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EVIDENCE

1 Introduction

Evidence refers to the information used to prove or disprove the facts in issue in a trial. In criminal trials, it is the prosecution that bears the burden of proving or disproving the facts in issue, in order to establish the guilt of the accused, unless an enactment specifically provides otherwise.

The subject of evidence and the rules related to it are a complex area of law. This chapter provides a brief introduction to the subject of evidence and outlines some of the rules of evidence that you may encounter in a criminal trial. It should not replace in-depth study of the rules of evidence and their application in criminal trials.

In order to properly apply the rules of evidence in a criminal trial, it is important to understand how evidence is classified.

2 Classification of Evidence

Evidence is generally distinguished by reference to the form it takes or by reference to its content. You must take into account both the form of evidence and the content of the evidence in a criminal trial. For example, oral evidence (which is a form of evidence) given during a trial may be direct or circumstantial (which is the content of the evidence).

2.1 Classification by Form

Classification by form refers to the way evidence is presented in Court and it is divided into three main categories.

1. Documentary evidence:

- consists of information contained in written or visual documents.

2. Real evidence:

- is usually some material object or thing (such as a weapon) that is produced in Court and the object's existence, condition or value is a fact in issue or is relevant to a fact in issue.

3. Oral evidence:

- is the most important category of evidence in criminal cases; and
- consists of the statements or representation of facts given by witnesses.

2.2 Classification by Content

Classification by content refers to the way the evidence is relevant to the facts in issue. This method of classification divides evidence into three categories.

1. Direct evidence:

- is evidence which, if believed, directly establishes a fact in issue. For example, direct evidence would be given by a witness who claimed to have personal knowledge of the facts in issue.

2. Circumstantial evidence:

- is evidence from which the existence or non-existence of facts in issue may be inferred;
- is circumstantial because, even if the evidence is believed, the information or circumstances may be too weak to establish the facts in issue or to uphold a reasonable conviction; and
- often works cumulatively and there may be a set of circumstances which, individually, would not be enough to establish the facts in issue but taken as a whole would be enough to do so.

3. Corroborating or collateral evidence:

- is evidence which does not bear upon the facts in issue either directly or indirectly but is relevant for the credibility or admissibility of other evidence in the case (either the direct or circumstantial evidence); and
- should come from another independent source, e.g, an analyst or medical report.

3 Documentary Evidence

This is information that is contained in written documents. These documents may include:

- public documents (statutes, parliamentary material, judicial documents, public registers);
- private documents (business records, agreements, deeds);
- plans and reports;
- certificates;
- statements in documents produced by computers (note that certain rules may apply to this form of documentary evidence);
- tape recordings; and
- photographs.

By definition, documentary evidence will always consist of 'out of Court' statements or representations of facts, and therefore the question of whether the document is hearsay evidence will always arise. Often, documentary evidence will only be admissible under an exception to the hearsay rule.

It is best if the documents produced at the trial are the originals. If the original cannot be produced, then copies may be ruled admissible depending on the circumstances.

Secondary Evidence

Secondary evidence refers to evidence that is not original.

Examples of secondary evidence include:

- shorthand writing;
- photocopy; or
- fax copy.

4 Real Evidence

Real evidence usually refers to material objects or items which are produced at trial.

Documents can also be real evidence when:

- contents of the document are merely being used to identify the document in question or to establish that it actually exists; or
- where the document's contents do not matter, but the document itself bears fingerprints, is made of a certain substance, or bears a certain physical appearance.

The following may also, in some circumstances, be regarded as real evidence:

- a person's behaviour;
- a person's physical appearance; and/or
- a persons demeanour or attitude, which may be relevant to his or her credibility as a witness, or whether he or she should be treated as a hostile witness.

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

When it is inconvenient or impossible to bring some evidence to Court, you may inspect a material object out of Court.

5 Exhibits

When real or documentary evidence is introduced in Court, it becomes an exhibit. When a party is tendering an exhibit in Court, you should check:

- has the witness seen the item?
- has the witness been able to identify the item to the Court?
- has the party seeking to have the item become an exhibit formally asked to tender it to the Court?
- has the other party been put on notice about the existence of the exhibit?

Once an article has become an exhibit, the Court has a responsibility to preserve and retain it until the trial is concluded. Alternatively, the Court may mark and record the existence of the item, and entrust the object or document to the clerk for safekeeping.

