Vanuatu Magistrates Bench Book

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Foreword

This Bench Book is a welcome assistance for Magisterial work. It is intended to be a practical, user-friendly and informative guide to many aspects of the jurisdiction of the Magistrates' Courts. I urge every Magistrate to use it often, to add to it and become part of developing and improving it further in the years ahead.

The Bench Book is an important milestone in the work of the National Judicial Education Committee and I am confident that it will lead to greater uniformity and consistency in the approach of Magistrates' Courts throughout Vanuatu.

I gratefully acknowledge the initiative and commitment on the part of the Pacific Judicial Education Programme (PJEP) to produce this Bench Book, and the financial backing by the Governments of Australia and New Zealand through their respective aid agencies, AusAID and NZAID. In addition, the assistance provided by the Government of Canada through the Canada Fund, the Department of Foreign Affairs and International Trade as well as the University of Saskatchewan Native Law Centre.

I particularly commend the outstanding work of Magistrate Jerry Boe; Tina Pope, the Bench Book Consultant; and Paul Logan, the Legal Researcher. They collaborated tirelessly in true team spirit to prepare and produce this Bench Book.

I appreciate the valuable contributions of PJEP Co-ordinator, Afioga Tagaloa Enoka Puni and PJEP Administration Manager, Mrs Vere Bakani; and the Vanuatu National Judicial Training Committee.

The Bench Book has been produced in loose leaf format to enable on-going revision and improvement. Comments are invited and should be referred to Magistrate Jerry Boe, Tina Pope or PJEP.

This joint effort has resulted in a Bench Book of which we can all be proud and which will go a long way towards improving the standards and quality of services provided by the Magistrates Court to members of the public.

Hon. Vincent Lunabek
Chief Justice

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GENERAL:

CONSTITUTIONAL AND COURT FRAMEWORK

1 The Constitutional Framework of Vanuatu

1.1 The *Constitution of the Republic of Vanuatu*

The *Constitution of the Republic of Vanuatu* came into effect on 30 July 1980. It provides the basic structure of government in Vanuatu, details the requirements of citizenship, and outlines the rights and duties for individuals in Vanuatu.

The *Constitution* also establishes a framework for the Public Service, creates the Office of the Ombudsman and provides a Leadership Code for the leaders of Vanuatu.

The *Constitution* is the supreme law of Vanuatu and all other laws must be consistent with it.

1.2 The Branches of Government

The *Constitution* provides for three branches of government: the Legislature, the Executive and the Judiciary.

In addition to the three branches of government, the *Constitution* provides for the role of President and for the establishment of a National Council of Chiefs.

The Legislative

The legislature in Vanuatu is a single chamber Parliament: *Article 15 Constitution*.

The role of Parliament is to make laws, "for the peace, order and good government" of Vanuatu: *Article 16(1) Constitution*.

All laws are made by passing bills introduced by ordinary members of Parliament, the Prime Minister or a Minister: *Article 16(2) Constitution*.

As of 2004, Parliament consists of 52 members. Unless dissolved earlier, Parliament has a life of 4 years from the date of its election: *Article 28(1) Constitution*.

Parliament must meet twice a year in ordinary session, but may meet in extraordinary session at the request of the majority of its members, the Speaker or the Prime Minister: *Article 21(1),(2) Constitution*.

The Executive

Executive authority in Vanuatu is vested in the Prime Minister and Council of Ministers: *Article 39 Constitution*. The Executive is responsible for carrying out all government business as provided by the *Constitution* or other law.

The Council of Ministers consists of the Prime Minister and all other Ministers: *Article 40(1) Constitution*.

The Prime Minister is elected from among the members of Parliament by secret ballot: *Article 41 Constitution*. The Prime Minister then appoints other Ministers from among the members of Parliament to be responsible for the conduct of government: *Article 42(2) Constitution*.

The Council of Ministers is collectively responsible to Parliament. Where Parliament has lost confidence in the government, it may pass a motion of no confidence in the Prime Minister in a manner laid out in the *Constitution*. If the motion passes, the Prime Minister and other Ministers cease to hold office but continue to exercise their functions until a new Prime Minister is elected: *Article 43(1),(2) Constitution*.

The President

The Head of State in Vanuatu is the President: *Article 33 Constitution*.

Any indigenous Vanuatu citizen qualified to be elected to Parliament may be eligible for election as President: *Article 35 Constitution.*

The President:

- is elected by secret ballot of an electoral college consisting of Parliament and the Chairmen of Local Government Councils;
- has a term of office of five years, unless removed from office for gross misconduct or incapacity: *Articles 34(1),36 Constitution*.

In cases of vacancy, incapacity or where the President is overseas, the Speaker of Parliament must perform the functions of President: *Article 37 Constitution*.

Role of President

Normally, the President must assent to bills passed by Parliament within 2 weeks of presentation: *Article 16(3) Constitution*.

If the President considers that the bill is inconsistent with the *Constitution*, he or she must refer it to the Supreme Court for its opinion. If the Supreme Court considers that the Bill is inconsistent with the *Constitution*, it may not be promulgated: *Article 16(4) Constitution.*

The President may:

- dissolve Parliament on the advice of the Council of Ministers: *Article 28(3) Constitution*
- pardon, commute or reduce a sentence imposed for conviction of a criminal offence.

Parliament may provide a committee to advise the President in exercising this function: *Article 38 Constitution*.

The National Council of Chiefs

While not itself a legislative body under the *Constitution*, the National Council of Chiefs sits in an advisory role to the government and Parliament. The *Constitution* demands that Parliament must provide for the organisation of the Council and for the role of chiefs at the village, island and district level: *Article 31 Constitution*.

The National Council of Chiefs is composed of the custom chiefs elected by their peers sitting in the District Council of Chiefs: *Article 29(1) Constitution*.

The National Council of Chiefs may discuss all matters relating to custom and tradition in Vanuatu. It may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages: *Article 30(1) Constitution*.

For any bill before Parliament, the Council may be consulted on any question, particularly any question relating to tradition or custom: *Article 30(2) Constitution*.

The Judiciary

The Judiciary:

- interprets and applies Parliament's laws;
- creates and interprets case law; and
- settles disputes of fact and law between individuals and between individuals and the State.

In cases where no rule of law is applicable it must determine the matter according to substantial justice and, if possible, in conformity with custom.

2 The Court System

2.1 General Characteristics of the Court System

Vanuatu has four types of Courts:

- the Court of Appeal;
- the Supreme Court;
- the Magistrates; Court; and
- the Island Courts.
-

Appointment

With the exception of the Chief Justice, all members of the judiciary are appointed by the President, who acts on the advice of the Judicial Service Commission: *Article 47(2) Constitution*.

The Chief Justice is appointed by the President after consultation with the Prime Minister and the Leader of the Opposition: *Article 49(3) Constitution*.

Likewise, any promotions and transfers of members of the judiciary may only be made by the President acting on the advice of the Judicial Service Commission: *Article 47(4) Constitution*.

All members of the judiciary hold office until:

- retirement; or
- removal for conviction and sentence on a criminal charge; or
- a determination by the Judicial Service Commission of gross misconduct, incapacity or professional incompetence: *Article 47(3) Constitution.*

In some cases, after consultation with the Judicial Service Commission, Parliament may provide for the appointment by the President of acting judges for set periods: *Article 47(5) Constitution.*

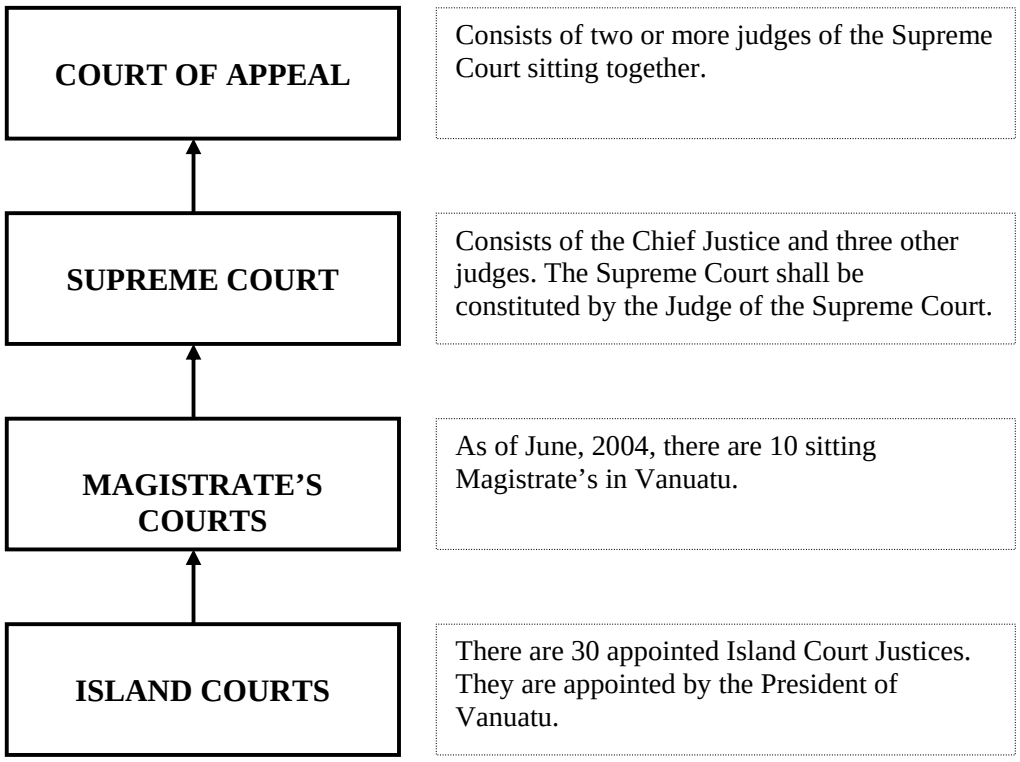
The Judicial Service Commission is made up of the Minister responsible for justice as Chairperson, the Chief Justice, the Chairman of the Public Service Commission and a representative of the National Council of Chiefs: *Article 48(1) Constitution*.

The Judicial Service Commission is not subject to the direction or control of any other person or body in exercising its functions: *Article 48(2) Constitution*.

The diagram on the following page shows the structure of the Court system.

2.2 The Structure of the Vanuatu Court System

Structure of the Court System



2.3 A Brief Description of the Courts

The Court of Appeal

The Court of Appeal is a superior Court of record composed of two or more judges of the Supreme Court sitting together: *Article 50 Constitution*.

Jurisdiction

The Court of Appeal must hear all criminal and civil appeals coming from the Supreme Court exercising its original jurisdiction: *Article 50 Constitution*.

The Court of Appeal also hears all appeals from the Supreme Court in its appellate jurisdiction: *Article 50 Constitution*.

The Supreme Court

The Supreme Court is a superior Court of record composed of the Chief Justice and three other judges: *Article 49(2) Constitution*.

Only lawyers qualified to practice in Vanuatu may be qualified for appointment as Chief Justice or other judge of the Supreme Court: *Article 49(4) Constitution*.

Jurisdiction

The Supreme Court has unlimited original jurisdiction in **civil** and **criminal** cases. This means that, as of right, it is capable of hearing all civil and criminal matters, including those that the Magistrates' Court may hear.

The Supreme Court also has jurisdiction to hear and determine all cases brought by anyone who alleges that his or her **constitutional** rights have been infringed: *Article 53(1),(2) Constitution*.

As well, when a constitutional question arises before a subordinate Court, and the Court believes that the question concerns a fundamental point of law, it must submit the question to the Supreme Court for determination: *Article 53(3) Constitution*.

The Supreme Court also has jurisdiction to hear and determine any question regarding whether a person has been **validly elected**, **vacated** or has become **disqualified** to sit in Parliament, the Council of Chiefs or a Local Government Council: *Article 54 Constitution*.

As an appellate Court the Supreme Court is able to:

- hear appeals from Magistrate's Courts;
- review convictions;
- receive referrals from the Magistrate's Courts on questions of law;
- hear appeals from Island Courts involving land matters.

Magistrate's Courts

The Magistrate's Courts are established as Courts of summary jurisdiction, subordinate to the Supreme Court

Jurisdiction

The Magistrate's Courts deals with the majority of all civil and criminal matters, although the most serious crimes and civil suits are tried in the Supreme Court.

Magistrate's Courts have jurisdiction to hear all **civil** proceedings as provided under the *Magistrate's Courts Civil Jurisdiction Act* and any other law: *s14(1) Judicial Services and Courts Act*.

Magistrate's Courts have original jurisdiction to hear all **criminal** matters for offences for which the maximum penalty does not exceed two years imprisonment: *s14(2) Judicial Services and Courts Act*.

See Chapter 3, Jurisdiction, for further guidance on both civil and criminal jurisdiction.

Island Courts

Island Courts are established by the *Island Courts Act* and are subordinate to the Magistrate's Courts.

Jurisdiction

Unlike Magistrate's Courts, Island Courts are limited in their territorial jurisdiction.

An Island Court may only hear a civil case if:

- the defendant is ordinarily resident within the territorial jurisdiction of that Court; or
- the cause of action arose in the jurisdiction; *s8(1)* as amended by *s3 Island Courts (Amendment) Act No. 15 of 2001*.

Island Courts have no jurisdiction to hear land cases: *s8(2)* as amended by *s3 Island Courts (Amendment) Act No 15 of 2001*.

Island Courts are restricted in civil cases to awarding a maximum VT 50,000 in compensation or damages: *s12 Island Courts Act*.

An Island Court may only hear a criminal case if the accused is alleged to have committed or participated in the offence, wholly or partially, within the territorial jurisdiction of the Court: *s7 Island Courts Act*.

Island Courts are restricted to imposing a maximum fine of VT 24,000 and a maximum term of imprisonment of 6 months: *s11 Island Courts Act*.

For further information on the jurisdiction of Island Courts, see the *Island Courts Act*.

Public Prosecutor and Public Solicitor

In addition to the Courts, the *Constitution* provides for the appointment of an independent Public Prosecutor to act as prosecutor in all criminal cases, and the Public Solicitor whose role is to provide free legal advice to needy persons: *Articles 55, 56 Constitution*.

Both the Public Prosecutor and the Public Solicitor are appointed by the President on the advice of the Judicial Service Commission: *Articles 55, 56 Constitution*.

2:

GENERAL:

THE LAW

1 Sources of Law

There are six sources of law in Vanuatu. They are:

- the *Constitution*;
- every Ordinance and every Act and all subsidiary legislation made under an Ordinance or Act;
- customary law;
- the common law of Vanuatu;
- pre-existing Joint Regulations; and
- pre-existing British and French laws.

1.1 The *Constitution*

The *Constitution* is the supreme law of Vanuatu: *Article 2 Constitution*.

Any law inconsistent with the *Constitution* is void to the extent of the inconsistency.

Among other things, the *Constitution*:

- sets out the basic structure of government;
- outlines requirements of citizenship;
- protects fundamental rights and freedoms of the individual; and
- details the basic tenets of land ownership in Vanuatu.

Procedures for amending the *Constitution* are different than for other Acts. See *Articles 84-86 Constitution*.

1.2 Legislation

The legislation of Vanuatu is made up of all Acts and Ordinances (also known as Statutes and enactments) made by Parliament.

In addition, subsidiary legislation may be created under the Acts or Ordinances. For example, several sections in the *Judicial Services and Courts Act* provide for the creation of subsidiary legislation in the form of Schedules or Rules. Schedules and other Rules are valid legislation and must be followed.

1.3 Customary Law

Customary law is recognised as part of the law of Vanuatu: *Article 95(3) Constitution*. Other Acts also mention that customary law must be considered in proceedings.

Inquiring Into Questions on Customary Law

All questions regarding the existence, application or relevance of customary law are questions of law and you may raise them yourself, even if no party has raised them.

If a question of customary law arises you should:

- ask the parties or their counsel to make submissions, and consider the submissions;
- consult reported cases, legal text books or other similar sources if a doubt still remains;
- conduct an inquiry as part of the proceedings in the manner you consider expedient if doubt still remains.

In conducting such an inquiry, you:

- may call such evidence or require the opinions of people you think fit;
- must admit and consider available evidence (including hearsay and opinion evidence);
- must otherwise inform yourself as you think fit;
- must consider submissions on the question made on behalf of the parties;
- may consult reported cases, books, treaties,

1.4 Common Law

Common law is law made and developed by Judges and Magistrates through their decisions. Under common law, each Court is bound by the decisions of superior Courts through the doctrine of judicial precedent.

Judicial Precedent

All Courts in Vanuatu must follow any decision on a question of law of a Court which is superior in relation to it. The Magistrate's Court must follow the decisions of the Supreme Court, and Court of Appeal.

Decisions from the Courts of other countries are not binding and are of persuasive value only.

The common law of Vanuatu is made up of the rules of the common law of England, (including the doctrines of equity) as applied to the circumstances in Vanuatu.

Vanuatu has taken these inherited rules and now adds to them through legislation and its own Court decisions. For this reason, many of the inherited rules no longer apply.

1.5 Pre-Existing Joint Regulations

Until otherwise provided by Parliament, all Joint Regulations and corresponding subsidiary legislation in force immediately prior to the Day of Independence continues in operation and shall be construed, with all adaptations necessary to bring them into conformity with the *Constitution*: *Article 95(1) Constitution*.

1.6 Pre-Existing British and French Laws

Until otherwise provided by Parliament, all British and French laws in force or applied in Vanuatu immediately prior to the Day of Independence continue to apply to the extent that they are not expressly revoked or incompatible with the independent status of Vanuatu and wherever possible, taking due account of custom: *Article 95(2) Constitution*.

2 Interpreting Legislation

It is your job to interpret and apply the legislation. Generally, a Statute contains a section at the start which defines the meaning of certain words and phrases. If the word or phrase is not defined, then it may be given its natural and ordinary meaning.

When interpreting a word or phrase, consider:

- definitions in the Act (if any);
- any relevant definitions in the *Interpretation Act*;
- a dictionary;
- how it has been used in the particular Act and section (i.e. the context it has been used in);
- what purpose Parliament had in passing the law.

When an Act says the Court "may" do something, that means the power may be exercised or not, at your discretion.

When an Act says you "shall" do something, this means you must. You have no choice.

If you have any doubt about the meaning of any section or words in these Acts, contact the Chief Registrar, who can provide guidance. You may also seek help from a member of the Judiciary or a lawyer appearing before you.

3:

GENERAL:

JURISDICTION

1 Jurisdiction Defined

Jurisdiction means the authority to hear and determine a particular matter. Courts may only act within their legally defined jurisdiction. If a Court acts outside its jurisdiction, it is said to be acting *ultra vires* (outside the power) which makes the Court's decision invalid on that matter.

An example where a Court would be acting outside its jurisdiction would be if the Magistrate's Court heard a murder case, which can only be heard by the Supreme Court.

1.1 Original Jurisdiction

Original jurisdiction means that a Court is given power to hear certain kinds of cases **in the first instance**, for example:

- the Supreme Court has original jurisdiction to hear murder and treason cases;
- the Magistrate's Court has original jurisdiction to hear criminal cases for which the maximum punishment does not exceed 2 years imprisonment: *s14(2) Judicial Services and Courts Act*.

In Vanuatu, the jurisdiction of the Magistrate's Court does not in any way restrict the jurisdiction of the Supreme Court: *s16(2) Judicial Services and Courts Act.* This means that the Supreme Court has original jurisdiction to hear any case that could be heard in Magistrate's Court.

1.2 Territorial Jurisdiction

Territorial jurisdiction refers to the **geographic** area in which a particular Court has competence.

1.3 Appellate Jurisdiction

This is the right of a Court to hear appeals from a lower Court.

The Court of Appeal and the Supreme Court each have some type of appellate jurisdiction under the *Constitution*, as does the Magistrate's Court under the *Island Courts Act*: *ss22-23 Island Courts Act*.

1.4 Criminal Jurisdiction

A crime (also called an offence) is the commission of an act that is forbidden by legislation or the omission of an act that is required by legislation.

The *Penal Code* sets out most crimes in Vanuatu. Other Statutes, such as the *Public Order Act* and the *Road Traffic (Control) Act*, also set out a number of offences you will encounter in Magistrate's Court.

1.5 Civil Jurisdiction

This covers disputes between individuals and between individuals and the state, that are not criminal matters.

2 Jurisdiction of the Magistrate's Court

2.1 Territorial Jurisdiction

Every Magistrate may exercise his or her powers throughout Vanuatu: *s18(3) Judicial Services and Courts Act*. For reasons of convenience, however, it may be advisable to transfer a case to another Magisterial district to be heard, where appropriate.

See paragraph 3 Transfer of Cases, below.

2.2 Criminal Jurisdiction

Within criminal jurisdiction, it must be noted that there is a distinction between what a Magistrate may **hear** and what **sentence** he or she may pass on conviction. It is vital that you keep this distinction in mind when hearing criminal cases.

Jurisdiction to Hear and Determine

Subject to any other Act or law, the Magistrate's Court has jurisdiction to **hear and determine** summarily all criminal proceedings for offences for which the maximum punishment does not exceed 2 years imprisonment: *s14(2) Judicial Services and Courts Act*.

The Supreme Court may extend the Magistrate's Court's hearing jurisdiction for a particular type or class of offence, or even for just one single case: *s14(6)* as added by *s10 Judicial Services and Courts (Amendment) Act No 4 of 2003*.

The Supreme Court has used this power, under *Order Investing Jurisdiction Upon the Magistrate's Court For Classes of Offences July 22, 2003*, to extend the hearing jurisdiction of all Magistrates to include:

- *s69 Penal Code, Unlawful Assembly*; on the application of the prosecutor;
- *s70 Penal Code, Riot*; on the application of the prosecutor;
- *s71 Penal Code, Forcible Entry*; on the application of the prosecutor;
- *s72 Penal Code, Forcible Detainer*; on the application of the prosecutor;
- *s73 Penal Code, Corruption and Bribery of Officials*; on the application of the prosecutor;
- *s73A Penal Code, Obstructing Police Officer*; on the application of the prosecutor;
- *s82 Penal Code, Offences relating to Judicial Proceedings*; on the application of the prosecutor;
- *ss83-87 Penal Code, Escapes and Rescues*; on the application of the prosecutor;
- *s114 Penal Code, Criminal Nuisance*; on the application of the prosecutor;
- *s120 Penal Code, Criminal Defamation*; on the application of the prosecutor;
- *s121 Penal Code, Abusive or Threatening Language*; on the application of the prosecutor;
- *s125 Penal Code, Theft, Misappropriation and False Pretences*; where the value of the relevant property is less than VT 1,000,000;
- *s126 Penal Code, Offences Resembling Theft*; where the value of the relevant property is less than VT 1,000,000; and
- *ss52, 53 Customs Act*; on the application of the prosecutor.

Jurisdiction to Sentence

While the Magistrate's Court may hear any offence listed above, he or she is still limited in sentencing.

When convicted, the Magistrate's Court may sentence an offender to:

- imprisonment up to a maximum of 2 years;
- a fine up to the maximum authorised by law for such an offence;
- any sentence or order authorised by law.

If convicted, the Magistrate's Court may sentence an offender to a combination of sentences: *s44(2) Penal Code.*

Where no fine has been authorised by Parliament, *s36(3) Interpretation Act* applies where a fine of VT 5,000 or imprisonment for one year or both can be imposed.

Two or more offences arising out of the same facts
For two or more distinct convictions, a Magistrate's Court may pass **consecutive** sentences of imprisonment (to be served one after another) to a maximum of 4 years: *s14(5)* as added by *s10 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

Senior Magistrates
On application, or at his or her own discretion, a senior Magistrate may **hear** and determine any offence for which the maximum punishment does not exceed 10 years imprisonment: *s14(4)* as added by *s10 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

A senior Magistrate may **sentence** to a maximum of 5 years imprisonment: *s14(4)* as added by *s10 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

2.3 Civil Jurisdiction

The civil jurisdiction of the Magistrate's Courts are set out in the *Magistrate's Court (Civil Jurisdiction) Act*.

A Magistrate's Court may:

- hear and determine all civil proceedings in which the amount claimed or the value of the subject matter does not exceed VT 1,000,000 (not including claims relating to permanent physical damage to a person);
- hear and determine all disputes between landlords and tenants where there is either no claim for damages or compensation, or the claim does not exceed VT 2,000,000;
- hear and determine all undefended suits for divorce or judicial separation, subject to the directions of the Chief Justice;
- hear and determine all claims under the *Maintenance of Family Act* and the *Maintenance of Children Act* or any other law providing for the maintenance of children, mothers of children or wives by fathers or husbands, where the annual sum claimed does not exceed VT 1,200,000: *s1* as amended by *s1 Magistrate's Court (Civil Jurisdiction) (Amendment) Act No 8 of 1994*.

Counterclaims Outside Jurisdiction
Where the original claim is within the jurisdiction of the Magistrate's Court but a counterclaim is outside its jurisdiction, the Magistrate's Court may hear the counterclaim; or refer the case to the Supreme Court who will then either hear the case or direct a Magistrate's Court to hear it: *ss3(3),(4),(5) Magistrate's Court (Civil Jurisdiction) Act*.

The Magistrate's Court does **not** have jurisdiction to try any civil suit concerning:

- wardship;
- guardianship of minors and persons of unsound mind;
- interdiction;
- appointment of a *conseil judicaire*;
- adoption;
- civil status;
- succession;
- wills;
- bankruptcy;
- insolvency; or
- liquidation of corporate bodies: *s2 Magistrate's Court (Civil Jurisdiction) Act*.

2.4 Lands Jurisdiction

Land cases at first instance are now dealt with by the Lands Tribunal. However, there are a number of land cases still pending in the Island Courts from before the creation of the Lands Tribunal. You may have to make interlocutory orders from time to time concerning these cases until they have been dealt with.

2.5 Appellate Jurisdiction

The appellate jurisdiction of the Magistrate's Court allows any person to appeal to the Magistrate's Court from a decision of an Island Court within 30 days from the date of the order or decision of the Island Court: *s22(1) as amended by s7 Schedule Island Courts (Amendment) Act No15 of 2001*.

Upon hearing the appeal, you may:

- make any order or pass any sentence the Island Court could have made or passed when hearing the matter; or
- order that the cause or matter be reheard before the same Court or before any other Island Court: *s23 Island Courts Act*.

2.6 Other Jurisdiction

Magistrates have jurisdiction to carry out many other tasks to assist them to carry out their judicial functions, including the power to:

- issue writs of summons;
- administer oaths and take affirmations and declarations;
- make decrees and orders;
- issue process; and
- exercise judicial and administrative powers in relation to the administration of justice.

Magistrates also have the power to punish contempt of Court by a maximum 2 months imprisonment or a maximum fine of VT 20,000: *s16(1) Judicial Services and Courts Act*.

3 Transfer of Cases

Transfer to Supreme Court

In some instances, you may realise that a case is outside your jurisdiction. For example, this could occur:

- in a criminal trial, where one offence has been charged but it becomes clear that a more serious charge beyond your jurisdiction should have been laid; or
- in a civil trial, where what was originally thought to be an undefended divorce is in fact a defended divorce.

In either example, when such a situation arises, the matter is now beyond your jurisdiction and you must discontinue the proceedings and transfer it to the Supreme Court.

Transfer to Another Magistrate's Court

While you have territorial jurisdiction throughout Vanuatu, in some cases it will become apparent that a criminal or civil matter will be better dealt with in another magisterial district. In such cases, you should transfer the case to that district.

3.1 Criminal Jurisdiction Problems

A jurisdictional error could occur, for example, when an accused was originally charged with assault, but during the hearing it appears to you that the accused should have properly been charged with indecent assault.

In such cases, order the prosecutor to amend the charge so that it suits the facts of the case. Once the proper charge has been laid, the case may be brought in the Supreme Court.

3.2 Civil Jurisdiction Problems

When it becomes apparent that a matter is outside your civil jurisdiction, strike out the case and order it transferred to the Supreme Court.

4:

GENERAL:

HUMAN RIGHTS AND NATURAL JUSTICE

1 Introduction

The *Constitution* sets out a number of fundamental rights and freedoms that are guaranteed to all persons in Vanuatu.

It is the responsibility of all Judges and Magistrates to ensure that these rights are respected in the administration of justice. Any person who believes his or her guaranteed rights have been, are being or are likely to be infringed may apply to the Supreme Court to enforce that right: *Article 6(1) Constitution*.

With the exception of legal restrictions placed on non-citizens, all persons are entitled to the following rights and freedoms set down in the *Constitution* without discrimination on the grounds of race, place of origin, religious or traditional beliefs, political opinions, language or gender:

- the right to life;
- the right to liberty;
- the right to security of the person;
- the right to protection of the law;
- freedom from inhuman treatment and forced labour;
- freedom of conscience and worship;
- freedom of expression;
- freedom of assembly and association;
- freedom of movement;
- the right to protection for the privacy of home and other property and from unjust deprivation of property;
- the right to equal treatment under the law or administrative action, except if the law makes provision for the benefit, welfare protection or advancement of females, children, young persons, members of under-privileged groups or inhabitants of less developed areas: *Article 5(1) Constitution*.

The scope of these rights and freedoms are only subject to the rights and freedoms of others in Vanuatu and to the legitimate public interest in defence, safety, public order, welfare and health: *Article 5(1) Constitution*.

2 Right to Personal Liberty

In criminal cases, the individual's right to personal liberty is often an issue. While the *Constitution* does not specifically mention situations where the deprivation of personal liberty is permissible, you must start from the presumption that the individual be allowed to exercise his or her free liberty unless, by operation of law, the individual loses that right.

The situations when an individual may be deprived of his or her liberty include, but are not restricted to, the following:

- in execution of the sentence or order of a Court in respect of a conviction for a criminal offence;
- in execution of a Court order punishing him or her for contempt of Court;
- in execution of a Court order made to secure the fulfilment of that person's obligations under the law;
- for the purposes of bringing the person before a Court in execution of a Court order;
- upon reasonable suspicion of the person having committed or being about to commit a criminal offence under the law of Vanuatu.

2.1 Procedure on Arrest

The protections of personal liberty in Vanuatu require certain procedural steps to be followed during arrest or detention. You should make yourself aware of these so that you can ensure that all Police and Court procedures obey the *Constitution*.

Any Police officer when making an arrest without a warrant must always without unnecessary delay take the arrested person to a judicial officer or before an officer in charge of a Police Station: *s15 CPC*.

Any person who as been taken into custody without a warrant must, within 24 hours, be released if the offence is not of a serious nature.

Section 51 CPC authorises the officer executing the warrant to inform the person of the substance of the warrant. *Section 52 CPC* requires a Police officer or other person executing a warrant must , without unnecessary delay bring the person to Court.

With regards to bail, *s60 CPC* allows for temporary release if the offence is not one punishable by life imprisonment and the person is prepared to enter a bond in writing.

If a bond has been entered in writing, the person, if in custody, must be released as stated at *s63(1) CPC*.

Under *s66*, if the Court refuses bail, the Magistrate Court must state the grounds for such refusal and must read out the following statement:

"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 be 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 application for bail informs the presiding Magistrate that the person in custody wishes to have the Supreme Court hear the application then that Magistrate must make sure that the file is sent to the Supreme Court with the report as to why bail was refused. Any decision made by the Supreme Court must be in writing and served without delay to the Magistrate and any other parties concerned.

3 Right to Protection of Law

The right to protection of the law in *Article 5 Constitution* has within it a number of rights which are crucial to ensuring justice in all criminal cases. For this reason, you should become familiar with *Article 5* and the important rights it confers. These relate to:

- the right to a fair hearing within a reasonable time by an independent and impartial Court and right to a lawyer for a serious offence;
- the presumption of innocence;
- the right to be informed promptly of the offence with which the accused is charged in a language he or she understands;
- the right, if necessary, to an interpreter during proceedings;
- the right to not be tried in his or her absence without consent, unless he or she makes it impossible to proceed in his or her presence;
- the protection against retrospective laws;
- the protection against greater penalties than existed at the time of the offence; and
- the right to not be tried twice for the same offence: *Article 5(2) Constitution*.

3.1 The Right to a Fair Hearing

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*.

This right captures four very important aspects of all criminal trials:

- a fair hearing;
- within a reasonable time;
- by an independent and impartial Court; and
- the right to a lawyer for serious offences.

What will be fair, reasonable or independent are matters which depend largely on the circumstances of each individual case. For example, what would be considered a reasonable time for concluding the trial of a very simple offence will likely be much less than for a very complex case involving multiple accused on trial for serious offences.

In fact, by putting too much emphasis on a speedy trial, it is possible that the fairness of the trial itself may be compromised by not allowing the accused adequate time to prepare a defence. Rather, you should try to balance these interests and ensure that overall the hearing is as fair as possible for the accused.

For a discussion of the meaning of a reasonable time, see *Public Prosecutor v Tagahi* [2000] VUSC 32; Criminal Case No 057 of 1999.

3.2 The Presumption of Innocence

Everyone is presumed innocent until a Court establishes his or her guilt according to law: *Article 5(2)(b) Constitution*.

See *Public Prosecutor v Simon* [2003] VUSC 58; Criminal Case No 043 of 2002.

While the accused is presumed to be innocent, he or she may still have the burden of proving particular facts. For example, the defence of insanity requires the accused to produce some evidence to make out the defence.

3.3 The Right to be Informed of the Offence Charged

Everyone charged shall be informed promptly of the offence with which he or she is being charged in a language he or she understands: *Article 5(2)(c) Constitution*.

This is an important right because only by knowing and understanding the offence with which he or she is charged, may an accused be able to properly provide a defence.

3.4 The Right to an Interpreter

If an accused does not understand the language used in the proceedings, he or she shall be provided with an interpreter throughout the proceedings: *Article 5(2)(d) Constitution*.

The right to an interpreter is very important because, without the ability to understand the proceedings, the accused will be unable to mount a proper defence. If you believe that an accused does not sufficiently understand the proceedings, stop the proceedings and find an interpreter to help the accused.

3.5 The Right to be Present During Trial

A person shall not be tried in his or her absence without his or her consent unless he or she makes it impossible for the Court to proceed in his or her presence: *Article 5(2)(e) Constitution*.

In order for the Court to proceed in the absence of the accused, the accused's conduct must be such as to make the continuance of the proceedings in his or her presence impracticable. Whether to exclude the accused is a matter for you to decide but you should only exclude the accused after warning him or her and as a last resort.

3.6 Protection Against Retrospective Laws

No person shall be convicted in respect of an act or omission which did not constitute an offence under written or custom law at the time it was committed: *Article 5(2)(f) Constitution*.

This rule against retrospective laws prevents a person from being held criminally liable for an act which was not criminal at the time the act was done.

3.7 Protection Against Greater Penalty

No person shall be punished with a greater penalty than that which exists at the time of the commission of the offence: *Article 5(2)(g) Constitution*.

Justice demands that individuals know or be able to find out the penalty for an offence beforehand. For this reason, if legislation increases the penalty for a particular offence between the time it was committed and the time of sentencing, the earlier lesser penalty must be applied to the offender.

3.8 The Right Not to be Tried Twice for the Same Offence

No person who has been pardoned, or tried and convicted or acquitted, shall be tried again for the same offence or any other offence of which he or she could have been convicted at his or her trial: *Article 5(2)(h) Constitution*.

Often referred to as the "rule against double jeopardy", a person convicted or acquitted of a criminal offence must normally not be tried again for the same offence.

If several charges stem from the same set of facts or form part of the same series of offences, a person may be tried for one offence after being convicted or acquitted of one of the other offences.

4 Protection from Inhuman Treatment and Forced Labour

Every person has the right to freedom from inhuman treatment and forced labour. The only permissible exceptions to this right are respect for the rights and freedoms of others and the legitimate public interests of defence, safety, public order, welfare and health: *Article 5(1)(e) Constitution*.

It is a good idea to keep this particular right in mind so that you can ensure that police and prisons officers treat all persons in accordance with the *Constitution*.

5 Freedom of Movement

As with freedom of liberty, every person in Vanuatu has freedom of movement unless that freedom is taken away in accordance with the law: *Article 5(1)(i) Constitution*.

The most common examples of restraining freedom of movement are Domestic Violence Protection Orders. Often these orders will include an order for exclusive occupation of the family home and/or an order restraining a person from coming within a certain number of metres of the home, workplace or school of family members.

When granting these orders, keep in mind the guaranteed right to freedom of movement and ensure that the order is broad enough only to accomplish the legitimate task of ensuring the safety and well-being of the claimant without overly infringing on the rights of the defendant.

6 Protection for Privacy of Home and Property and from Unjust Deprivation of Property

The right of individuals to the protection for privacy of home and other property will most commonly arise when dealing with search warrants. For this reason you should be mindful when granting search warrants. Demand a high level of professionalism from the Police in applying for and executing search warrants and ensure all proper procedures are followed.

7 Equal Treatment Under the Law

Every person in Vanuatu is guaranteed equal treatment under the law or administrative action. No law is inconsistent with this right insofar as it makes provision for the special benefit, welfare, protection, or advancement of females, children and young persons, members of under-privileged groups or inhabitants of less developed areas: *Article 5(1)(k) Constitution*.

This right underlines your duty to treat all parties to civil or criminal proceedings with equality and give each person the full benefit of the law.

8 Natural Justice

8.1 Principle that Affected Parties have the Right to be Heard

It is a well established principle of natural justice, evolved from the common law, that parties and the people affected by a decision should have a full and fair opportunity to be heard before the decision is made.

This principle focuses on the **procedural** steps implemented by the Court. The purpose of the principle is to ensure that you consider all relevant information before making a decision.

To give effect to this principle, you have to consider what has to be done to allow a person to be heard. This extends to:

- allowing the person sufficient notice to prepare his or her case;
- allowing sufficient time to enable the person to collect evidence to support his or her case;
- allowing sufficient time to enable the person to collect evidence to be able to rebut or contradict the other party's submissions.

