



THE PROSECUTOR'S HANDBOOK

AN INTRODUCTION TO PROSECUTIONS

A handbook containing policy and law covering the role and responsibilities of the Director of Public Prosecutions and his prosecutors from the charge to the appeal.

FOREWORD

This introductory handbook is designed to serve as a tool to assist prosecutors prepare and advance fair and ethical criminal prosecutions. There are three important principles that must be borne in mind:

- (i) The Director of Public Prosecutions entrusts lawyers with the great task of prosecuting matters on behalf of the State;
- (ii) Prosecutors must undertake this task under the directives of the Director of Public Prosecutions, and within the bounds of prosecutorial discretion; and
- (iii) If the prosecutor does not discharge his or her responsibilities ethically and within the ambits of the law, he or she turns a prosecution into a persecution and brings disrepute to both the office he or she holds and the office he or she represents.

The lawyer who joins the Office of the Director of Public Prosecutions as a new recruit should be commended for “making the cut”. However, he or she must understand that this is but the beginning of a journey, not the end of one. D.A Bellemare, M.S.M, Q.C put best the often difficult course for the prosecutor when he said:

“It is not easy to be a prosecutor. It is often a lonely journey. It tests character. It requires inner strength and self-confidence. It requires personal integrity and solid moral compass. It requires humility and willingness, where appropriate, to recognise mistakes and take appropriate steps to correct them. Prosecutors must be passionate about issues, but compassionate in their approach, always guided by fairness and common sense.”

The prosecutor should remain fiercely independent, fair and courageous. The responsibilities entrusted to the Director of Public Prosecutions, and thereby to State Counsel and police and public prosecutors, demand nothing less.

With this handbook, you will have the chance to gain a sound knowledge base from which you might wish to launch your practice as an Officer under the Director of Public Prosecutions. At the end of the day, however, it must be borne in mind that this is still nothing more than a handbook.

The course of your practice, your reputation and your professional accomplishments are still very much matters for you to attain and sustain; this being but a foundation from which you may wish to build and strengthen your practice as a prosecutor.



Christopher T. Pryde
DIRECTOR OF PUBLIC PROSECUTIONS

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ORGANISATIONAL STATEMENTS

The Office of the Director of Public Prosecutions Vision and Mission Statements are as follows:

VISION

- A modern and professional prosecution service that supports national goals and aspirations of peace and good governance.

MISSION

- To deliver a fair and independent prosecution service committed to the rule of law.

ORGANISATIONAL VALUES:



“Leadership is the ability to translate vision into reality.”

- Warren Bennis -

THE DIRECTOR OF PUBLIC PROSECUTIONS

The Director of Public Prosecutions is an important regulator of criminal proceedings in Fiji [see **Fiji Independent Commission Against Corruption v Devo** [2008] FJHC 132; HAC177D.2007S (27 June 2008) and Section 117 (8) of the **Constitution 2013**].

The Director of Public Prosecutions is the premier law officer in all criminal matters. All prosecutors; whether State Counsel, public prosecutors, police prosecutors or private prosecutors; must comply fully with his directives.

It is, therefore, imperative that prosecutors understand the role and functions of the DPP.

Diagram 1: Section 117 (8) of the Constitution of the Republic of Fiji, 2013

The Constitutional Powers of the DPP:



The DPP may intervene in proceedings that raise a question of public interest that may affect the conduct of criminal proceedings or criminal investigations.

The DPP must be a person who is qualified for appointment as a Judge and shall be appointed for a term of 7 years. The remuneration of the DPP shall not be less than that paid to a Judge. These provisions both recognise, and protect, the positional responsibilities of the DPP as an important regulator of criminal proceedings in Fiji.

The DPP is independent and in the exercise of his powers shall not be subject to the direction or control of any other person or authority, except by a court of law or as otherwise prescribed by the Constitution or a written law.

The Director of Public Prosecutions has the authority to determine all matters pertaining to the employment of all staff in the Office of the Director of Public Prosecutions, and is given sole authority to appoint, remove and discipline staff (including administrative staff). In exercising these powers, the DPP is subject to the principles of natural justice and to Fiji’s employment laws.

THE DIRECTOR OF PUBLIC PROSECUTIONS: POWER TO DELEGATE AUTHORITY

Section 117 (9) of the Constitution 2013

- The powers of the Director of Public Prosecutions may be exercised by the Director personally, or through other persons acting on his instructions.

Section 50 of the Criminal Procedure Decree 2009

- The Director of Public Prosecutions ... may by written notice authorise any lawyer to be a State Counsel and may authorise any such lawyer to exercise all or any of the functions vested in the Director of Public Prosecutions... in accordance with law.

SUPERVISION & CONTROL

Section 54 of the Criminal Procedure Decree 2009

- Every police officer lawfully conducting a prosecution and every public prosecutor appointed by the Director of Public Prosecutions shall be subject to the directions of the Director of Public Prosecutions.

POWER TO TRANSFER PROSECUTIONS

Section 55 (3) of the Criminal Procedure Decree 2009

- The Director of Public Prosecutions and the Commissioner of Fiji Independent Commission Against Corruption may at any time transfer to each other the conduct of any prosecution at any time before the close of the prosecution case. In such a case the public prosecutor or Fiji Independent Commission Against Corruption prosecutor as the case may be, is deemed to have been appointed by the Director of Public Prosecutions or Commissioner of Fiji Independent Commission Against Corruption to prosecute.

POWER TO APPOINT PUBLIC PROSECUTORS

Section 51 (1)

of the Criminal Procedure Decree 2009

- The Director of Public Prosecutions may appoint any lawyer to be a public prosecutor for the purposes of any case.

Section 52 (1)

of the Criminal Procedure Decree 2009

- A public prosecutor may appear before any court in which any case of which the public prosecutor has charge is under trial or on appeal.

POWER TO APPOINT POLICE PROSECUTORS

Section 51 (2)

of the Criminal Procedure Decree 2009

- The Director of Public Prosecutions as he thinks fit may appoint police officers to be police prosecutors for the purposes of conducting prosecutions in the Magistrates Court. No police prosecutor may appear in the Magistrates Court without such appointment.

Section 53

of the Criminal Procedure Decree 2009

- In any trial before a Magistrates Court, if the proceedings have been instituted by a police officer, any police officer having lawful authority to conduct the case may appear and conduct the prosecution notwithstanding the fact that he or she is not the officer who made the complaint or charge.

“My job as a prosecutor is to do justice. And justice is served when a guilty man is convicted and an innocent man is not.”

- Sonia Sotomayor -

THE DIRECTOR OF PUBLIC PROSECUTIONS:

The Need for Independence

In order to advance the rule of law, and in particular to protect the principle that all are equally subject to the law, the DPP (and therefore his officers) must be independent.

The Constitutional provision at Section 117 (10) of the **Constitution 2013** ensures that the DPP has complete independence in his decision making processes. This is vital to protect the integrity of the criminal justice system because it guarantees that any decision to prosecute a person or a corporate body is made free of any external influences. In the words of John Kelly TD, the prosecution system “should not only be impartial but should be seen to be so and that it should not only be free from outside influence but should be manifestly so.”

Recognising that the Attorney-General as a law officer of dignity and standing is still a member of a political party elected by the people into office, and in order to avoid the danger that that political aspect may give rise to a perception (however misconceived) that the decision to prosecute is politically motivated, agency to prosecute is vested in the separate and independent person of the DPP. In light of that consideration, it is of vital importance that both the DPP and every prosecutor remain apolitical at all times.

The following observations are useful to bear in mind:

“...the use of prosecutorial discretion should be exercised independently and free from political interference. Prosecutors are required to carry out their duties without fear, favour or prejudice – impartially, with objectivity, unaffected by individual or sectional interests and public or media pressures, fairly, having regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect and make all necessary and reasonable enquiries and disclose the results of those enquiries, regardless of whether they point to the guilt or innocence of the suspect ... That is a role which, I fear, is not well understood in the community. It may not be a popular position but it is a very valuable and important one.”¹

Anna Katzmann, SC²

The Director of Public Prosecutions is a person who must be capable of upholding and defending the integrity and independence of his office, and in so doing, win and hold public trust in that integrity and independence.

In order to protect the integrity of his office, the Director of Public Prosecutions periodically publishes comprehensive policies, guidelines and directives to ensure procedural fairness in the decision making process. These policies, guidelines and directives must be adhered to by every prosecutor.

While the prosecutor should diligently and vigilantly protect the independence of the Office of the Director of Public Prosecutions, no Director and no prosecutor should ever fear direct scrutiny.

“Independence without accountability is an illusion. Independent power is entrusted only to those who (can) give an account of its exercise.”³

John McKechnie, QC⁴

¹ Extract from a Speech by Anna Katzmann, SC at a dinner of the NSW Law Society's Government Lawyers CLE Conference on 30 October 2007.

² Now the Hon. Anna Katzmann, Judge of the Federal Court of Australia.

³ McKechnie, J. “Directors of Public Prosecutions: Independent and Accountable” (1996) University of Western Australia Law Review, Vol. 26, p. 268.

THE DUTY OF A PROSECUTOR

“Carrying out the duties of a prosecutor is difficult. It requires solid professional judgment and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress. Not everyone can do this. Moreover, there is no recipe that guarantees the right answer in every case, and in many cases reasonable persons may differ. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error.”

-Morris Rosenberg -

The following principles are important and should be followed:

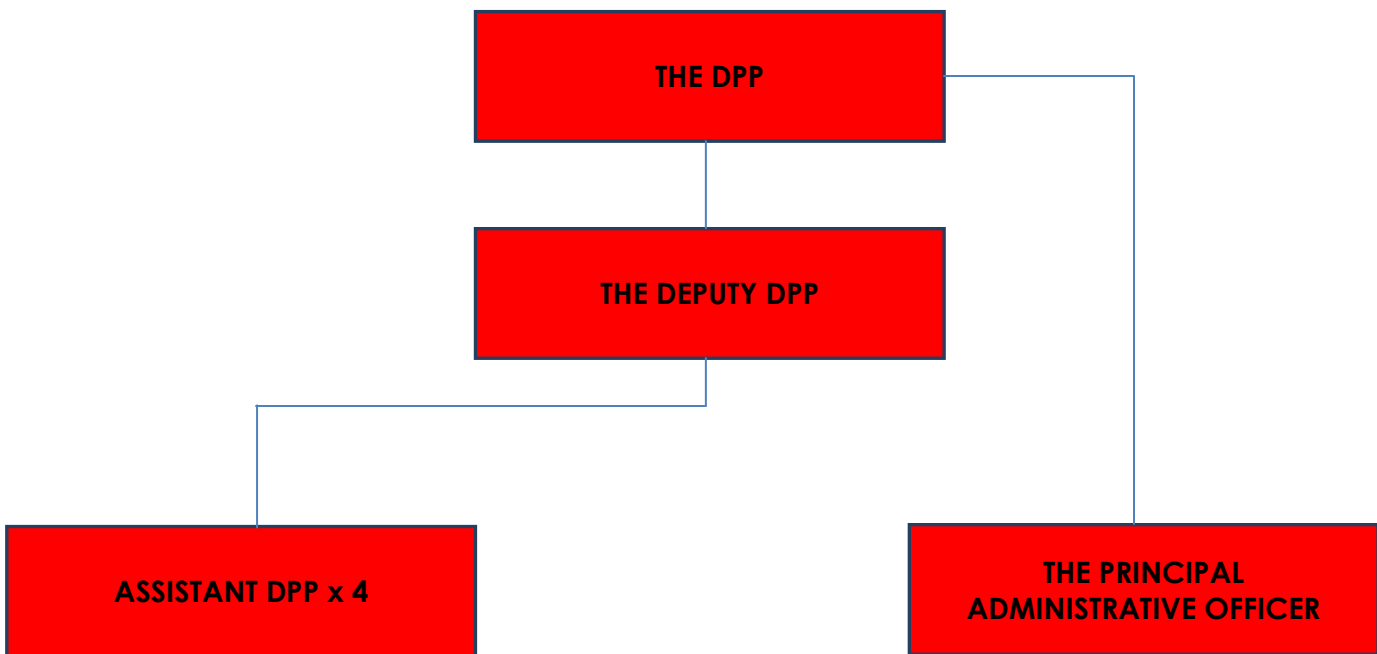
1. A prosecutor has an overriding duty to the Court to act with independence in the interests of justice. He or she must assist the Court in the administration of justice, and must not deceive or knowingly or recklessly mislead the Court.
2. A prosecutor is a ‘minister of justice’, an advocate, and an officer of the Court. The prosecutor must adhere to the professional and ethical standards required of the profession.
3. A prosecutor must not, in his or her professional practice, discriminate unlawfully against, victimise or harass any person on the basis of race, colour, ethnic or national origin, nationality, citizenship, sex, gender or gender re-assignment, sexual orientation, marital or civil partnership status, disability, age, religion or belief.
4. A prosecutor is individually and professionally responsible for his or her own conduct, and for his or her own professional work, and must strive to exercise sound judgment in the course of his or her professional activities.
5. A prosecutor must remain independent, and must not permit his or her absolute independence, integrity and freedom from external pressures to be compromised.
6. A prosecutor must not do anything (for example, accept a present) in such circumstances as may lead to an inference that his or her independence may be compromised.
7. A prosecutor must not compromise his or her professional standards to please his or her instructing officer, the Court or a third party, including any complainant, witness, investigative or referring authority.
8. Counsel for the prosecution, unlike counsel instructed for the defence in a criminal case or counsel instructed in civil matters, owes a wider duty to the court and to the public at large to conduct his or her case moderately, albeit firmly.
9. The prosecutor as a minister of justice must not strive for a conviction.
10. The purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the Court what the State considers to be credible evidence relevant to what is alleged to be a crime.

Counsel has a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; it is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings (see **Boucher v the Queen** (1954) 110 CCC 263, 270).

⁴ The first Director of Public Prosecutions for Western Australia and now the Hon. John McKechnie, Justice of the Supreme Court of Western Australia

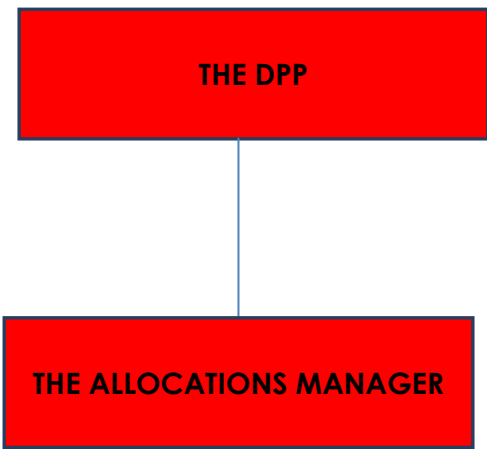
RESPONSIBILITIES OF PERSONS IN POSITIONS OF SUPERVISORY AUTHORITY

Diagram 1: *Executive Management Structure*



The Executive Management Team is responsible for providing legal and administrative advice to the DPP. The Executive Management Team will assist the DPP in developing and implementing strategic policies, which may include the provision of timely advice to the DPP on legal and administrative policy matters when called upon to do so. The Executive Management Team shall be responsible for formulating quality control mechanisms for the ODPP, and for conducting periodic risk management reviews either collectively or individually at the behest of the DPP.

Diagram 2: *Case Management Supervisory Structure*



THE DIVISIONAL MANAGER

- The Western Division
- Lautoka District Office
 - Nadi District Office
 - Ba District Office
 - Sigatoka District Office

The Northern Division

THE MANAGER

- The Serious Fraud Division (Suva)
- The Child Protection Division (Suva)
- The General Crimes Division (Suva)
- Nausori District Office

The Allocations Manager:

The Allocations Manager is a senior law officer appointed to this position by the DPP. The Allocations Manager will generally be the Deputy DPP, or in the alternative, the senior most member of the ADPP cadre or, thereafter, any other senior law officer so appointed.

The Allocations Manager will be responsible for the fair and equitable distribution of briefs at the advice, trial and High Court appeal stages for Suva and Nausori; and at the Court of Appeal and Supreme Court stages nationwide.

The Allocations Manager is responsible for supervising the allocations functions of the Divisional Managers. This supervisory function will necessitate a periodic review (with no longer than a ½ year period between reviews) of all allocations undertaken within the Western and Northern Divisions to ensure that allocations within the Divisions are undertaken in an equitable manner.

Any issues identified must be immediately brought to the attention of the Divisional Manager for discussion and correction. The decision of the Allocations Manager, in respect of any allocations, will supersede that of the Divisional Manager and in all instances, the decision of the DPP is final. A record of any action taken in this regard must be reduced in writing and retained as an official record of the ODPP.

These records will be reviewed periodically (but for no longer than ½ a year between reviews) by the DPP or any other staff member or members (the number of which is to be at the discretion of the DPP) so appointed to this review panel by the DPP.

The Assistant Director of Public Prosecutions:

The Assistant Director of Public Prosecutions (‘ADPP’) is responsible to the DPP and is required to assist the DPP in the efficient management of the ODPP, both administratively and in respect of the proper enforcement of the criminal laws of Fiji.

In this capacity, the ADPP as a member of the Executive Management team must be familiar with not only the criminal laws of Fiji, but also the ODPP Prosecution Code, Code of Conduct, Human Resource Manual, and the policies and directives issued by the DPP for the ODPP. The ADPP is responsible for assisting the DPP and the DDPP monitor effective compliance with the Codes, protocols, policies and directives of the DPP.

The ADPP must also assist the DPP and the DDPP in effectively safeguarding the institutional independence and integrity of the ODPP. Any risks or breaches identified should be immediately brought to the attention of the responsible Manager and, with the exception of the duties of allocation where the decision of the Allocations Manager is final for these purposes, a viable solution should be identified and implemented by both the ADPP and the Manager concerned.

In a situation where consensus is not reached within a reasonable time frame (to be determined by the ADPP in accordance with the nature and magnitude of the identified risk), the solution directed by the ADPP should prevail. In all instances, the direction of the DDPP will supersede that of an ADPP and the direction of the DPP is final.

A record of any action taken in this regard must be reduced in writing and retained as an official record of the ODPP. These records will be reviewed periodically (but for no longer than ½ a year between reviews) by the DPP and the DDPP or any other staff member or members (the number for which is to be at the discretion of the DPP) so appointed to this review panel by the DPP.

“A leader is one who knows the way, goes the way and shows the way.”
- John Maxwell -

The Divisional Manager:

The Divisional Manager is responsible to the DPP, and is required to assist the DPP in the efficient management of the Division, both administratively and in respect of the proper enforcement of the criminal laws within that Division.

In this capacity, the Divisional Manager must be familiar not only with the criminal laws of Fiji, but also the ODPP Prosecution Code, the Code of Conduct, Human Resource Manual and the policies and directives issued by the DPP for the ODPP.

The Divisional Manager is responsible for monitoring effective compliance with the Codes, protocols, policies and directives of the ODPP within the Division and should immediately intervene in any situation where, on any reasonable appraisal of the matter, a breach is imminent.

A record of any action taken in this regard must be reduced in writing and retained as an official record of the ODPP. These records will be reviewed periodically (but for no longer than ½ a year between reviews) by the DPP and the DDPP or any other staff member or members (the number for which is to be at the discretion of the DPP) so appointed to this review panel by the DPP.

The Divisional Manager is granted responsibility to allocate advice, trial and High Court appeal briefs within the Division they head. In this respect they are subject to the direct supervision of the Allocations Manager. Appeals must be handled in accordance with the protocols set out under 'The Decision to Appeal' at page 100.

Allocations must be undertaken in an equitable manner taking into account the District from which the external file emanates; the positional responsibilities of each Officer; and current workloads.

The Divisional Manager is also responsible for reviewing advice work and legal submissions prepared by the Officers under his or her charge. The Divisional Manager must ensure that the Criminal Advocacy Support and Enquiry System ('CASES') is updated. The protocol for updating CASES is outlined at pages 19 and 20.

The Divisional Manager is ultimately responsible for monitoring the work of each Officer in the Division, and must ensure that Officers are complying with all internal and Court set time-lines. The Divisional Manager is also responsible for the administrative management of the entire Division in conjunction with the PAO.

The Manager:

The Manager is responsible for reviewing advice work and legal submissions prepared by the Officers under his or her charge.

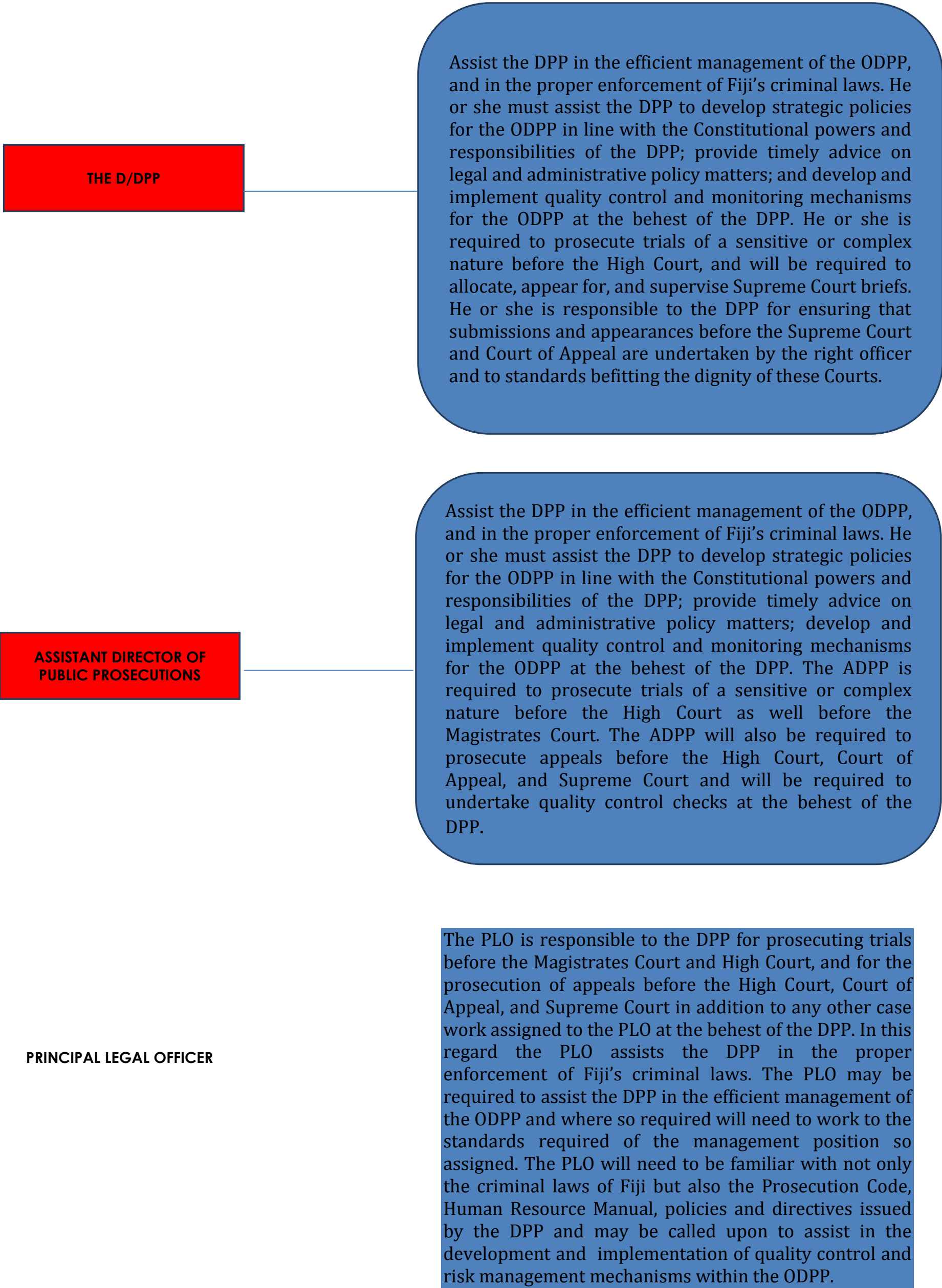
The Manager is responsible for monitoring the work of each Officer within his or her supervisory ambit and must ensure that these Officers are complying with all internal and Court set time-lines. The Manager must ensure that the Criminal Advocacy Support and Enquiry System ('CASES') is updated. The protocol for updating CASES is outlined at pages 19 and 20.

The Manager has an obligation to assist the DPP, the DDPP, the ADPPs and the PAO in the efficient management of the ODPP, with a particular emphasis on the proper enforcement of the criminal laws of Fiji. To this end, the Manager should be familiar with Fiji's criminal laws and procedures. The Manager should also acquaint themselves with the provisions of the ODPP Prosecution Code, the Code of Conduct, Human Resource Manual, and the policies and directives issued by the DPP for the ODPP.

The Manager is responsible for monitoring effective compliance with the Codes, protocols, policies and directives of the ODPP among the pool of officers they are required to supervise and should immediately intervene in any situation where, on any reasonable appraisal of the matter, a breach is

imminent. A record of any action taken in this regard must be reduced in writing and retained as an official record of the ODPP. These records will be reviewed periodically (but for no longer than ½ a year between reviews) by the DPP and the DDPP or any other staff member or members (the number for which is to be at the discretion of the DPP) so appointed to this review panel by the DPP.

Diagram 3: Office Hierarchy (Legal)



FILE PROTOCOLS:

Advice

1. A file ('the external file') is received from an investigative agency ('the referring agency'). The referring agency will normally be the Police. The external file should only ever be received by the Registry, and no legal officer regardless of rank should subsume this function. The external file should contain photocopies only of all statements, documentary exhibits, internal investigation notes etc. The original investigation file should be retained by the referring agency.
2. The Registry is responsible for immediately entering the details of that external file into the Case Advocacy Support and Enquiry System ('CASES') and opening a physical internal file for that matter. These tasks must be completed within 24 hours of the receipt of the external file at the ODPP.
3. The internal and external files ('the brief') must then be submitted by the Registry to the Allocations Manager or the Divisional Manager (whichever is applicable). This too must be completed within 24 hours of the receipt of the external file at the ODPP.
4. The Allocations Manager or the Divisional Manager is then responsible for allocating the brief to State Counsel ('the Officer'). The Allocations Manager or the Divisional Manager must ensure an equitable distribution of briefs commensurate with the experience and positional responsibilities of each State Counsel.
5. Briefs should to be allocated to the District or the District Officer that has jurisdiction over the matter. For example: an external file for an offence that allegedly occurred in Nadi, and which therefore will be prosecuted out of the Nadi Magistrates Court, should be allocated to the Officer based at the Nadi Office. When the Officer exits the ODPP or is transferred from one District Office to another, the briefs do not automatically re-allocate to another or transfer with the Officer. Instead, a proper hand-over to the Allocations or Divisional Manager must be undertaken. In certain cases, allocations will be made to experienced Counsel regardless of physical location in circumstances where the complexity of the brief warrants, on any reasonable consideration of the matter, that allocation.
6. Once a brief is allocated to an Officer, he or she is responsible for that brief until such time as the matter has been successfully resolved, either by the completion of the advice and the return of the external file to the referring agency; discontinuation of the proceedings by the DPP; termination of the proceedings by way of a court order, or by way of a conviction or an acquittal at trial. The protocol for dealing with a brief once the Court has made a decision either by way of a conviction or acquittal is outlined under "The Decision to Appeal" at page 100.
7. In certain instances, the Officer may feel unable to continue to retain carriage of the matter (because of a scheduling conflict for example). In these instances, the Officer must raise this issue with the Allocations Manager or Divisional Manager, who may thereafter decide to re-allocate the brief. No Officer is to 'allocate the brief' to another Officer in a manner inconsistent with this process.
8. Legal opinions must be completed using the ODPP Analysis Template within 21 days of receipt of the brief, unless this timeframe is expressly abbreviated or extended by the Allocations Manager or the Divisional Manager in writing. The legal opinion must be submitted to the Manager responsible for supervising the Officer ('the Divisional Manager or the Manager') within the required time frame. The Divisional Manager or Manager is responsible for reviewing the legal opinion and must submit the brief along with his or her recommendations to the DPP, within 7 days of receipt.

9. If the brief has been allocated for advice on whether or not there is sufficient evidence to sustain criminal prosecutions, the Officer should prepare both a legal opinion (using the ODPP Analysis Template) and an evidence matrix (using the ODPP Evidence Matrix template).
10. The Officer is required to conduct a preliminary analysis of the brief within 14 days of receipt. To that end, the Officer is strongly encouraged to complete the evidence matrix (using the ODPP Evidence Matrix template) within the first 14 days of receipt.

The purpose of this protocol is to enable the Officer to determine early on, within the 21 days assigned for legal opinions, whether or not further investigations are warranted on the evidence. If further investigations are warranted, then the preliminary opinion (or the evidence matrix with an explanatory covering note) regarding those further investigations should be submitted to the Divisional Manager or Manager within 14 days of State Counsel's receipt of the brief. Ultimately, this protocol is designed to avoid any delay in the finalisation of a decision in respect of the brief.