The Court must ensure that:

- proper care is taken to keep the exhibit safe from loss or damage; and
- that if the police are entrusted with the item, that the defence is given reasonable access to it for inspection and examination.

6 Oral Evidence

Oral testimony consists of statements or representations of fact. These statements may be 'in Court' statements or 'out of Court' statements.

'In Court' statements are defined as those made by a witness who is giving testimony. If a witness wants to mention in his or her testimony a statement made outside of the Court, that statement is an 'out of Court' statement.

The distinction between 'in Court' statements and 'out of Court' statements is very important in the law of evidence. If a witness wants to refer to 'out of Court' statements in his or her testimony, you must decide whether it should be classified as hearsay or original evidence.

If the purpose of an 'out of Court' statement is to prove the truth of any facts asserted, then the 'out of Court' statement is classified as hearsay evidence and will generally be ruled inadmissible, under the hearsay rule.

If the purpose of mentioning an 'out of Court' statement is simply to prove that an 'out of Court' statement was made, then it should be treated as original evidence and should generally be ruled admissible.

The value of oral evidence is that you can observe:

- the demeanour of the witness;
- the delivery;
- the tone of voice;
- the body language; and
- the attitude towards the parties.

You must ensure that at every stage of the proceedings, you or the Clerk takes down in writing oral evidence given before the Court or that which you deem material.

7 Taking Evidence

7.1 Power to Summon and Examine Witness

At any stage or any trial or proceeding, you may:

- summon any person;
- examine any person in attendance though not summoned; and
- recall and re-examine any person already examined: *s82(1) Criminal Procedure Code*.

You **must** summon and examine or recall and re-examine any person if it appears to you that his or her evidence is essential to the just determination of the case: *s82(1) Criminal Procedure Code*.

The prosecutor and accused have the right to cross-examine any person so summoned and you must adjourn the case if necessary to effect that purpose: *s82(2) Criminal Procedure Code*.

7.2 Evidence on Oath

With the exception of children, every witness in a criminal case must be examined upon oath or affirmation. You have full power and authority to administer the usual oath and affirmations: *s83(1) Criminal Procedure Code*.

The oaths and affirmations are as follows:

OATH ON BIBLE

'I swear by almighty God that the evidence I shall give to this court, shall be the truth, the whole truth and nothing but the truth'.

AFFIRMATION

'I solemnly truly sincerely declare and affirm that the evidence I shall give to this court, shall be the truth, the whole truth, nothing but the truth'.

SERMENT

'Je jure par devant Dieu que le temoinage que je vais donner, sera la verite, toute la verite, en rien que la verite'.

DECLARATION SOLENNELLE

'Je declare solennellement et sincerement que le temoinage que je vais donner, sera la verite, toute la verite, et rien que la verite'.

PROMES LONG BAEBOL

'Mi promes longnem blong God, se everi toktok we bambae mi talem long Kot ya, oli tru toktok, mo oli tru toktok everiwan'.

DIKLERESEN

'Mi mekem strong promes ya, mo mi affemem se bambae evri toktok we bambae mi talem long Kot ya, oli tru toktok, mo oli tru toktok everiwan'.

Evidence of Children

Normally, evidence is given upon oath. However, if you are of the opinion that a child of tender years does not understand the nature of an oath, you may still receive his or her evidence not on oath, if you believe:

- the child has sufficient intelligence to justify the reception of his or her evidence; and
- he or she understands the duty to tell the truth: *s83 Criminal Procedure Code*.

Where a child's evidence is given on behalf of the prosecution, the accused must not be convicted on that evidence alone. To secure conviction, the child's evidence must be corroborated by other material evidence: *s83(3) Criminal Procedure Code*.

7.3 Evidence in Absence of Accused

Unless expressly provided or when personal attendance has been dispensed with, all evidence taken in a criminal trial must be taken in the presence of the accused: *s120 Criminal Procedure Code*.

If an accused has absconded and there appears to be no immediate prospect of arresting him or her, you may examine any prosecution witnesses and record their dispositions: *s87 Criminal Procedure Code*.

On the arrest of the accused, the depositions may then be used as evidence if the deponent is:

- dead;
- incapable of giving evidence;
- outside Vanuatu; or
- his or her attendance cannot be procured without an undue amount of delay, expense or inconvenience: *s87 Criminal Procedure Code*.

7.4 Interpretation of Evidence

If evidence is given in the presence of the accused in a language he or she does not understand, it must be interpreted to him or her in open Court: *s121(1) Criminal Procedure Code*.

