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CRIMINAL:

CRIMINAL RESPONSIBILITY

1 Introduction

The *Penal Code* is the main Statute that sets out those acts or omissions which should be regarded as criminal offences and the rules related to the criminal law in Vanuatu.

This chapter will discuss:

- the important principles of the criminal law which govern the conviction of criminal offences in Vanuatu;
- defences that can be raised which excuse an accused from criminal responsibility;
- parties which should be held criminally responsible for those acts or omissions; and
- attempts to commit an offence.

2 Principles of Criminal Law

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.

See *Public Prosecutor v Arnhabat* [2003] VUSC 50; Criminal Case No 036 of 2003.

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, 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 producing evidence of all the elements of the offence, then the defence has a chance to present their case and you must then 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, based on the evidence that has been presented by the prosecution, and there is no reasonable doubt in your mind. For a discussion of the meaning of reasonable doubt, see *Public Prosecutor v Taleo* [2001] VUSC 8; Criminal Case No 009 of 1999.

If you are uncertain, you must find the accused not guilty. If you have reasonable doubts, this means that the prosecution has not proved the charge to the required standard.

2.3 What Must be Proved

All offences involve the:

- *actus reus*; and
- *mens rea*.

Actus Reus: The Physical Act or Omission

This is the physical conduct or action, or an omission:

- which is not allowed by law; or
- for which the result is not allowed by law.

These acts or omissions are the physical elements of the offence, **all** of which must be proved by the prosecution.

An offence may consist of one act or omission or a series of acts or omissions. The failure by the prosecution to prove the act(s) or omission(s), and any accompanying conditions or circumstances means there can be no conviction.

Mens Rea: Mental Capacity

Most offences require the prosecution to prove that the accused had a particular state of mind in addition to the act and its consequences. This is called the *mens rea*.

This could be:

- intention: the accused meant to do something, or desired a certain result;
- recklessness: the accused foresaw the possible or probable consequences of his or her actions and although did not intend the consequences, took the risk;
- knowledge: knowing the essential circumstances which constitute the offence;
- belief: mistaken conception of the essential circumstances of the offence; or

- negligence: the failure of the accused to foresee a consequence that a reasonable person would have foreseen and avoided.

The two main presumptions regarding *mens rea* that operate in the criminal law are:

- *mens rea* is an essential element of every offence, unless specifically excluded; and
- individuals intend the natural consequences of their actions.

Mens rea as an essential element of every offence

That *mens rea* is presumed to be an element of every offence was settled in the English case of *Sherras v. De Rutzen* (1985) 1QB 918. Even if words normally associated with *mens rea*, such as “knowingly” are not used in an offence section, it is still presumed that some mental element must accompany the act to make it criminal.

The only exception is where there is specific language in the offence which clearly shows that this presumption does not operate and committing the *actus reus* alone will be enough.

Individuals intend the natural consequences of their actions

It is the burden of the prosecution to prove every element of an offence through direct or circumstantial evidence. Nevertheless, you can presume that individuals intend the natural consequences of their actions: See *R v Lemon* [1979] 1 All ER 898.

2.4 Intention

Accident

With the exception of offences which specifically exclude *mens rea* as an element (absolute liability offences), an accused is not criminally responsible for an act which occurs independently of his or her free will or through an accident.

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

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 the accused is immaterial. For example, if Ambata tickles Barak hard, intending him to laugh and play fight back, and Barak suffers a broken rib, then the fact that Ambata intended an innocent result does not matter. He is guilty of an assault causing actual bodily harm.

Motive

Unless expressly declared to be an element of an offence, the reason or motive an accused has for doing an act is immaterial.

Even in cases where the accused is acting out of a good motive, the motive does not diminish responsibility, although it may have a bearing on the sentence imposed. For example, if Ambata steals from a store in order to feed his children, it does not diminish Ambata's criminal responsibility for the theft.

