

## ***IV CRIMINAL RESPONSIBILITY***

### ***1 Introduction***

The Crimes Rules are the main law that sets out the offences and the rules related to them in Tokelau.

This chapter discusses:

- important principles of the criminal law;
- defences that can be used to excuse an accused from criminal responsibility;
- the range of persons who may be criminally responsible for offences;
- attempts to commit an offence; and
- offences under laws other than the Crimes Rules.

### ***2 Important Principles of Criminal Law***

#### ***(i) 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 all elements of the offence, the accused is innocent. The court must always remember this.

#### ***(ii) Burden and Standard of Proof***

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 provided evidence of all the elements of the offence, then there is no case for the accused to answer and the case must be dismissed.

If the prosecution has proved all the elements of the offence, then the defence can present its case. After the court has heard the prosecution case and anything the accused wants to say, the court must decide whether the prosecution has proved its case beyond reasonable doubt.

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 any defence evidence, you have a reasonable doubt on any of the elements, then the case must be dismissed.

(iii) Beyond Reasonable Doubt

This means that the court must be sure that the accused is guilty of the charge. On the basis of the evidence presented to the court, the court must have no reasonable doubt that the accused is guilty. If the court has any reasonable doubt, the accused is not guilty and the case must be dismissed.

(iv) What must be proved

Most offences involve two elements: the physical element and the mental element. It is necessary to prove both elements.

(v) The Physical Element

This is the physical conduct or action (eg. Hitting a person) or an omission (eg. Failure to feed a child) which is forbidden by law.

These acts or omissions are the physical elements of the offence. They just all be proved by the prosecution.

An offence may consist of one act or omission or a series of acts or omissions.

If the prosecution cannot prove that the act or omission occurred, the person cannot be convicted.

(vi) The Mental Element (Guilty Mind)

Most offences require the prosecution to prove that the accused had a particular state of mind. This is in addition to the physical element.

This mental element could be:

- intention: The accused intends to do something, or desires a certain result (eg. Throwing a stone at a window with the desire to cause damage).
- knowledge: knowing the circumstances which constitute the offence;
- belief: mistaken idea of the circumstances of the offence;
- negligence: the failure of the accused to foresee a consequence of the action, where a reasonable person would have foreseen that consequence and avoided taking that action.

The two main ideas regarding the mental element are:

- it is an element of every criminal offence, unless specifically excluded; and
- individuals are presumed to intend the natural consequences of their actions.

### ***3 General Exemptions to Criminal Responsibility***

Generally speaking, ignorance of the law is not a valid defence.

Generally, an accused will argue that he or she should not be found guilty because:

- the prosecution has not proved all elements of the offence beyond a reasonable doubt; or
- he or she has a defence specified in the law relating to the offence (eg. lawful excuse);

- one of the general defences eg. Provocation; self-defence.

Where the accused presents a defence the accused must provide evidence to support that defence. Then the prosecution must prove that evidence should be excluded.

(i) Intention

*Accident*

With the exception of absolute liability offences, an accused is not responsible for an act which occurs by accident.

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

*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 an accused is immaterial.

For example, Alo tickles Meto, intending to make her laugh and to respond playfully. If as a result Meto suffers a broken rib, Alo is guilty of an assault even if he intended otherwise.

*Motive*

The reason or motive for the behaviour is irrelevant. Even where the accused had a good motive, that motive does not affect responsibility. It may be relevant to the sentence imposed.

For example, if Meto steals from a store in order to feed her children, Meto is still guilty of theft.

*Mistake of Fact*

The law tries to punish only blameworthy acts, not those where the accused acted honestly, even if the accused was mistaken.

For example, if Meto takes a mat from Alo, believing honestly and reasonably, but incorrectly, that Alo gave her the mat, Meto is not guilty of theft.

(ii) Insanity

An accused is not criminally responsible (and cannot be convicted) 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 (ie. Insanity: Rule 116 of the Crimes Rules).

The accused must prove, on the balance of probabilities (this means it is more probable than not) that the accused was insane at the time of the offence and, therefore, did not have the required mental state.

The Crimes Rules presume every person is sane until proven otherwise (Rule 116(1)(ii) of the Crimes Rules).

If the accused had a disease of the mind but the disease did not render the accused incapable of understanding the nature or wrongfulness of the act, then the accused may still be found criminally responsible.

If a person is not guilty by reason of insanity, then they are dealt with under rule 11 of the Health Rules.

(iii) Drunkenness not an excuse for offending

Drunkenness is not a defence to a charge. This means that if a person has committed a crime, they cannot be excused because of drunkenness (Rule 82 of the Crimes Rules).

