# 8:

# CRIMINAL:

# MANAGEMENT OF PROCEEDINGS

# 1 General Organisation for Court

Before going to Court:

- ensure your clerk has prepared the case list for the day;
- if necessary, ensure that you have a police orderly present; if there are chamber matters, deal with them quickly so that Court can start at the appointed time.

In Court:

- start Court on time and rise at the expected time. This is not only for your benefit but also for counsel, the prosecutors and Court staff.

# 2 Order of Calling Cases

Dealing with cases in the exact order they appear on the case list, while simple, is often not the best use of time for the Court, the Police and the public. By dealing first with those cases which require little time or that keep a number of individuals tied up in Court, you will improve the efficiency of the justice system.

The following are some suggestions for calling cases. This is not a strict order you need follow but some considerations you should keep in mind while dealing with the case list.

- Find out if there are any young offender cases. If possible, try to deal with these in a way that ensures the youth's privacy, either by adjourning them to the end of the day so that all adult cases have been dealt with or excluding people from the Court.
- Deal first with those cases which you expect to take less time. For example, a speeding offence to which the accused is pleading guilty can be expected to take less time than an arson case where the accused is pleading not guilty.
- Try to call cases where the accused is in custody early, to free up police and prison officers.
- If counsel are present for more than one matter, try to deal with those matters consecutively so they can get away.

# 3 Bail

The subject of bail is extremely important as it deals with the individual's constitutionally guaranteed right to liberty: *s5(1) Constitution*. For this reason, you should be familiar with the procedure for granting bail and ensure that you and the Police follow it precisely.

## 3.1 Bail after Arrest Without Warrant

A police officer arresting a person without a warrant must, in accordance with *Criminal Procedure Code*, take or send the person before a judicial officer or officer in charge of a police station without delay: *s15 Criminal Procedure Code*.

**Arrested Person Brought Before Police**

If a person is arrested without a warrant for an offence other than homicide or an offence against the external security of the State is brought before an officer in charge of a police station, the officer must, if it does not appear practicable to bring the person before a Court within 24 hours, inquire into the case: *s18* as amended by *Schedule 2 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

If it appears, after due inquiry, that there is insufficient evidence to proceed with a prosecution, the officer in charge of the police station may release the person: *s18(2) Criminal Procedure Code*.

Unless it appears to the police officer that the offence is serious, the officer must release the person upon him or her signing a written undertaking to appear before a Court at the time and place mentioned in the undertaking: *s18(1) Criminal Procedure Code*.

If the offence is not one punishable by life imprisonment, and the person is prepared to enter into a bond in writing, with or without conditions, to appear before the Court, the officer in charge of the police station may release the person on bail: *s60(1) Criminal Procedure Code*.

Before release, the person must enter into a bond in writing, subject to the condition that he or she will attend Court at the time and place mentioned and will continue to attend until otherwise directed, and other such conditions as the police officer thinks necessary: *s61 Criminal Procedure Code*.

The bail conditions must be fixed with regard to the circumstances and must not be oppressive or unreasonable: *s60(2) Criminal Procedure Code*.

As soon as the bond is executed, the person must be released unless he or she is also being detained for some other matter: *s63 Criminal Procedure Code*.

If the person is kept in custody, he or she must be brought before a Court as soon as practicable: *s18(1) Criminal Procedure Code*.

**Arrested Person Brought Before Magistrate**

If the person in custody is brought before you, and the offence is not one punishable by life imprisonment, and the person is prepared to enter into a bond in writing, with or without conditions, to appear before the Court, the person may be released on bail: *s60(1) Criminal Procedure Code*.

Before release, the person must enter into a bond in writing, subject to the condition that he or she will attend Court at the time and place mentioned and will continue to attend until otherwise directed, and any other such conditions as you think necessary: *s61 Criminal Procedure Code*.

As soon as the bond is executed, the person must be released unless he or she is also being detained for some other matter: *s63 Criminal Procedure Code*.

