecution has not proved all the elements beyond reasonable doubt.
- They have a specific affirmative defence, specified in the actual offence (for example without lawful excuse, reasonable excuse, or reasonable cause or lawful justification).
- They were not criminally responsible under Division 3.6 of the CA or the common law.

In the case of a specific defence or lack of criminal responsibility under Division 3.6 of the CA or the common law, the defendant must provide some evidence in support of the defence. It is then the prosecution that must exclude that defence beyond reasonable doubt.

The exception is insanity. In this case, it is for the defendant to prove, on the balance of probabilities, that they were insane at the time of the offence and therefore did not have the required intention for the offence.

Exemptions from criminal responsibility in Division 3.6 of the CA or under the common law can be divided into two categories:

1. The defendant did not have the mental intent or was acting involuntarily. These defences include:
   - limited or no criminal liability of children,
   - mental impairment,
   - intoxication,
   - mistake or ignorance of fact, and
   - mistake or ignorance of law.

2. Excuses or circumstances which justify, in law, the conduct of the defendant. In these cases, the defence need only point to evidence in support and then the prosecution must disprove that defence beyond reasonable doubt. These include:
   - claim of right,
   - intervening events,
   - duress,
   - sudden or extraordinary emergency,

- self-defence,
- lawful authority,
- surgical operations and medical treatment,
- other statutory defences.

7.3.1 Children and criminal responsibility

Sections 40 and 41 CA

A child under the age of 10 years old is not criminally responsible for an offence. A child aged from 10 years to under 14 years old can only be criminally responsible for an offence if the child knows that their conduct is wrong.

The prosecution has the burden of proving that the child knows that their conduct is wrong. That is a question of fact. See *Republic v RD* [2019] NRSC 21 and *Republic v DG* [2019] NRSC 20: in both cases Khan J quoted the House of Lords decision in *C v DPP* [1999] 2 All ER 43:

> "The presumption that a child between the ages of 10 and 14 was doli incapax and the rules of the presumption could only be rebutted by clear positive evidence that the child knew that his act was seriously wrong, and that the evidence of the acts amounting to the offence itself was not sufficient to rebut the presumption, were still part of English Law."

In *Republic v TR* [2020] NRSC 36, Khan J summarised the test as follows:

> "a. The prosecution must rebut the presumption of doli incapax as an element of the prosecution case.
> b. The child knew that the act was seriously wrong as opposed to naughty.
> c. The evidence relied upon by the prosecution must be strong and clear beyond all doubt or contradiction.
> d. The evidence to prove the accused's guilty knowledge, as defined above, must not be the mere proof of doing the act charged, however, horrifying or obviously wrong the act may be.
> e. The older the child is the easier it will be for the prosecution to prove guilty knowledge."

Capacity or understanding may be proven by:

- calling any person who knows the child and is able to show that the child did know that they ought not to commit the offence (eg: teachers, parents, relatives),
- the investigating officer asking the following questions:
  - Did you know that what you did was seriously wrong?
  - Why did you know it was seriously wrong?
  - Would you have done what you did if a police officer, your parents, teachers, village elders or your pastor could see you?

The Convention on the Rights of the Child (CRC) requires that there be a stated minimum age of criminal responsibility and the CRC committee provides non-binding guidance that this age should be between 14 and 16 years. The global average age of criminal responsibility is 12.

Nauru's age of criminal responsibility, being age 10-13 is below international guidance. This means that to read the Crimes Act consistently with the CRC, magistrates should require the prosecution to provide a high standard of proof that children aged 10-13 had capacity to know they were doing wrong, through applying a strong presumption they did not have capacity to form the relevant intent.

It is also incumbent on magistrates to apply adapted, restorative approaches tailored to the circumstances of all children, including those aged between 10 and 13 years. This includes maximising diversion from prosecution and if the criminal matter does proceed, ensuring the child has legal representation and that the procedure and the sentence reflect the young age of the offender.

7.3.2 Mental impairment

Section 42 CA

Due to the requirements to prove the defendant's criminal state of mind, those who are unable to appreciate the quality or nature of their acts due to mental disease should not be held criminally liable for those acts.

No person is responsible for an act or omission that would otherwise be an offence, if at the time of the act or omission, the person was suffering from a mental impairment that had the effect that the person:

- did not know the nature and quality of the conduct,
- did not know that the conduct was wrong, or
- was unable to control the conduct.

A person is presumed not to have been suffering from a mental impairment. That presumption is displaced if it is proved on the balance of probabilities. The question whether the person was suffering from a mental impairment is one of fact.

If you are satisfied that a person is not criminally responsible for an offence only because of a mental impairment, then you must return a special verdict that the person is not guilty of the offence because of mental impairment.