(iv) Children

A child under 10 years is not criminally responsible for any act or omission (Rule 114 of the Crimes Rules). This is because the law treats children under 10 years as being incapable of knowing right from wrong.

A child aged between 10 and 14 years is not criminally responsible for an act or omission unless it is proved that, at the time of the act in question, the child had capacity to know the act was wrong (Rule 114(2) of the Crimes Rules).

(v) Judicial Officers

Judicial officers are not criminally responsible for any act or omission done in good faith in the exercise of judicial functions (Rule 84(1) of the Crimes Rules).

(vi) Duress

Generally, a person who was forced to do an act by another person is not held criminally responsible for that act because they did not act of their own free will.

Metu steals goods in a shop. She forces Alo, by threat of violence to his children, to hide and remove the goods from the shop. Alo is not guilty of theft.

### (vii) Defence of Person or Property

A person has a right to defend themselves and their property. Therefore, self-defence could be a defence to a charge (Rule 116 of the Crimes Rules).

For instance, if Meto punches Alo, and Alo then punches Meto to defend himself, Alo is not guilty of assault.

### General Principles

- A person may use force that is reasonable in the circumstances if they honestly believe that use of force is necessary as a matter of defence.
- 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 be taken into account.
- Where an accused has used force to defend property, the harm to the property must be serious in order to excuse the accused from committing an offence.
- Where the accused raises the defence, the accused must provide evidence of the need and circumstances. Then the prosecution must prove that the accused did not act in self-defence or in defence of property.

### (viii) Provocation

A defence of provocation could reduce a charge of murder to manslaughter. This may apply where the person killed or another person provoked the accused.

Provocation may be relevant to the penalty imposed where something was said or done which was enough in the particular circumstances to cause the person to lose the power of self-control (see Rule 7 of the Crimes Rules).

#### 4 *Parties*

The law recognises that there can be more than one person connected with an offence. This includes:

- Those who actually commit the offence (principal offenders);
- Those who before the offence contribute in some way to the commission of the offence through encouragement, advice or assistance (accessories);
- Those who plan together to commit an offence;
- Those who aid an offender after the commission of an offence (accessories after the fact).

##### (i) Principal Offenders

A principal offender is the person whose conduct satisfies the elements of the offence in question.

In order to be a principal offender, it must be proved in respect of the accused that both the mental and physical elements of the offence exist. For example, if Anita punches Feleti, Anita would be considered the principal offender for the offence of assault.

##### (ii) Accessories

Anyone who commits any of the following acts may be guilty of committing the offence:

- anyone who does any act for the purpose of enabling or assisting another person to commit the offence;
- anyone who encourages another person in committing the offence;
- any person who counsels any other person to commit the offence; or
- arranges for the principal offender to commit an offence (Rule 113(iv) of the Crimes Rules).

The physical element of an offence by an accessory involves three concepts:

- assisting, encouraging or arranging;



- the offence committed by the principal offender;
- the behaviour of the accessory caused, directly or indirectly, the offence.

The mental element for an accessory is more specific than that required for a principal offender. Recklessness or negligence is not enough. The mental element must be:

- knowledge: the accessory must know the essential matters of the offence; and
- intention: the accessory must have the intention to assist, encourage or arrange.

A person who is an accessory after the fact to an offence, is guilty of the offence (Rule 113 of the Crimes Rules).

The elements for accessories after the offence are:

- the person assisted has committed an offence; and
- the defendant (accessory) knew that person had committed an offence; and
- the defendant (accessory) received or assisted the offender
- the defendant (accessory) received or assisted the principal offender in order to enable the principal offender to escape punishment.

## **5 Attempts**

A person is criminally responsible for attempting to commit an offence, and is liable for the same penalty as if they had committed that offence (Rule 80 of the Crimes Rules).

An attempt to commit an offence is anything done in order to commit that offence (Rule 80 of the Crimes Rules).

An attempt requires:

- some act or omission that is connected to the commission of the offence; and

## Attempts

- intention to commit that offence; and
- interruption of the offence either voluntarily (by the offender), or otherwise.

For example, Feleti intends to steal a piglet from Puga's pigsty. He is walking along the path near Puga's pig. He is carrying a bag, string and a knife. Unexpectedly, Puga arrives at the pigsty. Feleti quickly goes home. Puga reports the matter to the Police. Feleti has committed the offence of an attempt to steal.

In some cases, it would be impossible for the offender to commit the offence intended. Impossibility alone is not enough to excuse the offender.

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

### **6 *Offences under other laws***

This book uses examples from the Crimes Rules. There are many other laws with offences. They are all within the jurisdiction of the Commissioner. It is, for instance, an offence to disobey a rule made by the village council; it is an offence to do banking or insurance business without the approval of the Council for the Ongoing Government; it is an offence to fail to register a birth or a death.