Note that a person may be heard, but the view they have expressed need not prevail. You are entitled to reject it for what might be a good reason. The relevance and weight of their submissions are to be determined by you.

There are three aspects to the principle of being heard:

Prior Notice

- You should be satisfied that adequate notice has been given, as prescribed by law.
- If the accused or respondent does not take any steps or appear at the hearing, you will need some evidence that the documents have been served before proceeding with the hearing.
- You will need proof of service of any warrant or summons.
- Notice must be sufficient to allow the person to prepare their case. Where you are not satisfied that a party has been given sufficient notice for this, adjourn the matter to allow him or her more time.

Fair Hearing

- The way the hearing is managed and the way witnesses are examined is extremely important for ensuring that the parties have the opportunity to be heard.
- The general rule is that you should hear all sides of a matter. This includes allowing a party the opportunity to hear, contradict and correct unfavourable material, and allowing further time to deal with any new and relevant issues that arise.
- The principle always requires you to ensure you have all the relevant facts and materials before deciding a case.

Relevant Material Disclosed to Parties

- Generally, all relevant material should be disclosed to the parties. Those likely to be affected by a decision must have the opportunity to deal with any unfavourable material that you propose to take into account.

Before a hearing is concluded, you should ask yourself, “has each party had a fair opportunity to state his or her case?”

8.2 Principle that No Person Should Be a Judge in His or Her Own Cause

It is another well established principle of natural justice, evolved from the common law, is that no person should be a judge in his or her own cause. This principle relates to independence.

For more detail, see Chapter 5 Judicial Conduct. Briefly:

- Magistrates should not allow their decision to be affected by bias, prejudice or irrelevant considerations.
- They must not have an interest in the matter from which it might be said that they are biased.
- It is not necessary to show actual bias, the appearance of bias is sufficient.
- Bias might be inferred where there is a relationship to a party or witness, a strong personal attitude that will affect a Magistrate's decision, or a financial interest in the matter.

5:

GENERAL:

JUDICIAL CONDUCT

1 Appointment

1.1 All Magistrates

All Magistrates are appointed by the President on the recommendation of the Judicial Services Commission. All recommendations must be based on merit: *s18(1) Judicial Services and Courts Act*.

In order to recommend a person for appointment as a Magistrate, the person must:

- hold a degree in law from a recognised tertiary institution; and
- have suitable legal training or experience: *s18(2) Judicial Services and Courts Act*.

1.2 Senior Magistrates

Senior Magistrates are appointed by the President on the recommendation of the Judicial Services Commission. All recommendations must be based on merit: *s18(4)* as added by *s12 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

In order to be recommended for appointment as a Senior Magistrate, the person must have three years experience as a Magistrate: *s18(5)* as added by *s12 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

1.3 Chief Magistrate

One Chief Magistrate must be appointed by the President, on the recommendation of the Judicial Services Commission. The recommendation must be based on merit: *s18(3) Judicial Services and Courts Act*.

In order to be recommended for appointment as Chief Magistrate, the person must have five years experience as a Magistrate: *s19(2) Judicial Services and Courts Act.*

With prior consultation with the Chief Justice and the Registrar, the Chief Magistrate:

- is responsible for the management of the administrative affairs of the Magistrate's Court;
- may issue directions consistent with the Rules of Court with respect to Court practices and procedures;
- must identify training programs for Magistrates;
- must notify the Commission of any matter which affects the employment of Magistrates;
- may discipline Magistrates through counselling;

- is responsible for management and control of Magistrate's Court personnel;
- must implement all statutory orders relating to Magistrates;
- is responsible for the orderly and expeditious exercise of the Magistrate's Court jurisdiction and must ensure that:
  - the business of the Magistrate's Court is undertaken in a just and fair manner at reasonable cost;
  - all cases are listed, heard and determined as soon as possible; and
  - delays in proceedings are avoided through unnecessary adjournments and that reasonable notice is given to parties of changes in hearing dates: *s19(5),(6)* as amended by *ss13,14 Judicial Services and Courts (Amendment) Act No4 of 2003*.

2 Ethical Principles

Upon appointment as a Magistrate you have sworn the following two oaths:

Oath of Allegiance

> "I……..., do swear that I will well and truly serve and bear true allegiance to the Republic of Vanuatu according to law. So help me God."

Judicial Oath

> "I,…….., having been appointed a Magistrate of the Republic of Vanuatu do swear that I will bear true faith and allegiance to the Republic of Vanuatu and will uphold the Constitution and the law, that I will conscientiously, impartially and to the best of my knowledge, judgement and ability discharge the functions of my office and do right to all manner of people after the laws and usages of the Republic of Vanuatu without fear and favour, affection or ill-will. So help me God".

The Judicial Oath can be divided into parts to illustrate a number of well-established ethical principles of judicial conduct.

2.1 "To the Best of My Knowledge, Judgement and Ability Discharge the Functions of My Office"

Diligence

You should be diligent in the performance of your judicial duties.

This means you should:

- devote yourself to your judicial duties, including presiding in Court, making decisions and carrying out other tasks essential to the Court's operation;
- bring to each a case a high level of competence and preparation; and
- take steps to enhance the knowledge and skills necessary for your role.

Serving diligently also requires you to deliver decisions to the best of your ability, but also with regard to avoiding any unnecessary delay. To ensure this, you should:

- be familiar with common offences, the extent of your jurisdiction and Court procedures; and
- prepare as much as possible before sitting in Court.

2.2 "Do Right"

Integrity

You should conduct yourself with the utmost integrity to sustain and enhance public confidence in the judiciary.

This means you should:

- make every effort to ensure that your personal and public conduct is above reproach;
- not engage in conduct incompatible with the discharge of your role; and
- encourage and support your judicial colleagues to observe the same high standards.

2.3 "All Manner of People"

Equality

You should conduct yourself and proceedings before you so as to ensure equality according to the law.

This means you should:

- carry out your duties with appropriate consideration for all persons (for example, parties, witnesses, Court personnel and judicial colleagues) without discrimination;
- strive to be aware of and understand differences arising from, for example, gender, race, religious conviction, culture, ethnic background;
- avoid membership in any organisation that you know currently practices any form of discrimination that contravenes the law;
- in the course of proceedings before you, disassociate yourself from and disapprove of clearly improper comments or conduct by Court staff, counsel, or any other person

subject to your direction. Improper conduct can include sexist, racist, or discriminatory language or actions which are prohibited by law.

2.4 "After the Laws and Usages of the Republic of Vanuatu"

Lawfulness

You must always act within the authority of the law. This means you should:

- not take into account irrelevant considerations when making decisions. Your decisions should only be influenced by legally relevant considerations;
- not abdicate your discretionary powers to another. You must make the decision;
- defend the constitutionally guaranteed rights of the people of Vanuatu.

2.5 "Without Fear and Favour, Affection or Ill-Will"

Judicial Independence

An independent Judiciary is indispensable to justice under the law. You should therefore uphold and exemplify judicial independence in both its individual and institutional aspects.

You must:

- exercise your judicial functions independently and free from irrelevant influence;
- reject any attempts to influence your decisions outside of the Court;
- uphold arrangements and safeguards to ensure judicial independence;
- promote high standards of judicial conduct.

Impartiality

In any case in which you have a personal interest or there is actual bias or an apprehension of bias, you must disqualify yourself and direct that the proceedings be heard by another Magistrate: *s21(1) Judicial Services and Courts Act*.

You can disqualify yourself at your own discretion or at the application of a party: *s21(2) Judicial Services and Courts Act*.

If you reject an application for disqualification, you must give the applicant written reasons for the rejection: *s21(4) Judicial Services and Courts Act.*

If the applicant appeals your rejection to the Supreme Court, you must adjourn the proceedings until the appeal has been heard and determined: *s21(3) Judicial Services and Courts Act*.

Justice requires you to in fact be impartial, but also requires you to **appear** to be impartial in your decision making.

To ensure impartiality, you should:

- not allow your decisions to be affected by:
  - bias or prejudice; or
  - personal or business relationships or interests;
- as much as reasonably possible, conduct your personal and business affairs so as to minimise the occasions where it will be necessary to disqualify yourself from hearing cases.

Impartiality touches on several different aspects of your conduct.

1. Judicial demeanour

At all times you should maintain firm control of Court processes and ensure all people in the Court are treated with courtesy and respect.

2. Civic and charitable activity

You are free to participate in civic, charitable and religious activities, subject to the following considerations:

- avoid any activity or association that could interfere with the performance of your judicial duties or could reflect on your impartiality;
- do not use your judicial office to advance the causes of others;
- avoid involvement in causes or groups likely to be involved in litigation;
- do not give legal advice.

3. Political activity

You should refrain from conduct which, in the mind of a reasonable, fair-minded and informed person, would undermine confidence in your impartiality with respect to matters that could come before the Courts.

Specifically, you should refrain from:

- membership in political parties and political fundraising;
- attendance at political gatherings;
- contributing to political parties or campaigns;
- taking part publicly in controversial political discussions except in respect of matters directly affecting the operation of the Courts, the independence of the judiciary or fundamental aspects of the administration of justice.

4. Conflict of interest

In any case in which you believe you will be unable to act impartially, you must disqualify yourself.

It is impossible to list with certainty each situation where you should disqualify yourself but, as a general rule, you should never hear a case where close family members or friends are parties, witnesses or have an interest in the outcome.

For more distant family or friends, you should ask yourself whether your relationship with the person is one that could lead to bias, or that a reasonable, fair-minded and informed person would have a suspicion of bias. If so, you should disqualify yourself. For example, you should not sit in a case involving a very distant relative if you have a very close relationship with that person.

You must not preside over any case where you may have, or appear to have, preconceived or pronounced views relating to:

- issues in the case;
- witnesses; or
- parties.

For example, if you witness an accident, do not preside over any case arising out of that accident, as you may prefer your own memory over that of the evidence lawfully presented in Court.

Disqualifying yourself is **not** appropriate if:

- the matter giving rise to the perception of a possibility of conflict is trifling or would not support a plausible argument in favour of disqualification;
- no other Magistrates are available to deal with the case; or
- because of urgent circumstances, failure to act could lead to a miscarriage of justice.

If you must disqualify yourself, procedures are in place for your replacement so that the case can be heard in accordance with the law and without the possibility of real or perceived bias.

Alternatively, if it appears impossible to hear a case in the jurisdiction because too many Magistrates must disqualify themselves, report the matter to the Chief Justice.

3 Code of Conduct

As a judicial officer you must always follow the Code of Conduct. A copy of the Code of Conduct had been copied onto the following pages for reference.

Code of Conduct

GENERAL

1. Every Judicial Officer must recognize that if he or she accepts a judicial appointment that necessarily will restrict his or her behaviour and activities.

2. The duties set out in these rules must not only be done but be seen to be done.

3. If a Judicial Officer is unsure of how to conduct himself or herself in any circumstances, then he or she must consult the Chief Justice.

RULE 1

A Judicial Officer must be true and faithful to the oath of allegiance and the Judicial oath.

A Judicial Officer must:

- Uphold the Constitution and the law.

- Discharge the functions of office to the best of his or her knowledge, judgement and ability.

- Do right to all people without fear or favour, affection or ill will.

A Judicial Officer must not:

- Be influenced by the sex, ethnic or national origin, religious belief, political association or socio-economic grouping of any person involved in the execution of his or her duties.

- Be influenced by personal feelings in the execution of his or her duties.

RULE 2

A Judicial Officer must perform the duties of his or her office with diligence:

- A Judicial Officer must arrange and attend to his or her duties in an efficient and timely manner.
- A Judicial Officer must not allow any outside activities to interfere with the efficient and timely execution of his or her duties.
- A Judicial Officer, in the discharge of his or her duties must have and display professional competence and a clear understanding of the law
- A Judicial Officer must not engage in any other paid activity without proper authorization

RULE 3

A Judicial Officer must act at all times in a manner which upholds the good name, dignity and esteem of his or her office.

- A Judicial Officer must ensure that he or she conducts all his or her financial and other affairs in a reputable manner. In particular, he or she must only borrow from recognised financial institutions and only if he or she is capable of servicing the loan properly and without hardship to himself or herself or his or her family.
- A Judicial Officer must not commit any criminal offence.
- A Judicial Officer must not become a judgement debtor or be declared bankrupt.

RULE 4

A Judicial Officer must perform his or her duties with impartiality:

- A Judicial Officer must be free and be seen to be free from any external influence or pressure.
- A Judicial Officer must refrain from consulting or discussing with or seeking views from anyone outside judicial circles when executing his or her duties.

- A Judicial Officer shall disqualify himself or herself from any matter if:

  (i) he or she has any personal bias or prejudice or knowledge concerning any person or facts involved in any matter before him or her
  (ii) his or her family or close relation is involved in a matter or might reasonably be said to have a financial or other interest in the matter;
    - unless the matter is urgent and there is no alternative,
    - and the Judicial Officer declares the fact.

RULE 5

A Judicial Officer must not use the power vested in him or her by virtue of his or her appointment for any purpose other than the due discharge of his or her duties.

RULE 6

A Judicial Officer must act at all times with courtesy and respect for all people.

A Judicial Officer must require lawyers, parties and all other persons with whom he or she comes into contact in the execution of his or her duties to refrain from words or conduct based on prejudice in respect of any person's sex, ethnic or national origin, religious belief, political association or socio-economic grouping unless, and only to the extent, such is necessarily involved in the issues in a case.

RULE 7

A Judicial Officer must not put himself or herself in a position which conflicts or might conflict with the discharge of any of the functions of his or her office:

- A Judicial Officer must not give or accept gifts or other benefits in money, kind or services other than in the normal course of family life and personal friendships.

- If an unacceptable gift is sent to a Judicial Officer, it should be passed onto the Registrar to return with an accompanying letter explaining the reasons why it cannot be accepted.

- A Judicial Officer must not give legal advice either for payment or otherwise save to a close relative or personal friend in a non-contentious matter.

RULE 8

A Judicial Officer must not engage in political activity:

- A Judicial Officer must remain completely apart from politics.
- A Judicial Officer must not make statements to the press or in public of a political nature or which might reasonably be regarded as of a political nature.

RULE 9

A Judicial Officer must maintain confidentiality at all times:

- A Judicial Officer must not divulge any information concerned with the discharge of his or her duties to the press, the public or any person save those necessarily involved in the judicial system in those duties.
- A Judicial Officer must not communicate with the press or make public statements or give interviews without the consent of the Chief Justice and within the limits of any such consent.
- Press statements shall only emanate from the Chief Justice or the Registrar on the Chief Justice's direction.
- If a Judicial Officer does speak or act in public or at a meeting open to a limited section of the public, then he or she must make it clear in what capacity he or she is speaking or acting.

RULE 10

A Judicial Officer must seek at all times to maintain the independence of the Judiciary:

- A Judicial Officer must inform the Chief Justice immediately of any activity which he or she proposes to engage in or has engaged in if it might conflict with any of these rules.
- A Judicial Officer must inform the Chief Justice immediately of any breach or suspected breach of these rules by himself or herself or by any other Judicial Officer.

- A Judicial Officer must not directly, indirectly or tacitly utilize or allow to be utilized his or her position for any purpose other than the execution of the functions of his or her office.

4 Conduct in Court

4.1 Preparing for a Case

Ensure you have studied and understood the files you will be dealing with.

Have the relevant legislation at hand.

Criminal Jurisdiction

- Consider the offences – make sure you know what elements must be proved.
- Be prepared for interlocutory applications that may arise in the course of proceedings.
- Be prepared to deliver rulings at short notice.

Civil Jurisdiction

- Study the file, sworn statements, etc.
- Identify the issues in dispute and the relief sought.

4.2 Courtroom Conduct

You should exhibit a high standard of conduct in Court so as to reinforce public confidence in the judiciary:

- Be courteous and patient.
- Be dignified.
- Be humble. If a mistake is made you should apologise - there is no place on the Bench for arrogance.
- Continually remind yourself that a party is not simply a name on a piece of paper. The parties are looking to the Court to see justice is administered objectively, fairly, diligently, impartially, and with unquestionable integrity.
- Never make fun of a party or witness. A matter which may seem minor to you, may be very important to a party or witness.

- Show appropriate concern for distressed parties and witnesses.
- Never state an opinion from the Bench that criticises features of the law. Your duty is to uphold and administer the law, not to criticise it. If you believe that amendments should be made, discuss the matter with the Chief Justice.
- Never say anything or display conduct that would indicate you have already made your decision before all parties have been heard.
- Do not discuss the case or any aspect of it outside of the judiciary.

4.3 Maintaining the Dignity of the Court

Ensure that all people appearing before the Court treat it with respect by:

- keeping order in Court;
- being polite and respectful and expecting the same from all people in Court.

Deal effectively with unruly accused persons, parties, witnesses and spectators by:

- being decisive and firm;
- dealing promptly with interruptions or rudeness;
- clearing the Court or adjourning if necessary.

4.4 Communication in Court

Speaking

- Use simple language without jargon.
- Make sure you know what you want to say before you say it.
- Avoid a patronising and/or unduly harsh tone.
- Generally, do not interrupt counsel or witnesses.
- Always express yourself simply, clearly and audibly. It is important that:
    - the party examined and every other party understands what is happening in the Court and why it is happening;
    - the Court Clerk is able to hear what is being said for accurate records; and
    - the public in the Court are able to hear what is being said.

Active Listening

- Be attentive and be seen to be attentive in Court.

- Take accurate notes.
- Maintain eye contact with the speaker.

Questioning

You may ask a witness questions to clear up ambiguities in the evidence, but do not conduct the case for the parties. Each party should have the opportunity to re-examine the witness after your questions, and if necessary, the parties should be given an adjournment to prepare for the re-examination.

Criminal cases

- You have a wide-ranging power to ask questions but you should use it sparingly as the criminal justice system is based on an adversarial procedure, which requires the prosecution to prove the case. Your role is not to conduct the case for the parties, but to listen and determine.
- You should generally not ask questions while the prosecution or defence are presenting their case, examining, cross-examining or re-examining witnesses.
- You may ask questions at the end of cross-examination or re-examination, but only to attempt to clarify any ambiguities appearing from the evidence. If you do this, you should offer both sides the chance to ask any further questions of the witness, limited to the topic you have raised.
- Never ask questions to plug a gap in the evidence.

Civil

- You may ask questions. If parties are unrepresented, you might do this to indicate what is needed to satisfy you and clarify what they are saying.
- Be careful to be neutral when asking questions. Your questions must not show bias to either side.
- Avoid interrupting during submissions. If possible, wait until the party has finished his or her submissions.

Dealing With Parties Who Do Not Understand

- You may frequently be confronted with unrepresented accused persons and parties who do not appear to understand what the proceedings are about.
- It is your responsibility to ensure that the accused understands:
  - the criminal charges faced (criminal) or matters in issue (civil); and
  - the procedures of the Court.

- When dealing with unrepresented accused persons, you should explain to them:
  - the nature of the charge;
  - the legal implications of the allegations, including the possibility of a prison term if he or she is convicted;
  - the right to legal representation.

5 Actions Against Magistrates

As a Magistrate, you are protected from civil actions for any act you do or order in the discharge of your judicial duty, whether the act was within your jurisdiction or not, if you were acting on a belief in good faith that you had the jurisdiction to do the act: *s14 Magistrates' Courts Act*.

See s55 Judicial Services and Courts Act.

6:

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 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 convicted 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*.

7:

CRIMINAL:

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.

<u>Insanity</u>

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.

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.

9:

CRIMINAL:

PRE-TRIAL MATTERS

1 The Criminal Process

The diagram on the next page shows the general process of a criminal case to be heard in the Magistrate's Court. Each step is explained in detail over the next four chapters.

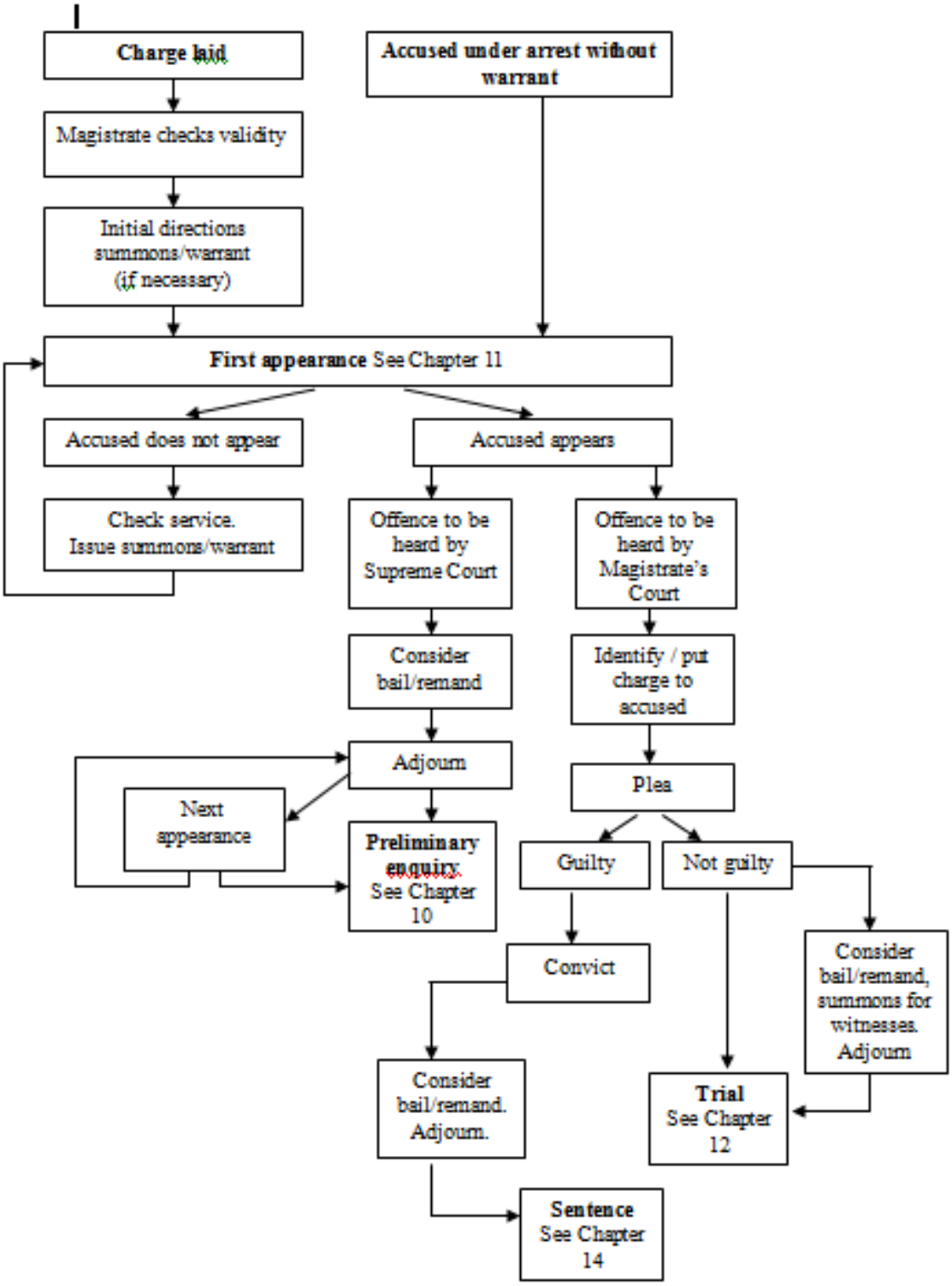
This chapter - Criminal: Pre-Trial Matters explains how a case comes before the Magistrate's Court and the steps to be taken up to the first appearance of the accused.

Chapter 10 - Preliminary Enquiries shows the steps that are taken for matters within the jurisdiction of the Supreme Court.

Chapter 11 - Criminal: First Appearance shows the steps that are taken when the accused appears in front of the Magistrates' Court for the first time.

Chapter 12 - The Criminal Trial shows the steps to be taken when the accused pleads not guilty and a defended hearing takes place in the Magistrates' Court.

1. The Criminal Process at a Glance



2 How a Case Comes to the Magistrate's Court

Criminal proceedings can be instituted by:

- any person who believes from reasonable and probable cause that an offence has been committed and makes a complaint to a judicial officer. The complaint must be made under oath, orally or in writing: *s35 Criminal Procedure Code Amendment) Act 13 of 1984*; or
- by bringing a person arrested without a warrant before the Court: *s12 Criminal Procedure Code*.

If the complaint is made orally it should be:

- reduced to writing by the Magistrate: *s35(2) Criminal Procedure Code*, as amended; and
- signed by the Magistrate: *s35(2) Criminal Procedure Code*, as amended.

Once reduced to writing, the judicial officer must have a formal charge drawn up which contains a statement of the offence with which the accused is charged: *s35(2) Criminal Procedure Code*, as amended.

Where a person has been arrested without a warrant (and not on the basis of a complaint) and has been brought before the Court, the Magistrate must draw up and sign a charge which contains a statement of the offence the person has been charged with: *s37(1) Criminal Procedure Code.*

Often this will be accompanied by an application for remand in custody. Whenever possible, these should be presented in advance to the clerk and the clerk should open a file and register the case in the Court record before putting it before the Magistrate. However, often the charge will be put directly to the Magistrate, who should hear the matter at the earliest opportunity.

3 Dealing with the Charge

3.1 Personal Interest

At this stage, ask yourself whether there is any reason for you not to hear the matter. You should excuse yourself if you have or appear to have:

- bias or prejudice in the matter;
- a personal or business relationship with the accused or victim/complainant; or
- a personal or financial interest in the matter: *s21 Judicial Services and Courts Act*.

See Chapter 5, Judicial Conduct, paragraph 2.5.

If you must disqualify yourself, procedures are in place for your replacement so that the case can be heard in accordance with the law and without the possibility of real or perceived bias.

Alternatively, if it appears impossible to hear a case in the jurisdiction because too many Magistrates must disqualify themselves, report the matter to the Chief Justice.

3.2 Transferring the Case

If it appears that the cause of the complaint arose outside the district limits of your Court, you may direct the case to be transferred to the Court having jurisdiction.

If you think the accused should remain in custody or be placed in custody, direct that the police take to the Court having jurisdiction:

- the accused; and
- the complaint and recognisances taken, if any.

You will need to issue a warrant for that purpose.

If the accused is not to be held in custody, explain to him or her that you have directed the case to be transferred to another Court and have the accused release on bail: *s60(1) Criminal Procedure Code.*

3.3 Validity of the Charge

General Requirements

A formal charge is an accusation of the commission of an offence. Proceedings are instituted by the making of a charge: *s34 Criminal Procedure Code*.

Generally, a charge should be filed:

- at the Court within the district in which the offence is alleged to have been committed (wholly or partly); or
- at the Court within the district in which the accused was apprehended; or
- at the Court within the district in which the accused is in custody or has appeared in answer to a summons: *s24 Criminal Procedure Code*.

Every charge must contain:

- a statement of the specific offence or offences with which the accused is charged; and
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: *s71 Criminal Procedure Code*.

Section 35 Criminal Procedure Code authorises a charge to be laid. However, unless the Court considers that there has been a miscarriage of justice, you should not quash, hold invalid or set aside any information or complaint only because of any defect, omission, irregularity or want of form: *s36(2) Criminal Procedure Code*.

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms wherever possible. *Section 74 Criminal Procedure Code* sets out details that need to be included in a charge, including:

- a statement of offence, although it is not necessary that all the essential elements of the offence be included;
- a reference to the section of the enactment creating the offence; and
- particulars of the offence, unless specifically not required by enactment.

Where there is more than one count, they should be numbered consecutively, and may be put in the alternative. Check that the charge does not improperly charge more than one offence for the same action (duplicity), unless put in the alternative. For example, separate counts for common assault and assault causing actual bodily harm arising from the same set of facts would have to be put in the alternative. If not, the charge will be defective for duplicity and will have to be amended when the accused first appears before the Court.

The charge need not go into any exceptions or exemptions to the offence.

Generally, people and property should be reasonably identified, although names need not be given where they are not known.

There is a time limit for laying a charge. No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence:

- in the case of offences punishable by imprisonment for more than 10 years, 20 years;
- for more than 3 months and not more than 10 years, five years; and
- for 3 months or less or by fine only; one year: *s15 Penal Code*.

Check Validity

Check that the charge sheet:

- is sworn; *s35 Criminal Procedure Code*, as amended;
- is within time; and
- sets out the offence, section and particulars of the offence sufficiently.

Ensure that the charge sheet is accurately completed before you sign it.

If the charge is defective:

- return it to the prosecution for correction; or
- raise it with the prosecution at the first appearance, for amendment or withdrawal.

If the only issue is that it is out of time according to *s15 Penal Code*:

- direct that a case file be opened; and
- at first appearance, declare that it is out of time and not triable, according to *s15*; and
- discharge the accused.

3.4 Joined Charges

More than one offence may be charged together in the same charge as long as:

- they are founded on the same facts; or
- they form or are a part of a series of offences of the same or similar character: *s72 Criminal Procedure Code.*

Each offence must each be set out in a separate paragraph in the charge, called a count.

If an accused is charged with more than one offence in a charge or information, you may order that the offences be tried separately, if you believe that trying the offences together would harm the accused in his or her defence.

3.5 Joined Parties

The following persons may be joined in one charge and tried together:

- persons accused of the same offence committed in the course of the same transaction;
- persons accused of an offence and persons accused of complicity or of an attempt to commit the offence;
- persons accused of more offences than one of the same kind committed by them jointly;
- persons accused of different offences committed in the course of the same transaction;
- persons accused of any offence involving dishonesty and of aiding, counselling or procuring the commission of or attempting to commit any such offence;
- Persons accused of any offence relating to counterfeit currency and of complicity or of attempting to commit any such offence: *s73 Criminal Procedure Code.*

See *Public Prosecutor v Simon* [2003] VUSC 58; Criminal Case No 043 of 2002.

4 Ensuring Attendance of the Accused

Once the charge or complaint is dealt with, you may personally issue a warrant, (see *ss45(1)(2), 46 Criminal Procedure Code*) or summons, (see *s38 Criminal Procedure Code*) compelling him or her to attend Court at a specified time and place, or if he or she does not intend to appear in person, to enter a written consent to the trial taking place in his or her absence: *s44(1) Criminal Procedure Code*.

4.1 Summons

A summons is a formal means of ensuring the attendance of a person before the Court.

The summons must be directed to the person being summoned and must:

- require him or her to appear before the Court having jurisdiction at a time and place mentioned in the summons; and
- state briefly the offence with which the person is charged: *s38(1)(2) Criminal Procedure Code*.

The summons must:

- be in writing, in duplicate;
- be signed by the Magistrate;
- be directed to the person summoned and require him or her to appear at a stated time and place; and
- state shortly the offence charged: *s38(1)(2) Criminal Procedure Code*.

Service
Sections 39 Criminal Procedure Code requires that the summons is served personally on the person by:

- a Police officer;
- an officer of the Court; or
- another public officer.

Whoever serves the summons must deliver to the accused a duplicate of the summons. The officer serving the summons must:

- ask the accused if he or she can read and understand the summons; and
- if requested or if it appears necessary, explain the substance of the summons in a way that the accused can understand: *s39(1) Criminal Procedure Code*.

The person served must sign the back of the duplicate copy retained by the officer as proof of service: *s39(2) Criminal Procedure Code*.

4.2 Warrant

While both summonses and warrants serve the same role of ensuring the accused's attendance in Court, a warrant is a more forceful means of ensuring attendance.

Most often a warrant is issued when an accused does not obey a summons, or does not obey a recognisance of bail. You may, however, issue a warrant right at the start, rather than issuing a summons if you have reason to believe that the accused is avoiding service or is unlikely to obey the summons or surrender himself or herself into custody: *s45(1) Criminal Procedure Code*.

Every warrant must:

- be signed by a judicial officer;
- briefly state the offence with which the person is charged;
- name or otherwise describe the accused; and
- order the person(s) to whom it is directed to arrest the accused and bring him or her before the Court: s*s47(1),(2) Criminal Procedure Code*.

For an offence, other than one punishable by life imprisonment, you may direct the officer to whom the warrant is directed to take security from the accused and release him or her from custody, if the accused executes a bond with sufficient sureties for his or her attendance before the Court at a specified time and thereafter until otherwise directed by the Court: *s48 Criminal Procedure Code*.

You do this by endorsing the warrant. The endorsement must state:

- any conditions of the release of such person; and
- the time at which he or she is to attend before the Court.

Every warrant remains in force until it is executed or cancelled by the Court issuing it: *s47(3) Criminal Procedure Code*.

<u>Execution of warrant</u>
Warrants are normally directed to all Police officers, but if the immediate execution of the warrant is necessary and no Police officer is immediately available, the warrant may be directed to any person or persons: *s49(1),(2) Criminal Procedure Code*.

When executing a warrant, the Police officer or other person must notify the person being arrested of the substance of the warrant: *s51 Criminal Procedure Code*.

The police officer or other person executing a warrant of arrest shall, without unnecessary delay, bring the person arrested before the court before which he is required by law to produce such person: *s52 Criminal Procedure Code.*

Accused person arrested under warrant
Once the accused is brought before you, you may:

- commit him or her to prison by warrant; or
- commit him or her to the custody of the Police orally; or
- commit him or her to other safe custody.

In all cases, you must order the accused to be brought before the Court at a certain time and place. In no circumstances, in any of the above situations, may the committal exceed 14 days: s143(3) Criminal Procedure Code.

Upon the request of the person laying the charge and with the consent of the accused, you may also hear and determine the matter immediately: *Rule11(2) Magistrate's Courts Rules*.

5 Ensuring Attendance of Witnesses

5.1 Summons

If it is clear from the charge that material evidence can be given by or is in the possession of any person, you may issue a summons requiring their attendance or requiring them to bring and produce documents as specified: *s76 Criminal Procedure Code*.

The police will generally prepare any necessary summonses in advance and attach these to the charge.

5.2 Warrant

Like an accused, a warrant may be issued to compel the attendance of a witness in Court at this stage. You may only issue a warrant for a witness at this stage if you are satisfied by evidence on oath that the witness will not attend Court unless compelled to do so: *s78 Criminal Procedure Code*.

Witnesses Arrested under Warrant

If a witness is arrested under warrant:

- you may order his or her release from custody upon furnishing security by recognisance satisfying you of his or her appearance at the hearing; or
- you may order him or her detained for appearance at the hearing on failing to furnish security: *s79 Criminal Procedure Code*.

10:

CRIMINAL:

PRELIMINARY ENQUIRIES

1 Introduction

Every offence triable only in the Supreme Court shall be the subject of a preliminary enquiry by a Senior Magistrate: *s143 Criminal Procedure Code*.

Before the commencement of the trial, the prosecution must make a complaint and the intended accused shall be provisionally charged with the offence before a Magistrate's Court presided over by a Senior Magistrate: *s143(2) Criminal Procedure Code*.

During the period of the preliminary enquiry, the intended accused shall:

- remain subject to the jurisdiction of the Magistrate's Court; and
- be remanded in custody or bail from time to time, for periods not exceeding 14 days at the discretion of the senior Magistrate: *s143(3) Criminal Procedure Code.*

Purpose of a Preliminary Enquiry

The purpose of the preliminary enquiry is for the Magistrate to determine whether there is a sufficient case, or evidence or grounds, to put the accused on trial before the Supreme Court. In this respect, the Magistrate's Court acts as a gatekeeper and prevents prosecutions which have insufficient evidence from proceeding to the Supreme Court.

All the rules and procedures in respect to a preliminary enquiry are contained in *ss143-152 Criminal Procedure Code.* Therefore, it is important that these rules are followed: see *Julian Motis v Public Prosecutor*, Vanuatu Appeal Court.

2 Role of the Magistrate

In a preliminary hearing, it is **not** the function of Magistrates to:

- determine, or even comment on, the guilt or innocence of the accused;
- believe or disbelieve any of the witnesses;
- disallow any evidence.

The only question to be answered by the Magistrate is:

> "Has a *prima facie* case been made against the accused on the evidence before me, if that evidence is not discredited?"

Preliminary enquiries protect the accused from baseless charges because the Magistrate is required to discharge the accused in cases where there is not sufficient evidence to commit the person to trial by the Supreme Court.

3 The Process

The Senior Magistrate is not bound to hold any formal hearing. He or she must consider the matter without delay, but may do this in whatever manner and at whatever time(s) he or she considers to be appropriate: *s145(1) Criminal Procedure Code*.

The following process may assist:

Reading Over the Charge

Read over the charge and explain to the accused:

- the charge; and
- the purpose of the proceedings; and
- that he or she will have the opportunity later on in the enquiry to make a statement if he or she chooses to: *s145(3) Criminal Procedure Code.*

Statements of Witnesses and Exhibits

The prosecutor may prepare and furnish to the Senior Magistrate and intended accused:

- a draft Information for the charge(s); and
- the statement of any witness whom they intend to call in proof at the trial in the Supreme Court; and
- any exhibit which they intend to produce at trial in the Supreme Court.

If you have considered the written statements of witnesses, documents, exhibits and submissions made by the prosecutor and find that the statements disclose sufficient grounds for committing the accused to trial, you **must**:

- ensure that the accused understands the charge;
- ask the accused if he or she wishes to make any statement in his or her defence;
- explain to accused that he or she is not bound to make a statement but if he or she choose to do so, the statement will become part of the evidence at trial: *s145(3) Criminal Procedure Code*.

Everything that the accused person says must be recorded in full.

If the accused or his or her advocate does address the Court, the prosecution will have the right of reply.