The bail conditions must be fixed with regard to the circumstances and must not be oppressive or unreasonable: *s60(2) Criminal Procedure Code*.

## 3.2 Court Imposed Bail Conditions

For a person arrested either with or without a warrant, being released on his or her own recognizance, you may impose such conditions as you think fit, including any conditions which:

- are likely to result in the person's appearance at the time and place mentioned;
- are necessary in the interests of justice; and
- are necessary for the prevention of crime: *ss62(1),(2) Criminal Procedure Code*.

If you impose any conditions upon the release of the person, you must not require him or her to find any surety in respect of the condition: *s62(3) Criminal Procedure Code*.

**Insufficient Conditions**

If insufficient conditions have been imposed either through mistake or fraud, or if the conditions afterward become insufficient, you may issue a warrant of arrest directing the person released on bail to be brought before you. Upon the person appearing you may order the person to comply with sufficient conditions, and on failing to do so, you may commit him or her to prison: *s64 Criminal Procedure Code*.

**Committal of Person on Bail**

If it appears from information on oath that a person bound by a bond is about to leave Vanuatu, you may:

- have the person arrested and commit him or her to prison until the trial; or
- release him or her from custody upon further conditions: *s65 Criminal Procedure Code*.

## 3.3 Relevant Factors for Bail

There are a number of factors relevant to the grant of bail. These include:

- the protection of the right to personal liberty contained in *s5(1) Constitution*;
- whether the accused will abscond while on bail;
- the nature and circumstances of the offence charged, including the possibility of a sentence of imprisonment;
- the weight of the evidence against the accused, bearing in mind the presumption of innocence;
- the history and characteristics of the accused, including character, physical and mental condition, family ties, employment, financial resources, length of residence in community, community ties, past conduct, criminal history and record concerning appearances at Court proceedings;
- whether at the time of the current offence or arrest, the accused was subject to a sentence or awaiting trial;
- the nature and seriousness of any possible danger to any person or the community if the accused is released;
- whether the accused will interfere with prosecution witnesses and Police investigation;
- the possibility of a repetition of the offence or of further offences;
- any danger posed by the accused to the alleged victim;
- the accused's record of past convictions and any evidence indicating prior failure to appear for scheduled Court hearings;
- the length of any delay;
- the family needs of the accused.

See *Public Prosecutor v Festa* [2003] VUSC 65; Criminal Case No 44 of 2003.

## 3.4 Refusal of Bail

If you refuse a bail application, you must state the grounds for your refusal and must read aloud to the accused the following statement from *s66 Criminal Procedure Code*:

"Your application for release from custody on bail having been refused by this Court, you now have the right to make a fresh application for bail to the Supreme Court. If you so desire, the matter will be referred immediately by this Court to the Supreme Court, which will review your application as soon as possible. You will remain in custody in the meantime but will suffer no disadvantage by reason of making a further application to the Supreme Court. Do you wish the Supreme Court to consider your application for release from custody on bail?"

If the applicant informs you that he or she wishes to have his or her bail application considered by the Supreme Court, you must personally ensure that the relevant case file and other documents and material are forwarded without delay to the Supreme Court Registrar: *s67 Criminal Procedure Code*.

When forwarding the file to the Supreme Court, you must include a written report stating your grounds for refusing bail and setting out in detail the evidence or information upon which you based your conclusions. You must date and sign the report: *s68 Criminal Procedure Code*.

The Supreme Court will then hear the matter and will issue a copy of its decision to you. If the Supreme Court orders the release of the applicant, you must personally ensure that a copy of the decision is served on the officer of the prison and that the person is produced before you and released on such conditions as you determine: *s69 Criminal Procedure Code*.

# 4 Adjournments

## 4.1 Adjourning a Case

Before or during the hearing of a case, you may use your discretion to adjourn the hearing to another time and place. You must, at that time, state the time and place in the presence of the parties or their advocates: *s130 Criminal Procedure Code*.