11. The Divisional Manager or Manager is responsible for deciding whether or not further investigations should be called for. If the Divisional Manager or Manager is of the view that further investigations are required, she or he may direct the Officer to write to the referring agency calling for these further investigations. Discretion regarding the necessity for further investigations is vested in the Divisional Manager or Manager, and any decisions taken in this respect should be noted down on the file and retained as an official record of the ODPP.
12. The Officer should submit the ODPP's request to the referring agency in accordance with his or her instructions. (Officers should use the ODPP Letter to Police – Further Investigations Template). Within the body of that letter, the Officer should ask the referring agency to submit the relevant information gathered in response to our request (photocopies only) to us within a clearly set out time frame (for example: the Officer should specify the date and time the external file is expected back at the ODPP). The time period for the conduct of the legal opinion does not run during the period the external file is not physically at the ODPP.
13. The Officer will then be given a further 7 days to complete the advice from the date that the investigative docket is returned. The final analysis, accompanied by a completed evidence matrix, should then be submitted to the DPP through the Divisional Manager or Manager for the DPP's consideration and decision.
14. The DPP may, if he considers it necessary, call for a second opinion from an Assistant Director of Public Prosecutions ('ADPP') or the Deputy DPP ('DDPP'). The ADPP or the DDPP is expected to complete that second opinion and return the brief to the DPP within 7 days. The DPP may also choose to discuss the legal analysis and/or the evidence matrix with the Officer before making his decision on the brief.
15. Once the DPP has made his decision on the brief, it will be returned to the Officer to effect his decision. The Officer must thereafter communicate the DPP's decision to the relevant referring agency. If a decision is taken to instruct the brief out to the Police Prosecution Service or the prosecuting branch of the referring agency, the external file should be returned with a covering note (usually a letter) and a copy of the advice or the evidence matrix prepared by the Officer and endorsed by the DPP (although the endorsement itself must not be visible on the copy sent).
16. The note and advice sent to the Police Prosecutions Service will be by way of a memorandum (using the ODPP Memorandum to the Police Prosecutions Service Template) and marked "Confidential and Legally Privileged".
17. Each movement of the brief must be noted in writing on the file and on CASES.

18. No file is to be submitted to another member of staff without a neatly written or typed covering note on the blue minute sheets supplied by the Office for these purposes.
19. When instructing Counsel to appear for a matter on your behalf, the ODPP Instructions Template must be used. All instructions issued to administrative staff in respect of the brief must be noted in writing on the file and the language of these instructions must be expressed in precise but courteous terms.
20. The language of any internal or external correspondence must be temperate, formal and professional.
21. The ODPP uses four modes of written communication with external parties. They are correspondence by way of:
- (1) Letters
 - (2) Memoranda
 - (3) Emails
 - (4) Facsimile.
22. The Director of Public Prosecutions, as Constitutional head of the ODPP and as a matter of protocol, directs that he is the only person authorised to write directly to:
- (1) The President
 - (2) The Prime Minister
 - (3) A member of Cabinet
 - (4) A member of Parliament
 - (5) Another Constitutional appointee
 - (6) A Permanent Secretary
 - (7) The international equivalent of (1) to (6) above
 - (8) The head of any international organisation.

Letters

23. Letters must always be sent out using the ODPP Letterhead.

The Letterhead must contain the Coat of Arms, followed immediately by the words “The Office of the Director of Public Prosecutions” (in capital letters). The Letterhead must also contain the physical and mailing address of the ODPP Headquarters. This is because all official correspondence sent to the ODPP should be addressed to the Director of Public Prosecutions. The Letterhead must also contain the official telephone number of the Officer sending the letter and the internal ODPP Reference for the matter being written about.

24. Further, the “Footer” of every page of the Letter must bear the words “All official correspondence to be addressed to the Director of Public Prosecutions.”
25. The Letter must be reviewed, before sending, to ensure that it contains no grammatical, syntax or spelling errors. Letters that commence with “Dear Sir” should end with “Yours faithfully” and letters that commence with “Dear Mr./Ms./IP” should end with “Yours sincerely.”
26. Counsel must write using language that is courteous, temperate and professional.
27. Every letter sent by or on behalf of the ODPP must be signed using the following style:

“Seini K. Puamau
Principal Legal Officer
for Director of Public Prosecutions”

Emails

28. All official email accounts need to be regularly checked and emails should be responded to, within 24 hours of receipt, where appropriate.
29. All official emails need to be typed using black font colour and the background needs to be white. No other colour or pictures are to be used.
30. Do not include logos (e.g. the ODPP logo or the Coat of Arms) in the body of emails sent by or on behalf of the ODPP. Do not add quotes of any sort to the ends of emails, both internal and outgoing.
31. However, the ends of all official emails sent by or on behalf of the ODPP which contains confidential information should contain the disclaimer: "This email contains information that is confidential and which may be subject to legal privilege. If you are not the intended recipient, you must not read, use, distribute or copy the contents of this email. If you have received this email in error, please notify me immediately and destroy the original."
32. When writing to a member of staff within the ODPP please adopt this format:

"PLO (SV),

(Insert content)

Thank you,

SLO (FL).

This email contains information that is confidential and which may be subject to legal privilege. If you are not the intended recipient, you must not read, use, distribute or copy the contents of this email. If you have received this email in error, please notify me immediately and destroy the original."

33. When writing to a person outside the ODPP please adopt this format:

"Dear Mr. Smith,

(Insert content)

Yours sincerely,

Mr. Lisiate Fotofili

Principal Legal Officer

OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

25 Gladstone Road,

P.O Box 2355, Government Buildings,

SUVA, FIJI

Ph: (+679) 3211 567

Fax: (+679) 3304 789

This email contains information that is confidential and which may be subject to legal privilege. If you are not the intended recipient, you must not read, use, distribute or copy the contents of this email. If you have received this email in error, please notify me immediately and destroy the original."

34. Do not use nicknames or any other forms of informal address when drafting official emails sent by or on behalf of the ODPP.
35. The email must be reviewed, before sending, to ensure that it contains no grammatical, syntax or spelling errors.
36. Courtesy, formality and uniformity are the rule for all official emails sent by or on behalf of the ODPP.

Memoranda

37. A memorandum is a brief written message that contains directive, advisory or informative matter which is sent from one person or one department in an organisation to another person or another department within the same organisation.
38. It is for this reason that written messages between the ODPP and the Police Prosecutions Service in respect of all prosecution matters are communicated via memorandums or “memos”.
39. Memos are only to be used:
 - (1) within the ODPP for formal administrative communication between staff;
 - (2) between the ODPP and the Police Prosecution Service in respect of prosecution matters only (as the Police Prosecution Service is administratively under the aegis of the Commissioner of Police); and
 - (3) between the ODPP and Working Groups that the ODPP is a part of, whether in Government or otherwise.
40. Counsel must use the ODPP Memorandum Template and must ensure that all internal administrative memos and all external Working Group memos are marked “Confidential.” All memos to the Police Prosecution Service must be marked “Confidential and Legally Privileged.”
41. The memorandum must be reviewed, before sending, to ensure that it contains no grammatical, syntax or spelling errors. Counsel must write using language that is courteous, temperate and professional.

Facsimile

42. Like emails, and the post, the facsimile is a way through which messages may be passed on to intended recipients.
43. All official messages communicated by or on behalf of the ODPP via facsimile must be sent out with a Facsimile Cover Form (the ODPP Facsimile Cover Form Template must be used).
44. The Facsimile Cover Form should set out the name of the intended recipient, the name of the sender and the date, and should list the documents that are being sent.

“The difference between the right word and almost the right word is the difference between lightning and a lightning bug.”

- Mark Twain -

Diagram 1: ADVICE PROCEDURE – FLOW CHART

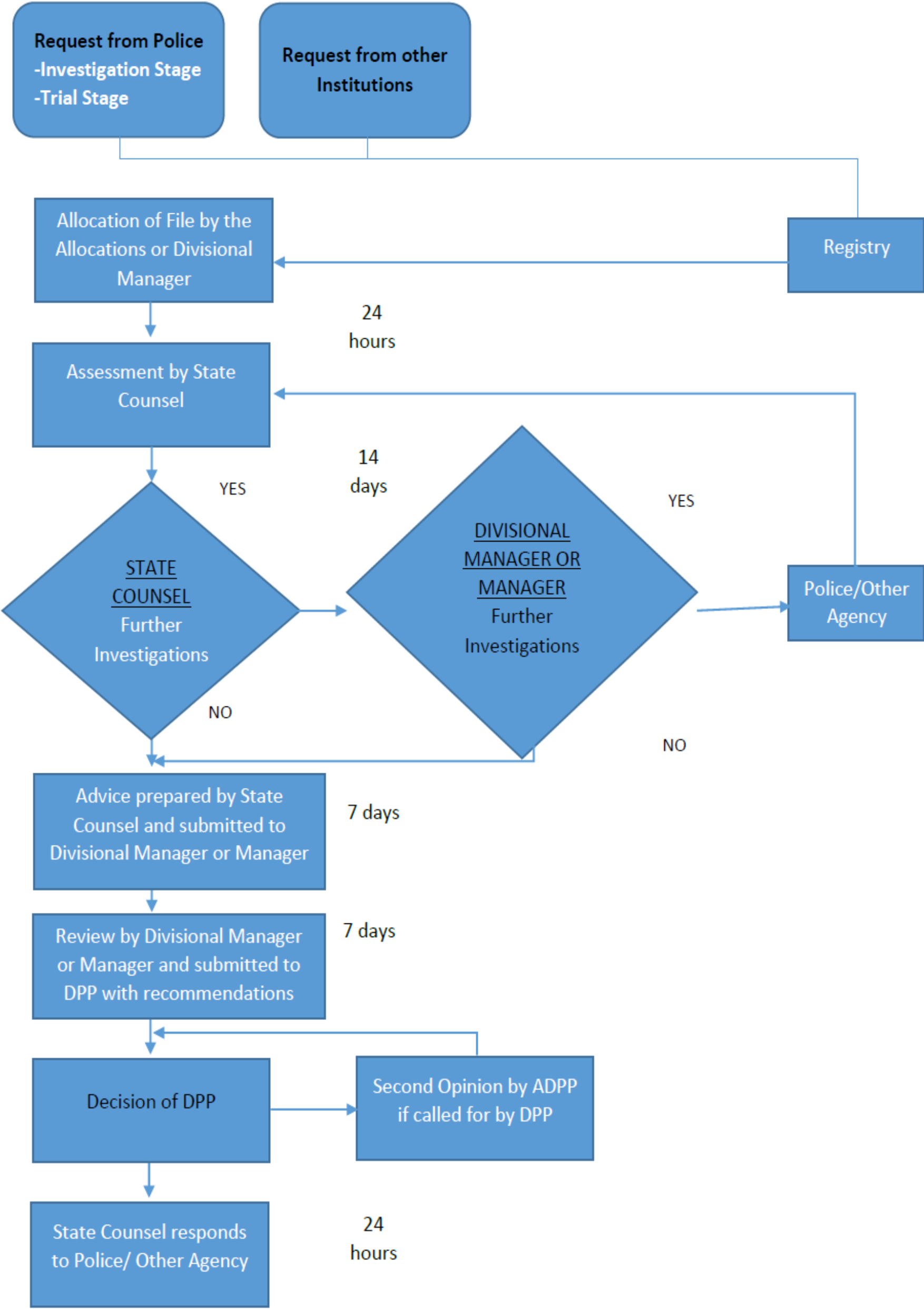


Diagram 2: Advice Template

ANALYSIS

OFFICE FILE NUMBER

TO: DPP

UFS: (TYPE IN NAME OF MANAGER, POSITION HELD)

RE: STATE v.
CRIMINAL CASE NO:
POLICE DOCKET NO:
INVESTIGATING OFFICER:

BACKGROUND:

How the file came to be in our Office.
What is the current status of the matter?
What is the instructing note given to you regarding the file?

FACTS OF THE CASE:

Only set out those facts which are essential to each essential element of an offence, and those facts which are essential to a possible defence, or possible defences.

ISSUES:

For a potential prosecution, the issues are generally: (1) whether or not there is sufficient evidence to sustain criminal prosecutions, and (2) whether or not it is in the public interest to prosecute.
For a potential appeal, the issues are: (1) whether or not there are merits to an appeal, (2) whether or not the appeal is within time, and (3) whether despite the merits to an appeal, an appeal is justified (i.e. whether or not a substantial miscarriage of justice has occurred).

LAW:

When canvassing the law, set out the possible offences available on the evidence, set out the essential elements of each offence, and discuss the relevant and most up to date authority on any available defences.

ANALYSIS:

The analysis should not be a regurgitation of the facts. Nor should it be a simple marrying of the essential facts to the essential elements. The analysis should filter the evidence pertinent to each essential element. The prosecutor should consider whether or not the evidence that Counsel intends to rely on is admissible. If it is not, then it cannot be used in Court. The prosecutor should then consider whether there is now sufficient evidence in respect of each essential element. The prosecutor should only consider those public interest factors which are directly relevant to the case in question. If there are no relevant public interest considerations relevant to the brief then not too much time need be spent on this issue.

RECOMMENDATIONS:

Recommendations should be in bullet form and succinct. The recommendations should set out whether or not there is sufficient evidence to proceed, and the charges that can be sustained on the evidence. If the evidence is insufficient in respect of one or all elements, the prosecutor needs to set out the appropriate next course of action for the DPP’s sanction. A recommendation regarding possible defences needs to be made; and if public interest is an issue, then a recommendation regarding that public interest consideration is necessary. In short, set out recommendations regarding the key issues canvassed in the body of your advice.

Respectfully submitted,
Signature
Name of Counsel
Rank
Date

RECOMMENDATIONS BY MANAGER:

DECISION OF THE DPP

Diagram 3: Overview

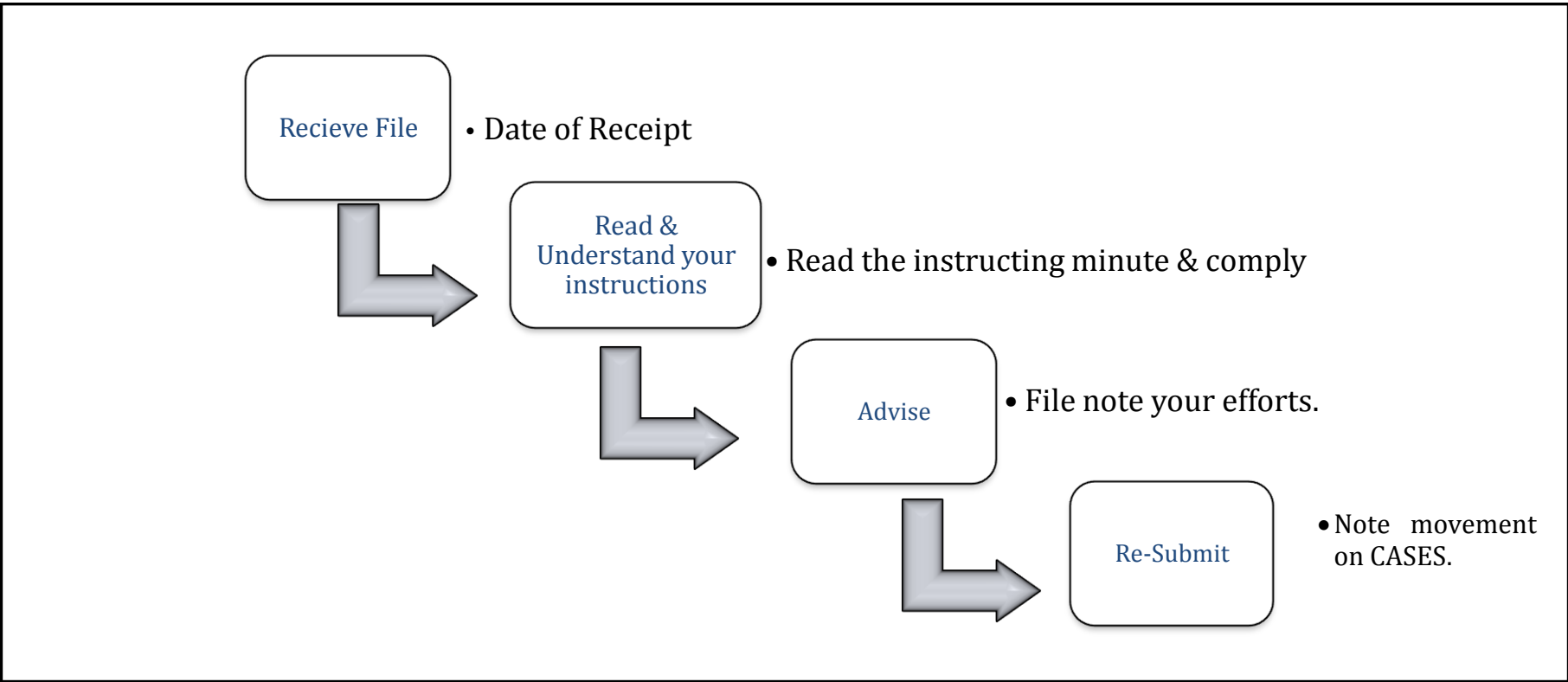


Diagram 4: Preparing your Advice

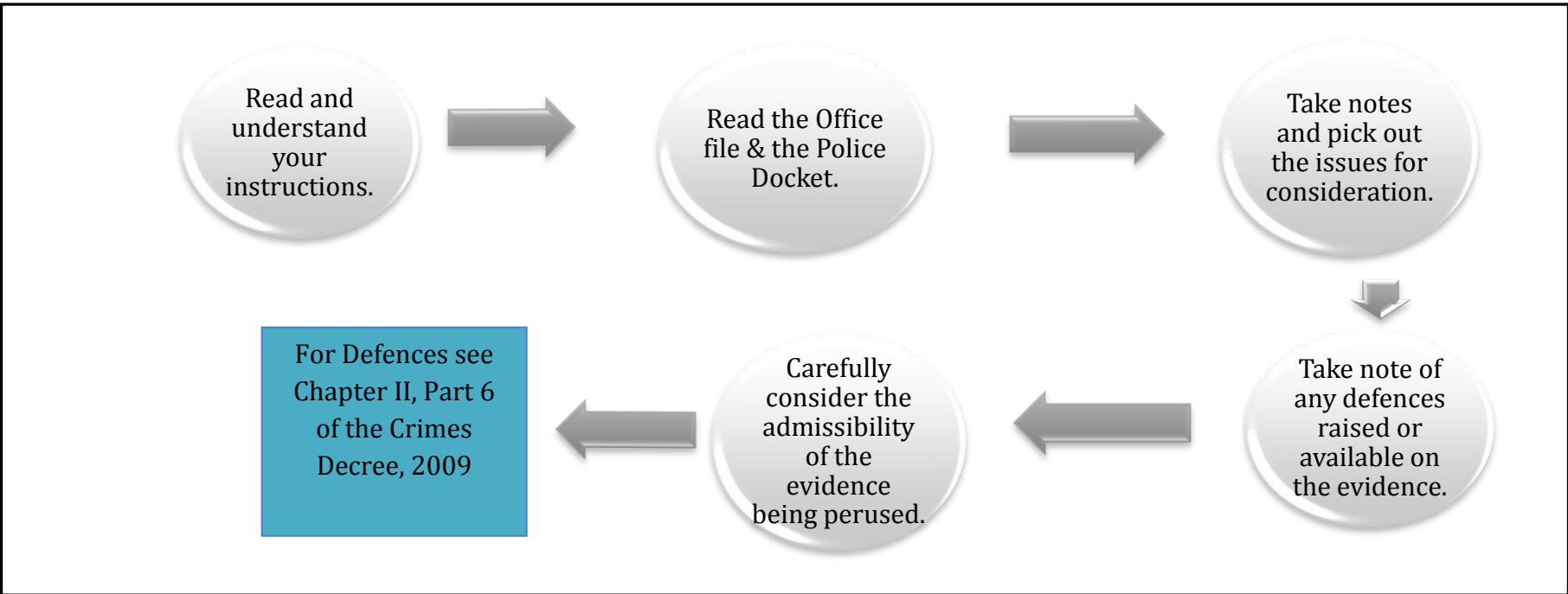


Diagram 5: Advice Format

PAPER

Minute Sheets

- All legal opinions are to be presented on blue minute sheets specifically purchased by the Office of the Director of Public Prosecutions for this purpose.

PROOF READ

Cross-Check and Refine

- The official language of the Office of the Director of Public Prosecutions and the Court is English (U.K).
- Abide by the rules of English grammar. Avoid spelling and syntax errors.

STRUCTURE

Aspire to clarity, cogency and cohesiveness

- Space left margin - 2 1/2 inch. Font - Times New Roman. Font Size - 12.
- Line Spacing- 1 1/2. Spacing (Before and After)- 0.

CASES

The Office of the Director of Public Prosecutions has invested in an electronic case management tool.

The Criminal Advocacy Support and Enquiry System (‘CASES’) allows the user to track and manage any brief handled by the ODPP. It has been designed by the ODPP to suit the work flow of State Counsel, Litigation Clerks and other members of staff. It is a dynamic, easy to use system that can be updated quickly to reflect progress on a case, as well as changes in office policy and procedures relevant to case work.

The four main purposes of CASES are:

- **File tracking**

Each officer should note down the date and time a file leaves or arrives at his or her desk.

- **Practice management**

The Allocations Manager, Divisional Manager and Manager should monitor CASES regularly to ensure that his or her Officers are complying with internal and Court set deadlines.

- **Management reports**

The Allocations Manager should prepare weekly reports for the DPP. These reports should be copied to the ADPPs.

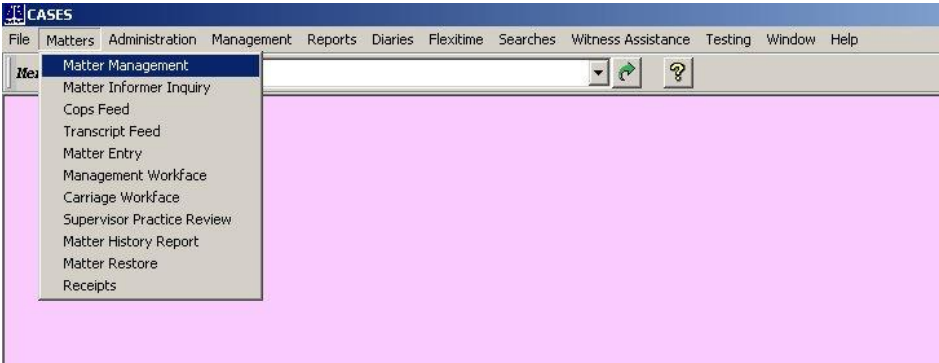
- **Statistics**

The Registries should prepare quarterly reports for the DPP.

Every legal officer must update CASES after every court appearance by the officer who appeared. If for some reason it cannot be done straight after the court appearance then, without fail, it must be done before the officer goes home that day. It is the responsibility of the officer who appeared to update CASES **not** Registry staff. No files should be given to Registry staff for updating.

Diagram 1: Updating CASES

Step 1:



- From the Matters menu select Matter Management, as displayed below. You are now in the **MATTER SEARCH SCREEN**.

Step 2:

Search

Reset

Preview

Print

Screen

Help

Select All

Show Criteria

Matter Search

Matter No:

Ext Ref:

Type:

Surname:

Sound Match

Given Name:

CNI Number:

Related to Matter as:

Subject

Matter Name:

Practice:

Charge Cat:

Venue:

DPP Centre:

State:

Matter

Matters

DPP No	Name	Rel	Type	Venue	Centre	Charge	Practice	State
--------	------	-----	------	-------	--------	--------	----------	-------

- Type the matter number/external reference/surname and or given name in the labelled fields e.g. Matter No. and press **Enter** or click on the **Search** button in the toolbar at the top of the **MATTER SEARCH SCREEN**. When you enter the matter number the other search criteria become inactive.
- You are now shown the Matters tab and the matter resulting from the search may be shown. Select the matter by double clicking on the row or pressing ‘enter’.

Step 3:

File

Save

Insert

Undo

Reports

Screen

Help

Matter Listings Maintenance

Matter Listings 2510058 PELE.P

Date	Listing	Venue	Bench	Solicitor	Result	Next Date	Instr
17/06/2005	M	CENTLC	BAPTIE J	APPS.S	APG		

Listing: Mention

Court Venue: Central Local Court

Bench: Mr J Baptie

Solicitor: Simon APPS

Result:

Subjects for this Listing: All

Dates - From: 17/06

Duration: 1

Court Room:

Crown:

APG

APR

BAW

BC

BCA

BDW

BR

BREV

BUA

BV

BVR

COMDIR

CSDC

CSSC

CTDC

CTSC

DCSD

DISM

Application granted

Application Refused

Bail application withdrawn

Bail continued

Bail (conditional) allowed

Bail dispensed with

Bail refused

Bail revoked

Bail (unconditional) allowed

Bail varied

Bail variation refused

Committal hearing directed

Comm. for sentence to Dist.Ct

Comm. for sentence to Sup.Ct

Comm. for trial to Dist.Ct

Comm. for trial to Sup.Ct

Subject deceased

Dismissed

- Select the relevant listing so that an arrow is shown on the far left hand side of the listing.
- Click on the drop down arrow in the **Result** field
- Select the correct **Result**.

“Effective leadership is putting things first. Effective management is discipline, carrying it out.”

-Stephen Covey-

THE MENTIONS TEAM

INTRODUCTION:

The Mentions Team ('MT') is comprised of Legal Officers ('MT LO') who come under the supervision of the Mentions Team Manager ('MTM'). The MTM is an LO appointed to this position by the DPP.

There are 10 members of the MT, inclusive of the MTM. The MT is responsible for attending to mention matters before the Magistrates Court of Fiji at Suva, Nasinu and Navua and the MTM is responsible for coordinating these appearances.

The MT only appears for mention and other relatively straight-forward matters, which can include first call, bail hearings, mentions, sentencing and judgment. Prosecutors are expected to appear personally for pre-trial conferences and trials.

It is compulsory that all Prosecutors use the MT for mention matters before the Magistrates Court. However, in circumstances where a Prosecutor intends to appear in person for a mention matter, he or she must first notify the MTM of that fact before 2.30pm the day before the scheduled appearance.

In these instances, the MT LO assigned to that Court will apply to have the matter stood down until the Prosecutor is able to personally appear.

STEP 1:

Prosecutors are expected to identify the Magistrates Court matters which are listed for mention only, and prepare complete instructions for these mention matters. The file and the complete instructions (which must be prepared using the ODPP Instructions Template) are to be submitted to the MTM by the Prosecutor in carriage, no later than 2.30pm on the day prior to the scheduled appearance.

STEP 2:

The Registry distributes the Cause List generated from CASES along with the Cause List received from the Magistrates Court Registry to the MTM, as a matter of priority, a day before the scheduled appearances. Upon receipt of the Lists, the MTM circulates them to the MT LOs via email.

The MT LOs are then expected to respond to the email and indicate the Court before which they intend to appear. In exceptional circumstances, the MTM may unilaterally allocate Courts to Officers within the MT. This, however, is usually only done in instances where there is a high volume of mention matters and not enough MT LOs available to cover all courts, i.e. as a result of leave or individual trial commitments.

STEP 3:

Whenever there are scheduled mentions before the Magistrates Court at Nasinu and/or Navua, the MTM will submit a Vehicle Request Form (using the ODPP Vehicle Request Form template) to the ODPP Transport Coordinator. The Vehicle Request Form should be submitted a day prior to the expected appearance.

STEP 4:

The MTM will receive files on instructions for the MT throughout the course of a day, but no later than 2.30pm on the day prior to the scheduled appearance. This receipt must be entered into the inward section of the Inward/Outward Register supplied to the MT, and retained by the MTM, for this purpose. The MTM will enter the particulars of the file, the date and time of the receipt, and the name of the instructing Prosecutor as part of that inward entry.

STEP 5:

The MTM will then dispatch files to members of the MT in accordance with the Courts each MT LO has volunteered to appear before. This first outward entry must be noted in the outward section of the Inward/Outward Register.

STEP 6:

Upon return from Court on the day of the scheduled appearance, the MT LO is expected to update CASES immediately. A copy of the appearance return generated should then be signed and placed in the respective file. The MT LO is expected to note the next date on the cover of the ODPP red file. (The Appearance Return (On Instructions) Template should be used during the appearance and included in the file alongside the CASES generated return).

In instances where a Bench Warrant has been issued during the course of a mention matter, the MT LO is expected to email the Suva Registry and the Officer handling the brief to notify both these parties of that fact. The email should contain the particulars of the Bench Warrant, and should include a request to the Suva ODPP Registry to uplift the Bench Warrant from the relevant Magistrates Court Registry and dispatch it to the Officer. A copy of that email should be printed out by the MT LO and placed in the file alongside the appearance returns.

STEP 7:

The MT LO is then responsible for returning the file to the MTM. This will be marked in the inward section of the Inward/Outward Register and once all files have been received back from the MT, the MTM shall notify the ODPP Suva Registry and a member of staff from the Registry shall be responsible for dispatching each file back to the Prosecutor in carriage. This second outward entry must be noted in the outward section of the MT Inward/Outward Register.