This is explored in *Republic v Baguga* [2022] NRSC 10:

> "S.111 of the Criminal Procedure Act 1972 provides that if the court were to find that the accused committed the act but was not criminally responsible by virtue of the provisions of s.42 of the Act at the time then the court shall make a "special finding" that the accused is not guilty by "reason of insanity". Where such a "special finding" is made then the court shall report the case for the order of the President, and shall meanwhile order that the accused be kept in custody in such place and in such manner as the court shall direct. The President may order that the accused be confined in a hospital or in prison or other suitable place of safe custody.
> ...

> S.42 of the Act speaks about "mental impairment" whereas s.111 of the Criminal Procedure Act 1972 speaks of "by reason of insanity". For practical purposes both "mental impairment" and "insanity" mean the same thing."

The key guidance is to identify possible mental impairment as early as possible in the process and if necessary, order an assessment by an expert (either a psychiatrist or a psychologist) so that the court has the information it needs to decide whether, on the balance of probabilities, the person understood what they did, and that it was wrong.

These steps are important because people with mental impairments are heavily overrepresented in pre-trial detention and in prisons, highlighting how courts may not always properly take these conditions into account in criminal justice processes, resulting in unfairness and even unlawful discrimination against people due to their disabilities.

In any of these scenarios, the condition must so severely impair the defendant's mental faculties and lead them not to know the nature and quality of the act that they were doing, or that they did not know that what they were doing was wrong: see the *Rules in M'Naghten's case* (1843) 10Cl & F 200 at page 210; 8ER 718 at 722:

> "The jurors ought to be told that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did know it, that he did not know he was doing what was wrong."

The term 'disease of the mind' has often been defined by what it is not. It is not:

- a temporary problem of the mind due to an external factor such as violence, drugs, or hypnotic influences;
- a self-inflicted incapacity of the mind;
- an incapacity that could have been reasonably foreseen due to doing or omitting to do something, such as taking alcohol with pills against medical advice.

The focus is on the state of mind of the defendant and whether they appreciated that what they were doing was wrong. See *R v Macmillan* [1966] NZLR 616 (CA).

7.3.3 Intoxication

Section 43 CA
A person is not criminally responsible for an offence if their conduct that constituted the offence was a result of intoxication that was not self-induced. Intoxication includes states produced by alcohol, drugs, or another substance.

Intoxication is "self-induced" unless it came about:

- involuntarily,
- because of fraud, sudden or extraordinary emergency, accident, reasonable but mistaken belief, duress or force,

- from the use of a drug for which a prescription is required and that was used in accordance with the directions of a medical practitioner or dentist who prescribed it, or
- from the use of a drug for which no prescription is required and that was used for a purpose, and in accordance with the dosage level, recommended by the manufacturer.

Evidence of self-induced intoxication cannot be considered in deciding whether a fault element of intention existed for a physical element that consists only of conduct. You can still consider evidence of self-intoxication in deciding whether conduct is voluntary.

7.3.4 Mistake or ignorance of fact

Sections 44 and 45 CA

A person is not criminally responsible for an offence that has a physical element for which there is a fault element other than negligence if:

- when engaging in the conduct making up the physical element, the person is under a reasonable but mistaken belief about, or ignorance of, the facts; and
- the existence of the mistaken belief or ignorance negates a fault element applying to the physical element.

If the offence has a physical element for which there is no fault required (strict liability), a person is not criminal responsible if

- when engaging in the conduct making up the physical element, the person:
  - considered whether or not facts existed; and
  - was under a reasonable but mistaken belief about, or ignorance of, the facts; and
- had the facts existed the conduct would not have been an offence.

Under the common law, if an ingredient of an offence includes (expressly or by implication) a requirement of intention, knowledge or subjective recklessness, the defendant is entitled to be acquitted if such a state of mind is absent at the time of the conduct. Even if this results from a mistake of fact which may not have been reasonable or based on reasonable grounds: *R v Wood* [1982] 2 NZLR 233 (CA) at 237, *R v Metuariki* [1986] 1 NZLR 488 (CA), *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) (cited in Robertson Finn (Ed) Adams on Criminal Law - 2013 Student Edition (Brookers, Wellington)) at pp 59 and 60.

This is so even though the defendant may have thought of the risk, but honestly concluded that it would not eventuate: *R v Hay* (1987) 3 CRNZ 419 (HC).

The conscious taking of a risk which is unreasonable will remain reckless even though the offender mistakenly believed that the degree of risk had been reduced: *Jefferson v Ministry of Agriculture and Fisheries* (High Court, Rotorua, M286/85, 12 August 1986, Barker J).

