

# C: CRIMINAL

This part describes the criminal jurisdiction of the Island Court. It:

- sets out the extent of your criminal jurisdiction;
- lists the range of offences you may hear and determine;
- describes the processes, from pre-trial to acquittal or sentence;
- provides best practice guidance in the conduct of criminal proceedings;
- provides a guide to decision making;
- provides a guide to sentencing;
- sets out the rights of appeal; and
- provides guidance for dealing with children and young people.



# 1 Criminal Jurisdiction of the Island Court

See *ss5 and 6 and Schedule 2 Island Courts Act (Cap 3)*.

Island Courts can only hear and determine summary offences punishable by a maximum sentence of:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

Additionally, Island Courts may hear and determine the specific offences listed in *Schedule 2 to the Island Courts Act (Cap 3)*, provided that the sentence passed by the Island Court does not exceed:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

In practice, the Police will decide which Court will hear the more serious cases.

## 2 Offences

Certain offences are more frequently before the Island Court, particularly offences involving:

- alcohol;
- driving; and
- sanitation.

You need to know and understand the most common offences very well. They are contained in the following Acts, which you should study:

- *Penal Code (Cap 8)*;
- *Public Order Act (Cap 9)*;
- *Alcoholic Drinks Act (Cap 69)*;
- *Traffic Act (Cap 71)*;
- *Public Health Act (Cap 35)*.

## Interpretation

These Acts contain definitions of key words in *s2* (except for the *Penal Code (Cap 8)*, which has definitions in *s4*). See Part A, 4.3 for guidance on understanding and interpreting legislation. If you have any doubt about the meaning of any section or words in these Acts, ask the Resident Magistrate, who can provide guidance. You should only seek help from a member of the Judiciary or a lawyer appearing before you.

The following table lists the offences within the jurisdiction of the Island Court.

Act	Section	Description
<i>Penal Code (Cap 8)</i>	<i>s60</i>	Spreading false rumours, etc
	<i>s82</i>	Challenging to fight a duel
	<i>s83</i>	Threatening violence
	<i>s115</i>	Offences relating to judicial proceedings (where the Court or proceeding is before an Island Court)
	<i>s117</i>	Resisting arrest and escape
	<i>s133</i>	Indecent assault on a female
	<i>s167</i>	Idle and disorderly persons (except proviso)
	<i>s169</i>	Offences in public ways, etc
	<i>s170</i>	Drunk and incapable
	<i>s171</i>	Shouting, etc in town, etc
	<i>s172</i>	Polluting or obstructing watercourses
	<i>s173</i>	Posting on walls without consent of owner
	<i>s174</i>	Inciting dogs to attack
	<i>s181</i>	Endangering property with fire, etc
	<i>s182</i>	Criminal trespass
	<i>s183</i>	Sorcery
	<i>s223</i>	Unlawful wounding
	<i>s237</i>	Common assault
	<i>s238</i>	Assault causing bodily harm
	<i>s240</i>	Assault punishable with 2 years' imprisonment
	<i>s254(1)</i>	Simple larceny

<b>Act</b>	<b>Section</b>	<b>Description</b>
<i>Penal Code (Cap 8)</i>	<i>s268</i>	Larceny of dog
	<i>s269</i>	Larceny of creatures not subject of larceny at common law
	<i>s270</i>	Larceny of fish
	<i>s272</i>	Larceny of trees (where value of trees does not exceed \$50)
	<i>s273</i>	Larceny of fences (where value of fence does not exceed \$50)
	<i>s274</i>	Larceny of fruit and vegetables (where value of food does not exceed \$50)
	<i>s275</i>	Damaging fixtures, trees etc with intent to steal (where value of property does not exceed \$50)
	<i>s285</i>	Unlawful use of vehicle
	<i>s306</i>	Receiving (where value of property does not exceed \$50)
	<i>s307</i>	Receiving goods stolen outside Tuvalu (where value of goods does not exceed \$50)
	<i>s318</i>	Injuring animals
	<i>s319(1)</i>	Malicious damage (where value of property does not exceed \$50)
	<i>s322</i>	Removing boundary marks with intent to defraud
	<i>s323</i>	Wilful damage, etc to survey and boundary marks
<i>Dogs Act (Cap 46)</i>	<i>s5</i>	Dog attacking person or animal on public road
	<i>s10</i>	Non-registration of dog
	<i>s13</i>	Falsely describing dog
<i>Traffic Act 1983 (Cap 71)</i>	<i>s13</i>	Driving without a licence
	<i>s14</i>	Breach of provisional driving licence
	<i>s17</i>	Failure to produce licence within 48 hours

<b>Act</b>	<b>Section</b>	<b>Description</b>
<i>Traffic Act 1983 (Cap 71)</i>	<i>s20</i>	Careless driving
	<i>s22</i>	Taking vehicle without authority
	<i>s23</i>	Driving under influence of alcohol or drugs
	<i>s24</i>	Disqualification in certain cases
	<i>s25</i>	Disqualification
	<i>s30</i>	Traffic Regulations
<i>Alcoholic Drinks Act 1984 (Cap 69)</i>	<i>s81</i>	Offences relating to sour toddy licences
	<i>s84</i>	Drinking by prohibited person
	<i>s92</i>	Selling alcohol without licence
	<i>s93</i>	Sale outside permitted hours /keeping licensed premises open/ drinking on licensed premises outside hours
	<i>s98</i>	Drunkenness on licensed premises
	<i>s99</i>	Persons drinking under age
	<i>s105</i>	Possession of weapon under influence of alcohol
	<i>s118</i>	Drinking in a prohibited area
	<i>s120</i>	Refusal to leave licensed premises
<i>Public Order Act (Cap 9)</i>	<i>s15</i>	Disorder in public places
	<i>s16</i>	Possession of offensive weapon at public meeting or procession
	<i>s25</i>	Going armed in public
	<i>s28</i>	Fighting
	<i>s29</i>	Proposing violence at public gatherings
	<i>s34</i>	Possession of offensive weapon in public place

<b>Act</b>	<b>Section</b>	<b>Description</b>
<i>Marriage Act (Cap 29)</i>	<i>s12(6)</i>	Wilful objection to marriage without sufficient and proper cause
<i>Public Health Act (Cap 35)</i>	<i>s3</i>	Breach of Regulations for protecting and advancing public health
<i>Falekaupule Act 1997</i>	<i>s53</i>	By-laws for regulating matters such as sanitation, pig pens and as may be necessary from time to time

Guidance for some of the common offences is included in Part D Common Offences.