STEP 8:

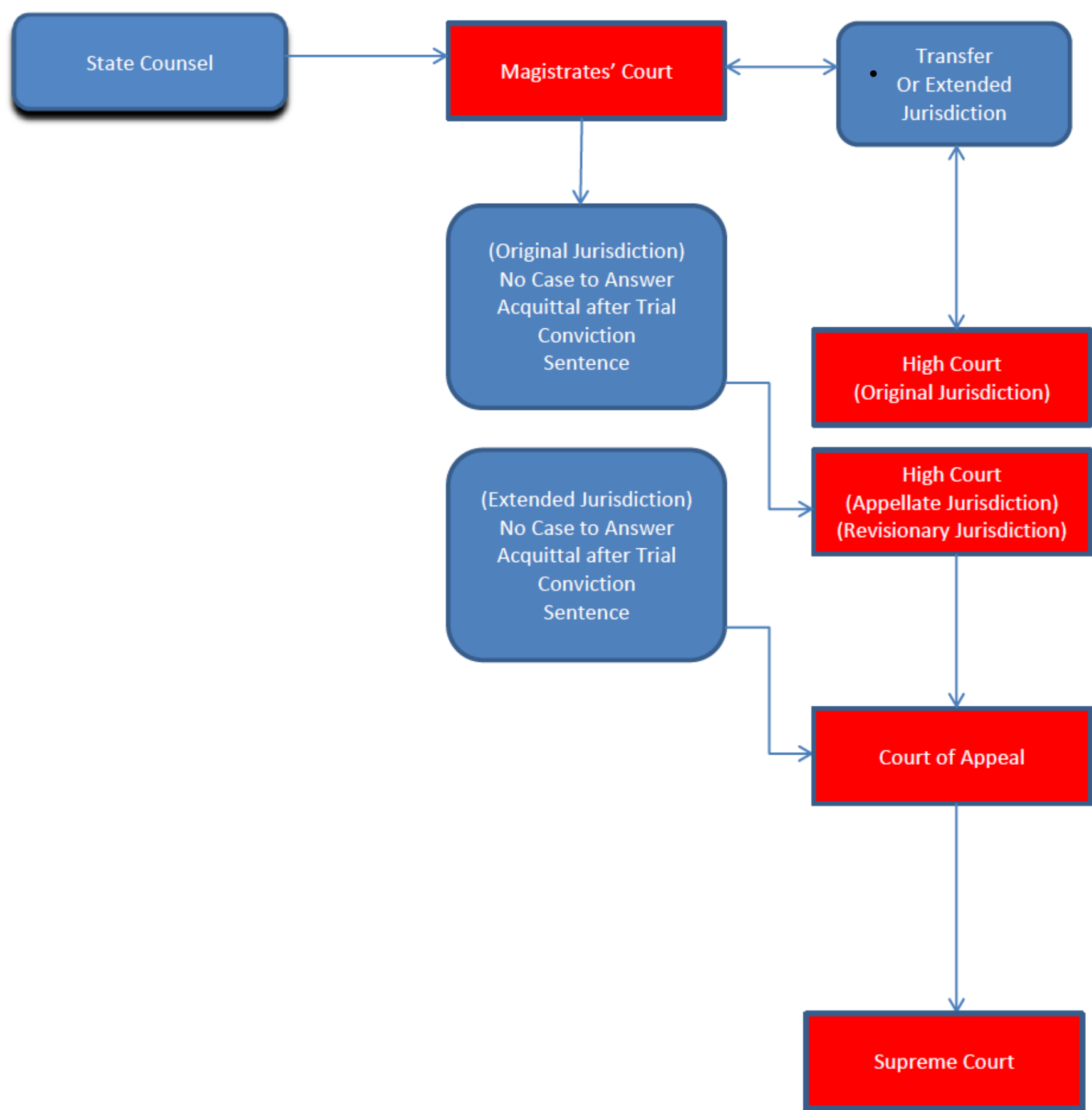
In respect of mention matters forwarded from an outer District for appearances in Suva, Nasinu and Navua, the ODPP Registry should forward these files to the MTM by or before 2.30pm, a day prior to the scheduled appearance. This means that the Prosecutor in carriage must submit the file two days before the scheduled appearance (if submitted by the Western and Northern Divisions) or the morning of the day prior to the scheduled appearance (if submitted by the Eastern Division) in order to enable this file handover to occur within time.

In all instances, after the appearance in Suva, Nasinu or Navua, the MT LO who appeared for the matter is expected to return the file to the MTM after having complied with protocol 6. The MTM will be responsible for ensuring that the file is dispatched to the ODPP Suva Registry for EMS to the Division that file emanated from. The MT LO who appeared for the matter is expected to email the Prosecutor in carriage a soft copy of the appearance return, and indicate that the file is in transit back to the District Office from which it emanated.

“Surround yourself with a loyal and trusted team. It makes all the difference.”

- Alison G. Pincus -

APPEARANCES THROUGH THE COURT SYSTEM



Explanatory Note:

- State Counsel are allocated briefs to prosecute. The matter is first called before the Magistrates Court of Fiji. If a summary matter, the trial will take place in the Magistrates Court. If the matter is indictable it will be transferred to the High Court, or if an indictable matter triable summarily, and the accused elects a High Court trial, the matter may be transferred to the High Court.

The matter may also be transferred to the High Court for sentence. With the exception of matters that have been transferred to the High Court for sentence or election by an accused, the High Court may choose to remit the matter back to the Magistrates Court pursuant to Section 4 (2) of the **Criminal Procedure Decree 2009**, by effectively extending the jurisdiction of the Magistrates Court to try a case that would otherwise be beyond its jurisdiction to try. There is no power to extend a Magistrates jurisdiction on sentence.

FAULT ELEMENTS

The shift in terminology from *mens rea* to *fault element* at Section 18 of the **Crimes Decree 2009** better reflects the common law development in the area of criminal culpability. Criminal law in Fiji has moved away from the proposition that for a person to be guilty, he or she must have the requisite guilty mind only i.e. intention, knowledge, willfulness, malice etc. In the case of a strict *mens rea* offence, a person is assessed subjectively and is penalized only for his or her morally defective choices.

Criminal jurisprudence has expanded criminal liability to include instances of recklessness or negligence; an objective assessment of morally defective conduct giving rise to criminal culpability. Fault simply means culpability or blameworthiness.

Intention, knowledge, recklessness and negligence are specifically defined in the **Crimes Decree 2009** at sections 19 to 22. Section 23 of the **Crimes Decree 2009** provides that in respect of offences that do not specify fault elements, the following default fault element will exist:

“23. — (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.

(2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.”

It follows then that in order for a crime to be one of strict liability or absolute liability, the law must expressly make it so.

STRICT LIABILITY

Pursuant to Section 24 of the **Crimes Decree 2009**:

‘(1) If a law that creates an offence provides that the offence is an offence of strict liability (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 35 is available. (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence (a) there are no fault elements for that physical element; and (b) the defence of mistake of fact under section 35 is available in relation to that physical element. (3) The existence of strict liability does not prevent an offender from raising any other defence that is applicable to the offence for which he or she is charged.”

For example, involuntariness pursuant to Section 16 (3) of the **Crimes Decree 2009** or the common law defence of absence of fault, or reasonable care.

ABSOLUTE LIABILITY

Pursuant to Section 25 of the **Crimes Decree 2009**, “(1) if a law that creates an offence provides that the offence is an offence of absolute liability (a) there are no fault elements for any of the physical elements of the offence; and (b) the defence of mistake of fact under section 35 is unavailable. (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence (a) there are no fault elements for that physical element; and (b) the defence of mistake of fact under section 35 is unavailable in relation to that physical element. (3) The existence of absolute liability does not prevent an offender from raising any other defence that is applicable to the offence for which he or she is charged.”

For example, involuntariness pursuant to Section 16 (3) of the **Crimes Decree 2009**, or denial of the charge.

THE LOCUS CLASSICUS – PRESUMPTION THAT MENS REA IS AN ESSENTIAL ELEMENT OF AN OFFENCE

Western Electric Co Ltd v Comptroller of Customs [1964] FJCA 2; [1965] 11 FLR 8 (4 September 1964)

*“What is usually regarded as locus classicus on this subject is the dictum of Wright J. in **Sherras v. De Rutzen** [1895] 1 QB at p. 921:*

“There is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered.”

THREE CATEGORIES OF OFFENCES -MENS REA OFFENCES, STRICT AND ABSOLUTE LIABILITY OFFENCES

DPP v Coya (Construction) Pty Ltd [1983] FJCA 7; [1983] 29 FLR 29 (28 July 1983)

*“In the **Sault Ste Marie case** the Supreme Court of Canada recognised three categories of offences: (1) those in which mens rea such as intent, knowledge or recklessness must be proved by the prosecution; (2) those in which the prosecution need not prove mens rea but the accused may avoid liability by proving all reasonable care ('strict liability'); (3) absolute liability.”*

Frequently in the past "strict" liability and "absolute" liability have been regarded as synonymous. But they are not so semantically. "Absolute" admits of no exception. "Strict" merely means stringent or rigorous. One will look with interest to see if these useful designations will be more widely adopted.”

A FOURTH CATEGORY – THE STRAWBRIDGE APPROACH

State v Hong Kuo Hui [2005] FJHC 732; HAC40.2004 (2 May 2005)

“The four categories of offences that operate in instances where the statute does not state a mens rea offence are:

- (a) **Implied Mens Rea:** The prosecution has both a persuasive and an evidential burden to prove mens rea. Once the prosecution has proved mens rea, then in the absence of evidence to contrary (ie. a defence is raised or the defence raises a reasonable doubt) mens rea is presumed.*
- (b) **The Strawbridge Approach:** "Requires, in addition to some evidence that the accused had an honest belief in facts which would make his act lawful, some evidence or basis for thinking that it was on reasonable grounds; in which event the onus falls on the prosecution to disprove honest belief on reasonable grounds," per Cooke P at 665.*

- (c) **Strict Liability:** The prosecution is required to prove the *actus reus*, but in relation to one or more elements of the *actus reus*, there is no *mens rea* element to prove. However, the defendant can prove absence of fault in his part in order to exculpate themselves.
- (d) **Absolute Liability:** The offence is complete upon proof of the *actus reus*. There is no requirement to prove *mens rea*; neither can the defendant claim an absence of fault in his or her own defence."

HOW TO DETERMINE WHETHER AN OFFENCE IS ONE OF STRICT OR ABSOLUTE LIABILITY

State v Hong Kuo Hui [2005] FJHC 732; HAC40.2004 (2 May 2005)

"In order to determine whether an offence is one of strict or absolute liability, the following are also determinants:

- Where absolute liability may be a necessary implication, for example in tax law where failing to file a tax return automatically elicits liability otherwise a range of excuses could be used to defer the filing of a return in time. See **IRD v Thomas** [1989] 13 TRNZ 697.
- The presence of an evaluative term in the *actus reus*, such as "fair" or "reasonable" as such terms cannot be determined with sufficient certainty in advance and problems of fair warning arise.
- The absence of words such as "knowingly" or "willfully" indicating in context the absence of a *mens rea* component.
- Absolute liability should be threatened in clear terms, so that the defendant knows in advance what the boundaries of the offence are. See **Re Wairarapa Election Petition** [1988] 2 NZLR 74, 117.
- The severity of the penalty prescribed for the breach should not be too high. "It is contrary to sense and justice that a person should be subject to the ultimate penalty, no matter how careful or innocent he may be", **Re Wairarapa Election Petition**, at 117.
- If the statute itself specifies a defence, this points to there being an absolute liability offence. See **McLaren Transport Ltd v MOT** [1986] 2 NZLR 81, 83.
- If the statute expressly describes an offence as being one of "strict liability", or provides that it need not be proved that a defendant "intended" the relevant conduct, this supports the availability of the defence of a total absence of fault: **Buchanans Foundry Ltd v Department of Labour** [1996] 3 NZLR 112."

IN SUMMARY

- 1 • **Intention, knowledge, recklessness, negligence.** If a statute does not expressly make an offence one of strict or absolute liability, then **intention** is the default fault element for all crimes where the physical element is one of conduct, and **recklessness** is the default fault element for all crimes where the physical element is one of circumstance or result.
- 2 • **Strict Liability:** Offence complete upon proof of the physical element only but a defence of involuntariness, mistake of fact, absence of fault or taking all reasonable care is available.
- 3 • **Absolute Liability:** Offence complete upon proof of the physical element only. Defence of mistake of fact, absence of fault or taking all reasonable care is NOT available. Defences negating voluntariness of the conduct or denial may be raised.

DOLI INCAPAX

Pursuant to Section 26 of the **Crimes Decree 2009**, “A child under 10 years old is not criminally responsible for an offence.”

However, pursuant to Section 27, “(1) A child aged 10 years or more but under 14 years old can only be criminally responsible for an offence if the child knows that his or her conduct is wrong. (2) The question whether a child knows that his or her conduct is wrong is one of fact. The burden of proving this is on the prosecution.”

DK v Rooney & Anor (unreported, Supreme Court of NSW, 3/7/96)

“On consideration of the authorities it is quite clear that in order to rebut the presumption of doli incapax it must be established by the prosecution beyond reasonable doubt not only that the child did the act in the circumstances which would involve adult criminal liability, but also that what he was doing was wrong. The knowledge is not to be presumed from the mere fact of the commission of the act, but it must be proved aliunde and may be proved inter alia by the circumstances attending the act, the manner in which it was done and the evidence as to the nature and disposition of the child concerned. The burden of proving that the child’s knowledge is wrong is on the prosecution, so at the conclusion of the evidence the prosecution must fail if the court is not satisfied beyond reasonable doubt of the child’s guilt.”

R v Vito Meola (1999) NSWCCA 388.

“The presumption of doli incapax is not a defence; it is an element of the prosecution case. If the prosecution fails to call evidence to rebut the presumption there is no case to answer. If, at the conclusion of the prosecution case there is evidence that could satisfy a jury, the hearing or trial will proceed. In some cases the defence may elect to call evidence in the defence case. Ultimately, it is for the Magistrate or jury to determine at the end of the case whether this element has been established beyond a reasonable doubt. That is, it is for the Crown to establish to the criminal standard that the alleged offender had the capacity which the law requires.”

C v DPP (1996) 1 AC 1 at 38C, per Lord Lowry

“A long uncontradicted line of authority makes two propositions clear. The first is that the prosecution must prove that the child defendant did the act charged and that in doing that act he knew that it was a wrong act as distinct from an act of mere naughtiness or childish mischief.

The second clearly established proposition is that the evidence to prove the defendant’s guilty knowledge, as defined above, must not be the mere proof of the doing of the act charged, however, horrifying or obviously wrong that act may be. As Erle J said in Reg v Smith (Sydney) (1845) 1 Cox CC 260

‘a guilty knowledge that he was doing wrong , must be proved by the evidence, and cannot be presumed from the mere commission of the act. You are to determine from a review of the evidence whether it satisfactorily proved that at the time he fired the rick (if you should be of the opinion he did fire it) he had a guilty knowledge that he was committing a crime.’”

It is important to note that the requirement at Section 27 (2) of the **Crimes Decree 2009** imposes an additional element for the Prosecution to prove i.e. that the child accused knew that his or her conduct was wrong.

In **State v K.R.A.K – Judgment** [2013] FJHC 703; HAC73.2013L (15 July 2013), the High Court of Fiji, assisted by a panel of three (3) assessors, found the child accused (approx. 11 years old) guilty of “manslaughter”. Indeed, as the evidence developed, it became apparent at trial that a charge of “murder” was available. This case is clear support for the proposition that a child who is between the ages of 10 and 14 years old can and should be held fully responsible for his criminal acts.

In proving knowledge, the State can have recourse to any or a combination of the following:

- ▶ Statements/admissions made by the child.

For example: in **State v K.R.A.K**, supra, the child accused admitted that:

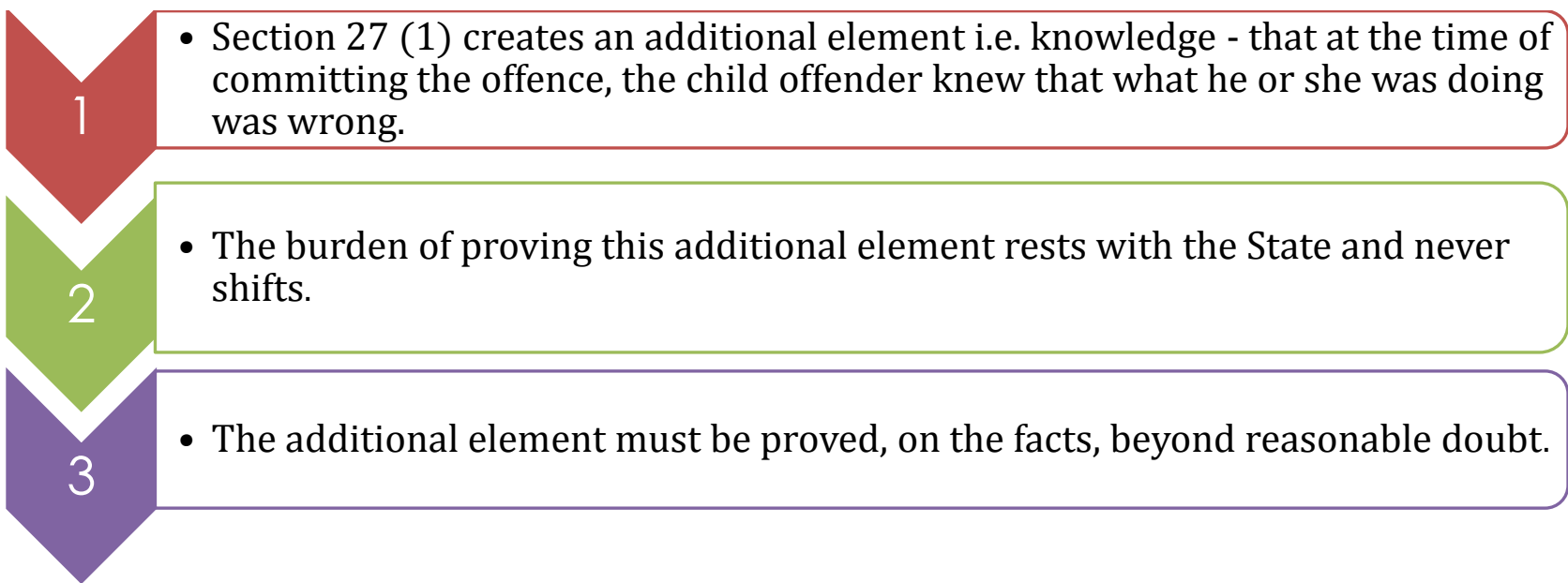
- (i) He had had gun safety training in school.
- (ii) He had witnessed a relative use the same gun to shoot and kill a pigeon within a few hours of the incident.

- ▶ Behaviour of the child before and after the act.

For example: in **State v K.R.A.K**, supra, after the shooting, the child accused hid behind one of two trucks. He only came out after relatives had rushed the shooting victims to the hospital. When a labourer came upon him he said, “Slap me. I did it. I am guilty.”

- ▶ Evidence of parents/ home background.
- ▶ Evidence of teachers.
- ▶ Evidence of psychologists/ psychiatrists.

IN SUMMARY



THE CHARGE:

DEFINITIONS:

Offence: A specified transgression of the criminal or regulatory law. An offence may be against the common law or against the provisions of statutes, or subordinate legislation. (Contrast: Section 2 of the **Crimes Decree 2009**.)

•Source: Butterworths Concise Australian Legal Dictionary, 2004

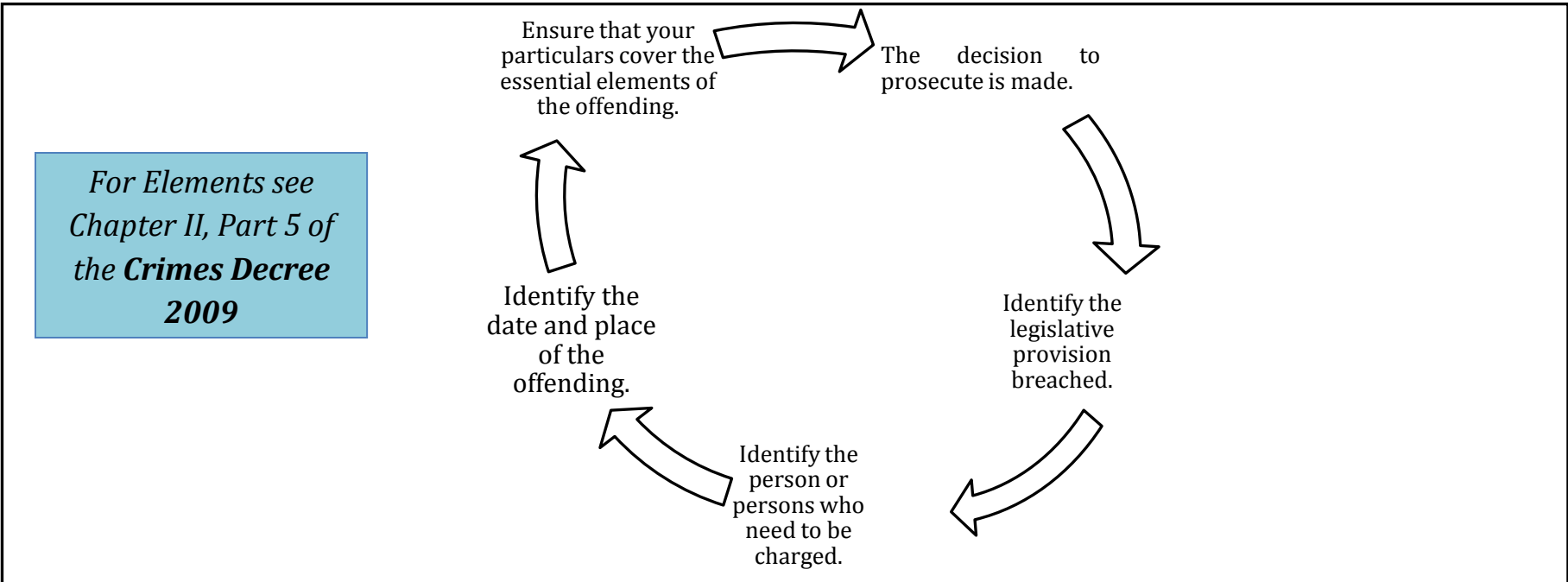
Element: In relation to an offence, a constituent part of the offence, either an essential component of the offence as defined, or a part of the offence as it was actually committed ; ‘element’ is an equivocal word: *Kaporonovski v R* (1973) 133 CLR 209 at 238; 1 ALR 296 at 314; *Re Hamilton-Byrne* [1995] 1 VR 129

•Source: Butterworths Concise Australian Legal Dictionary, 2004

Fault Element: The state of mind required to constitute a particular crime; *He Kaw The v. R* (1985) 157 CLR 523; 60 ALR 449.

There may be alternate fault elements for an offence and these may include intention, recklessness, negligence, dishonesty, or malice.

Diagram 1: Preparing the Charge



THE PROSECUTION CODE TEST

Para 8.1

of the Prosecution Code 2003

- Prosecutors should select charges which:
 - (a) Reflect the seriousness of the offending;
 - (b) Give the court adequate sentencing powers;
 - (c) Enable the case to be presented in a clear and simple way; and
 - (d) Adequately reflect the true criminality of the offender's conduct.
- Prosecutors should not continue with more charges than are necessary. They should not lay more charges than are necessary just to encourage an accused to plead guilty to a few. They should never lay a more serious charge just to encourage an accused to plead guilty to a lesser charge.

THE TEST FOR PROSECUTION

"Prosecuting is the art of the possible; you can only prosecute if you have evidence."

-Sir David Calvert-Smith QC -

Paragraph 5 of the **Prosecution Code 2003** provides:

"5.1... No person in Fiji shall be prosecuted unless there is sufficient evidence and it is in the public interest to prosecute..."

*5.2. The first step is to be sure that there is a reasonable prospect of a conviction. This is an objective test, which includes an assessment of the reliability of evidence, and the likely defence case. **The test is, whether a court, properly directed in accordance with the law is more likely than not, to convict the accused of the charge alleged.**"*

There are two stages that the prosecutor's analysis of the brief must address in arriving at a decision to prosecute. These stages are the evidential stage and the public interest stage.

Sufficiency of Evidence:

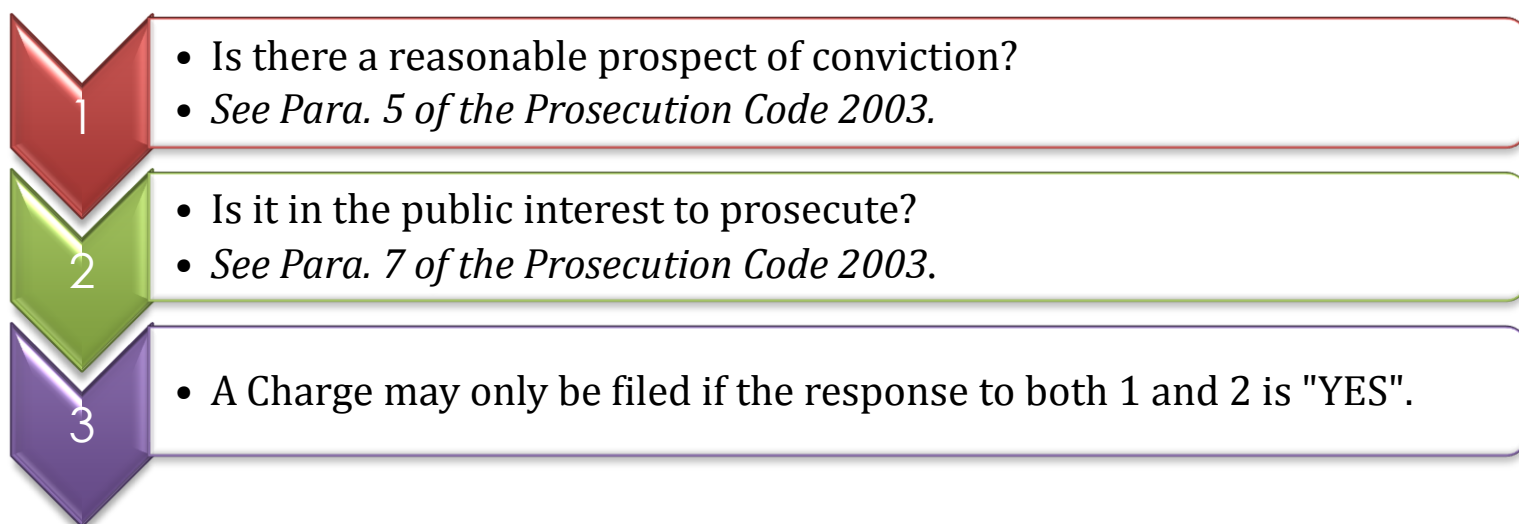
The prosecutor must first be satisfied that there is sufficient evidence to provide a 'reasonable prospect of conviction' against each accused person on each charge proffered. The prosecutor must consider the admissibility and reliability of each piece of evidence contained in the brief. The prosecutor must also consider the likely defence case and assess the likely effect this may have on the prosecution case.

In assessing whether or not there is sufficient evidence to provide a reasonable prospect of conviction, the prosecutor must objectively consider whether or not a judge, assisted by assessors properly directed in accordance with the law, or a magistrate, will more likely than not convict the accused person of the charge alleged. If the answer is yes, then the charge can proceed. If the answer is no, then it must not go ahead, no matter how important the case or serious the charge itself may be.

The Public Interest:

If the prosecutor assesses that there is sufficient evidence to sustain criminal proceedings, then the prosecutor must decide whether or not a prosecution is needed in the public interest. The prosecutor must balance factors for and against prosecutions fairly and objectively. Generally, criminal proceedings will be instituted unless the factors against prosecutions are clear and cogent. For more information on the public interest please see Section 7 of the **Prosecution Code 2003**.

IN SUMMARY



THE CHARGE FORMAT:

Section 58

of the Criminal Procedure Decree 2009

- Every charge or information shall contain -
 - (a) A statement of the specific offence or offences with which the accused person is charged; and
 - (b) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged.

Note: The prosecutor must use the forms that apply or which have been approved by the **Criminal Procedure Decree 2009** (or forms conforming to the applicable or approved forms as near as may be). (*See s. 61 (6)*). The forms under the Criminal Procedure Code, Cap. 21 apply *mutatis mutandi* (*See s.300*).

Section 61 of the Criminal Procedure Decree 2009

Each Count should start with a Statement of Offence which describes the offence shortly and in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.

The Statement of Offence should also include a reference to the section of the law creating the offence (*s.61 (1) – (3)*). As a matter of good practice, the Statement of Offence should include the section and sub-section of the law creating the offence, particularly in circumstances where different physical and fault elements apply.

After the Statement of Offence, the Count should contain the Particulars of Offence which shall be set out in ordinary language. The use of technical terms is unnecessary.

If any rule of law, Act, Decree or Promulgation limits the particulars of offence required to be given on the Charge or Information, then it is enough if the prosecutor gives only those particulars so required (*s. 61 (4) – (5)*). As a matter of good practice, the Particulars of Offence should contain a short factual narrative relevant to each element of the offending.

Where a Charge or Information contains more than one count, the Counts are to be numbered consecutively. (*s.61 (7)*)

STATUTORY PROVISIONS FOR CHARGING ACTS OR OMISSIONS IN THE ALTERNATIVE

Where a statute prescribes an offence to be (a) the doing or the omission to do any one of any different acts in the alternative; or (b) the doing or the omission to do any act in any one of any different capacities, or with any one of different intentions; or (c) states any part of the offence in the alternative; the acts, omissions, capacities or intentions or other matters stated in the alternative in the statute, may be stated in the alternative in the count charging the offence.

It shall not be necessary in any count charging an offence to negative any exception or exemption from, or proviso or qualification to, the operation of the statute creating the offence. (*s. 62, CPD 09*)

DESCRIPTIONS:

General Rule:

Subject to other provisions in the **Criminal Procedure Decree 2009**, places, times, things, matters, acts or omissions, shall be described in ordinary language and with sufficient clarity. (s.66, CPD 09)

Persons:

The description or designation on the Charge or Information needs to be reasonably sufficient to identify the person without necessarily stating the correct name, place of residence, style, degree or occupation.

If the person's name is not known, or if it is impracticable to give the description or designation required, then the person may be described as "a person unknown", or by a description or designation reasonably practicable in the circumstances.

A court may dispense with any requirement to expressly name or identify a person on grounds relating to the safety of the person, or for reasons of public security. (s.64, CPD 09)

Documents:

If the Prosecutor needs to refer to a document in a Charge or Information, it is sufficient to set out the name or designation by which it is usually known; or to describe it by its purpose. (s.65, CPD 09)

Example: ANZ Bank Cheque No: 123456 as opposed to Australia and New Zealand Banking Corporation Limited Cheque No: 123456.

Statement of Intent:

If intention to defraud, deceive or injure is not an essential element, the Prosecutor need not include a statement of that intent in the Charge or Information. (s.67, CPD 09)

Figures and Abbreviations:

Figures and abbreviations may be used to express anything usually expressed in figures or in abbreviations. (s.69, CPD 09) *Example:* FJD\$1.00.

Charging for Previous Convictions:

Counts that allege a previous conviction should be included at the end of a Charge or Information by means of a statement that the accused person has been previously convicted of that offence at a certain time and place. No description of the particulars of that offence is to be included. (s.68, CPD 09)

Breach of a suspended sentence contrary to Section 28 of the **Sentencing and Penalties Decree 2009** is one example of a charge that includes a previous conviction. The Prosecutor should, as a matter of practice, split a Charge or Information that includes a Breach of a suspended sentence, by severing the count alleging the Breach when an accused has entered a plea of not guilty to the substantive count or counts on that Charge or Information.

