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CRIMINAL:

THE CRIMINAL TRIAL

1 Introduction

If an accused pleads not guilty, the case proceeds to a defended hearing, also known as a trial.

1.1 Role of Prosecution

The duty of the person prosecuting (usually the police and the prosecutor) 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.

The Police have two distinct roles, which you must be aware of:

- 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.

The prosecution must prove all elements of the offence beyond reasonable doubt.

1.2 Defence Counsel

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

2 Proving an Offence

2.1 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.

2.2 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 you decide that the prosecution has not proved all the elements of the offence beyond reasonable doubt at the end of their case, then there is no case to answer and the prosecution has failed.

Remember that the defence does not have to prove anything. It is for the prosecution to prove all elements beyond reasonable doubt. If the prosecution has provided evidence to prove all the elements, and then the defence evidence casts 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 reasonable 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. For example, possession of a weapon – *s26 Fire Arms Act.*

The standard of proof for the defence to prove this 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.

3 Open Court

To ensure the transparency of justice, it is a long standing principle of the common law that hearings be conducted in an open Court, wherever possible. *Section 26 (1) Criminal Procedure Code* recognises this.

However, you may order at any stage in the trial that the public generally or any particular person or class of persons shall not have access to or be in or remain in the Courtroom:

- for reasons of decency; or
- for reasons of security of the State; or
- otherwise authorised by law.

4 Legal Representation

Any person accused of any serious offence before the Court may be defended by an advocate or, with leave of the Court, by any person: *Vanuatu Constitution Chapter 2 Article 5(2)(a)* and *s117 Criminal Procedure Code*.

However, in most cases before the Magistrates' Court, the accused will be unrepresented.

Whenever an accused is unrepresented, you must take special care to ensure that his or her rights are respected and that justice is done. It is not your responsibility to conduct the case for the accused, but you must ensure that the trial is fair.

"In all cases the duty of the Magistrate is to ensure that an unrepresented person charged with a criminal offence understands both the charge and the proceedings and also that, if he has a defence, he has an opportunity to present it…Once he is satisfied the accused understands the charge he faces and that he has admitted it, the Magistrate should proceed to hear the facts and mitigation…" *Cocker v Police Department* Criminal Appeal Case #Cr.App.1251 of 1998.

In the following explanation of trial procedure, almost all functions of the accused such as cross-examination or addressing the Court may be carried out by an advocate.

The only times an accused must act personally is when he or she is:

- giving evidence as a witness; or
- making a statement to the Court.

5 Evidence

See Chapter 6 Evidence.

5.1 Evidence to be Taken in the Presence of the Accused

Except as otherwise expressly provided by enactment, all evidence taken in any trial must be taken in the presence of the accused, except when his or her personal attendance has been dispensed with: *s120 Criminal Procedure Code*.

5.2 Interpretation of Evidence

In accordance with the *Vanuatu Constitution*, whenever the accused is present in person, any evidence is given in a language not understood by the accused must be interpreted to him or her in a language he or she understands: *Vanuatu Constitution Chapter 2 Article 5(2)(d*); *s121 Criminal Procedure Code*.

If the accused appears by advocate and the advocate does not understand evidence given in a language other than English or French, it must be interpreted for the advocate: *s121(2) Criminal Procedure Code*.

Where you are sufficiently conversant with English, French or Bislama, you may undertake any interpretation from one into the other of those languages, and dispense with the use of a sworn interpreter: *s121(4) Criminal Procedure Code*.

See Chapter 8, Management of Proceedings.

5.3 Recording Evidence

In trials other than for a minor offence (see below), the evidence of each witness:

- shall be taken down in English, French or Bislama by the Magistrate (or clerk, in his or her presence and hearing and under his or her personal direction and supervision), and signed by the Magistrate;
- shall form part of the record;
- shall be in the form of a narrative, not in the form of question and answer;
- may be taken down in a different language than the language it is given in (both being either English, French or Bislama), so long as the magistrate is sufficiently conversant with the languages: *s122(a) – (c) Criminal Procedure Code*.

5.4 Remarks Respecting Demeanour of Witnesses

In addition to recording the evidence of a witness, the Magistrate shall record any remarks he or she considers material respecting the demeanour of the witness while under examination: *s123 Criminal Procedure Code*.