During the period of the adjournment, you may:

- allow the accused to go at large;
- commit the person to prison; or
- release him or her upon bail conditioned for his or her appearance at the adjourned time and place: *s130(1) Criminal Procedure Code*.

If you commit the person to prison, the adjournment must not be for more than 14 days, the day following the committal being counted as the first day: *s130(2) Criminal Procedure Code*.

**Guidance on Adjournment**

Adjourning a case has a useful role if used properly. It allows parties to prepare themselves to present their best case and recognises that delays do sometimes happen.

Adjourning a case should not be used merely as a delaying tactic so that parties are not diligent in their preparation.

The most common reasons for adjourning a case are:

- the person making the charge does not appear;
- the witnesses of one of the parties do not appear;
- legal representation is being sought;
- a new issue has been raised and a party needs time to prepare a response.

**Non-Appearance After Adjournment**

If the **accused** does not appear at the adjourned time and place you may issue a warrant for the arrest of the accused to be brought before the Court: *s131 Criminal Procedure Code*.

If the **complainant** does not appear at the adjourned time and place, you may dismiss the charge with or without costs: *s131 Criminal Procedure Code*.

# 5 Dealing with the Accused

## 5.1 Rights of the Accused

**Right to be Present**

Under *Article 5 Constitution*, every accused has the right not to be tried in his or her absence without consent, unless he or she makes it impossible to proceed in his or her presence.

Only in rare cases should you consider dispensing with the personal attendance of the accused.

**Limitation on Prosecution**

After a certain period has elapsed from the time of an offence, it is unlawful for a prosecution to go ahead.

These periods are:

- 20 years, for an offence punishable by 10 years imprisonment or more;
- 5 years, for an offence punishable by more than 3 months imprisonment and less than 10 years; and
- 1 year, for an offence punishable by fine or by 3 months imprisonment or less: *s15 Penal Code*.

You must be aware of these periods. For every case, it is a good idea to check the date on which an offence is alleged and ensure that the prosecution is being brought within the appropriate period. If it is outside the period, you must dismiss the case.

## 5.2 The Unrepresented Accused

Everyone charged with an offence shall have a fair hearing, within a reasonable time, by an independent and impartial Court and be afforded a lawyer if it is a serious offence: *Article 5(2)(a) Constitution*.

Any person accused of an offence may, of right, be defended by an advocate. With your leave, the accused may be defended by an agent or friend: *s117 Criminal Procedure Code*.

Despite the constitutional right to representation, many litigants appear in Magistrates' Court on their own. Most have little or no idea of Court procedures and rely on the Court system to assist to some extent.

If possible, all accused persons charged with an offence carrying imprisonment as a penalty should be legally represented. However, if legal representation is not available, then you should ensure the accused understands:

- the charge(s); and
- if found guilty, whether there is a probability of an imprisonment term.

To assist in the smooth running of any hearing, you should give an initial explanation outlining:

- the procedure;
- the obligation to put their case;
- the limitation of providing new evidence;
- the need to ask questions and not make statements; and
- any issues arising out of the evidence.

## 5.3 The Mentally Ill Accused

**Unfitness to Plead**

If, at the commencement of a trial or preliminary enquiry, you have reason to believe the accused is of unsound mind and unfit to plead or incapable of making a defence, you must order the person's detention to a hospital for medical observation for no more than one month to inquire into such unsoundness: *s91(1) Criminal Procedure Code*.

If, after the inquiry, you believe that the accused is of unsound mind and is unfit to plead or incapable of making a defence, you must postpone further proceedings in the case: *s91(2) Criminal Procedure Code*.

If a person charged with an offence is unfit to plead or to stand trial, by reason of insanity or other mental disorder, you must make an order placing the person under guardianship. The order must prescribe the manner of guardianship: *s13 Penal Code*.