3 Exemptions to Criminal Responsibility under *Part 1 Penal Code*

Where a person is not criminally responsible for an offence, they are not liable for punishment for the offence.

Part I of the *Penal Code* sets out some of the exemptions to criminal responsibility. It may also be necessary from time to time to refer to the *Criminal Procedure Code* when dealing with issues of criminal responsibility.

Generally, an accused will argue that he or she should not be punished for an offence because:

1. the prosecution has not proved one or more elements of the offence beyond a reasonable doubt; or
2. he or she has a specific defence specified in the actual offence (eg. lawful excuse); or
3. that he or she was not criminally responsible, relying on one of the defences in *Part I* of the *Penal Code*.

Where the accused is arguing one of the defences from *Part I* of the *Penal Code*, he or she must point to some evidence to support such a defence. Then it is the prosecution that bears the burden of proving that such evidence should be excluded or that the accused **was** criminally responsible for his or her act or omission.

The exception is **insanity**. In this case, it is for the accused to prove, on the balance of probabilities, that he or she was insane at the time of the offence and, therefore, did not have the required *mens rea* for the offence.

3.1 Ignorance of the Law

Ignorance of the law is not a valid defence: *s11 Penal Code*. This is because, if knowledge of the law was necessary for conviction, it would encourage people to ignore the law.

3.2 Mistake of Fact

A mistake of fact may also be a defence to a criminal charge. The mistake must be a reasonable and genuine belief in any fact or circumstances which, had it existed, would have rendered the conduct of the accused innocent: s12 Penal Code.

This is because the law tries to punish only blameworthy acts, not those where the accused is acting honestly, even if the accused is mistaken.

For example, if Ambata takes a knife from Barak, believing honestly and reasonably, but incorrectly, that Barak consented to him taking the knife, Ambata is not guilty of theft.

For some offences, the defence of mistake of fact is not available. For example, a reasonable but mistaken belief as to the age of the complainant for most sexual offences is immaterial: See *s97(3) Penal Code*.

3.3 Insanity

An accused is not criminally responsible by reason of insanity 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: *s20 Penal Code*.

The *Penal Code* presumes every person is sane until proved otherwise: *s20(1) Penal Code*. For a successful insanity defence, the accused must prove on the balance of probabilities that he or she was insane at the time of the offence and therefore did not have the required *mens rea* for the offence.

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

Insanity Defence

If an accused is found to be not criminally responsible by reason of insanity, you must acquit the accused: *s20(3) Penal Code*.

When you make such a finding, you may order the accused to be kept in custody as a criminal lunatic in a place and manner you direct: *s20(3) Penal Code*.

See *ss91, 92* of the *Criminal Procedure Code* for how to deal with an accused, who appears to be suffering from mental disease.

3.4 Intoxication

Voluntary Intoxication

Voluntary intoxication shall not constitute a defence to any charge unless the offence charge is one in which:

- criminal intention is an element; and
- the intoxication was of so gross a degree as to deprive the accused of the capacity to form the necessary criminal intention: *s21 Penal Code*.

Involuntary Intoxication

Involuntary intoxication shall, for the purpose of the criminal law, be deemed to be a mental disease. *s20(4) Penal Code*.

3.5 Immature Age

In all cases where immature age is at issue, the age of the accused is taken at the time of the act or omission in question: *s17(2) Penal Code*.

When inquiring into age, in the absence of official civil records, the age of the person must be determined upon a balance of probabilities after hearing the evidence of a medical expert: *s17(3) Penal Code*.

Under 10 Years of Age

A child under 10 years is not criminally responsible for any act or omission: *s17(1) Penal Code*. This is because the law only seeks to punish those who do wrongful acts and the law treats children under 10 years as being incapable of knowing right from wrong.

Under 14 Years of Age

A child under the age of 14 years is not criminally responsible for an act or omission unless it is proved that, at the time of the act in question, he or she had capacity to know the difference between right and wrong with respect to the offence charged: *s17(1) Penal Code*.