In all cases, the reasonableness or otherwise of a supposed mistake, or ignorance, will be relevant to the credibility of the claim, but reasonableness is not essential: *R v Metuariki* [1986] 1 NZLR 488 (CA).

For the common law defence of mistake of fact to succeed:

- the prosecution must prove the unlawfulness of the defendant's action;
- the defendant must have been under an honest, but mistaken, belief as to the existence of any state of things;
- it does not matter that the mistake was unreasonable; and
- the offence must have been committed while holding that honest but mistaken belief.

Whether the defendant was under an honest but mistaken belief is taken from the evidence presented: did the defendant have a genuine and honest belief as to the state of things, even though they were mistaken in that belief?

Se *Republic v Quadina* [2023] NRSC 18 where the defendant was charged with rape and he claimed that he held "a reasonable and honest belief that [the victim] was consenting to sexual intercourse". Acting Chief Justice Khan explored the defence of "mistake of fact" in finding the defendant guilty of rape.

See 11 Halsbury's Laws of England, 4th Ed, para 21 and authorities there cited in *Director of Public Prosecutions v Morgan* [1976] AC 182; [1975] 2 All ER 347.

See also: *Millar v Ministry of Transport* [1986] 1 NZLR 660 (CA) at 667 and 668, *R v Wood* [1982] 2 NZLR 233 (CA) at 237, and *R v Metuariki* [1986] 1 NZLR 488 (CA).

7.3.5 Mistake or ignorance of the law

Section 46 CA
The fact that a defendant is mistaken about, or ignorant of, the law is not an excuse. The prosecution does not have to prove the defendant's knowledge of the law to prove its case. However, you may take this into account when determining the appropriate sentence.

The exception to this rule is where knowledge of the law is expressly set out in a statute as being an element of an offence, in which case:

- the defendant may raise evidence that they did not know that their acts or omissions were against the law at the time of the offence; and
- the prosecution is required to prove beyond reasonable doubt that the defendant had such knowledge of the law.

7.3.6 Claim of right

Section 47 CA

Claim of right is based on a common law defence of an honest belief that the act was lawful. A person is not criminally responsible for an offence that has a physical element relating to property if:

- at the time of the conduct constituting the offence, the person is under an honest and reasona
- ble but mistaken belief about a proprietary or possessory right in relation to the property; and
- the existence of that right would negate a fault element for any physical element of the offence.

Claim of right does not negate criminal responsibility for an offence relating to the use of force against a person.

For example, this defence may be raised for the offence of theft. When successful, a claim of right means the conduct does not attract criminal (or civil) liability. A defendant may have a valid defence if they have an honest belief that they had a legal right to take the goods in question.

7.3.7 Intervening events

A person is not criminally responsible for an offence if:

- strict liability or absolute liability applies to all or any of the physical elements of the offence; and
- the physical element to which strict liability or absolute liability applies exists:
  - because another person over whom the person has no control engages in conduct constituting the physical element; or
  - because of an act or event over which the person has no control; and
- the person could not reasonably be expected to guard against the bringing about of the physical element.

7.3.8 Duress

Section 49 CA

If a person engages in conduct constituting an offence under duress, they are not criminally responsible for the offence.

A person is under duress if they reasonably believe that:

- a threat has been made that will be carried out unless the offence is committed, and
- there is no reasonable way that the threat can be rendered ineffective, and

- the conduct is a reasonable response to the threat.

"Duress" does not apply if the threat is made by, or on behalf of, a person with whom the person under duress is voluntarily associating for the purpose of engaging in conduct of the kind in fact carried out.

7.3.9 Sudden or extraordinary emergency

If a person engages in conduct constituting an offence in response to circumstances of sudden or extraordinary emergency, they are not criminally responsible for the offence.

This only applies if the person engaging in the conduct reasonably believes that:

- circumstances of sudden or extraordinary emergency exist, and
- committing the offence is the only reasonable way to deal with the emergency, and
- the conduct is a reasonable response to the emergency.

7.3.10 Self-defence and defence of property

Section 51 CA

If a person engages in conduct constituting an offence in self-defence, they are not criminally responsible for the offence.

Conduct is considered to be in "self-defence" only if the person believes the conduct is necessary to:

- defend the person or another person,
- prevent or end the unlawful imprisonment of the person or another person,
- protect property from unlawful appropriation, destruction, damage or interference,
- prevent unlawful entry to land or premises, or
- remove from land or premises a person who unlawfully entered; and
- also that the conduct is a reasonable response in the circumstances as the person perceives them.