You must order a medical report to establish the mental condition of the accused: *s13 Penal Code*.

**Insanity as a Defence**

Every person is presumed sane until the contrary is proved on a balance of probabilities by the accused: *s20(1) Penal Code*.

See Chapter 6 Criminal Responsibility for proving the defence of insanity.

If the accused is found insane, you must acquit the accused. Despite the acquittal you may make an order prescribing the manner of his or her confinement: *s20(3) Penal Code*.

Even if the plea of insanity fails and you find the accused guilty, you may still find the accused was suffering from an abnormality of mind arising from arrested or retarded development or any inherent cause or induced by disease or injury which may diminish his or her responsibility for the act: *s25(1) Penal Code*.

If you do find the accused was suffering from diminished responsibility, you may make an order as to custody and treatment as necessary for his or her own well-being and the safety of others: *s25(2) Penal Code.*

# 6 Victims

Victims of crime are usually the main prosecution witnesses. There is no specific legislation dealing with victims, but Magistrates are expected to treat them with courtesy and compassion.

In particular, you should restrain defence lawyers from humiliating victims of crime in Court.

Especially vulnerable witnesses, such as the very young, very old, or disabled, are entitled to special measures when they are giving evidence. Consider allowing a family member or friend to sit with a child victim or elderly victim while giving evidence.

## 6.1 Consideration of Victim's Statement

Ensure that you acknowledge any statements by the victim in your sentencing remarks. A brief summary is appropriate.

Be careful about "blaming" the victim, for example, she was drunk, unless the victim's actions are clearly relevant to mitigate the offence and you are certain about the facts.

# 7 Child Witnesses

**Taking Evidence of Child**

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*.

**Guidance**

In order to ensure that a child witness is best able to give evidence, special steps may be taken to ensure the child is not distracted or frightened. For example, a parent or guardian may be allowed to sit with the child while the child gives evidence, or you may ask the child to face you rather than look at the accused.

When cross-examination of the child is conducted, you are expected to be sensitive to the child's special vulnerability in deciding whether or not you should allow the questions to be asked.

# 8 The Prosecution

## 8.1 Conduct of Prosecution

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

If the prosecutor does not appear for an offence which has **not** been the subject of a Police investigation, you may conduct the proceedings without the assistance of a prosecutor. In such cases you are bound by the rules of procedure and evidence which would apply to a prosecutor in addition to your duties as a Magistrate: *s132(2) Criminal Procedure Code*.

You should be very wary in personally conducting a prosecution in the absence of a prosecutor for it has the potential to call your impartiality into question. If possible, adjourn the case until a prosecutor can be found.

## 8.2 Expectations on Prosecution

The criminal justice system relies on the adversarial model to find justice. Only by both sides vigorously putting their cases can a just outcome be reached. With such considerations, a high level of professionalism is expected from prosecutors.

In order to ensure the fairness and effectiveness of the prosecution, prosecutors should strive to co-operate with police force members, the Courts, the legal profession and other government agencies or institutions.

You should expect the prosecutor to be prepared when he or she appears before you in Court.

- If the accused or a witness does not show up, the prosecutor should be prepared to prove service.
  - Asking for a new summons instead of proving service the first time wastes Court and police time and must be strongly discouraged.
- Simply reading the facts from the charge sheet is not a vigorous prosecution.
  - The prosecutor should know the elements of the offence and have evidence to prove each element.
  - The facts should be complete enough so you do not have to ask too many questions. If you must ask a lot of questions to establish the prosecution's case, it could appear you are conducting the case for the prosecution and that you may be biased.
- The prosecutor should have his or her witnesses ready or have a good explanation why they are not.
- The prosecutor should have a basic understanding of Court procedure and be prepared to deal with issues that commonly arise.