3.6 Superior Orders

A person is not criminally responsible for an act performed on the orders of a superior to whom obedience is lawfully due, unless the order was manifestly unlawful or the accused knew that the superior had no authority to make the order in question: *s22 Penal Code*.

3.7 Judicial Officers

A judicial officer is not criminally responsible for any act or omission in the exercise of his or her judicial functions if he or she:

- acted in good faith in doing or ordering the act; and
- believed that he or she had the jurisdiction to do or order to act by the *Judicial Services And Courts Act No 54 of 2000: s55 Judicial Services And Courts Act*.

3.8 Defence of Person or Property or Prevention of Offence

The law recognises a right for individuals to defend themselves and their property from others. For this reason, what would otherwise be offences such as assault or murder may not be if the accused was acting in defence of himself or another or herself or another or property, so long as the defence is not disproportionate to the seriousness of the unlawful action: *s23(1) Penal Code*.

A person is not criminally responsible for an act done in necessary protection of any right of property, in order to protect oneself or another or any property from a **grave and imminent** danger, so long as the means of protection is not disproportionate to the severity of the imminent harm: *s23(3) Penal Code*.

A person is not criminally responsible for using such force as is reasonably necessary in the circumstances to:

- prevent the commission of an offence (not an offence against the person acting); or
- effect or assist the lawful arrest of any offender or suspected offender or any person unlawfully at large: *s23(4) Penal Code*.

Principles

- A person may use such force as is reasonable in the circumstances as he or she honestly believes them to be in the defence of himself or herself or another: *Beckford v The Queen* [1988] AC 130.
- What force is necessary is a matter of fact to be decided on a consideration of all the surrounding factors.
- The state of mind of the accused should also be taken into account. This is a subjective test: *R v Whyte* (1987) 85 CrAppR 283.
- Force may include killing the aggressor, but there must be a reasonable necessity for the killing or at least an honest belief based on reasonable grounds that there is such a necessity.

- It would only be in the most extreme circumstances of clear and very serious danger that a Court would hold that a person was entitled to kill simply to defend his or her property, as there are many other effective remedies available.
- The onus is on the **prosecution** to prove that the accused did **not** act in self-defence or in defence of property, once the issue has been raised by the accused and evidence has been presented: *Billard v R* (1957) 42 CrAppR 1; *R v Moon* [1969] 1 WLR 1705.

4 Diminished Responsibility

In addition to lawful excuses which will remove criminal responsibility, there are a number of situations where responsibility may be diminished. Whenever responsibility is diminished by law, you may mitigate the punishment at your discretion: *s24 Penal Code*.

4.1 Failure of Plea of Insanity

If a plea of insanity fails, you may find the accused guilty of the charge. In such situations, even if you find the accused not insane, you may still find the accused has diminished responsibility for his or her acts because he or she was suffering from an abnormality of mind, arising from:

- a condition of arrested development of mind; or
- any inherent cause or induced by disease or injury: *s25(1) Penal Code*.

If an accused is found guilty but with diminished responsibility, you may make any order with respect to his or her custody and treatment as is necessary for the safety of others and his or her own well-being: *s25(2) Penal Code*.

4.2 Compulsion and Coercion

A person's criminal responsibility is diminished if that person is forced to do acts by another person against his or her own free will: *s26(1) Penal Code*.

The two types of compulsion are:

- under actual, unavoidable compulsion or threats of death or grievous harm; or
- under the coercion of a parent, spouse, employer or other person having actual or moral authority over the person: *s26(1) Penal Code*.

Criminal responsibility will not be diminished if the person has voluntarily exposed himself or herself to the risk of such compulsion.

4.3 Provocation

So long as the reaction constituting the offence is proportionate to the degree of provocation, a person's criminal responsibility is diminished if the offence was immediately provoked by the unlawful act of another:

- against the offender; or
- against the offender's spouse, descendant, ascendant, brother, sister, master, servant or any minor or incapable person in the offender's charge in the offender's presence: *s27(1) Penal Code*.