5.5 Recording Minor Offence

The following offences are called minor offences:

- offences punishable with imprisonment for a term not exceeding three months or a fine not exceeding VT10,000, or both;
- offences of absolute liability;
- assault causing no physical damage;
- offences against property where the value of the property in respect of which the offence is alleged to have been committed does not exceed VT 2,000;
- any other offence which in pursuance of any enactment may be tried as a minor offence; and
- attempting, aiding, counselling or procuring the commission of these offences: *s124(2) Criminal Procedure Code.*

With minor offences, the Magistrate may dispense with recording evidence other than:

- the serial number;
- the date of the commission of the offence;
- the date of the complaint;
- the name of the complainant;
- the name, surname and address of the accused;
- the offence complained of and the offence (if any) proved and the value of the property against which the offence is alleged to have been committed (if any);
- the accused's plea;
- the finding and a judgment embodying the substance of the evidence taken; the sentence or other final order; and
- the date on which the proceedings terminated: *s124(1) Criminal Procedure Code.*

6 Non–Appearance

6.1 Prosecution Does Not Appear

See Chapter 11 Criminal: First Appearance.

6.2 Accused Does Not Appear

See Chapter 11 Criminal: First Appearance.

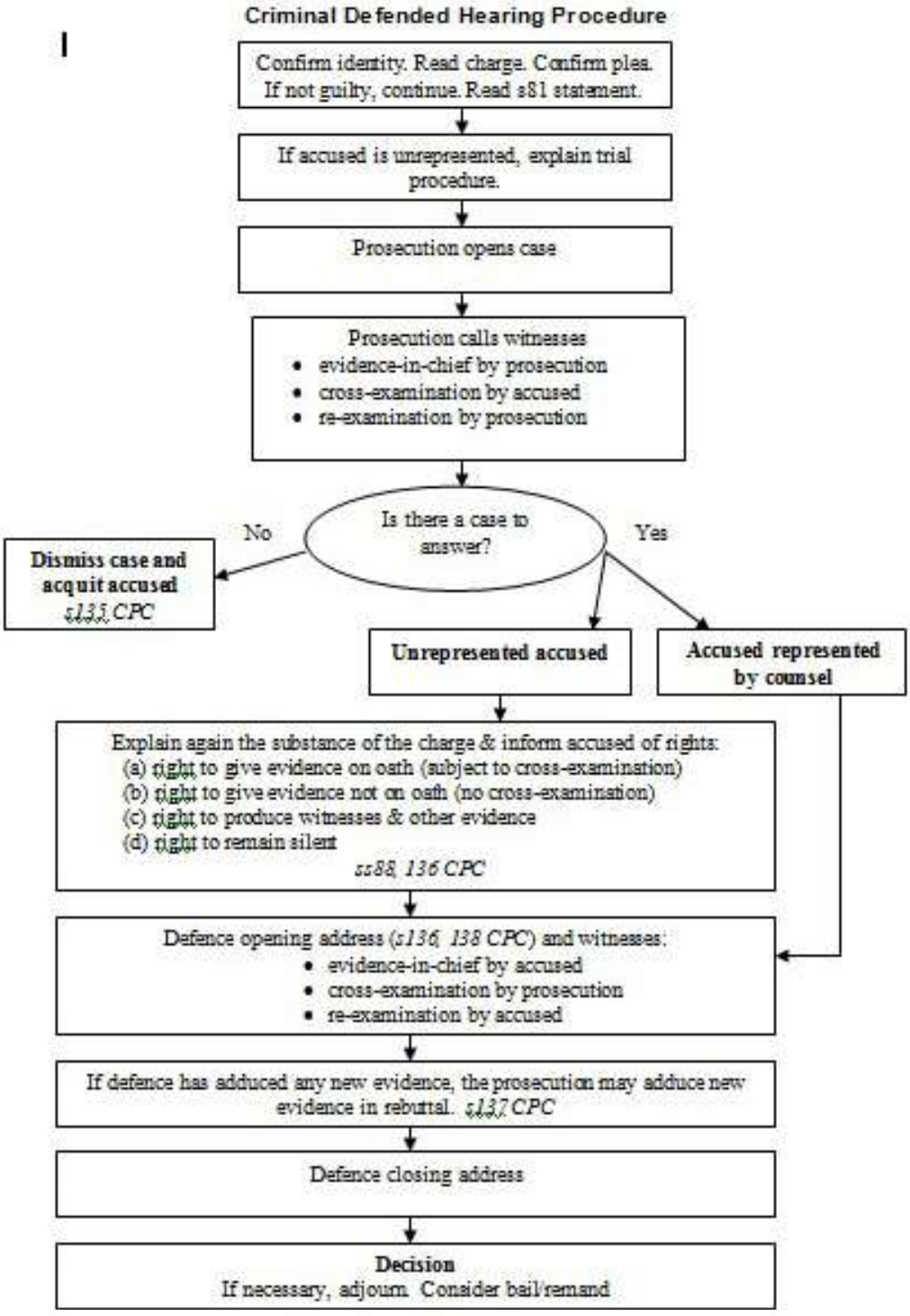
6.3 Witness Does Not Appear

If a witness does not appear in obedience to a summons, you may issue a warrant to bring him or her before the Court if:

- the witness does not have a sufficient excuse for not attending; and
- there is proof that the summons was properly served on the witness at a reasonable time before the appearance date: *s77 Criminal Procedure Code.*

7 Defended Hearing Procedure

The diagram on the next page shows the steps in a defended hearing.


Criminal Defended Hearing Procedure
Confirm identity. Read charge. Confirm plea.
If not guilty, continue. Read s81 statement.
If accused is unrepresented, explain trial procedure.
Prosecution opens case
Prosecution calls witnesses
evidence-in-chief by prosecution
cross-examination by accused
re-examination by prosecution
Is there a case to answer?
No
Yes
Dismiss case and acquit accused
s133 CPC
Unrepresented accused
Accused represented by counsel
Explain again the substance of the charge & inform accused of rights:
(a) right to give evidence on oath (subject to cross-examination)
(b) right to give evidence not on oath (no cross-examination)
(c) right to produce witnesses & other evidence
(d) right to remain silent
ss88, 136 CPC