If the accused is appearing by advocate and the evidence is in a language other than French or English which is not understood by the advocate, it must be interpreted to him or her in open Court: *s121(2) Criminal Procedure Code* as amended by *Schedule 2 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

For documents entered as formal proof, you must decide how much of the document appears to be necessary for translation: *s121(3) Criminal Procedure Code*.

If you are satisfied with your proficiency in English, French or Bislama you may, without a sworn interpreter, undertake any required interpretation any of the languages mentioned in a trial: *s121(4) Criminal Procedure Code*.

7.5 Recording Evidence

With the exception of trial for a minor offence, you must ensure the evidence is taken down:

- in writing in English, French or Bislama by you or in your presence and hearing and under your direction and supervision;
- after you sign this it will then form part of the record; and
- not in the form of question and answer but in the form of a narrative, unless you cause to be taken down any particular question and answer: s122 Criminal Procedure Code.

If you are satisfied with your proficiency in English, French or Bislama you may, take down in one language evidence given in another language without a sworn interpreter: *s122 Criminal Procedure Code*.

Demeanour

When recording substantive evidence, you must also record any remarks you consider material in respect of the demeanour of the witness under examination: *s123 Criminal Procedure Code*.

Minor Cases

You may try an offence without recording evidence for offences:

- punishable with a maximum 3 months imprisonment and/or a VT 10,000 fine;
- offences of absolute liability;
- assault causing no physical damage;
- offences against property worth a maximum value of VT 2,000;
- any other offence which you are directed to try in this manner; and
- the attempting, aiding, counselling or procuring of any of the offences mentioned: *s124 Criminal Procedure Code* as amended by *Criminal Procedure Code (Amendment) Act No 13 of 1984*.

For these cases, you must record:

- the serial number;
- the date of the commission of the offence;
- the date of complaint;
- the name of the complainant;
- the name, surname and address of the accused;
- the offence complained of, the offence proved and the value of property damaged;
- the accused's plea;
- the finding, and where evidence has been taken, a judgment of the evidence;
- the sentence or final order; and
- the date on which the proceedings were terminated: *s124(1) Criminal Procedure Code*.

When during such a proceeding it appears that the case should not be tried as a minor offence, you must recall any witnesses and proceed to rehear the case in the regular manner: *s124(3) Criminal Procedure Code*.

Upon conviction in such a proceeding, you must not pass a sentence exceeding 3 months or a fine exceeding VT 10,000: *s124(4) Criminal Procedure Code*.

7.6 Admissions

Any fact which could be admitted as oral evidence at trial may be admitted by a party and shall be treated as conclusive evidence of that fact: *s84(1) Criminal Procedure Code*.

Such an admission:

- may be made before or during a trial;
- if made outside of Court, it must be in writing;
- if made in writing, must be signed by the person making it (or a director, manager, secretary, clerk or similar officer if made by a body corporate);
- if made on behalf of an accused who is an individual, may be made by his or her advocate; and
- if made before trial by an accused who is an individual, must be approved by his or her advocate before or during trial: *s84(2) Criminal Procedure Code*.

For dealing with confessions of an accused, see *Public Prosecutor v Louman* [2003] VUSC 42; Criminal Case No 027 of 2003.

7.7 Expert Evidence

Any document purporting to be a report from a surveyor, Government analyst, Government geologist or a medical practitioner about any person, matter or thing submitted to the person for examination may be used as evidence in the proceedings: *s86(1) Criminal Procedure Code* as amended by *Schedule 2 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

When examining such a report, you may presume the signature to be genuine and that the writer of such report held the qualification or office claimed at the time of signing: *s86(2) Criminal Procedure Code* as amended by *Schedule 2 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

You may summon or issue interrogatories to the surveyor, analyst, geologist or medical practitioner in question and examine the person on the subject matter of the document. Such interrogatories and replies may also be used as evidence in the proceeding: *s86(3) Criminal Procedure Code* as amended by *Schedule 2 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

The fact you may receive such documents does not affect any rule as to their admissibility into evidence: *s86(4) Criminal Procedure Code*.

All evidence so received is still subject to rules regarding hearsay, etc.

7.8 Competency of Accused and Spouse

The Accused

Every accused and his or her wife or husband is a competent witness for the defence at every stage of the proceedings, whether the accused is charged solely or jointly: *s89(1) Criminal Procedure Code*.