### **3 Criminal Procedure**

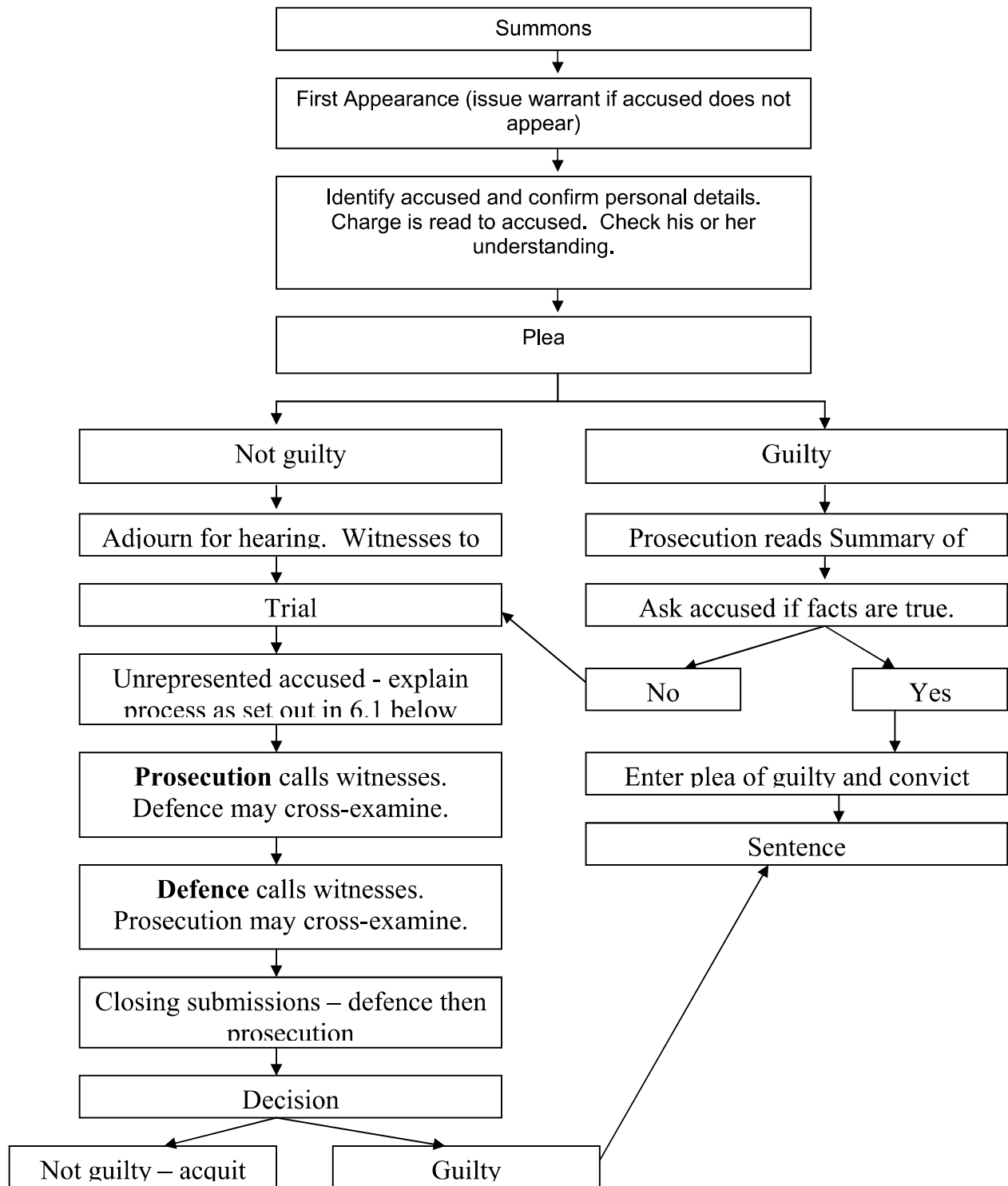
Procedures establish how an offender is brought to Court and how the case is dealt with in Court.

For the Island Court, procedures are found in the *Island Courts Act (Cap 3)*, and *Regulations*.

Where the *Act* or *Regulations* are silent on how something is done, refer to the *Criminal Procedure Code (Cap 7)*, which sets out the practice and procedure in the Magistrates' Court and High Court: *reg 50 Island Courts Regulations*.

The diagram on the next page shows the steps in a criminal case.

## Criminal Procedure





## 4 How a Case Gets to Court

Criminal proceedings (known as a prosecution) are normally filed by the Police on behalf of the Crown against a person alleged to have committed an offence. Other authorities like the Kaupule may also file charges against people for alleged offences, such as under the *Public Health Regulations*.

### 4.1 The Charge

Before a criminal case proceeds to Court, the President of the Court will be asked to sign a charge (Form 1). The charge is prepared by the Police or Kaupule.

The charge gives the name of the person who is accused of an offence, details of what the Police allege that the accused has done, and the law the Police allege that the accused has breached. Remember that these are allegations which have to be proved or admitted and the **accused is innocent until proven guilty**.

Frequently, in the Island Court, the charge has details of when and where the charge will be heard. This is served as a summons. This can be separate or on the same document.

**A charge must be brought not more than 6 months after the offence was committed:** *reg13 Island Courts Regulations; s204 CPC.*

### 4.2 The Summons

A summons is a formal notice requiring a person to appear before the Court on the date and time stated in the summons.