Make Your Decision

You must decide whether there is a *prima facie* case on the evidence (if it is not discredited): *s145(2) Criminal Procedure Code.*

The Senior Magistrate shall record his or her decision in writing and deliver copies to the prosecutor and the intended accused: *s146(1) Criminal Procedure Code.*

The decision must show clearly that the Senior Magistrate authorises or does not authorise the laying of the proposed against the intended accused: *s146(1) Criminal Procedure Code.*

<u>If the Information is authorised</u>

If the information is authorised, a copy of the authorised proposed information must be sent by the Senior Magistrate to the nearest registry of the Supreme Court: *s146(1) Criminal Procedure Code.*

The intended accused shall be remanded to a date specified for trial in the Supreme Court, either in custody or on bail: *s146(2) Criminal Procedure Code*

No Information will be accepted for filing in the registry unless it has been specifically authorised by the Senior Magistrate: *s146(3) Criminal Procedure Code*.

<u>If the Information is not authorised</u>

If the information is not authorised, the intended accused shall immediately:

- be discharged; and
- if in custody, be released: *s146(2) Criminal Procedure Code*.

11:

CRIMINAL: FIRST APPEARANCE

1 General Matters at First Appearance

An accused, on first appearance, will be present:

- after arrest and in custody; or
- after arrest and on bail; or
- on summons.

At the first hearing, you will be concerned with some or all of the following:

- Your ability to deal with the case;
- The validity of the charge (if not already considered);
- Non appearance of the accused, therefore summons and warrants;
- Legal representation;
- Plea, including fitness to plead;
- Remands in custody;
- Bail;
- Adjournments.

1.1 Complainant (Prosecution) Does Not Appear

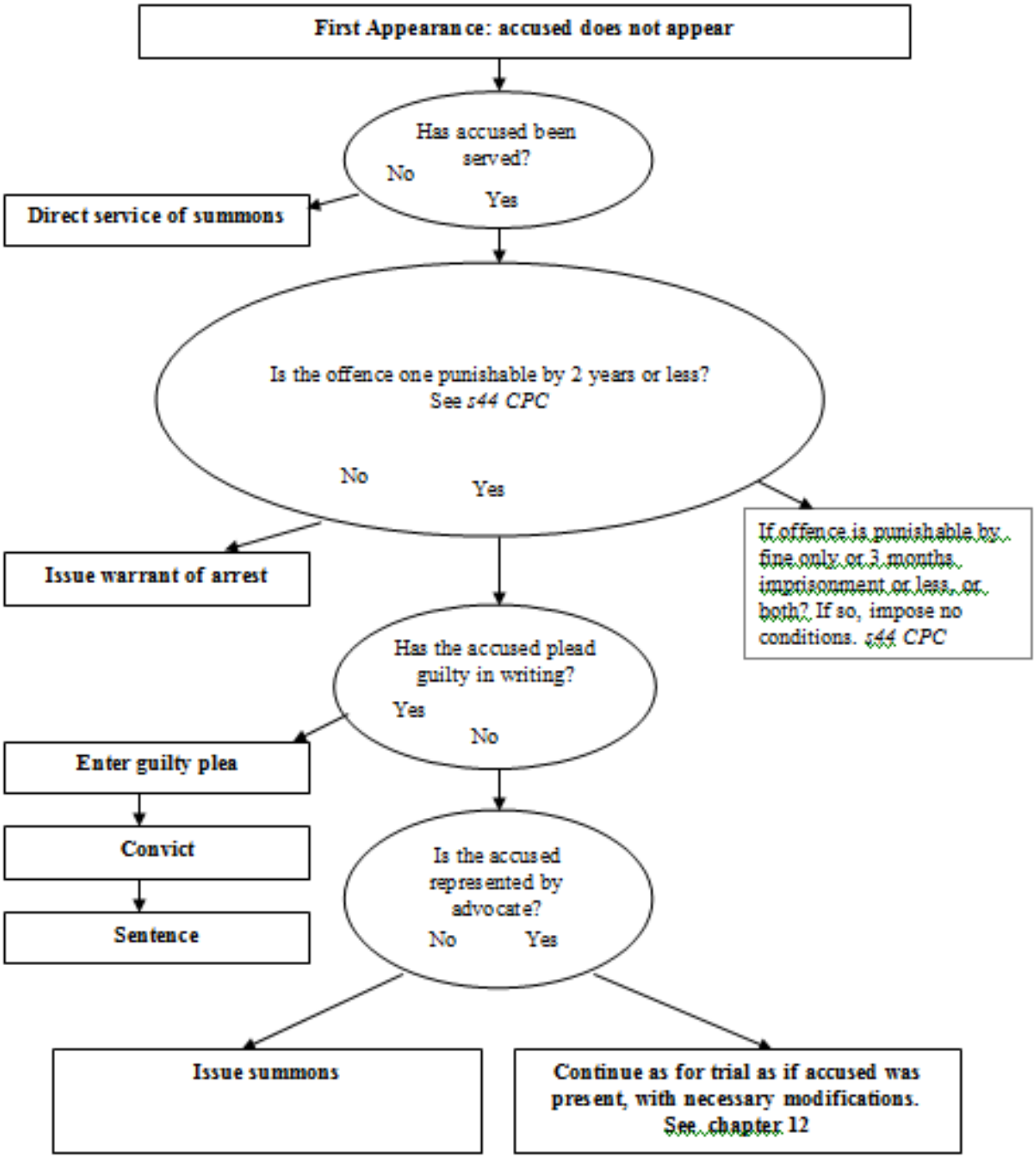
If the complainant does not appear in person or by an advocate (including a public prosecutor):

- check that the complainant has had notice of the time and place of the hearing; and
- if so, dismiss the charge unless you think it proper to adjourn the case upon such terms as you think fit: *s127 Criminal Procedure Code*.

If you adjourn the case, you must allow the accused bail, or remand him or her to prison, as you think fit: *s127 Criminal Procedure Code*.

If you dismiss the charge, you may make an order as to compensation from the private prosecutor to the accused and his or her witnesses if the Court shall be of opinion that that the charge was frivolous and vexatious. Such compensation must be reasonable for the trouble, expense and any special loss to which such person may have been put by reason of such charge, in addition to his costs: *s103 Criminal Procedure Code.*

First appearance: Accused does not appear



If the accused does not appear, check that the accused has in fact been served the summons by checking the back of the duplicate retained by the serving officer: *s39(3) Criminal Procedure Code*.

If the person who served the summons is not present, service may be proved by affidavit: *s43 Criminal Procedure Code*.

Consider:

- What effort has the prosecution made to serve the accused?
- Is the failure to serve the accused a result of false information by the accused?
- Does the offence with which the accused is charged carry a term of imprisonment?
- How long after the alleged offence was the summons issued?

If service has been proved, you may dispense with the attendance of the accused in cases where the offence is punishable by imprisonment for two years or less: *s44 Criminal Procedure Code*.

Dispensing with Attendance of Accused

Subject to *s44* of the *Criminal Procedure Code* there are certain instances where you may dispense with the personal attendance of the accused and proceed in his or her absence:

For all offences punishable only by fine or by imprisonment not exceeding three months or both, you **must** dispense with the personal appearance of the accused if the accused has pleaded guilty in writing or is represented by an advocate: *s44 Criminal Procedure Code*.

Despite having dispensed with the attendance of the accused, you may at any later time direct the personal attendance of the accused and, if necessary, enforce the attendance: *s44(2) Criminal Procedure Code*.

If the Court imposed a fine on the accused whose personal attendance has been dispensed with and such fine has not been paid within the time prescribed, the Court must do the following:

- issue a summons calling upon the convicted person to provide a good reason why he or she should not be committed to prison for such term as the Court may then fix within the limits prescribed by law: *s44(3) Criminal Procedure Code*; and
- if the convicted person does not attend Court to provide a reason, the Court may forthwith issue a warrant and commit such person to prison for such term as the Court may then fix*: s44(3) Criminal Procedure Code.*

Warrants for Arrest

Where the accused does not appear, and his or her personal attendance has not been dispensed with under *s44 Criminal Procedure Code,* you may issue a warrant for the arrest of the accused: *ss45, 46 Criminal Procedure Code*.

Some relevant considerations are:

- What effort has the Prosecution made to serve the accused?
- Is the failure to serve the accused a result of false information by the accused?
- Does the offence with which the accused is charged carry a term of imprisonment?
- How long after the alleged offence was the summons issued?

Every warrant must:

- be under the hand of a judicial officer: *s47(1) Criminal Procedure Code*.
- briefly state the offence with which the person is charged; *s47(2) Criminal Procedure Code*;
- name or otherwise describe the accused; *s47(2) Criminal Procedure Code*;
- order the person(s) to whom it is directed to arrest the accused and bring him or her before the Court having jurisdiction to answer the charge and to be further dealt with according to the law; *s47(2) Criminal Procedure Code*.

Every warrant will remain in force until executed or until it is cancelled by the judicial officer who issued it or, if he is unable to do so, by another judicial officer: *s47(3) Criminal Procedure Code*.

For offences other than murder or treason, you may direct the officer to whom the warrant is directed to take security from the accused and release him or her from custody, if the accused executes a bond with sufficient sureties for his or her attendance before the Court at a specified time and thereafter until otherwise directed by the Court: *s48 Criminal Procedure Code*.

You do this by endorsing the warrant. The endorsement must state:

- any conditions of the release of such person: *s48(2) Criminal Procedure Code*; and
- time at which he or she is to attend Court: *s48(2) Criminal Procedure Code*.

The officer must forward the bond to the Court.

Execution of warrant

Warrants are normally directed to all police officers, but if the immediate execution of the warrant is necessary and no police officer is immediately available, the warrant may be directed to any person or persons: *s49(1) Criminal Procedure Code*.

When executing a warrant, the police officer or other person must notify the person being arrested of the substance of the warrant: *s51 Criminal Procedure Code*.

The police officer or other person executing a warrant of arrest shall, subject to the provision of s48, without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person *s52 Criminal Procedure Code*.

If arrested outside the district of the Court issuing the warrant, the person arrested must be brought before the Magistrates' Court in the place appointed in and by the summons unless the Court that issued the warrant authorises that the person arrested be dealt with outside the appointed place in the summons: *s46 Criminal Procedure Code*.

Accused persons arrested under warrant
Once the accused is brought before you, you may:

- commit him or her to prison by warrant; or
- commit him or her to the custody of the police; or
- commit him or her to other safe custody.

In all cases, you must order the accused to be brought before the Court at a certain time and place.

As with an accused arrested without a warrant, a person arrested under a warrant may be committed to prison not more than 14 days: *s130(2) Criminal Procedure Code*.

2 Offences Requiring a Preliminary Enquiry

The Magistrates' Court **shall** hold a preliminary enquiry in respect of an offence triable only in the Supreme Court: *s143(1) Criminal Procedure Code*.

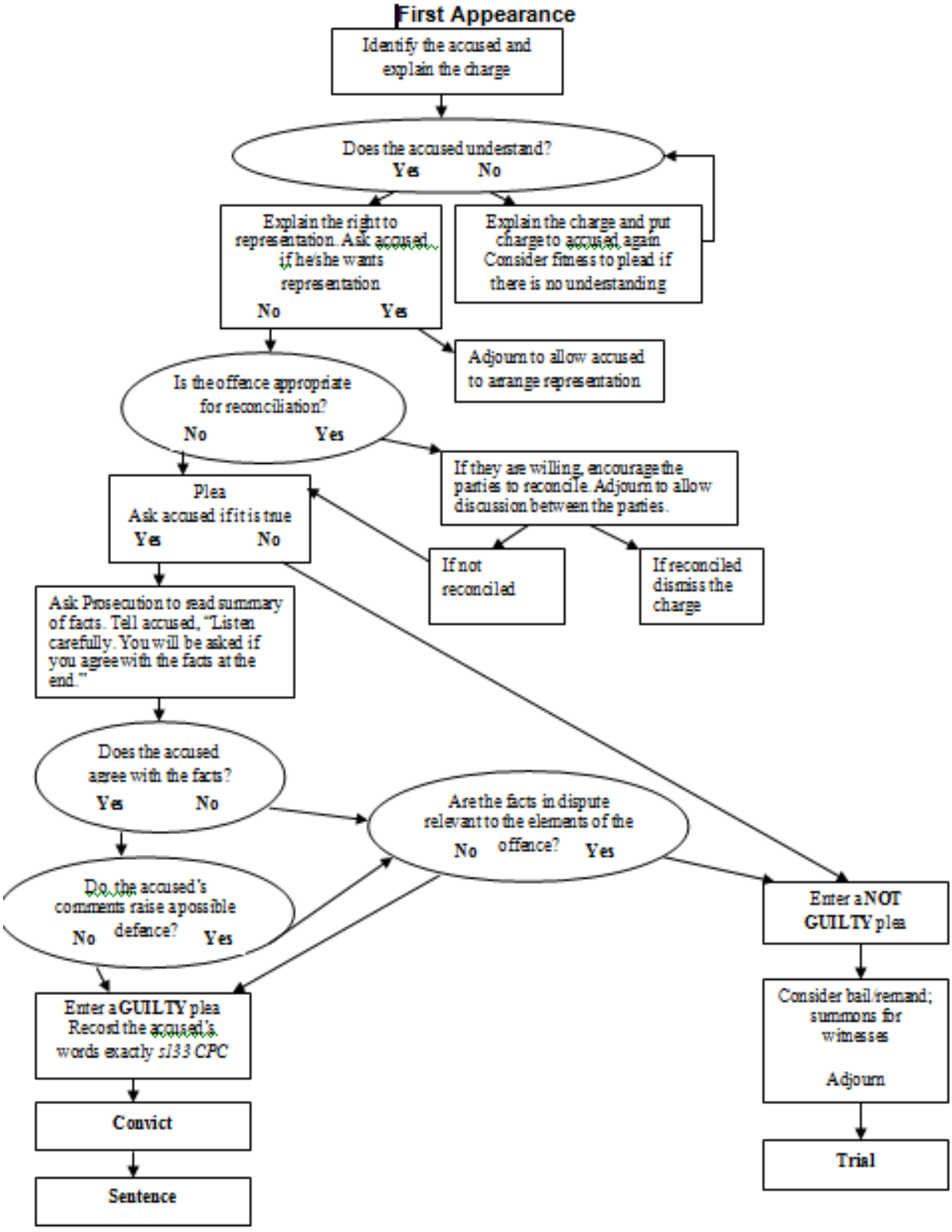
Consider bail/remand in custody, set a date for the preliminary enquiry (if possible at this stage) and adjourn not more than 14 days: *s143(3) Criminal Procedure Cod*e.

Note that the accused must come back before the Court:

- within 14 days if remanded in custody;
- within 14 days if bailed.

3 Offences to be Heard in the Magistrate's Court

This diagram over the page shows the process for offences to be heard in the Magistrates' Court, at the first appearance of the accused.


First Appearance
Identify the accused and explain the charge
Does the accused understand?
Yes No
Explain the right to representation. Ask accused if he/she wants representation
No Yes
Explain the charge and put charge to accused again Consider fitness to plead if there is no understanding
Adjourn to allow accused to arrange representation
Is the offence appropriate for reconciliation?
No Yes
If they are willing, encourage the parties to reconcile. Adjourn to allow discussion between the parties.
If not reconciled
If reconciled dismiss the charge
Plea
Ask accused if it is true
Yes No
Ask Prosecution to read summary of facts. Tell accused, "Listen carefully. You will be asked if you agree with the facts at the end."
Does the accused agree with the facts?
Yes No
Are the facts in dispute relevant to the elements of the offence?
No Yes
Do the accused's comments raise a possible defence?
No Yes
Enter a NOT GUILTY plea
Consider bail/remand; summons for witnesses
Adjourn
Trial
Enter a GUILTY plea
Record the accused's words exactly s133 CPC
Convict
Sentence

3.1 Identifying the Accused and Putting the Charge

Identification of the Accused

When an accused person is brought before you, you must first ascertain who he or she is. Record his or her:

- full name;
- address; and
- age.

This is very important. More than one person may share the same name. The accused person might be a juvenile and you would want to treat a juvenile accused differently to adults.

Putting the Charge to the Accused

You must know the elements of the offence charged. The elements are those particulars the prosecutor must prove beyond reasonable doubt to secure a conviction.

Your understanding of the elements of the offence is very important. Unless you know and understand the elements:

- you will not be able to clearly explain them to the accused;
- you will not be able to decide which evidence is relevant and which is not.

Explain the Charge to the Accused

You must clearly explain the nature of the offence to the accused person. This involves explaining the elements.

Unless the accused clearly understands the nature of the offence with which he or she is charged, he or she will not be able to work out if he or she has a defence. This will affect his or her ability to enter a plea.

<u>Check understanding</u>

Check whether the accused understands the charge. Only when you are sure the accused understands the full nature of the offence charged, ask the accused how he or she pleads to the charge. Never take for granted that the accused person might have understood your explanation without his or her confirmation.

3.2 Unrepresented Accused

Most accused persons appear in the 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.

Many accused will simply appear and plead guilty without any real understanding of the elements of the offence they are charged with. It is your duty to ensure they understand the charge and the consequences of pleading guilty.

If an accused appears without representation, it is vital that you explain tot he accused that he or she has a right to be represented, either by a lawyer or, with leave of the Court, some other person. Ask the accused whether he or she wishes to arrange representation. If so, adjourn to allow this.

3.3 Reconciliation

You may promote reconciliation and encourage and facilitate amicable settlement of an offence of a personal or private nature punishable by imprisonment for less than seven years or by a fine only: *s118 Criminal Procedure Code.*

The reconciliation or settlement may be on terms of payment of compensation or other terms you approve: *s118 Criminal Procedure Code*.

The Court may then order that the proceedings be stayed or terminated: *s118 Criminal Procedure Code*.

When attempting to reconcile or settle criminal cases, ensure that all parties are acting freely and that one party is not forcing another party to be part of the reconciliation process against their will.

3.4 Taking a Plea

After you are sure that the accused understands the charge, you then take a plea: *s133 Criminal Procedure Code*.

An accused can plead:

- guilty; or
- not guilty; or
- one of the "special" pleas, e.g. *autrefois acquit* (previous acquittal).

Where the accused is represented, a plea by counsel is acceptable.

Fitness to Plead

In certain cases, you will need to consider whether the accused is fit to plead.

The issue to be determined is whether the accused is under a disability.

An accused is under a disability if he or she cannot:

- plead;
- understand the nature of the proceedings; or
- instruct Counsel.

If you determine that the accused is under a disability, you should remand the accused in the custody of the police and direct them to arrange a medical assessment and report: *s91 Criminal Procedure Code*.

Taking the Plea

Ask the accused whether the charge is true or not. If the accused says it is true:

- ask the prosecution to read a brief summary of the facts;
- tell the accused to listen very carefully to this. Explain that he or she will be asked at the end whether the facts are true; and
- after the prosecution has read the facts, ask the accused whether they are true or not.

If the accused admits the truth of the facts without further comment, this will suffice as a **plea of guilty**.

However, if the accused admits the truth of the charge, but makes some remarks or comments, you must listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this if the accused is unrepresented.

If the accused disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence. Note that a plea of guilty is a plea to the **elements** of the charge not necessarily acceptance of the police summary of facts. If the facts in dispute are not relevant to the elements, enter a **plea of guilty**.

If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the accused may amount to a defence, you must enter a **plea of not guilty** for the accused.

For example, on a charge of damaging property, one of the elements is actual damage to property. If the accused pleads guilty but disputes the amount of damage (e.g. the prosecution alleges 10 glasses were damaged and the accused says only three were damaged). then the element of damage is not disputed, just the amount. That is relevant to sentence, not guilt, and you should enter a plea of guilty.

On a charge of drunk and incapable, one of the elements is that the behaviour must be in a public place. If the accused admits to being drunk and incapable, but it was in his friend's backyard, that is relevant, as one of the elements of the offence has not been admitted to or proved, and you should enter a plea of not guilty for the accused. It is then up to the prosecution to prove he was in a public place.

"If anything comes up in the statements to the Court by the prosecution or the accused that might suggest a defence, the Magistrate should stop the proceedings and ascertain just what is being asserted. Often a short enquiry will make it plain that the plea is properly entered but in any case where it is not, the Magistrate must enter a plea of not guilty and try it as a contested case": *Cocker v Police Department* Criminal Appeal Case #Cr.App.1251 of 1998.

Accused Denies the Charge

If the accused denies the charge, enter a **plea of not guilty**.

Accused Refuses to Plead

Where the accused refuses to plead, a **plea of not guilty** should be entered: *s133(4) Criminal Procedure Code*.

4 Adjournments

If the case is not ready to proceed, you will need to adjourn. See chapter 8 Management of Proceedings, for a discussion on adjournments.

5 Guilty Plea – Next Steps

Record Words of Accused

The accused's admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her: *s133(2) Criminal Procedure Code*.

Enter Conviction

Convict the accused, enter this on the record.

Sentence

After convicting the accused, you pass sentence. You should never sentence a person without convicting him or her first.

You may sentence immediately, or adjourn to consider reports or at the request of one of the parties. See chapter 14 Sentencing.

Adjournment
If adjourning before sentencing, you may:

- allow the offender to go at large;
- commit the offender to prison for 14 days: *s130 Criminal Procedure Code*; or
- release the offender upon a recognisance with or without sureties, conditioned on his or her reappearance at the adjourned time and place: *s61 Criminal Procedure Code*.

If the accused has been committed to prison, the adjournment must be for no longer than 14 days: *s130 Criminal Procedure Code.*

Remands / Bail After Conviction
You may:

- remand the accused to a sentencing date; or
- release the accused on bail on such condition or conditions that he or she attends the Court at the date and time scheduled.

Record all of the above on the Court record.

Bail
See *ss60 to 70 Criminal Procedure Code*.

If bail is granted, the terms, if any, should be noted carefully on the Court record.

Reasons must be given for refusing bail

Warrants of commitment
Ensure all warrants of commitment (remands in custody) are completed before you leave the Court for the day.

Any instructions to the prison should be recorded on the warrant. For example, the accused is to be kept apart from adult prisoners, there is a need for medication or there is a risk of self-harm.

6 Not Guilty Plea – Next Steps

If the accused has pleaded not guilty, a defended hearing must follow. This can happen straight away, or you may adjourn the matter and hear it later.

6.1 Immediate Hearing

Sometimes all parties are ready to proceed with a defended hearing (including witnesses). In this case, proceed to hear the matter or adjourn the case to later in the day.

6.2 Hearing at a Later Date

Adjournment

If a plea of not guilty is entered and either party is not ready to proceed, you may do the following:

- adjourn the hearing to a certain time and place then appointed and stated in the presence and hearing of the parties or their advocates, or

- proceed and hear the matter: *s133(3) Criminal Procedure Code*.

Before fixing the date:

- inform the accused of his or her right to legal counsel (if unrepresented);
- advise the accused to prepare for hearing the case; and
- set a date after considering the time the parties need to prepare their cases and the Court diary.

You may then:

- allow the accused person to go at large;
- commit the accused to prison; or
- release the accused upon a written bond or recognisance with or without sureties, conditional on his or her reappearance at the adjourned time and place: *s61 Criminal Procedure Code*.

Record all of the above on the Court record.

If the accused has been committed to prison, the adjournment must be for no longer than 14 days: *s130 Criminal Procedure Code*.

Remands /Bail After Plea

Bail

See *ss60 to 70 Criminal Procedure Code*.

If bail is granted, the terms, if any, should be noted carefully on the Court record.

If you do not grant bail, you will need to give reasons. You should tell the accused why you will not grant bail and record this in the Court record.

Warrants of commitment
Ensure all warrants of commitment (remands in custody) are completed before you leave the Court for the day.

Any instructions to the prison should be recorded on the warrant. For example, the accused is to be kept apart from adult prisoners, a need for medication or risk of self-harm.

6.3 Warrants/Summons for Witnesses to Attend

Summons

If it is clear from the charge that material evidence can be given by or is in the possession of any person, you may issue a summons requiring their attendance or requiring them to bring and produce documents as specified: *s76(2) Criminal Procedure Code*.

Warrant

Like an accused, a warrant may be issued to compel the attendance of a witness in Court at this stage. You may **only** issue a warrant for a witness at this stage if you are satisfied by evidence on oath that the witness will not attend Court unless compelled to do so: *s78 Criminal Procedure Code*.

Witnesses arrested under warrant
If a witness is arrested under warrant:

- you may order his or her release from custody upon furnishing security by recognisance satisfying you of his or her appearance at the hearing: *s79 Criminal Procedure Code*; or
- you may order him or her detained for production at the hearing on failing to furnish security: *s79 Criminal Procedure Code*.

12:

CRIMINAL:

THE CRIMINAL TRIAL

1 Introduction

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

1.1 Role of Prosecution

The duty of the person prosecuting (usually the police and the prosecutor) is to the Court. They must not mislead or deceive the Court. They must:

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

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

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

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

1.2 Defence Counsel

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

2 Proving an Offence

2.1 Innocent Until Proved Guilty

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

2.2 Burden and Standard of Proof

The prosecution has the burden, or responsibility, of proving their case. They must prove all the elements of the offence, beyond reasonable doubt.

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

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

Beyond Reasonable Doubt

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

Lawful Excuse

In some cases, once the prosecution has established facts to support all the elements, the burden of proof is then on the accused to satisfy the Court that he or she acted with lawful excuse, good reason or lawful justification. For example, possession of a weapon – *s26 Fire Arms Act.*

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

3 Open Court

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

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

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

4 Legal Representation

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

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

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

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

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

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

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

5 Evidence

See Chapter 6 Evidence.

5.1 Evidence to be Taken in the Presence of the Accused

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

5.2 Interpretation of Evidence

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

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

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

See Chapter 8, Management of Proceedings.

5.3 Recording Evidence

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

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

5.4 Remarks Respecting Demeanour of Witnesses

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

5.5 Recording Minor Offence

The following offences are called minor offences:

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

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

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

6 Non–Appearance

6.1 Prosecution Does Not Appear

See Chapter 11 Criminal: First Appearance.

6.2 Accused Does Not Appear

See Chapter 11 Criminal: First Appearance.

6.3 Witness Does Not Appear

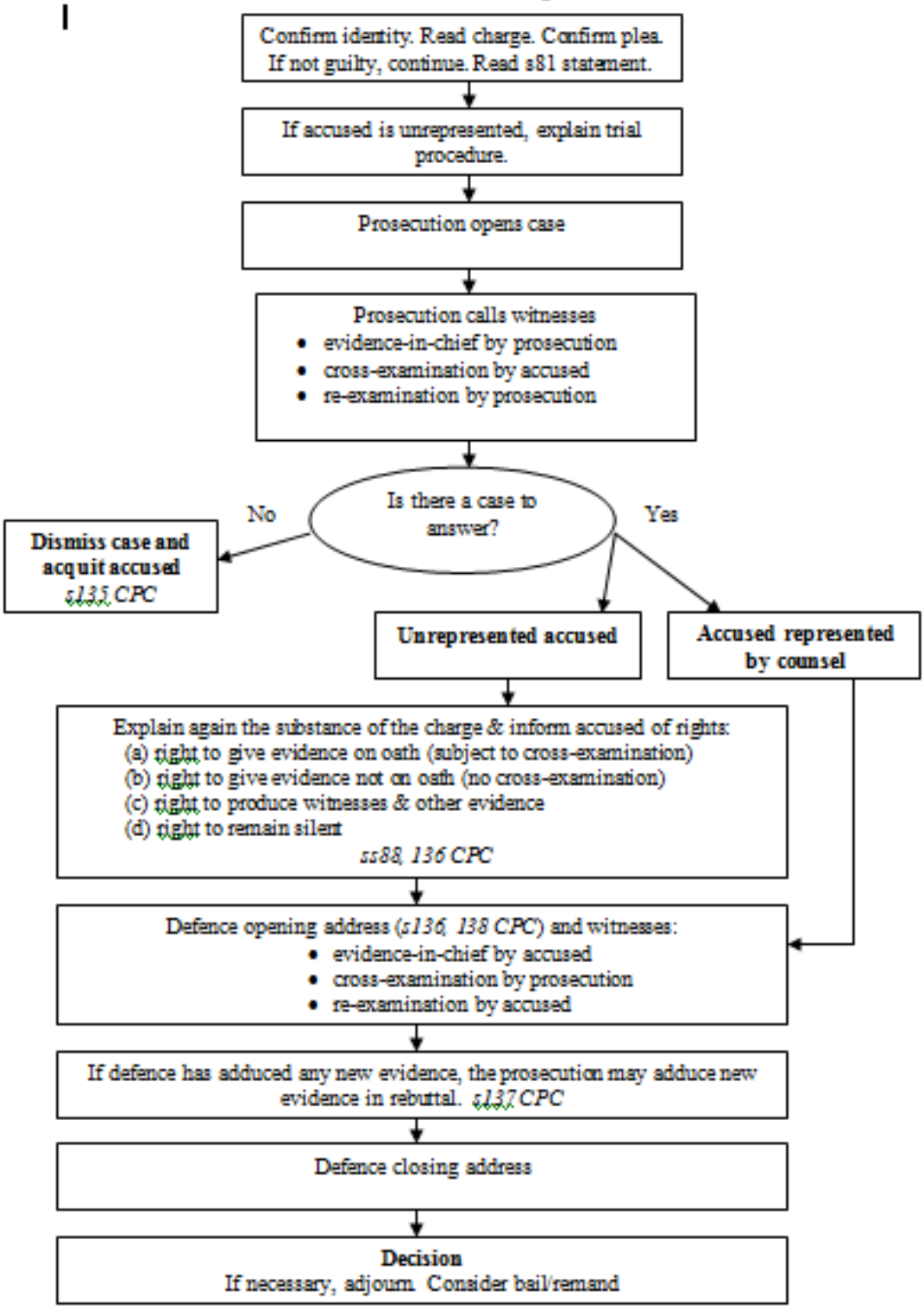
If a witness does not appear in obedience to a summons, you may issue a warrant to bring him or her before the Court if:

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

7 Defended Hearing Procedure

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

Criminal Defended Hearing Procedure



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

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

1. Confirm Personal Details of the Accused

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

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

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

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

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

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

3. Confirming the Plea

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

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

If the accused refuses to plead:

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

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

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

4. Exclude Witnesses

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

5. Prepare Accused for Prosecution Case

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

Explain:

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

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

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

The prosecution may make an opening statement. The prosecutor calls the witnesses individually to give evidence. If there is more than one, the other witnesses must not be present in Court, nor able to hear what is being said.

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

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

Record the accused's answer.

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

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

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

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

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

The following applies whether the accused is represented or not.

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

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

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

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

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

8. Defence Case: *s136 Criminal Procedure Code*

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

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

Explain the substance of the charge to the accused again.

Tell the accused: *s88 Criminal Procedure Code*:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. Decision

After hearing all submissions on the law and the evidence:

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

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

See Chapter 13 Criminal: Judgment.

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

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

8 Amending the Charge

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

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

You must:

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

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

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

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

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

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

9 Withdrawal of Complaint

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

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

The time that the charge is withdrawn is important:

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

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

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

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

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

10 Adjournments

See Chapter 8 Criminal: Management of Proceedings.

13:

CRIMINAL:

JUDGMENT

1 Decision Making

When the evidence and the addresses, if any, have been completed, the Court shall record a conviction or acquittal on each count of the charge.

This decision is to be made by you alone. Although help as to meaning of the law can be sought from textbooks and legal counsel, the decision cannot be made by anyone other than by you.

1.1 Principles Governing Decision Making

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

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

The principles are intended to ensure:

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

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

You Must Act Lawfully

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

There are several aspects to the principle of lawfulness:

- You must act within the authority of the law;
- You must take into account all the relevant considerations and must not take into account irrelevant considerations; and
- You must not give away your discretionary power.

Ask yourself:

- "Do I have jurisdiction to hear and determine the matter?"
- "What are the considerations I must take into account?"
    - Look to the appropriate legislation to work out what you must be satisfied of.

- Each element of the offence will point to the relevant considerations. Factors unrelated to those elements will be irrelevant.

- "Have I taken into account anything irrelevant?"

Affected Parties Have a Right to be Heard

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

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

Throughout the hearing process, ask yourself:

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

You Must be Free From Bias

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

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

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

Ask yourself:

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

Consequences of a Breach of the Principles

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

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

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

2 A Structured Approach to Making a Decision

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

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

There are three tasks involved:

1. To Be Clear What the Court is Being Asked to Do

In criminal cases, be clear about what the accused is charged with and all the essential elements of the offence. For the accused to be found guilty, every element of the offence must be proved beyond reasonable doubt. The essential elements of a number of offences are outlined in Chapter 17 Common Offences. In all cases, however, you must refer to the applicable legislation.

2. To Determine What the Facts of the Case Are - What Happened, What Did Not Happen

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

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

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

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

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

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

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

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

3. To Make Your Decision

This is done by applying the law to the facts.

Only you can make the decision. Under no circumstances may the clerk or anyone else decide the matter.

3 Note Taking

You will have to decide between yourself and the clerk who will record the minutes of proceedings. If the clerk records the minutes, it is still advisable that you keep your own personal record to keep track of the evidence.

A suggestion is to note each element of the charge or note each issue on a separate sheet of paper. As the evidence is given, note it as it relates to each of these. This method can provide a helpful framework for your decision.

4 The Judgment

Unless otherwise provided by the *Criminal Procedure Code*, every criminal judgment, whether acquittal or conviction, must:

- be written by the presiding Magistrate in the language of the Court;
- contain the point or points for determination;
- contain the decision on each point and the reasons;
- be dated and signed by the presiding Magistrate in open Court at the time of pronouncing it: *s95(1) Criminal Procedure Code*.

In the case of an **acquittal**, the judgment must also:

- specify the offence of which the person is acquitted; and
- direct that the person shall be set at liberty as soon as possible, unless in custody for some other offence: *s95(3) Criminal Procedure Code*.

In the case of a **conviction**, the judgment must also specify:

- the provision of the *Penal Code* or other law under which the offender is convicted; and
- the punishment to which the offender has been sentenced: *s95(2) Criminal Procedure Code*.

The format at the end of this chapter is a useful format for making and delivering a criminal decision. This must be applied to each charge.

It is a good idea to have the 'losing' party in mind when giving your reasons. Make sure you address all their evidence and submissions thoroughly so they know they have been heard.

Remember that it is important to:

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

5 Delivering Your Judgment

For all criminal trials, you must pronounce the judgment or the substance of the judgment in open Court, either immediately after the trial or at some later time, with notice given to the parties and their lawyers: *s93(1) Criminal Procedure Code*.

If either the prosecution or defence request, you must read out the whole judgment, rather than just giving its substance: *s93(2) Criminal Procedure Code*.

In practice, it is a good idea to always read out the whole of the judgment each time so that there is no possibility of confusion or that two versions of your judgment are circulating.

If the accused is in custody, he or she must be brought before the Court when you deliver your judgment. If the accused is not in custody, the accused is required to attend for judgment, unless:

- personal attendance was not required during the trial or was dispensed with; and
- the verdict is acquittal or the sentence is a fine only: *s93(3) Criminal Procedure Code*.

No judgment is invalid merely because the party or his or her lawyer is absent when the judgment is given, or by failure to properly serve the notice of the date and time of the judgment: *s93(4) Criminal Procedure Code*.

If a right of appeal exists, you must:

- inform the accused of the right and the time for lodging the appeal;
- record on the record that you have told the accused of the right; and
- sign and date such: *s94 Criminal Procedure Code*.

If the accused applies, a copy of the judgment, if it is in written form, must be given to him or her without delay and free of cost: *s96 Criminal Procedure Code*.

6 Tips for Writing a Good Judgment

When writing a judgment, there are a number of points you should keep in mind to help you create the best judgment possible.

1. Think about your audience.
    - You are not only writing for the parties but for all others who may read the judgment. This includes the legal profession who are interested in knowing the law, the media who may be reporting on the case, Parliament who will be considering legislative changes, the public and other Magistrates and the Supreme Court.

2. Write your judgment as soon as possible after the conclusion of the trial as possible.
    - Try to write a first draft of your judgment while the evidence and issues are still fresh in your mind. You can then put this draft aside and rewrite it later for clarity and to check for any matters you may have missed the first time.
    - Writing judgments as soon as possible will also ensure that your workload does not become unmanageable as unwritten judgments pile up.

3. Stick to the issues.
    - Avoid *obiter dicta* and comments that are unnecessary to the determination of the issues.

4. Be clear in your writing.
    - Whenever possible, use short clear sentences without unnecessary legal jargon or archaic terminology.
    - Use short sentences.
    - Try to use the active voice. For example, write, “A assaulted B” rather than “B was assaulted by A”.

5. Include clear statements on evidentiary issues in the judgment.
    - Although you may internally remind yourself of certain evidentiary provisions, writing them in the judgment will ensure your decision is not appealed because it is unclear whether you acted in accordance with them.

6. Include highlights of counsel submissions.
    - This will let the lawyers know that you have taken their arguments into consideration and will help them and other lawyers better determine the state of the law.

7. When delivering your judgment orally, be dispassionate to show your neutrality.
    - Consider having a police officer present in Court if your judgment has the potential to cause disruption among the public present in Court or the parties.

7 Criminal Judgment Format

1. Introduction

- The first paragraph must say what the accused is charged with. Set the scene for the case.

2. Brief summary of the facts

- Set out the material facts of what is alleged by the prosecution.

3. The Law

- Onus and standard of proof. The prosecution has the burden of proving all elements of the offence beyond a reasonable doubt.
- Mention the relevant offence section and identify the elements of the offence.
- Mention any other relevant statutory provisions regarding evidence, etc.