An accused may not be called as a witness except upon his or her own application: *s89(2)(a) Criminal Procedure Code*.

The prosecution must not comment on the fact that the accused does not give evidence: *s89(2)(b) Criminal Procedure Code*.

If an accused called as a witness, he or she:

- must be called as the first witness for the defence unless, for a special reason, you otherwise permit: *s90 Criminal Procedure Code*;
- may be asked any question in cross-examination although the answer would be incriminating as to the offence charged: *s89(2)(e) Criminal Procedure Code*. It would be good practice for you to caution an accused in such circumstances that he or she is not compelled to answer the question on the grounds that it may self-incriminate.

An accused called as a witness shall not be asked, and if asked is not required to answer any question tending to show he or she is of bad character, or has committed, been convicted of, or charged with any other offence, unless:

- the proof of the other offence is admissible evidence to show that he or she is guilty of the offence which is the subject of the proceeding; or
- he or she personally, or through an advocate has:
    4. asked questions of a prosecution witness to establish his or her own good character;
    5. given evidence of his or her own good character; or
- the nature or conduct of the defence involves imputations on the character of the complainant, or prosecution witnesses; or
- he or she has given evidence against any other accused jointly charged: *s89(2)(f) Criminal Procedure Code* as amended by *Schedule 2 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

Wife or Husband of Accused

The wife or husband of the accused may only be called as a witness without the accused's consent if:

- a law in force permits it; or
- the accused is charged with an offence against morality under *ss 90 – 101 Penal Code*; or
- the accused is charged for any act or omission affecting the person or property of the wife or husband or children of both or either of them: *s89(2)(c) Criminal Procedure Code* as amended by *Schedule 2 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

The prosecution must not comment on the fact that the accused's wife or husband does not give evidence: *s89(2)(b) Criminal Procedure Code*.

While a wife or husband may be competent under the *Criminal Procedure Code*, this does not make either **compellable** to disclose any communication made by the other spouse during marriage: *s89(2)(d) Criminal Procedure Code*.

7.9 Evidence Partly Heard by Two Courts

Whenever you receive a case where evidence has been partly heard and recorded by another Magistrate, you may act on the evidence already recorded or you may summon the witnesses afresh and recommence the trial: *s125 Criminal Procedure Code*.

In such cases, if the accused wishes, he or she may require you to summon any or all of the witnesses afresh and reheard: *s125 Criminal Procedure Code*.

8 Evidentiary Issues Relating to Witness Testimony

There are a number of important issues that relate specifically to witness testimony during the course of a criminal trial. These issues include:

- the competence and compellability of witnesses including spouses, children and the accused;
- examination of witnesses;
- leading questions;
- witnesses' credibility;
- refreshing memory;
- lies;

- warnings to witnesses against self-incrimination; and
- identification evidence by witnesses.

8.1 Competence and Compellability of Witnesses

A witness is **competent** if he or she may be lawfully called to testify. In Vanuatu, all witnesses are competent unless they fall under one of the few exceptions outlined below.

Compellability means that the Court can require or compel a witness to testify once they have been found competent. You may compel a witness to give material evidence in a criminal trial, subject to certain just exceptions.

Special statutory and common law rules have been developed regarding the competence and compellability of certain kinds of witnesses.

The Accused

The accused is considered a competent witness, except where the contrary is expressly provided for in an enactment, **but** he or she is not a compellable witness.

This means that an accused cannot be called by the prosecution to give evidence against himself or herself.

Spouses

Definition of spouse

In order to promote strong marital relations, the law has developed to prevent spouses from having to testify against one another in Court, except in specific circumstances.

Evidence for the prosecution

The English case *R v Pitt* [1983] QB 25, 65-66, sets out a number of points relating to a spouse who is competent but not compellable to provide evidence for the prosecution. These points are:

- the choice whether to give evidence is that of the spouse and the spouse retains the right of refusal; and
- if the spouse waives the right of refusal, he or she becomes an ordinary witness and in some cases, an application may be made to treat the spouse as a hostile witness; and
- although not a rule of law or practice, it is desirable that when a spouse is determined a competent but not a compellable witness, that the Judge [or Magistrate] explain that he or she has the right to refuse to give evidence but if he or she does choose to give evidence, he or she will be treated like any other witness.

Children

Normally, evidence is given upon oath. However, if you are of the opinion that a child of tender years does not understand the nature of an oath, you may still receive his or her evidence not on oath, if you believe:

- the child has sufficient intelligence to justify the reception of his or her evidence; and
- he or she understands the duty to tell the truth: *s83 Criminal Procedure Code*.