Defence opening address (s136, 138 CPC) and witnesses:
evidence-in-chief by accused
cross-examination by prosecution
re-examination by accused
If defence has adduced any new evidence, the prosecution may adduce new evidence in rebuttal. s137 CPC
Defence closing address
Decision
If necessary, adjourn. Consider bail/remand

The following outline applies where the accused is unrepresented. With necessary modifications, however, it also applies when the accused is represented.

Take care to fully advise an unrepresented accused of the procedure to be followed and to accurately record the advice given to him or her.

1. Confirm Personal Details of the Accused

It is a good idea to confirm the accused's name, age, occupation and address. Make sure these are recorded.

2. Explain the Charge and Read the Statement of Presumption of Innocence

Before the hearing begins, explain the charge to the accused. This is where you explain to the accused:

- the section(s) of the law he or she is charged under;
- the elements of the charge that must be proven;
- the statement of presumption of innocence (see below);
- that if he or she has anything to say in his or her defence, there will be an opportunity to do so once the prosecutor has finished;
- that if he or she disagrees with the charge as read, he or she must say 'no'.

Section 81 Criminal Procedure Code requires you to read the following statement before the prosecution case is opened:

> "In this trial you will be presumed to be innocent unless and until the prosecution has proved your guilt beyond reasonable doubt. It is not your task to prove your innocence. If at the end of the trial, any reasonable doubt exists as to your guilt, you will be deemed to be innocent of the charge and will be acquitted."

3. Confirming the Plea

The clerk then reads the charge to the accused and asks whether he or she admits the truth of the charge. Ensure this is recorded on the Court record.

If the accused does not admit the truth of the charge, or pleads not guilty, proceed and conduct a trial: *ss133(3)* and *134(1) Criminal Procedure Code*.

If the accused refuses to plead:

- order a plea of not guilty to be entered for him or her: *s133(3) Criminal Procedure Code*, and
- proceed to hear the complaint and other witnesses: *s134(1) Criminal Procedure Code.*

If the accused pleads guilty or admits the truth of the charge:

- you may briefly enquire into the nature of the facts admitted and the effect of those facts in law; and
- if you have reason to believe he or she may not be guilty of the offence charged, enter a plea of not guilty and proceed to hear the case; or
- enter a conviction and sentence the accused.