The summons is prepared by the Court Clerk (Form 2).

The Court Clerk arranges for the Police to serve the summons on the accused in person.

Where the accused is off island, the charge and summons should be prepared and sent to where the accused is living.

- That is not a problem if on Tuvalu.
- If the accused is overseas, the case cannot proceed until he or she returns.

A case cannot be transferred from one island to another. It must be heard where the summons has been issued. Service can take place on another island for a person to attend on the other, provided that reasonable travel arrangements can be made by the accused.

## 5 The First Hearing

The accused should attend at the time and place where the case will be heard by the Court.

### Where an accused does not appear in Court

- Establish that he or she has been served with the summons with sufficient time to comply. This may be done by Affidavit of Service (Form 3) or by the person who served the accused giving evidence of that fact.
- If service has been proved, issue an arrest warrant (Form 4).
- If the summons has not been served, adjourn the matter to allow service.

### 5.1 Unrepresented Accused

In the Island Courts, the accused has an automatic right to legal advice. However, as there is limited access to legal advice, this may not be available even if he or she may require help.

Make sure that legal advice is given if it is needed. Explain that the Peoples Lawyer can assist by telephone and consider papers on request, if necessary.

It is important that the accused understands the charge against him or her, and is able to respond to the allegation made.

In Nui, for example, a charge should be in either Tuvaluan, Nuian or Kiribati language, dependant on the person.

It is important that you clearly record what an unrepresented accused has been told and his or her responses: see *Tasi Togiga v R* (HC 8/03).

### 5.2 The Prosecution

On the islands, the Police officer is the investigating officer as well as the Prosecutor.

This can cause difficulties, as they are two separate roles:

- the duty of Police as Prosecutor is to present and argue the case for the prosecution;
- when a Police officer is giving evidence as a witness, they are in no different position from anyone else coming before the Court. Their evidence is judged by the same standards as evidence from other sources – it is no more or less credible.

In any case before the Court, the duty of the person prosecuting (the Police or Kaupule) is to the Court. They must not mislead or deceive the Court. They must:

- assist the Court to arrive at a conclusion which is in accordance with truth and justice; and
- place the case impartially before the Court, including all relevant facts.

If a charge has been filed after 6 months has passed since the offence took place, the case should be withdrawn by the Police.

### **5.3 Defence Counsel**

A defence lawyer also has a duty to the Court. They must not mislead or deceive the Court, but remember that their interests are those of the accused, and they are under no duty to be impartial.

### **5.4 Arraignment and Plea**

When a case is ready to proceed, begin by:

- identifying the accused; and
- confirming the accused's personal details - name and address.

The charge will be read to the accused by the Court, giving particulars and details of the offence.

In every case, you must be satisfied that:

- the accused understands what has been read; and
- he or she knows what is meant by guilty or not guilty. Although the facts may be true, the law may give a defence. Explain this to avoid any misunderstanding.

Never take for granted that the accused understands the charge. Unless the accused clearly understands the nature of the offence, he or she will not be able to work out if there is a defence and what to plead. If you are not satisfied that the accused understands, explain it in a way that he or she will. If the accused still does not understand, adjourn the hearing so that he or she can get legal assistance.

When that has been done, the accused will be asked whether he or she is guilty or not guilty (whether he or she admits or denies the offence).

If the accused enters a guilty plea, then the case may proceed on the same day. If not, the case should be adjourned for hearing.

Where an accused refuses to enter a plea, then the Court should enter a plea of not guilty. Record the plea clearly on the Court record.

## 5.5 Guilty Plea

When the accused pleads guilty, ask him or her to sit down.

### **Police Summary of Facts**

Tell the accused to listen very carefully to the Summary of Facts. Explain that he or she will be asked at the end whether the facts are true.

The facts will be read out by the Prosecutor. The Prosecutor explains what happened, where, and the consequences.

Ensure that the facts given support the charge brought. The Prosecutor must present sufficient information to establish all the elements of the offence.

Ask the accused whether or not the facts read to the Court are true.

If the accused admits the truth of the charge, enter a plea of guilty, convict the accused and pass sentence.

However, if the accused admits the truth of the charge, but makes some comments, you must listen carefully because sometimes those comments indicate a possible defence. Where any comments made by the accused amounts to a defence, you must enter a plea of not guilty for the accused.

If the accused disputes any of the facts, consider whether the disputed facts are relevant to the offence. Remember that a plea of guilty is a plea to the **elements** of the offence, not necessarily acceptance of the Summary of Facts. If the facts that the accused disputes are not relevant to the elements, enter a plea of guilty, convict and pass sentence. If the disputed facts are relevant to the elements, you must enter a plea of not guilty for the accused.

## 5.6 Plea by Letter

In certain offences, a letter admitting the offence can be accepted by the Court, and the Court may excuse the attendance of the accused. This letter has to be signed and dated.

The letter will be read out to the Court and the plea entered. The Prosecutor will proceed to read out the facts, and any other relevant information.

The Court will sentence the accused in their absence and the Clerk will write to the accused to advise him or her of the decision made.

This should be done only where the offence is minor.

The person should be in attendance where the sentence is:

- an order disqualifying from driving; or
- imprisonment.

The case should be adjourned and the accused summoned for that purpose.

## **5.7 Not Guilty Plea**

If the accused pleads not guilty, or the Court enters such a plea on behalf of the accused, the case should be adjourned for hearing. This enables and ensures:

- witnesses are called by both parties;
- disclosure of Police papers to the defence (on request); and
- legal advice to be given so that a fair trial can take place.

## **6 Trial**

Prior to the defended hearing, all witnesses should be asked to attend Court. This is done by issuing a summons (Form 5) asking them to attend at a certain time and place.

Before the hearing begins, it is usual to confirm the plea. In some cases where advice has been given, the plea may change to guilty. If this happens:

- send any witnesses away, as there is no further need for their attendance; and
- continue as for a guilty plea (see 5.5 above).