4. Determining proven facts

- Identify facts that are accepted by the defence. Mention the elements that the accepted facts prove.
- Identify relevant facts in dispute. These are usually the issues (points for determination).
- Make rulings on facts in dispute and give reasons.
  - Which evidence you prefer and **why**. Questions of credibility and reliability must be dealt with here.

5. Apply the law to the facts

- Determine what aspects of the applicable law have been proved from the facts. Have all the elements been proved?

6. Conclusion

- What is the end result of the case? Conviction or acquittal?
- If convicted and a right of appeal exists, inform the accused of this right and the time for lodging the appeal, and record this.

7. Orders

- What orders, if any, must the Court make?
- Ensure you deal with any procedural orders such as costs, return of exhibits, etc.

14:

CRIMINAL:

SENTENCING AND ORDERS

1 Introduction

At the end of a trial, after you have heard and considered all the relevant evidence and have entered a conviction, you must sentence the offender to an appropriate sentence: *s187* as amended by *s6 Criminal Procedure Code (Amendment) Act No 13 of 1989*.

You may either pass sentence immediately after conviction or at another time. If you do not pass sentence immediately, you must either remand the accused in custody or allow the accused to go at liberty on any conditions as you think fit: *s187(2) Criminal Procedure Code*.

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

You must explain the sentence and your reasons for it so that the accused understands what he or she needs to do.

At this time, you are also able to make other orders.

2 Jurisdiction

A Magistrate may sentence an offender to:

- imprisonment up to a maximum of 2 years; or
- any other sentence available by law.

A Senior Magistrate may sentence an offender to a maximum of 5 years imprisonment: *s14(4)* as added by *s10 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

See Types of Sentences below, for further explanation of these penalties.

For two or more distinct convictions, a Magistrates' Court may pass **consecutive** sentences of imprisonment (to be served one after another) to a maximum of 4 years: *s14(5)* as added by *s10 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

According to the legislation, the ability to pass consecutive sentences up to twice normal sentencing jurisdiction does not appear to extend to Senior Magistrates.

2.1 Where No Penalty in Act

Where an Act creates an offence but no penalty is expressed, the default penalty is a maximum VT 5000 fine or a maximum 1 year imprisonment or both the maximum fine and imprisonment: *s36(3) Interpretation Act*.

3 Sentencing Principles

There are five basic sentencing principles to be considered by the Court. These are:

- Deterrence;
- Prevention;
- Rehabilitation;
- Punishment; and
- Restoration.

Deterrence
The sentence is designed to deter the offender from breaking the law again and acts as a warning to others not to do the same.

Prevention
The sentence is to prevent the offender from doing the same thing again.

Rehabilitation
The sentence is to assist an offender to reform and not offend again.

Punishment
The sentence is to punish the offender for his or her criminal behaviour.

Restoration
The sentence serves to restore or repair the damage done to others by the offender.

When considering the appropriate sentence, you should have one or more of these principles in mind. Ask yourself which of the sentencing principles apply in this case?

4 Sentencing Discretion

The level of sentence in each case is a matter for you to decide, up to the maximum limit for the offence and within your sentencing jurisdiction. The sentence in each case must be just and correct in principle and requires the application of judicial discretion.

The act of sentencing needs you to balance:

- the gravity of the offence;
- the needs of society; and
- an expedient and just disposal of the case.

4.1 Factors Influencing Sentence

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

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

Aggravating factors include:

- the use of violence;
- persistent offending;
- damage to property;
- age and vulnerability of victim;
- value of property stolen;
- premeditated acts;
- danger to the public; and
- prevalence.

Mitigating factors include:

- guilty plea (but note that the Court cannot penalise an offender for exercising his or her right to plead not guilty);
- genuine remorse;
- reparation;
- reconciliation;
- young offender;

- first offender;
- provocation; and
- no harm or minimal harm to person or property.

There are also a number of factors that float between these two categories, depending on the circumstances. In these cases, you need to evaluate the weight to be given to each of them in terms of the appropriate sentence to be considered by the Court.

These include the following:

- previous good character;
- victim acquiescence;
- family ties;
- custom ties;
- political instability; and
- responsible position.

4.2 Previous Convictions

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

In assessing previous convictions, you have to be aware of the result and effect of a previous sentence. If, for example, a person is before you having been convicted of being drunk and disorderly, and has a similar offence from 1986, the earlier offence may not be taken into consideration as it has been so many years since the conviction.

If that person is convicted of a similar offence later in the year, then the Court may deal with him or her more harshly.

A previous conviction may be proved by proving the identity of the accused, along with:

- a copy of an extract signed by the officer having custody of the Court records recording the conviction; or
- a certificate signed by the officer of the prison in which any part of the punishment was inflicted, or by production of the warrant of commitment under which the punishment was suffered: *s75 Criminal Procedure Code*.

4.3 Plea in Mitigation

Before sentence is given, ask the offender if he or she has anything to say on their own behalf. This is known as a **plea in mitigation**. This can be done by either the offender or by a lawyer. You should consider any comments made before sentencing.

4.4 Compensation by Custom

Whenever assessing the penalty to be imposed upon conviction, you must take into account any compensation or reparation made or due by the offender: *s119 Criminal Procedure Code*.

See *Public Prosecutor v Dick* [2004] VUSC 2; Criminal Case No 01 of 2004.

If the compensation or reparation due by the offender is still undetermined at the time of sentencing, you may postpone passing sentence if you believe that the postponement will not cause undue delay: *s119 Criminal Procedure Code*.

4.5 Further Information and Reports

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

4.6 Consistency

One of the most common criticisms of the Court is that sentences are inconsistent. Failure to achieve consistency leads to individual injustice.

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

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

A means of ensuring consistency is to seek continuity in the **approach** to sentencing, both as an individual and with other judicial officers presiding over the matter with you.

5 A Structured Approach to Sentencing

You must develop a systematic method of working through each sentence. Make sure you have as much information as possible by taking into account all applicable reports.

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

Sentencing Format

Introduction

What the offender has been convicted of.

The relevant facts

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

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

The law

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

Common law:
What do the higher Courts say?

Mitigating and aggravating features

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

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

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

Relating to the offender:
Aggravating factors, e.g. personal information; previous convictions; lack of remorse.

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

Relevant factors from reports

The Pre-Sentence Report, particularly the recommendation.

Pronounce sentence

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

Advise on rights of appeal

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

6 Sentences and Orders

6.1 Dismissal of Charge

Even if a charge against an accused is proved, you may make an order dismissing the charge, after inquiring into the circumstances of the case, unless a minimum penalty is expressly provided for by any enactment: *s43(1) Penal Code*. Such a discharge is considered an acquittal: *s43(2) Penal Code*.

Despite discharging a person under *s43 Penal Code*, if you are satisfied that the charge has been proved, you may make any order as to payment of costs, damages, payment of compensation or the restitution of any property, as would be available under any enactment applicable to the offence charged: *s43(3) Penal Code*.

Nothing in *s43 Penal Code* affects the power of the Court to convict and discharge any person: *s43(4) Penal Code*.

6.2 Probation

In any case where imprisonment may be imposed, you may order probation in addition to, or instead of, any other sentence: *s45(1) Penal Code*.

Probation sets out a number of conditions with which the offender must comply. These conditions, which are supervised by a Magistrate and by a Probation Officer are designed to monitor the offender's behaviour to ensure he or she does not re-offend.

The period of probation may be from one to three years: *s45(2) Penal Code*.

Conditions of Probation

When granting probation, it must be granted upon general, and where appropriate, special conditions: *s46(1) Penal Code*.

General conditions

An offender on probation **must always** be subject to the following general conditions. He or she must:

- establish residence in a given place;
- appear when called upon by the probation officer;
- receive visits from the probation officer and furnish all information and documents for verifying his or her means of support;
- advise the probation officer in advance of any change of employment, residence and the reasons for the change;

- inform the probation officer of any intended absence from his or her place of residence of over 15 days and of his or her return; and
- obtain the prior permission of the probation officer before any departure abroad: *s47 Penal Code*.

Special conditions

In addition to the mandatory general conditions, you **may** order the offender's compliance with any of the following special conditions. You may order the offender to:

- take up residence in any specified place(s);
- not to be present in any specified place(s) without special permission;
- remain employed or to follow a course of instruction or vocational training;
- submit to measures of control or treatment, including hospital treatment, in particular for curing an addiction to alcohol or drugs;
- contribute to his family expenses or pay regularly any maintenance due by him or her;
- compensate any person for damage caused by his or her offence;
- not drive any motor vehicle or any class of motor vehicles;
- avoid specified places or premises;
- abstain from wagering or to abstain from consumption of alcohol;
- avoid the company of specified offenders, in particular his or her co-offenders or accessories to the offence; and
- not to receive or lodge any specified persons or class of persons at his or her residence: *s48 Penal Code*.

The Magistrate in the offender's home district nominated for supervising probation may, at any time, suspend any or all of the special conditions or may vary them to make them less onerous. If doing so, the Magistrate must record the reasons for doing so in writing: *s46(4) Penal Code*.

See *Public Prosecutor v Moli* [2000] VUSC 31; Criminal Case No 023 of 1999.

Compliance with Conditions

Compliance with the conditions must be supervised by a Magistrate nominated for that purpose, with the assistance of honorary probation officers: *s46(2) Penal Code*.

The probation officer supervising the offender is chosen and may be replaced by the Magistrate in charge of the case: *s46(3) Penal Code*.

The probation officer must satisfy himself or herself that the offender observes the general and special conditions of the probation order and must encourage the offender's reform, particularly his or her re-adjustment to family and occupation: *s49(1) Penal Code*.

The probation officer must report regularly to the Magistrate on the progress of the probation and must advise the Magistrate if there are any matters of difficulty: *s49(2) Penal Code*.

Breach of Conditions

If the offender breaks any of the general or special conditions, you must order the termination of the probation and must sentence the offender afresh: *s50 Penal Code*. The offender is then ineligible for probation: *s50 Penal Code*.

6.3 Community Service Orders

If you sentence an offender to a term of imprisonment of six months or less, you may as an alternative order the person to perform specified community work. The order must specify:

- the work;
- the period of work, not exceeding 100 hours; and
- any other specified conditions: *s15(1) Judicial Services and Courts Act*.

Breach of Order

An offender undertaking community work who is absent from the work, without lawful excuse, is guilty of an offence. Upon conviction for such a breach, you may order:

- that the offender be sentenced for the original offence and the probation order discharged; or
- that the offender be imprisoned for a maximum one month or a maximum fine of VT 20,000 and the probation order to continue: *s15(2) Judicial Services and Courts Act*.

6.4 Fines

In addition to any fine prescribed by law as penalty for an offence, where the penalty provided is a limited term of imprisonment, instead or as an alternative, you may fine the offender: *s51(2) Penal Code*.

Any fine imposed as an alternative penalty to imprisonment **must exceed** a sum calculated at the rate of VT 100 for every day of the prescribed maximum term of imprisonment to which the offender is liable: *s51(3) Penal Code*.

For example, if the maximum term of imprisonment for an offence is 30 days, a fine imposed as an alternative to imprisonment must exceed VT 3000.

Whenever you sentence an offender to pay a fine, you may:

- allow whatever time you consider appropriate for payment;
- extend such time;
- direct that payment is to be made in instalments;
- allow further time for payment of an instalment;
- vary the instalment; or
- order that payment be deducted from wages: *s192(1) Criminal Procedure Code*.

Fine by Instalments

If an offender fails to pay any instalment within the time fixed and does not obtain further time or a variation of the order, you must order recovery of all the unpaid instalments, as if there had been no allowance for payment by instalments: *s192(2) Criminal Procedure Code*.

Default on fine by instalments

If the offender has been ordered to pay the fine by instalments and has defaulted on one or more of the instalments, the sentence of imprisonment must not be executed until the date for payment of the final instalment: *s52(2) Penal Code*. If the offender has paid one or more of the instalments, the term of imprisonment must be reduced in proportion to the amount paid: *s52(2) Penal Code*.

Imprisonment on Default

When sentencing an offender to pay a fine, you may direct as part of the sentence that if the offender fails to pay the fine within the prescribed time that he or she be imprisoned for a term calculated at the rate of one day imprisonment for every VT50 of the fine: *s52(1) Penal Code* as amended by *s1 Penal Code (Amendment) Act No 14 of 1989*.

For example, as part of the sentence you may order that default of a fine of VT50,000 will result in 100 days imprisonment. The period of imprisonment for default must not exceed 6 years: *s52(1) Penal Code* as amended by *s3 Penal Code (Amendment) Act No 27 of 1989*.

The period of imprisonment for default is in **addition** to any other period of imprisonment the offender has been sentenced: *s52(1) Penal Code*. Upon completing the period of imprisonment for default, the offender is free from paying the fine: *s52(1) Penal Code*.

Awarding Expenses Out of Fine

Whenever you impose a fine or confirm a fine on appeal, you may order the whole or part of the fine to be applied in defraying expenses properly incurred in the prosecution: *s105(1) Criminal Procedure Code*.

If the fine is in a case subject to appeal, no payment from the fine may be made before the end of the period for appeal or before the appeal has been heard: *s105(2) Criminal Procedure Code*.

You may also order the restoration to the lawful owner of any property seized or forfeited, by way of penalty, or order the proceeds from the sale of such property to the lawful owner: *s105(3) Criminal Procedure Code*.

6.5 Periodic Detention

In any case where you could sentence an offender to imprisonment for a limited term, you may instead sentence the offender to undergo periodic detention for a minimum of one month and a maximum of six months: *s44(1) Penal Code*.

To give effect to the sentence of periodic detention, you must issue a warrant under your hand, with the seal of the Court: *s190 Criminal Procedure Code*.

Periodic detention involves the offender's loss of liberty for a maximum of 36 hours between Friday evening and Sunday evening in each consecutive week throughout the term in which periodic detention has been imposed. During the period, the offender must perform unpaid community work for a maximum of 8 hours each day: *s44(2) Penal Code*.

As far as possible, during the periods of detention, the offender should be treated as though he or she were undergoing a sentence of imprisonment: *s44(2) Penal Code*.

Before deciding to impose a sentence of periodic detention, you must have regard to:

- the nature of the offence;
- the age and circumstances of the offender, including his or her occupation or employment, family circumstances, the prospects reformation; and
- any other circumstances you consider relevant: *s44(3) Penal Code*.

Periodic detention can be a useful tool when a serious punishment is required but imprisonment would do more harm than good. For example, if an offender is supporting a family and is trying to make behavioural changes, periodic detention may be very appropriate. Periodic detention, rather than imprisonment will allow the offender to continue to work to support his family and may help him continue with counselling or other rehabilitative measures.

Breach of Conditions

If an offender fails on any occasion to surrender himself or herself to custody, to properly perform the community work, or otherwise violates the terms of the sentence or rules governing periodic detention, the sentence of periodic detention lapses: *s44(4) Penal Code*.

The offender must then be taken into custody before the original Court to be sentenced afresh, and he or she is no longer eligible for periodic detention: *s44(4) Penal Code*.

6.6 Imprisonment

Magistrates may impose sentences of imprisonment up to a maximum two years.

Senior Magistrates may impose sentences of imprisonment up to a maximum five years.

Procedure

When sentencing an offender to a term of imprisonment, you must draw up a warrant under the seal of the Court for his or her committal, stating the sentence: *187(3) Criminal Procedure Code*. This must be delivered to the officer having custody of the offender and will serve as full authority for carrying the sentence described: *ss 187(3), 189 Criminal Procedure Code*.

No sentence of imprisonment may be enforced until after the time for appeal has passed or the offender has elected to begin serving his or her sentence, unless:

- the offender is already in custody pending trial; and
- no warrant of arrest or remand has been issued prior to the time of judgment: *s36 Penal Code*.

Ideally, imprisonment should only be considered when no other sentence is appropriate. Ask yourself:

- Is it necessary to impose a sentence of imprisonment?
- Is there a viable alternative sentence available?

This is particularly so for offenders under the age of 16, where imprisonment may only be ordered if no other method of punishment is appropriate: *s38(1) Penal Code*.

Concurrent and Consecutive Sentences

When more than one offence is tried together and the offender is convicted on more than one charge, the respective sentences are deemed to be concurrent sentences (served at the same time), unless you order them to be served consecutively (one after the other): *s39(1) Penal Code*.

This will most often occur when more than one charge arises from one event. For example, if an offender commits theft and damages property at the same home, the two separate offences should be treated as one transaction and the sentences of imprisonment should run concurrently, unless there is a good reason to do otherwise.

Where two offences are tried separately, and the offender is convicted on more than one charge, the sentence passed later for an offence committed prior to the earlier trial, shall be deemed to be concurrent sentences, unless you order them to be served consecutively: *s39(2) Penal Code*.

You may not order a sentence to run concurrently with any sentence which had already become final before the commission of the second offence: *s39(3) Penal Code*. For example, if an offender is released from prison and re-offends, you may not order the sentence to run concurrently for the time already served.

For consecutive sentences, they must be enforced in the order in which the warrants of imprisonment are notified to the offender: *s40 Penal Code*.

When ordering consecutive sentences, a Magistrate may order up to a maximum of four years: *s14(5)* as added by *s10 Schedule Judicial Services and Courts (Amendment) Act No 4 of 2003*.

The ability to sentence up to double the normal term of imprisonment does not apply to Senior Magistrates.

Calculating the Term of Imprisonment

For a term of imprisonment expressed in days, each day means 24 hours: *s37(1) Penal Code*.

For a term of imprisonment expressed in months, each month means one calendar month: *s37(2) Penal Code*.

For a term of imprisonment expressed in months and years, it shall be calculated by calendar date: *s37(3) Penal Code*.

The duration of a sentence of imprisonment includes and runs from:

- the day on which the offender is taken into custody; or
- in the case of concurrent sentences passed on different dates, the day on which the offender was taken into custody under any of the sentences*: s37(4) Penal Code*.

Offender already in custody

If the offender has been in custody pending trial or appeal, the term of custody must be wholly deducted from the calculation of the sentence remaining: *s41(1) Penal Code*.

If the offender has been in custody pending trial or appeal and is later sentenced to a fine only, you may relieve the offender from paying the whole or part of the fine: *s41(2) Penal Code*.

6.7 Sentence if Called Upon

After taking into account the circumstances, including the nature of the offence and character of the offender, any court which convicts or sentences an offender may, instead of passing sentence, order the offender to appear for sentence if called upon. This may be upon such conditions as you think fit: *s42(1) Penal Code*.

Making such an order does not limit or affect you power under any applicable enactment to make any order as to payment of costs, damages, compensation or for the restitution of any property, even though the offender has not been sentenced: *s42(2) Penal Code*.

You may order that an offender subject to such an order be called upon for sentence any time up to three years from the date of conviction: *s42(3) Penal Code*.

If you do not specify the period for which the offender may be called upon, the offender may be called upon only within one year from the date of conviction: *s42(3) Penal Code*.

Using this tool can help gauge whether an offender has made lasting changes that would justify not imposing a sentence immediately. For example, if an offender claims to have stopped drinking alcohol at the time of sentencing, you may consider deferring the sentence to see if the change is permanent and if it solves the problem behaviour.

If Called Upon

If the offender is called upon, any judicial officer having jurisdiction to deal with the original offence (whether he or she heard the case) may sentence or otherwise deal with the offender: *s42(4) Penal Code*.

Before sentencing the offender, the judicial officer must inquire into the circumstances of the case and the conduct of the offender since the order was made: *s42(4) Penal Code*.

6.8 Suspended Sentence

If, in view of the circumstances and in particular the nature of the crime and the character of the offender, you consider that imposing a penalty on an offender would be inappropriate, you may order the suspension of the execution of any sentence imposed, on the condition that the person commits no further offence against any Act, regulation, rule or order within a period you fix, not exceeding three years: *s1(a) Suspension of Sentences Act*.

When ordering the suspension of the execution of the sentence, explain clearly to the person sentenced the nature of the order and shall ascertain that he has understood its meaning: *s1(d) Suspension of Sentences Act*.

At the end of the period, if the person has not have been convicted of any further offence, the sentence shall be deemed to be annulled: *s1(b) Suspension of Sentences Act*.

If the person is convicted of another offence before the end of such period, the sentence must be immediately executed, in no case concurrently with any subsequent sentence: *s1(c) Suspension of Sentences Act*.

6.9 Confiscation of Property

Upon conviction for any offence, you may order the confiscation of any property of the offender seized which was:

- used in committing the offence; or
- represents the proceeds of the offence: *s53(1) Penal Code*.

Property which may be seized includes any ship, boat, aircraft or motor vehicle used by the offender to travel to or away from the place where the offence was committed: *s53(2) Penal Code*.

6.10 Restitution of Property

Upon conviction for any offence where property was unlawfully obtained, you may order the offender to pay restitution to the person lawfully entitled to the property: s*s54, 107 Penal Code*.

In the order, you may also direct that if the offender fails to make restitution within the period specified in the order that the offender be imprisoned for a term calculated at a rate of one week's imprisonment for every VT 1000 of the value of the property concerned: *s54 Penal Code*.

For example, if the offender fails to make restitution of goods worth VT 10,000, he or she may be imprisoned for 10 weeks.

If the offender defaults on the restitution and is imprisoned for the appropriate term, he or she is still liable to make restitution of the property: *s54 Penal Code*.

6.11 Confinement of Addicts or Partially Insane Persons

You may order a person addicted to alcohol or drugs or who is suffering from a mental illness to confinement in a specified health institution, if:

- the criminal offence arose from the addiction or mental condition; and
- you are of the opinion that the offender's liberty is a danger to himself or herself or to the public: *s55(1) Penal Code*.

In the case of a person addicted to alcohol or drugs, the confinement must not exceed 2 years, and in the case of a mentally ill person must not exceed 5 years: *s55(2) Penal Code*.

The two or five year period of confinement may be terminated earlier upon review: *s55(3) Penal Code*.

Review

For all persons who are confined but not by periodic detention or by imprisonment, a full report on his or her condition and the necessity of detention must be sent to the Supreme Court at maximum of 12 month intervals: *s56(1) Penal Code*.

The Supreme Court then reviews all confinements and will make orders as to the continuation or dismissal of the detained person.

6.12 Recognizance to Keep the Peace

Whenever you are informed on oath that a person is likely to commit a breach of the peace or do any wrongful act that may cause a breach of the peace, you may require the person to show why he or she should not be ordered to enter a recognizance for keeping the peace: *s23A(1) Criminal Procedure Code* as added by *Schedule 1 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

At your discretion, you may order:

- the recognizance to be with or without sureties; and
- for any period up to one year: *s23A(2) Criminal Procedure Code* as added by *Schedule 1 Criminal Procedure Code (Amendment) Act No 13 of 1984*.

While an order to keep the peace is not a sentence, it can be a useful tool to control parties when conviction for an offence and a sentence is impossible or otherwise impractical. This is particularly useful when there are ongoing disputes between parties which have the potential to escalate into a situation where an offence may be caused. Ordering each party to keep the peace may help prevent an offence from occurring.

Inquiry Procedure

1. When you receive the information on oath and you deem it necessary for the person to come before the Court, you must make an order setting out:
   - the substance of the information received;
   - the amount of the recognizance;
   - the term which it will be in force; and
   - the number, character and class of sureties (if any) required: *s23B Criminal Procedure Code*.

2. If the person is not present before you in Court, you must issue a summons requiring him or her to appear, or a summons if he or she is in custody: *s23D Criminal Procedure Code*.

You may also issue an arrest warrant, if a Police report or other information gives you reason to fear the commission of a breach of the peace which can only be prevented by the immediate arrest of the person: *s23D Criminal Procedure Code*.

Every summons or warrant must be accompanied by a copy of the order when served on the person: *s23E Criminal Procedure Code*.

If you see fit, you may also allow the person to appear by advocate to show cause why he or she should not be required to enter into a recognizance for keeping the peace: *s23F Criminal Procedure Code*.

3. When the person does appear in Court, you must read the order over to him or her, and explain the substance of the order if he or she requests: *s23C Criminal Procedure Code*.

4. Once read or explained, you must proceed to inquire into the truth of the information and take further evidence as appears necessary: *s23G(1) Criminal Procedure Code*.

   The procedure for taking and recording evidence shall be conducted as nearly as practicable as for a trial: *s23G(2) Criminal Procedure Code*.

   When more than one person is involved, you may deal with them in the same or separate inquiries: *s23G(3) Criminal Procedure Code*.

5. If it appears that that it is necessary for the person to enter into a recognizance to keep the peace or be of good behaviour, you must make an entry on the record to that effect, and release the person from custody or discharge him or her as necessary: *s23I Criminal Procedure Code*.

6. If it appears necessary that in order to keep the peace or be of good behaviour, the person must enter into a recognizance, with or without sureties, make an order accordingly: *s23H Criminal Procedure Code*.

Content of the Recognizance

The recognizance entered into must bind the person to keep the peace or to be of good behaviour, as necessary: *s23K Criminal Procedure Code*.

If the recognizance is to keep the peace, the commission, attempt, or aiding, abbetting, counselling or procuring of any offence punishable by imprisonment is a breach of the recognizance: *s23K Criminal Procedure Code*.

The recognizance:

- must be fixed with due regard to the circumstances of the case and must not be excessive;
- must be entered into only by his or her sureties, if the person is a minor;
- must not require the person to give security different in nature, larger than, or for a longer time than that specified in the original order drawn up from the information: *s23H(1) Criminal Procedure Code*.

Any person you order to give security may appeal to the Supreme Court: *s23H(2) Criminal Procedure Code*.

Period of Recognizance with security
If you require security to be given for a certain period, the period commences:

- on the date of the order, unless you fix a later date; or
- on the expiration of any term of imprisonment to which the person has been sentenced: *s23J Criminal Procedure Code*.

Imprisonment for Failing to Give Security

If a person fails to give security on or before the date of commencement, you must commit the person to prison, pending the decision of the Supreme Court. The proceeding must then be given to the Supreme Court as soon as practicable: *s23M Criminal Procedure Code*.

If the person is already in prison on the date, he or she must be detained in prison until the period expires or the security is given: *s23M Criminal Procedure Code*.

The maximum period of imprisonment for failure to give security is two years: *s23M(4) Criminal Procedure Code*.

If the person gives the security to the officer in charge of the prison, the officer must refer the matter to the Court who made the order, and await further orders: *s23Q(5) Criminal Procedure Code*.

Release
If you believe that a person imprisoned for failing to give security may be released without hazard to the community, you may make an immediate report of the case for the Supreme Court to decide: *s23N Criminal Procedure Code*.

Sureties

You may reject any surety offered on the grounds that the surety is an unfit person. You must record your reason for rejecting any offered surety: *s23L Criminal Procedure Code*.

Any surety may apply to cancel any recognizance he or she has entered into for the peaceable conduct or good behaviour of another person: *s23Q(1) Criminal Procedure Code*.

If a surety applies to be cancelled, you must issue a summons or warrant, requiring the person for whom the surety is bound to appear before you: *s23Q(2) Criminal Procedure Code*.

When the person appears, you must cancel the recognizance and order the person to give fresh security of the same description as the original security for the outstanding portion of the term of the recognizance: *s23Q(3) Criminal Procedure Code*.

6.13 Compensation

On the dismissal of any charge, if you believe the charge was frivolous or vexatious, you may order the complainant to pay to the accused a reasonable sum for the accused's trouble, expense and any special loss, in addition to any costs: *s103 Criminal Procedure Code*.

Recovery of Compensation

Any sum you award for compensation must be specified in the conviction or order: *s104 Criminal Procedure Code.*

If the person then fails to pay the compensation and defaults on distress, he or she is liable to imprisonment in accordance with *s52 Penal Code*, unless the compensation is paid sooner: *s104 Criminal Procedure Code*.

6.14 Restoration of Property

Where any property is taken from an accused upon his or her arrest, you may order:

- that the whole or part of the property be restored to the person who appears to be entitled to it (including the accused or such person as he or she may direct); or
- that the whole or part of the property be applied to the payment of any fine, any costs, or any compensation directed to be paid: *s108 Criminal Procedure Code*.

7 Costs

All costs awarded are in addition to any compensation awarded: *s100(1) Criminal Procedure Code*.

All orders for costs may be appealed to the Supreme Court: *s102 Criminal Procedure Code*.

7.1 Costs Against the Accused

In addition to any sentence imposed upon the offender in respect of the offence, you may also order the offender to pay the public or private prosecutor, reasonable costs up to a maximum of VT 100,000: *s98 Criminal Procedure Code* as amended by *s1 Criminal Procedure Code (Amendment) Act No 13 of 1989*.

7.2 Costs Against a Private Prosecutor

You may order a private prosecutor to pay reasonable costs to an accused, up to a maximum of VT 25,000, if:

- the prosecution was originally brought on a summons or warrant issued by a Court on the application of a private prosecutor; and
- you consider that the private prosecutor had no reasonable grounds for making the complaint: *s99(3) Criminal Procedure Code*.

7.3 Costs Against the State

In the case of a dismissal of the charge, you may only order the State to pay costs to an accused, if you feel the prosecution was unjustified or oppressive: *s101(1) Criminal Procedure Code*.

Witnesses called on behalf of the State are entitled to payment of attendance fees and allowances, unless you disallow the fees: *s101(2) Criminal Procedure Code*. These fees may be recovered from any party ordered to pay costs: *s101(1) Criminal Procedure Code*.

7.4 Recovery of Costs

Any sum you award for costs must be specified in the conviction or order: *s104 Criminal Procedure Code*.

If the person then fails to pay the costs and defaults on distress, he or she is liable to imprisonment in accordance with *s52 Penal Code*, unless the compensation is paid sooner: *s104 Penal Code*.

8 Enforcement of Fines, Penalty, Costs, Compensation and Other Expenses

8.1 Enforcement By Warrant

Whenever you order money to be paid, the money may be levied on the real and personal property of the person by distress and sale through a Court warrant. This applies to money ordered to pay:

- a fine;
- a penalty;
- compensation;
- costs; or
- other expenses: *s193(1) Criminal Procedure Code*.

Such a warrant may be executed by the distress and sale of any property of the person anywhere in Vanuatu: *s193(4) Criminal Procedure Code*.

When enforcing an order, it must be levied on personal property first and real property second. If the person has sufficient personal property to satisfy the order, his or her real property must not be sold: *s193(1) Criminal Procedure Code*.

If the person pays or tenders to the officer executing the warrant the sum mentioned in the warrant, along with the applicable expenses of the distress up to the time of payment, the officer must cease to execute the order: *s193(2) Criminal Procedure Code*.

Any sums received by executing the warrant must be applied in the following order:

- first to the costs of execution;
- secondly to the fine; and
- thirdly to the costs due by the offender in virtue of the conviction or order*: s193(3) Criminal Procedure Code*.

Objections to Attachment of Property

Any person who claims to have any legal or equitable interest in the property being used to satisfy the warrant may, at any time prior to the Court receiving the proceeds from the sale, give notice in writing of his or her objection to the attachment of the property: *s194(1) Criminal Procedure Code*.

The notice must:

- briefly set out the nature of the objector's claim to the property; and
- must certify the value of the property in the notice along with an accompanying affidavit as to value: *s194(1) Criminal Procedure Code*.

Upon receiving such a notice, you must:

- direct the executing officer to halt the execution; and
- direct the objector to appear before the Court to establish his or her claim upon a date specified in the notice: *s194(2) Criminal Procedure Code*.

A notice outlining the time and place when the objector will appear must then be served upon:

- the person whose property was to be attached; and
- any person entitled to the sale or proceeds of the property: *s194(4) Criminal Procedure Code*.

Upon the date fixed for hearing the objection, you must investigate the objection. You may hear from the objector and any other person served with a notice of the hearing: *s194(5) Criminal Procedure Code*.

After investigating the matter, you may then order the property to be released from attachment, if you are satisfied that the property was not in the possession of or being held in trust for the person ordered to pay the money: *s194(6) Criminal Procedure Code*.

If the objector fails to appear on the date fixed for the hearing, or the objector fails to establish his or her claim, you must order the attachment and execution of the warrant over the property to proceed and must make any order as to costs: *s194(7) Criminal Procedure Code*.

8.2 Enforcement by Committal to Prison

Instead of enforcing the payment of a fine, a penalty, compensation, costs or other expenses by distress, you may commit the person to prison for a specified time.

You may enforce by imprisonment, rather than by distress, if:

- you believe that distress and sale of the person's property would be ruinous to the person or to his or her family;
- the person has no property upon which to levy the distress; or
- any other sufficient reason appears: *s195 Criminal Procedure Code*.

You may enforce by committal instead of or after issuing a warrant of distress: *s195 Criminal Procedure Code*.

The term of imprisonment must be specified in the warrant, unless the person is earlier released for payment of the amount owed plus all expenses of the commitment and conveyance to prison: *s195 Criminal Procedure Code*. If full payment is received by the officer in charge of the prison having custody of the person, the officer must release the person, unless the person is in custody for another matter: *s196 Criminal Procedure Code*.

Part Payment

If the person pays any part of amount owed while committed to prison, the term of imprisonment must be reduced as nearly as possible in proportion to the sum owed in relation to the total number of days: *s197(1) Criminal Procedure Code*.

For example, if the person committed owes VT 10,000 and has been committed for 10 days, if he or she pays VT 1,000, the term of imprisonment should be reduced to nine days.

If the person committed wishes to make part payment, the officer in charge of the prison must take him or her before a Court as soon as possible, and the Court must certify the amount of payment and make all applicable orders to reduce the term of imprisonment accordingly: *s197(2) Criminal Procedure Code*.

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CRIMINAL:

YOUNG OFFENDERS

1 Dealing with Young Offenders

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

When a person appears before you, and looks as if they may be under 16 years, find out the age as the very first issue. The Police should know the person's age, as they will have been responsible for the investigation. If not, then you will need to check the young person's age and its implications. You should verify the age through birth records, or on a balance of probabilities after hearing expert medical evidence: *s17(3) Penal Code*.

Dealing with a Young Person Privately

If you can, deal with the young person a little more privately than you would for an adult.

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

Assistance for the Young Person

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

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

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

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

It is best if a lawyer can be found to give advice and sometimes the case needs to be put off to allow this to happen.

What a young person should have, in view of age, and usually a poor understanding of the legal process, is the ability to talk to someone and to have someone speak on their behalf if this is what he or she wants.

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

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

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

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

Guilty Plea

See paragraph 2 below.

Not Guilty Plea – Defended Hearing

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

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

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

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

Is the Defended Hearing a Normal One?

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

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

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

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

- tell me what happened?
- what happened next?
- why do you say that?

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

2 Sentencing Young Offenders

You must have particular regard when sentencing young offenders because the greatest emphasis is put on rehabilitation of the offender rather than on punishment. Because of this unique situation, a number of provisions exist specifically for the handling of young offenders.

Before deciding how to deal with the convicted young offender, you should obtain any information related to his or her:

- general conduct;
- home surroundings;
- school record; and/or
- medical history.

This information will help you deal with the case in the best interests of the young offender.

2.1 Imprisonment

No person under 16 years may be sentenced to imprisonment unless no other method of punishment is appropriate: *s38(1) Penal Code*. If you do sentence a young offender to imprisonment, you must give your reasons for doing so: *s38(1) Penal Code*.

If imprisoned, the young offender must:

- serve his or her sentence in a special establishment; or
- if no such establishment exists, must be segregated from offenders over 16 years: *s38(2) Penal Code;*
- imprisonment of young offenders should be a last resort.

2.2 Liability of Parents and Guardians

Parents and guardians cannot be held liable for criminal offences committed by their children: *s19 Penal Code.*

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CRIMINAL:

APPEALS/ CASES STATED/ REVIEWS

1 Appeals to the Supreme Court

1.1 Right of Appeal

Any person convicted on a trial held by a Magistrate's Court may appeal to the Supreme Court: *s200(1) Criminal Procedure Code*.

The Public Prosecutor may appeal to the Supreme Court on a point of law against any judgment of a Magistrate's Court: *s200(3) Criminal Procedure Code*.

Every appeal from a trial Court to an appeal Court shall be final: *s212 Criminal Procedure Code*. This means that a trial originally heard in Magistrate's Court can only be appealed to the Supreme Court, with no further appeal to the Court of Appeal.

1.2 Commencement of Appeal

Appeals are brought by either the prosecutor or the offender (or his or her representative) giving a Notice of Appeal to the Registrar of the Supreme Court within 14 days from the date of your order or sentence being appealed against: *s201 Criminal Procedure Code*.

For further information on how an appeal is commenced with the Supreme Court, see *ss201-206 Criminal Procedure Code*.

If an appeal is brought by a prosecutor, the accused must be personally served with the notice of appeal. See *Public Prosecutor v Toa* [2003] VUCA 13; Criminal Appeal Case No 04 of 2003.

1.3 Bail

For criminal appeals, once an appeal has been launched, you may order that the appellant be released from custody on bail subject to any conditions you think fit: *s209(1) Criminal Procedure Code*.

The application for bail is made without formal process to any Magistrate in the Court: *s209(2) Criminal Procedure Code*. You may hear the application for bail in chambers.

If the appeal is dismissed and the original or some other sentence has been ordered, the time during which the appellant has been released on bail is excluded from computing the remaining term of imprisonment from which he or she is finally sentenced: *s209(3) Criminal Procedure Code*.

1.4 Further Evidence

In order to deal with the appeal, the Supreme Court may require additional evidence to be taken. The Supreme Court will record its reasons for doing so and may direct that the Magistrate's Court take the further evidence: *s210(1) Criminal Procedure Code*.

If you are directed to take further evidence:

- take the evidence in the presence of the accused or his or her advocate, unless the Supreme Court otherwise directs; and
- certify it to the Supreme Court: *s210 Criminal Procedure Code*.

1.5 Orders

Once the Supreme Court has dealt with the appeal, it will certify its judgment or order to the Magistrate's Court which originally passed the conviction, sentence or order appealed against: *s208(1) Criminal Procedure Code*.