In all cases, for provocation to operate to diminish criminal responsibility, the provocation must be of such a degree as would deprive a normal person of his or her self-control: *s27(2) Penal Code*.

The intentional killing or wounding of another is deemed not disproportionate if the provocation consists of violent blows or injuries: *s27(2) Penal Code*.

4.4 Withdrawal

For the offence of conspiracy and for all attempted offences, if a person voluntarily withdraws from the offence before its commission, he or she may have diminished criminal responsibility.

5 Parties

The law recognises that there can be more than one person connected to a criminal offence. This includes:

- those who actually commit the offence (principal offenders);
- those who somehow contribute to the commission of the offence through encouragement, advice or assistance (accomplices);
- those who conspire to commit an offence (conspirators); and
- those who aid an offender after the commission of the offence (accessories after the fact).

5.1 Principal Offenders

A principal offender is the person(s) whose actual conduct satisfies the definition of the particular offence in question, i.e. did the act/omitted to do the act.

It must be proved that the accused had both the *mens rea* and *actus reus* for the particular offence that they have been charged with in order for him or her to be a principal offender.

In cases where there is only one person who is involved in the offence, he or she will be the principal offender.

For example, if Ambata punches Barak on the face, Ambata would be considered the principal offender for the offence of assault.

5.2 Co-Offenders

Any person who, in agreement with another, takes part with him or her in the commission of a criminal offence is a co-offender.

Unless an enactment expressly states otherwise, co-offenders are punishable in the same manner as the principal offender: *s32 Penal Code*.

5.3 Accomplices

Anyone who aids, counsels or procures any other person to commit the offence shall be guilty as an accomplice and may be charged with, and found guilty of actually committing the offence: *s30 Penal Code*.

An accessory may be found criminally responsible for all offences unless it is expressly excluded by Statute.

The *actus reus* of an accomplice involves two concepts:

- aiding, counselling and procuring; and
- the offence.

The mental element (*mens rea*) for an accessory is generally narrower and more demanding than that required for a principal offender. The mental element for principal offenders includes less culpable states of mind such as recklessness or negligence, while the mental elements required for an accessory are:

- **knowledge:** he or she must have known at least the essential matters which constitute the offence; and
- **intention:** he or she must have had an intention to aid, counsel or procure. This does not necessarily mean that he or she had the intention as to the principal offence that was committed. Note that a common intention is not required for procuring.

Aiding: s30 Penal Code

Every person who aids another person in committing the offence:

- shall be guilty as an accomplice; and
- may be charged and convicted as a principal offender: *s30 Penal Code*.

The term “to aid” generally means to give assistance and encouragement at the time of the offence.

To prove the offence of aiding to another person in the commission of an offence it must be established that he or she:

- knows the facts necessary to constitute the offence; and
- is actively encouraging or in some way assisting the other person in the commission of the offence.

Actual knowledge of the circumstances which constitute the offence is required. This does not mean the same mental state as that required by the principal party in the commission of the substantive offence. Rather, the secondary party must know of the principal’s mental state and the facts which would make his or her purpose criminal.

In *Attorney-General Reference* (No. 1 of 1975) [1975] 2 All ER 684, it was found that some sort of mental link is required between the principal offender and the secondary party in order for there to be aiding. This requires that the principal offender and the secondary party were together at some stage discussing the plans made in relation to the alleged offence.

In *Wilcox v Jeffrey* [1951] 1 All ER 464, the Court held that mere presence alone is insufficient to act as an encouragement. There must, on behalf of the secondary party, be an intention to encourage, or actual encouragement, beyond an accidental presence at the scene of the crime.

In *R v Allan* [1965] 1 QB 130, the Court held that, to be a principal in the second degree to an affray, there must be some evidence of encouraging those who participated. Courts cannot convict a man for his thoughts unaccompanied by any other physical act beyond his presence.