The rationale for the recommended severance is the general prohibition against the Prosecution putting character evidence against an accused person during trial. A Charge or Information that refers to a previous conviction during the course of trial for other offences is potentially prejudicial to an accused in respect of those other offences.

Property

63.—(1) The description of property in a charge or information shall be—

- (a) In ordinary language; and
- (b) Such as to indicate the property referred to with reasonable clearness.

(2) It shall not be necessary to name the person to whom the property belongs or the value of the property, unless this is required for the purpose of describing an offence depending on any particular ownership of property or specific value of property.

(3) Where the property is vested in more than one person, and the owners of the property are referred to in a charge or information, it shall be sufficient to—

- (a) Describe the property as owned by one of those persons by name “with others”; or
- (b) To use a collective name without naming any individual if the persons owning the property are a body of persons with a collective name, such as a company or “Inhabitants”, “Trustees”, “Commissioners” or “Club”, or other such name.

(4) Property belonging to or provided for the use of any government or public establishment, agency, service or department may be described as the property of the State.

(5) Coin and currency notes may be described as money, and any allegation as to money, so far as regards the description of the property, shall be sustained by proof of any amount of coin or currency note (although the particular species of coin of which such amount was composed or the particular nature of the bank or currency note shall not be proved).

(6) In cases of theft, embezzling or defrauding by false pretences, any allegation as to money shall be sustained by proof that the accused person dishonestly appropriated or obtained any coin or any currency note (or any portion of the value of it), although the coin or bank or currency note may have been delivered to the accused person in order that some part of the value of it should be returned to the party delivering it (or to any other person), and such part shall have been returned accordingly.

(s 63, CPD09)

JOINDER

JOINDER IN A CHARGE OR INFORMATION

Section 59 (1)

of the Criminal Procedure Decree 2009

- Any offence may be charged together in the same charge or information if the offences charged are:
 - (a) founded on the same facts or form; or
 - (b) are part of a series of offences of the same or similar nature.

“Charges must have a common factual origin.”

R v. Barrell and Wilson (1979) 69 Cr.App.R 250

EXAMPLE 1 – Section 59 (1) (a) of the Criminal Procedure Decree 2009

On 13 September 2012, Benjamin Wolf crept into Robin Woodcutter’s home (31 Natokowaqa Lane, Lautoka).

He waited behind the kitchen counter for Red Riding Hood to enter.

When she did, he pounced from behind the counter and he gobbled her up in one bite. Red Riding Hood lost her life.

LAUTOKA PEP 58/11

CPC FORM 4

I.O SP4303 TIMOCI COUNSEL

CRIMINAL PROCEDURE DECREE 2009
(Section 56) FIJI

In the Magistrates Court at **LAUTOKA**

Criminal Case No:

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

Count 1

Statement of Offence

Criminal Trespass: Contrary to Section 387 (1) (a) of the **Crimes Decree 2009**

Particulars of Offence

Benjamin Wolf, on the 13th day of September 2012, at **Lautoka** in the **Western Division** entered into the dwelling house of **RobinWoodcutter**, with intent to commit an offence, namely the **MURDER of Red Riding Hood**.

Count 2

Statement of Offence

Murder: Contrary to Section 237 of the **Crimes Decree, 2009**

Particulars of Offence

Benjamin Wolf, on the 13th day of September 2012, at **Lautoka** in the **Western Division** murdered **Red Riding Hood**.

..... (d)
State Counsel

Taken before me:
[Benjamin Wolf] 53 years old

Magistrate
Date:

EXAMPLE 2– Section 59 (1) (b) of the Criminal Procedure Decree 2009

On 10 August 2012, Robin Hood spied the Sheriff’s taxman (Lincoln Green) walking through Shirley Park, Lautoka. He attacked him with a wooden staff and brought him down. He then stole two bags containing 50 gold coins each, being tax money collected from a nearby village.

On 15 September 2012, Robin Hood spied Bishop Merry Winter’s carriage travelling through Churchill Park, Lautoka. He held up the carriage with a long bow and threatened to kill the driver if the Bishop did not surrender his valuables. The Bishop surrendered a bag containing 10 gold coins; a golden chalice; and an 18 carat ruby ring. Robin Hood scooped these items up and made his escape.

Lautoka PEP58/11
I.O SP4303 FILIMONI JOLIE

C.P.C Form 4

CRIMINAL PROCEDURE DECREE, 2009
(Section 56)

FIJI

In the Magistrates Court at **LAUTOKA**

Criminal Case No:

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

Count 1
Statement of Offence

Aggravated Robbery: Contrary to Section 311 (1)(b) of the **Crimes Decree 2009.**

Particulars of Offence

Robert of Locksley on the 10th day of August 2012, at **Lautoka** in the **Western Division**, being armed with a wooden staff, robbed **Lincoln Green**, of 100 gold coins.

Count 2
Statement of Offence

Aggravated Robbery: Contrary to Section 311 (1)(b) of the **Crimes Decree, 2009**

Particulars of Offence

Robert of Locksley on the 15th day of August 2012, at **Lautoka** in the **Western Division**, being armed with a long bow, robbed **Merry Winter**, of 10 gold coins, a golden chalice and an 18 carat ruby ring.

Taken before me:
[Robert of Locksley] 30 years old

..... (d)
State Counsel
Magistrate
Date:

“A joint trial must be just.”
R v. P (1991) 3 All ER 337

JOINDER OF COUNTS

Section 59(2)

of the Criminal Procedure Decree 2009

- Where more than one offence is charged in a charge or information, a description of each offence shall be set out in a separate paragraph of the charge of information, and each paragraph shall be called a count.

JOINDER OF ACCUSED PERSONS

Section 60

of the Criminal Procedure Decree 2009

- The following persons may be joined in one charge or information and may be tried together -
- (a) persons accused of the same offence committed in the course of the same transaction;
- (b) persons accused of an offence and persons accused of -
 - (i) aiding or abetting the commission of the offence; or
 - (ii) attempting to commit the offence;
- (c) persons accused of different offences provided that all offences are founded on the same facts, or form or a part of a series of offences of the same or similar character, and
- (d) persons accused of different offences committed in the course of the same transaction.

EXAMPLE 3 – Section 60 (a) of the Criminal Procedure Decree 2009

On 5 September 2012, at 7.00pm, Batman and Robin broke into Commissioner Gordon’s residence at Grantham Road, Raiwaqa, Suva and looked through the Commissioner’s files for his records of the Joker. They took nothing and caused no damage.

“Where the evidence at the trial is admissible against each accused, it is not necessary for the judge to address the case against each accused separately.”

Huynh v the Queen [2013] HCA 6 at [51]

Direction: *“As you are well aware by now this is a joint trial of [number] accused. I told you at the outset of the trial that this was simply a matter of administrative convenience. But I also told you that you have to consider the case against each accused person separately when considering your verdicts. You will be required to return a separate verdict in respect of each individual accused. Simply because the Prosecution allegation is that they are [each/all] guilty of the same offence, it does not follow that you approach your deliberations in the same way.”*

CRIMINAL PROCEDURE DECREE 2009
(Section 56) FIJI

In the Magistrates Court at SUVA Criminal Case No:

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

Count

Statement of Offence

Criminal Trespass: Contrary to Section 387 (4)(a) of the Crimes Decree 2009

Particulars of Offence

Bruce Wayne and Dick Grayson, on the 5th day of September 2012, at **Suva** in the **Central Division**, entered, by night and without lawful excuse, the dwelling-house of **James Gordon**.

..... (d)

State Counsel
Magistrate

Taken before me:
[Bruce Wayne] 25 years old
[Dick Grayson] 18 years old

Date:

EXAMPLE 4– Section 59 (2) and Section 60 (b)(i) of the Criminal Procedure Decree 2009

On 11 September 2012, at Airport Park, Nadi, the Penguin assaulted Batman with his umbrella whilst Catwoman called out encouragement from the side. Batman received a cut to the side of the face before he escaped in a cloud of smoke.

The interests of justice normally require that all co-accused are dealt with in one trial. A joint trial will reduce the risk of inconsistent verdicts. Prejudice associated with inadmissible material can usually be cured by appropriate directions.

Webb & Hay v R (1994)181 CLR 41; **R v Gibb & McKenzie** [1983] 2 VR 155; **R v Demirok** [1976] VR 244)

CRIMINAL PROCEDURE DECREE 2009
(Section 56) FIJI

In the Magistrates Court at NADI Criminal Case No:

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

Count

Statement of Offence

Assault Causing Actual Bodily Harm: Contrary to Section 275 and Section 45 (2) of the Crimes Decree 2009

Particulars of Offence

Oswald Chesterfield Cobblepot (as principal in the first degree) and Selina Kyle (as principal in the second degree) on the 11th day of September 2012, at Nadi in the Western Division, hit Bruce Wayne with an umbrella, thereby causing a cut to the face of the said Bruce Wayne.

..... (d)
State Counsel

Taken before me:

Magistrate

[Selina Kyle] 25 years old
[Oswald Cobblepot] 50 years old

Date:

The general rule in favour of joint trials may be displaced where this course will deny an accused a fair trial.

R v Oliver (1984) 57 ALR 543; **R v Patsalis** [1999] NSWSC 649

EXAMPLE 5– Section 60 (b)(ii) of the Criminal Procedure Decree 2009

On 11 September 2012, at Labasa, Hasar (10 years and 4 months old) tried to kill Behter.
Hassar shot an arrow at Behter but Behter ducked and avoided the arrow meant for him.

Labasa PEP38/12
I.O SGT 4303 ALVIN RHODES

C.P.C Form 3

CRIMINAL PROCEDURE DECREE 2009
(Section 56) FIJI

In the Magistrates Court at **LABASA** Criminal Case No:

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

Count 1

Statement of Offence

Attempted Murder: Contrary to Section 237 and Section 44 of the **Crimes Decree 2009**

Particulars of Offence

Hasar on the 11th day of September 2012, at **Labasa** in the **Northern Division**, unlawfully attempted to cause the death of **Behter**.

..... (d)
State Counsel

Taken before me:
[Hasar] 10 years and 4 months old

Magistrate
Date:

“States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.”

Article 41 (1) of the **Convention on the Rights of the Child**

EXAMPLE 6– Section 60 (c) of the Criminal Procedure Decree 2009

On 11 September 2012, at 7.00pm, Mika Dua and Jone Rua broke into Fruit Town Shop (4, Sunshine Parade, Nausori) and stole 10 oranges. Jerry Lima owned Fruit Town Shop.

At 12.00am, Mika Dua met Rusi Tolu and they broke into Jack B. Nimble Shop (5 Water Drive, Nakasi) and stole 5 candlesticks.

At 2.00am, Jone Rua and Sireli Va punched Ciwa Tini at Bau Landing, Bau and took \$10.00 off him.

On 13 September 2012, Rusi Tolu met Jo Ono and they assaulted Vitu Walu outside the Whistling Duck Nightclub, Main Street, Nausori and took his Timex watch valued at \$50.00.

Nausori PEP58/12
I.O SGT 4303 JOSAIA REED

C.P.C Form 4

CRIMINAL PROCEDURE DECREE 2009
(Section 56) FIJI

In the Magistrates Court at **NAUSORI** Criminal Case No:

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

Count 1

Statement of Offence

Aggravated Burglary: Contrary to Section 313 (1) (a) of the **Crimes Decree 2009**

Particulars of Offence

Mika Dua and **Jone Rua**, in company with each other, on the 11th day of September 2012, at **Nausori** in the **Eastern Division**, entered **Fruit Town Shop** with intent to commit theft therein.

Count 2

Statement of Offence

Theft: Contrary to Section 291 of the **Crimes Decree 2009**

Particulars of Offence

Mika Dua and **Jone Rua**, on the 11th day of September 2012, at **Nausori** in the **Eastern Division** stole ten (10) oranges from **Fruit Town Shop**, the property of **Jerry Lima**.

Count 3

Statement of Offence

Aggravated Burglary: Contrary to Section 313 (1)(a) of the **Crimes Decree 2009**

Particulars of Offence

Mika Dua and **Rusi Toli**, in company with each other, on the 12th day of September 2012, at **Nausori** in the **Eastern Division** entered into **Jack B. Nimble Shop**, with intent to steal therein.

Count 4

Statement of Offence

Theft: Contrary to Section 291 of the **Crimes Decree 2009**

Particulars of Offence

Mika Dua and **Rusi Toli**, on the 12th day of September 2012, at **Nausori** in the **Eastern Division** stole 5 candlesticks from **Jack B. Nimble Stop**, the property of **Jack B. Nimble**.

Count 5

Statement of Offence

Aggravated Robbery: Contrary to Section 311 (1) of the **Crimes Decree 2009**

Particulars of Offence

Jone Rua and **Sireli Va**, in company with each other, on the 12th day of September 2012, at **Nakasi** in the **Eastern Division** robbed **Ciwa Tini** of cash to the total value of FJD\$10.00.

Count 6

Statement of Offence

Aggravated Robbery: Contrary to Section 311 (1) of the **Crimes Decree 2009**

Particulars of Offence

Rusi Tolu and **Jo Ono**, in company with each other, on the 13th day of September 2012, at **Nausori** in the **Eastern Division** robbed **Vitu Walu** of a wrist watch valued at FJD\$50.00.

..... (d)

State Counsel

Taken before me:
[List all accused] List their ages

Magistrate

Date:

“The capacity to ensure a fair trial for the accused must always be the dominant consideration governing the exercise of a discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused.”

CGL v DPP (Vic) [2010] VSCA 26

EXAMPLE 7– Section 60 (d) of the Criminal Procedure Decree 2009

On 12 March 2014, Aros Volturi met Edward Snowden in Vienna and gave the said Edward Snowden Austrian Passport No. 62228888 which contained Snowden’s picture but which was in the name of a William Bligh. The passport was purportedly made in the form of an Austrian passport on the authority of the Director of Immigration of Austria. The Director of Immigration provided a statement on 21 March 2014 indicating that he had not authorized the making of the said passport.

Aros Volturi intended that Edward Snowden use the Passport to enter into Tonga via Fiji under a false identity in order that the said Edward Snowden might evade capture by Viennese authorities. Edward Snowden paid him €10, 000.00 for the passport via wire transfer on 14 March 2014. On 15 March 2014, Aros Volturi wire transferred Mere Jane, a Fijian national, €1,000.00. Mere Jane then facilitated the entry of Edward Snowden into Tonga via on 17 March 2014, knowing that Edward Snowden was travelling under an assumed name and using a false passport.

Nadi PEP67/14

C.P.C Form 4

I.O SGT 4303 AMAN DATT

CRIMINAL PROCEDURE DECREE 2009

(Section 56)

FII

In the Magistrates Court at NADI

Criminal Case No:

CHARGE

(COMPLAINT BY PUBLIC OFFICER)

Count 1

Statement of Offence

PROVIDING A FALSE TRAVEL DOCUMENT: Contrary to Section 127 (a), (b) and (c) (ii) of the Crimes Decree 2009.

Particulars of Offence

Aros Volturi, on the 12th day of March 2014, at **Vienna** in **Austria**⁵, provided a false travel document, namely Austrian Passport number 62228888, to **Edward Snowden**, with intent that the said document would be used to facilitate the entry of **Edward Snowden** into the Republic of Fiji, in circumstances where the entry of the said **Edward Snowden** into the Republic of Fiji would not comply with the requirements of the Republic of Fiji’s laws for entry into the Republic of Fiji; and with intent to obtain €10, 000.00 for the provision of the said passport.

Count 2

Statement of Offence

People Smuggling: Contrary to Section 122 (1) (a), (b), (c) and (d) (i) of the Crimes Decree 2009.

Particulars of Offence

Mere Jane, on the 17th of March 2014, at **Nadi** in the **Western Division**, facilitated the entry of **Edward Snowden** into the Kingdom of Tonga via Fiji under a false travel document namely Austrian Passport number 62228888 in non-compliance with the Kingdom of Tonga’s immigration laws; **Edward Snowden** not being a citizen or permanent resident of the Kingdom of Tonga, and the said **Mere Jane** having obtained €1, 000.00 to facilitate the said entry.

..... (d)

State Counsel

Taken before me:
[List all accused] List their ages

Magistrate
Date:

⁵ See Section 7 of the Crimes Decree 2009.

REQUISITES OF A CHARGE:

The following principles are important to bear in mind:

Shekar v State [2005] FJCA 18; AAU0056.2004 (15 July 2005) per Ward P, Henry and McPherson JJA

“...the purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary to slavishly follow the section in the Act.”

DPP v Solomone Tui[1975] 21 FLR 4 per Grant CJ.

“Despite its apparent scope, it has been held that the provisions of this section cannot validate a fundamental error going to the root of the matter; such as the failure to include in the charge a necessary ingredient of the offence in question, duplicity of a charge, want of jurisdiction, or a charge which discloses no offence known to law.”

*Grant C.J. was referring to the provision at Section 342 of the **Criminal Procedure Code Cap. 21** (now repealed).*

DUPLICITY IN A CHARGE:

Archbold, Criminal Pleading, Evidence and Practice (44th Ed, 1995), Vol 1, p. 75

“The indictment must not be double; that is to say, no one count of the indictment should charge the defendant with having committed two or more separate offences...This rule, though simple to state, is sometimes difficult to apply...Duplicity in a count is a matter of form, not evidence.(see Greenfield (1973) 57 Cr App R 849 at 855-856)”

Vokai v Reginam [1981] FJCA 16; [1981] 27 FLR 16 (25 November 1981) per Gould VP, Marsack and Spring JJA

“We are in agreement with the learned judge in the (High) Court that there was no duplicity; as he states, duplicity only arises when a person is charged in one count with two distinct offences.”

“The interests of justice is not a hard-edged concept. A decision as to what the interests of justice requires calls for an exercise of judgment in which a number of relevant factors have to be taken into account and weighed in the balance. In difficult borderline cases, there may be scope for legitimate differences of opinion.”

R v Maxwell [2010] UKSC 48

DPP v. Merriman [1973] AC 584, per Lord Morris of Borth-y-Gest at p. 593A-E

*"It is...a general rule that not more than one offence is to be charged in a count in an indictment....The question arises – what is an offence? If A attacks B and, in doing so, stabs B five times with a knife, has A committed one offence or five? If A in the dwelling house steals 10 different chattels, some perhaps from one room and some from others, has he committed one offence or several? In many different situations comparable questions could be asked. In my view, such questions when they arise are best answered by applying common sense and by deciding what is fair in the circumstances. No precise formula can usefully be laid down but I consider that clear and helpful guidance was given by Lord Widgery CJ in ...**Jemmison v Priddle** [1972] 1 QB at 495. I agree...that it will often be legitimate to bring a single charge in respect of what might be called one activity even though that activity may involve one or more than one act. It must, of course, depend upon the circumstances..."*

SEVERING THE CHARGE:

Section 59 (3)

of the Criminal Procedure Decree 2009

- Where, before trial or at any stage of a trial, the court is of the opinion that -
 - (a) an accused person may be prejudiced in his or her defence by reason of being charged with more than one offence in the same charge or information; or
 - (b) for any other reason it is desirable to direct that the person be tried separately for any one or more offences charged in a charge or information -
- the court may order a separate trial of any count or counts in the charge or information.

R v. Moghal (1977) 65 Cr App R 56, (CA) per Scarman L.J.

"...we think that only in very exceptional cases is it wise to order separate trials when two or more are jointly charged with participation in one criminal offence. ... The question is for the judge in the exercise of his discretion, and it is thus that the law has been stated ever since, that the appellate court will intervene only if satisfied that the judge's decision has caused a miscarriage of justice."

"For the concept of the interests of justice carries with it the notion of practicality, reasonableness, and regard for the rights of others, including the rights of other litigants and participants in the case in question or in the case lists awaiting their trials."

State v Takiveikata - Ruling No 2 [2004] FJHC 123; HAC0005.2004S (22 July 2004)

State v. Boila [2005] FJHC 143; HAC0032X.2004S (17 June 2005) per Shameem J.

"There are many public interest reasons why such offenders should be tried together. One is the public expense involved in conducting several trials based on the same law and evidence. Another is that witnesses would be greatly inconvenienced by having to give the same evidence many times. A third is that a joint trial is more likely to lead to uniform treatment in respect of all connected defendants. Lastly, separate trials usually lead to delay in the hearing of cases."

R v Assim (1966) 2 All ER 881.

"As a general rule it is, of course, no more proper to have tried by the same jury several offenders on charges of committing individual offences that have nothing to do with each other than it is to try before the same Jury offences committed by the same person that have nothing to do with each other. Where, however, the matters which constitute the individual offences of the several offenders are upon the available evidence so related, whether in time or by other factors, that the interests of justice are best served by their being tried together, then they can properly be the subject of counts in one indictment and can, subject always to the discretion of the Court, be tried together. Such a rule, of course includes cases where there is evidence that several offenders acted in concert but is not limited to such cases."

State v Rasaqio [2010] FJHC 283; HAC155.2007S (27 July 2010) per Madigan J

"[11]...Some of the civilian witnesses would have to be called twice. As the State counsel points out to run two trials is an expensive burden on the State.

[12] I agree. Only in cases where it is absolutely necessary should severance of counts be ordered. Not one of the accused in this trial will be prejudiced in his defence by being charged with both robbery and murder."

R v Grondkowski and Malinowski [1946] KB 396 at 371 per Goddard LCJ.

"Prima facie it appears to the court that where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried, and in some cases it would be as much in the interest of the accused as of the prosecution that they should be. Suppose, for instance, that the defence of one was that he or she was acting under the positive duress of the other. It would be obviously right that they should be tried by the same jury, who might see in one prisoner a harmless or nervous looking little man or woman, and in the other a savage brute whom they might deem capable of forcing his co-prisoner against his will into assisting in a crime."

R v Patsalis [1999] NSWSC 649

The presumption in favour of joint trials is not rebutted simply because one or more accused persons intend to mount a "cut-throat" defence (i.e. implicate a co-accused). The judge must consider whether a joint-trial would cause unfair prejudice to each accused, although such prejudice will likely be uncommon.

R v Fernando & Ors [1999] NSWCCA 66; **R v Beaven** (1952) 69 WN 140; **R v Gibb & McKenzie** [1983] 2 VR 155; **R v Grondkowski** [1946] KB 369.

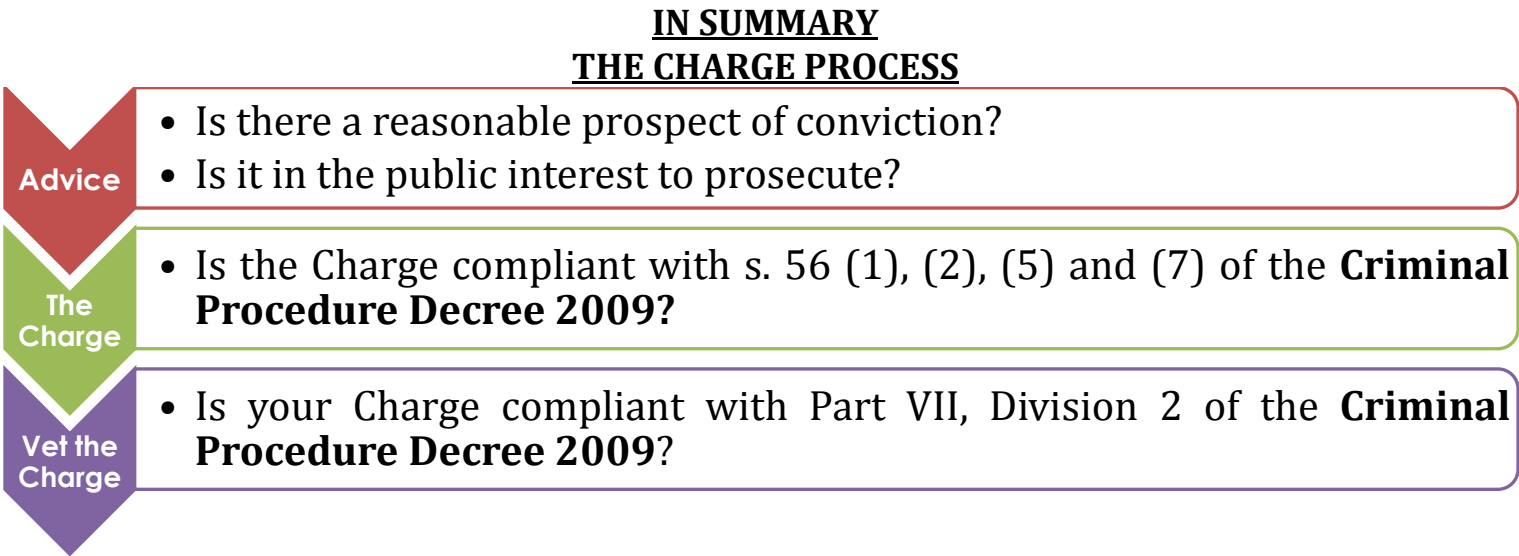
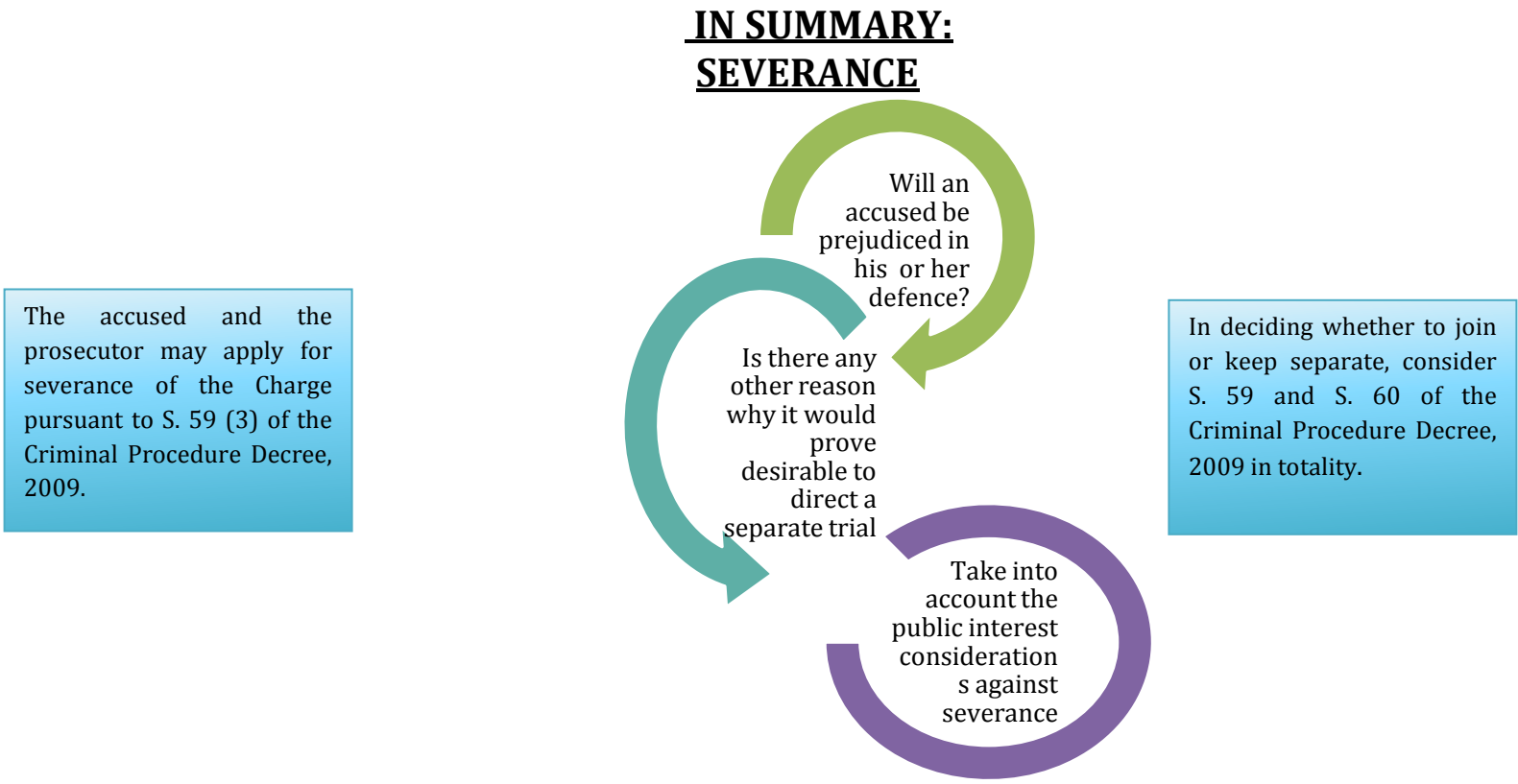
Where an accused will rely on a "cut-throat defence", a joint trial will allow the jury to consider all the relevant facts. The evidence at separate trials is likely to be incomplete in relation to each accused and the jury would receive an artificial version of events.

R v Gibb & McKenzie [1983] 2 VR 155; **R v Grondkowski** [1946] KB 369; **R v Patsalis** [1999] NSWSC 649.

A joint trial where one accused intends to implicate a co-accused may be inappropriate where the evidence which will be led is so prejudicial that a fair trial for all accused would be impossible.

R v Darby (1982) 148 CLR 668; **R v Brown** [1990] VR 820.

Where several accused are charged as co-conspirators, they should not be tried together if the evidence against one or more is substantially different to the evidence against the others. Such a situation creates a real risk that the jury may convict one of the accused on inadmissible evidence by failing to give effect to a separate consideration direction.



REPRESENTATIVE COUNTS:

THEFT OR OTHER MISAPPROPRIATION OF PROPERTY

Section 70 (1)

of the Criminal Procedure Decree 2009

- When a person is charged with any offence involving the theft or other misappropriation of property, it shall be sufficient to specify the gross amount of property in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed without specifying particular times or exact dates.