### **6.1 Unrepresented Accused**

Often an accused will appear without a lawyer. Most have little idea what is involved in a defended hearing.

You should begin by explaining:

- the elements of the charge that the prosecution must prove;
- how the case will proceed;
- their right to cross-examine witnesses and call their own witnesses, who will be cross-examined by the prosecution; and

- that they may give evidence, but do not have to, and if they do, they may be cross-examined by the prosecution.

It is most important that you record clearly what you put to an unrepresented accused and their response: see *Tasi Togiga v R* (HC 8/03).

## **6.2 Prosecution Case**

The Police Prosecutor will present the case on behalf of the Crown. As one of two resident Police officers on the island, he or she is both investigating officer and Prosecutor. This means he or she will have prepared the case.

The Prosecutor calls the witnesses individually to give evidence. If there is more than one, the other witnesses must not be present in Court, nor able to hear what is being said.

The Court Clerk records this evidence (or the President if the Clerk is not present).

Take notes of the evidence presented, to assist in making your decision. One way to do this is to note each element on a separate piece of paper, and as the evidence is given, note it as it relates to each of these elements. This method can provide a helpful framework for your decision, as well as ensuring every element has been proved.

Once the Police have finished with each witness, the accused can ask questions. This is called cross-examination.

The Police can re-examine that witness if they feel it necessary to do so.

When the Police have called their final witness, that concludes their case.

## **6.3 No Case to Answer**

Once the prosecution case is closed, you need to be satisfied that the facts support the charge, and there is evidence of all the elements of the offence charged in relation to the accused.

If not, then the case should be dismissed and the accused acquitted.

Make a note on the Court record that there was no case to answer and the accused is acquitted.

If you are satisfied that the prosecution has presented evidence to prove all the elements of the offence charged in relation to the accused, then the accused or their lawyer will present the case for the defence.

## **6.4 The Defence**

The defence does not have to prove anything.

The accused may give evidence, and call witnesses to support his or her case.

An accused is not obliged to give evidence if he or she does not want to do so. If they do, the Prosecutor may ask questions and re-examination may take place.

The Magistrates may ask any questions on the evidence that has been heard or to deal with issues that he or she feels need to be asked from the evidence that has been heard.

The defence case is then closed.

## **6.5 Conclusion of Case**

The defence may summarise the facts and explain why the case has not been proved. This may include reference to the law.

The prosecution will respond, explaining how the case has been proved and the law that applies.

In both cases, they will explain how the evidence supports their case.

See *Lisale v R* [2003] TVHC 7, 1/03, where the Chief Justice makes it clear that the failure to give a closing speech would probably result in the conviction being quashed and referred back to the Magistrate.

# **7 Proving an Offence**

## **7.1 Innocent Until Proved Guilty**

One of the most important principles in criminal law is that the accused is innocent until proved guilty. Unless and until the prosecution proves that the accused is guilty of all the elements of the offence, he or she is innocent in the eyes of the law. You must always remember this.

## **7.2 Burden and Standard of Proof**

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 produced evidence of all the elements of the offence, then there is no case to answer and the prosecution has failed.

If the prosecution has succeeded at that stage, 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.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If, after hearing the defence evidence, if any, you have a reasonable doubt on any of the elements, then the prosecution has failed.

### **Beyond reasonable doubt**

This means you are sure the accused is guilty of the charge, and there is no doubt in your mind. If you are uncertain in any way, you must find the accused not guilty.

### **Lawful excuse**

In some cases, once the prosecution has established facts to support all the elements, the burden of proof is then on the accused to satisfy the Court that he or she acted with lawful excuse, good reason or lawful justification. See 7.4 defences, below.

The standard of proof for the defence to prove is not as high as the prosecution. They have to prove this “on the balance of probabilities”, which means that what the defence is seeking to prove is more likely than not.

## **7.3 What Must be Proved**

### **Elements**

Every offence has a number of elements that must be proved for an accused to be convicted.

Every element must be proved.

All offences involve a physical act, and mental capacity.

### **Physical act (called the *actus reus*)**

This is:

- the doing of an act not allowed by law; or
- the doing of something, the result of which is not allowed by law.



### **Mental capacity (called the *mens rea*)**

Most offences require the prosecution to prove the accused had a particular state of mind in addition to the act and its consequences. Not all offences require this.

This could be:

- intention (meaning to do something, or meaning a certain result will happen);
- recklessness (taking an unjustified risk);
- knowledge (knowing something);
- belief (believing something); or
- carelessness or negligence (not taking enough care).

In most cases, the doing of the act will allow you to assume that there was the mental element.

## **7.4 Defences**

The defence may raise a reasonable doubt about any of the elements that the prosecution has attempted to prove. In addition, there are a number of specific defences available to the accused.

These are set out in *Part IV* of the *Penal Code (Cap 8)*.

Some of the common defences are:

- Age: no child under 10 years old can be convicted of an offence, and no child under 14 years old can be convicted unless it is proved he or she had the capacity to know it was wrong: *s14 Penal Code (Cap 8)*;
- Insanity: if the person is known to be suffering from a mental illness it may make them incapable of understanding what they did (which means they will not have the necessary mental element): *ss11, 12 Penal Code (Cap 8)*;
- Intoxication: drunkenness is a defence only where the person is unaware that he has been drinking alcohol: *s13 Penal Code (Cap 8)*;
- Compulsion: where a person is compelled to commit an offence by the immediate threat of death or grievous bodily harm from a person who is present when the offence is committed, there is a defence if that person believes the threats will be carried out: *s16 Penal Code (Cap 8)*;
- Self-defence: a person is justified in using reasonable force to defend themselves, or another. This is common where two parties have been charged with fighting or common assault: *s17 Penal Code (Cap 8)*.

In certain cases, an offence itself may give the accused a defence. Some examples are given below. In these examples, the defences are in bold and once the prosecution has proved the elements of the offence, it is open for the defence to prove, on the balance of probabilities, the defence.