- The prosecutor has a duty to faithfully represent the Republic of Vanuatu and should only give a strong prosecution on the facts.
    - The prosecutor should not try to help the accused by making the offence appear more minor than it was, nor should they embellish the facts to make the offence sound worse than it was.
- At sentencing, the prosecutor should have previous convictions ready and be ready to prove them if denied by the accused, as well as any reports or statements of aggravating or mitigating factors.

### 8.3 *Nolle Prosequi*

At any stage before verdict or judgment in a criminal case, the prosecutor may enter a *nolle prosequi* by informing the Court that he or she intends to discontinue the proceedings against the accused. The accused must be then immediately discharged, and if in prison immediately released: *s29(1) Criminal Procedure Code.*

The discharge of the accused due to *nolle prosequi* acts as a bar to any later proceedings against the accused on the same facts, and the accused must be treated as if he or she were acquitted: *s29(1) Criminal Procedure Code*.

If the accused is not present in Court when the *nolle prosequi* is entered, the Court Registrar must notify the keeper of the prison where the accused is detained of the *nolle prosequi* immediately: *s29(2) Criminal Procedure Code*.

See *Public Prosecutor v Pakete* [2000] VUSC 6; Criminal Case No 061 of 1999.

## 9 Misbehaviour in Court

### 9.1 Contempt of Court

Occasionally, it may be necessary to find a witness, accused or member of the public in contempt of Court.

In addition to the powers from the *Criminal Procedure Code* to deal with misbehaviour, there are a number of *Penal Code* offences relating to misleading justice that may arise occasionally.

These are:

- *ss74, 75 Penal Code*; Perjury;
- *s76 Penal Code*; Making false statements;

- *s77 Penal Code*; Fabricating evidence;
- *s78 Penal Code*; Destroying evidence;
- *s79 Penal Code*; Conspiracy to defeat justice;
- *s80 Penal Code*; False statements by interpreters;
- *s81 Penal Code*; Deceiving witnesses;
- *s82 Penal Code*; Offences relating to judicial proceedings.

Familiarise yourself with these offences so that you are able to deal with them in Court, should the need arise.

The most common of these offences which you will encounter are contained in *s82*. Under *s82*, it is an offence for a person:

- to show disrespect, in speech or manner, to or with reference to a proceeding, or any person before whom such proceeding is being conducted within the Court premises;
- who has been called upon to give evidence if he or she fails to attend, refuses to be sworn or make an affirmation, refuses without lawful excuse to answer a question or to produce a document, or remains in the room in which such proceeding is being conducted after having been ordered to leave such room;
- to cause an obstruction or disturbance in the course of a judicial proceeding;
- make use of any speech or writing misrepresenting a proceeding which is pending or capable of prejudicing any person in favour of or against any parties to such proceeding, or calculated to lower the authority of any person before whom such proceeding is being conducted;
- to publish a report of the evidence in any proceeding which has been directed to be held in private;
- to attempt wrongfully to interfere with or influence a witness in a judicial proceeding, either before or after he has given evidence, in connection with such evidence;
- to dismiss a servant or employee because he has given evidence on behalf of any party to a judicial proceeding; or
- to commit any other act of intentional disrespect to any judicial proceeding or to any person before whom such proceeding is being conducted.

If a person commits any of the above offences in your view, you may:

- cause the offender to be detained in custody; and
- any time before the rising of the Court on the same day you may sentence the offender to a maximum 5 years imprisonment or a maximum VT 50,000 fine: *s82(1) Penal Code* as amended by *s1 Penal Code (Amendment) Act No 14 of 1989*.

## 9.2 Refractory Witness

A person is a refractory witness if the person is required by the Court to give evidence, and without offering a sufficient excuse, he or she:

- refuses to be sworn;
- having been sworn refuses to answer any question put to him or her; or
- refuses or neglects to produce any document or thing he or she is required to produce: *s85(1) Criminal Procedure Code*.

If you find a person to be a refractory witness, you may adjourn the case for up to 8 days and may commit the person to prison, unless he or she sooner consents to do what is required: *s85(1) Criminal Procedure Code*.