THEFT, FRAUD, CORRUPTION & ABUSE OF OFFICE

Section 70 (2)

of the Criminal Procedure Decree 2009

- When a person is charged with any offence involving theft, fraud, corruption or abuse of office, and the evidence points to many separate acts involving money, property or other advantage, it shall be sufficient to specify a gross amount and the dates between which the total of the gross amount was taken or accepted.

DISTINCTION

Section 70 (1) of the **Crimes Decree 2009** allows you to roll up **property** and **dates** in the one representative or 'rolled up' count, for **theft** and other **misappropriation of property** offences.

Section 70 (2) of the **Crimes Decree 2009** allows you to roll up **property** stolen, **property or money** defrauded or dishonestly gained or lost, and **property or money or advantages** dishonestly or corruptly gained, and the dates in which these acts occurred for **theft**, **fraud**, **corruption** or **abuse of office** offences.

REPRESENTATIVE COUNTS -SEX CRIMES:

Section 70 (3)

of the **Criminal Procedure Decree 2009**

- When a person is charged with any offence of a sexual nature and the evidence points to more than one separate acts of sexual misconduct, it shall be sufficient to specify the dates between which the acts occurred in one count and the prosecution must prove that between the specified dates at least one act of a sexual nature occurred. In such a case the charge must specify in the statement of offence that the count is a representative one.

EXAMPLE 8

Suva PEP59/11
I.O SSP5509 RONEIL PRAKASH

C.P.C Form 3

CRIMINAL PROCEDURE DECREE 2009
(Section 56) FIJI

In the Magistrates Court at SUVA Criminal Case No:

CHARGE
(COMPLAINT BY PUBLIC OFFICER)

[REPRESENTATIVE COUNT]

Count

Statement of Offence

RAPE: Contrary to Section 207 (1) and (2)(a) and (3) of the Crimes Decree 2009

Particulars of Offence

JOHN SMITH, between the 5th day of September 2012 and the 31st day of December 2012, at **SUVA** in the **CENTRAL DIVISION**, inserted his penis into the vagina of **JANE DOE**, a 12 year old female child.

..... (d)

State Counsel

Taken before me:
[John Smith] 25 years old

Magistrate

Date:

Note: When a victim alleges the commission of one offence but cannot remember a specific date, Section 70 (3) does not apply.

Section 70 (3) only applies when a victim alleges multiple instances of a sexual offence occurring over a period of time.

Note: When faced with a situation where a victim alleges the commission of multiple offences of a sexual nature, the Prosecutor should group offences that are the same together, and if there are different types of sexual offences, they should be set out in separate and distinct counts.

For example: in instances where a victim asserts digital penetration of the vagina, digital penetration of the anus and penile penetration of the vagina over a period of time, and is unable to supply specific dates to the Police, then the Prosecutor should set out three separate representative counts for each of these distinct forms of rape.

RIGHTS OF ACCUSED PERSONS:

Section 14 of the **Constitution of the Republic of Fiji:**

Rights of accused persons

“14 – (2) Every person charged with an offence has the right –

- (a) to be presumed innocent until proven guilty according to law;
 - (b) to be informed in legible writing, in a language that he or she understands, of the nature of and reasons for the charge;
 - (c) to be given adequate time and facilities to prepare a defence, including if he or she so requests, a right of access to witness statements;
 - (d) to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interest of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right;
 - (e) to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to the evidence;
 - (f) to a public trial before a court of law, unless the interests of justice otherwise require;
 - (g) to have the trial begin and conclude without unreasonable delay;
 - (h) to be present when being tried, unless –
 - (i) the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or
 - (ii) the conduct of the person is such that the continuation of the proceedings in his or her presence is impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence;
 - (i) to be tried in a language that the person understands or, if that is not practicable, to have the proceedings interpreted in such a language at State expense;
 - (j) to remain silent, not to testify during the proceedings, and not to be compelled to give self-incriminating evidence, and not to have adverse inferences drawn from the exercise of any of these rights;
 - (k) not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted;
 - (l) to call witnesses and present evidence, and to challenge evidence presented against him or her;
 - (m) to a copy of the record of proceedings within a reasonable period of time and on payment of a reasonably prescribed fee;
 - (n) to the benefits of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time the offence was committed and the time of sentencing;
- and
- (o) of appeal to, or review by, a higher court.

THE PLEA:

1. The Charge is filed at the Criminal Court Registry commencing criminal proceedings against an accused person.
2. When parties appear before the Court in respect of the Charge, the accused person will be given the opportunity to offer his or her plea.
3. Before the plea is taken, the Court must tell an unrepresented accused person that:
 - (1) He or she has the right to represent himself or herself.
 - (2) He or she has the right to seek private Counsel for himself or herself.
 - (3) He or she also has the right to seek legal aid from the Legal Aid Commission.
4. The Court should hear the unrepresented accused person's reply and give them a reasonable opportunity to obtain Counsel if that is what the accused person elects. (See: **Singh v the State** [2000] FJHC 115; HAA0079j.2000s (26 October 2000).)
5. If the accused person is ready to offer a plea, then the Court should ask the accused which language he or she wishes the Charge to be read out in and should accommodate that preference. (See: **DPP v. Amato** [1995] FJHC 183; [1995] 41 FLR 18 (10 February 1995).)
6. The Charge should then be read out and the Court should explain the elements of each offence, before asking the accused person if he or she understands the allegation. (See: **DPP v. Amato**, supra.)
7. If the accused person indicates that he or she understands the Charge, then his or her plea should be taken. The Court should at that point bring to the unrepresented accused person's attention any statutory defences that are available to him or her. (See: ***Akuila Kuboutawa v. R***, Labasa Criminal Appeal No. 2 of 1975.)
8. If the accused person elects a plea of guilty, the Court must ask the accused person if he or she is pleading voluntarily or if he or she has been pressured or induced into offering that plea. (See: **Singh v the State**, supra.)
9. If the Court is satisfied that the plea is voluntary, then the Court should then call upon the State to present its Summary of Facts.
10. The Summary of Facts should include the original Record of Interview, Charge Statement, Medical Reports and Post-Mortem Reports, and a factual narrative that includes sufficient detail regarding each element of the offence. (See: **Nawaqa v State** [2001] FJHC 283; [2001] 1 FLR 123 (15 March 2001).)
11. If there is no dispute regarding the Summary of Facts, the Court may then decide to accept the plea of guilty. However, no conviction should be entered at this point. The Court should then hear from the accused or Counsel for the accused regarding any factors to be presented in mitigation. (See: **R v. Blandford Justices** (1966) 2 WLR 1232.)
12. Following this, the Court should then hear from both parties regarding sentence. The Court should then, after hearing from parties, exercise the sentencing options available under the **Sentencing and Penalties Decree 2009** which range from orders made without a conviction being entered, to the entering of a conviction followed by the imposition of a term of imprisonment. (See: the ODPP Sentencing Policy at page 79.)

DUTY TO EXERCISE VIGILANCE IN THE CASE OF UNREPRESENTED ACCUSED PERSONS

Michael Iro v R [1966] 12 FLR 104 the Court of Appeal at p 106D said:

"In our view there is a duty cast on the trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what that plea of guilty involves.

*As was said by Lord Reading CJ in **Rex v Golatlian** 11 Cr. App. R. 79:*

"It is a well known principle that a man is not to be taken to have admitted that he has committed an offence unless he pleads guilty in plain, unambiguous and unmistakeable terms."

*To this statement of the law could properly be added that not only should the plea be unambiguous but that it should be given in full understanding of all that it implies: **R v Vent** (1935) 25 Cr. App. R. 55; **R v Griffiths** (1932) 23 Cr. App. R. 153 (emphasis added)."*

GUIDANCE TO MAGISTRATES – DEALING WITH AN UNREPRESENTED ACCUSED PERSON

Singh v the State [2000] FJHC 115; HAA0079j.2000s (26 October 2000):

"When an accused person is unrepresented, the court must be sure that the plea has been entered with a full and understanding mind.

If the record does not reflect such an understanding, this will lead to the entire proceedings being declared a nullity...

For the guidance of Magistrates in the future however I suggest the following format before the plea is taken:

- 1. Before you plead to the charge, I must inform you that you have the right to defend yourself, to instruct a lawyer of your own choice, or if you wish, to apply for a lawyer on legal aid.*
- 2. Do you wish to instruct your own lawyer?*
- 3. Do you wish to apply for legal aid to the Legal Aid Commission?*

If the answer is no to (2) and (3) then the Magistrate should hear the plea. If the plea is one of "Guilty" the Magistrate should ask:

- 4. Are you pleading guilty voluntarily or have you been pressured or induced to do so?"*

DUTY TO ENSURE THAT THE ACCUSED PERSON UNDERSTANDS THE CHARGE

Director of Public Prosecutions v. Amato [1995] FJHC 183; [1995] 41 FLR 18 (10 February 1995)

“When a person is charged the particulars should be read out to him, so far as possible in his own language, but if that is not possible, then in a language which he can speak and understand.

The magistrate should then explain to the accused person all the essential ingredients of the offence charged. If the accused then admits all those essential elements, the magistrate should record what the accused has said, as nearly as possible in his own words, and then formally enter a plea of guilty.

The magistrate should next ask the prosecutor to state the facts of the alleged offence and, when the statement is complete, should give the accused the opportunity to dispute or explain the facts or to add any relevant facts.

If the accused does not agree with the statement of facts or asserts additional facts which, if true, might raise a question as to his guilt, the magistrate should record a charge of plea to “not guilty” and proceed to hold a trial.

If the accused does not deny the alleged facts in any material respect, the magistrate should record a conviction and proceed to hear any further facts relevant to sentence. The statement of facts and the accused’s reply must, of course, be recorded.”

DUTY TO BRING STATUTORY DEFENCES TO THE ATTENTION OF THE UNREPRESENTED ACCUSED PERSON

Akuila Kuboutawa v. R, Labasa Criminal Appeal No. 2 of 1975:

“...in the case of an unrepresented accused any statutory defence should be brought to his attention.”

WHEN THE GUILTY PLEA MAY BE ACCEPTED

R v. Blandford Justices (1966) 2 WLR 1232 per Widgery J, as he then was, at p. 1240:

“If the defendant is represented, if the defendant ...is a man of mature years who clearly understands what is being put to him, it may well be that the magistrate can accept the plea in the sense that he can regard it as being a satisfactory plea upon which he can safely act without further enquiries. But in cases where the defendant is not represented or where the defendant is of tender age or for any other reason there must necessarily be doubts as to his ability finally to decide whether he is guilty or not, the magistrate ought, in my judgment, to accept the plea, as it were, provisionally, and not at that stage enter a conviction. He ought, in my judgment, in these cases to defer a final acceptance of the plea until he has a chance to learn a little more about the case and to see whether there is some undisclosed factor which may render the unequivocal plea a misleading one...”

DUTY TO READ THE RECORD OF INTERVIEW, CHARGE STATEMENT & MEDICAL REPORT

Nawaqa v State [2001] FJHC 283; [2001] 1 FLR 123 (15 March 2001) per Gates J. (as he then was):

"It seems the proceedings in the Magistrates Court have miscarried. This is because of the incorrect facts put to the magistrate, which may have deterred him from perusing the interview statements ...

Had he examined those statements together with the Medical Report, he would have raised with the Appellants the defences preferred in those statements to see if the Appellants were still maintaining those defences, before he accepted their pleas of guilty.

As Grant (then) Ag. CJ in **DPP v Jolame Pita** [\[1974\] 20 FLR 5](#) at p6E put it:

"On a plea of guilty to any offence, the question of what is admitted by an accused should be ascertained with certainty and if facts are put before a court or explanations given which derogate from the plea of guilty or which appear to render equivocal what would otherwise have been an unequivocal plea, then the plea must be changed to one of not guilty) and the case set down for hearing." (emphasis added)

*This ascertainment was not done, and such omission amounted to a lack of vigilance sufficient to render the proceedings a nullity cf: **R v Marylebone Justices, ex parte Westminster City Council** [1971] 1 All ER 1025 at p 1026j."*

CONVICTION FOLLOWING A GUILTY PLEA

Interpreting Section 206 (2) of the **Criminal Procedure Code Cap. 21** (now repealed) which is mirrored at Section 174 (2) of the **Criminal Procedure Decree 2009**, the High Court of Fiji per Pain J. in **Epeli Delai v the State**, HAA 22 of 1995 (8 August 1995) held that the word "convict" refers to the:

"secondary or narrow sense of acceptance of a plea of guilty."

In **State v Commissioner of Police & Attorney-General** ex parte Mahen Chand, HBJ 001 of 2000 (7 February 2001), the High Court of Fiji per Byrne J. held:

"it is trite law now that a finding of guilty amounts to a conviction."

In **Rupeni Baleitamavua v State**, Criminal Appeal No. HAA107 of 2007 (29 November 2007), the High Court of Fiji per Shameem J. held that:

"it is still open to the magistrate to not enter 'conviction' and instead discharge the defendant without conviction."

STATUTORY PROVISIONS
MAGISTRATES COURT

Section 174 of the **Criminal Procedure Decree 2009**:

- “(1) The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.
- (2) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the **Sentencing and Penalties Decree 2009**.
- (3) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this Decree.
- (4) If the accused person refuses to plead, the court shall order a plea of not guilty to be entered.
- (5) When a corporation is charged with any offence before a Magistrates Court, the corporation may enter in writing by its representative a plea of guilty or not guilty; and if -
(a) the corporation does not appear by its representative; or
(b) though it appears it fails to enter any plea -
the court shall cause a plea of not guilty to be entered.
- (6) Where a charge against a corporation is one which may, with the consent of the accused, be tried by a Magistrates Court, and the corporation -
(a) does not appear by its representative; or
(b) if it does appear, consents that the offence should be so dealt with -
the Magistrates Court may proceed to try such charge summarily in accordance with the provisions of this Decree.
- (7) For the purposes of this section a “representative” need not be appointed under the seal of the corporation, and a statement in writing purporting to be signed by -
(a) a managing director of the corporation; or
(b) any person (by whatsoever name called) having or being one of the persons having, the management of the affairs of the corporation -
to the effect that the person named in the statement has been appointed as a representative of the corporation for the purposes of this section shall be admissible without further proof as prima facie evidence that the person has been so appointed.”

SEE : For the Procedure of Taking Plea in the High Court

Sections 217 to 221 of the **Criminal Procedure Decree 2009**.

DISCLOSURE:

Para 10.1-2

of the Prosecution Code 2003

- Every accused has a right to fair trial. The prosecutor has, as an integral part of fair trial, a positive and continuing duty to disclose during any part of the trial material that may assist the defence.
- Not all materials need to be disclosed to the defence if disclosure is prejudicial to the public interest.

Para 10. 3

of the Prosecution Code 2003

- The concept of public interest immunity recognises that there is immunity from making disclosure when the public interest in withholding information in a particular case outweighs the normal rules requiring disclosure.*

Para 10.4

of the Prosecution Code 2003

- The task of the prosecutor is to evaluate the materiality of information which he or she possesses. In *R v. Keane* (1994) 99 Cr. App. R 1, the Court of Appeal defined materiality, emphasizing the prosecutor's duty in judging materiality, and setting out the balancing exercise to be undertaken by the courts in deciding upon disclosure. Information is material if it can be seen on a sensible appraisal by the prosecution to:
 - (a) be relevant or possibly relevant to an issue in the case;
 - (b) to raise or possibly raise a new issue the existence of which is not apparent from the evidence that the prosecution proposes to use; and
 - (c) hold a real (as opposed to a fanciful) prospect of providing strong link evidence to (a) and (b) above.

* **NB:** Seek the opinion of an ADPP if this is in issue.

Dip Chand v. the State [2012] FJSC 6; CAV0014.2010 (9 May 2012):

"[41] Under the common law, the duty to disclose encompassed the disclosure of all material matters which affected the case relied on by the prosecution, whether they would strengthen or weaken the prosecution case or assist the defence case. Traditionally, the prosecution duty was considered to be restricted to a duty to make available to the defence, witnesses whom the prosecution did not intend to call, and earlier inconsistent statements of witnesses whom the prosecution were to call: see Archbold, Pleading, Evidence and Practice in Criminal Cases, 41st ed (1982), paras 4-178-4-179.

*The prosecutor's duty to disclose, is just one aspect of what is sometimes called the "prosecutor's obligation to act fairly". The rules of practice, which are calculated to enhance the administration of criminal justice by ensuring that accused persons have a "fair trial", are collected in the speech of Lord Devlin in *Connelly v. Director of Public Prosecutions* [1964] A.C 1254 at 1347. As his Lordship noted, "it is the court itself which carries the responsibility of ensuring that an accused has a "fair trial", and, to that end, will enforce practices such as those which extend to controlling the form of presentment or indictment to prevent abuses of the court's process which involve unfairness to the accused..."*

*[42] In *R v Ward*, 674 this limited approach to disclosure was held to be inadequate, wherein it was said that -*

"An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence. Moreover, this duty is continuous: it applies not only in the pre-trial period but also throughout the trial".

The rule was stated with reference to scientific evidence, because that is what the case concerned, but the authority was understood to be laying down a general test based on relevance: see R v Keane [\[1994\] 1 WLR 746](#), 752.

[44] In Australia, although the principles of common law are generally applicable, there are differences in the law in the various jurisdictions within the country, as explained in the New South Wales Law Commission Report of 2000. However, the best statement of the ambit of the prosecutor's duty in the Australian context is to be found in the judgement of Chernov, J in Cannon & Rochford v Tahche & Ors [\[2002\] VSCA 84](#) (13 June 2002) at paragraph 57, which is quoted below-

"The prosecutor's 'duty of disclosure' has been the subject of much debate in appellate courts over the years. But, as it seems to us, authority suggests that, whatever the nature and extent of the "duty", it is a duty owed to the court and not a duty, enforceable at law at the instance of the accused. This, we think, is made apparent when the so-called "duty" is described (correctly in our view) as a discretionary responsibility exercisable according to the circumstances as the prosecutor perceives them to be. The responsibility is, thus, dependent for its content upon what the prosecutor perceives, in the light of the facts known to him or her, that fairness in the trial process requires."

[46] A similar view has been expressed in the leading Canadian case of R. v Stinchcombe [1991] 3 S.C.R. 326. As Sopinka J observed in the course of his judgment in that case-

"...this obligation to disclose is not absolute. It is subject to the discretion of counsel for the Crown. This discretion extends both to the withholding of information and to the timing of disclosure. For example, counsel for the Crown has a duty to respect the rules of privilege. In the case of informers, the Crown has a duty to protect their identity. In some cases, serious prejudice or even harm may result to a person who has supplied evidence or information to the investigation. While it is a harsh reality of justice that ultimately any person with relevant evidence must appear to testify, the discretion extends to the timing and manner of disclosure in such circumstances. Discretion must also be exercised with respect to the relevance of information. While the Crown must err on the side of inclusion, it need not produce what is clearly irrelevant...."

[47] In the light of the above case law, it is impossible to discern in the circumstances of this case, a violation of the prosecution's duty to disclose material evidence. In the first place, there is nothing to suggest that the prosecution was aware of the existence of the medical card that the Petitioner alleges should have been disclosed to him. Even if the Respondent was possessed a copy of the medical card, or was aware of its existence, in the absence of any request from the Petitioner for its disclosure or production, the Respondent could not have anticipated that the Petitioner was in need of this document and cannot be blamed entirely for its non-disclosure."

"Fairness is not an attitude. It is a professional skill that must be honed and exercised."

-Brit Hume-

BAIL

RATIONALE:

R v. Morales [1992] 3 SCR 711, a decision of the Supreme Court of Canada

“The liberty interest of the accused is, undoubtedly, a very important matter which must be brought to bear on any consideration of the process by which bail is granted or denied. Yet, it is also evident that it is only one of several important considerations of this kind which bears on such an inquiry. Indeed, the bail process cannot be accurately described wholly in terms of the discrete aims of the criminal law. While a finding of guilt under the criminal law will often result in a deprivation of the liberty of the guilty party, depending upon the sentence, a finding of criminal guilt also constitutes a recognition of a contravention of one or more of the most important norms which govern our society. It is the breach of rules of this kind which contributes to the justness of the detention. It is partly for this reason that a special stigma is viewed as being attached to a criminal conviction. Unlike that of the application of the criminal law, the purpose of a denial of bail is neither punishment, nor is it retribution or reform. Rather, it is better understood as a part of the process by which those aims of the law may eventually be achieved by safeguarding the proper functioning of the justice system. Far from obscuring the importance of liberty, a consideration of the administration of justice in these broader terms is necessary for the due recognition of the ways in which the administration of justice allows liberty to be properly respected.”

Amina Koya v the State, Crim. App. No. AAU0011

“I have borne in mind the fundamental difference between a bail applicant waiting trial and one who has been convicted and sentenced to jail by a court of competent jurisdiction. In the former the applicant is innocent in the eyes of the law until proven guilty. In respect of the latter he or she remains guilty until such time as a higher court overturns, if at all. It therefore follows that a convicted person carries a higher burden of satisfying the court that the interests of justice require that bail be granted pending appeal.”

PRIMARY CONSIDERATIONS:

Article 9 of the **International Convention on Civil and Political Rights**

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.”

Bechu and Another v. Regina (1962) 8 FLR 240

“There are other considerations which may affect the discretion of a Court in granting or refusing bail. In the first place, while a Court has, subject to statutory restriction, discretion in granting bail, such discretion must be exercised judiciously and in the light of the paramount principle that an accused person is presumed innocent until proven guilty. For that reason, he should not be

deprived of his liberty merely because he is accused of a crime if he can satisfy the test that in all the circumstances he will appear for his trial on that accusation.”

State v. Tunidau [2003] FJHC 188; HAM0001.2003S (1 January 2003)

“Prima facie, the test for the grant or refusal of bail must always been whether the accused person will appear for trial. Matters which might assist the court in coming to any conclusion would be whether bail has been refused previously, the seriousness of the charge, the likelihood of re-offending, and of interference with prosecution witnesses, the accused’s character, the possibility of further charges, the accused’s right to properly prepare his/her defence and any previous failure to attend court.”

NB : **Bechu and Another v. Regina** supra was decided prior to the coming into effect of the Bail Act, 2002 but the principles espoused are reflected at Section 3 of the Bail Act, 2002.

The decision to grant or deny bail is a discretionary power and as such must be exercised judiciously.

The primary source for all bail matters is the **Bail Act, 2002**. See Section 3 (4) and Section 18 of the Bail Act, 2002.

Tukai v. the State [2004] FJHC 235; HAM0053D.2004S (16 August 2004)

“Although both Applicants have a right to bail, the presumption can be rebutted where the State shows that there is a likelihood that the Applicant will not appear in court, or where it is not in the public interest to grant bail.”

State v. Singh [2010] FJHC 600; HAM187.2010 (2 September 2010)

“[2] The principles governing bail pending trial are contained in the Bail Act. Section 3 (1) provides that an accused has the right to be released on bail unless it is not in the interests of justice that bail should be granted. Consistent with this right, section 3 (3) of the Act declares that there is a presumption in favour of the granting of bail to an accused, but a person who opposes the granting of bail may seek to rebut the presumption. In determining whether a presumption is rebutted, the primary consideration in determining whether to grant bail is the likelihood of the accused appearing in court to answer the charges against him. Bail can be opposed on three grounds provided by section 18 (1) of the Act. Section 19(1) provides for three grounds for refusing bail. Section 19(2) sets out a series of considerations the court must take into account in determining the three grounds. In broad terms, bail can be refused if the accused is a flight risk or if it is not in the accused’s interest to be released on bail or it is not in the public interest to release an accused on bail.”

NB: If bail is to be opposed, it is essential that the investigating officer deposes an Affidavit addressing such issues as flight risk, gravity of any injuries or seriousness, circumstances and nature of the offence, strength of the prosecution case, severity of likely punishment, or the grounds upon which the State is asserting prejudice to the accused or the public interest by reason of the grant of bail. In injury cases, it is important that the State include in the affidavit, the victim’s medical report and ideally, the statement of the examining doctor.

REBUTTING THE PRESUMPTION IN FAVOUR OF BAIL

THE IMPORTANCE OF AFFIDAVIT EVIDENCE:

Roneel Prasad v the State, Criminal Case No. HAM462 of 2012L per Gates C.J

“[8] No affidavit was filed by the State. This was a mistake. In forming an opinion for refusal of bail a court must consider and have regard to all relevant circumstances. Those considerations are set out at section 19 (2) of the Act and I set them out now:

(a) as regards the likelihood of surrender to custody –

- (i) the accused person’s background and community ties (including residence, employment, family situation, previous criminal history);*
- (ii) any previous failure by the person to surrender to custody or to observe bail conditions;*
- (iii) the circumstances, nature and seriousness of the offence;*
- (iv) the strength of the prosecution case;*
- (v) the severity of the likely penalty if the person is found guilty;*
- (vi) any specific indications (such as that the person voluntarily surrendered to the police at the time of the arrest, or, as a contrary indication, was arrested trying to flee the country.)...”*

Shiri Krishna Rao v the State, Cr. Misc. Case No. HAM 463/2013 (LTK) per Gates C.J.

“[5] The applicant is charged with a single count of “acts intended to cause grievous harm.” This arose from an act of domestic violence by a son against his mother, using a stick. He allegedly hit his mother on the left temple and left hand. During the course of his mother’s evidence before me, it appeared there were no remaining wounds or scars at either injury site and no continuing symptoms. The injuries though not medically described were thus fortunately slight.

[6] However, in cases such as these where bail is applied for, it is of great assistance for the Court, indeed essential, to be provided by the State with affidavit evidence going to the gravity of the assault and injuries...

[7] Applications of urgency, or those made in the legal vacation, present administrative difficulties in the path of prosecutors or police investigators. Nonetheless corners must not be cut. Bail issues must be addressed properly and necessary evidence placed before the court.

[8] Issues of importance here are the extent of the injuries inflicted and the gravity of the assault. Relevant circumstances when considering the likelihood of the Accused surrendering to custody are “the circumstances, nature and seriousness of the offence”[Section 19 (2)(a)(iii) Bail Act].”

“All (people) have equal rights to liberty, to their property and to the protection of the laws”

- Voltaire -

THE BURDEN AND STANDARD OF PROOF:

Williams v the State [2008] FJHC 249; HAM099.2008 (8 October 2008)

“...Under the Bail Act, there is a presumption in favour of bail. This presumption has to be rebutted by the prosecution on balance of probability. Under section 3 (3) of the Bail Act the presumption is rebutted if the Accused has previously breached a bail undertaking or condition.”

State v Tuimouta [2008] FJHC 177; HAC078.2008 (18 August 2008)

“In a bail hearing the prosecution carries the burden of proof on balance of probability that the accused should not be granted bail.”

THE EVIDENTIAL REQUIREMENT FOR BAIL:

State v. Singh [2010] FJHC 600; HAM187.2010 (2 September 2010)

“[7] It is recognized that rules of evidence are relaxed in bail hearings and a court may rely on written hearsay evidence provided it is properly evaluated. It must be borne in mind that a bail hearing is not equivalent to a trial hearing, when guilt or innocence is determined.”

State v Tuimouta [2008] FJHC 177; HAC078.2008 (18 August 2008)

“[8] A bail hearing is not a trial. In a trial the prosecution carries the burden of proof to satisfy the guilt of an accused beyond a reasonable doubt.”

Suresh Sani & Anor v. the State, HAM 037.03S, 2nd October 2003)

“An application for bail in the High Court is generally brought on as a result of the filing of a motion with supporting affidavits.”

PROTECTION OF THE ACCUSED:

Pita Vuli v. State, Misc. Action No. 8 of 1990

“...the ‘safety’ of the applicant himself,...is an insufficient ground for depriving a person of his liberty.

If I might say so the protection, safety and security of persons in this country rests primarily with the police and not with prison warders. Furthermore it is not suggested (by the State) that the police would not be able to carry out its normal responsibilities in regard to the applicant or that he has received serious life-endangering threats.”

NB: The fact that an offence charged for is a serious one, is not on its own, sufficient to justify remand.

When arguing protection of an accused or the public interest against an accused, the merest possibility of harm to self or to others or to the system is not sufficient. You will have to satisfy the court on the balance of probabilities that the harm is “substantially more likely than not to occur.”

PUBLIC INTEREST CONSIDERATIONS:

Turagabete v. the State [2005] FJHC 24; HAM0001J.2005L (14 February 2005)

“However, I consider that bail should nevertheless be refused. The offence charged is a serious offence, and the facts relied upon by the prosecution are set forth in the affidavit of Sgt. 496 Kushi Ram are that the Applicants kicked the victim to death. The prosecution alleges that the victim had previously assaulted the 1st Applicant, and that this was a “revenge” killing. The prosecution will rely on the evidence of the two eye-witnesses one who is 13 and the other 16.

My concern is for the vulnerability of these two witnesses. The Applicants and the witnesses all come from the same community. Children are notoriously easy to intimidate or influence. I am of the view that it is not in the public interest to release the Applicants on bail in order to protect these witnesses...”

Williams v the State [2008] FJHC 249; HAM099.2008 (8 October 2008)

“[4] However, I am concerned about the Applicant’s history of breaching bail conditions...

[7] Robbery with violence is a serious charge. The offence is prevalent in our community. The Applicant has a history of committing robbery with violence. Of course, he is presumed to be innocent until proven guilty in respect of the charges pending in court, but these matters persuade me that it is in the public interest that the Applicant remains in remand pending trial despite his ability to provide a surety who has good standing in the community.”

Rapui v. the State [2006] FJHC 3; HAM0004D.2006S (2 February 2006)

“[5] A Magistrate is sometimes faced with a number of Accused who take it in turns not to turn up, thus prolonging, and putting off the resolve of the witnesses, to attend and to give their evidence. In such cases, if a Magistrate forms that view, such view should be recorded, and orders made for bail to be revoked and for the trial to be advanced. Much will depend on the circumstances and gravity of the charge as well as on the bail circumstances of each Accused.”

“Fairness is what justice really is.”