Trespass: s182(2) Penal Code (Cap 8)

‘Any person who enters, by night any house, ... **without lawful excuse.**’

For example, to prove trespass, the prosecution need to show that the person entered the house by night, without the permission of the owner or some other lawful excuse. However, the accused could establish that he had an excuse (for example, the son/daughter had invited him to the house), and would need to show that on the balance of probabilities.

Larceny: s251 Penal Code (Cap 8)

‘a person, who without the consent of the owner, ... takes and carries away ... **permanently to deprive the owner**’.

Here, if the accused can prove that she had the intention of returning the item, she has a defence.

Possession of weapon under the influence of alcohol: s105(1) Alcoholic Drinks Act (Cap 69)

‘A person who ... whilst under the influence of alcohol is, **without reasonable and lawful excuse**, in possession of any dangerous or offensive weapon.

If the accused can prove some reasonable and lawful excuse for possessing the weapon in the circumstances, he has a defence.

Driving under the influence of drink or drugs: s23(3) Traffic Act (Cap 71)

Where, in any proceeding for an offence in connexion with drink it is proved the accused drove or attempted to drive within 2 hours after consuming any liquid containing alcohol; and –

- the accused committed an offence through his driving; or
- was involved in an accident,

the Court shall presume the driver was impaired by drink, “**unless the contrary is proved.**”

Here, the accused will have a defence if he can prove that he was not impaired by drink.

## 8 Decision Making

The decision should be by agreement of the three Magistrates, or if there is disagreement, by a majority (2 out of 3): *s10 Island Courts Act (Cap 3)*.

The decision is to be made by the Magistrates. Although help as to meaning of the law can be sought from textbooks and legal counsel, the decision cannot be made by anyone else.

## 8.1 Principles Governing Decision Making

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

- you must act lawfully;
- affected parties have a right to be heard;
- you must be free from bias.

The principles are intended to ensure:

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

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

### **You must act lawfully**

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

There are several aspects to the principle of lawfulness:

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

Ask yourself:

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

### **Affected parties have a right to be heard**

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

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

Throughout the hearing process, ask yourself:

- “Am I giving each party a fair opportunity to state his or her case?”

### **You must be free from bias**

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

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

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

Ask yourself:

- “Is there any factor present which could amount to bias, or the perception of bias, if I hear this matter?”

### **Consequences of a breach of the principles**

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

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

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

## **8.2 Deliberations**

At the end of the formal hearing, the panel discusses the evidence produced by parties and makes their decision. It is good practice to retire to discuss the matter and reach a decision. The Clerk may only assist you if there is a point of law that you wish to be clarified.

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

The President will lead discussions.

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

### 8.3 A Structured Approach to Making a Decision

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

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

There are three tasks involved:

**1. To be clear with what the Court is being asked to do.**

In criminal cases, this is what the accused is charged with and all the essential elements of the offence. For the accused to be found guilty, every element of the offence must be proved beyond reasonable doubt.

**2. To determine what the facts of the case are – what happened; what did not happen.**

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

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

Credibility: “Is the evidence believable?” “Can it be believed?” “Is the witness being honest?”

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

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

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

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

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

**3. To make your decision, according to the law.**

This is done by applying the facts to the law.

You must make the decision. Under no circumstances should you ask anybody else to decide the matter.

## **8.4 Delivering a Decision**

Follow the format on the next page when making and delivering your decision. Remember that it is important to:

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

## ***Criminal Decision Format***

Follow this format when making and delivering your decisions.

### **Introduction**

What the case is about.

### **Summary of what is alleged**

What is alleged by the prosecution.

### **The law**

What must be proved beyond reasonable doubt.

The elements of the offence.

### **The facts not in dispute**

The facts that are accepted by the defence.

The elements that those accepted facts prove.

### **The facts in dispute**

Your finding of the facts, with reasons. Which evidence you prefer and why?

### **Apply the facts to the law**

Apply the facts as you have found them to the elements of the offence. Do the facts prove all the essential elements?

You may convict the accused if you are satisfied beyond reasonable doubt that the prosecution has proved the essential elements of the offence.

If there is a reasonable doubt, your verdict must be not guilty.

### **Deliver your decision**

Structure your decision before delivering it. Make sure you give adequate reasons and that the parties understand. Record your decision and reasons on the Court record.

### **Orders**

## 9 Sentencing

After a guilty plea, or a finding of guilt, you pass sentence. The sentence explains the penalty that the Court will give, and its reasons.

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

Once that has been done, you can pass sentence on the offender. You must explain the sentence and your reasons for it, so that the accused understands what he or she needs to do.

### Sentencing jurisdiction

You must not impose any sentence that the Island Court does not have authority to impose and where it has authority to impose, you must not exceed the maximum given.

The maximum sentence an Island Court may give is:

- 6 months imprisonment; or
- a fine of \$100; or
- both: *s6 Island Courts Act (Cap 3)*.

Note that *s71 Interpretation Act* states that where a penalty is expressed in an offence, committing the offence makes the person liable to a penalty **not exceeding** the penalty expressed. This means that the penalties set out in the *Penal Code* and other Acts are the **maximum** penalties that may be imposed. You may, of course, sentence the offender to a lesser penalty.

### Consistency

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

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



## 9.1 Principles of Sentencing

It is the Court's task to represent the community by deciding on and imposing a sentence for criminal behaviour. There are a number of reasons for passing a sentence. These are called the principles of sentencing. They are:

- Punishment – the sentence is to punish the offender for their criminal behaviour;
- Deterrent – the sentence is to deter other people from doing the same thing;
- Prevention – the sentence is to prevent the offender from doing the same thing again;
- Restoration – the sentence serves to restore or repair the damage done to others;
- Rehabilitation – the sentence is to rehabilitate the offender.

When deciding which sentence to pass, you will have one or more of these reasons in mind. Ask yourself, which of the sentencing principles apply in this case?