Where a child's evidence is given on behalf of the prosecution, the accused must not be convicted on that evidence alone. To secure conviction, the child's evidence must be corroborated by other material evidence: *s83(3) Criminal Procedure Code*.

See *Public Prosecutor v Massing* [2003] VUSC 44; Criminal Case No 026 of 2003.

8.2 Examination of Witnesses

Examination-in-Chief

The object of examining a witness by the party calling him or her is to gain evidence from the witness that supports the party's case.

Examination-in-chief must be conducted in accordance with rules of general application such as those relating to hearsay, opinion and the character of the accused.

There are also other rules that relate to examination-in-chief including:

- the rule requiring the prosecution to call all their evidence before the close of their case;
- leading questions; and
- refreshing memory.

Cross-Examination

The object of cross-examination is:

- to gain evidence from the witness that supports the cross-examining party's version of the facts in issue;
- to weaken or cast doubt upon the accuracy of the evidence given by the witness in examination-in-chief; and
- in appropriate circumstances, to draw questions as to the credibility of the witness.

8.3 Leading Questions

A general rule is that leading questions may not be asked of a witness during examination-in-chief.

A leading question is one which either:

- suggests to the witness the answer which should be given; or
- assumes the existence of facts which are in dispute.

Leading questions may be allowed in the following circumstances:

- in regard to formal or introductory matters. For example, the name, address and occupation of the witness;
- with respect to facts which are not in dispute or introductory questions about facts which are in dispute;
- for the purpose of identifying a witness or object in Court;
- in cases where the interests of justice requires it at your discretion.

8.4 Witness Credibility

An important part of both examination-in-chief and cross-examination is establishing or trying to diminish the credibility of the witness being examined.

Generally speaking, a party is not allowed to attack the credibility of a witness they have called. However, if a witness acts in a manner which frustrates the party calling the witness, he or she may be treated as an adverse witness and his or her credibility may be attacked through showing inconsistent statements.

8.5 Refreshing Memory

In the course of giving his or her evidence, a witness may refer to a document in order to refresh his or her memory.

The basic rules are:

- a witness may refresh their memory from notes;
- the notes must have been made by the witness or under their supervision;
- the notes must have been made at the time of the incident or almost immediately after the incident occurred. Notes made after a day or two could not usually be used;
- the witness should not normally read from the notes, but should use them only to refresh their memory. However, if the notes are lengthy and complex, then the only sensible and practicable course is to allow the witness to actually read them; and
- if the accused or counsel wishes to see the notes, there is a right to inspect them.

8.6 Lies

If it is established that the accused lied (i.e. told a deliberate falsehood as opposed to making a genuine error), this is relevant to his or her credibility as a witness. It does not necessarily mean, however, that the accused is guilty. Experience demonstrates that lies are told for a variety of reasons, and not necessarily for the avoidance of guilt.

As with an accused, where a witness is shown to have lied, this is highly relevant to that witness' credibility.

In addition, a witness found to be lying may be guilty of perjury under the *Penal Code*.

8.7 Self-Incriminating Evidence

It may happen that a witness will object to giving evidence on any particular matter on the grounds that it would prove that he or she committed an offence in Vanuatu or any foreign country or would make him or her liable to a civil penalty.

The witness may be required to answer the question but will be protected from the use of the evidence against himself or herself through a certificate of protection.

8.8 Identification Evidence by Witnesses

The visual identification of the accused by witnesses needs to be treated with caution. Honest and genuine witnesses have made mistakes regarding the identity of the accused.

The fundamental principal of identification evidence is that the weight to be assigned to such evidence is determined by the circumstances under which the identification was made.

The authority on the issue is the English case of *R v Turnbull and Others* [1977] QB 224, where the Court made the following guidelines for visual identification:

- How long did the witness have the accused under observation?
- At what distance?
- In what light?
- Was the observation impeded in any way, as, for example, by passing traffic or a press of people?
- Had the witness ever seen the accused before?
- How often?
- If only occasionally, had they any special reason for remembering the accused?

- How long elapsed before the original observation and the subsequent identification to the police?
- Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his or her actual appearance?

9 Rules of Evidence

9.1 Introduction

Rules of evidence have been established by common law.

The rules of evidence are many and complicated. A brief overview of some of the important rules of evidence that will arise in defended criminal proceedings follow.