Upon receiving this judgment, you must make all appropriate orders to bring the judgment of the Supreme Court into effect: *s208(2) Criminal Procedure Code*. If necessary, the record must also be amended to reflect the appeal judgment: *s208(2) Criminal Procedure Code*.

Any costs taxed by the Supreme Court Registrar are recovered by execution in the Magistrate's Court: *s211 Criminal Procedure Code*.

2 Appeals From Island Courts

2.1 Right of Appeal

Any person may appeal to the Magistrate's Court from a decision of an Island Court within 30 days from the date of the order or decision of the Island Court: *s22(1) as amended by s7 Schedule Island Courts (Amendment) Act No. 15 of 2001*.

Notwithstanding the 30 day requirement, if you receive an application, you may grant an extension to bring the appeal, provided the application is made within 60 days of the date of the order or decision of the Island Court: *s22(5) Island Courts Act*.

2.2 Hearing the Appeal

When hearing an appeal against a decision of an Island Court, you must appoint two or more assessors knowledgeable in custom to sit with the Court: *s22(2) Island Courts Act*.

When hearing the appeal, you must:

- consider any records relevant to the decision;
- receive any relevant evidence; and
- make any inquiries you think fit: *s22(3) Island Courts Act*.

On hearing the appeal, you may:

- make any order or pass any sentence the Island Court could have made or passed when hearing the matter; or
- order that the cause or matter be reheard before the same court or before any other Island Court: *s23 Island Courts Act*.

3 Cases Stated

A case stated is a statement of certain relevant portions of the case for the opinion or judgment of another Court. Unlike an appeal, a case stated is limited to a specific issue. Once the issue is decided, the case returns to Magistrate's Court for determination of the case itself.

For any civil or criminal matter, you may reserve any question of law for the Supreme Court to determine through a case stated: *s17(1) Judicial Services and Courts Act*.

After sending a case stated to the Supreme Court you cannot deliver judgment on the case until the Supreme Court has given its opinion: *s17(2) Judicial Services and Courts Act*.

After the Supreme Court hears argument on the case, it will make its determination. Upon receiving this determination you may proceed in accordance with it to continue with the proceedings.

4 Review of Island Court Decisions by Supervising Magistrate

The decisions of all Island Courts are subject to the review by the Court's Supervising Magistrate.

At all times, the Supervising Magistrate must have access to the Island Courts and their records within his or her jurisdiction: *s21(1) Island Courts Act*.

4.1 Review

For both civil and criminal matters, on his or her own application or on the application of any other person, the Supervising Magistrate may:

- revise any of the proceedings as an Island Court;
- make any order or pass any sentence which the Island Court itself could have done;
- order any case to be retried before the same or any other Island Court under his or her supervision; or
- at any stage of the proceedings order the case to be transferred to himself or herself for hearing: *s21(2) Judicial Services and Courts Act*.

Supervising Magistrate Increasing Penalty

In criminal cases, the Supervising Magistrate cannot increase the fine or term of imprisonment without first giving the accused an opportunity to be heard: *s21(2)(a) Judicial Services and Courts Act*.

If the Supervising Magistrate increases the fine or term of imprisonment upon review, a right of appeal to the Supreme Court is available. The Supreme Court may then reduce, remit or increase any such sentence: *s21(2)(a) Judicial Services and Courts Act*.

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CRIMINAL: COMMON OFFENCES

Intentional Assault

Section

s107 Penal Code (Cap. 135)

Description

Any person who intentionally assaults any portion of another person's body is guilty of an offence.

Elements

Every element (ie. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused assaulted a part or parts of another person's body; **and**
5. The accused committed this assault intentionally.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who committed the offence.

Assault
Assault includes actual physical contact.

Intent
The accused must have purposely intended to assault the other person's body.

Physical force
The physical force used by the accused against the complainant must be without the complainant's consent.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Sentence

3 months imprisonment if no physical damage is caused.

1 year imprisonment if damage of a temporary nature is caused.

5 years imprisonment if permanent damage is caused.

10 years imprisonment if the damage caused results in death, although the offender did not intend to cause death.

Before sentencing, please note that the Magistrate's Courts generally have jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

As a consequence, a Magistrate can only hear and sentence an accused if the effect of the assault had no physical damage or damage was of a temporary nature.

Only a Senior Magistrate or Judge of the Supreme Court would be able to hear and sentence an accused where permanent damage or death resulted from the offence of intentional assault.

Careless Driving

Section

s14 Road Traffic Control Act 1962 (Cap 29)

Description

Any person who drives a motor vehicle on a road without due care and attention, or without reasonable consideration for other persons using the road, is guilty of an offence.

Elements

Every element (ie. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused used a motor vehicle on a road; **and**

5. The accused did not use care and attention;

or

4. The accused used a motor vehicle on a road; **and**

5. The accused did not use reasonable consideration for other persons using the road.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Due care and attention or without reasonable consideration
The prosecution must be able to prove that the accused either did not use due care and attention while driving on the road ***or*** that the accused drove without reasonable consideration for other persons using the road.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

6 months imprisonment or a fine of VT 50,000, or both.

Additionally you are able to use your discretion and, in circumstances where you think it appropriate, you can make an order to disqualify an offender found guilty of this offence from driving a motor vehicle for up to 5 years: *s55(1) RTCA 1962.*

Driving Under Influence of Liquor

Section

s16 Road Traffic Control Act 1962

Description

Any person who drives on a public road when under the influence of alcohol or a drug to such an extent that he or she is incapable of properly controlling the vehicle, is guilty of an offence.

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was under the influence of either alcohol or drug(s); **and**
5. The accused drove on a public road; **and**
6. The accused was affected by the alcohol or drug(s) to such an extent that he or she was incapable of properly controlling the vehicle.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Public road
Public road includes every road or right of way, which the public may have at any time, unrestricted right of access: *s2 RTCA.*

Under influence
The prosecution will need to show that the accused was under the influence of alcohol or a drug at the time of the offence. This may mean that the prosecution will need to provide evidence that the accused had taken alcohol or a drug sometime prior to the event, ie in the previous 3-4 hours before the offence occurring.

Control of vehicle
The Court needs to hear evidence of the driver's incapability to properly control his or her vehicle such as excessive swerving over the road or dangerous driving.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

3 months imprisonment or fine not exceeding VT 30,000, or both: *s53(2)RTCA 1962.*

Additionally you are able to use your discretion and, in circumstances where you think it appropriate you are able to make an order to disqualify an offender from driving a motor vehicle for not more than 5 years: *s55(1) RTCA 1962.*

Providing False Information (False Statements)

Section

s76 Penal Code (Cap 135)

Description

Any person who makes a statement or declaration within a judicial proceeding (whether on oath or affirmation or not), which would amount to perjury, is guilty of an offence.

Elements

Every element (ie. numbers 1-7 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused made a statement or declaration; **and**
5. The accused statement or declaration was made during a judicial proceeding; **and**
6. The accused statement or declaration is false; **and**
7. The accused committed perjury, ie the accused intended to mislead the judicial proceeding with his or her false statement or declaration.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the***

accused who committed the offence.

Definition of perjury*: s 74 Penal Code*
'Perjury' is an assertion (ie statement or declaration) of a fact, opinion, belief or knowledge, made by a witness as part of his or her evidence in any judicial proceeding, known by the person making it that it is false **and** is intended to mislead the judicial proceeding.

Witness: *s74 (2) Penal Code*
For the purpose of this section, every person is a witness who actually gives evidence n a judicial proceeding, whether the witness is competent or not and whether the evidence is admissible or not.

Definition of judicial proceeding: *s74(3)Penal Code*
Every proceeding is judicial (whether or not it is duly instituted or not and whether it is invalid or not) if it is held before:

- any Court of Justice;
- Parliament or any Parliamentary Committee;
- any Arbitrator or any person authorised by law to make an inquiry and to take evidence on oath in relation to that inquiry;
- any legal Tribunal where any legal right or liability can be established; and
- any person acting as a Court or Tribunal having power to hold a judicial proceeding.

Intention
Intention is an important element of this offence and the prosecution must provide evidence that the accused intended to mislead the judicial proceedings in which the assertion was made to. However intention can be inferred from evidence given on events before, during or after the offence.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

3 years imprisonment

Indecent Act in Public Place

Section

s94 Penal Code (Cap 135)

Description

Any person who wilfully does any indecent act in any place, in which the public have either access to or is within view of the public, is guilty of an offence.

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused did an act which is held to be indecent; **and**
5. The accused did the indecent act in a place where the public have access to, or in a place within view of a place which the public have access to; **and**
6. The accused did the indecent act wilfully, on purpose.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Indecent act
The prosecution will need to provide evidence that:

- the accused did an indecent act; and
- the act performed by the accused would be considered indecent if seen by an objective bystander.

Public access, public view
The prosecution will need to prove that the indecent act was done in an area that the public had lawful access to or that the act was done in a place in which the public could see it.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

It is a defence to a charge under this section if the person charged proves that he or she had reasonable grounds for believing he or she would not be observed: *s94(2) Penal Code*.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

2 years imprisonment.

Contempt of Court (Premises and Proceedings)

Section

s82(1)(a) Penal Code (Cap 135)

Description

Any person who shows disrespect (by either speech or manner) in any premises where judicial proceedings occur, by either reference to any proceeding or to anyone in which the proceedings were being held in front of, is guilty of an offence.

Elements

Every element (ie. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was on or near the premises where any type of judicial proceedings occur; **and**
5. The accused used speech or manner to show disrespect to either the proceedings, or to any person in which the proceedings were being conducted in front of.

Commentary

Burden and standard of proof
The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the***

accused who committed the offence.

Premises
The prosecution will need to provide evidence that the accused was in a place that hears judicial proceedings or was very near by.

Disrespect
The prosecution will need to show that the accused either by his or her words or manner actually showed disrespect, either to the proceedings directly or to the person who was hearing the proceedings when the offence occurred.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment, or where the offence is committed in your view, you may have the offender detained in custody and may, after allowing sufficient time for the offender to gain representation and be heard before the Court on the matter before it rises at the end of the day, sentence him or her a fine up to VT 5000.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code*, when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Contempt of Court (as a Witness)

Section

s82(1)(b) Penal Code (Cap 135)

Description

Any person is guilty of an offence who having been called to give evidence in a judicial proceeding either fails to attend, or:

- refuses to be sworn or affirmed; ***or***
- refuses to answer a question, without lawful excuse ; ***or***
- refused to produce a document; without lawful excuse ***or***
- remains in the room during the judicial proceedings having been ordered to leave.

Elements

Every element (ie. numbers 1-5 below must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was required to attend judicial proceedings; **and**

5. The accused failed to attend the judicial proceeding; ***or***

5. The accused did attend the judicial proceedings but refused to be sworn or affirmed; ***or***

5. The accused was sworn/affirmed but refused, without lawful excuse, to answer a question or produce a document; ***or***

5. The accused refused to leave the room where the judicial proceeding were being held after being ordered to leave.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Elements of offence

The prosecution need to prove elements 1-4 above and one of the listed no. 5 elements.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment, or where the offence is committed in your view, you may have the offender detained in custody and may, after allowing sufficient time for the offender to gain representation and be heard before the Court on the matter before it rises at the end of the day, sentence him or her a fine up to VT 5000.

Important Note

Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code*, when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Contempt of Court (Obstruction or Disturbance)

Section

s82(1)(c) Penal Code (Cap 135)

Description

Any person who causes an obstruction or disturbance in the course of judicial proceedings, is guilty of an offence.

Elements

Every element (ie. numbers 1-4 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused caused an obstruction or a disturbance during the course of a judicial proceeding.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment, or where the offence is committed in your view, you may have the offender detained in custody and may, after allowing sufficient time for the offender to gain representation and be heard before the Court on the matter before it rises at the end of the day, sentence him or her a fine up to VT 5000.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code*, when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Contempt of Court (Misrepresenting Proceedings)

Section

s8(1)(d) Penal Code (Cap 135)

Description

When a judicial proceeding is pending, any person who misrepresents that proceeding by speech or writing, or prejudices any person in favour of or against any party to the proceedings or calculates to lower the authority of any person in which the proceedings will be conducted in front of, is guilty of an offence.

Elements

Every element (ie. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. Judicial proceedings were pending; **and**
5. The accused either:

- misrepresented the proceedings (including by speech or writing); **or**
- prejudiced any person in favour of or against any party to the proceedings; **or**
- calculated to lower the authority of the person in which the proceedings will be heard in front of.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment or where the offence is committed in your view, you may have the offender detained in custody and may, after allowing sufficient time for the offender to gain representation and be heard before the Court on the matter before it rises at the end of the day, you may sentence him or her a fine up to VT 5000.

Important Note

Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code,* when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Contempt of Court (Publishing Evidence Held by the Court to be Private)

Section

s82(1)(e) Penal Code (Cap 135)

Description

Any person who publishes a report of evidence taken in any judicial proceeding which has been directed by the Court to be held in private, is guilty of an offence.

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. A judicial hearing was directed by the Court to be held in private; **and**
5. Evidence was given during the judicial hearing which was held in private; **and**
6. The accused published a report of the evidence taken in the private judicial proceedings.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Publish
The prosecution must prove that the evidence published in the report was about evidence given while the judicial proceedings were held in private and not at any other time, ie the information published cannot have been made public by some other means. For further information see legal principles relevant to the law of defamation.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment or where the offence is committed in your view, you may have the offender detained in custody and may, after allowing sufficient time for the offender to gain representation and be heard before the Court on the matter before the Court rises at the end of the day, you may sentence him or her a fine up to VT 5000.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code*, when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Contempt of Court (Interfere or Influence Witnesses)

Section

s82(1)(f) Penal Code (Cap 135)

Description

Any person who attempts wrongfully to interfere with or influence a witness in connexion with the evidence of that witness, either before or after the witness has given evidence in any judicial proceedings, is guilty of an offence.

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused attempted to interfere with or influence a witness who either was to give, or had given, evidence in a judicial hearing; **and**
5. The accused attempted to interfere with or influence the witness in connexion to the evidence of the witness; **and**
6. The accused wrongly attempted to interfere with or influence the witness.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Wrongly
The prosecution must provide evidence of the accused 'wrong' intention, however intention can be inferred from evidence on the matter gained before, during and after the offence.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment or where the offence is committed in your view of the Court, you may have the offender detained in custody and may, after allowing sufficient time for the offender to gain representation and be heard before the Court before it rises at the end of the day, sentence him or her a fine up to VT 5000.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code*, when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Contempt of Court (Employee as a Witness)

Section

s82(1)(g) Penal Code (Cap 135)

Description

Any person, who dismisses a servant or employee because he or she has given evidence on behalf of any party to a judicial proceeding, is guilty of an offence.

Elements

Every element (ie. numbers 1-7 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused employed a servant or an employee; **and**
5. The servant or employee gave evidence in a judicial proceeding; **and**
6. The accused dismissed the servant or employee from employment with the accused; **and**
7. The accused did this because he the servant or employee had given evidence in a judicial hearing.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment or where the offence is committed in your view, you may have the offender detained in custody and may, (after allowing sufficient time for the offender to gain representation and be heard before the Court before it rises at the end of the day), sentence him or her a fine up to VT 5000.

Important Note

Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code*, when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Contempt of Court (Intentional Disrespect)

Section

s82(1)(h) Penal Code (Cap 135)

Description

Any person who commits any other intentional act of disrespect (other that those recorded at *ss82(1)(a)-(g) Penal Code*) in any judicial proceedings, or to any person before whom such judicial proceedings are being conducted, is guilty of an offence.

Elements

Every element (ie. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused must intentionally commit an act of disrespect; **and**
5. The accused must do this act to:

- any judicial proceeding; **or**
- any person before whom the judicial proceeding is being considered.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the***

accused who committed the offence.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

5 years imprisonment or where the offence is committed in your view, you may have the offender detained in custody and may, (after allowing sufficient time for the offender to gain representation and be heard before the Court before it rises at the end of the day), sentence him or her a fine up to VT 5000.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s82 Penal Code,* when the prosecution has made an application to have the matter heard before the Magistrates' Court.

Failure to Maintain Family

Section

s1 Maintenance of Family (Cap 42)

Description

Any:
(a) man who fails to make adequate provision for the maintenance of his legal wife, or his legitimate children under the age of 18 years for a period exceeding 1 month;
or
(b) any mother who deserts her children under the age of 18 years for a period exceeding 1 month;

- is guilty of an offence.

Elements

Every element (ie. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific under *s1(a)*

4. The accused is a man; **and**
5. The accused failed to make adequate provision for more than 1 month for the maintenance of either his:
   - legal wife; or
   - his legitimate children under 18 years; **or**

Specific under *s1(b)*

4. The accused is the mother of a child or children under 18 years; **and**
5. The accused deserted those children for more than 1 month.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Specific under *s1(a)*

The prosecution will need to prove the man was either legally married to the woman, and/or that the children are legally his responsibility.

Exceptions to *s1(a)*

The offence described at *s1(a) Maintenance Of Family Act* does not apply to any man who is rendered financially incapable of making such provision by reason of:

- illness or injury;
- incarceration in prison; or
- any other circumstances beyond his control.

Specific under *s1(b)*

The prosecution will need to prove that the woman is the mother to children under 18 and that she deserted them.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

3 months imprisonment or a fine of VT 20,000. Where a man is convicted under *s1(a),* you may make an order for the offender to make adequate provision for his wife and children as you think fit: *s 2 Maintenance of Family.*

Failure to Control Dangerous Dog

Section

s11 Control and Registration of Dogs (Cap 64)

Description

Every person is guilty of an offence who fails to keep a dangerous dog under proper control.

Elements

Every element (ie. numbers 1-7 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was responsible for a dog; **and**
5. The accused did not properly control the dog; **and**
6. The dog attacked or attempted to attack another person; **and**
7. The accused cannot prove that the dog was wilfully provoked by the person who the dog attacked or attempted to attack, or was wilfully provoked by any other person.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Dangerous dog
Any dog which has attacked or attempted to attack any person is deemed for the purposes of *s11 Failure to Control Dangerous Dog*, to be a dangerous dog.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

It will be a defence for the accused if he or she can prove that the dog was wilfully provoked either by the complainant or some other person. 'Wilfully' is an important element of the defence and the onus is one the accused to clearly show that the dog was purposely provoked. It is not up to the prosecution to prove that the dog was not provoked.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

3 months imprisonment or a fine of VT 25,000, or both.

Additionally the District Commissioner of the district concerned may, on the conviction of the accused under this section, order the dog to be destroyed humanely by an officer or agent of the Ministry of Agriculture and Livestock.

No Public Vehicle Drivers Permit

Section

s2 Part 11, Taxis Act

Description

Every person is guilty of an offence who drives a public vehicle without a valid public vehicle driver's permit issued by the licensing officer of the region in which the vehicle is to be driven.

Elements

Every element (ie. numbers 1-5 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused drove a public vehicle which was intended to carry passengers for hire or reward; **and**
5. The accused did not have a valid public vehicle drivers permit which had been issued by the licensing officer of the region in which the accused was driving in.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Public vehicle
The accused must have either used or intend to use the vehicle to carry passengers from the public, for hire or reward.

Public vehicle driver's permit
For a public vehicle drivers license to be valid it must conform to the requirements prescribed in *Schedule 1, Taxis Act* and must have been obtained in accordance with *Part 11 Taxi's Act.*

Exceptions to this offence
This section does not apply to a person hiring a public vehicle to drive him or her self provided that person can provide a drivers license (valid in the country of origin) to the owner of the public vehicle and does not any passengers for hire or reward.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

1 year imprisonment or fine of VT 50,000, or both.

Trespass (Criminal)

Section

s144 Penal Code (Cap.135)

Description

Any person is guilty of an offence, who:

- enters another person's property with intent to commit an offence, or intimidate or annoy that person; ***or***
- having lawfully entered another person's property, unlawfully remains there with intent to intimidate, insult or annoy that person or commit an offence.

Elements

Every element (ie. numbers 1-5/6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific under *s144(a)*

4. The accused entered in or onto property; **and**
5. The property was in lawful possession of another; **and**
6. The accused entered with the intention of either committing an offence; or intimidating or annoying the other person.

or

Specific under *s144(b*)

4. The property was in lawful possession of another; **and**
5. The accused then unlawfully remained there with the intention of intimidating or annoying the other person, or committing an offence.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Under s144(a)

Property in the possession of another

This will include ownership and lease and any other kind of possession. The possession must be lawful. You can infer that a person in possession of property includes family members or others who live there, even if they are not the person named on the title or lease.

Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused'' intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person -–intention to do so is enough.

Under s144(b)

Lawful entering

The accused must have entered the property for a lawful purpose. This includes being invited onto the property by the other person, entering to deliver something or other good reason.

Unlawfully remaining

The prosecution must prove that there was no lawful reason for remaining. If the other person asks the accused to leave and he or she does not, the accused is unlawfully remaining. If the lawful entering was something like making a delivery, as soon as that as been done, the accused should leave the property, otherwise he or she is unlawfully remaining.

Intention

The prosecution must prove that the accused intended to commit an offence or intimidate, insult or annoy the other person. It is the accused'' intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence or intimidated, insulted or annoyed the other person -–intention to do so is enough

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

1 year imprisonment.

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Malicious Damage to Property

Section

s133 Penal Code (Cap. 135)

Description

Any person who wilfully and unlawfully destroys or damages any property which he or she knows belongs to another is guilty of an offence.

Elements

Every element (ie. numbers 1-7 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused destroyed the property; **and**
5. The accused knew that the property belonged to another; **and**
6. The accused intentionally destroyed the property; **and**
7. The accused did not have a lawful excuse to damage or destroy the property;

or

4. The accused damaged the property; **and**
5. The accused knew that the property belonged to another; **and**
6. The accused did intentionally damaged the property; **and**
7. The accused did not have a lawful excuse to damage or destroy the property.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Intention
Intention is an important element of this offence. Intention may be inferred from the surrounding circumstances before, during or after the offence has been committed.

Knowledge
The prosecution will need to prove that the accused had knowledge that the property belonged to another. Knowledge may be inferred from the surrounding circumstances before, during or after the offence has been committed.

Damage or destroy
The Courts in Vanuatu have made a distinction between destroy and damage. To wilfully destroy is considered a more serious offence than to wilfully damage. As a consequence your sentencing should reflect this distinction.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The prosecution will need to show the Court that the accused did not have a lawful excuse for destroying or damaging the property, in order to fulfil the required elements to the offence, before the accused can be convicted.

Maximum Sentence

1 year imprisonment or fine of VT 5000, or both: *Interpretation Act.*

Forgery

Section

s140 Penal Code (Cap. 135)

Description

Any person who commits forgery, is guilty of an offence.

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused made a false document or falsified a document; **and**
5. The accused knew the document was false; **and**
6. The accused made or falsified the document with the intent that the document would be used or acted upon as genuine;

or

4. The accused made a false document or falsified a document; **and**
5. The accused knew the document was false; **and**
6. The accused made or falsified the document with the intent that some person shall be induced by the belief that it is genuine to do an action or omit to do an action.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Making a false document
'Making a false document' includes making any material alteration to a genuine document whether by insertion, addition, obliteration, erasure, removal or otherwise: *s139(2) Penal Code*

False document
'False document' means a document of which either all or any part of it (including the time and place of its making) appears to be made by or on behalf of any person (including real, fictitious or deceased). who did not make or authorise either all or any part of it. For a more comprehensive definition see *s139(3) Penal Code*.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

10 years imprisonment

Before sentencing, please note that the Magistrates' Court generally has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

Theft

Section

s125(a) Penal Code (Cap. 135)

Description

Any person who causes loss to another by theft is guilty of an offence.

A person commits theft who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen, with the intention (at the time of such taking) to permanently to deprive the owner of the thing.

Elements

Every element (ie. numbers 1-7) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused took and carried away anything capable of being stolen; **and**
5. The accused did this without the consent of the owner; **and**
6. The accused did this fraudulently and without a claim of right made in good faith; **and**
7. The accused, at the time of taking the property, intended to permanently deprive the owner of the thing.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification
In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was **the accused** who committed the offence.

Theft Defined
Section 122 further defines the elements of the offence of theft.

"Takes"
The expression "takes" includes obtaining possession:

- by any trick;
- by intimidation;
- under a mistake on the part of the owner with knowledge on the part of the taker that possession has been so obtained; or
- by finding, where at the time of the finding the finder believes that the owner can be discovered by taking reasonable steps: *s122(3)(a): Penal Code*.

"Carries away"
The expression "carries away" includes any removal of anything from the place which it occupies, but in the case of a thing attached, only if it has been completely detached: *s122(3)(b) Penal Code*.

"Owner"
Under *s122(3)(c)*, the expression "owner" includes any part owner, or person having physical control of, or a special property or interest in, anything capable of being stolen.

Whether the owner is named or not, ownership must be proved by the prosecution as an essential element of the offence.

"Bailee / part-owner"
Such person(s) may be guilty of stealing any such thing notwithstanding that he or she has lawful possession of the thing, if, being a bailee or part-owner of the thing, he or she fraudulently converts the thing to his or her own use or the use of a person other than the owner: *s122(2) Penal Code*.

Without claim of right made in good faith
An accused may have a valid defence where he or she has an

honest belief that he or she has a legal right to take the goods in question.

Intent at the time of taking to permanently deprive
There must be a coincidence of *actus reus* and *mens rea* for this element to stand, although issues of continuing trespass against the owner's property may arise.

The requirement of permanent deprivation disqualifies situations of borrowing or temporary possession.

Fraudulently
Usually the intent to defraud will consist of an intention to steal but not always so. A fraud is complete once a false statement is made by an accused who knows the statement is false and the victim parts with his or her property on the basis of that statement: See *Denning* [1962] NSWLR 175.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish any defence to your satisfaction, on the balance of probabilities (ie. more likely than not).
For instance, the defence may raise a belief of honest claim of right, which the prosecution must rebut.

Maximum Sentence

12 years imprisonment.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s125 Penal Code,* where the relevant property is less than VT 1,000,000.

Unlawful Entry

Section

s143 Penal Code (Cap. 135)

Description

Any person who is in, or enters into, any house, building, tent, vessel or other place with intent to commit an offence is guilty of a further offence.

Elements

Every element (ie. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date and/or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence is alleged to have been committed; **and**

Specific

4. The accused entered in or onto a house, building, tent, vessel or other place; **and**
5. The accused entered in or onto a house, tent, vessel or other place with the intention of committing an offence in or on that place.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence ie. it was ***the accused*** who committed the offence.

Entering
An accused may still be guilty of this offence even if he or she entered the place with lawful authority, for example by invitation by another person or entered by means of threat or collusion with any person in or on the place. This also includes entering the place to deliver goods or some other good reason.

Intention
The prosecution must prove that the accused intended to commit an offence. It is the accused's intention that is important. You may have to infer this from the circumstances. The prosecution does not have to prove that the accused actually committed an offence - intention to do so is enough.

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a defence under legislation or common law.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum sentence

20 years imprisonment where the place was used for human habitation.

10 years imprisonment where the place was not used for human habitation.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

Misappropriation

Section

s125(b) Penal Code (Cap. 135)

Description

Any person who causes loss to another by misappropriation is guilty of an offence.

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was entrusted with property capable of being stolen; **and**
5. The property entrusted to the accused was for custody, return, accounting or any particular manner of dealing (but not a loan of money or monies for use); **and**
6. The accused destroyed, wasted, or converted the property entrusted to him or her.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the***

accused who committed the offence.

Misappropriation
A person commits misappropriation of property who destroys, wastes or converts nay property capable of being taken which has been entrusted to him for custody, return accounting or any particular manner of dealing not being a loan of money or monies for consumption: *s123 Penal Code.*

Defences
If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence.

The accused will have to establish their defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

12 years imprisonment.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s125 Penal Code*, where the relevant property is less than 1,000000 VT

Escape

Section

s84 Penal Code (Cap. 135)

Description

Any person, who escapes while in lawful custody, is guilty of an offence.

Elements

Every element (ie. numbers 1-5) must be proved by the prosecution.

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused was being held in custody; **and**
5. The accused was held in custody which was lawful; **and**
6. The accused unlawfully escaped from custody

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need not to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court. The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish any defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Sentence

2 years imprisonment.

Important Note
Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.
However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s84 Penal Code*, when the prosecutor has made an application to have the matter heard in the Magistrates' Court.

Obtaining Property by False Pretences

Section

s125 Penal Code (Cap. 135)

Description

Any person who causes loss to another by false pretences is guilty of an offence.

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused made a false statement, **and**

5. The accused knew the statement to be false or untrue at the time he or she made it; **and**
6. The accused made the false statement with the intention to defraud another, so that he or she could obtain possession , (directly or indirectly), or title to anything capable of being stolen;

or

4. The accused made a false representation (either by words, writing or conduct); **and**
5. The accused knew the statement to be false or untrue at the time he or she made it; **and**
6. The accused made the false statement with the intention to procure anything capable of being delivered to any person other than himself or herself.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

False pretences

A 'false pretence' is defined as any representation made by words, writing or conduct, of a matter of fact, either past or present, which is false and the person making it knows it is false or not true, with the intent to defraud so as to obtain (either directly or indirectly) possession of or title to anything capable of being stolen, or procures anything capable of being stolen to be delivered to any person other than himself or herself; *s124 Penal Code*.

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish any defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

12 years imprisonment.

Important Note

Generally the Magistrates' Court only has jurisdiction to hear criminal cases for which the maximum punishment **does not exceed** 2 years imprisonment unless the matter is heard before a Senior Magistrate or in the Supreme Court: *s14(2) Judicial Services and Courts Act*.

However *s146 Judicial Services and Courts Act No. 54* of *2000* as amended *No. 4* of 2003, invests the Magistrates' Court with jurisdiction to try any proceeding under *s125 Penal Code,* where the relevant property is less than VT 1,000,000.

Receiving Property Dishonestly Obtained

Section

s131 Penal Code (Cap. 135)

Description

Any person who knowingly receives anything which has been dishonestly obtained (no matter where), which if committed in Vanuatu would be an offence, is guilty of a further offence

Elements

Every element (ie. numbers 1-6 below) must be proved by the prosecution

General

1. The person named in the charge is the same person who is appearing in Court; **and**
2. There is a date or period of time when the offence charged is alleged to have taken place; **and**
3. There must be a place where the offence was alleged to have been committed; **and**

Specific

4. The accused received a thing; **and**
5. The accused knew that the thing had been dishonestly obtained; **and**
6. The thing had been dishonestly obtained by an action, that if committed in Vanuatu would be an offence, even if the offence was not performed in Vanuatu.

Commentary

Burden and standard of proof

The prosecution must prove all the elements beyond reasonable doubt. The defence does not need to prove anything, however if the defence establishes to your satisfaction that there is a reasonable doubt, then the prosecution has failed.

Identification

In Court, the prosecution should identify the person charged by clearly pointing out that person in Court.

The prosecution must provide evidence to prove that it was ***the accused*** who committed the offence.

Dishonestly

The prosecution needs to prove that the accused knew that the thing he or she had received was obtained dishonestly. It is the accused'' knowledge that is important. You may have to infer this from the circumstances.

Offence

The prosecution will also need to prove that the thing was dishonestly obtained. It does not matter if the thing was dishonestly obtained somewhere other than Vanuatu. No matter where the offence occurred, if that same action had been performed in Vanuatu it would be considered an offence.

Obtained

The prosecution will also need to prove that the thing was dishonestly obtained

Defences

If the prosecution has proved the elements of the offence, beyond reasonable doubt, the accused may still have a legal defence. The accused will have to establish any defence to your satisfaction, on the balance of probabilities (ie. more likely than not).

Maximum Sentence

1 year imprisonment or a fine of VT 5000 or both: *s36(3) Interpretation Act.*

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CIVIL:

EVIDENCE

1 Introduction

Evidence refers to the information used to prove or disprove the facts in issue in a hearing.

Generally, most of the rules of evidence that apply to criminal cases apply to civil cases as well. The difference between criminal and civil cases is the burden of proof. In civil cases, the evidential burden is on the claimant to prove the case and the evidence on the balance of probabilities. This means you must find it is more probable than not that a contested fact exists.

This chapter deals with issues relating to evidence in civil hearings. For more information on the rules of evidence, see Chapter 7 Criminal: Evidence.

2 Summoning Witnesses

In most civil cases, witnesses will attend Court voluntarily. However, you may order that a summons be issued requiring a person to attend Court to give evidence or to produce documents: *Rule 11.15(1) Civil Procedure Rules*.

2.1 Making the Summons

You may make the order at a conference:

- at a party's request; or
- on your own initiative: *Rule 11.15(3) Civil Procedure Rules*.

The summons must:

- give the full name of the witness;
- clearly identify the documents to be produced;
- state the time and place the witness is to attend Court; and
- be in Form 20: *Rule 11.15(4) Civil Procedure Rules*.

2.2 Service

The summons must be served personally on the person, unless you order otherwise: *Rule 11.16 Civil Procedure Rules*.

At the time of service, the person must be given enough money to meet the reasonable costs of travelling to comply with the order: *Rule 11.17(1) Civil Procedure Rules*.

If the summons is not served personally, the person must be reimbursed the reasonable costs of travelling when he or she attends Court in answer to the summons: *Rule 11.17(2) Civil Procedure Rules*.

A person not summoned to attend must also be reimbursed the reasonable costs of travelling when he or she attends Court as if he or she had been summoned: *Rule 11.17(3) Civil Procedure Rules*.

2.3 Summons to Produce Documents

A person who is summoned to produce documents may do so by giving the documents to the Court office at the place stated in the summons: *Rule 11.18(1) Civil Procedure Rules*.

For the purposes of the *Rules*, "document" includes any object: *Rule 11.1 Civil Procedure Rules*.

The Court officer must then give the person a receipt for the documents: *Rule 11.18(2) Civil Procedure Rules*.

If the person summoned to produce documents is not a party to the proceeding, he or she is entitled to be paid or reimbursed the reasonable costs of producing the documents: *Rule 11.18(3) Civil Procedure Rules*.

2.4 Failure to Comply with Summons

A person who fails to attend Court when summoned, or fails to give evidence, or produce documents without a lawful excuse may be found in contempt of Court: *Rule 11.19 Civil Procedure Rules*.

3 Oral Evidence

Normally, evidence in the Magistrate's Court is given orally: *Rule 11.2(1) Civil Procedure Rules*.

However, you may order that evidence in a particular case, or particular evidence be given by sworn statement: *Rule 11.2(2) Civil Procedure Rules.*

3.1 Evidence on Oath

Oral evidence can be given under oath or affirmation: *Evidence Act 1893 (UK), Civil Evidence Act 1968 (UK).*

3.2 Giving Evidence Before Trial

A party may apply to have a witness give evidence before trial: *Rule 11.9(1) Civil Procedure Rules*.

You may order the witness give evidence before trial, if you are satisfied that:

- the evidence the witness will give is relevant to the person's case;
- the witness' evidence is admissible; and
- the witness will be unable to give evidence at trial because of health or because he or she is leaving Vanuatu either permanently or for an extended period of time: *Rule 11.9(2) Civil Procedure Rules*.

Giving Evidence Before Trial

The witness must give his or her evidence to the Court, in the presence of lawyers for each party, if any; and may be cross-examined and re-examined: *Rule 11.9(3) Civil Procedure Rules*.

Any evidence given before trial has the same value as evidence given during trial: *Rule 11.9(4) Civil Procedure Rules*.

4 Sworn Statements

4.1 Content of Sworn Statement

A sworn statement may only contain:

- material required to prove a party's case, and references to documents in support of that material; and
- material required to rebut the other party's case and references to documents in support of that material: *Rule 11.4(1) Civil Procedure Rules*.

A sworn statement must not contain material or refer to documents that would not be admitted in evidence: *Rule 11.4(2) Civil Procedure Rules*.

4.2 Attachments and Exhibits

Documents referred to in a sworn statement must be attached to the statement and identified by the initials of the person making the statement and numbered in sequence: *Rule 11.5(2) Civil Procedure Rules*.

After disclosure, a document may only be attached to a sworn statement if the document has been disclosed: *Rule 11.5(1) Civil Procedure Rules*.

A sworn statement may refer to an exhibit. It must state where the exhibit may be inspected: *Rules 11.4(3) ,(4) Civil Procedure Rules*.

The party making the sworn statement must ensure the exhibit is available at reasonable times for inspection by the other parties: *Rule 11.5(5) Civil Procedure Rules*.

If a person makes more than one sworn statement, the numbering of attachments and exhibits must follow from the previous statement: *Rule 11.5(6) Civil Procedure Rules*.

4.3 Service of Sworn Statement

A sworn statement must be filed and served on all parties:

- within the time you fix, if you fix a time;
- a minimum of 21 days before trial for a sworn statement being used at trial; or
- a minimum of 3 days before the application is to be heard for a sworn statement being used for an application: *Rule 11.6 Civil Procedure Rules*.

4.4 Using Sworn Statement in Proceeding

A sworn statement filed and served is evidence in the proceeding unless you rule it inadmissible: *Rule 11.7(1) Civil Procedure Rules*.

The sworn statement need not be read during trial, unless you order otherwise: *Rule 11.7(2) Civil Procedure Rules*.

A witness making a sworn statement may be cross-examined and re-examined on the contents of the statement: *Rule 11.7(3) Civil Procedure Rules*.

A party wishing to cross-examine a witness on his or her sworn statement must give the other party notice, a minimum of 14 days before the trial or within another period you order: *Rule 11.7(4) Civil Procedure Rules*.