See also: *Johnson v Youden* [1950] 1 KB 554, per Lord Goddard; *Gillick v West Norfolk and Wisbeach Area Health Authority* [1986] 1 AC 112; *R v Clarkson* [1971] 3 All ER 344.

Elements for aiding

- An offence must have been committed by the principal offender.
- The accused must have done something (or omitted to do something) to encourage or assist the principal offender and was acting in concert with the principal offender.
- There was some sort of mental link or meeting of the minds between the secondary party and the principal offender regarding the offence.

Counselling or Procuring: s30 Penal Code

Every person who counsels or procures any other person to commit a criminal offence:

- shall be guilty as an accomplice; and
- may be charged and convicted as a principal offender: *s30 Penal Code*.

The term “to counsel or procure” generally describes advice and assistance given at an earlier stage in the commission of the offence.

Counselling

The normal meaning of “counsel” is to incite, solicit, instruct or authorise.

Counselling does **not** require any causal link. As long as the advice or encouragement of the counsellor comes to the attention of the principal offender, the person who counselled can be convicted of the offence. It does not matter that the principal offender would have committed the offence anyway, even without the encouragement of the counsellor: *Attorney-General v Able* [1984] QB 795.

The accused must counsel **before** the commission of the offence.

When a person counsels another to commit an offence and the offence is committed, it is immaterial whether:

- the offence actually committed is the same as the one that was counselled or a different one:
 - For example, if Ambata counsels Barak to murder Charlie by shooting, Ambata can still be found guilty of murder if Barak uses a knife to kill Charlie;
- the offence is committed in the way counselled or in a different way:
 - For example, if Ambata counsels Barak to murder Charlie, but Barak only caused grievous bodily harm, Ambata can be found guilty of causing grievous bodily harm.

The one who counselled will be deemed to have counselled the offence actually committed by the principal offender, provided the facts constituting the offence actually committed are a **probable consequence** of the counselling.

See *R v Calhaem* [1985] 2 All ER 226.

Elements for counselling

- An offence must have been committed by the principal offender; and
- The accused counselled the principal offender to commit an offence; and
- The principal offender acted within the scope of his or her authority: *R v Calhaem* [1985] 2 All ER 267.

Procuring

To procure means to bring about or to cause something or to acquire, provide for, or obtain for another.

Procuring must occur **before** the commission of the offence.

Procuring was defined in *Attorney-General's Reference (No. 1 of 1975)* [1975] 2 All ER 684:

- Procure means to produce by endeavour.
- You procure a thing by setting out to see that it happens and taking appropriate steps to produce that happening.
- You cannot procure an offence unless there is a causal link between what you do and the commission of the offence.
- There does not have to be a common intention or purpose but there must be a causal link.

Elements for procuring

- An offence must have been committed by the principal offender; and
- The accused procured the principal offender to commit an offence; and
- There is a causal link between the procuring and the commission of the offence.

For other case law on parties see *John v R* (1980) 143 CLR 108; *R v Clarkson* (1971) 55 Cr App R 455; *Ferguson v Weaving* (1951) 1KB 814; *National Coal Board v Gamble* (1958) 3 All ER 203.

Withdrawal

Sometimes there may be a period of time between the act of an accessory and the completion of the offence by the principal offender. An accessory **may** escape criminal responsibility for the offence if they change their mind about participating and take steps to withdraw their participation in the offence.

What is required for withdrawal varies from case to case but some of the common law rules set down are:

- withdrawal should be made before the crime is committed; and
- if the participation of the counsellor is confined to advice and encouragement, the withdrawal should be communicated by telling the one counselled that there has been a change of mind;

- withdrawal should be communicated in a way that will serve unequivocal notice to the one being counselled that help is being withdrawn; and
- withdrawal should give notice to the principal offender that, if he or she proceeds to carry out the unlawful action, he or she will be doing so without the aid and assistance of the one who withdrew.