-Potter Stewart-

QUANTUM OF BAIL:

S v. Acheson [1991] 2 SA 805 at 823F per Mahomed AJ

“The quantum of bail must not be so high as to be beyond the resources of the accused, but not so low as to make its possible forfeiture a prospect which the accused can contemplate with easy resignation.”

Stack v. Boyle, 342 U.S 1 (1951) 342 U.S 1, a decision of the Supreme Court of America

“The right to release before trial is conditioned upon the accused’s giving adequate assurance that he will stand trial and submit to sentence if found guilty. Ex parte Milburn, 9 Pet. 704, 710 (1835) [342 U.S. 1, 5]. Like the ancient practice of securing the oaths of responsible persons to stand as sureties for the accused, the modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is “excessive” under the Eighth Amendment. See United States v. Motlow, 10 F.2d 657 (1926, opinion by Mr. Justice Butler as Circuit Justice of the Seventh Circuit.) Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.”

Saqasaqa v The State [2006] FJHC 35; HAM0005D.2006S (31 January 2006)

“[5] Bail conditions, imposing as they must restrictions on persons awaiting trial, must therefore be reasonable and commensurate with the gravity of the offence and with the individual risks identified as applicable. Bail must not be fixed excessively, in effect, denying the applicant an opportunity to take up the grant of bail. This has been a principle of great antiquity in the common law.”

SURETIES:

State v. Stephens [2003] FJHC 51; HAM0004.1997S (26 May 2003)

“[9] In assessing whether a person is a suitable person to stand as a surety for an accused person, those granting bail must have regard to the definition of “surety” provided in Section 2 (1) of the Bail Act, 2002.

“surety” means a person, other than an accused person or a person under 18 years, whom a Police Officer or Court determines to be acceptable to provide confirmation of the accused persons bail undertaking, or security that such undertaking will be complied with.

[10] If a person lives overseas, he will not be able to confirm a bail undertaking or to ensure that bail undertaking or conditions will be complied with, and perhaps most important of all bail issues, to ensure that the accused person bailed will attend for his trial or the mention of his case when notified to do so.

[11] Other persons will not be suitable for a variety of reasons. A spouse may be thought too beholden to, or emotionally engaged with, an accused person to possess sufficient independence to take on the duties of the surety. The police need to check persons put up as sureties, and for that purpose to be allowed to check out and approve the suitability of such persons. If there is a serious disagreement, the matter of suitability of a surety will have to come back before the court for its decision.

[12] Prosecution witnesses, even if relatives of an accused, would not be suitable persons to stand as sureties because of a conflict of their interests.

[13] Because the surety has a duty to ensure the accused's attendance at court, which is a duty independent of the accused's obligation, and to ensure compliance with bail undertakings and conditions on the part of the accused, it is not possible for an accused himself to put up the cash surety, or to guarantee reimbursement to the surety in the event of a bail default by the accused. Indeed in England such conduct amounts to an offence (see Section 9 Bail Act, 1976).

[14] Unless the court were to receive a written request from the surety for his cash to be handed over to the applicant, the court must be bound by the bond document itself and order the cash surety to be returned only to the named surety."

Rajesh Kumar v. the State, HAM 008.05S, (23rd March 2005)

"Sureties are usually offered, who are in a position to ensure the applicant's presence in court, not only because of the fear of losing the money guaranteed if there is non-appearance, but also because of some ability to insist on the applicant's obedience to bail conditions."

Tawake Cakacaka v. the State, HAM045.04S (2nd August 2004)

"A spouse would not be a suitable surety since that person would lack independence, and by virtue of the emotional attachment to the applicant would be unlikely to ensure the attendance of the Accused at court."

R v. Head and Head [1978] Crim. LR 427

"It is an offence in England for an accused person to put up the cash surety or to guarantee reimbursement to the surety in the event of a bail default by the accused."

INCOMPLETE POLICE INVESTIGATIONS:

Pita Vuli v. State, Misc. Action No. 8 of 1

"Needless to say the laying of criminal charges ought not to be allowed to become an easy means of depriving or prejudicing a person's liberty nor should it be used to facilitate incomplete police enquiries unless there are real and substantial grounds to suspect interference."

IN SUMMARY



- Is the Accused a flight risk? Is this a fit case for objection to bail? See Sections 17 -19 of the **Bail Act 2002**.



- If the answer to 1 is yes, then object to bail and file an Affidavit in support of that objection.



- If bail is granted, ensure that suitable conditions are imposed and review the sureties to ensure that they are suitable.

COURT ETIQUETTE

1. Be on time to Court. You should be present inside the Courtroom 15 minutes before the session is due to commence.
2. Be prepared. You are an officer of the Court and owe a duty to the Court and to the proper administration of justice to be prepared for the matter you are scheduled to appear for.
3. Stand and bow when the Magistrate or Judge enters or leaves the room.
4. Stop talking when the Magistrate or Judge enters the room. Beyond rising, bowing and taking your seat again, do not move and remain silent until the Court is called into session.
5. Announce your appearance when your matter is called. Be clear and do not presume that the presiding Judge or Magistrate has remembered your name, particularly if you are not a regular before that Court.
6. Stand when addressing the Court, a witness or the Assessors. Stand when the Court is addressing you. Do not remain sitting when speaking or when you are being spoken to, unless you have a disability and have received permission from the Court to dispense with rising to your feet.
7. Do not speak out of turn. Be courteous. If your opponent is raising an objection, let he or she finish and give the Court an opportunity to truly understand the nature of the objection by way of any further questions to your opponent, before you offer your response.
8. Do not engage in prolonged conversation with any person who is not the Judge, Magistrate or a witness when the Court is in session. When a case is being conducted, the focus should be on the case.
9. Do not distract the due administration of justice by chatting with your Junior or Counsel for the Defence, regardless of whether you are a party to the case or are waiting your turn. If conversation is needful, and your case has not yet been called, stand up and leave the room, have your conversation in quiet and dignified tones outside the Courtroom and then return.
10. Honorifics should be used. The Magistrate is to be addressed as “*Sir or Ma’am*”, the Judge is to be addressed as “*My Lord or My Lady*”, Counsel for the Defence should be addressed as “*my learned Friend*” and witnesses should always be addressed as “*Mr., Ms., Miss., or Mrs.*”, in Court.
11. Outside of Court, the Magistrate is to be addressed as “*Mr., Ms., Miss., or Mrs.,*” and the Judge is to be addressed as “*Judge.*” Unless they truly hold a title outside of their role as Puisne Judge, it is inappropriate to address them as “*my Lord*” or “*my Lady*” outside of Court. If they do have a title outside of their role as Puisne Judge, beyond that of Mr. or Miss. etc, then it is generally appropriate to address them using the appropriate honorific for that title.
12. Do not leave the Bar Table unattended. There should always be Counsel at the Bar Table during a civil court session, and there should always be a Prosecutor at the Bar Table during the criminal court session. When the criminal court is in session, it is important that the Bar Table be attended by a representative of the Director of Public Prosecutions.
13. Do not remain at the Bar Table if you are not representing any of the parties during the conduct of a trial. It is not appropriate for parties other than Counsel on record to sit at the Bar Table during any of the stages of the trial process, including the reading of a ruling, the summing up, the judgment or the sentence.

14. Stand when the Court is addressing you, and remain silent and attentive when the Court is addressing your opponent, the accused, the assessors or a witness. Remain silent and still when the Court is pronouncing a ruling, judgment or sentence.

SEATING

Magistrates Court: The Prosecutor sits closest to the Witness Box. Counsel for the Defence sits closest to the Dock (if only one row is available). Otherwise, the Prosecutor sits in front, closest to the Court and Counsel for the Defence sits at the back, closest to the Dock.

High Court: The Prosecutor sits closest to the Assessors box. The Defence sits closest to the Witness Box (if only one row is available). Otherwise, the Prosecutor sits in front closest to the Court and Counsel for the Defence sits at the back, closest to the Dock.

NOTE: In accordance with the tradition of the English Bar, the Attorney-General sits in the front row to the right of the Bench, with the DPP immediately on his right.

ORDER OF APPEARANCES

State Counsel: Introduces first. Lead Counsel always introduces both Counsel (Lead and Junior).

Defence Counsel: Introduces in order of Accused persons. Lead Counsel always introduces both Counsel (Lead and Junior).

Be clear: *“May it please the Court, Counsel’s name is Puamau, first initial S. With me is my learned Junior, Fatiaki, first initial J. We represent the Director of Public Prosecutions, my Lord.”*

“May it so please you my Lord, Counsel’s name is Fotofili, first initial L. With me is my learned Junior, Kumar, first initial R. We are Counsel for the 1st Accused, Mr. Shivendra Nath.”

THE LEAD UP TO THE TRIAL PROCESS

First Call: The State should present its Information and file and serve its disclosures.

Plea: The Court should ensure that the accused person’s plea is taken.

Pre-Trial: Trial issues should be identified. Objections to any piece of evidence should be received. Bail should be dealt with as should any applications for the protection of vulnerable witnesses. In addition, trial dates, durations and needs should be identified and orders made accordingly, e.g. facilities for the taking of evidence via *Skype*, a white board for the expert witness, a DVD player for an exhibit etc.

Voir Dire: Ideally, all evidentiary disputes should be dealt with before the trial proper commences.

VOIR DIRE

A voir dire (trial within a trial) is held to determine any issue during the course of a trial in any court, usually the admissibility of impugned evidence. A voir dire may be conducted prior to the swearing in of assessors but after the accused person has pleaded to the information. (see Section 288 of the **CPD 09**).

For example, the accused may assert that material should not be admitted into evidence because it offends against the best evidence rule; or that the material should not be admitted because it was the result of an unlawful search and/or seizure.

More frequently, a trial within trial will be held to determine the admissibility of confessions, i.e. admissions against interest made by an accused to a person in authority.

PROCESSES

STEP 1:

During the Pre-Trial Conference, Counsel for the Defence must notify the Court and the State of their intention to challenge the admissibility of a particular piece of evidence and the grounds upon which that challenge is mounted. See *Section 289* and *Section 290 (1)(d) and (2) and (3)* of the **Criminal Procedure Decree 2009** and **Barmanand v R** [1968] FJCA 10; [1968] 14 FLR 139 (30 May 1968).

State Counsel, during the course of serving disclosures will not only have supplied a list of contents per the disclosure bundle but will also have supplied to the Defence a list of witnesses and a list of exhibits. The accused should be aware of the evidence the State intends to rely on. Where the accused is represented by Counsel, it will be reasonable for the Court and the State to expect the accused to be ready with his or her position and grounds for objection at the Pre-Trial Conference.

For an unrepresented accused, the Court should be encouraged to invest the time, during the early stages of the proceedings, to explain to him or her the various stages of the pre-trial and trial process, with a particular focus on the Pre-Trial Conference and all that the Court expects to happen in it.

The List of Exhibits will not be sufficient to indicate whether or not a voir dire in respect of photocopy evidence should be held. To that end, State Counsel owes a duty of fairness to the Court and to the Defence to notify them when exhibits go missing, as well as to notify them of any intention the State may have to tender photocopy or other alternative evidence.

STEP 2:

If Counsel for the Defence or the accused in person challenges admissibility, they should give the Court and the State the grounds of that challenge in writing. If they refuse to give or fail to give written grounds, the State should have recourse to the provisions at *Section 289* and *Section 290 (1)(d) and (2) and (3)* of the **Criminal Procedure Decree 2009**. State Counsel should apply to the Court for orders to compel the accused person to supply to the State their written reasons for asserting that this is impugned evidence.

"Productivity is never an accident. It is always the result of a commitment to excellence, intelligent planning, and focused effort."

-Paul J. Meyer-

STEP 3:

The State should invite the Court to set a realistic schedule regarding the compilation and service of voir dire disclosures upon the Defence; and regarding the hearing of the voir dire in connection with the trial.

It is important to note that the Court may fix a voir dire hearing prior to the trial proper pursuant to *Section 290 (2)* of the **Criminal Procedure Decree 2009** and indeed, it may be prudent for the Court to hear and determine all matters pertaining to admissibility prior to an actual trial.

For example, it is open to the Court to order that a hearing of the voir dire on photocopy evidence; or an illegal search and seizure; or the confessions of the accused be heard on 14 June 2014, but fix a trial date for 3 December 2014 and continue to hold Pre-Trial Conferences to meet any other objects as set out at *Section 289* of the **Criminal Procedure Decree 2009**, in between.

STEP 4:

The Investigating Officer should be encouraged to maintain close contact with the Officer prosecuting the brief through each and every step of the criminal court process. Once the voir dire grounds have been received by State Counsel, they should be immediately dispatched to the Director of the Criminal Investigations Division, cc'd to the Crime Officer of the relevant Police Station and attentioned to the Investigating Officer.

The grounds should be accompanied by a covering letter and that covering letter should also set out the materials State Counsel expects the Investigating Officer to supply in the lead up to the voir dire. Strict time lines should be set and followed. State Counsel should summon all the Officers who have been impugned (or who have been involved in the arrest and interview of the accused) and direct them to read through and re-familiarise themselves with their notes and materials from the time of the arrest, interview and charge.

MATERIALS TO BE GATHERED

Photocopy Evidence:

Statements in Affidavit form from Police personnel confirming that an original existed; that it had been obtained through lawful and proper means; that the copy is an accurate one; that the original has been lost or destroyed and if destroyed, how; and that if lost, a diligent search had been conducted to find it. See **State v Vincent Lobendhan** (1972) 18 FLR 1, approved in **Drodroveivali v State**, [2005] FJCA 5; AAU0019.2003S (4 March 2005).

Search and Seizure:

Statements from the Police regarding the circumstances and particulars surrounding the search and seizure; and the authority upon which the search and/or seizure was carried out. See **Police v Smith** [2003] WSSC 23 (28 October 2003); **Police v Masame** [2007] WSSC 83 (30 October 2007); **R v Sang** [1980] AC 402 and **Karuma v State** [1955] AC 197.

Admissions against Interest:

Statements from the Arresting Officer/s, the Station Orderly who received the suspect at the Police Station, the Escorting Officer/s, the Interviewing Officer/s, the Witnessing Officer/s, the Station Orderly who locked the suspect in the cell, the Charging Officer/s, the Witnessing Officer to the Charge, the Medical Doctor who examined the suspect, the Justice of the Peace who met with the suspect. The Medical Report/s of the suspect and the Magistrates Court record for the date of first call. The relevant State Diary, Cell Book and Meal Book should also be obtained.

NB: *These lists are not exhaustive.*

PHOTOCOPIES

In **Satya Prasad and Anor v R**, Criminal Appeal No. AAU0056 of 1980, the Court of Appeal said:

“Secondary evidence may be given in the absence of better evidence which the law requires to be given first, when a proper explanation is given of the absence of the better evidence.”

In **Drodroveivali v State** [2005] FJCA 5; AAU0019.2003S (4 March 2005), the Court of Appeal (differently constituted) approved the principles set out in **R v Vincent Lobendahn** (1972) 18 FLR 1 relating to the admissibility of photocopy evidence as follows:

“The law on this question required –

- (a) It must be established that the original itself formerly existed, would have been admissible in evidence, and that the copy tendered is a true and faithful reproduction of the original.*
- (b) The original must be proved to have been lost or destroyed and if lost, due and diligent search must be established.*
- (c) It must be shown what happened to the original up to the time when it was lost, and how the copy was made and came into the hands of the person tendering it.”*

SEARCH AND SEIZURE

In **R v Maihi** [2002] NZCA 205; (2002) 19 CRNZ 453; (2002) 7 HRNZ 126 (22 August 2002), the Court of Appeal of New Zealand summarised the principles that applied to a consideration of the admissibility of any piece of evidence obtained as a result of the breach of a Constitutional right.

- (1) Was the method by which the evidence was obtained lawful?*
- (2) Despite the unlawfulness of any action undertaken by the Police to obtain that evidence, was the method by which the evidence was obtained reasonable in all the circumstances.*
- (3) In considering reasonableness, the Court must have regard to the following:*
 - (i) Whether vindication of that breach by exclusion of the resulting evidence is outweighed in the particular case by the competing public interest in bringing offenders to justice. The more serious the breach, the stronger the public interest factors must be before they can be seen as outweighing the need to vindicate the breach by exclusion of the resulting evidence. Conversely, of course, a lesser breach requires less on the public interest side of the scale to outweigh it.*

In **R v Williams** [2007] NZCA 52; [2007] 3 NZLR 207; (2007) 23 CRNZ 1 (7 March 2007), the New Zealand Court of Appeal held:

- (i) A search and/or seizure is only lawful if statute or the common law makes it so.*
- (ii) An illegal search and/or seizure will only be deemed reasonable if the breach is minor or technical. In New Zealand, failure to file a report after the exercise of a warrantless search is a minor and technical breach but specifying the wrong property or the wrong registration number on a search warrant was not.*

ADMISSIONS AGAINST INTEREST

Voir Dire to be Held in the Magistrates Court

1. Practice Direction 1 of 1983 has been expressly disapproved by the Court of Appeal in **Rokonabete v the State** [2006] FJCA 40; AAU0048.2005S (14 July 2006). At para. [24] the Court said:

“[24] Whenever the court is advised that there is a challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial within a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confessions is to be led.

Test for Voir Dire

2. In **Ganga Ram & Shiu Charan v R**, Criminal Appeal No. AAU0046 of 1983, the Court of Appeal held:

*“It will be remembered that there are two matters each of which requires consideration in this area. **First**, it must be established affirmatively by the Crown beyond reasonable doubt that the statements were voluntary in the sense that they were not procured by improper practices such as the use of force, threats of prejudice or inducement by offer of some advantage – what has been picturesquely described as ‘the flattery of hope or tyranny of fear.’ **Second**, even if such voluntariness is established there is also need to consider whether the more general ground of unfairness exists in the way in which the police behave, perhaps by breach of the Judges Rules falling short of overbearing the will, by trickery or unfair treatment.”*

Fabrication

3. In **Guston Kean v State** [2011] FJSC 11; CAV 0015.2010 (12 August 2011), the Supreme Court held that the truth and weight of the confession was a matter for the assessors to consider after taking into account all the evidence.

Directions that ought to be Given regarding Confessions at Trial

4. In **Ramalasou v R** [2010] FJCA 19; AAU0085.2007 (28 May 2010) and earlier in **Tara Chand v R** 14 FLR 72, the Court of Appeal held that voluntariness is not a matter for the assessors. It is a matter for the judge at the voir dire. At the conclusion of the trial, the assessors should only rely and act on the confessions if they are satisfied beyond reasonable doubt that (1) the accused did in fact make the confession and (2) the confession was true.

THE TRIAL PROCESS

*'Where shall I begin, please your Majesty?' asked the White Rabbit.
'Begin at the beginning' the King said gravely, 'and go on till you come to the end: then stop.'*

LEWIS CARROLL: *Alice's Adventures in Wonderland*

THE PROSECUTION CASE

(1) *The Opening Address:*

It is good to think of the Opening Address as an introduction, one that is planned well and consequently, is well structured. This is the Prosecutor's opportunity to introduce the Prosecution case against the accused. It should provide a clear road map to the Court of the legal issues that you expect it to resolve as the trier of fact and law. It should fairly state what the intended proof will be. If your case is complicated, then there is no better opportunity to help simplify it and make it understandable. Set out the burden and standard of proof. In identifying the issues, address realistically anticipated defences. Do not hesitate to clearly and courteously set out what your expectations are of the Court. Remember though, this is not a debate; it's an important part of a process. Avoid wild rhetoric and do not over-state your case. (Refer to 'Addresses' at page 76)

This guide by the eminent jurist, John Sopinka, Q.C. will no doubt assist:

"Counsel in opening states the facts of the case, the substance of the evidence he has to adduce, and its effect on proving his case, and remarks upon any point of law involved in the case. Counsel may in opening refer to those facts of which the Court takes judicial notice. Neither in the opening nor at any stage of the trial may counsel give his own opinion of the case or mention facts which require proof, but which it is not intended to prove, or which is irrelevant to the issue to be tried."

Sopinka, J. (1981) *The Trial of an Action*. Toronto: Butterworth & Co (Canada) Ltd.

(2) *Calling of Witnesses:*

The Prosecution is duty bound to adduce its evidence first. Sometimes, as occurred during the **Mahendra Pal Chaudhary** trial (a strict liability case), the case will fundamentally revolve around agreed facts. If witnesses are called, as they will have to be 99% of the time, the Prosecutor will normally undertake an examination in chief of the witness (an exception occurs when the Prosecutor is only calling the witness in order to tender the witness for cross-examination).

Examination in Chief:

The purpose of the examination in chief is to have the witness tell their story in their own words. The examination in chief should be conducted in accordance with the rules of evidence, be well planned and consequently well-structured, and demonstrate your ability to ask the appropriate questions in the appropriate manner.

Do not lead except in respect of an undisputed fact. A good rule of thumb is to ask a question using the four "**W**"ives and a "**H**"usband. Remember, there is more than one way to skin a cat.

“Where were you at 10.00am on Christmas Day, 2013?”

“When did this happen?”

“What were you doing there?”

“Why were you there at that time?”

“How did you come to be there?”

Examining a witness is a delicate skill. The witness is often nervous and may sometimes give incomplete or unclear answers. The first two and the last three questions are examples of how you can ask the same question in three different ways. If the answer given by the witness seems to you to be incomplete or unclear, take the witness back and then bring the narrative forward, being careful not to regurgitate old evidence, and not to “lead” a witness to an answer. Generally speaking, give it some time between attempts, or better yet, ask the right question at the right time.

Maintain a logical flow and break down the subject areas. **Use a chronological guide for how you intend to get the witness to tell his or her story. Get the witness to “set the scene”, “describe the players”, and “narrate the act.”**

Focus on one fact at a time. Use transition questions e.g. *“What happened on 12 February 2014?”* Ans: I was attacked. *“I would like to focus on the description of the person who attacked you. How tall was your attacker?”* Or piggy-back on a previous answer: *“What did you see?”* Ans: The window pane was broken. *“When you saw the broken window pane, what did you do?”*

Cross – Examination:

This will be undertaken by Counsel for the Defence or the Accused in person. (Refer to page 73).

Re-Examination:

Questions in re-examination should only be asked if necessary and should focus on issues arising out of cross-examination by the Defence. The purpose of re-examination is to give the witness the opportunity to clarify any matters raised during cross-examination, for example: if it looks like the witness’s evidence is unclear, or there now seems to be an inconsistency between the witness’s evidence and a prior inconsistent statement. In the case of the latter, the appropriate line of questioning should be aimed at giving the witness an opportunity to explain or clarify the inconsistency. Remember, it is the witness that is giving evidence not Counsel, either for the State or the Defence.

Re-examination should be brief. Counsel should really think about whether or not it is necessary, and whether or not it is strategically viable to undertake a re-examination:

“Re-examination is a dangerous business. You are trying to rehabilitate a witness who has been knocked about in cross-examination. The witness is often feeling most unhappy about being a witness at all and just wants to get out of the witness box. There is a grave danger that re-examination will produce the same answers that he has just given in cross-examination...”

Reid R.F and Holland R.E (1984) *Advocacy – Views from the Bench*. Aurora: Canada Law Book. However, Counsel must not resile from re-examination simply because a witness seems fatigued or the case seems hopelessly lost. On the contrary, Counsel should have the wherewithal to ask the questions needed to revive a case which may fail utterly for want of trying.

(3) Concluding the Prosecution Case:

Once you have adduced all the evidence you intend to adduce, or can adduce, State Counsel (or Lead Counsel within the State prosecuting team) should rise to his or her feet and say:

 ('Sir' or 'Ma'am' or 'My Lord' or 'My Lady'), *that is the conclusion of the State's case against Mr. XYZ."*

NO CASE TO ANSWER

The Defence may make an application at this point for a ruling of "no case to answer" in favour of the accused. (Refer to 'No Case to Answer' at page 78).

THE DEFENCE CASE

- (1) Opening the Defence case** : *The same considerations for a Prosecution opening address apply.*

- (2) Calling Defence witnesses** : *The same considerations for the call of Prosecution witnesses apply.*

- Examination in Chief** : *See Prosecution Case – Examination in Chief*

- Cross – Examination** : State Counsel cross-examines the Defence witness.

The purpose of cross-examination is to do any or all of the following:

- (i) Obtain helpful information.
- (ii) Discredit witnesses and/or their testimony.
- (iii) Bolster the testimony of a third person who has discredited the witness and/or his or her testimony.

Keep your closing address in mind, and only cross-examine to the extent to which you need to get the information necessary to support the argument you intend to run during your closing address.

Prepare your cross-examination, and ensure that it is well-structured. You are allowed to lead.

Francis Wellman said of cross-examination:

"It requires the greatest ingenuity; a habit of logical thought; clearness of perception; infinite patience and self control; power to read men's mind intuitively, to judge of their characters by their faces, to appreciate their motive; the ability to act with force and precision; a masterful knowledge of the subject matter itself; an extreme caution, and above all, the instinct to discover the weak point in the witness under examination. It involves all shades and complexions of human morals, human passions and human intelligence. It is a mental dual between counsel and witness."

Wellman, F. (1948) *The Art of Cross-Examination, 4th Edition*. London: The Macmillan Company.

Listen to the witness during examination in chief and during cross-examination.

Do not have them regurgitate evidence they have already offered in examination in chief. This only reinforces their previous testimony.

Do not ask a question you do not know the probable answer to.

Do not argue with the witness. Keep cool, calm and in control throughout the cross-examination.

Do not allow the witness to explain and in that respect, ask only short, simple, leading questions.

Have an ordered, logical structure and within that structure, tackle one fact at a time.

You may wish to adopt a sequential approach:

- (1) Be friendly and win some concessions. Get the witness to agree with you.
- (2) Seek to discredit the witness and put your case (apply **Browne v Dunn**).
- (3) End on a high note. End with a strong point but do not ask one question too many.

Re-Examination : *See Prosecution Case – Re-Examination*

(3) Concluding the Case for the Defence : *Like the Prosecution, the Defence should clearly indicate that that is the conclusion of their case.*

NB: The Defence is under **no obligation** to offer any evidence and may choose to remain silent and call no witnesses.

THE CLOSING ADDRESSES

If the accused person calls any witnesses other than himself or herself (regardless of whether he or she testifies or not), then the Prosecution closes last. In all other circumstances, the Prosecutor closes first. (*Refer to Section 182 of the **Criminal Procedure Decree 2009***).

“In making a speech one must study three points: first, the means of producing persuasion; second, the style or language to be used; third, the proper arrangement of the various parts of the speech.”

Aristotle, Rhetoric, Book 3, Part 1

The purpose of the closing submission is to persuade the court that the State has proven each and every element of the offence against the accused beyond reasonable doubt.

Prepare your closing speech and ensure that it is well-structured. State your argument succinctly and clearly. When canvassing the evidence, draw the Court’s attention to the actual documents and excerpts from given testimony that supports your contention that an element has been proven beyond reasonable doubt.

French C.J in a speech to the Australian Bar Association Bar Readers' Trial Advocacy Course – Closing Dinner Speech titled “Trials of Advocacy” delivered on 8 July 2011 at Perth said of the closing address:

“Do not get carried away by the justice of your client's case by becoming emotional in address. It is the reasonableness of your propositions that should work their magic on the judge, although a glint of moral steel showing just above the forensic scabbard can be a help.”

In **Ashmore v Corp of Lloyd's** [1992] 1 WLR 446 at 453, approved in **R v Higgins** (1994) 71 A Crim R 429 at 442 (Vic CCA), Lord Templeton made the point that:

“It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner.”

The Closing Address (or Speech) should have the following:

A short, succinct statement to engage the Court's interest and/or drive an important point home.

A short discussion on the Charge the accused is facing and the elements of the Charge.

The Burden and Standard of Proof

An assurance that the State has discharged that burden and met that standard.

Proof of that claim *vis-à-vis* a logical discussion of the facts adduced via the evidence at trial and a structured linking of the evidence to each element of the offence.

By the application of reasoned logic, debunk the defences raised at trial.

End on a strong point or on a high note.

The adage “don't tell them, show them” is a useful one to apply. Do not hesitate to use the exhibits tendered into evidence, or quote testimony verbatim (your record must be accurate). This is an effective way to persuade the Court of the soundness of your submissions. Your closing address should have content that if adopted by the Judge would easily form the basis, not of the summing up, but his or her actual judgment on the matter.

“Speak when you're angry and you will make the best speech you will ever regret.”

-Ambrose Bierce -

ADDRESSES

COUNSEL SHOULD NOT:

1. Make submissions to the Court based upon material which is not in evidence.
2. Offer intemperate or inflammatory comments, tending to arouse prejudice or emotion.
3. Offer comments which belittle or ridicule any part of an accused's case.
4. Offer comments which impugn the credit of a State witness, where the witness was not afforded the opportunity of responding to an attack upon credit (e.g. no application has been made to declare the witness hostile).
5. Offer comments which convey to the Court the Prosecutor's personal opinions.
6. Speculate about the motivations of a witness for the evidence that he had given, unless that motivation has been the subject of specific evidence adduced at trial. (**DeVries v The Queen** [2013] VSCA 210 (13 August 2013); **R v Cupid** [2004] VSCA 183 (8 October 2004)).
7. Invite the Court to speculate on any matter or to suggest that the onus of proof is inverted (in circumstances where it is not lawful to do so). **R v Russo** [2004] VSCA 206 (19 November 2004).