For example, if a person was to strike another who was attempting to steal their property, they would not be guilty of assault. Any action taken in defence of person or property must be reasonable considering all the circumstances.

The defence must point to some evidence to raise the defence. The prosecution may then prove, beyond reasonable doubt, that the act was not done in self-defence or defence of property or another person (as the case may be) and/or that the force used was unreasonable.

The law has always recognised a reasonable right to self-defence as a form of lawful justification of force used: see *Beckford v The Queen* [1988] 1 AC 130. At page 144 his Lordship stated that:

> "[t]he test to be applied for self-defence is that a person may use such force as is reasonable in the circumstances as he honestly believes them to be in defence of himself or another".

Gendered aspects of the right to self-defence may also need to be considered, especially the requirement that the threat faced be imminent. Women's ability to act in the moment in self-defence may be limited where they are physically weaker than the abuser, or due to the coercive control the abuser exercises within the relationship.

A person is justified in using reasonable force in defence of their property, for instance in removing a trespasser or preventing entry or restraining another from taking or destroying their goods. No more force may be used than is necessary for the purpose.

7.3.11 Lawful authority

Section 52 CA

A person is not criminally responsible for an offence if the conduct constituting the offence is authorised, justified or excused by or under a law of Nauru.

7.3.12 Surgical operations and medical treatment

Section 53 CA

A person is not criminally responsible for an offence if the conduct constituting the offence involved performing a surgical operation on, or giving medical treatment to:

- a person for the person's benefit, or
- an unborn child for the preservation of the mother's life.

This applies where the operation or treatment was performed or given in good faith and with reasonable care and skill; and performing the operation or giving the treatment was reasonable, having regard to the patient's state at the time and all the circumstances of the case.

7.3.13 Other statutory defences

There are some offences within your jurisdiction where the provision creating the offence also specifies a defence. For example, where provisions make it an offence to do something:

- "without reasonable excuse"
- "without reasonable cause"
- "without lawful justification"

Once the elements of the offence have been proved by the prosecution, the burden of proof shifts to the defendant to prove on the balance of probabilities that they had a reasonable excuse.

7.4 Extensions of criminal responsibility

7.4.1 Aiding, abetting, counselling and procuring

Section 29 CA

A person commits an offence if their conduct aids, abets, counsels or procures the commission of an offence by another person (the 'other offender'), and that other offender in fact commits the offence. This applies where the person:

- intends the conduct to aid, abet, counsel or procure the commission of an offence of the type the other offender commits; or
- intends the conduct to aid, abet, counsel or procure the commission of an offence and the person is reckless about the commission of the particular offence that the other offender in fact commits.

The offence is punishable as if the person had committed the offence. However, a person is not guilty of the offence if, before the offence is committed, the person:

- terminates the person's involvement; and
- takes all reasonable steps to prevent the commission of the offence.

This applies regardless of whether the other offender or another person is prosecuted or found criminally responsible for the offence that the person aids, abets, counsels or procures.

7.4.2 Incitement

Section 30 CA

If a person urges an offence to be committed, and intends that the offence incited be committed, they have committed an offence. Even if it is impossible to commit the offence incited, the person may still be found guilty of an offence.

However, it is not an offence to incite the commission of the offences of incitement (s 30), conspiracy (s 31), or an attempt to commit an offence (s 34).

The penalty is the lesser of:

- half the penalty the person would have been liable for if the person had committed the offence incited; and
- 10 years imprisonment.

7.4.3 Conspiracy

Section 31 CA

A person commits an offence of conspiracy if they enter into an arrangement under which the person and at least one other party to the arrangement intend to commit an offence, and at least one party commits an overt act under the arrangement. The question whether an act is overt is one of fact.

A person may be found guilty of the offence even if it is impossible to commit the offence that the person conspired to commit. Further a person may be found guilty if each other party to the arrangement is a person:

- who is not criminally responsible; or
- for whose benefit or protection the offence exists.

Even if the person and each other party to the arrangement is a corporation, the person may be found guilty of the offence.

If all other parties to the arrangement are acquitted of the conspiracy, the person may still be found guilty of an offence (unless to find the person guilty would be inconsistent with their acquittal). The offence is punishable as if the person had committed the offence.

A person is not guilty of the offence if, before the offence is committed, the person withdraws from the arrangement, and takes all reasonable steps to prevent the commission of the offence.

You may dismiss a charge of conspiracy if you consider that the interests of justice require you to do so.

7.4.4 Joint commission

Section 32 CA

Joint commission exists where a person enters into an arrangement and the person and at least one other party to the arrangement intend to commit an offence and to assist one another to commit the offence; and either:

- an offence is committed in accordance with the arrangement; or
- an offence is committed in the course of carrying out the arrangement.