5 Taking Evidence in Special Ways

5.1 Taking Evidence of Children

If a child must give evidence, you must take whatever steps are necessary to enable the child to give evidence without intimidation, restraint or influence: *Rule 11.10(1) Civil Procedure Rules*.

You may:

- allow the child to give evidence while screened from the rest of the Court, and just facing you;
- choose to hear the evidence somewhere other than the Court room;
- allow only the parties' lawyers to be present while the child gives evidence;
- appoint a person to sit with the child while he or she gives evidence; and
- do anything else that may assist the child to give evidence: *Rule 11.10(2) Civil Procedure Rules*.

5.2 Taking Evidence of Vulnerable Person

If you are satisfied that a witness other than a child may be unable to give evidence without intimidation, restraint or influence you may take any steps allowed as for taking the evidence of children for the witness: *Rule 11.11 Civil Procedure Rules*.

See paragraph 5.1, Taking Evidence of Children, above.

5.3 Taking Evidence by Link

If you are satisfied that it is impracticable for a witness inside or outside Vanuatu to come to Court to give oral evidence or be cross-examined, you may allow the witness to give evidence by telephone, video or other form of communication: *Rules 11.8(1),(2) Civil Procedure Rules*. This is known as taking evidence by link.

The Application to Give Evidence by Link

The application to give evidence by link must:

- be in writing; and
- be accompanied by a sworn statement setting out:
    6. the name and address of the witness;
    7. the place where he or she will be giving evidence;
    8. the matters on which the witness will be giving evidence;

9. why the witness cannot or should not come to Court and any other reason for evidence by link;
10. the type of link to be used and the facility to be used; and
11. any other matter helpful in deciding whether or not you should grant the application: *Rule 11.8(3) Civil Procedure Rules*.

In deciding whether to grant the application, you must take account of:

- the public interest in the proper conduct of the trial and in establishing truth by clear and open means;
- the question of fairness to the parties and balancing their interests;
- any compelling reason why the witness should come to Court;
- the importance of the evidence to the proceeding;
- whether or not the reason for seeking the application is genuine and reasonable with regard to the inconvenience of the witness coming to Court, the cost and any other relevant matter;
- whether the link will be reliable and of good quality;
- whether or not an essential element in the proceeding can be decided before the evidence is given;
- whether the kind of link will make examination of the witness difficult;
- if given by telephone, how the witness will be identified visually; and
- any other relevant matter: *Rule 11.8(4) Civil Procedure Rules*.

Directions

Evidence taken by link is taken to be evidence given in Court during the proceeding: *Rule 11.8(12) Civil Procedure Rules*.

You may give directions about giving evidence by link, including:

- which party must pay and arrange for the link;
- when and where the evidence will be given by the witness;
- the stage of the hearing when the evidence will be given: *Rule 11.8(11) Civil Procedure Rules*.

You may end the giving of evidence by link if you consider the quality of the link unacceptable or to continue to take the evidence would cause unfairness to a party: *Rule 11.8(10) Civil Procedure Rules*.

Evidence by Telephone Link

If the link is by telephone, if practicable a fax machine should be available at both ends of the link: *Rule 11.8(5) Civil Procedure Rules.*

When the evidence is given, you must be satisfied of the identity of the witness and that he or she is giving evidence freely: *Rule 11.8(5) Civil Procedure Rules.*

For this purpose, you may take into account a certificate from a Magistrate, Police officer or Police chief (Form 19) who was present when the evidence was given that:

- the person when the witness gave the evidence;
- the person knows the witness; and
- the witness seemed to give the evidence freely: *Rules 11.8(6),(8) Civil Procedure Rules*.

Evidence by Video Link

Evidence given by a video link should show:

- the witness sitting at a plain table or desk, with only the required documents or exhibits;
- a reasonable part of the room but still allow the Court to see the witness clearly; and
- no other person is in the room with the witness except a technical person to run the link: *Rule 11.8(9) Civil Procedure Rules.*

5.4 Taking Evidence in Vanuatu for Foreign Proceeding

If the Court receives a letter of request from a foreign Court asking that evidence be taken in Vanuatu for use in the foreign country, the evidence must be taken in accordance with *Rule 11.20 Civil Procedure Rules*: *Rule 11.20(2) Civil Procedure Rules.*

The letter of request from the foreign Court must be accompanied by a sworn statement by an officer of that Court, verifying the letter of request: *Rule 11.20(2) Civil Procedure Rules*.

You must give effect to the letter by:

- issuing a summons to the person named in the letter to appear and give evidence or produce documents;
- hearing the witness' evidence orally;
- making a written record of the evidence; and
- sending the record to the foreign Court: *Rule 11.20(3) Civil Procedure Rules.*

You must take the evidence as if it were a proceeding in the Supreme Court: *Rule 11.20(5) Civil Procedure Rules*. You must sign and seal the written record: *Rule 11.20(4) Civil Procedure Rules*.

5.5 Taking Evidence Abroad for Proceeding in Vanuatu

A party to a proceeding in Vanuatu may apply to have evidence taken in a foreign Court: *Rule 11.21(1) Civil Procedure Rules*.

The application must be accompanied by a sworn statement that:

- the person's evidence will be relevant and admissible; and
- the evidence cannot be obtained from a person in Vanuatu: *Rule 11.21(2) Civil Procedure Rules*.

You may issue a letter of request asking the Court in the foreign country to take evidence, if you are satisfied that:

- the person's evidence is relevant and admissible;
- the evidence cannot be obtained from a person in Vanuatu; and
- there is an arrangement between the country and Vanuatu for the taking of evidence for use in civil proceedings in Vanuatu: *Rule 11.21(3) Civil Procedure Rules*.

6 Expert Evidence

6.1 Expert Called by Party

If a party intends to call a witness to give evidence as an expert, the party must:

- tell every other party; and
- give them each a copy of the witness' report a minimum of 21 days before trial, or if it is a response to an existing report within 14 days or some other date you approve: *Rules 11.12(1),(2) Civil Procedure Rules*.

A party may only call one expert witness in a field unless you order otherwise: *Rule 11.12(4) Civil Procedure Rules*.

6.2 Expert Appointed by Court

If a question arises that requires an expert to decide it, you may:

- direct the expert to inquire into the question and report back to the Court within a specified time; and
- give instructions to the expert about the terms of reference and the report: *Rule 11.13(2) Civil Procedure Rules*.

The costs of such an expert are payable **equally** by the parties, unless you direct otherwise: *Rule 11.13(4) Civil Procedure Rules*.

If you appoint an expert, a party may not call another expert in that field unless you order otherwise: *Rule 11.13(4) Civil Procedure Rules*.

Remember that the expert is only there to assist the Court and as with any other witness, you may choose to accept or reject the evidence given. It is still up to you to make all decisions on fact and law, using the expert's help as to special scientific or technical matters.

6.3 Medical Evidence

If there is a claim for damages arising from personal injury, the defendant may ask that the claimant be examined by a medical practitioner chosen by the defendant: *Rule 11.14(1) Civil Procedure Rules*.

If the claimant, without reasonable excuse, does not attend and allow such examination to take place, you may:

- order the proceedings to be stayed until the claimant is examined; or
- take the circumstances of the claimant's refusal into account when considering his or her evidence: *Rule 11.14(2) Civil Procedure Rules*.

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CIVIL:

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 and Court staff.

2 Applying the *Civil Procedure Rules*

The *Civil Procedure Rules* (the *Rules)* apply in all civil proceedings, unless the proceeding is one for which other rules under an enactment apply: *Rule 1.6 Civil Procedure Rules*.

If a situation arises which is not covered by the *Rules*, you may give whatever directions are necessary to determine the matter according to substantial justice: *Rule 1.7 Civil Procedure Rules*.

See *Government of the Republic of Vanuatu v Carlot* [2003] VUCA 23; Civil Appeal Case No 19 of 2003.

2.1 Overriding Objective

The overriding objective of the Civil Procedure Rules is to enable all Courts to deal with cases justly: *Rule 1.2(1) Civil Procedure Rules*.

This includes, as far as practicable:

- ensuring all parties are on an equal footing;
- saving expense;
- dealing with the case in ways that are proportionate to the importance, complexity, amount of money and financial position of each party;

- ensuring the case is dealt with speedily and fairly; and
- allotting an appropriate share of Court resources, while taking into account the needs of other cases: *Rule 1.2(2) Civil Procedure Rules*.

Whenever you are dealing with any matters of civil procedure or interpreting the *Civil Procedure Rules*, you must keep the overriding objective in mind: *Rule 1.3 Civil Procedure Rules*.

Parties to a proceeding must help the Court to act in accordance with the overriding objective: *Rule 1.5 Civil Procedure Rules*.

You may even allow a party to re-open a proceeding after trial but before judgment if you are satisfied that it is necessary to ensure substantial justice is done: *Rule 12.10 Civil Procedure Rules*.

2.2 Duty to Manage Cases

The *Civil Procedure Rules* demand that you actively manage cases: *Rule 1.4(1) Civil Procedure Rules*.

Actively managing cases includes:

- encouraging parties to cooperate with each other during the proceeding;
- identifying issues in dispute at an early stage;
- deciding which issues need to be resolved through trial and resolving all other issues without a hearing;
- deciding the order in which issues are to be resolved;
- encouraging alternative dispute resolution when appropriate and facilitating its use;
- helping parties to settle the whole or part of the case;
- fixing a timetable for the case or controlling its progress;
- considering whether the benefits of taking a step in the proceeding justify the costs;
- dealing with as many aspects of the case as you can at the one time;
- dealing with the case without the parties attendance when appropriate;
- taking advantage of technology available to you; and
- giving directions to ensure the trial goes ahead quickly and efficiently: *Rule 1.4(2) Civil Procedure Rules*.

2.3 Failure to Comply with *Civil Procedure Rules*

While you should always strive to comply with the *Civil Procedure Rules* and encourage parties, lawyers and Court staff to do the same, a failure to comply with the *Rules* is treated as an irregularity and does not necessarily make the proceeding, document, step taken or order made a nullity: *Rule 18.10(1) Civil Procedure Rules*.

However, if there has been a failure to comply with the *Rules*, you may:

- set aside all or part of the proceedings;
- set aside a step taken;
- declare a document or step taken to be ineffectual;
- declare a document or step taken to be effectual;
- make another order that could be made under the Rules;
- make an order dealing with the proceeding generally that you consider appropriate: *Rule 18.10(2) Civil Procedure Rules*.

2.4 Extending and Shortening Time for Doing an Act

You should always try to ensure that steps in a proceeding faithfully comply with the times set out in the *Rules*. However, on your own initiative or on the application of a party you may extend or shorten any time set out in the *Rules* for doing an act: *Rule 18.1(1) Civil Procedure Rules*.

If a party is applying for the extension or shortening of the time, the application may be made either before or after the time for doing the act has ended: *Rule 18.1(2) Civil Procedure Rules*.

3 Dealing with Parties and Claims

One of your roles in managing civil proceedings is to ensure that all parties who should be represented are represented in the proceeding. For parties who are under a legal incapacity, who die, or who become bankrupt during a proceeding, you will have to use the Court's power to ensure that, if possible, the proceeding continues.

Another part of your role in managing civil proceedings is to ensure that there are a minimum of proceedings by ensuring all proper parties and claims are included in one proceeding and that anyone unnecessary is excluded.

3.1 Persons Under a Legal Incapacity

A child or person with impaired capacity is under a legal incapacity and cannot start or defend a proceeding alone: *Rule 3.8(1) Civil Procedure Rules.*

A person with impaired capacity is any person who is incapable of making the decisions required to be made by a party to conduct the proceeding: *Rule 20.1 Civil Procedure Rules.*

A child is any person under 18 years of age: *Rule 20.1 Civil Procedure Rules.*

A person under a legal incapacity can only start or defend a proceeding through a litigation guardian: *Rule 3.8(3) Civil Procedure Rules.*

You may appoint a litigation guardian for this purpose: *Rule 3.8(2) Civil Procedure Rules.*

Once appointed, anything required of the person under a legal incapacity may be done by the litigation guardian: *Rule 3.8(4) Civil Procedure Rules.*

3.2 Death of a Party

Defendant Dies Before Proceeding Starts

If, at the start of the proceeding, the defendant is dead and the cause of action continues after the death, the proceeding must be brought against the personal representative: *Rule 3.9(2) Civil Procedure Rules.*

If the claimant knows the defendant is dead, he or she must name the estate of the deceased person as the defendant: *Rule 3.9(2) Civil Procedure Rules.*

After a personal representative is appointed, all documents must name the personal representative as the defendant: *Rule 3.9(2)(e) Civil Procedure Rules.*

Claimant Dies During Proceeding

If the claimant dies during a proceeding and the cause of action continues after death, then the proceeding may be continued by the deceased's personal representative: *Rule 3.9(1) Civil Procedure Rules.*

You may give whatever directions are necessary to allow the personal representative to continue the proceeding: *Rule 3.9(1) Civil Procedure Rules.*

3.3 Bankruptcy, Death or Legal Incapacitation of Party During Proceedings

If any party dies, becomes bankrupt or becomes legally incapacitated during a proceeding, a person may only take another step in the proceeding, for or against the party, with your permission and in accordance with your directions: *Rule 3.10(1) Civil Procedure Rules*.

If a party becomes bankrupt or dies, you may:

- order the party's trustee or personal representative or someone else to be substituted as a party; and
- make other orders about the proceeding: *Rule 3.10(2) Civil Procedure Rules*.

You may also require notice to be given to anyone with an interest in the deceased party's estate before making such an order: *Rule 3.10(4) Civil Procedure Rules.*

If you appoint someone other than a personal representative to be substituted for a deceased party and later another person is appointed as a personal representative, the first person must give all documents in the proceeding to the personal representative as soon as practicable: *Rule 3.10(4) Civil Procedure Rules*.

3.4 Representative Party

One or more persons with the same interest in the subject matter may start or defend a proceeding, representing **all** persons who have the same interest and who could have been parties: *Rule 3.12(1) Civil Procedure Rules*.

At any stage of the proceeding, you may appoint one or more parties or another person to represent the persons having the same interest. If you appoint a person other than a party to the proceedings to represent all persons, you must also order that person to become a party: *Rules 3.12(2),(3) Civil Procedure Rules*.

Any order made against a representative party may only be enforced against a person not named as a party with your leave: *Rule 3.12(4) Civil Procedure Rules*.

Any application for leave to enforce such an order must be served on the person as if the application were a claim: *Rule 3.12(5) Civil Procedure Rules*.

3.5 Adding and Removing Parties

When inquiring into the case, you may order that a person become a party to a proceeding if the person's presence is necessary to make a decision fairly and effectively in the proceeding: *Rule 3.2(1) Civil Procedure Rules*. This can be done upon application or on your own motion.

Similarly, you may order that a party be removed from the proceedings if:

- the person's presence is unnecessary to make a decision fairly and effectively in the proceeding; or
- for any other reason you consider that the person should not be a party to the proceeding: *Rule 3.2(2) Civil Procedure Rules*.

Either a party to the proceeding or a person affected by the proceeding may apply to **add** a party: *Rules 3.2(3),(4) Civil Procedure Rules*.

Only a party to the proceeding may apply to **remove** a party: *Rule 3.2(3)(b) Civil Procedure Rules*.

An application for adding or removing a party must be accompanied by a sworn statement setting out the reasons why the person should be added or removed as a party: *Rule 3.2(5) Civil Procedure Rules*.

When making an order regarding adding or removing parties, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules*.

Third Party

A defendant may file and serve on any person not a party to the proceedings a notice (a third party notice) to state a claim for a contribution, indemnity or other remedy: *Rule 3.7(1) Civil Procedure Rules*.

The third party notice must:

- be in Form 4,
- state that the defendant claims the contribution, indemnity or other remedy; and
- that the person is party to the proceeding from the date of service: *Rules 3.7(1),(2) Civil Procedure Rules*.

Once served, the person becomes a party to the proceeding with all rights and obligations as if the defendant had started a proceeding against the person: *Rule 3.7(4) Civil Procedure Rules*.

If the third party notice is filed after the defence is filed, the defendant must obtain leave of the Court: *Rule 3.7(3) Civil Procedure Rules*.

Amending Documents

After an order is made changing the parties to a proceeding, the applicant for the order must:

- file an amended claim showing the new party and the date of the order;
- serve the amended claim on the new party; and

- if the order added or changed a defendant, serve the amended claim on the continuing party: *Rule 3.6(1) Civil Procedure Rules.*

The amended claim must be filed and served:

- within the time fixed by the order; or
- within 14 days of the order, if no time was fixed: *Rule 3.6(2) Civil Procedure Rules.*

If the order added or substituted a defendant, unless you order otherwise, everything done in the proceeding before the order was made has the same effect for the new defendant as for the old defendant: *Rule3.6(3) Civil Procedure Rules.*

3.6 Joining and Separating Claims

You may order that several claims against one person be included in one proceeding if:

- a common question of law or fact is involved in all the claims;
- the claims arise out of the same transaction or event; or
- for any other reason you consider the claims should be included in the same proceeding: *Rule 3.3(1) Civil Procedure Rules.*

You may order that several claims against one person be separated into different proceedings if:

- the claims may be more effectively dealt with separately; or
- for any other reason you consider that the claims should be heard as separate proceedings: *Rule 3.3(2) Civil Procedure Rules.*

A party may apply for the joining or separating of claims, or you may do this on your own motion: *Rule 3.3(3) Civil Procedure Rules.*

When making an order regarding joining or separating claims, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules*.

3.7 Consolidating Proceedings

You may order several proceedings be heard together if:

- the same question is involved in each proceeding;
- the decision in one proceeding will affect the other; or
- for any other reason you consider the proceedings should be heard together: *Rule 3.4 Civil Procedure Rules.*

When making an order regarding consolidating proceedings, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules*.

4 Adjournments

At or before a trial, you may adjourn the trial: *Rule 12.3 Civil Procedure Rules*.

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:

- a party 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.

5 Contempt of Court and Other Misbehaviour

Occasionally, you may decide that a witness, party or member of the public is in contempt of Court. You will need to deal with this person by the following processes.

5.1 Contempt of Court by Failing to Appear

A person who fails to attend Court when summoned, fails to give evidence, or produce documents without a lawful excuse may be found in contempt of Court: *Rule 11.19 Civil Procedure Rules*.

5.1 Contempt in the Hearing of Court

If it appears that a person is guilty of contempt in your hearing, you may:

- direct the person be brought before the Court; or
- issue a warrant for the person to be arrested and brought before the Court: *Rule 18.13(1) Civil Procedure Rules*.

When the person is brought before you for contempt of Court, you must:

- explain to the person how he or she committed the contempt;
- ask the person to give reasons why he or she should not be punished for the contempt;
- decide the matter in any way you think appropriate; and
- order the person punished or discharged: *Rule 18.13(2) Civil Procedure Rules*.

If you cannot deal with the matter immediately, you may order the person:

- to be kept in custody;
- to be released; or
- to be released on conditions: *Rule 18.13(3) Civil Procedure Rules*.

5.3 Contempt By Not Complying With an Order

During Proceeding

If a person fails to comply with an order of the Court or an undertaken given to the Court **during** a proceeding:

- you may initiate proceedings for contempt; or
- another party may apply for an order that the first person be punished for contempt: *Rule 18.14(2) Civil Procedure Rules*.

After Proceeding

If a person fails to comply with an order of the Court or an undertaking given to the Court **after** a proceeding, another person may apply to reopen the proceeding and ask that the first person be punished for contempt: *Rule 18.14(3) Civil Procedure Rules*.

Application

If a person applies for an order that the first person be punished for contempt, the application:

- must have an accompanying sworn statement giving details of the contempt; and
- must be served personally on the first person: *Rule 18.14(4) Civil Procedure Rules*.

After hearing the matter, you may do any or all of the following:

- fine the person;
- order the person imprisoned for a period you decide;
- release the person, with or without conditions; or
- order that a body corporate's property be seized: *Rule 18.14(5) Civil Procedure Rules*.

5.4 Failing to Comply with Order to Advance Proceedings

If a party fails to comply with an order dealing with progress or steps to be taken in a proceeding, the party entitled to the benefit of the order may require the non-complying party to show cause why an order should not be made against him or her: *Rules 18.11(1),(2) Civil Procedure Rules*.

The application must:

- set out the details of the failure to comply;
- be accompanied by a sworn statement in support of the application; and
- be filed and served, with the sworn statement, on the non-complying party a minimum of 3 business days before the date of hearing: *Rule 18.11(3) Civil Procedure Rules*.

Hearing

At the hearing, you may:

- give judgment against the non-complying party;
- extend the time for complying with the order;
- give directions; or
- make another order: *Rule 18.11(4) Civil Procedure Rules*.

Regardless of which option you choose to deal with the non-complying party, you may still use your power to punish for contempt of Court: *Rule 18.11(5) Civil Procedure Rules*.

You should not make an order to strike out the proceeding without providing the parties an opportunity to address all fundamental issues. See *Government of the Republic of Vanuatu v Carlot* [2003] VUCA 23; Civil Appeal Case No 19 of 2003.

5.5 Vexatious Litigant

If you believe that a person is a vexatious litigant, refer the question to the Supreme Court: *Rule 18.12(2) Civil Procedure Rules*.

If the Supreme Court declares the person to be a vexatious litigant, the person may not start a proceeding without leave of the Court: *Rule 18.12(7) Civil Procedure Rules*.

5.6 *Penal Code* Offences

In addition to the powers from the *Civil Procedure Rules* to deal with misbehaviour, there are a number of 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; or
- *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.

6 Miscellaneous

6.1 Lawyer Beginning or Ceasing to Act

If a lawyer begins to act for a party **during** a proceeding or ceases to act for a party, he or she must:

- file a notice (Form 35) as soon as practicable; and
- serve a notice on each other party to the proceeding: *Rule 18.8(1) Civil Procedure Rules*.

The notice becomes effective after the last service: *Rule 18.8(2) Civil Procedure Rules*.

Despite filing the notice, you may still make an order for costs against the lawyer personally under the *Civil Procedure Rules*: *Rule 18.8(3) Civil Procedure Rules*.

20:

CIVIL:

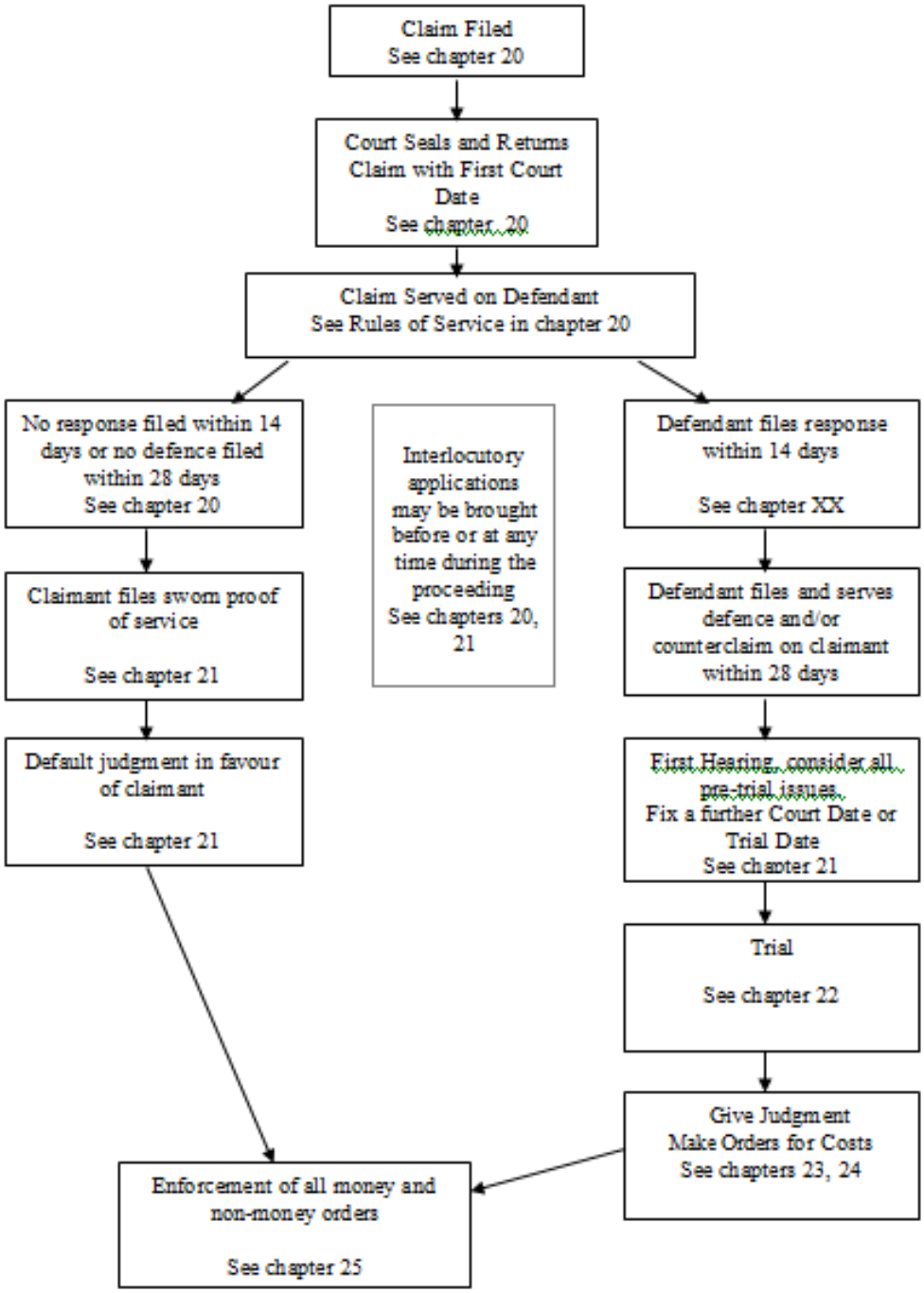
PRE-TRIAL MATTERS

1 The Civil Process

This chapter explains how a case comes before the Magistrate's Court and the steps taken to prepare a case to come to trial.

The diagram over the page shows the general process of a civil case from starting a proceeding to the enforcement of judgments and orders. Each step is explained in detail over the next three chapters.

A Civil Proceeding at a Glance



2 Matters Relating to All Civil Proceedings

2.1 Overriding Objective of *Civil Procedure Rules*

The overriding objective of the Civil Procedure Rules is to deal with cases justly: *Rule 1.2(1) Civil Procedure Rules*.

This includes, as far as practicable:

- ensuring all parties are on an equal footing;
- saving expense;
- dealing with the case in ways that are proportionate to the importance, complexity, amount of money and financial position of each party;
- ensuring the case is dealt with speedily and fairly; and
- allotting an appropriate share of Court resources, while taking into account the needs of other cases: *Rule 1.2(2) Civil Procedure Rules*.

Whenever you are dealing with any matters of civil procedure or interpreting the *Civil Procedure Rules*, you must keep the overriding objective in mind: *Rule 1.3 Civil Procedure Rules*.

2.2 Parties

The four categories of person who can be a party to a civil proceeding are:

- claimant;
- defendant;
- a person who becomes a party; or
- a person ordered by the Court to take part in the proceeding: *Rule 3.1(1) Civil Procedure Rules*.

There may be more than one claimant and defendant in a proceeding: *Rule 3.1(2) Criminal Procedure Rules*.

2.3 Statements of the Case

The most important part of all civil proceedings is the statement of the case. It forms part of all claims, defences or replies, so it is necessary to keep the requirements of a statement of the case in mind throughout the conduct of a proceeding.

The purpose of a statement of the case is to:

- set out the facts of what happened, as each party sees them;
- show the matters on which the parties agree; and
- show the areas where the parties disagree (the "issues between the parties"): *Rule 4.1(2) Civil Procedure Rules*.

Every statement of the case must:

- be as brief as possible;
- set out all the relevant facts on which the party relies but not the evidence of the facts;
- identify any statute or principle of law on which the party relies but not contain the legal arguments; and
- if the party is relying on custom law, state the custom law: *Rule 4.2(1) Civil Procedure Rules*.

Additionally, if the statement of the case is either a claim or counterclaim it must set out the remedies or orders sought: *Rule 4.2(2) Civil Procedure Rules*.

2.4 Service of Documents

For all documents required to be served, the party who files the document is responsible for ensuring the document is served: *Rule 5.1(1) Civil Procedure Rules*.

The party responsible for service may apply to the Court for an order that the document be served by an enforcement officer or other person. If you are satisfied that the circumstances of the case require service by a person other than the party himself or herself, you may order another person to serve it: *Rules 5.1(2),(3) Civil Procedure Rules*.

Service by an enforcement officer or other person will usually be advisable when service by the party would be highly inconvenient, unsafe, or otherwise impractical. For example, for domestic violence non-molestation orders, it would be highly inadvisable for the victim of the violence to personally serve the documents, as it may put her into danger.

3 How a Case Comes to the Magistrate's Courts

3.1 Interlocutory Orders Prior to Beginning of Proceedings

Even prior to a claim being brought, a potential litigant may bring an application for an interlocutory order.

This can happen:

- the applicant has a serious question to be tried; and
- the applicant would be seriously disadvantaged if the order is not granted: *Rule 7.5(1) Civil Procedure Rules*.

An application for an interlocutory order prior to proceedings starting must:

- set out the substance of the applicant's claim; and
- give a brief statement of the evidence on which the applicant will rely; and
- set out the reasons why the applicant would be disadvantaged if the order is not made; and
- have a sworn statement in support of the application: *Rule 7.5(2) Civil Procedure Rules*.

You may grant an order if you are satisfied that the applicant:

- has a serious question, and under the evidence provided, it is likely to succeed; and
- would be seriously disadvantaged if the order is not made: *Rule 7.5(3) Civil Procedure Rules*.

When granting the order, you may order that the applicant file a claim to start the proceeding by the time stated in the order: *Rule 7.5(4) Civil Procedure Rules*.

If the interlocutory order sought is one outside your jurisdiction (such as an Order to Protect Property under *Rule 7.8* or *Order to Seize Documents* under *Rule 7.9*), direct the applicant to apply to the Supreme Court for the order.

3.2 The Claim

All civil proceedings in the Magistrate's Court start by a claimant filing a claim in the district where:

- the claimant or defendant lives;
- the actions that give rise to the proceeding happened; or
- the property which is the subject of the claim is located: *Rule 2.2, 2.4 Civil Procedure Rules*.

Content of the Claim

The claim must:

- be in Form 6;
- contain a statement of the case;

- contain the claimant's address for service;
- have with it a Response Form; and
- show the facts that give the Court jurisdiction to decide the claim: *Rule 4.3(1),(2) Civil Procedure Rules*.

If damages are claimed, the claim must also state the nature and amount of the damages, including special and exemplary damages: *Rule 4.10(1) Civil Procedure Rules*.

If general damages are claimed, the claim must state:

- the nature of the loss or damage suffered;
- the exact circumstances in which the loss or damage was suffered;
- the basis on which the amount claimed has been assessed or estimated; and
- any other matter about the assessment of damages that might take the other party by surprise: *Rule 4.10(2),(3) Civil Procedure Rules*.

Once the claim is filed, the Court must write on the form the date of the first hearing: *Rule 4.3(3) Civil Procedure Rules*.

Once the date has been set, three copies of the claim are made; for the Court, the claimant and the defendant.

Service

The claimant is responsible for serving the defendant with his or her copy of the claim: *Rule 5.1(1) Civil Procedure Rules*.

Normally, the defendant must be served with the claim personally. This is done by:

- giving a copy of the claim to the defendant; or
- if the individual does not accept the document, by putting it down in his or her presence and telling the person what it is: *Rule 5.8(1) Civil Procedure Rules*.

If personal service cannot be accomplished, the claimant may apply to the Court for an order of substituted service of the claim: *Rule 5.9(1) Civil Procedure Rules*.

You may order that substituted service be made by:

- serving the claim on a chief or church minister who lives in the area where it is believed the defendant is living;
- putting a notice in a newspaper circulating in the area where the defendant lives;

- arranging for an announcement to be broadcast on the local radio; or
- any other way that you think will ensure the defendant will be aware of the claim and its contents: *Rule 5.9(2) Civil Procedure Rules*.

If substituted service is to be effected by newspaper or radio broadcast, it must:

- be addressed to the defendant;
- give the defendant's name and last known address and the claimant's name and address for service;
- say where a copy of the claim can be picked up; and
- (if appearance is required) say the date, time and place of the Court where the person is to go: *Rule 5.9(3) Civil Procedure Rules*.

A number of rules govern the service of particular parties. For service:

- of children and other persons under a legal incapacity, see *Rule 5.10*;
- relating to the estate of a deceased person, see *Rule 5.11*;
- on a partnership, see *Rule 5.12*.

3.3 Defendant's Response / Defence / Counterclaim

Once served with the claim, the defendant has several options. He or she may:

- file a response;
- file a defence; and/or
- file a counterclaim.

Response

Upon service of the claim, the defendant has 14 days to file a response: *Rule 4.13(1)(a) Civil Procedure Rules*.

The response allows the defendant to:

- admit the claim;
- dispute all of the claim;
- dispute part of the claim;
- make a counterclaim; or
- object to the place of the proceeding.

A response must:

- be in Form 7;
- set out the defendant's address of service;
- be completed and signed: *Rule 4.4(2) Civil Procedure Rules*.

The defendant need not file a response if he or she files and serves a defence within 14 days of service of the claim: *Rule 4.4(3) Civil Procedure Rules*.

Defence

If the defendant intends to contest the claim, he or she must file and serve a defence within 14 days of being served if no response has been filed or within 28 days of being served if a response has been filed: *Rule 4.13(1),(2) Civil Procedure Rules*.

The defence:

- must be in Form 8:
- must contain a statement of the case;
- must not deny the claim generally, but must deal with each fact in the claim by denying the fact and stating what the defendant alleges happened.

By not denying a particular fact, the defendant is taken to agree with that fact.

If the defendant does not know about a particular fact and cannot reasonably find out about it, it must be stated in the defence: *Rule 4.5 Civil Procedure Rules*.

In a defence, the statement of the case must **specifically** mention matters that:

- make the claim not maintainable;
- show a transaction is void or voidable;
- may take the claimant by surprise if not mentioned; or
- raise a question of fact not arising out of the claim: *Rule 4.7 Civil Procedure Rules*.

Counterclaim

When served with a claim, the defendant also has the option of starting a counterclaim against the claimant, rather than bringing the matter in a separate proceeding.

If a defendant wants to make a counterclaim against the defendant, he or she must include it in the details of the defence: *Rule 4.8(1) Civil Procedure Rules*.

The counterclaim must:

- contain a statement of the case;
- be shown within the defence to clearly to be a counterclaim; and
- set out the details of the counterclaim as if it were a claim: *Rule 4.8(2),(3) Civil Procedure Rules*.

Counterclaim against additional party
A defendant may also make a counterclaim against someone other than the claimant if:

- the claimant is also a party to the counterclaim; and
- the defendant alleges the other party is liable with the claimant or the relief the defendant claims against the other person is related to or connected with the original subject matter of the proceeding: *Rule 4.9(1) Civil Procedure Rules*.

The defendant must file and serve a counterclaim against the additional party within 14 days of being served if no response has been filed or within 28 days of being served if a response has been filed: *Rule 4.13(1),(2) Civil Procedure Rules*.

3.4 Reply

Once the defendant has made a defence or counterclaim, the claimant then has the opportunity to make a reply to the defence. If the claimant does not file and serve a reply, he or she is taken to deny all facts alleged by the defendant: *Rule 4.6(1) Civil Procedure Rules*.

The reply:

- must be in Form 9;
- must contain a statement of the case;
- must state what the claimant alleges happened.

If the reply does not deal with a particular fact, the claimant is taken to deny it: *Rule 4.6 Civil Procedure Rules*.

In a reply, the statement of the case must **specifically** mention matters that:

- make the claim not maintainable;
- show a transaction is void or voidable;
- may take the claimant by surprise if not mentioned; or
- raise a question of fact not arising out of the claim: *Rule 4.7 Civil Procedure Rules.*

Reply to Defence Against Counterclaim

As the claimant has a right of reply to a defence, so a defendant also has the right of reply if the claimant has made a defence to a counterclaim: *Rule 4.13(3) Civil Procedure Rules*.

Service

The claimant's reply must be filed and served within 14 days of service of the defence: *Rule 4.13(1)(c) Civil Procedure Rules*.

If the reply is to a counterclaim against a third party, the reply must be filed and served within 28 days of service of the counterclaim: *Rule 4.13(1)(d) Civil Procedure Rules*.

4 Dealing with the Matter

4.1 Personal Interest

The first time a claim comes before you, you must always ask yourself if there is any reason why you should not hear the case. You should excuse yourself if you have or appear to have:

- bias or prejudice in the matter;
- a personal or business relationship with any of the parties, or witnesses; or
- a personal or financial interest in the matter.

For further guidance see Chapter 5, Judicial Conduct.

Ideally, you should be able to determine whether there is some reason you should excuse yourself when you first read the claim. However, as parties, witnesses or documents are added to a proceeding you will have to constantly re-evaluate whether there is some reason you should excuse yourself.

4.2 Transferring the Case

Under *Rule 2.4*, a claim may be filed in any one of a number of districts. Even if a claim has been filed in your district, you may change the district where it is dealt with if you are satisfied that the matter can be more conveniently or fairly dealt with in another district: *Rule 2.5(1) Civil Procedure Rules*.

The balance of convenience on where the matter should be heard will depend on:

- the location of the parties;
- the subject matter of the claim, and

- the location of witnesses and evidence.

Transfer to Supreme Court

It may become apparent as documents are tendered that the matter is beyond your jurisdiction, either due to the subject matter (such as child custody) or because the amount of the claim exceeds your jurisdiction.