[See also: **Livermore v R** [2006] NSWCCA 334 (20 October 2006), the Supreme Court of New South Wales (Court of Criminal Appeal)]

HINTS FOR THE PROSECUTOR:

OPENING ADDRESS:

- (1) You will have opportunity to argue your case in closing. Keep your remarks factually descriptive and avoid emotive words or emotive overtones to your remarks. Build your case brick by brick and avoid long dissertations of the law.
- (2) Do not be argumentative. Argument invites the Court to speculate on matters not in evidence. Argument on the law is bound to be unpersuasive so early into the trial, particularly as there is at that point currently no material to anchor your argument.
- (3) Do not state your personal opinion. As was said in **R v Rugari** [2001] 122 A Crim R 1 (NSW CCA) at 12 [60], "It is not appropriate for counsel, whether they be for the defence or for the Crown, to express their own views about the evidence, that is a matter for the tribunal of fact, particularly so where that tribunal is a jury."
- (4) Do not overstate the evidence. If a witness does not come up to proof, it will damage your case. Counsel should state the basis for your case, the general nature of the evidence and highlight the witnesses you intend to call, as part of your over-arching duty of fairness to the accused to help them understand the nature of the State's case against them.

- (5) Be fair. Do not mention inadmissible evidence, or evidence that is still under challenge (for example: confessions or a photocopy of a document that you intend to adduce in the absence of the original).
- (6) Do not mention facts that you know you cannot prove; or which you are not certain you are able to prove. Counsel should confine themselves only to the evidence which they *bona fide* believe is both available and admissible at trial.
- (7) Be prepared. Adequate preparation should allow you to deliver your address in a clear and engaged manner to and with your panel of assessors. Do not read. If necessary, Counsel could perhaps reduce the outline of the address to one sheet of paper. Eg. The sheet could perhaps contain only your key points and the ideas you intend to convey to your panel of assessors and to the Court, instead of large blocks of text which you expect to read out.
- (8) Be neat, courteous and well-presented. Do not put your hands in your pockets; adopt an informal pose; place your feet on a seat; fiddle with pens or coins or paperclips etc; do anything to distract the assessors and the Court from what you are saying. Speak to them and not at them and ensure that your movement emphasises what you are saying, not distract from it. Do not come out from behind the Bar Table.
- (9) Do not discuss the other side's evidence. This is argumentative. At this point, the Defense has not opened their case yet, and in light of the burden of proof and the accused person's right to remain silent, it would be both presumptuous and prejudicial for Counsel to give the Court the impression that you expect the Defense to drop their shield or prove anything in their defence.

CLOSING ADDRESS

- (1) Do not misstate the evidence.
- (2) Do not misstate the law.
- (3) Do not offer a personal opinion.
- (4) Do not appeal to any perceived biases.
- (5) Do not engage in prejudicial argument.
- (6) Do not engage in personal attacks against anyone.
- (7) Do not offend against the principles set out in **Livermore v R** supra.
- (8) Be fair.
- (9) Be prepared.
- (10) Be logical.

"Excellence is an art won by training and habituation."

-Aristotle-

NO CASE TO ANSWER

MAGISTRATES COURT

Section 178 of the **Criminal Procedure Decree 2009** (the prevailing section for the purposes of a 'No Case to Answer' application) mirrors Section 210 of the **Criminal Procedure Code Cap. 21** (now repealed). As a result the common law regarding the interpretation of Section 210 of the **Criminal Procedure Code, Cap. 21** can apply to an interpretation of Section 178 of the **Criminal Procedure Decree 2009**.

TEST FOR NO CASE TO ANSWER

State v Ganesh [2009] FJHC 207; HAM030.2008 (17 September 2009) per Goundar J.

The test for 'No Case to Answer' in the Magistrates Court has two limbs:

- (i) *whether there is relevant and admissible evidence implicating the accused in respect of each element of the charged offence;*
- (ii) *whether the prosecution evidence has been so discredited by cross examination that no reasonable tribunal could convict.*

Either limb of the test can be relied upon to make an application for no case to answer in the Magistrates Court.

The test was summarised in **Sahib v the State** [2005] FJHC 95; HAA0022J.2005S (28 April 2005) per Shameem J. as follows:

"So the magistrate must ask himself or herself firstly whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and second whether on the prosecution case, taken at its highest, a reasonable tribunal could convict.

In considering the prosecution case at its highest, there can be no doubt at all that where the evidence is entirely discredited, from no matter which angle one looks at it, a court can uphold a submission of no case. However, where a possible view of the evidence might lead the court to convict, the case should proceed to the defence case."

HIGH COURT

Section 231(1) and (2) of the **Criminal Procedure Decree 2009** (the prevailing provision for a 'No Case to Answer' application in the High Court) is similar to Section 293 (1) and (2) of the **Criminal Procedure Code Cap 21** (now repealed).

TEST FOR NO CASE TO ANSWER

Sisa Kalisoqo v Reginam, Criminal Appeal No. 52 of 1984, Fiji Court of Appeal

Whether or not, there is some relevant and admissible evidence, direct or circumstantial, touching on all elements of the offence, the weight and credibility of such evidence, are not matters for assessment by the court, at this stage of the proceeding. The weight and credibility of such evidence, are matters for the assessors, in the trial proper.

SENTENCING POLICY

THE ROLE OF THE PROSECUTOR

1. Chapter 4 of the **Legal Practitioner's Decree 2009** mandates that the Prosecutor must:
 - (1) prosecute a criminal matter dispassionately and with fairness;
 - (2) save in exceptional circumstances, always advise the defence of any matters of which the prosecutor is aware which might tend to indicate the innocence of the accused, or mitigate the seriousness of the offence; and
 - (3) comply with all lawful directions of the Director of Public Prosecutions ('DPP') relating to the manner of conducting prosecutions.

(Emphasis added)
2. The Prosecutor's duty is not to advocate for a particular sentence. The Prosecutor's only duty is to ensure that the Court is presented with the information necessary to enable it to properly carry out its sentencing functions.
3. To that end, the Prosecutor must not seek to persuade the court to impose a vindictive sentence, or even a sentence of a particular magnitude. Instead, the Prosecutor should:
 - (a) inform the court of any relevant authority or legislation bearing on the appropriate sentence;
 - (b) assist the court to avoid appealable errors on the issue of sentence;
 - (c) inform the court of an appropriate range of sentencing options available on the facts of the case, including any custodial or non-custodial options, by reference to guideline authorities or relevant appellate authority;
 - (d) highlight any aggravating features available on the facts presented in Court;
 - (e) provide the court with any facts available to the Prosecutor which might tend to mitigate the seriousness of the offence;
 - (f) provide the court with a victim impact statement whenever appropriate; and
 - (g) correct any error made by Counsel for the Defence in address on sentence.
4. In informing the court of an appropriate range of sentencing options available on the facts of the case, including any custodial or non-custodial options, the Prosecutor should:
 - (a) adequately present the facts, and in so doing, only present those facts which are properly available on the evidence;
 - (b) ensure that the court is not proceedings upon any error of law or fact;

- (c) provide well-researched and up-to-date assistance on the law or facts;
 - (d) fairly test the opposing case as required;
 - (e) refer to relevant official statistics and comparable cases and the sentencing options available;
 - (f) in instances where there appears a real possibility that the court may make a sentencing order that is inappropriate and not within the proper exercise of the sentencing discretion, make firm submissions on that issue – particularly if, where a custodial sentence is appropriate, the court is contemplating a non-custodial sentence.
5. Upon conviction, the Prosecutor must inform the court of the accused's latest record of previous convictions, and must ensure that the record is both up to date and accurate.
 6. In the case of a juvenile offender, the Prosecutor must exercise care when making submissions to a court regarding the orders available following a finding of guilt. During the consideration of an appropriate order following a finding of guilt, the Prosecutor should ensure that all protections available to the juvenile offender are properly considered and fairly applied.
 7. When matters advanced in mitigation can be proven wrong, it is the duty of the Prosecutor to inform the defence accordingly. If the defence persists, it becomes the duty of the Prosecutor to invite the court to put the defence to proof on the disputed material and, if necessary, to hear rebutting evidence. (See the Prosecution Code, 2003).
 8. The DPP expressly disapproves the practice of plea-bargaining and no sentence agreement should be made between the Prosecutor and Counsel for the Defence or an accused in exchange for a plea.
 9. No Prosecutor should, in any way, fetter the discretion of the DPP to appeal against the inadequacy of a sentence (including, by informing the court or an opponent whether the DPP would be likely to appeal or not appeal, or whether or not the DPP considers a sentence or particular range within the sentence appropriate or inappropriate). In exceptional circumstances, prior approval may be sought from the DPP.
 10. No Prosecutor should ever feel pressured into articulating a numerical figure in respect of a sentence sought for in Court. The Prosecutor is reminded that it is the court's duty to find and apply the law in respect of sentence and that responsibility is not and should not be circumscribed by the conduct of legal representatives, and in particular, State Counsel. (See ***State v Ashil Kumar***, Criminal Case No. AAU0040 of 2012 (2 June 2014).

"Punishment is not for revenge, but to lessen crime and reform the criminal."

- Elizabeth Fry -

CONVICTIONS ON ALTERNATIVE COUNTS, LESSER AND MINOR OFFENCES

Minor Offences included in the Offence Charged:

When some of the particulars of the offence charge constitute in themselves a separate minor offence, a Court may convict on the minor offence in instances where the offence charged is not made out but the minor offence has been proved. No charge for the separate minor offence need have been laid. (*see s.160 CPD 09*)

Attempts:

A person may be convicted of an attempt to commit the offence charged with. Implicit in the statute is the requirement that there be sufficient evidence to prove the attempt. Also implicit in the statute is the fact that this provision comes into operation only if a Court finds that the substantive offence was not proved. No charge for the attempt need have been laid. (*see s. 161 CPD 09*)

Lesser or Alternative Offences:

A person may be convicted, after due process, of the following lesser offences or alternative offences:

- 1) The lesser offence of infanticide on an initial charge for murder of a child under the age of 12 months.
- 2) The lesser or alternative offence of killing an unborn child on an initial charge for murder, manslaughter, infanticide or for unlawful abortion in relation to the unborn child.
- 3) The alternative offence of unlawful abortion on an initial charge for killing an unborn child.
- 4) The lesser offence of concealment of birth where the charge has been for murder, infanticide or killing an unborn child.
- 5) The lesser offence of careless or dangerous driving where the charge has been for manslaughter.
- 6) Any sexual offence where the charge has been for rape.
- 7) The alternative offence of carnal knowledge where the charge was for incest.
- 8) Any other applicable sexual offence where the original charge was for defilement of a girl under 16 years, however the offence may be termed.
- 9) Any other applicable property related offence where the initial charge was for burglary or another property related offence.
- 10) An alternative offence of receiving for an initial charge for theft.
- 11) An alternative offence of embezzlement where the initial charge was theft.
- 12) An alternative offence of theft where the initial charge was embezzlement.
- 13) An alternative offence of obtaining by false pretences (however the offence is termed) where the initial charge was theft.
- 14) An alternative offence of theft where the initial charge was for an offence of obtaining by false pretences (however the offence is termed).
- 15) An alternative offence of assault with intent to rob where the initial charge was robbery.

No charge need be laid in respect of these lesser/alternative counts. (*see s. 162 (2) CPD 09*)

Section 162 of the Criminal Procedure Decree 2009 is to be construed as in addition to and not in derogation of the provisions of any other Act Decree or Promulgation and the other provisions of this Decree; and as being without prejudice to the generality of the provisions at Sections 160 and 161 of the Criminal Procedure Decree 2009. (*see s. 163 CPD 09*)

PROCEEDS OF CRIME APPLICATIONS

APPLICATION 1:

RESTRAINING ORDER

NB: Applications under the **Proceeds of Crime Act Cap. 22D** should be made *inter-parte*, unless the broader interests of justice require that the application be made *ex-parte*, e.g. there is a real risk that if notified of the application, the person or persons in possession of the property might destroy, or abscond with, it.

The High Court Rules, 1988 apply. Section 27B of the **Proceeds of Crime Act Cap. 22D** provides that the proceeding on an application for a restraining order, forfeiture order or pecuniary penalty order are not criminal proceedings, and with the exception of an offence under the Act, the rules of construction applicable only in criminal law do not apply to the interpretation of the Act; and only those rules of evidence applicable in civil proceedings apply.

Sections 19A, 19B. 34 and 35 of the Proceeds of Crime Act Cap. 22D

Originating Summons
Affidavit in Support
High Court (Civil) Registry

Restraining Order for Property in respect of which a Civil Forfeiture or Criminal Forfeiture Order may be issued

The Affidavit must state:

(s.34 (4))

- (a) the description of the property in respect of which the restraining order is sought.
- (b) the location of the property, and
- (c) the grounds for the belief that the property is tainted property or terrorist property for which a civil forfeiture order (or criminal forfeiture order) may be made.

Restraining Order for Property in respect of which a Pecuniary Penalty Order may be issued

The Affidavit must state:

(s. 34 (5))

- (a) a description of the property in respect of which the restraining order is sought,
- (b) the location of the property,

- (c) the grounds for the belief that the person is suspected of having committed a serious offence and for the belief that the person has obtained a benefit directly or indirectly from the commission of said offence; and
- (d) where the application seeks a restraining order against property of a person other than the person who is suspected of having committed a serious offence: the grounds for the belief that the property is subject to the effective control of the person who is suspected of having committed a serious offence.

Restraining Order for Property in respect of which an Unexplained Declaration may be issued

The Affidavit must state:

(s. 71G (2), s. 71H, s. 71I and s. 71J) of the **Proceeds of Crime (Amendment) Decree 2012)**

- (1) All property that the person owns, whether the property was acquired before or after the commencement of the Decree and the value of each property at the time it was acquired and at the time of the application.
- (2) All property that the person effectively controls, regardless of when the person acquired effective control, and the value of each property both at the time of attaining effective control and at the time of the application.
- (3) All property that the person has given away at any time regardless whether it was given away before or after the commencement of the Decree and the value of each property both at the time it was given away and its value at the time of the application.
- (4) All other property acquired by the person at any time regardless whether this was before or after the commencement of the Decree, including consumer goods and consumer durables that have been consumed or discarded (but not including food, clothing and other items reasonably necessary for ordinary daily requirements of life), and the value of each property both at the time it was consumed and discarded and at the time of the application.
- (5) All services, advantages and benefits that the person acquired at any time, whether before or after the commencement of the Decree, and the value of the service, advantage or benefit both at the time it was acquired and at the time of the making of the application.
- (6) All property, services, advantages and benefits acquired by another person acting upon the request or direction of the person, regardless whether this was acquired before or after the commencement of the Decree, and the value of each property, service, advantage and benefit both at the time it was acquired and at the time of the making of the application. The property, services, advantages and benefits should include consumer goods and durables that have been consumed and discarded (except that food, clothing and other items reasonably necessary for the ordinary daily requirements of life should not be included).
- (7) Anything of monetary value acquired by the person or another person, in Fiji or elsewhere, from the commercial exploitation of any product or any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from the

person's involvement in the commission of a serious offence, whether or not the thing was lawfully acquired and whether or not the person has been charged with or convicted of the offence.

- (8) The Affidavit should also state the source of the funds used to acquire the property or item of monetary value set out at (1) – (7) above and where the source is unexplained, set that fact out too.
- (9) The Affidavit should state the person's income and outgoings at any or all times within the period in question.

RESTRAINING ORDER APPLICATIONS

NB: Considerations for Restraining Order applications should be undertaken during the analysis stage within the brief handling cycle. Counsel should advise the DPP through the Manager or Divisional Manager when a restraining order application is warranted, and should prepare and supply draft copies of the Originating Summons and Affidavit to the DPP within 14 days of the DPP's endorsement of the analysis regarding the desirability of a Restraining Order.

Review is a continuing duty and Counsel should advise on the desirability of obtaining a restraining order application within 14 days of the receipt of new information that signals (on any reasonable consideration of the matter) that a restraining order is warranted. The restraining order application should be filed and served within 14 days of the DPP's endorsement of that analysis.

STEP 1:

Identify the purpose of the Restraining Order. Is it being restrained for the purposes of an eventual Civil Forfeiture Order, Forfeiture Order following Conviction, Pecuniary Penalty Order, Forfeiture of Terrorist Property or in anticipation of an Unexplained Wealth Declaration and the eventual Forfeiture of Unexplained Wealth should the Declaration be granted?

STEP 2:

Identify the person or persons who have an interest in the property.

STEP 3:

Prepare an Originating Summons and Affidavit in Support using the ODPP Templates provided. Have it endorsed by the DPP, through your Divisional Manager or Manager, and cause it to be filed. Remember that pursuant to *Section 19A* of **POCA Cap. 22D**, all parties are entitled to 30 days written notice of the application.

STEP 4:

File and Serve the Originating Summons and Affidavit in Support on the relevant parties, including any parties that you've identified as having an interest in the property.

STEP 5:

At the hearing, make submissions on the law based on the Affidavit in Support.

STEP 6:

Prepare the Orders in line with the Court's ruling on the matter, and serve the Courts Orders on all parties, in accordance with the directives of the Court. See *Section 38* of **POCA Cap. 22D**.

APPLICATION 2:

NON – CONVICTION BASED FORFEITURE ORDER

The Civil Forfeiture Order

Sections 19C, 19D, 19E of the Proceeds of Crime Act Cap. 22D

Originating Summons
Affidavit in Support
High Court (Civil) Registry

The Affidavit must state:

(s. 19E(1))

- (i) The evidentiary basis upon which a Court may be satisfied on the balance of probabilities that the property is tainted property.

Tainted property, in relation to a serious offence or a foreign serious offence means (s.3):

- (a) property used in, or in conjunction with, the commission of the offence;
- (b) property intended to be used in, or in connection with, the commission of the offence;
- (c) proceeds of crime.

Serious offence means (s.3) an offence of which the maximum penalty prescribed by law is death, or imprisonment for not less than 6 months or a fine of not less than \$500 and a foreign serious offence means (s.3) a serious offence against the law of a foreign country.

Proceeds of crime means (s.4(1A)) property or benefit that is:

- (a) wholly or partly derived or realised directly or indirectly by any person from the commission of a serious offence or a foreign serious offence;
- (b) wholly or partly derived or realised from a disposal or other dealings with proceeds of a serious offence or a foreign serious offence,

and includes, on a proportional basis, property into which any property derived or realised directly from the serious offence or foreign serious offence is later converted, transformed or intermingled, and any income, capital or other economic gains derived or realised from the property at any time after the offence.

“Follow the money. Inevitably it will lead to an oak-paneled door and behind it will be Mr. Big.”

-Attributed to Mr. James Crane by **Clive Borrell** and **Brian Cashinella** in their 1975 book *Crime in Britain Today* -

CIVIL FORFEITURE APPLICATIONS

STEP 1:

Is there sufficient evidence available to satisfy the Court on the balance of probabilities that property owned by the person, in the possession of the person, or under the effective control of the person is tainted property? On a careful perusal of the facts and circumstances presented to the ODPP, is the property best dealt with by way of a non-conviction based forfeiture application?

STEP 2:

Has the property been restrained? If it has not, apply immediately for a restraining order on that property.

STEP 3:

State Counsel should consult with his or her Divisional Manager or Manager regarding the timing of the Civil Forfeiture application and these recommendations should go to the DPP in writing. The DPP will thereafter direct on the appropriate timing of the Civil Forfeiture Order.

This protocol is incorporated to take in account circumstances where other properties or other crimes come to light in the interim; and/or it transpires that other properties will need to be restrained, it transpires on a further consideration of the matter that the crime alleged falls within the purview of a terrorist act and other properties need to be restrained and forfeited, the circumstances warrant an Unexplained Wealth Declaration application instead, or the timing of these considerations within the trial cycle, make a post-conviction order the more practical order to apply for.

STEP 4:

Prepare an Originating Summons and Affidavit in Support using the ODPP Templates provided. Have it endorsed by the DPP through your Supervising Officer and file it. Remember that pursuant to *Section 19D* of **POCA Cap. 22D**, all parties are entitled to 30 days written notice of the application.

STEP 5:

At the hearing, make submissions in accordance with the evidence you have presented in Court in support of the Application.

STEP 6:

Prepare the Orders in line with the Court's ruling on the matter, and serve the Courts Orders on all parties, in accordance with the directives of the Court.

APPLICATION 3:

NON-CONVICTION BASED FORFEITURE ORDER

Forfeiture Orders for Terrorist Property

Sections 19F, 19G and 19H of the Proceeds of Crime Act Cap. 22D

Originating Summons
Affidavit in Support
High Court (Civil) Registry

The Affidavit must state:
(s.19H (1))

- (i) the evidentiary basis upon which the Court can be satisfied on the balance of probabilities that the property to which the application relates is terrorist property.

Terrorist property means:

- (a) proceeds from the commission of a terrorist act;
- (b) property which has been, is being, or is likely to be used to commit a terrorist act;
- (c) property which has been, is being, or is likely to be used by a terrorist group;
- (d) property owned or controlled by or on behalf of a terrorist group; or
- (e) property which has been collected for the purpose of providing support to a terrorist group or funding a terrorist act.

(s. 3 of the **Proceeds of Crime Act Cap. 22D** and s. 2 of the **Financial Transactions Report Act 2004**)

Terrorist act means:

- (a) an act or omission in or outside Fiji which constitutes an offence within the scope of a counter terrorism convention;
- (b) an act or threat of action in or outside Fiji which –
 - (i) involves serious bodily harm to a person;
 - (ii) involves serious damage to property;
 - (iii) endangers a person's life'
 - (iv) creates a serious risk to the health or safety of the public or a section of the public;

- (v) involves the use of firearms or explosives;
- (vi) involves releasing into the environment or any part thereof or distributing or exposing the public or any part thereof to any dangerous, hazardous, radioactive or harmful substance, any toxic chemical, or any microbial or other biological agent or toxin;
- (vii) is designed or intended to disrupt any computer system or the provision of services directly related to communications, infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
- (viii) is designed or intended to disrupt the provision of essential emergency services such as police, civil defence or medical services;
- or
- (ix) involves prejudice to national security or public safety;

and is intended, or by its nature and context, may reasonably be regarded as being intended to –

- (A) intimidate the public or a section of the public; or
- (B) compel a government or an international organisation to do, or refrain from doing any act; or
- (C) seriously destabilize or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation;

but does not include an act which disrupts any services, or is committed in pursuance of a protest, demonstration or stoppage of work if the act is not intended to result in any harm referred to in subparagraphs (i), (ii), (iii) or (iv).

(s. 3 of the **Proceeds of Crime Act Cap. 22D** and s. 2 of the **Financial Transactions Report Act 2004**)

Terrorist group means:

- (a) an entity that has as one of its activities or purposes committing, or facilitating a terrorist act;
- (b) a specified entity; or
- (c) an organisation that is prescribed by regulation.

(s. 3 of the **Proceeds of Crime Act Cap. 22D** and s. 2 of the **Financial Transactions Report Act 2004**)

Specified entity means:

- (a) an entity that has knowingly committed, attempted to commit, participated in committing, or facilitated the commission of a terrorist act; or
- (b) an entity knowingly acting on behalf of, or at the direction of, or in association with, an entity referred to in paragraph (a) and which has been prescribed under a written law relating to terrorism.

APPLICATIONS FOR A FORFEITURE ORDER FOR TERRORIST PROPERTY

STEP 1:

Is there sufficient evidence available to satisfy the Court on the balance of probabilities that property owned by the person, in the possession of the person, or under the effective control is terrorist property? On a careful perusal of the facts and circumstances presented to the ODPP, is the property best dealt with by way of an application for a non-conviction based forfeiture order for terrorist property?

STEP 2:

Has the property been restrained? If it has not, apply immediately for a restraining order on that property.

STEP 3:

State Counsel should consult with his or her Divisional Manager or Manager regarding the timing of the forfeiture application and these recommendations should go to the DPP in writing. The DPP will thereafter direct on the appropriate timing of the forfeiture application. This protocol is incorporated to take in account circumstances where other properties or other crimes come to light in the interim; and/or it transpires that other properties will need to be retrained, properties or other crimes have come to light in the interim and/or it transpires that other properties will need to be retrained, the circumstances warrant an Unexplained Wealth Declaration application instead, or the timing of these considerations within the trial cycle, make a post-conviction order the more practical order to apply for.

STEP 4:

Prepare an Originating Summons and Affidavit in Support, have it endorsed by the DPP through your Supervising Officer and file it. Remember that pursuant to *Section 19G* of **the Proceeds of Crime Act Cap 22D**, all parties are entitled to 30 days written notice of the application.

STEP 5:

At the hearing, make submissions in accordance with the evidence you have presented in Court in support of the Application.

STEP 6:

Prepare the Orders in line with the Court's ruling on the matter, and serve the Courts Orders on all parties, in accordance with the directives of the Court.

APPLICATION 3:
CONVICTION BASED ORDERS

Forfeiture Order on Conviction

Sections 5, 6, 7, 9, and 11 of the Proceeds of Crime Act Cap. 22D

Originating Summons

Affidavit in Support

Transcript of any proceedings against the person for the offence (s. 9(1))

High Court (Civil) Registry

The Affidavit must state:

(s. 11)

- (i) the evidential basis upon which the Court can be satisfied that the property is tainted property or terrorist property for example:
- (a) whether the property was in the person's possession at the time of, or immediately after, the commission of the offence of which the person was convicted;
- (b) whether the property was under the effective control of the person at the time of, or immediately after, the commission of the offence of which the person was convicted;
- (c) whether the property, and in particular money, was found in the person's possession or under the person's control in a building, vehicle, receptacle or place during the course of investigations conducted by the police before or after the arrest and charge of the person for the offence of which the person was convicted;
- (d) whether the value, after the commission of the offence, of all ascertainable property of a person convicted of the offence exceeds the value of all ascertainable property of that person prior to the commission of that offence, and whether the income of that person from sources unrelated to criminal activity of that person can reasonably account for the increase in value.

Inferences:

(s. 11(2))

- (a) where the evidence establishes that the property was in the person's possession at the time of, or immediately after, the commission of the offence of which the person was convicted – that the property was used in, or in connection with, the commission of the offence;
- (b) where the evidence establishes that the property was under the effective control of the person at the time of, or immediately after, the commission of the offence of which the person was convicted – that the property was derived, obtained or realised as a result of the commission by the person of the offence of which the person was convicted and for purposes of this

paragraph effective control shall have the same meaning as in *Section 25* of the **Proceeds of Crime Act Cap. 22D**;

- (c) where the evidence establishes that the property, and in particular money, was found in the person's possession or under the person's control in a building, vehicle, receptacle or place during the course of investigations conducted by the police before or after the arrest and charge of the person for the offence of which the person was convicted – that the property was derived, obtained or realised as a result of the commission by the person of the offence of which the person was convicted;
- (d) where the evidence establishes that the value, after the commission of the offence, of all ascertainable property of person convicted of the offence exceeds the value of all ascertainable property of that person prior to the commission of that offence, and the Court is satisfied that the income of that person from sources unrelated to criminal activity of that person cannot reasonably account for the increase in value – that the value of the increase represents property which was derived, obtained or realised by the person directly or indirectly from the commission of the offence of which the person was convicted.

Payment instead of Forfeiture Order

(s. 16)

Where the Court is satisfied that a forfeiture order should be made in respect of property of a person pursuant to *Section 11* (forfeiture order following conviction) or *Section 18* (forfeiture order where person has absconded) but that the property or any part thereof or interest therein cannot be made subject to such an order and, in particular:

- (a) cannot, on the exercise of due diligence, be located; or
- (b) has been transferred to a third party in circumstances that do not give rise to a reasonable inference that the title or interest was transferred for the purpose of avoiding the forfeiture of the property; or
- (c) is located outside Fiji; or
- (d) has been mixed with other property that cannot be divided without difficulty; or
- (e) has been transferred to a *bona fide* third party purchaser for fair value without notice,

the Court may, instead of ordering the property or part thereof or interest therein to be forfeited, order the person to pay to the State an amount equal to the value of the property of the property, part or interest.

“
In a world where crime knows no boundaries, robust law enforcement cooperation is essential to detecting and prosecuting organized crime.”

-Lanny A. Breur -

APPLICATION FOR A CONVICTION BASED FORFEITURE ORDER

STEP 1:

Has the accused been convicted of a serious offence? Is the property tainted property in respect of the offence for which the person is convicted? Due to the fact that the DPP can apply for either or both a convicted based forfeiture order or a conviction based pecuniary penalty order, Counsel should consider which course of action is warranted on the circumstances and specific facts of that case. The application should be made on the same day that the conviction is handed down, or at least before the sentence is passed (*s. 5(1) and (2) and s. 9 (2)*).

STEP 2:

In light of the fact that the proceedings are civil and not criminal in nature (*s. 27B*) and pursuant to the DPP's obligation to give written notice of the application to the person and any other person who may have an interest in the property (*s.7(1)*), an Originating Summons should be filed. The DPP (or his or her delegate pursuant to *s. 150 and s. 151(1)* of the **CPD 09**) may either file an Affidavit in Support or apply to rely on the transcript of any proceedings against the person for the offence (*s.9 (1)*).

STEP 3:

Any amendments to the application should be dealt with pursuant to *Section 8* of **POCA Cap 22D**.

STEP 4:

If a person has absconded the jurisdiction of the court and where the DPP (or his or her delegate) can satisfy the Court on the evidence that the property is tainted property in respect of a serious offence for which an information has been laid; that a warrant for the person was issued in relation to that information; reasonable attempts to arrest the person pursuant to the warrant have been unsuccessful for a period of 6 months following the issuance of that warrant; or the person has died after the warrant was issued or an investigation into the matter had commenced, the Court may issue a Forfeiture Order pursuant to *Section 11 (2), (3), (4) and (5)* and *Section 12* and *Section 13* of **POCA CAP. 22D**. (*see s. 10 and s. 18*)

STEP 5:

At the hearing of the matter, make submissions in accordance with the evidence adduced in support of that application.

STEP 6:

Prepare the Orders in line with the Court's ruling on the matter, and serve the Courts Orders on all parties, in accordance with the directives of the Court.