To prove that the parties to the arrangement intend to commit an offence, it is not necessary to prove that the parties intend to commit a particular offence.

An arrangement may consist of a non-verbal understanding; and may be entered into before, or at the same time as, the conduct making up any of the physical elements of the joint offence was engaged in.

An offence is committed in accordance with an arrangement if:

- the conduct of one or more parties in accordance with the arrangement makes up the conduct required for an offence (the 'joint offence') of the same type as the offence agreed to; and
- to the extent that a physical element of the joint offence consists of a result of conduct—the result arises from the conduct engaged in; and
- to the extent that a physical element of the joint offence consists of a circumstance—the conduct engaged in, or a result of the conduct engaged in, happened in the circumstance.

An offence is committed in the course of carrying out an arrangement if a person is reckless about the commission of an offence that another person in fact commits in the course of carrying out the arrangement.

The offence is punishable as if the person had committed the offence.

A person is not guilty of the offence if, before any offence is committed, the person:

- withdraws from the arrangement; and
- takes all reasonable steps to prevent the commission of an offence by the parties to the arrangement.

A person may be found guilty of the offence even if:

- another party to the arrangement is not prosecuted or found guilty; or
- the person was not present when any of the conduct making up the physical elements of the joint offence was engaged in.
- it is impossible to commit the offence the person intended to commit.

7.4.5 Commission by proxy

Section 33 CA

A person commits an offence if they procure someone else to engage in conduct that (whether or not together with conduct engaged in by the person) makes up the physical elements of the offence consisting of conduct, and when that person procures the other person to engage in the conduct, the person has a fault element applying to each physical element of the offence.

The term 'to procure' generally describes advice and assistance given before the offence is committed.
The offence is punishable as if the person had committed the offence.

7.4.6 Attempts

Section 34 CA

If a person attempts to commit an offence, that is an offence which is punishable as if the offence attempted had been committed.

The person's conduct must be more than merely preparatory to the commission of the offence. As to whether the conduct is more than merely preparatory, the question is one of fact.

A person may be found guilty of the offence even if:

- it is impossible to commit the offence attempted; or
- the person in fact commits the offence.

If a person is found guilty of attempting to commit an offence, the person cannot later be charged with committing the offence.

7.4.7 Accessory after the fact

Section 35 CA

A person commits an offence if they assist another person (the 'other offender') who commits an offence. This is where the person knows the other offender committed the offence; and the person assists the other offender in order to enable the other offender to escape punishment or to dispose of the proceeds of the offence.

The penalty for being an accessory after the fact is the lesser of:

- half the penalty the person would have been liable for if the person had committed the offence; and
- 10 years imprisonment.

7.4.8 Withdrawal

Sometimes there is a gap 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 before it is completed by the principal offender.

Under the common law withdrawal should be:

- made before the crime is committed;
- communicated by telling the one counselled that there has been a change of mind (if the participation of counsellor is confined to advice and encouragement);
- communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn: *R v Becerra and Cooper* (1975) 62 Cr App R 212.

Withdrawal should give notice to the principal offender that, if they proceed to carry out the unlawful action, they will be doing so without the aid and assistance of the person who withdrew.

- name and describe the person the subject of the warrant,
- order the person or persons to whom it is directed to apprehend the person against whom it is issued, and
- be in force until it is executed or it is cancelled by the court which issued it.

You may direct that security be taken or the defendant executes a bond to ensure his or her attendance before the court at a specified time. Whenever security is taken, the officer to whom the warrant is directed shall forward the bond to the court: s 65 CPA.

A person arrested under warrant shall be brought before the court without delay: s 68 CPA.

Irregularities in the warrant either in substance or form shall not affect the validity of any subsequent proceedings unless it has deceived or misled the defendant: s 70 CPA.

Where the person, the subject of a warrant is in prison, you may issue an order to the officer in charge of such prison requiring him or her to produce the person named in the order before the court: s 73 CPA.

Defendant charged and released on bail and/or recognisance

The defendant may be released on his or her entering a recognisance, with or without sureties, for a reasonable amount to appear before the District Court at a time and place named in the recognisance where:

- a defendant 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.

For a discussion of bail and bail procedures, see the chapter on Bail.

A signed copy of the notice will be kept by the police and forwarded to the court on the date on which the offence is to be heard.
When the clerk receives the charge, he or she will forward it to you for your direction.

Defendant 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 and no later than 24 hours after the time of arrest or, if that is not reasonably possible, as soon as possible thereafter: Art 5(3) of the Constitution.

For an extensive description of the rights of arrested or detained persons, see Art 5 of the Constitution.