## 9.2 Factors Influencing Sentence

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

Such factors might include the offender's:

- age;
- character;
- community involvement;
- previous criminal record;
- employment;
- steps to make changes and repair the damage caused by the offending;
- plea of guilty; and
- other relevant personal information.

They will also include factors about the offence, such as:

- the seriousness of the offending;
- the impact on the victims or the community; and
- the seriousness with which the community views the offending.

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

### **Previous convictions**

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

The Chief Justice in *Tasi Togiga v R* (HC 8/03) stated that it is fundamental that a Court should be told of any previous convictions before determining the appropriate sentence – it is vital that the Court is aware of the fact that the offender has no convictions when that is the case.

You must ensure that the list of convictions are shown to the offender.

- If the offender accepts these are correct, then you can proceed to consider them.
- If the offender disputes these, the prosecution will need to obtain evidence to support the conviction/s. It is the duty of the prosecution to provide that evidence – a Court can only pass sentence on the strength of the evidence produced. It cannot rely on evidence that they might know but has not been produced.

A particular problem in Tuvalu is the fact that a person may be known by more than one name. A careful check needs to be made to ensure that the record of convictions relates to the offender.

In assessing previous convictions you have to be aware of the result, and effect of a previous sentence. If, for example, a person is convicted of being drunk and disorderly and has a similar offence in 1986, this is a one-off as he or she has been of good behaviour for many years. This may reduce the sentence to be given.

If that person is involved in a similar incident later in the year, then the Court may deal with him or her with a greater penalty.

See also *Logologo Viliamu v R* [2003] TVHC 9, 2/03.

### ***Rehabilitation of Offenders Act 1991***

The *Rehabilitation of Offenders Act 1991* prevents a person from being punished twice for the same offence. It provides that when a certain time period has passed, these can be regarded as ‘spent’. This means that the Court must not take notice or base their decision on these.

The Court should note whether there has been an incident in the past of a similar type, and if so, how long ago it was.

This is an extremely important rule and will apply where there are minor offences, such as alcohol-related crimes and traffic convictions.

Further, where disqualification from driving has taken place, a Court must disregard offences before the ban was imposed in assessing a further sentence.

You will need to identify which of the offences are spent (in the absence of legal assistance).

### **Customary considerations**

Custom may assist in passing sentence. It is common in cases of trespass, for example, for an apology to be made to the owner of the property. Where that has been done, that will be considered to be important when sentence is given.

This is helpful, as the offender and the people affected by the offending have to continue to live together on the same island.

### **Plea of mitigation**

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

### **Further information and reports**

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

See *Maluofenua Kalisi v R* [2003] TVHC 1, 6/02, and *Logologo Viliamu v R* [2003] TVHC 9, 2/03.

## **9.3 A Systematic Approach to Sentencing**

You must develop a systematic method of working through each sentence. Make sure you have as much information as possible. If a Welfare Report is necessary, ask the Welfare Officer or Community Officer.

The format on the following page is a useful guide for you to work through.

## ***Sentencing Format***

### **Introduction**

What the offender has been convicted of.

### **The relevant facts**

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

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

### **The law**

#### **Statute:**

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

#### **Common law:**

What do the higher Courts say? See Appendix 4 for relevant sentencing cases.

### **Mitigating and aggravating features**

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

#### **Relating to the offence:**

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

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

#### **Relating to the offender:**

Aggravating factors, e.g. personal information; previous convictions; lack of remorse.

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

### **Relevant factors from reports**

The Pre-sentence Welfare Report, particularly the recommendation.

### **Pronounce sentence**

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

### **Advise rights of appeal**

When someone has been found guilty and sentenced following trial, or has pleaded guilty and is sentenced, explain their rights of appeal. See 10 below.

Where the sentence is imprisonment, suggest that the offender seeks legal assistance.

## 9.4 Types of Sentence

The Island Court may pass the following sentences:

- imprisonment for not more than 6 months; or
- a fine not exceeding \$100; or
- both; or
- a supervision or probation order for a period of not more than one year; or
- a discharge, either with or without conditions; or
- a suspended sentence. This means the sentence of imprisonment will only be served if the accused commits another offence within the period of supervision; or
- a compensation order for any loss or injury caused; or
- an order requiring the offender to give security for keeping the peace; or
- an order that the offender be taken to his or her home island; or
- an order prohibiting the offender from drinking or having alcohol in his or her possession, for not more than 12 months.

In addition, the Island Court may enforce fines by sentencing an offender to imprisonment if they fail to pay a fine: *s30(1) Penal Code 1978*. The term of imprisonment you may sentence for default on a fine is discretionary, but must not exceed the limits set out in the chart below.

<b>Amount</b>	<b>Maximum Period</b>
Not exceeding \$2	7 days
exceeding \$2 but not exceeding \$4	14 days
exceeding \$4 but not exceeding \$20	6 weeks
exceeding \$20 but not exceeding \$40	2 months
exceeding \$40 but not exceeding \$50	3 months
exceeding \$50 but not exceeding \$100	6 months
exceeding \$100 but not exceeding \$200	12 months

The imprisonment term for default on a fine shall terminate when the fine is:

- paid; or
- levied by the process of law: *s30(2) Penal Code 1978*.

See *Viliamu v R [2003] TVHC 9, 2/03* and *Lisale v R [2003] TVHC 8, 3/03*.

Where a person has 2 or more separate offences, the Court should sentence him or her on each offence.

Sentences may be either concurrent (they run together) or consecutive (they run one after another).

Directions may be given by the Chief Justice, Senior or Resident Magistrate on sentence, as may be necessary.

The following table has been designed to explain all the types of sentences, and when each may be used.