4. Exclude Witnesses

Make an order for the exclusion of witnesses and record this.

5. Prepare Accused for Prosecution Case

Request the accused to be seated at one of counsel's tables and have your clerk provide a pen and paper for note taking.

Explain:

- the elements of the charge;
- how the case will proceed;
- the right to cross-examine witnesses.

6. Prosecution Case: *ss132* and *134 Criminal Procedure Code*

In every trial for an offence which has been the subject of police investigation by the police, a state prosecutor may appear to conduct the case for the prosecution: *s132(1) Criminal Procedure Code.*

The prosecution may make an opening statement. 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.

You must record all material evidence in accordance with *ss120 to 125 Criminal Procedure Code*. See paragraph 5, above.

Once the prosecution has finished with each witness, invite the accused to ask cross-examination questions: *ss134(2), (3) Criminal Procedure Code.*

Record the accused's answer.

The prosecution may re-examine that witness if they feel it necessary to do so. After each witness has given evidence, excuse the witness from further attendance unless the parties object.

If you ask any questions of a witness after re-examination has concluded, you should ask the prosecution and the accused if there are any further matters raised by your questions which they wish to put to the witness.

Without overdoing it, you must expect to have to help the accused from time to time during the hearing.

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

7. No Case to Answer: *s135 Criminal Procedure Code*

The following applies whether the accused is represented or not.

At the close of the prosecution case, if you consider that a case is not made out against the accused sufficiently to require him or her to make a defence, dismiss the case and acquit the accused, with reasons: *s135 Criminal Procedure Code*. This means that the accused may not be brought back to Court on the same set of facts (known as the doctrine of *autrefois acquit*).

A convenient test is found in the Practice Note at (1962) 1 All ER 448:

"A submission that there is no case to answer may properly be made and upheld: when there has been no evidence to prove an essential element in the alleged offence, when the evidence adduced by the Prosecution has been so discredited as a result of cross examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it ... if a submission is made that there is no case to answer the decision should depend not so much on whether the adjudicating tribunal (if compelled to do so) would at that stage convict or acquit but on whether the evidence is such that a reasonable tribunal might convict. If a reasonable tribunal might convict on the evidence so far laid before it there is a case to answer".

If you decide that there is a case to answer announce: "I find that there is a case to answer".

Sometimes brief reasons are appropriate. Care should be taken to ensure that the accused does not feel that the case is already decided against him or her.

8. Defence Case: *s136 Criminal Procedure Code*

If the prosecution have made their case, the defence may or may not:

- make an opening address;
- call evidence and make submissions; and
- make a closing address.

Explain the substance of the charge to the accused again.

Tell the accused: *s88 Criminal Procedure Code*:

"In making your defence in this trial, you are entitled, in addition to calling other persons as witnesses, to give evidence yourself on your own behalf, upon oath or affirmation and subject to cross-examination by the prosecution. However you are not obliged to give evidence and elect instead to remain silent. If you do not chose to give evidence, this will not of itself lead to an inference of guilt against you. Do you fully understand what I have said?"

Record the fact that you have given this advice and that the accused has understood.

Ask the accused whether he or she has any witnesses to examine or other evidence in his or her defence. If he or she has witnesses to call, but they are not present in Court, you may adjourn the trial and compel the attendance of the witnesses if you are satisfied that:

- the absence of the witness is not due to any fault or neglect of the accused; and
- there is a likelihood that they could give material evidence on behalf of the accused: *s136(2) Criminal Procedure Code*.

If other witnesses are called, the accused or his or her advocate may address the Court: *s138(1) Criminal Procedure Code*. If the accused decides to give evidence, he or she will be called as the first defence witness (unless you otherwise permit for special reasons): *s90 Criminal Procedure Code*. After he or she is sworn, say:

"State your full name, occupation and where you live. Now, slowly and clearly, tell the Court the evidence that you wish to give relevant to the charges you are facing".

It is often helpful to lead the accused through the preliminary matters in order to help provide confidence for him or her to give their own account of the crucial event.