The power to commit a refractory witness to prison is in addition to any other punishment or proceeding which may be brought for refusing or neglecting to do what is required of him or her: *s85(3) Criminal Procedure Code*.

You may also dispose of the case according to any other sufficient evidence: *s85(3) Criminal Procedure Code*.

**After Adjournment**

At the adjourned time, if the person still refuses to do what is required, you may continue to commit the person to prison for 8 day periods until he or she consents to do what is required: *s85(2) Criminal Procedure Code*.

# 10 Search Warrants

Although not strictly part of the process of hearing a case, search warrants are a necessary part of the investigation of crime. Search warrants allow the police to gather evidence for the trial. It is important that you are aware of the procedure to follow when a search warrant is sought.

Note that the *Constitution* recognises an individual's right to privacy of home and other property. The most common applications for search involve allegations that an individual has another person's goods on his or her property.

## 10.1 Granting the Search Warrant

You may issue a search warrant when it is proved to you on oath that anything in respect of an offence necessary to the conduct of the investigation can, in fact or on reasonable suspicion, be found in any:

- building;
- ship;
- aircraft;
- vehicle;
- box;
- receptacle; or
- other place: *s55 Criminal Procedure Code*.

**Procedure**

To apply for a search warrant, the Police officer must swear or affirm the information which provides the grounds for the search warrant.

This information should be sworn before you personally by the requesting Police officer.

A person who believes that his or her goods may be found on another person's property should not apply directly to you for a search warrant. He or she should take their complaint to the Police, who will then apply to you for a search warrant if they deem it necessary.

**Execution**

A search warrant allows a Police officer or other named person, to search any of the places named or described in the warrant and seize and detain anything searched for use for use in evidence: *s55 Criminal Procedure Code*.

A search warrant may be issued on any day and may be executed at any time between sunrise and sunset. You may, however, authorise the Police officer or other person to execute it at any hour: *s56 Criminal Procedure Code*.

Any person residing in or being in charge of any place authorised for search must allow free entry and exit of the Police officer or other person on their demand and afford all reasonable facilities for their search: *s57(1) Criminal Procedure Code*.

Anything seized in accordance with the search warrant may be detained until the conclusion of the case: *s58(1) Criminal Procedure Code*.

# 11 Civil Claim During Criminal Proceeding

You may hear a civil claim within your jurisdiction against a person before you charged with a criminal offence, if the civil claim is directly related to the criminal act: *s213 Criminal Procedure Code*.

The civil claim must be in writing and may only be launched if there no proceeding over the same matter in civil Court: *ss214(1), 215 Criminal Procedure Code*.

## 11.1 Conduct of Civil Claim

You may hear the claimant and any of his or her witnesses and the claimant may cross-examine witnesses for either the prosecution or defence: *s214(2) Criminal Procedure Code*.

You may hear the accused and any of his or her witnesses and the accused may cross-examine the claimant's witnesses: *s214(3) Criminal Procedure Code*.

All applicable *Civil Procedure Rules* must be followed during conduct of the civil claim: *Rule 16.21 Civil Procedure Rules*.

# 12 Case Management

Maintaining an efficient Court must not interfere with the substantive decisions you make but, where possible, avoiding delay and quickly dealing with cases will improve justice.

**Goals**

The goals of case management are to:

- ensure the just treatment of all litigants by the Court;
- promote the prompt and economic disposal of cases;
- improve the quality of the litigation process;
- maintain public confidence in the Court; and
- use efficiently the available judicial, legal and administrative resources.

The following points should be kept in mind to improve case-flow management:

- unnecessary delay should be eliminated;
- it is the responsibility of the Court to supervise the progress of each case;

- the Court has a responsibility to ensure litigants and lawyers are aware of their obligations;
- the system should be orderly, reliable and predictable;
- early settlement of disputes is a major aim;
- procedures should be as simple and understandable as possible.