### **Types of Sentences**

<b>Type</b>	<b>Statute</b>	<b>Considerations</b>
<p><b>Imprisonment</b></p> <p>Imposed as a last resort, to punish and deter.</p> <p>Used rarely.</p>	<p><i>ss6(1), (2), (3) Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> <li>1. Age;</li> <li>2. Previous convictions – unless has significant convictions, rare to be imprisoned without a second chance being given;</li> <li>3. Severity of the offence;</li> <li>4. Custom.</li> </ol>
<p><b>Fine</b></p> <p>The financial means of the offender should always be considered.</p> <p>Extremely common, and used widely.</p>	<p><i>s6(1) Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> <li>1. Age;</li> <li>2. Employment – ability to pay a fine;</li> <li>3. Previous convictions – if has some, and fines may be more appropriate than imprisonment;</li> <li>4. Custom.</li> </ol>
<p><b>Supervision</b></p> <p>Purpose is rehabilitative - to assist the person to become an active part of society.</p> <p>Very useful.</p>	<p><i>s6(7) Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> <li>1. Age - appropriate where offender is between 14 and 25;</li> <li>2. Previous convictions – note if there is a common link to offences (such as alcohol);</li> <li>3. Custom.</li> </ol>
<p><b>Deferred Sentence</b></p> <p>Imposed where you believe offender is unlikely to re-offend, but wish to encourage good behaviour</p>	<p><i>s6(7), s7 Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> <li>1. Age;</li> <li>2. Previous convictions - useful where there are few, and seems to be settled member of the community;</li> <li>3. Custom.</li> </ol>

<p><b>Discharge (Absolute)</b></p> <p>Imposed where the case has been proved but the circumstances are such that the matter is minor or trivial, so as not to justify a conviction being entered.</p>	<p><i>s7 Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> <li>1. Used widely for first-time offenders where the offence is seen as a one-off;</li> <li>2. Previous good character;</li> <li>3. Where offender is a student - often given because of age and lack of maturity.</li> </ol>
<p><b>Disqualification from driving</b></p> <p>Compulsory where is a conviction under <i>ss21, 23(1) Traffic Act (Cap 71)</i>.</p>	<p><i>s25 Traffic Act (Cap 71)</i></p>	<ol style="list-style-type: none"> <li>1. Under <i>ss21 and 23(1)</i>, special considerations do not exist. Penalty is mandatory in serious cases.</li> <li>2. In all other cases, disqualification is discretionary. Mitigation in standard form should be given.</li> <li>3. See <i>Tianamo Savave v R</i> (with <i>Pita v R</i>) [2002] TVHC 4, 3/02 and <i>Logologo Viliamu v R</i> [2003] TVHC 9, 2/03.</li> </ol>
<p><b>Security for keeping the peace, or to discourage other minor criminal behaviour</b></p> <p>Given where it is anticipated future offences may take place, to discourage this.</p>	<p><i>s40 Criminal Procedure Code (Cap 7)</i></p> <p><i>Schedule 2 reg 50 Island Courts Act (Cap 3)</i></p>	<ol style="list-style-type: none"> <li>1. Special considerations detailed in the section itself.</li> </ol>
<p><b>Prohibition order</b></p>	<p><i>ss82(1) and (2), 83 Alcoholic Drinks Act (Cap 69)</i></p>	<ol style="list-style-type: none"> <li>1. Special considerations detailed in the section itself.</li> <li>2. See <i>Sele Lausavere v R</i> (Crim App Feb 03)</li> </ol>

## 10 Appeals and Revisions

### 10.1 Rights of Appeal

Any person convicted in an Island Court and sentenced to:

- imprisonment;
- a fine of more than \$10; or
- imprisonment for more than 7 days in default of payment of a fine,

may appeal to a Magistrate's Court against the conviction or sentence: *s29 Island Courts Act (Cap 3)*.

They may not appeal against the sentence if it is one fixed by law: *s29 Island Courts Act (Cap 3)*.

If they pleaded guilty, they may not appeal against the conviction, but may appeal against the sentence: *s29 Island Courts Act (Cap 3)*.

Regardless of *s29*, in any case the Magistrate's Court may hear any appeal on any terms it thinks just: *s30 Island Courts Act (Cap 3)*.

### 10.2 Duties of Island Magistrate

When someone has been found guilty and sentenced following trial, or has pleaded guilty and is sentenced, you must explain their rights of appeal: *reg 30(2) Island Courts Regulations (Cap 3)*.

Explain that if they are not satisfied with the decision, they can appeal. They must do this within 21 days and they do this in writing on a form that the Court Clerk can give them (Form 11).

Explain that if there is a doubt, advice should be sought through the People's Lawyer.

Note if the appellant is not represented by a lawyer and declares an intention to appeal in Court, that has the same effect as a written notice of appeal. It is a good idea to ask the Court clerk to assist them in putting their grounds onto Form 11.

When a convicted person gives notice of appeal, the Island Court may decide to:

- grant bail to the offender if he or she is in custody; or
- order that the sentence be suspended pending the determination of the appeal: *reg 43 Island Courts Regulations (Cap 3)*.

The Magistrate's Court may direct the Island Court to take additional evidence for the appeal hearing. This shall be taken in the same way as it would in a trial: *s33 Island Courts Act (Cap 3)*.



When a case has been decided on appeal, the Island Court shall:

- make such orders to conform with the judgment or order of the Magistrate's Court; and
- take such steps as may be necessary to enforce that judgment or order.

### **10.3 Duties of Court Clerk when Appeal is Lodged**

When an appeal is lodged, the Court clerk must:

- send particulars of the appeal to the nearest Magistrate's Court, by post or telegraph, not more than 24 hours after receiving notice of the appeal: *reg 33(1) Island Courts Regulations (Cap 3)*;
- within 7 days of receiving the notice of appeal, make up and complete a record of appeal, consisting of:
  - ⇒ the pleadings, if any;
  - ⇒ all documents admitted as evidence in the original proceeding;
  - ⇒ all documents tendered as evidence and rejected in the original proceeding;
  - ⇒ true copies of the notes of the evidence in the original proceedings;
  - ⇒ the judgment or order of the Court;
- comply with any directions from the clerk of the Magistrate's Court regarding the Court record: *regs 33 and 34 Island Courts Regulations (Cap 3)*; and
- send any recognisance to the Magistrate's Court, if the offender has been released on bail.