In such cases, make an order striking the case from the Magistrates' Courts List and transfer it to the Supreme Court:

4.3 Managing the File

After determining whether the case is one you can hear, you will have to deal with the documents which have been filed. The file may range from a complete set of all documents, including the claim, defence and reply, or may consist of just the claim. The steps you take will depend on which documents are in the file.

If only a claim has been filed:

- look at the date of filing and determine what the applicable date for response / defence is;
- if it is before the applicable date, mark the date in your diary and return to it at that date to see if a response or defence has been filed;
- if the date of filing a response or defence has passed, wait until the claimant asks for default judgment or wait for the date of First Hearing to inquire into the matter.

If a claim and defence and/or counterclaims have been filed:

- read the claim and defence and try to determine the issues in dispute; and
- once you have determined the issues, make any notes on the file so that you will be prepared for the First Hearing.

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CIVIL:

FIRST HEARING

1 Introduction

At the first hearing, you will be concerned with some or all of the following:

- non-appearance of the parties;
- your ability to deal with the case;
- legal representation;
- the readiness of the parties to proceed with the case.

2 Preliminary Matters

At a First Hearing, there are a number of preliminary issues you must deal with prior to inquiring into the merits of the case itself.

2.1 Claimant Does Not Appear

If the claimant does not appear at the date of first hearing:

- you may adjourn the proceedings to a date you fix; or
- you may dismiss the claimant's claim and give judgment for the defendant; or
- with your permission, the defendant may call evidence to establish that he or she is entitled to judgment under a counterclaim against the claimant: *Rule 12.9(2) Criminal Procedure Rules*.

You may give directions about further dealing with the case, and must consider the question of costs: *Rule 12.9(3) Civil Procedure Rules*.

2.2 Defendant Does Not Appear

If the defendant does not appear at the date of first hearing:

- you may adjourn the proceedings to a date you fix; or
- you may give judgment for the claimant; or
- with your permission, the claimant may call evidence to establish that he or she is entitled to judgment against the defendant: *Rule 12.9(1) Criminal Procedure Rules*.

You may give directions about further dealing with the case, and must consider the question of costs: *Rule 12.9(3) Civil Procedure Rules*.

Despite the nearly identical provision to non-appearance for the claimant, the procedure you must follow for non-appearance of the defendant is very different.

You should do the following:

1. Ask the claimant as to the date of service of the claim on the defendant:
    - If the claimant says it has been less than 14 days since service of the claim, adjourn the matter until after the 14 day period.

2. Ask the claimant whether he or she has a sworn statement proving service of the claim on the defendant:
    - If the claimant does not have a sworn statement proving the time and manner in which the claim was served, adjourn the matter until the claimant can prove that he or she has complied with the rules of service.

3. If the claimant does have a sworn statement, check to see what date the claim was served on the defendant:
    - If it has been less than 14 days since the date of service, adjourn the matter;
    - If it has been more than 14 days since the date of service, decide whether the defendant has a likely defence and whether it would be unjust to give default judgment to the claimant.

4. If it would be unjust to give the claimant default judgment, set a new date for appearance and direct that notice be given to the defendant to appear on that date.

5. If it would be just to give the claimant default judgment, do so. See paragraph 7.3, below.

2.3 Personal Interest

Once the parties are before you, you must deal with any issues of personal interest that arise. Determine whether there is any reason you should not hear the case.

For further guidance, see Chapter 5, Judicial Conduct.

As well, it is usually at this stage of First Hearing that any objections from the parties as to your ability to hear the matter will arise.

If a party makes an application for you to disqualify yourself from hearing the matter, do the following:

1. hear from the party on his or her reasons for applying for your disqualification from the case.

2. hear from the opposing party.

3. make your decision on whether you should disqualify yourself:
    - if you reject the application for disqualification, you must given written reasons for the rejection to the applicant: *s21(4) Judicial Services and Courts Act*;
    - upon rejection, the applicant may appeal to the Supreme Court. During the appeal, you must adjourn the proceedings until the Supreme Court has heard and determined the appeal: *s21(3) Judicial Services and Courts Act*;
    - if you grant the application, transfer the case to another Magistrate.

2.4 Jurisdiction

You must always ensure that the matter is one within your jurisdiction. Ideally, you will have been able to determine this issue when you first read over the claim and defence in the file.

If, however, you discover that the case has changed in some material aspect which takes it outside your jurisdiction, strike out the proceeding and transfer it to the Supreme Court.

2.5 Unrepresented Defendant

Many defendants will arrive at First Hearing without having consulted a lawyer.

If the defendant shows a willingness to defend and there seems to be serious issues in the case, adjourn the proceeding and direct the defendant to the Public Solicitor for advice.

Direct that the defendant file a defence within 14 days or, if the case is complex, a longer time. Set a new date for hearing sometime after the date set for the filing of the defence.

3 Mediation

If you consider mediation may help resolve some or all of the issues in dispute and no party raises a substantial objection, you may refer a matter for mediation: *Rule 10.3(1) Civil Procedure Rules*.

Substantial objections to mediation include:

- the parties do not consent to mediation;
- the nature of the dispute makes it unsuitable for mediation; or
- anything else which suggests that mediation will be futile, unfair or unjust to a party: *Rule 10.3(2) Civil Procedure Rules*.

Remember that mediation is voluntary and a party may withdraw from mediation at any time: *Rule 10.6 Civil Procedure Rules*. For this reason, only refer parties that seem willing to mediate.

If mediation is appropriate, make a mediation order.

Content of Mediation Order

The mediation order must set out enough information to inform the mediator of the dispute and the present stage of the proceeding between the parties, including:

- the statements of the case;
- the issues; and
- any other relevant matters: *Rule 10.5(1) Civil Procedure Rules*.

In the mediation order, you may include directions about:

- the mediator's role;
- time deadlines; and
- any other relevant matters: *Rule 10.5(2) Civil Procedure Rules*.

Suspend Proceedings

During the period of mediation, suspend the proceedings: *Rule 10.11 Civil Procedure Rules*.

Settlement

If a settlement is reached, it must be:

- written down, signed and dated by the mediator and the parties; and
- filed with the Court: *Rule 10.9(1) Civil Procedure Rules*.

You may then approve the settlement and make any orders to give effect to the mediated agreement: *Rule 10.9(2) Civil Procedure Rules*.

If the mediation is unsuccessful and no settlement is reached, the proceedings may continue to trial. See Chapter 22, The Civil Trial.

4 Adding and Removing Parties

When inquiring into the case, you may order that a person becomes a party to a proceeding if the person's presence is necessary to make a decision fairly and effectively in the proceeding: *Rule 3.2(1) Civil Procedure Rules*. This can be done upon application or on your own motion.

Similarly, you may order that a party be removed from the proceedings if:

- the person's presence is unnecessary to make a decision fairly and effectively in the proceeding; or
- for any other reason you consider that the person should not be a party to the proceeding: *Rule 3.2(2) Civil Procedure Rules*.

Either a party to the proceeding or a person affected by the proceeding may apply to **add** a party: *Rules 3.2(3),(4) Civil Procedure Rules*.

Only a party to the proceeding may apply to **remove** a party: *Rule 3.2(3)(b) Civil Procedure Rules*.

An application for adding or removing a party must be accompanied by a sworn statement setting out the reasons why the person should be added or removed as a party: *Rule 3.2(5) Civil Procedure Rules*.

When making an order regarding adding or removing parties, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules*.

4.1 Third Party

A defendant may file and serve a third party notice on any person not a party to the proceedings to claim a contribution, indemnity or other remedy: *Rule 3.7(1) Civil Procedure Rules*.

The third party notice must:

- be in Form 4,
- state that the defendant claims the contribution, indemnity or other remedy; and
- state that the person is party to the proceeding from the date of service: *Rules 3.7(1),(2) Civil Procedure Rules*.

Once served, the person becomes a party to the proceeding with all rights and obligations as if the defendant had started a proceeding against the person: *Rule 3.7(4) Civil Procedure Rules*.

If the third party notice is filed after the defence is filed, the defendant must obtain leave of the Court: *Rule 3.7(3) Civil Procedure Rules*.

4.2 Amending Documents

After an order is made changing the parties to a proceeding, the applicant for the order must:

- file an amended claim showing the new party and the date of the order;
- serve the amended claim on the new party; and
- if the order added or changed a defendant, serve the amended claim on the continuing party: *Rule 3.6(1) Civil Procedure Rules*.

The amended claim must be filed and served:

- within the time fixed by the order; or
- within 14 days of the order, if no time was fixed: *Rule 3.6(2) Civil Procedure Rules*.

If the order added or substituted a defendant, unless you order otherwise, everything done in the proceeding before the order was made has the same effect for the new defendant as for the old defendant: *Rule3.6(3) Civil Procedure Rules*.

5 Joining and Separating Claims

You may order that several claims against one person be included in one proceeding if:

- a common question of law or fact is involved in all the claims;
- the claims arise out of the same transaction or event; or
- for any other reason, you consider the claims should be included in the same proceeding: *Rule 3.3(1) Civil Procedure Rules*.

You may order that several claims against one person be separated into different proceedings if:

- the claims may be more effectively dealt with separately; or
- for any other reason you consider that the claims should be heard as separate proceedings: *Rule 3.3(2) Civil Procedure Rules*.

A party may apply for the joining or separating of claims, or you may do this on your own motion: *Rule 3.3(3) Civil Procedure Rules*.

When making an order regarding joining or separating claims, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules*.

6 Consolidating Proceedings

You may order several proceedings be heard together if:

- the same question is involved in each proceeding;
- the decision in one proceeding will affect the other; or
- for any other reason you consider the proceedings should be heard together: *Rule 3.4 Civil Procedure Rules*.

When making an order regarding consolidating proceedings, you may make an order as to costs: *Rule 3.5 Civil Procedure Rules*.

7 Defence Not Filed – Next Steps

If the parties are present and you have dealt with all preliminary matters, you must inquire into whether or not a defence has been filed.

If all parties are present, and the defence has not been filed, do the following:

1. Ask the defendant whether he or she wishes to defend the claim.

7.1 Defendant Wishes to Defend the Claim

2. If the defendant wishes to defend, inquire as to the date when he or she was served with the claim.
    - If the claimant was served over 14 days before the date of First Hearing, inquire into why the defendant has not filed a response or defence.
        - If there has been a sufficient reason for the failure to file a defence, order the defendant to file a defence within 14 days. Adjourn the case to a later date.
        - If the defendant does not have a sufficient reason, consider awarding default judgment to the claimant. See paragraph 7.3 Default Judgment, below.
    - If the claimant was served less than 14 days prior to the date of First Hearing, the defendant's expressed desire to defend will serve as a response. Order the defendant to file a defence within 14 days. Adjourn the case to a later date.

7.2 Defendant Does Not Wish to Defend the Claim

3. If the defendant does not wish to defend, ask the claimant to briefly lay out his or her claim. Ensure that a valid claim against the defendant exists.

4. Ask the defendant if he or she has anything to say regarding the matter. For example, he or she may dispute the amount of the claim.

5. Give judgment for the claimant. See Chapter 23, Civil Judgment.

6. Make any applicable orders.

7. Consider any applicable costs. See Chapter 24, Costs.

7.3 Default Judgment

Importantly, you must not give default judgment before the date of the First Hearing: *Rule 9.2(5)* and *9.3(5) Civil Procedure Rules*.

If the defendant does not file and serve a response or defence within the applicable time, the claimant may file a sworn statement (proof of service) that the claim and response form were lawfully served on the defendant: *Rule 9.1 Civil Procedure Rules.* See Chapter 20, Civil Pre-Trial Matters for the dates and methods of service.

Claim for Fixed Amount

If the claim was for a fixed amount, the claimant may file a request for judgment against the defendant for the amount of the claim, together with interest and costs. This request may be made orally or in Form 12: *Rules 9.2(2),(3) Civil Procedure Rules*.

Upon granting the judgment, the claimant must serve a copy on the defendant: *Rule 9.2(6) Civil Procedure Rules*.

If the defendant does not apply within 28 days to have the default judgment set aside, the claimant may:

- file a sworn statement that the judgment was lawfully served on the defendant; and
- apply for an enforcement order: *Rule 9.2(7) Civil Procedure Rules*.

Claim for Damages

If the claim was for an amount of damages to be decided by the Court, the claimant may file a request for judgment against the defendant for an amount to be determined by the Court. The request may be made orally or in Form 13: *Rules 9.3(2),(3) Civil Procedure Rules*.

You may give judgment for the claimant for an amount to be determined, and either:

- determine the amount of damages; or
- if there is not enough information to determine the amount, fix a date for a conference or hearing to determine the amount: *Rule 9.3(4) Civil Procedure Rules*.

The claimant must then serve a copy of the judgment and, if necessary, a notice stating the date fixed for the conference to determine the amount of damages: *Rule 9.3(6) Civil Procedure Rules*.

Deciding amount of damages

You must conduct the determination of the amount of damages as nearly as possible in the same way as a trial: *Rule 9.4(1) Civil Procedure Rules*.

You may, however, give directions about:

- procedures to be followed before the determination takes place;
- disclosure of information and documents;
- filing of statements of the case; and
- conduct of the determination generally: *Rule 9.4(2) Civil Procedure Rules.*

After you have determined the amount of damages, the claimant must file the judgment setting out the amount of damages and serve a copy on the defendant, unless the defendant was present when the damages were determined: *Rule 9.4(3) Civil Procedure Rules*.

The judgment may then be enforced in the same way as a judgment given after trial: *Rule 9.4(4) Civil Procedure Rules.*

Setting Aside Default Judgment

After default judgment has been awarded, a defendant may still apply to have the judgment set aside: *Rule 9.5(1) Civil Procedure Rules*.

The defendant's application:

- may be made at any time;
- must set out the reasons why the defendant did not defend the claim;
- must give details of the defendant's defence to the claim;
- must have an accompanying sworn statement in support of the application; and
- must be in Form 14.

You may set aside default judgment if you are satisfied that the defendant:

- has shown reasonable cause for not defending the claim; and
- has an arguable defence, either on liability or about the amount of the claim: *Rule 9.5(3) Civil Procedure Rules*.

Upon hearing the application, you must:

- give directions about the filing of the defence and other statements of the case;
- make an order about the costs incurred up to that date;
- consider whether an order for security for costs should be made; and
- make any other order necessary for the progress of the proceeding: *Rule 9.5(4) Civil Procedure Rules*.

8 Defence Filed – Next Steps

If all parties are present and the defence, counterclaim and applicable replies have been filed, you may be able to:

- hear the case immediately; or
- adjourn the case to a later date and order the parties to prepare for trial.

8.1 Immediate Hearing

Sometimes all parties are ready to proceed with a defended hearing. For an immediate hearing, all applicable sworn statements will need to have been filed and all witnesses will need to be present or have had their evidence otherwise taken.

In this case, proceed to hear the matter or adjourn the case to later in the day. See Chapter 22, The Civil Trial.

8.2 Hearing at a Later Date

Typically, the parties will not be ready to proceed with an immediate hearing of the case at First Hearing. In this case, do the following:

1. Give the claimant and defendant an opportunity to explain their positions. Along with the claim and defence, this will allow you to determine which facts are agreed upon by the parties and which are the issues for determination.

2. Direct the claimant to file sworn statements from his or her witnesses and disclose these statements to the defendant. Typically 14 days is given, but the circumstances of the case will determine how long you should give the claimant to file these sworn statements.

3. Direct the defendant to respond to the sworn statements upon receiving them. Again, typically 14 days is given to respond, but the circumstances of the case will determine what is appropriate.

4. Set a hearing date for sometime after the date set for the filing of all sworn statements and responses.

5. Order the parties to have their witnesses ready for the date.

6. Deal with any interlocutory applications. See Chapter 20, Civil Pre-Trial Matters.

8.3 Summary Judgment

Summary judgment applies where the defendant has filed a claim but the claimant believes the defendant has no real prospect of successfully defending the claim: *Rule 9.6(1) Civil Procedure Rules*.

Similar to default judgment, summary judgment applies **only if** a defence has been filed.

A claimant's application for summary judgment must:

- be in Form 15; and
- have with it a sworn statement that the facts in the claimant's claim are true and state the claimant's belief that there is no defence to the claim and the reasons for this belief: *Rule 9.6(3) Civil Procedure Rules*.

Upon filing the application and sworn statement, the claimant must:

- get a hearing date from the Court and ensure the date appears on the application; and
- serve a copy of the application and sworn statement on the defendant a minimum of 14 days prior to the hearing date: *Rule 9.6(4) Civil Procedure Rules*.

Upon receiving the application and sworn statement, the defendant:

- may file a sworn statement setting out the reasons why he or she has an arguable defence; and
- must serve the statement on the claimant a minimum of seven days prior to the hearing date: *Rule 9.6(5) Civil Procedure Rules*.

Upon receiving the defendant's sworn statement, the claimant may file another sworn statement in response and serve it on the defendant a minimum of two days prior to the hearing date: *Rule 9.6(6) Civil Procedure Rules*.

If you are satisfied that the defendant has no real prospect of defending part or all of the defendant's claim and there is no need for a trial on that part or all of the claim, you may:

- give judgment for the claimant for part or all of the claim; and
- make any other appropriate orders: *Rule 9.6(7) Civil Procedure Rules*.

You must not give summary judgment against a defendant if you are satisfied that there is a dispute between the parties about a substantial question of fact, or a difficult question of law: *Rule 9.6(9) Civil Procedure Rules.*

If you refuse to give summary judgment, you may still order the defendant to give security for costs within the time stated in the order: *Rule 9.6(8) Civil Procedure Rules*.

9 Interlocutory Orders During a Proceeding

At anytime during a proceeding a person may apply for an interlocutory order.

9.1 Content of the Application

The application must:

- be signed be signed by the applicant or the applicant's lawyer; and
- name, as defendant, anyone whose interests are affected by the order sought; and
- state what the applicant applies for; and
- have with it a sworn statement by the applicant setting out the reasons why the order should be made (unless there are no questions of fact regarding the order or the facts are already known to the Court): *Rule 2.7(2), 7.2(4) Civil Procedure Rules*.

9.2 Urgent Interlocutory Applications

In urgent situations you may dispense with a written application and allow an oral application.

You may allow an **oral** application if:

- the application is for urgent relief; and
- the applicant agrees to file a written application within the time you order; and

- you consider the matter an appropriate one:
  - because of the need to protect persons or property; or
  - to prevent the removal of persons or property from Vanuatu; or
  - because of other circumstances that justify making the order: *Rule 7.6 Civil Procedure Rules*.

If the interlocutory order sought is one outside your jurisdiction (such as an Order to Protect Property under *Rule 7.8* or Order to Seize documents under *Rule 7.9*), direct the applicant to apply to the Supreme Court for the order.

10 Disclosure

As part of the preparation for trial, each party to a proceeding must disclose the documents upon which he or she intends to rely at trial: *Rule 8.27(1) Civil Procedure Rules*.

A party discloses a document by giving a copy to each other party a minimum of 14 days before the trial: *Rule 8.27(2) Civil Procedure Rules.*

A party may apply for an order that another party disclose particular documents: *Rule 8.28(1) Civil Procedure Rules.*

You may order disclosure of the documents if you are satisfied that:

- the documents are relevant to the issues;
- disclosure is necessary to decide the matter fairly; or
- for any other reason the documents should be disclosed: *Rule 8.28(2) Civil Procedure Rules*.

If you order that documents are to be disclosed, you may also order that all or part of *Part 8, Division 1 Civil Procedure Rules* be followed: *Rule 8.28(3) Civil Procedure Rules*.

22:

CIVIL:

THE CIVIL TRIAL

1 Introduction

If a defendant chooses to defend against a claim, and the matter has not been dealt with through mediation, or settlement, or summary judgment, the case proceeds to trial.

2 Proving a Claim

2.1 Burden and Standard of Proof

The claimant has the burden, or responsibility, of proving their case. They must prove their case on a balance of probabilities.

3 Open Court

To ensure the transparency of justice, it is a long standing principle of the common law that hearings be conducted in open Court, wherever possible. In Vanuatu, all civil proceedings must be held in open Court unless you direct otherwise: *Rule 12.2 Civil Procedure Rules*.

Exceptions
All domestic violence cases are heard in chambers. This allows the parties to maintain their privacy while also being able to speak honestly about the situation.

4 Non – Appearance

4.1 Claimant Does Not Appear

If the claimant does not appear at the date trial:

- you may adjourn the proceedings to a date you fix; or
- you may dismiss the claimant's claim and give judgment for the defendant; or
- with your permission, the defendant may call evidence to establish that he or she is entitled to judgment under a counterclaim against the claimant;

- you may give directions about further dealing with the case; and
- you must consider the question of costs: *Rules 12.9(2),(3) Civil Procedure Rules*.

See Chapter 21, Civil: First Hearing.

4.2 Defendant Does Not Appear

If the defendant does not appear at the date of first hearing:

- you may adjourn the proceedings to a date you fix; or
- you may give judgment for the claimant; or
- with your permission, the claimant may call evidence to establish that he or she is entitled to judgment against the defendant; and
- you may give directions about further dealing with the case; and
- you must consider the question of costs: *Rules 12.9(1),(3) Civil Procedure Rules*.

See Chapter 21, Civil: First Hearing.

4.3 Witness Does Not Appear

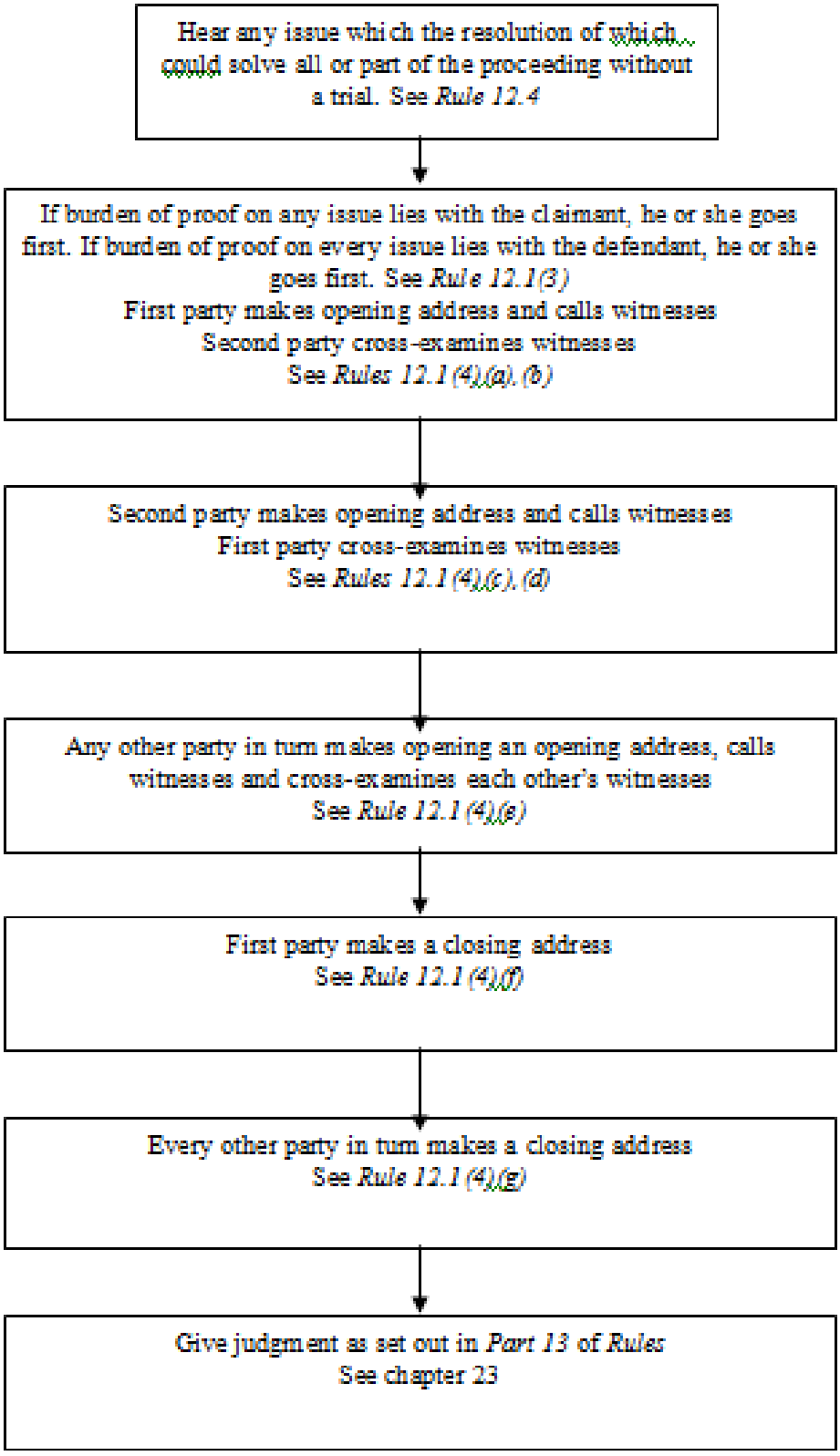
If a witness does not appear, and no summons was given, issue a summons for that person to attend. If necessary, adjourn proceedings.

If the witness does not appear in response to a summons, without a lawful excuse, the matter may be dealt with as contempt of Court. For further guidance, see chapter 19, Civil: Management of Proceedings.

5 Defended Hearing Procedure

The diagram on the next page shows the hearing procedure for a civil trial.

Civil Defended Hearing



At trial, it is within your discretion to give directions about the order of evidence and addresses and the conduct of the trial, generally: *Rule 12.1(1) Civil Procedure Rules*. Nevertheless, the following steps should serve as a guideline for the conduct of a civil trial:

1. Hear any legal arguments on preliminary issues if it appears that resolving these issues will lead to the proceeding or part of the proceeding being resolved without a trial.

2. The claimant presents his or her case first if the claimant has the burden of proof on any question.

3. The defendant presents his or her case first only if he or she has the burden of proof on every question.

4. The party who presents his or her case first (normally the claimant) makes an opening address and brings any oral evidence in support of his or her case. See chapter 18, Civil: Evidence.

5. The defendant then cross-examines the claimant's witnesses.

6. The defendant then makes an opening address and brings any oral evidence in support of his or her case.

7. The claimant then cross-examines the defendant's witnesses.

8. If there are any other parties, they in turn make their opening addresses, bring any oral evidence and cross-examine each other's witnesses.

9. The claimant then makes a closing address.

10. The other parties make their closing addresses in turn.

11. At the end of the trial, you must give judgment: *Rules 12.1(3),(4), 12.4, 12.11 Civil Procedure Rules*. See Chapter 23, Civil: Judgment.

Re-opening a Proceeding

After the conclusion of a hearing but before judgment is given, you may allow a party to re-open a proceeding if you are satisfied that it is necessary to do so in order for substantial justice to be done: *Rule 12.10 Civil Procedure Rules*.

6 Ending a Proceeding Early

6.1 Claimant Discontinues Claim

The claimant may discontinue his or her claim, at any time, for any reason: *Rule 9.9(1) Civil Procedure Rules*.

To discontinue, the claimant must:

- file a Notice of Discontinuance in Form 18; and
- serve the notice on all other parties: *Rule 9.9(2) Civil Procedure Rules*.

If there are several defendants, the claimant may discontinue the claim against one or some of the defendants. The claim will then continue in force against the remaining defendants: *Rule 9.9(3) Civil Procedure Rules*.

If the claimant discontinues:

- he or she may not revive the claim;
- the defendant's counterclaim will continue in force; and
- the party against whom the claimant discontinued may apply to the Court for costs against the claimant: *Rule 9.9(4) Civil Procedure Rules*.

6.2 Striking Out the Claim

If the claimant does not take the steps required by the *Civil Procedure Rules* to advance proceedings, or fails to comply with a Court order made during the proceedings, the claimant may have his or her proceedings struck out.

If the claimant takes no steps in a proceeding for three months, you may give the claimant notice to appear on the date in the notice to show why the proceeding should not be struck out: *Rule 9.10(3) Civil Procedure Rules*.

If the claimant does not appear on the date or does not show cause, you may strike out the proceeding: *Rule 9.10(3) Civil Procedure Rules*.

Additionally, you may strike out a proceeding:

- at a hearing; or
- without notice, if there has been no step taken in the proceeding for six months: *Rule 9.10(2) Civil Procedure Rules*.

Upon striking out a proceeding, ensure the Registrar sends the required notice to the parties telling them the proceeding has been struck out: *Rule 9.10(4) Civil Procedure Rules*.

6.3 Settlement

If the parties to a proceeding inform you that they have settled the matter, you must:

- record the case as being settled;
- note in the file the details of the settlement; and
- not enter judgment for any party: *Rule 9.8(2) Civil Procedure Rules*.

If the parties to a proceeding do not inform you that they have settled the matter, you may:

- set the case aside for six months; or
- if nothing has been heard from the parties in six months, strike out the case under *Civil Procedure Rule 9.10*.

If either party does not comply with the terms of the settlement, the other party may apply to have you reopen the case, whether or not it has already been struck out: *Rule 9.8(3) Civil Procedure Rules*.

If you are satisfied that the party has not complied with the settlement, you may reopen the case: *Rule 9.8(4) Civil Procedure Rules.*

7 Adjournments

Before or during the hearing of any case, you may adjourn the hearing to a certain time and place: *Rule 12.3 Civil Procedure Rules.* State the time and place in the hearing of the parties or their advocates.

Set a date after considering the time the parties need to prepare their cases and the Court diary.

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:

- a party 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.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

- the interests of the accused to a fair trial;
- the interests of the public in ensuring efficient prosecutions;
- the reasons for the adjournment;
- any fault causing the delay.

8 Interlocutory Orders During a Proceeding

At anytime during a proceeding a person may apply for an interlocutory order.

8.1 Content of the Application

The application must:

- be signed be signed by the applicant or the applicant's lawyer; and
- name, as defendant, anyone whose interests are affected by the order sought; and
- state what the applicant applies for; and
- have with it a sworn statement by the applicant setting out the reasons why the order should be made (unless there are no questions of fact regarding the order or the facts are already known to the Court): *Rule 2.7(2), 7.2(4) Civil Procedure Rules*.

8.2 Urgent Interlocutory Applications

In urgent situations you may dispense with a written application and allow an oral application.

You may allow an **oral** application if:

- the application is for urgent relief; and
- the applicant agrees to file a written application within the time you order; and

- you consider the matter an appropriate one:
  - because of the need to protect persons or property; or
  - to prevent the removal of persons or property from Vanuatu; or
  - because of other circumstances that justify making the order: *Rule 7.6 Civil Procedure Rules*.

If the interlocutory order sought is one outside your jurisdiction (such as an Order to Protect Property under *Rule 7.8* or *Order to Seize Documents* under *Rule 7.9*), direct the applicant to apply to the Supreme Court for the order.

23:

CIVIL:

JUDGMENT

1 Decision Making

The decision you make following the conclusion if a civil proceeding is to be made by you alone. Although help as to meaning of the law can be sought from textbooks and legal counsel, the decision cannot be made by anyone other than by you.

1.1 Principles Governing Decision Making

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

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

The principles are intended to ensure:

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

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

You Must Act Lawfully

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

There are several aspects to the principle of lawfulness:

- You must act within the authority of the law;
- You must take into account all the relevant considerations and must not take into account irrelevant considerations; and
- You must not give away your discretionary power.

Ask yourself:

- "Do I have jurisdiction to hear and determine the matter?"
- "What are the considerations I must take into account?"
  - Look to the appropriate legislation and common law to work out what you must be satisfied of. Factors unrelated to those issues will be irrelevant.
- "Have I taken into account anything irrelevant?"

Affected Parties Have a Right to be Heard

All parties must have a full and fair opportunity to be heard before the decision is made.

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

Throughout the hearing process, ask yourself:

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

You Must be Free from Bias

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

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

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

Ask yourself:

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

Consequences of a Breach of the Principles

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

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

- a person being unlawfully affected;
- expense, hardship and emotional turmoil; and
- a loss of faith in the system of justice.

2 A Structured Approach to Making a Decision

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

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

There are three tasks involved:

4. To be Clear What the Court is Being Asked to Do

In civil cases, be clear about what the claimant is asking the Court to do. For the the claim to be successful, the claimant must prove the claim on a balance of probabilities.

5. To Determine What the Facts of the Case Are - What Happened, What Did Not Happen

Facts are proved by producing evidence. To determine the facts, you will need to assess the credibility of the witnesses and the reliability of their evidence.

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

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

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

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

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

6. To Make Your Decision

This is done by applying the law to the facts.

Only you can make the decision. Under no circumstances may the clerk or anyone else decide the matter.

3 Note Taking

You will have to decide between yourself and the clerk who will record the minutes of proceedings. If the clerk records the minutes, it is still advisable that you keep your own personal record to keep track of the evidence.

A suggestion is to note each issue in the case on a separate sheet of paper. As the evidence is given, note it as it relates to each of these. This method can provide a helpful framework for your decision.

4 The Judgment

You must give judgment in a civil proceeding by:

- setting out the relevant evidence;
- stating your finding of the facts;
- stating your findings of law and the application of these to the facts;
- giving your reasons for your decisions; and
- making orders as a consequence of your decisions: *Rule 13.1(1) Civil Procedure Rules*.

Your judgment must set out the entitlement of a party to payment of money or other form of final relief: *Rule 13.1(2) Civil Procedure Rules*.

A copy of the judgment must be given to the parties and also made available to the public: *Rule 13.1(4) Civil Procedure Rules*.

The format at the end of this chapter is a useful format for making and delivering a civil decision.

It is a good idea to have the 'losing' party in mind when giving your reasons. Make sure you address all their evidence and submissions thoroughly so they know they have been heard.

Remember that it is important to:

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

5 Delivering Your Judgment

As far as practicable, you must give judgment at the end of the trial and fix the amount of costs at the same time: *Rule 13.2(3) Civil Procedure Rules.*

Until you sign and seal a separate judgment, your writing of the terms or orders on a file is sufficient proof that the order was made, and its date and terms: *Rule 13.3 Civil Procedure Rules*.

In practice, it is a good idea to always read out the whole of the judgment each time so that there is no possibility of confusion or that two versions of your judgment are circulating.

6 Tips for Writing a Good Judgment

When writing a judgment, there are a number of points you should keep in mind to help you create the best judgment possible.

8. Think about your audience:
    - You are not only writing for the parties but for all others who may read the judgment. This includes the legal profession who are interested in knowing the law, the media who may be reporting on the case, Parliament who will be considering legislative changes, the public and other Magistrates and the Supreme Court.

9. Write your judgment as soon as possible after the conclusion of the trial as possible:
    - Try to write a first draft of your judgment while the evidence and issues are still fresh in your mind. You can then put this draft aside and rewrite it later for clarity and to check for any matters you may have missed the first time.
    - Writing judgments as soon as possible will also ensure that your workload does not become unmanageable as unwritten judgments pile up.

10. Stick to the issues:
    - Avoid *obiter dicta* and comments that are unnecessary to the determination of the issues.

11. Be clear in your writing:
    - Whenever possible, use short clear sentences without unnecessary legal jargon or archaic terminology.
    - Use short sentences.
    - Try to use the active voice. For example, write, “A contracted B” rather than “B was contracted by A”.

12. Include clear statements on evidentiary issues in the judgment:
    - Although you may internally remind yourself of certain evidentiary provisions, writing them in the judgment will ensure your decision is not appealed because it is unclear whether you acted in accordance with them.

13. Include highlights of counsel submissions:
    - This will let the lawyers know that you have taken their arguments into consideration and will help them and other lawyers better determine the state of the law.

14. When delivering your judgment orally, be dispassionate to show your neutrality:
    - Consider having a police officer present in Court if your judgment has the potential to cause disruption among the public present in Court or the parties.

7 Civil Judgment Format

1. Introduction

- The first paragraph must say what the case is about. Set the scene for the case.

2. Brief summary of the facts

- Set out the material facts of what is alleged by each party. Only refer to those facts that are relevant to the issues to be determined.

3. The Law

- Set out which party has the burden on which issues.
- The standard of proof will be on a balance of probabilities.
- What needs to be proved at law? Set out the legal principles which apply, referring to the legislation and common law where appropriate.

4. Determining proven facts

- Identify relevant facts that are not in dispute.
- Identify relevant facts in dispute. These are usually the issues (points for determination).
- Make rulings on facts in dispute and give reasons.
  - Which evidence you prefer and **why**. Questions of credibility and reliability must be dealt with here.

5. Apply the law to the facts

- Determine what aspects of the applicable law have been proved from the facts.

6. Orders and costs

- What orders, if any, must the Court make?
- Set up the enforcement conference if necessary.
- Ensure you deal with any procedural orders such as costs, return of exhibits, etc.

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COSTS

1 Introduction

Costs are a way of ensuring that a party who is not at fault is adequately paid for his or her expenses in defending a suit. As such, generally the costs of a proceeding are payable by the **unsuccessful** party in the proceeding: *Rule 15.1(2) Civil Procedure Rules*.

Despite this general rule, you have a discretion in deciding whether and how to award costs: *Rule 15.1(1) Civil Procedure Rules*. This includes the discretion to order that each party pay his or her own costs: *Rule 15.1(4) Civil Procedure Rules.*

Parties may also agree to pay their own costs: *Rule 15.1(3) Civil Procedure Rules.*

2 Costs and Disbursements

Costs relate to the work done by a legal advisor. They are awarded on either a standard basis or indemnity basis.