If reference to damaging evidence given by the prosecution is omitted, draw attention to it and inquire if the accused wishes to comment on it.

After the accused has been cross-examined, ask: "Is there any further evidence you wish to give arising out of the questions just put to you by the prosecutor?"

Then hear any defence witnesses, who may be cross-examined by the prosecution and re-examined by the accused.

9. Evidence in Reply: *s137 Criminal Procedure Code*

If the accused adduces evidence introducing new matter which the prosecution could not have foreseen, you may allow the prosecution to adduce evidence in reply to rebut it.

10. Closing Addresses: *s138(2) Criminal Procedure Code*

If the defence has adduced evidence, the accused or his or her advocate may address the Court: *s138(2)*.

Both the prosecution and the defence have a right to make a closing address. The order of that address is the prosecution first followed by the defence: *s140 Criminal Procedure Code.*

11. Decision

After hearing all submissions on the law and the evidence:

- give your judgment immediately, if it is straightforward; or
- adjourn briefly to consider the matter or structure your decision and deliver it the same day; or
- reserve your decision and adjourn the matter to a later date for delivery.

You will either convict the accused or acquit him or her.

See Chapter 13 Criminal: Judgment.

If you convict the accused, you must then pass sentence or make an order against the offender: *s140 (3) Criminal Procedure Code*. See Chapter 14 Sentencing.

If you acquit the accused, that will be a bar to any subsequent Information or complaint for the same matter against the same accused: *s142 Criminal Procedure Code*.

8 Amending the Charge

At any stage before the close of the prosecution case, if it appears that the charge is defective in substance or form, you may make an order for the alteration of the charge, either by:

- amending it;
- substituting one charge for another; or
- adding a new charge: *s139(1), (2) Criminal Procedure Code*.

You must:

- clearly explain to the accused the difference in the essential ingredients of the former charge and the altered charge;
- put the amended charge to the accused and take a plea: *s139(1)(a) Criminal Procedure Code*, as amended; and

- allow the accused to recall witnesses to give their evidence afresh or be further cross-examined (and be re-examined by the prosecution): *s139(1)(b) Criminal Procedure Code*, as amended.

See *Obed v Public Prosecutor* [2002] VUCA 37; CA 10-02

You may adjourn the hearing for whatever time may be reasonably necessary if you think the accused has been misled or deceived: *s139(2)(4) Criminal Procedure Code*, as amended.

Make sure you record the amendment of the charge and the plea.

Note that if the defect in the charge relates to the day on which the alleged offence was committed, this is immaterial and does not require an amendment: *s139(3) Criminal Procedure Code*, as amended.

9 Withdrawal of Complaint

The prosecutor may apply to withdraw the charge at any time before the final order is passed: *s129 Criminal Procedure Code*. The withdrawal is done by the prosecutor entering a "*nolle prosequi*" by stating in Court or by informing the Court in writing of the intention to discontinue: *s29(1) Criminal Procedure Code*.

It is your duty to ascertain whether the grounds for the application to withdraw are reasonable. If not, you may exercise your discretion to refuse the application.

The time that the charge is withdrawn is important:

- If it is withdrawn **before** the accused is called upon to make his or her defence, then you **may** either:
  - acquit the accused; or
  - discharge the accused.

- If it is withdrawn **after** the accused is called upon to make his or her defence, then you **must** acquit the accused. The doctrine of *autrefois acquit or autrefois convict* applies.
  - This means that the accused may not be brought back to Court on the same set of facts under which he or she has been previously acquitted or convicted: *Vanuatu Constitution Chapter 2 Article 5(2)(h).*

(Note that, if you find that there is no case to answer, *s135 Criminal Procedure Code* requires that you acquit the accused.)

Sometimes, the Police will make a request to withdraw a complaint. This often occurs when parties have reconciled and compensation has been paid for minor offences. It is good policy to inquire into the reason for the withdrawal to ensure that justice has been done in the case.

Occasionally, withdrawal will be sought in cases of assault or other violent crime. You must be very careful in these situations that the withdrawal is not being sought because the complainant is being coerced or threatened in some manner. In such cases, you should consider refusing the application for withdrawal, and give reasons for your refusal.

10 Adjournments

See Chapter 8 Criminal: Management of Proceedings.