9.2 Burden and Standard of Proof

There are two principal kinds of burden of proof: the legal burden and the evidential burden.

Legal Burden

The legal burden is the burden imposed on a party to prove a fact or facts in issue. The standard of proof required to discharge the legal burden varies according to whether the burden is borne by the prosecution or the accused.

If the legal burden is borne by the prosecution, the standard of proof required is 'beyond reasonable doubt.'

If the legal burden is borne by the accused, the standard of proof required is 'on the balance of probabilities.'

The term balance of probabilities means that the person deciding a case must find that it is more probable than not that a contested fact exists.

The general rule is that the prosecution bears the legal burden of proving all the elements in the offence necessary to establish guilt. There are only three categories of exception to the general rule.

Insanity

If the accused raises this defence, he or she will bear the burden of proving it, on the balance of probabilities.

Evidential Burden

The evidential burden is the burden imposed on a party to introduce sufficient evidence on the fact or facts in issue to satisfy you that you should consider those facts in issue.

Generally, the party bearing the legal burden on a particular issue will also bear the evidential burden on that issue. Therefore, the general rule is that the prosecution bears both the legal and evidential burden in relation to all the elements in the offence necessary to establish the guilt of the accused.

Where the accused bears the legal burden of proving insanity or some other issue, by virtue of an express or implied statutory exception, they will also bear the evidential burden. However, in relation to some common law and statutory defences, once the accused discharges his or her evidential burden, then the legal burden of disproving the defence will be on the prosecution.

9.3 Presumptions

Certain facts may be proved through the operation of a presumption. Presumptions speed up the conduct of a trial by acknowledging well-known or sometimes hard to prove facts. Some presumptions are conclusive and cannot be challenged while other presumptions are rebuttable by contrary evidence.

Judicial Notice

The doctrine of judicial notice is a particular brand of presumption. It allows the Court to treat a fact as established in spite of the fact that no evidence has been introduced to establish it. The purpose of this rule is to save the time and expense of proving self-evident or well-established facts.

9.4 Evidence of *Mens Rea*

It is always upon the prosecution to prove the required state of mind of the accused for criminal conviction.

9.5 Admissibility of Evidence

You have the discretion to admit, receive and act on such evidence as you consider admissible. If you wish to admit evidence which would not normally be admitted, you must clearly state and record your reasons for allowing the evidence.

Despite this discretion, at any time during the course of the proceedings, there may be questions or objections as to the admissibility of evidence.

If there are questions or objections to the admissibility of evidence, the parties will be called upon to make submissions to the Court.

The submissions on the admissibility of evidence should be dealt with in the following manner:

- The party objecting must state the grounds of the objection.
- The other party must be given an opportunity to reply.
- You should then rule on the objection.
- If you disallow the objection, counsel may ask that the objection be noted.
- If you allow the objection and hold that evidence to be inadmissible, you must take great care to disregard that part when making your decision at the conclusion of the hearing.
- In your decision at the conclusion of the case, you should record the objections to evidence and whether you ruled the evidence admissible or inadmissible and on what basis.

If you allow such submissions, it is up to you to rule on whether the evidence should be admitted or excluded. You may want to consider the common law rules regarding admissibility of evidence as they may help you in your discretion.

Relevance

You may refuse to receive any evidence, whether it is admissible or not at common law, which you consider irrelevant or needless.

Weight

Upon evidence being ruled admissible, you must then determine what weight (i.e. the amount of importance) the evidence should be given.

Discretion to Exclude at Common Law

Every person charged with a criminal offence has the right to a fair trial before a Court. In order to ensure that the accused receives a fair hearing, you have discretion under the common law to exclude otherwise admissible prosecution evidence if, in your opinion, it is gravely prejudicial to the accused.

The discretion to exclude evidence has developed on a case by case basis in relation to particular types of otherwise admissible evidence. The judicial discretion to exclude prosecution evidence has been most commonly used in cases where evidence was unlawfully, improperly or unfairly obtained by the police or prosecution.

9.6 Best Evidence Rule

The best evidence rule relates to the use of documents as evidence. The rule is that if an original document is available and can be produced without any difficulty, it should be produced.

If the original has been lost or destroyed, or there is some other good explanation as to why the original cannot be produced, a copy may be produced as it is the best evidence that is now available.

9.7 Hearsay Rule

Evidence given by a person who did not see or hear the original matter is called hearsay evidence.

