

## ***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.

## *V EVIDENCE*

Evidence means all statements, documents and exhibits which a court permits or requires in relation to matters of fact under inquiry in the case (Rule 163 of the Crimes Rules).

### *1 Any court may receive documentary, real or oral evidence*

#### (i) Documentary Evidence

This consists of information in written or visual form. These documents may include:

- Public documents (village or General Fono records, judicial documents, public registers)
- Private documents (business records, agreements, deeds)
- Plans and reports
- Certificates
- Statements in documents produced by computers
- Tape recordings and photographs.

If an original document is available, it should be produced. This is known as the best evidence rule.

If the original document cannot be produced in proceedings, a copy may be produced because it is the best evidence that is available.

Some matters need not be proved by evidence. Commissioners shall take judicial notice of all enactments in force in Tokelau, and of the government seal (Rules 169 of the Crimes Rules).

(ii) Real Evidence

Real evidence usually refers to objects that are produced at trial. For example, the prosecution may produce as evidence the weapon that was allegedly used to injure a complainant.

Often little weight is attached to real evidence unless it is accompanied by other evidence identifying the object and connecting it to the facts in issue.

When documentary evidence is admitted in court, it becomes an exhibit. The court must ensure that proper care is taken to keep the evidence free from damage, and that the evidence is available for inspection by both the prosecution and the defence.

(iii) Oral Evidence

Oral evidence consists of statements of fact.

## ***2 Competence and Compellability***

All persons are competent to testify unless the court considers that the witness is not able to understand the questions or give rational answers to those questions by reason of age, disease or similar cause (Rule 164 of the Crimes Rules).

Compellability means a court can require a witness to give evidence. All witnesses are compellable, unless the Rules expressly state that they need not testify (Rule 164 of the Crimes Rules).

### **3 Privilege**

There are strict rules concerning information that is communicated to people during some relationships that attract legal privilege. Persons generally cannot be compelled if information was communicated to them in privileged circumstances.

A minister of religion must not disclose any confession made to the minister of religion in a professional context unless the person who made the confession has expressly consented to its being divulged (Rule 170(1) of the Crimes Rules).

A doctor must not, without the express consent of the person who made the confession, divulge in proceedings (unless the sanity of the patient is in dispute) any communication made to the doctor that was necessary to prescribe or act for the patient (Rule 170(2) of the Crimes Rules).

A lawyer must not, without the express consent of the client, disclose any communication made to the lawyer in the course and for the purpose of employment as a lawyer (Rule 170(3) of the Crimes Rules).

#### *Oaths*

All evidence must be given on oath or affirmation (Rule 167 of the Crimes Rules).

Children under 14, however, do not swear the oath set out in Rule 167. Before giving evidence children must make the following declaration: “I promise to speak the truth, the whole truth and nothing but the truth” (Rule 168 of the Crimes Rules).



#### **4 *The Accused***

The accused is a competent and compellable witness (Rule 132 of the Crimes Rules).

The Commissioner may, at any stage in proceedings, ask any questions of the accused that the court thinks necessary or proper for arriving at the truth in respect of the case. The answers of the accused shall be evidence in the case (Rule 132(1) of the Crimes Rules).

A confession made in relation to a crime shall not be rejected on the ground that a promise or threat or inducement has been held out to the person confessing, if the judge is satisfied that the means by which the confession was obtained were not likely to cause an untrue admission of guilt to be made (Rule 165 of the Crimes Rules).

The court may expressly summon a compellable witness to appear in court. If a witness fails to attend in answer to the summons or leaves the village without the permission of the court, the court may issue a warrant for the arrest of that person using form 6 of schedule 1 (Rule 102(2) of the Crimes Rules).

All evidence should be taken in the presence of the accused unless the accused has been given notice to appear before the Commissioner and fails to appear (Rule 103 of the Crimes Rules). If the accused has been given notice to appear and fails to do so the court may adjourn the case or may try and sentence the accused in the absence of the accused.

## **5 Use of Evidence**

The purpose for examining a witness called by a party is to gain evidence from the witness that supports that party's case.

A witness may give evidence as to the visual identification of the accused. Such evidence needs to be treated with caution because honest witnesses may have made mistakes regarding the identity of the accused.

The purpose of cross-examining witnesses is twofold. First, to gain evidence that supports the cross-examining parties' version of the facts in issue. Second, cross-examination may weaken the evidence given by the witness when first questioned.

Only the Commissioner may ask questions of the accused (Rule 132 of the Crimes Rules). If a party wishes to ask questions of the accused, those questions must be put to the Commissioner. It is for the Commissioner to ask those questions of the accused, if doing so is appropriate.

An important part of examining a witness is to establish, or try to diminish, the credibility of the witness. A cross-examining party will seek to attack a witnesses credibility by proving that a witness has made other statements inconsistent with their present testimony. If it is established that the accused or other witness has lied, this is relevant to his or her credibility. It does not mean the accused is guilty. People lie for many reasons. The witness may, however, be found guilty of perjury under Rule 76 of the Crimes Rules.

As a general rule, it is not open to the prosecution to produce evidence of the bad character of the accused. An accused may, however, put their own character in issue by bringing evidence of good character. In such circumstances, the prosecution may cross-examine witnesses (other than the accused) about the accused's character.