See *R v Becerra and Cooper* (1975) 62 Cr App R 212.

Punishment of Accomplices

Unless an enactment expressly states otherwise, accomplices are punishable in the same manner as the principal offender: *s32 Penal Code*.

5.4 Foreseeable Consequences

Any accomplice or co-offender in the commission or attempted commission of an offence shall be equally responsible for any other offence committed or attempted as a foreseeable consequence of the complicity or agreement: *s33 Penal Code*.

Section 33 Penal Code applies when, during the commission of the intended original offence, an additional offence is carried out.

Example

Ambata and Barak decide to commit a robbery. Ambata is inside the store taking the money while Barak is holding the door and making sure no one comes into the shop. During the hustle Ambata assaulted the shopkeeper. Although the assault was not part of their agreement or intention both shall be equally responsible and charged because the assault is a foreseeable consequence of their agreement.

The Elements

- An offence is committed (or attempted); and
- The accused is an accomplice or co-offender of that offence (or attempted offence); and
- Another offence is committed during the commission (or attempted commission) of the original offence; and
- That other offence is a foreseeable consequence arising from the original offence (or attempted offence).

5.5 Conspiracy

Conspiracy is an agreement between two or more people to do an act which, if done by even one person would constitute a criminal offence: *s29(1) Penal Code*. This may be either an express or implied agreement.

Rules Regarding Conspiracy

There can be no conspiracy between husband and wife: *s29(2) Penal Code*.

Conspiracy is only punishable where expressly provided by any provision of law: *s29(4) Penal Code*.

No prosecution against a conspirator is allowed without the consent, in writing, of the Public Prosecutor: *s29(5) Penal Code*.

A conspirator who voluntarily withdraws from the conspiracy before the commission of the offence shall have diminished criminal responsibility: *s29(3) Penal Code*. See paragraph 4, Diminished Responsibility, above.

Actus reus of conspiracy

- Agreement is the essential element of conspiracy. It is the *actus reus* of conspiracy. There is no conspiracy if negotiations fail to result in a firm agreement between the parties: *R v Walker* [1962] Crim LR 458.
- The offence of conspiracy is committed at the moment of agreement: *R v Simmonds & Others* (1967) 51 CrAppR 316.
- An intention between two parties is not enough for a charge. What is required is an **agreement** between two or more to commit an offence: *s29 (1) Penal Code*. See also: *R v West, Northcott, Weitzman & White* (1948) 32 CrAppR 152.
- At least **two** persons must agree for there to be a conspiracy. However, a single accused may be charged and convicted of conspiracy even if the identities of his or her fellow conspirators are unknown.

Mens rea of conspiracy

- Conspiracy requires two or more people to commit an unlawful act with the intention of carrying it out. It is the intention to **carry out the crime** that constitutes the necessary *mens rea* for conspiracy: *Yip Chieu-Chung v The Queen* [1995] 1 AC 111.
- Knowledge of the facts is only material, in so far as such knowledge throws light onto what was agreed to by the parties: *Churchill v Walton* [1967] 2 AC 224.
- Knowledge of the relevant law that makes the proposed conduct illegal need not be proved: *R v Broad* [1997] Crim LR 666.

The Elements for Conspiracy

- There must be an agreement between at least two people.
- There must be an intention for at least one of the people to do an act which would constitute a criminal offence.

5.6 Accessories After the Fact

A person is said to be an accessory after the fact to an offence when he or she knows or has cause to reasonably suspect that another person has committed an offence, and:

- shelters that person or his or her accomplice from arrest or investigation; or
- has possession of or disposes of anything taken, misappropriated or otherwise obtained by means of the offence or used for the purpose of committing the offence: *s34(1) Penal Code*.

Any person who becomes an accessory after the fact is guilty and shall be punished as a principal offender: *s34(3) Penal Code*.