An example of hearsay evidence would be a witness telling the Court what his friend told him about what she saw the accused do. The witness did not see the accused do anything. It was his friend who saw it, and who should give evidence.

The general rule is that an assertion that is made by a person other than the one giving oral evidence in a proceeding is inadmissible as evidence to prove the truth of some fact that has been asserted.

Despite the general rule, in order to determine whether evidence is hearsay, you must:

- determine the purpose for which the evidence will be used before ruling it hearsay evidence:
  - for example, a statement made to a witness by a person who is not called to be a witness may or may not be hearsay;
  - it would be hearsay and inadmissible if the object of the evidence would be to establish the truth of what is contained in the statement;
  - it would not be hearsay and would be admissible when the statement is used to establish not the truth of the statement itself, but the fact that it was made;
- ensure that the witness who gives the evidence has direct personal knowledge of the evidence contained in the statement if prosecution relies on the evidence as being the truth of what is contained in the statement.

The reason for the hearsay rule is because the truthfulness and accuracy of the person whose words are spoken to another witness cannot be tested by cross examination because that person is not or cannot be called as a witness. See *Teper v R* [1952] 2 All ER 447 at 449.

Although the rule against hearsay evidence is fundamental, it is qualified by common law.

Exceptions to the Hearsay Rule

Some of the exceptions to the hearsay rule which exist at common law include:

- confessions;
- dying declarations;
- *res gestae* (certain statements made in the course of, or soon after, a transaction that is the subject of the Court's inquiry); and
- telephone conversations.

9.8 Opinion Evidence

The rule on opinion evidence is that witnesses may only give evidence of facts they personally observed and not evidence of their opinion. A statement of opinion is only an inference drawn from the facts.

Sometimes the borderline between fact and opinion is a very narrow one, and you must exercise ordinary common sense in deciding whether or not the evidence is admissible and (if so) what weight you should give it.

There are two exceptions to the rule on opinion evidence.

- experts;
- non-experts or lay persons.

Experts

Expert witnesses are allowed to give opinion evidence if:

- they are qualified to do so; and
- if the matter requires such expertise.

In order to give opinion evidence, an expert witness must relate to the Court his or her background, qualifications and experience, to establish their credentials to speak as an expert in a specific field. Having done that, as a general rule they should be allowed to give their opinion on all relevant matters within their competency.

Expert opinion should only be admitted where the Court has been shown that an issue of fact requires the application of knowledge, experience and understanding that is beyond that of ordinary persons.

Some examples of expert opinion evidence include:

- a registered medical practitioner giving an opinion about the health of a patient;
- a registered architect giving an opinion about the structure of a building; and

- a qualified motor mechanic giving an opinion about the condition of a motor vehicle.

Non-Experts

Non-experts may give a statement of opinion on a matter in order to convey relevant facts personally perceived by him or her.

In order for a non-expert or layperson to give evidence of opinion, there must be a factual basis for their opinion.

The witness should be asked to describe the persons or circumstances prior to being asked for his or her opinion.

For example, non-experts have given evidence of opinion in regards to:

- the identity of an object;
- the handwriting of which he or she was familiar;
- a person's age;
- the speed of a vehicle;
- the weather;
- whether relations between two persons appear to be friendly or unfriendly.

9.9 Character Evidence

Admissibility of Evidence of Bad Character

As a general rule, it is not open to the prosecution to introduce evidence of the bad character of the accused in any form.

Therefore, the previous convictions of the accused may not form part of the case against him or her, nor may his previous misconduct, his disposition towards wrong doing or immorality, or his or bad reputation in the community in which he or she lives.

The only way that evidence of bad character of the accused can be introduced is by exceptions to the rule. Some of the exceptions to this rule at common law are:

- if evidence of other misconduct forming part of the same transaction of the offence charged is also be admissible at common law; or
- if the accused puts his or her character in issue, evidence of bad character may be admitted at common law; or
- where the accused gives evidence, he or she may in certain circumstances face cross-examination on his character.

Admissibility of Evidence of Good Character

An accused may introduce evidence to show that he or she is of good character. By doing so, however, they put their character in issue and the prosecutor may cross-examine witnesses or, in some cases, the accused about their character and about any previous convictions.

The purpose of introducing evidence of good character is primarily to establish the credibility of a witness or the accused, as well as to point to the improbability of guilt. Evidence of good character also becomes very important when sentencing the accused upon conviction of an offence.