### **10.4 Revision**

*Section 37 Island Courts Act (Cap 3)* enables the Resident/Senior Magistrate to review the decisions of the Island Court in criminal cases. Decisions may be varied or modified if appropriate. In practice this seldom happens, and is subject to the right of appeal.

## **11 Dealing with Young People**

### **11.1 Criminal Responsibility of Young Accused**

A child under 10 years cannot be convicted of an offence: *s14(1) Penal Code (Cap 8)*.

A child under 14 years cannot be convicted of an offence unless the prosecution proves that, at the time of the offence, they had the capacity to know that what they were doing was wrong: *s14(1) Penal Code (Cap 8)*.

## **11.2 Young Accused in Need of Care, Protection or Control**

Where a young accused under 16 years is in need of care, protection or control, the Court may:

- make an order committing them to the care of a fit person willing to take care them;
- make an order that a parent or guardian make contributions towards the maintenance of the young person (having regard to the means of the parent or guardian); or
- make an order that a parent or guardian enters into a recognisance (with or without sureties) to exercise proper care and guardianship over the young person: *s39 Penal Code (Cap 8)*.

Any such order and recognisance remains in force until the young person reaches 18 years: *s39(2) Penal Code (Cap 8)*.

The Court may consider contacting the Social Welfare Officer (on Funafuti) for assistance and the Community Worker attached to the Kaupule to assist with the young accused.

## **11.3 Guidelines for Dealing with Young Accused**

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

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

### **Dealing with a young person privately**

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

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

### **Assistance for the young person**

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

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

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

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

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

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

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

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

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

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

Note that in *Simona v R* [2002] TVHC 1, 01/02, the Chief Justice stated that any child in the custody of the Police has the right to have a parent or guardian present unless that is impractical. If the Court is not satisfied that the Police advised the child of its rights to have a parent, guardian or legal adviser present but went ahead with questioning, any statements made by the child should be excluded.

### **Guilty plea**

See 11.4 below.

### **Not guilty plea – defended hearing**

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

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

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

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

### **Is the defended hearing a normal one?**

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

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

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

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

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

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

## 11.4 Sentencing Young Offenders

Particular considerations apply to any person who is either a child or a young person who is to be sentenced by the Court. These are set out in *s8 Island Courts Act (Cap 3)*.

A child is defined as any person who is under the age of 14 years. A young person is someone who has reached the age of 14 but is under the age of 17.

### Child (under 14 years)

- No imprisonment shall be imposed: *s8(2) Island Courts Act (Cap 3)*.
- If fine/damages/costs are to be made, those must be paid by the parent or guardian of the child: *s8(5) Island Courts Act (Cap 3)*.
- The Court may order a parent or guardian to give security up to \$20 for the good behaviour of the child for any period up to a year: *s8(6) Island Courts Act (Cap 3)*.
- The Court may summon the attendance of a parent or guardian and issue a warrant if necessary to compel them to appear: *s8(7) Island Courts Act (Cap 3)*.
- Caning may be ordered as an alternative for boys: *ss8(8), (9) Island Courts Act (Cap 3)*.

### Young person (14 – 16 years)

- No imprisonment shall be imposed unless:
  - ≡ the young offender is over 15 years; and
  - ≡ the Court has considered information about the circumstances of the offence and the young offender's age and character (usually from a Welfare Report); and
  - ≡ the Court is of the opinion that no other method of dealing with the young offender is appropriate: *s8(3) Island Courts Act (Cap 3)*.
- If imprisonment is imposed, the term must not exceed 1 month.
- If fine/damages/costs are to be made, those may be paid by either:
  - ≡ the parent or guardian of the young person; or
  - ≡ the young person: *s8(5) Island Courts Act (Cap 3)*.
- The Court may order a parent or guardian to give security up to \$20 for the good behaviour of the young person for any period up to a year: *s8(6) Island Courts Act (Cap 3)*.
- The Court may summon the attendance of a parent or guardian and issue a warrant if necessary to compel them to appear: *s8(7) Island Courts Act (Cap 3)*.
- Caning may be ordered as an alternative for young males: *ss8(8), (9) Island Courts Act (Cap 3)*.

However, imposing just another sentence may not be very helpful either to the victim, or the young person. Sometimes it is essential to find out more information before you sentence, and this may be obtained from a social worker, a parent, a village elder, or church minister and if it is relevant, the school teacher.

Think about putting the case off, and asking either for a report from one or more of these people, or even asking them to come to Court.

See *Tuaga v R* [2003] TVHC 6, 3/02, where the Chief Justice said "... in the case of young offenders with few or no previous convictions, where the Magistrate considers immediate imprisonment is a possible sentence, he should always ensure he has full information about the offender before he decides."

### **Is a formal sentence necessary?**

Remember that all of us make mistakes, and probably we make more when we are young. To enter a conviction and formal sentence may mark out a young person as a criminal forever.

You might think about putting the case off for a couple of months, and getting the young person to undertake an informal sentence. This might include some voluntary community work, paying some money over to the victim or to charity, or something similar. In this way you avoid a formal sentence, and give the young person another chance.

If you do decide to do this, make sure that you put the case off to allow the informal sentence to be carried out, and that you then recall the case later to make sure that the work has been done, or the money has been paid.

This type of approach is referred to as **diversion**, and it is designed to divert the young person away from formal sentences.

You may not feel that diversion is appropriate, if you have tried it previously with the young person and it has failed. They may have already been given this chance. Also, if the charge is quite serious, the Police may want a formal conviction and sentence.

### **Who else should you consult?**

One very important thing in all crime, but more so with young persons, is that they must take responsibility for what they have done. Consider a case of theft of money from someone else, of assaulting another person. Both actions will have caused damage and distress to someone else.

Give the victim a say, and involve the victim in the outcome, if possible.