A spouse, ascendant, descendant or sibling of the person sheltered may **not** become an accessory after the fact: *s34(2) Penal Code*.

The Elements for Accessories After the Fact

- The principal offender was guilty of an offence; and
- The accused knew of, or had cause to reasonably suspect, the principal offender's guilt; and
- The accused either:
 - ⇒ sheltered or assisted the principal offender in order to avoid arrest or investigation; or
 - ⇒ had possession of or disposed of anything taken, misappropriated or obtained by means of the offence or used in committing the offence.

Points to Note

- The principal offender must have committed an offence.
- The assistance must be given to the person or his or her accomplice.
- The assistance must be given in order to prevent or hinder him or her from being apprehended or being punished.
- The Court must be satisfied that the accused knew or should have suspected that an offence had been committed by the principal offender.

- An accessory cannot be convicted if the principal offender has been acquitted (*Hui Chi-Ming v R* [1991] 3 All ER 897), so the guilt of the principal offender should be determined before a plea of guilty is taken from an accessory (*R v Rowley* (1948) 32 Cr. App R 147).

6 Attempts

A person may be held criminally responsible for attempting to commit an offence.

This is because the basis of criminal responsibility is the punishment of blameworthy behaviour coupled with a blameworthy state of mind.

When a person is charged with an offence, he or she may be convicted of having attempted that offence, although not specifically charged with the attempt: *s110 Criminal Procedure Code*.

Definition of Attempt

An attempt to commit a criminal offence is committed if any act is done or omitted with intent to commit that crime and such act or omission:

- is a step towards the commission of the crime, which is immediately connected with it; or
- would have been had the facts been as the offender supposed them to be: *s28(1) Penal Code*.

Even if complete commission of the offence was impossible by reason of a circumstance unknown to the offender, a person may still be guilty of attempt: *s28(2) Penal Code*.

Acts committed in mere preparation of an offence shall not constitute an offence: *s28(3) Penal Code*.

Penalty for Attempts

The penalty for the commission of an attempted offence is the same as for the full offence concerned: *s28(4) Penal Code*.

The criminal responsibility of a person committing an attempted offence who voluntarily withdraws from the attempt before the offence has been committed shall be diminished: *s28(5) Penal Code*. See paragraph 4, Diminished Responsibility, above.

7 Lesser Offences

An accused may be convicted of a lesser offence though not specifically charged with it, when:

- the offence charged consists of several particulars;
- a complete lesser offence consists of a combination of only some of those particulars; and
- the evidence proves only the combination of the fewer particulars not all particulars of the larger offence: *s109(1) Criminal Procedure Code.*

For example, if an accused is charged with assault causing actual bodily harm but the evidence proves only common assault, the accused may still be convicted of the common assault.

In the same way, when an accused is charged with an offence and the facts proved reduce it to a lesser offence, he or she may be convicted of the lesser offence though not charged with it: *s109(2) Criminal Procedure Code.*

More Serious Offence Proved

If in any trial for an offence the facts prove a more serious offence than the one charged, you must not acquit the accused of the lesser offence: *s116 Criminal Procedure Code.*

A person may not be later tried on the same facts for a more serious offence, unless you otherwise direct. If you do direct a trial for the more serious offence, the person may be dealt with as if he or she had not previously been put on trial for the lesser offence: *s116 Criminal Procedure Code.*

8 Alternative Offences

Occasionally, an accused charged with one offence may be convicted of an offence with very different particulars. The one most likely encountered in Magistrate's Court is alternative offences to theft.

Theft

When an accused is charged with theft and it is proved that he or she received the thing knowing it to have been stolen, you may convict the accused of receiving although he or she was not charged with it: *s115(1) Criminal Procedure Code.*

When an accused is charged with obtaining anything capable of being stolen by false pretences and it is proved the accused stole the thing, you may convict the accused of the offence of theft although he or she was not charged with it: *s 115(2) Criminal Procedure Code.*