2.1 Costs Awarded on a Standard Basis

Costs awarded on a standard basis (formerly party and party costs) are all costs necessary for the proper conduct of the proceeding and are proportionate to the matters involved: *Rule 15.5(1) Civil Procedure Rules.*

Normally costs are awarded on a standard basis unless you order that the costs should be awarded on an indemnity basis: *Rule 15.5(3) Civil Procedure Rules.*

2.2 Costs Awarded on an Indemnity Basis

Costs awarded on an indemnity basis (formerly known as solicitor and client costs) are all costs reasonably incurred and proportionate to the matters involved, having regard to:

- any agreement as to costs between the party and his or her lawyer; and
- charges ordinarily payable by a client to a lawyer for the work: *Rule 15.5(2) Civil Procedure Rules.*

You may order costs to be paid on an indemnity basis if the costs are:

- to be paid to a party suing or being sued as a trustee;
- the costs of a proceeding brought for non-compliance with a Court order; or
- to be paid out of a fund: *Rule 15.5(4) Civil Procedure Rules*.

You may also order costs to be paid on an indemnity basis if:

- the other party deliberately or without good cause prolonged the proceeding;
- the other party brought the proceeding in a way, or at a time, that amounted to a misuse of the litigation process;
- the other party deliberately or without good cause engaged in conduct that resulted in increased costs; or
- in any other circumstances you think it is appropriate (including the rejection of an offered settlement): *Rule 15.5 Civil Procedure Rules*.

2.3 Disbursements

Disbursements refer to the money paid out by one party to cover the expenses of bringing or defending the action. Disbursements are awarded in addition to any costs.

Examples of disbursements are money paid out:

- to witnesses to travel and attend Court;
- to have reports prepared;
- photocopying binding and postage of documents.

A litigant unrepresented by a lawyer is only entitled to recover disbursements, not costs: *Rule 15.4 Civil Procedure Rules*.

3 Awarding Costs under *Schedule 2*

For each proceeding you must make an order for costs when you give judgment: *Rules 15.10(1),(2) Civil Procedure Rules.*

All costs are to be worked out according to the appropriate scale in *Schedule 2, Civil Procedure Rules*: *Rule 15.10(3) Civil Procedure Rules.*

See *Schedule 2* below for costs as of June, 2004.

SCHEDULE 2

COSTS, MAGISTRATES COURT

ITEM	LOW SCALE VT	MEDIUM SCALE VT	HIGH SCALE VT
1. For drafting and settling claim (including counterclaim)	5,000	10,000	15,000
2. For drafting and settling defence (including any set-off)	5,000	10,000	15,000
3. For drafting and settling any other application to the Court, including an application for enforcement and a judgment order	3,000	4,000	5,000
4. For preparation for trial only	3,000	3,000	3,000
5. For any court appearance including for entry of default judgment, but not for trial or adjournment	10,000	15,000	20,000
6. For Court appearance for adjournment	3,000	4,000	5,000
7. First day appearance, for each half day or part of a half day	16,000	20,000	24,000
8. Each subsequent half day	2/3 of half day rate	2/3 of half day rate	2/3 of half day rate
9. Discretionary items (give details of each)	Amount to be determined by the Magistrate		

3.1 The Three Scales

Schedule 2 has three scales: low, medium and high. In deciding which scale the proceeding falls under, you must take into account:

- the amount recovered or claimed;
- the complexity of the case;
- the length of the proceeding; and
- any other relevant matter: *Rule 15.10(4) Civil Procedure Rules*.

Once you decide which scale the proceeding falls under, all item costs are to be awarded using that scale. You must not jump between scales once you have determined under which scale the entire proceeding falls.

Under each scale, there are nine items. Which of the nine items will be recoverable will depend on the proceeding.

3.2 The Nine Items

Item 1. - For Drafting and Settling Claim (Including Counterclaim)

Item 1 will always be recoverable by a successful claimant.

Item 2. - For Drafting and Settling Defence (Including any Set-Off)

Item 2 will always be recoverable by a successful defendant.

Item 3. - For Drafting and Settling any Other Application to the Court, Including an Application for Enforcement and a Judgment Order

Item 3 is recoverable for costs associated with interlocutory applications incurred by a party. Additionally, item 3 will be recoverable for applications for enforcement or judgment orders by the successful party.

Item 4. - For Preparation for Trial Only

Item 4 will always be recoverable by a party if the proceeding goes to trial, no matter how simple the trial.

Item 5. - For any Court Appearance Including for Entry of Default Judgment, but not for Trial or Adjournment

Item 5 will be recoverable if some substantial work is done for the appearance. This item does not cover simple, quick appearances such as adjournments nor does it cover the days spent in full

trial. The very large difference in the amount awarded by item 5 suggests that some substantial work distinguishes it from items 4 and 6.

Item 6. - For Court Appearance for Adjournment

Item 6 is recoverable for straightforward adjournments which take very little time. For example, an adjournment accompanied by a simple request would be covered by this item. If the appearance involves more complex issues in addition to the adjournment, consider awarding item 5 instead.

Item 7. - First Day Appearance, for Each Half Day or Part of Half Day

Item 7 is recoverable only for the first calendar day of a trial. For example, if a trial has one half day on Monday and one half day on Tuesday, only Monday's appearance is covered by this item.

Item 8. - Each Subsequent Half Day

Item 8 is recoverable for each half day after the first calendar day of a trial. For example, if a trial has one half day on Monday, one half day on Tuesday, and one half day on Wednesday, the appearances on Tuesday and Wednesday are covered by this item.

Item 9. – Discretionary Items (give details of each)

Item 9 is recoverable for other items not covered by the first 8 items. It is recoverable for such things as sworn statements, and other complex matters not paid for by item 4 such as trying to get mediation, settlement conferences, etc. Use your discretion to avoid getting into an examination of every minor cost incurred by a party.

4 Particular Costs

Settlement Offers

You must take into account any rejected settlement offers: *Rule 15.11 Civil Procedure Rules*.

Costs of Amendments

A party who amends a document must pay the costs arising from the amendment, unless:

- the amendment was made in response to another party's amendment or default; or
- you order another party to pay them: *Rule 15.12 Civil Procedure Rules*.

Costs of Extending or Shortening Time

A party who applies to extend or to shorten the length of time set under the *Civil Procedure Rules* must pay the costs of the application: *Rule 15.13 Civil Procedure Rules.*

Trustee's Costs

A person who is sued or sues as a trustee is entitled to have the costs that are not paid by someone else paid out of the funds held by the trustee, unless you order otherwise: *Rule 15.14 Civil Procedure Rules.*

Costs of Counterclaim

A party successful on a counterclaim may be awarded the costs of the counterclaim even if he or she is unsuccessful in the proceeding overall: *Rule 15.15 Civil Procedure Rules*.

Costs of Determination

The costs of determining costs of a proceeding are themselves part of the costs of the proceeding: *Rule 15.16 Civil Procedure Rules*.

4.1 Costs Unnecessarily Incurred

Time Wasted

If costs are incurred unnecessarily by one party, you may order costs against the first party for the time wasted, if the first party:

- has failed to appear at a conference or hearing when given notice of the date and time;
- has not filed and served on time a document required by the Court to file and serve;
- actions or failure to act, have otherwise led to the time of the Court or other parties being wasted: *Rule 15.25(1) Civil Procedure Rules*.

Any party incurring costs for time wasted may apply for the order: *Rule 15.25(4) Civil Procedure Rules*.

You may make an order for costs for time wasted:

- for the whole or part of a proceeding;
- at a conference or hearing: *Rules 15.25(2),(3) Civil Procedure Rules.*

If you are satisfied that the unnecessary costs were incurred because of the conduct of the party's lawyer, you may order the lawyer to personally pay the costs: *Rule 15.25(5)) Civil Procedure Rules*.

All costs for time wasted are to be paid within the period you order. You must order a minimum period of 7 days: *Rule 15.25(6) Civil Procedure Rules*.

If the costs are not paid within the period ordered, you may order that the whole or part of the proceeding be struck out: *Rule 15.25(7) Civil Procedure Rules.*

Wasted Proceeding

You may order the costs of the whole or part of the proceeding be paid by the lawyer personally if the party brings a proceeding that:

- has no prospect of success, is vexatious, mischievous or without legal merit; and
- a reasonably competent lawyer would have advised the party not to bring the proceeding: *Rule 15.26 Civil Procedure Rules*.

You may order that the whole or part of the proceeding be paid by the lawyer personally if you are satisfied that the costs of the proceeding were increased because the lawyer:

- did not appear when required;
- was not ready to proceed or otherwise wasted the Court's time; or
- incurred unnecessary expense for the other party: *Rule 15.26(2) Civil Procedure Rules*.

A party may apply for costs against a lawyer personally: *Rule 15.27(1) Civil Procedure Rules*.

Application

The application must:

- set out the reasons why the costs order is being sought;
- fix a date, no less than 14 days later, for the lawyer to file a sworn statement in response;
- fix a date for hearing the application; and
- be served on the lawyer concerned: *Rules 15.27(2),(3) Civil Procedure Rules*.

If possible, the trial judge should deal with the application: *Rule 15.27(4) Civil Procedure Rules*.

You must not make an order for costs against a lawyer personally without giving the lawyer an opportunity to be heard: *Rule 15.26(3) Civil Procedure Rules*.

Order

If you are satisfied that the order for costs against the lawyer should be granted, you may order that the costs be paid by the lawyer personally: *Rule 15.28(1) Civil Procedure Rules*.

The order is then enforceable as a money order under *Part 14 Civil Procedure Rules*: *Rule 15.28(2) Civil Procedure Rules.*

5 Security for Costs

Security for costs is only very rarely ordered in Magistrate's Court. You may only order security for costs if:

- the proceeding is to set aside a default judgment; or
- the claimant is ordinarily resident outside Vanuatu: *Rule 15.17 Civil Procedure Rules*.

For further information see *Civil Procedure Rules 15.18 – 15.24*.

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ENFORCEMENT OF JUDGMENTS AND ORDERS

1 Introduction

There are two ways of enforcing Court decisions, by enforcement orders and enforcement warrants. Orders can be broadly divided into two categories: money orders and non-money orders.

2 Money Orders

2.1 Procedure When Giving Judgment

All enforcement orders must be in Form 21: *Rule 14.2(2) Civil Procedure Rules*.

Immediately after you have given judgment that includes a money order, you must ask the enforcement debtor who he or she proposes to pay the money. You must then:

- make an enforcement order for payment of the debt; or
- fix a date for an enforcement conference to examine how the enforcement debtor will pay the debt: *Rule 14.3(1) Civil Procedure Rules*.

If the parties agree as to how the enforcment debtor will pay the debt, you may make an order in the terms of the agreement: *Rule 14.4(1) Civil Procedure Rules*.

The order may:

- fix a date by which the enforcement debtor will pay the debt;
- if the parties have agreed to payment by instalments, set out the dates and amounts of the instalments; or
- make any other order about payment: *Rule 14.4(2) Civil Procedure Rules*.

If you fix a date for an enforcement conference, you must direct the enforcement debtor to:

- appear in Court on the date fixed for the conference; and
- bring with him or her sufficient documents to enable him or her to give a fair and accurate picture of his or her financial circumstances: *Rule 14.3(2) Civil Procedure Rules*.

If the enforcement debtor is not present when you give your judgment, you must:

- fix a date for an enforcement conference;
- issue a summons (Form 24) requiring the enforcement debtor to appear in Court on the date fixed for the conference; and

- bring with him or her sufficient documents to enable him or her to give a fair and accurate picture of his or her financial circumstances: *Rule 14.3(3) Civil Procedure Rules*.

When fixing a date for an enforcement conference you must fix a date within 28 days of the date of the money order or if not possible, as soon as practicable after 28 days: *Rule 14.5(2) Civil Procedure Rules*.

You may also issue a summons to another person to attend the conference and give evidence about the enforcement debtor's affairs: *Rule 14.5(4) Civil Procedure Rules*.

2.2 Enforcement Conference

The purpose of an enforcement conference is to determine how the enforcement debtor proposes to pay the debt: *Rule 14.5(1) Civil Procedure Rules*.

The enforcement debtor must attend the conference: *Rule 14.5(3) Civil Procedure Rules*

If the enforcement debtor does not appear, you may issue a warrant for his or her arrest if you are satisfied that the enforcement debtor:

- was present when the date was fixed, was personally served with or received the summons; and
- he or she does not have sufficient cause for not attending the conference: *Rule 14.6 Civil Procedure Rules*.

Keep in mind that the costs of enforcing a money order and interest on the amount of the order are recoverable as part of the order: *Rule 14.8 Civil Procedure Rules*.

Conduct of Examination

At the conference, the enforcement creditor may ask the enforcement debtor about his or her financial affairs and how he she proposes to pay the debt: *Rule 14.7(1) Civil Procedure Rules*.

The enforcement creditor may also examine anyone else summoned to attend the conference to provide information: *Rule 14.7(2) Civil Procedure Rules*.

At the end of the enforcement conference, you must:

- if the parties have agreed, make an enforcement order on the terms agreed between the parties;
- make an enforcement order about how the debtor will pay;
- issue an enforcement warrant; or
- make another order about the payment: *Rule 14.7(3) Civil Procedure Rules*.

2.3 After the Enforcement Conference

The Enforcement Creditor

An enforcement creditor may enforce an enforcement order at any time within 6 years of the date of the order: *Rule 14.9(1) Civil Procedure Rules*.

After 6 years, the enforcement creditor must get leave of the Court to enforce the enforcement order: *Rule 14.9(2) Civil Procedure Rules*. See *Rule 14.9 Civil Procedure Rules*.

If the enforcement debtor does not comply with the order, the enforcement creditor may apply for an enforcement warrant: *Rule 14.11 Civil Procedure Rules*. See paragraph 3, Enforcement Warrants, below.

The Enforcement Debtor

The enforcement debtor may apply to the Court to suspend the enforcement order: *Rule 14.10(1) Civil Procedure Rules*.

The application must:

- be supported by a sworn statement; and
- be filed and served on the enforcement creditor a minimum of 7 days before the application is heard: *Rule 14.10(2) Civil Procedure Rules*.

Upon hearing the application, you may:

- suspend the enforcement of all or part of the order to take account of new or newly discovered facts, or for other reasons; and
- make other appropriate orders, including making another enforcement order: *Rule 14.10(3) Civil Procedure Rules*.

3 Enforcement Warrants for Money Orders

If an enforcement debtor fails to pay a money order, the enforcement creditor may apply for the issue of an enforcement warrant: *Rule 14.11(1) Civil Procedure Rules*.

An enforcement warrant can be seen as a more forceful means of enforcing the judgment of the Court. Only one enforcement warrant may be in force to enforce payment of a money order: *Rule 14.11(2) Civil Procedure Rules*.

3.1 Applying for an Enforcement Warrant

The enforcement creditor must file:

- an application (Form 25);
- a copy of the enforcement order;
- 2 copies of the form of warrant;
- a sworn statement, made not earlier than 2 business days before filing the application, stating:
  - the date of the enforcement order;
  - the amount payable under the order;
  - the dates and amounts of any payments made;
  - costs of previous enforcements;
  - the interest due at the date of the statement;
  - any other details needed to determine the amount payable, and how the amount is worked out;
  - the daily amount of future interest; and
  - any other information needed for the warrant: *Rule 14.12(1) Civil Procedure Rules*.

If you believe a hearing is required before issuing a warrant, you may order the enforcement debtor and enforcement creditor to attend a conference: *Rule 14.12(2) Civil Procedure Rules*.

If you grant an enforcement warrant, it must state:

- the enforcement debtor's name;
- the date the warrant ends;
- the amount recoverable under the warrant, including the costs of the enforcement plus interest;
- and anything else required by the *Civil Procedure Rules*: *Rule 14.13(1) Civil Procedure Rules*.

3.2 Enforcement Warrants

No matter which enforcement warrant you choose, all warrants are enforceable throughout Vanuatu: *Rule 14.14 Civil Procedure Rules*.

Before enforcing an enforcement warrant made by a Magistrate in another district, the person must have the warrant sealed by the Magistrate's Court in that district: *Rule 14.14 Civil Procedure Rules*.

Seizure and Sale of Property

One of the main enforcement warrants authorises an enforcement officer to seize and sell all real and personal property (other than exempt property) in which the enforcement debtor has a legal or beneficial interest: *Rule 14.16(1) Civil Procedure Rules.*

When issuing such a warrant, you must give the warrant to an enforcement officer: *Rule 14.16(2) Civil Procedure Rules*.

The enforcement officer must then seize and sell property in accordance with *Rules 14.17 – 14.21 Civil Procedure Rules*.

Once the money has been received by the Court from the sale of the property seized, you must:

- first, pay the enforcement officer the costs of enforcing the warrant;
- second, pay the balance, up to the amount of the warrant, to the enforcement creditor; and
- thirdly, pay any balance remaining to the enforcement debtor: *Rule 14.21(2) Civil Procedure Rules*.

Redirection of Debts

Rather than ordering the seizure and sale of property, you may issue an enforcement warrant requiring a third person to pay the enforcement creditor a debt that is:

- certain and payable;
- payable to the enforcement debtor; and
- specified in the warrant: *Rule 14.22(1) Civil Procedure Rules*.

In deciding whether to order such a warrant, you must consider:

- whether the enforcement debtor will have adequate means to pay his or her living expenses and those of his or her family;
- whether the enforcement debtor will have adequate means to pay other known liabilities;
- whether the enforcement debtor will suffer unreasonable hardship by paying the debt; and
- if it is appropriate to issue the warrant, having regard to the nature and the amount of the debt: *Rule 14.22(2) Civil Procedure Rules*.

The warrant to redirect the debt does not take effect until it is served on the third person. Once served, the third person must pay the debt to the enforcement creditor, in accordance with the warrant: *Rule 14.23 Civil Procedure Rules.*

If the third person claims the debt is not payable to the enforcement debtor, he or she may apply to the Court for directions: *Rule 14.24 Civil Procedure Rules*.

Redirection of Deposits

If a depositor regularly pays money into the enforcement debtor's account, you may issue an enforcement warrant to have the financial institution of the enforcement debtor to make regular payments to the enforcement creditor, equal to the amount of the regular deposits: *Rule 14.25(1) Civil Procedure Rules*.

Such a warrant must state:

- the enforcement debtor's name;
- the date the warrant ends;
- the amount recoverable under the warrant, including the costs of the enforcement plus interest;
- anything else required by the *Civil Procedure Rules*;
- the financial institution's name;
- details of the enforcement debtor's account;
- the amount to be paid;
- the enforcement creditor's name and address; and
- how the amount is to be paid to the enforcement creditor: *Rule 14.25(2) Civil Procedure Rules*.

The enforcement warrant must then be served personally on the enforcement debtor and his or her financial institution. The enforcement warrant then comes into effect 7 days after service on the financial institution: *Rule 14.26 Civil Procedure Rules*.

See *Rule 14.27 Civil Procedure Rules* for details on the payment.

Redirection of Earnings

You may direct that particular earnings of the enforcement debtor be paid by the debtor's employer to the enforcement creditor: *Rule 14.28(1) Civil Procedure Rules*.

When issuing such a warrant, you must also fix:

- the amount of each deduction; and
- the minimum amount available to the enforcement debtor as take-home pay: *Rule 14.28 Civil Procedure Rules*.

Before deciding whether to order such a warrant, or the amount to deduct, you must consider:

- whether the enforcement debtor is employed by the employer;
- whether the enforcement debtor will have adequate means to pay his or her living expenses and those of his or her family;

- whether the enforcement debtor will have adequate means to pay other known liabilities;
- whether the enforcement debtor will suffer unreasonable hardship by paying the debt: *Rule 14.28(3) Civil Procedure Rules*.

Such a warrant must state:

- the enforcement debtor's name;
- the date the warrant ends;
- the amount recoverable under the warrant, including the costs of the enforcement plus interest;
- anything else required by the Civil Procedure Rules;
- the employer's name;
- the total amount to be deducted;
- the amount to be deducted each pay day;
- the minimum amount to be available to the employee as take home pay;
- the enforcement creditor's name and address; and
- how the amount is to be paid to the enforcement creditor: *Rule 14.28(4) Civil Procedure Rules*.

The enforcement warrant must be served personally on the enforcement debtor and on his or her employer: *Rule 14.29 Civil Procedure Rules.*

The enforcement creditor must also serve on the employer a notice (Form 26) telling the employer of the effect of the order and what the employer must do: *Rule 14.29(2) Civil Procedure Rules*.

See *Rules 14.30 – 14.31 Civil Procedure Rules* for how payments are made.

3.3 Setting Aside Enforcement Warrants

Either the enforcement debtor or enforcement creditor may apply for an enforcement warrant redirecting debts or earnings to be set aside, suspended or varied: *Rule 14.32(1) Civil Procedure Rules*.

If you grant an order to set aside, suspend or vary an enforcement order, the order must be served on the enforcement creditor or enforcement debtor (depending on who is applying) and the debtor, the financial institution or the employer, as the case requires: *Rule 14.32(2) Civil Procedure Rules*.

4 Non-Money Orders

4.1 Procedure When Giving Judgment

Immediately after you have given judgment that includes a non-money order, you must ask the enforcement debtor how he or she proposes to comply with the order. You must then:

- make an enforcement order; or
- fix a date for an enforcement conference to examine how the person on how he or she proposes to comply with the non-money order: *Rule 14.37(1) Civil Procedure Rules*.

If the parties agree as to how the person will comply with the non-money order, you may make an order in the terms of the agreement: *Rule 14.38 Civil Procedure Rules*.

If the person is not present when you give your judgment, you must:

- fix a date for an enforcement conference; and
- issue a summons (Form 27) requiring the person to appear in Court on the date fixed for the conference: *Rule 14.37(3) Civil Procedure Rules*.

The summons should contain a notice to the enforcement debtor to bring with him or her sufficient information to enable him or her to inform the Court how he or she proposes to comply with the order: *Rule 14.37(3) Civil Procedure Rules*

4.2 Suspension of Enforcement Order

A person subject to an enforcement order may apply to the Court to have the non-money order suspended: *Rule 14.40(1) Civil Procedure Rules*.

The application must be:

- supported by a sworn statement; and
- be filed and served on the other party a minimum of 7 days before the application is to be heard: *Rule 14.40(2) Civil Procedure Rules*.

Upon hearing the application, you may:

- suspend the enforcement of all or part of the order because new facts have arisen, been discovered, or for any other reason; and
- make other orders you consider appropriate, including another enforcement order: *Rule 14.40(3) Civil Procedure Rules*.

5 Enforcement Warrants for Non-Money Orders

5.1 Applying for an Enforcement Warrant

A person applying for an enforcement warrant to enforce a non-money order must file:

- an application with two copies of the warrant;
- a sworn statement stating that the person subject to the order has not complied with the order, and in what way he or she has not complied: *Rule 14.43(1) Civil Procedure Rules*.

Unless you order otherwise, you may issue the warrant without a hearing: *Rule 14.43(2) Civil Procedure Rules*.

5.2 Enforcement Warrants

An enforcement for a non-money order must state:

- the name of the person who must comply with the order;
- the date within 1 year of issue when the warrant ends;
- what the warrant authorises;
- any other details required by the *Civil Procedure Rules*.

After issuing the warrant, you must give the warrant to an enforcement officer to be enforced: *Rule 14.43(3) Civil Procedure Rules*.

If there are several non-money warrants arising from different non-money orders, the enforcement officer must deal with them in the order they were issued: *Rule 14.43(4) Civil Procedure Rules*.

After issuing an enforcement warrant, it is enforceable throughout Vanuatu: *Rule 14.41(1) Civil Procedure Rules*.

Before enforcing an enforcement warrant made by a Magistrate in another district, the person must have the warrant sealed by the Magistrate's Court in that district: *Rule 14.41 Civil Procedure Rules*.

Warrant for Delivery of Goods

The warrant for delivery of goods authorises an enforcement warrant to seize specified goods and give them to the person entitled to them under the order: *Rule 14.47(2) Civil Procedure Rules*.

You may issue an enforcement for delivery of goods, if:

- the order for the delivery of goods does not give the person subject to the order the option of keeping the goods and paying an equivalent value; or
- the order does give the option but the person does not choose to pay the equivalent value: *Rule 14.47(1) Civil Procedure Rules*.

If the person chooses to keep the goods and pay the equivalent value, it may be enforced in the same way as a money order: *Rule 14.47(3) Civil Procedure Rules*. See paragraph 2, Money Orders, above.

Order to Do or Not Do an Act

If a non-money order requires a person to do or not do an act, and that person does not comply with the order or does not comply within the time specified in the order, the person may be punished:

- for contempt;
- by seizing the person's property; or
- if it is a body corporate, by punishing an officer for contempt or seizing the officer's property: *Rule 14.48(3) Civil Procedure Rules.*

You may also enforce an order to do an act by appointing another person to do the act and ordering the person originally required to do the act to pay the costs and expenses caused by not doing the act: *Rule 14.48(4) Civil Procedure Rules*.

Such costs and expenses may be recovered under an enforcement warrant for a money order: *Rule 14.48(5) Civil Procedure Rules*. See paragraph 3, Enforcement Warrants for Money Orders, above.

6 Domestic Violence Protection Orders

Domestic violence orders are unique in that unlike other orders, they are not dependent upon another proceeding to support them.

6.1 Applying for Domestic Violence Protection Order

A person may file a claim for a domestic violence protection order against another member of the person's family: *Rule 16.16(1) Civil Procedure Rules*.

Note the term 'family' includes a person who is accepted as a member of a family, whether or not the person is related by blood or marriage to the other members of the family: *Rule 16.15 Civil Procedure Rules*.

The claim must:

- set out the order claimed and the reasons why the order should be made;
- include a statement that the claimant agrees to pay damages to the defendant if it is found that the order should not have been made;
- be in Form 30; and
- be accompanied by a sworn statement in support of the claim (Form 31): *Rule 16.16(2) Civil Procedure Rules*.

6.2 Hearing the Claim

After the claim and sworn statement have been filed, the Registrar must immediately inform you of the claim: *Rule 16.17(1)(a) Civil Procedure Rules*.

You must then hear the claim as soon as possible: *Rule 16.17(1)(b) Civil Procedure Rules*.

The hearing is to be without notice to the defendant: *Rule 16.17(3) Civil Procedure Rules*. Giving notice of the hearing to the defendant could put the claimant in further danger.

The claimant may appear in person or be represented by a lawyer or any other person you approve: *Rule 16.17(2) Civil Procedure Rules*.

Due to the private and often emotional nature of such proceedings, it is important that you treat the claimant with dignity and ensure he or she is made aware the Court will use its power to protect the claimant and other family members.

Read the sworn statement accompanying the claim and be sure to check any ambiguities with the claimant.

After hearing the claim, you may:

- dismiss the claim;
- make whichever domestic violence protection order is appropriate; and
- make whatever other order is appropriate: *Rule 16.17(4) Civil Procedure Rules*.

Typically, a domestic violence protection order will encompass some or all of the following:

- a non-violence order;
- an exclusive occupation of the family home order;

- a non-molestation order; and
- costs.

Before granting an order, it is advisable to discuss each of these orders and their consequences with the claimant. This will ensure that all children or other family members are protected by the order. If necessary, allow the claimant to amend the claim to ensure it fits the situation.

If you grant an order:

- it must be in Form 32;
- it must include a statement authorising the police to arrest the defendant if he or she breaches the order, unless you exclude this power; and
- you must fix a date a maximum of 28 days later for a further hearing and write the date on the order: *Rules 16.17(4)(c),(5),(6) Civil Procedure Rules*.

Service of Order

If you grant the order, you must direct a person other than the claimant to serve the order: *Rule 16.18(2) Civil Procedure Rules*.

The order must then be served on the defendant as soon as practicable and a copy must be given to the police in the area concerned: *Rules 16.18(1),(3) Civil Procedure Rules*.

6.3 Further Hearing

A further hearing of the matter must be held on the date fixed, or if either party asks for an earlier date, on that earlier date: *Rule 16.19(1) Civil Procedure Rules*.

At the hearing, you must consider whether the domestic violence protection order should be continued, amended, or revoked and make an order accordingly: *Rule 16.19(2)(a) Civil Procedure Rules*.

If both parties appear, check to see that the defendant has been served with the order and is aware of the contents.

Question the defendant to see if the order has made him or her aware of the damage caused by violence and whether he or she is willing to abide peacefully with the claimant. If possible, encourage reconciliation between the parties.

If the claimant agrees to have the defendant return to the family home, tell the claimant that he or she should return to the Court immediately should there be any further violence. Ensure the defendant is aware of the serious nature with which he or she will be dealt should there be any further incidents of violence.

If both parties do not appear at the further hearing, it is often advisable to extend the order for another one or two weeks and then see if the order has had any effect on the defendant's behaviour.

If the order is continued or amended, you must give other directions about the progress of the case: *Rule 16.19(2)(b) Civil Procedure Rules*.

6.4 Referral to the Supreme Court

If at any time you believe the level of real or threatened violence is serious, you may refer a domestic violence protection order to the Supreme Court: *Rule 16.20(1) Civil Procedure Rules*.

The Supreme Court will then deal with it and make appropriate orders.

26:

CIVIL:

APPEALS/CASES STATED/REVIEWS

1 Appeals to the Supreme Court

1.1 Right of Appeal

A party to a proceeding may appeal:

- a judgment or final order of the Magistrate's Court; and
- an interim injunction: *Rules 16.26 and 16.27(1) Civil Procedure Rules*.

The appeal may be on a question of law or fact or mixed law and fact: *Rule 16.27(2) Civil Procedure Rules*

1.2 Commencement of Appeal

An appeal is launched by filing and serving an application within 28 days of the date of the decision: *Rule 16.28(1) Civil Procedure Rules*.

The application must:

- set out the grounds of appeal; and
- be in Form 33: *Rule 16.28(2) Civil Procedure Rules*.

Filing an appeal against a civil judgment does not affect the enforcement of the judgment unless:

- the party appealing applies for a suspension; and
- the Court grants a suspension: *Rule 13.4 Civil Procedure Rules*.

2 Appeals From Island Courts

2.1 Right of Appeal

Any person may appeal to the Magistrate's Court from a decision of an Island Court within 30 days from the date of the order or decision of the Island Court *s22(1) as amended by s7 Schedule Island Courts (Amendment) Act No15 of 2001*.

Notwithstanding the 30 day requirement, upon application, you may grant an extension to bring the appeal, provided the application is made within 60 days of the date of the order or decision of the Island Court: *s22(5) Island Courts Act*.

Whether or not to grant an extension is within your discretion. See *Laho Ltd v QBE Insurance (Vanuatu) Ltd* [2003] VUCA 26; Civil Appeal Case No 15 of 2003.

The appellant must:

- file a Notice of Appeal in the Magistrate's Court; and
- give a copy of the Notice to each other party: *Rule 16.34(2) Civil Procedure Rules*.

Each party must give an address for service to the Magistrate's Court: *Rule 16.34(3) Civil Procedure Rules*.

Ensure that the Island Court provides you with the Notice of Appeal and all supporting documents: *s16.34(4) Civil Procedure Rules*.

Upon getting the documents to launch the appeal:

- fix a first hearing date; and
- tell the parties of this date: *Rule 16.34(5) Civil Procedure Rules*.

2.2 Hearing the Appeal

When hearing an appeal against a decision of an Island Court, you must appoint two or more assessors knowledgeable in custom to sit with the Court: *s22(2) Island Courts Act*.

When hearing the appeal, you must:

- consider any records relevant to the decision;
- receive any relevant evidence; and
- make any inquiries you think fit: *s22(3) Island Courts Act*.

Upon hearing the appeal, you may:

- make any order or pass any sentence the Island Court could have made or passed when hearing the matter; or
- order that the cause or matter be reheard before the same court or before any other Island Court: *s23 Island Courts Act*.

First Hearing

At the first hearing of the appeal:

- you must appoint 2 or more assessors knowledgeable in custom to sit on the appeal;
- you may make any other orders, or give any directions, for hearing the appeal; and
- you must fix a date for hearing the appeal: *Rule 16.34(6) Civil Procedure Rules*.

3 Cases Stated

A case stated is a statement of certain relevant portions of the case for the opinion or judgment of another Court. Unlike an appeal, a case stated is limited to a specific issue. Once the issue is decided, the case returns to Magistrate's Court for determination of the case itself.

For any civil or criminal matter, you may reserve any question of law for the Supreme Court to determine through a case stated: *s17(1) Judicial Services and Courts Act*.

After sending a case stated to the Supreme Court you cannot deliver judgment in the case until the Supreme Court has given its opinion: *s17(2) Judicial Services and Courts Act*.

After the Supreme Court hears argument on the case, it will make its determination. Upon receiving this determination you may proceed in accordance with it to continue with the proceedings.

3.1 Referring Civil Appeals

Whenever you refer a constitutional question or question of law to the Supreme Court, you must:

- state the question to be decided;
- state concisely the facts necessary to enable the Supreme Court to decide the question; and
- set out the questions and facts in numbered paragraphs: *Rules 16.22(2),(3) Civil Procedure Code*.

It is very important to clearly state the question you wish the Supreme Court to answer and to provide sufficient information. Leaving out important facts or details could lead to the Supreme Court being unable to make a good decision, which will affect the proceeding and may serve to bring the judiciary into disrepute.

Copies of the case stated must be served on all parties to the proceeding: *Rule 16.22(5) Civil Procedure Rules*.

While the case stated is being dealt with by the Supreme Court, you must ensure no steps in the proceeding are taken either by yourself or by the parties: *Rule 16.22(6) Civil Procedure Rules*.

4 Review of Island Court Decisions by Supervising Magistrate

The decisions of all Island Courts are subject to the review by the Court's Supervising Magistrate.

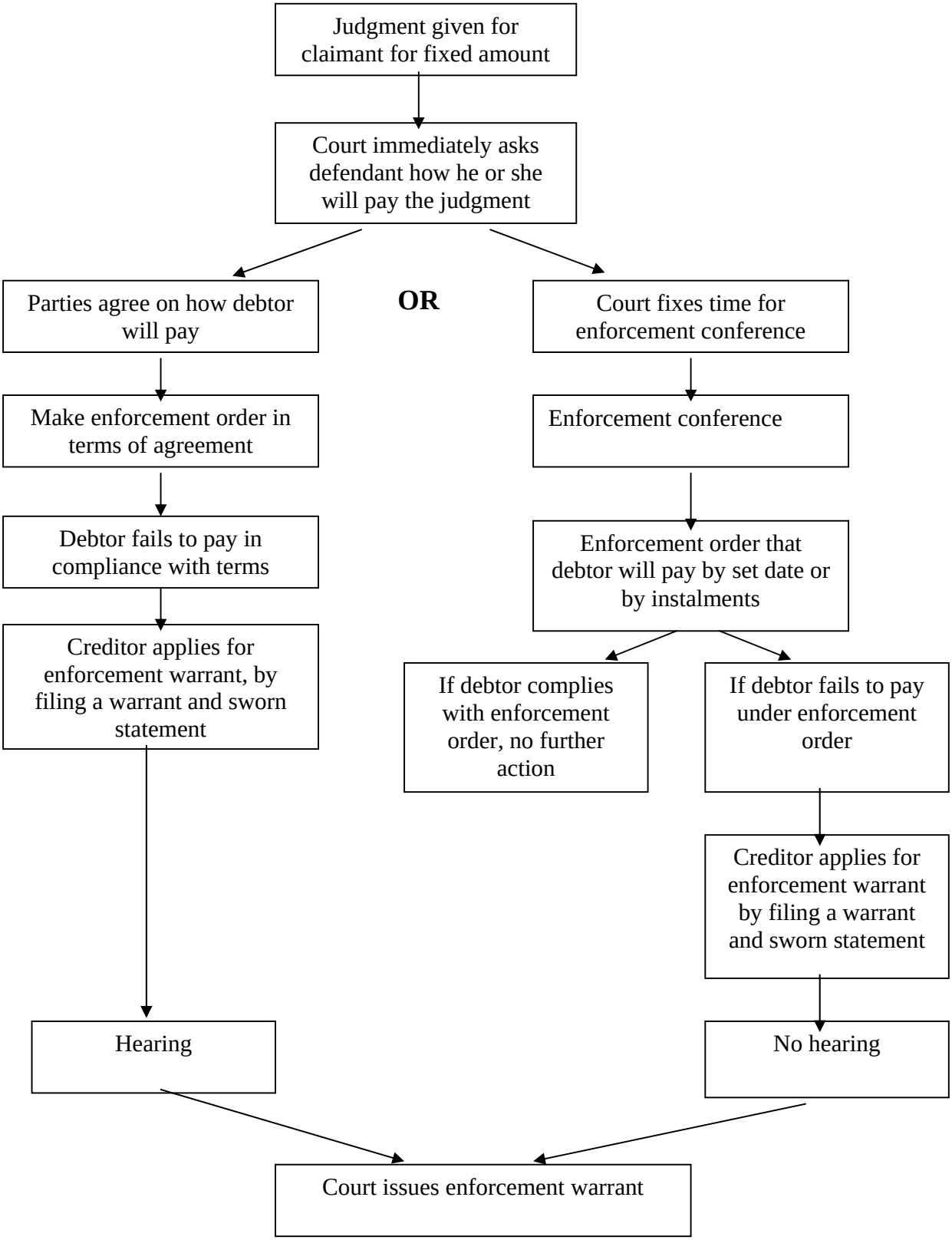
At all times, the Supervising Magistrate must have access to the Island Courts and their records within his or her jurisdiction: *s21(1) Island Courts Act.*

4.1 Review

For both civil and criminal matters, on his or her own application or on the application of any other person, the Supervising Magistrate may:

- revise any of the proceedings as an Island Court;
- make any order or pass any sentence which the Island Court itself could have done;
- order any case to be retried before the same or any other Island Court under his or her supervision; or
- at any stage of the proceedings order the case to be transferred to himself or herself for hearing: *s21(2) Judicial Services and Courts Act*.

Enforcement of Money Orders



Enforcement of Non-Money Orders