APPLICATION 4:

CONVICTION BASED ORDER

Pecuniary Penalty Order

Sections 5, 8, 20, 21, 22, 23 and 24 of the Proceeds of Crime Act Cap. 22D

Originating Summons

Affidavit in Support

Statements relating to benefits from commission of serious offences (s. 22)

High Court (Civil) Registry

The Affidavit should state:

(s. 20 and s. 21)

- (1) the evidential basis to satisfy the court on the balance of probabilities that the person has benefitted from the offence; and
- (2) the value of the benefits derived by a person from the commission of an offence, for example by stating:
 - (1) if there is any property obtained as a result of, or in connection with the commission of, a serious offence;
 - (2) any advantage the person derived as a result of, or in connection with the commission of, a serious offence;
 - (3) (a) (i) all property held by the person on the day on which the application is made;

(ii) all property held by the person at any time within the period between the day of the offence, or the earliest offence was committed and the day the application was made; or within the period of 5 years immediately before the day on which the application was made, which is the shorter;

(b) any expenditure by the person since the beginning of the periods set out at (3)(a) above;
- (4) whether a pecuniary penalty order has previously been made against the person, and the particulars of that previous order;

AND/OR

- (5) the value of the person's property at any time after the commission of the serious offence and the value of the person's property before the commission of the serious offence.

Inferences:

(s. 21)

- (1) Where a person obtains property as a result of, or in connection with the commission of, a serious offence - the person's benefit is the value of the property so obtained.
- (2) Where a person derives an advantage as a result of, or in connection with the commission of, a serious offence - the person's advantage is deemed to be a sum of money equal to the value of the advantage so derived.
- (3) The Court shall deem, unless the contrary is proven, that
 - (a) all property appearing to the Court to be held by the person on the day the application is made; and all property appearing to the Court to be held by the person at any time within the period between the day the offence, or the earliest offence, was committed and the day on which the application is made, or within the period of 5 years immediately before the day on which the application is made, whichever is shorter, to be property that came into the possession or under the control of the person by reason of the commission of that offence or offences.
 - (b) Any expenditure by the person since the beginning of that period shall be deemed by the Court to be expenditure met out of payments received by the person as a result of, or in connection with, the commission of that offence or offence.
 - (c) Any property received or is deemed to have been received by the person at any time as a result of, or in connection with, the commission by the person of that offence, or offences, will be deemed by the Court to have been received by the person free of any interest therein.
- (4) Where a pecuniary penalty order has previously been made against a person, the Court shall have regard to and leave out from its calculations any benefits taken into account in respect of the previous pecuniary penalty order.
- (5) If evidence is given at the hearing of the application for the pecuniary penalty order that the value of the person's property at any time after the commission of the serious offence exceeded the value of the person's property before the commission of the offence - then the Court shall, unless satisfied that the whole or part of the excess was due to causes unrelated to the commission of the offence, treat the value of that excess as being benefits derived from the commission of the offence or offences for which he has been convicted.

Statements relating to benefits from commission of serious offences

Where a person has been convicted of a serious offence, the DPP (or his or her representative acting under delegated authority pursuant to *Sections 50 of 51 (1)* of the **Criminal Procedure Decree 2009**) may tender to the Court a statement as to any matter relevant:

- (i) to determining whether the person has benefited from the offence or from any other serious offence of which the person is convicted in the same proceedings or which is taken into account in determining his sentences, or
- (ii) to an assessment of the value of the person's benefit from the offence or any other serious offence of which he is so convicted in the same proceedings or which is so taken into account.

If the person accepts (to any extent) an allegation in the statement, the court may, for the purposes of making that determination or assessment, treat his acceptance as conclusive of the matters to which it relates.

(s.22 (1)(a) and (b))

Where the statement is tendered and the Court is satisfied that the person has been served a copy of the statement, the court may require the person to indicate to what extent he accepts each allegation in the statement and, so far as the person does not accept any such allegation, to indicate any matter the person proposes to rely on.

(s.22 (2))

If the person fails to indicate to what extent he accepts each allegation of the statement, and insofar as he does not accept any such allegation, fails to indicate any matter that he proposes to rely on, the court may treat the person as having accepted every allegation in the statement, except for an allegation in respect of which the person has complied and except for an allegation that the person has benefited from the serious offence or that any property or advantage was obtained by the person as a result of, or in connection with, the commission of the offence.

(s.22 (3))

An acceptance by the person pursuant to *Section 22* of the **Proceeds of Crimes Act Cap. 22D** that he received any benefit from the commission of a serious offence is admissible in any proceedings for any offence.

(s. 22 (6))

The person can tender to the Court a statement as to any matters relevant to determining the amount that might be realised at the time of the pecuniary penalty order is made; and the DPP may accept to any extent any allegation in the statement. The Court may treat the acceptance by the DPP as conclusive of the matters to which it relates.

(s. 22 (4))

Allegations may be accepted, or a matter may be indicated:

- (a) orally before the Court; or
- (b) in writing in accordance with the rules of the Court.

(s. 22 (5))

PECUNIARY PENALTY ORDER APPLICATIONS

STEP 1:

Has the accused been convicted of a serious offence? Has the accused benefited from the offence for which he is convicted? Because the DPP can apply for either or both a convicted based forfeiture order or a conviction based pecuniary penalty order, Counsel should consider which course of action is warranted on the circumstances and specific facts of that case. The application should be made on the same day that the conviction is handed down, or at least before the sentence is passed (*s. 5(1) and (2) and s. 9 (2)*).

STEP 2:

Because the proceedings are civil and not criminal in nature (*s. 27B*), pursuant to the DPP's obligation to give written notice of the application to the person and any other person who may have an interest in the property (*s.7(2)*), an Originating Summons should be filed. The DPP (or his or her delegate pursuant to *s. 150 and s. 151(1)* of the **CPD 09**) may either file an Affidavit in Support or submit and rely on a statement pursuant to *Section 22* of **POCA CAP 22D**.

STEP 3:

Any amendments to the application should be dealt with pursuant to *Section 8* of **POCA Cap 22D**.

STEP 4:

At the hearing of the matter, make submissions in accordance with the evidence adduced in support of that application.

STEP 5:

Prepare the Orders in line with the Court's ruling on the matter, and serve the Courts Orders on all parties, in accordance with the directives of the Court.

"All of our countries are dealing with the costs and consequences of organized crime on a daily basis, from human trafficking to illicit drug smuggling and cybercrime. Criminal enterprises engaging in this activity are increasingly sophisticated and fluid in their operations, often forging new alliances with other networks around the world. These networks and the crimes they commit pose serious threats to our vital infrastructure, our economies, our communications systems, and our citizens – and they demand a coordinated international response."

-William E. Kennard -

APPLICATION 5

UNEXPLAINED WEALTH FORFEITURE

Unexplained Wealth Declaration

NB: The current policy of the Director of Public Prosecutions is that he will not exercise his powers pursuant to *Section 71G* of the **Proceed of Crime (Amendment) Decree 2009** except in respect of matters emanating from legitimately investigated criminal matters referred to the ODPP by the Fiji Police Force, the Fiji Independent Commission against Corruption or any other legally constituted investigative agency in Fiji, or abroad.

Sections 71F, 71G and 71K of the Proceeds of Crime (Amendment) Decree 2009

Originating Summons
Affidavit in Support
High Court (Civil) Registry

The Affidavit should state:

(*s. 71G (2), s. 71H, s. 71I and s. 71J* of the **Proceeds of Crime (Amendment) Decree 2012**)

- (i) The basis upon which a court may determine that it is more likely than not that the person’s total wealth is greater than his or her lawfully acquired wealth and to that end, the Affidavit should state the following:
- (ii) All property that the person owns, whether the property was acquired before or after the commencement of this Decree and the value of each property at the time it was acquired and at the time of the application;
- (iii) All property that the person effectively controls, regardless of when the person acquired effective control and the value of each property from both at the time of attaining effective control and at the time of the application’
- (iv) All property that the person has given away at any time regardless whether it was given away before or after the commencement of the Decree and the value of each property both at the time it was given away and its value at the time of the application;
- (v) All other property acquired by the person at any time regardless whether this was before or after the commencement of the Decree, including consumer goods and consumer durables that have been consumed or discarded (but not including food, clothing and other items reasonably necessary for ordinary daily requirements of life), and the value of each property both at the time it was consumed and discarded and at the time of the application;
- (vi) All services, advantages and benefits that the person acquired at any time, whether before or after the commencement of the Decree, and the value of the service, advantage or benefit both at the time it was acquired and at the time of the making of the application;

- (vii) All property, services, advantages and benefits acquired by another person acting upon the request or direction of the person, regardless whether this was acquired before or after the commencement of the Decree, and the value of each property, service, advantage and benefit both at the time it was acquired and at the time of the making of the application. The property, services, advantages and benefits should include consumer goods and durables that have been consumed and discarded (except that food, clothing and other items reasonable necessary for the ordinary daily requirements of life should not be included);
- (viii) Anything of monetary value acquired by the person or another person, in Fiji or elsewhere, from the commercial exploitation of any product or any broadcast, telecast or other publication, where the commercial value of the product, broadcast, telecast or other publication depends on or is derived from the person's involvement in the commission of a serious offence, whether or not the thing was lawfully acquired and whether or not the person has been charged with or convicted of the offence;
- (ix) The Affidavit should also state the source of the funds used to acquire the property or item of monetary value set out at (1) – (7) above, and where the source is unexplained, set that fact out too;
- (x) The Affidavit should state the person's income and outgoings at any or all times within the period in question.

APPLICATION FOR AN UNEXPLAINED WEALTH DECLARATION

NB : The current policy of the Director of Public Prosecutions is that any application to the court for an Unexplained Wealth Declaration would need to be part of an existing criminal proceeding.

In the absence of a current criminal proceeding it is unlikely an application will be made.

STEP 1:

Are you satisfied on the material before you that a person maintains a standard of living above that which is commensurate with his or her present or past lawful emoluments? Or Are you satisfied on the material before you that a person is in control of pecuniary resources or property disproportionate to his or her present or past lawful emoluments?

STEP 2:

Has this material come to the ODPP by way of legitimate investigations carried out by a lawfully constituted referring body?

STEP 3:

If the answers to 1 and 2 are yes, then prepare an advice to the DPP through your Divisional Manager or Manager to the effect that this is a fit case for an application for an Unexplained Wealth Declaration. In your analysis please consider *s.71I and s.71J* of the **Proceeds of Crime (Amendment) Decree 2012** and also identify all possible interested parties to the proceedings, should proceedings commence.

STEP 4:

If the DPP concurs that this is matter for which an Unexplained Wealth Declaration should be sought, then you ought to simultaneously prepare the documents necessary for a restraining order application in respect of the person's properties and for an application for an Unexplained Wealth Declaration (see *Section 71G* of the **Proceeds of Crime (Amendment) Decree 2012**). Please actively seek the assistance of your Divisional Manager or Manager and submit your perfected documents to the DPP for his or her signature within 7 days of the date the DPP's directive is communicated to you.

STEP 5:

Ensure that the restraining order application documents (the Originating Summons and Affidavit in Support) and the unexplained wealth declaration application documents (the Originating Summons and Affidavit in Support) are filed and served on the relevant parties. Please note that *Section 71G (2)* of the **Proceeds of Crime (Amendment) Decree 2012** permits these simultaneous applications.

STEP 6:

At the hearing of the matters, you ought to make submissions in accordance with the evidence you rely on. Please note that the applications will likely be heard separately and therefore you may be required to make two separate submissions per each application.

STEP 7:

Prepare the Order and the Declaration in accordance with the Court's rulings and serve on the parties in accordance with the Court's directives.

"You get to a point where it gets very complex, where you have money laundering activities, drug related activities, and terrorist support activities converging at certain points and becoming one."

- Sibel Edmonds -

THE DECISION TO APPEAL

1. Within 5 days from the date a judgment, sentence, final ruling or final order is handed down by a trial or appeal court, Counsel in carriage ('the Officer') must render a brief analysis addressed to the DPP, through the Divisional Manager or Manager, regarding the appropriateness of the said judgment, sentence, final ruling or final order.

If the Officer is of the view that an Appeal should be filed, the advice should contain the grounds that the Officer urges for inclusion in the Petition or Notice of Appeal. At this juncture, the actual Petition or Notice of Appeal need not be drafted.

2. If the Divisional Manager or Manager concurs or holds the independent view that an appeal is warranted, he or she should perfect the grounds of appeal offered, or draft new and perfected grounds of appeal, and submit the brief along with his or her recommendation or comments to the DPP within 7 days thereafter.
3. If the DPP decides that no appeal is warranted, he shall enter that direction in writing in the brief and the brief will be submitted to the Officer, who is to hold the brief until the conclusion of the appeal period and thereafter, apply to the DPP to close the brief by no later than 14 days from the conclusion of the appeal period.
4. If the DPP decides that an appeal is warranted, he shall enter that direction in writing in the brief and the brief will be submitted to the ODPP Registry.
5. In the case of an appeal, the Registry must immediately open a new Appeal Brief ("the Green File"). The Appeal Brief must contain the original trial brief ('the Red File') or the original appeal brief ('the Green File'), and where applicable the:

- (1) summing up
- (2) judgment
- (3) sentence
- (4) voir dire ruling
- (5) no case to answer ruling
- (6) other rulings
- (7) application for Bail Pending Appeal
- (8) Ruling on Bail Pending Appeal
- (9) High Court or Court of Appeal rulings on Leave
- (10) High Court or Court of Appeal Judgments

The Green file should have the deadline for the appeal embossed on the front cover in bold. The Registry should, forthwith, ensure that the details of the newly created Green File is entered in CASES and dispatched as a matter of priority to the Allocations Manager.

6. The Allocations Manager shall, thereafter, have the brief allocated and dispatched to a Principal Legal Officer ('PLO'), with instructions to the PLO to prepare and perfect the Petition or Notice of Appeal, for the DPP's signature. The Allocations Manager must also assign an ADPP to work in tandem with the PLO and vet that Petition or Notice of Appeal before it is handed up to the DPP.
7. Alternatively, the Allocations Manager may choose to have the brief allocated to an ADPP for prosecution of the appeal, and may choose to assign a PLO to assist the ADPP in the preparation of the Petition or Notice of Appeal and in the prosecution of the appeal proper.
8. The DPP directs that in the case of appeals before the Court of Appeal or Supreme Court, and as a means of quality control, the matters should only be assigned to Officers of the rank of Principal Legal Officer or above. Exceptions may be made in rare instances to enable an allocation to a Senior Legal Officer, but this may only be done by way of an express written waiver issued by the DPP.

9. The DPP further directs that in the case of appeals before the High Court, the Allocations Manager and the Divisional Managers are granted the discretionary power to allocate these matters to Officers of the rank of Senior Legal Officer or above. In these instances, the Allocations Manager or the Divisional Manager (individually or in conjunction with the other) must ensure that an Officer senior to the Senior Legal Officer is tasked with the role of supervising the perfecting of the Petition of Appeal; as well as the prosecution of the appeal proper before the High Court.
10. The PLO and the ADPP or vice versa, and the Senior Legal Officer and the senior officer assigned to supervise or vice-versa, must work together to have a perfected Petition or Notice of Appeal submitted to the DPP for his signature by or before 10.00am two days prior to the expiry of the appeal period. If the expiration of the appeal period falls on a weekend or holiday, then the deadline shall correspondingly be either three or four days prior to the expiration of the appeal period.
11. Once the papers are delivered to the DPP, the DPP's Secretary shall be responsible for bringing the brief to the immediate (or as soon as is reasonably practicable thereafter) attention of the DPP. The DPP's Secretary, the Officer assigned to the brief, and the Registry must work together to ensure that the Petition or Notice of Appeal is signed and filed at the High Court, Court of Appeal or Supreme Court Registry by or before close of business on the date that the appeal period expires.

EXPLANATORY NOTE:

High Court Appeals:

The Petition of Appeal must be filed within 28 days of the date the impugned decision of the Magistrates Court was handed down. Pursuant to *Section 252* of the **Criminal Procedure Decree 2009** the High Court is responsible for notifying parties that the appeal is afoot and supplying a copy of the Petition and the Appeal Record to the Respondent.

An exception of this rule lies in respect of decisions of the Magistrates Court operating under an extended jurisdiction pursuant to *Section 4 (2)* of the **Criminal Procedure Decree 2009**. Appeals from the decision of the Magistrates Court operating under an extended jurisdiction are to be filed before the Court of Appeal within 30 days of the delivery of that decision.

Court of Appeal:

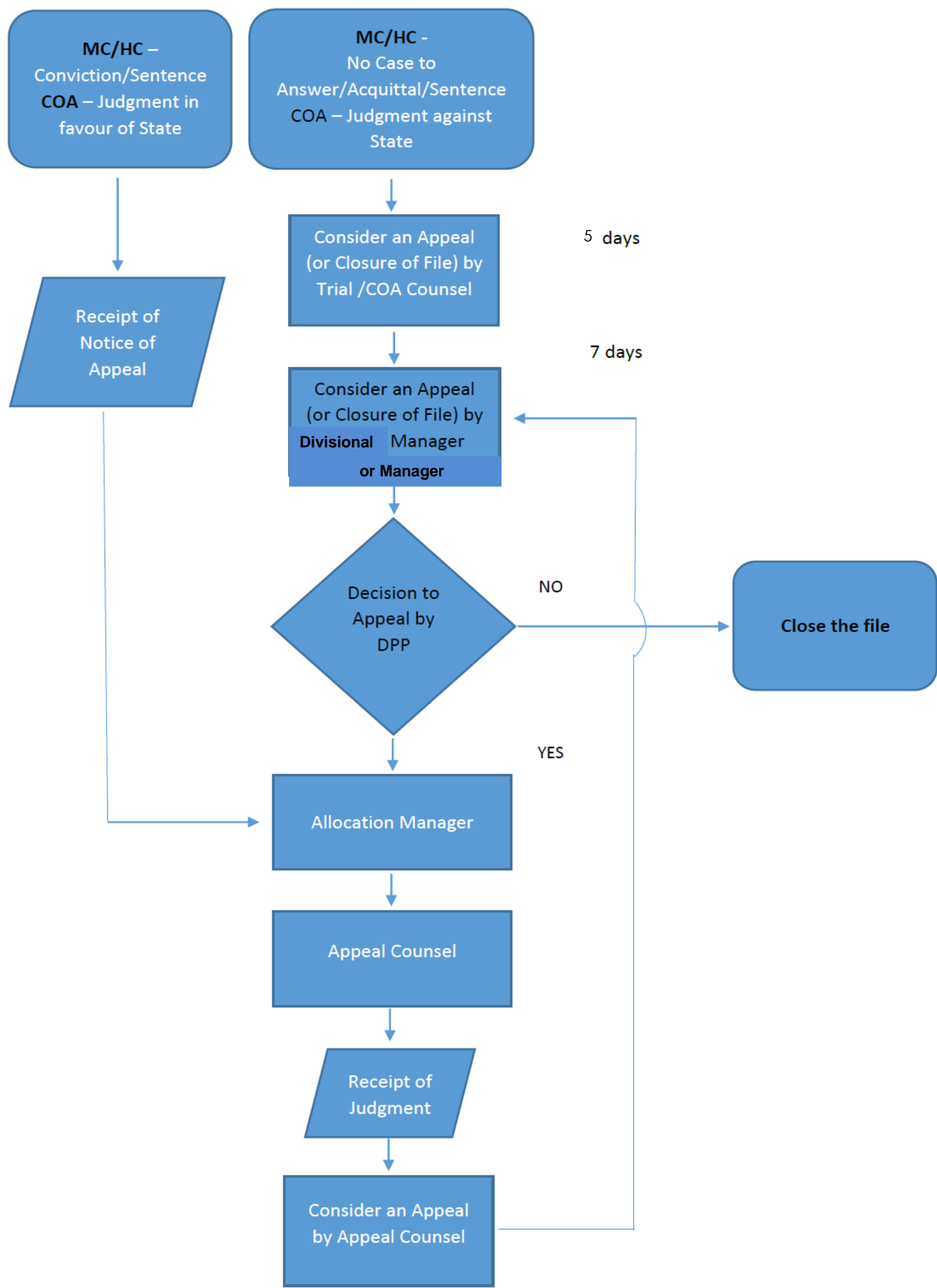
The Notice of Appeal or Notice for Leave to Appeal must be filed within 30 days of the delivery of the final judgment or sentence (see *Section 26* of the **Court of Appeal Act Cap. 12**). According to the **Court of Appeal Rules Cap. 12**, the would-be Appellant is responsible for serving a copy of the Notice or Application upon the Respondent. Pursuant to *Rule 42 (2)* of the **Court of Appeal Rules Cap. 12**, the service may be undertaken after filing and the only requirement under the rules is that the State file a certification of service along with a copy of the Notice or Application served that is endorsed with the date that the Notice or Application was served, and this should be filed within 7 days of service.

Supreme Court:

Pursuant to *Rule 6* of the **Supreme Court Rules Cap. 13**, "A petition and affidavit in support must – (a) be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought; and (b) served upon the registrar and all parties to the proceedings who are directly affected by the petition."

NB: The ODPP should file Petitions and Notices of Appeal along with its necessary supporting documents and in the quantities required by the Court, within the allocated appeal periods. Service should be effected within 14 days after the filing of the appeal documents, and a copy of the served documents along with a certificate endorsing the date the documents were served should be filed with the requisite registry within 7 days of the date of service.

Diagram 1: APPEAL PROCEDURE – FLOW CHART

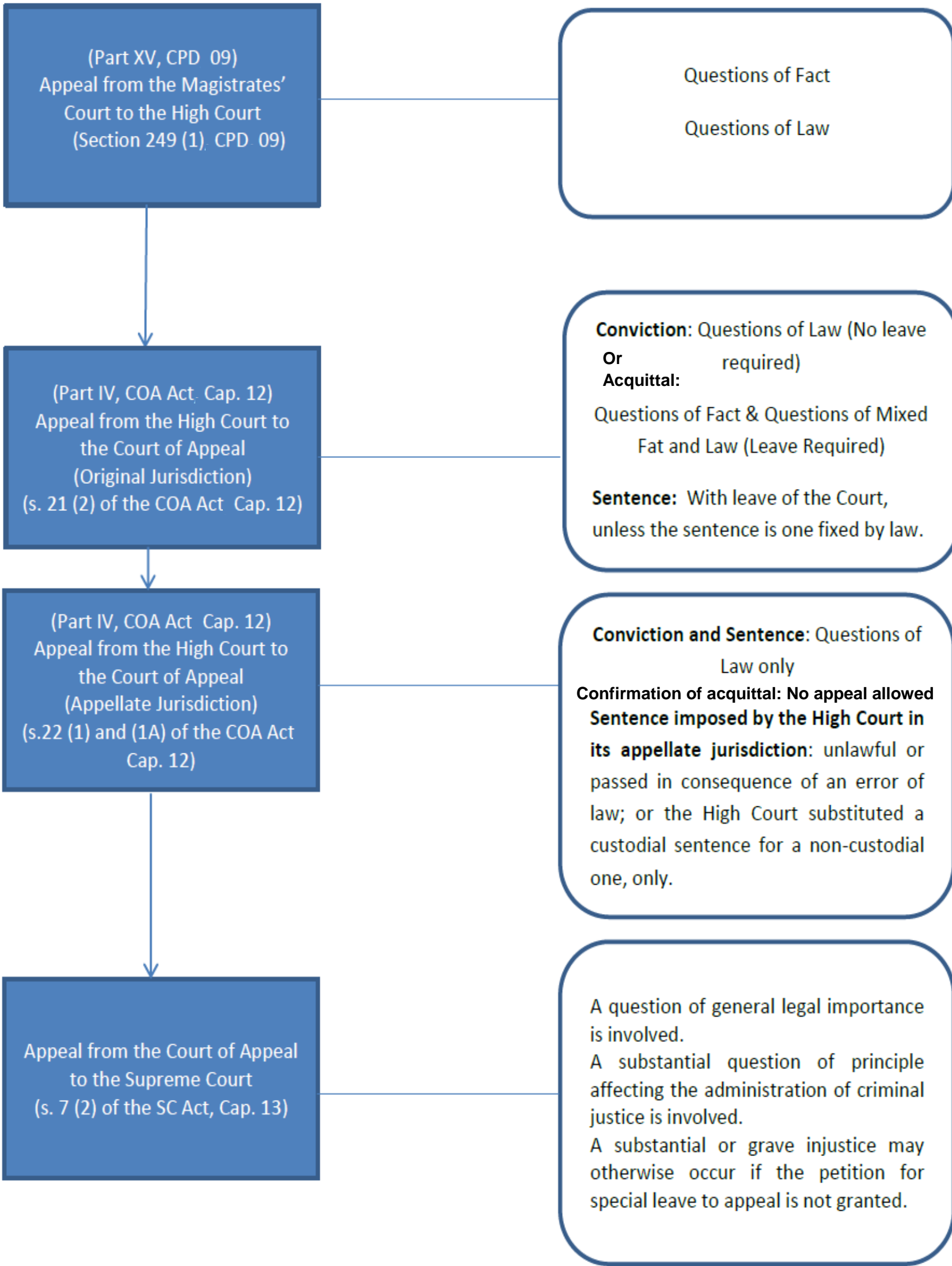


NB: Appeals from the decision or sentence of a Magistrates Court operating under an Extended Jurisdiction conferred upon it by virtue of Section 4 (2) of the **Criminal Procedure Decree 2009** shall be appealed to the Court of Appeal.

Diagram 2:

APPEALS

GROUND OF APPEAL

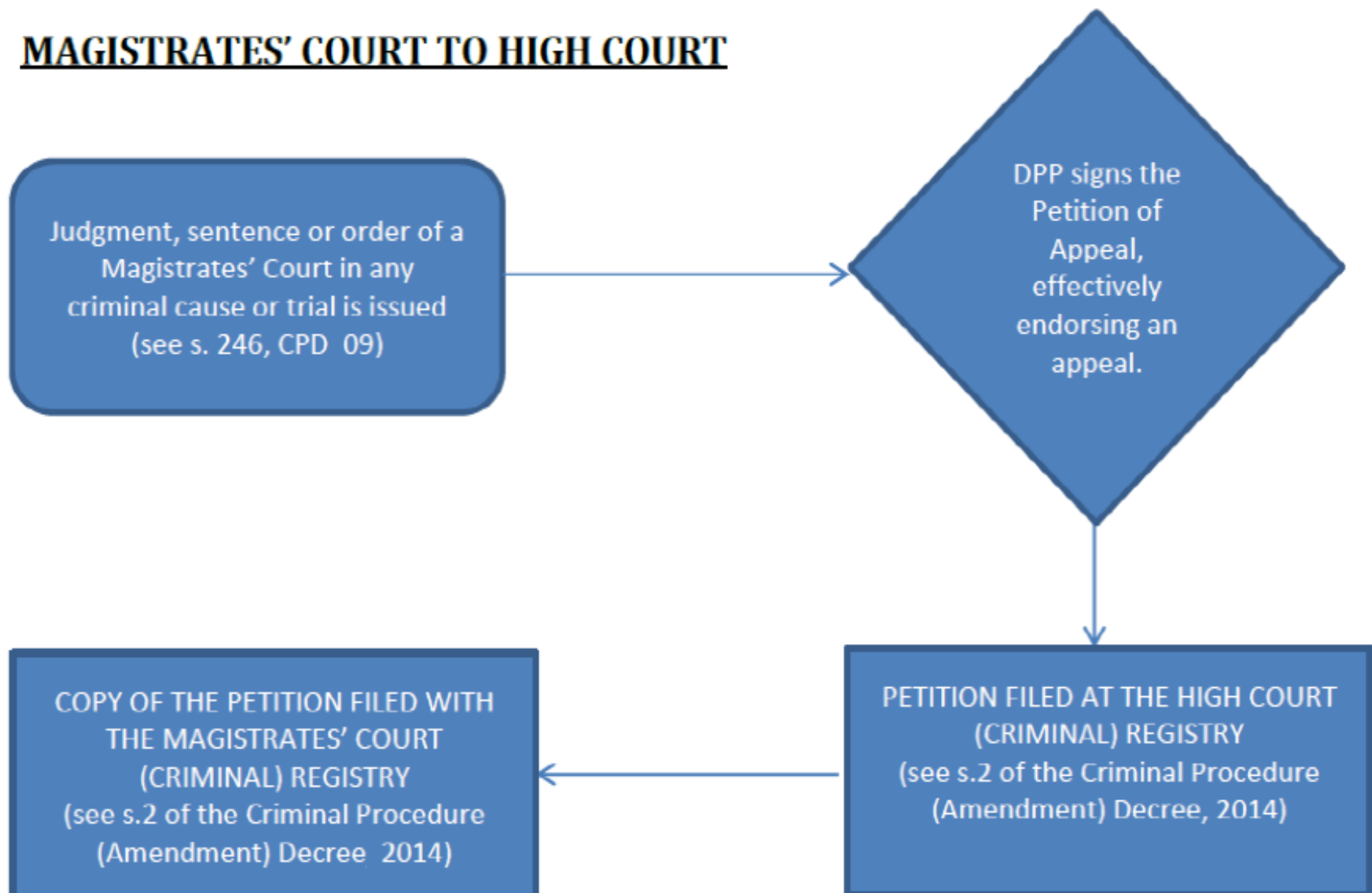


NB: When an appeal is filed against the decision or sentence of a Magistrates Court operating under an Extended Jurisdiction, it shall be deemed a first appeal and Section 21 of the **Court of Appeal Act Cap. 12** applies.

Diagram 3:

APPEALS

MAGISTRATES' COURT TO HIGH COURT



THE APPEAL

Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer. (s.248 (1) CPD 09)

The appeal must be filed within 28 days of the date of the decision appealed against. (s.248 (1), CPD 09)

Every petition shall contain a concise statement of the grounds upon which it is alleged that the decision of the Magistrates' Court has erred on the facts of the case or the applicable law (s.249 (3), CPD, 09)

Additional grounds of appeal may be filed by leave of the High Court at any time not later than 3 days before the date fixed for the hearing of the appeal (s. 249 (4), CPD, 09)

OUT OF TIME

The Magistrates' or High Court, may at any time, for good cause, enlarge the period of limitation. Good cause includes:

- (a) if the appellant's lawyer was not present at the hearing before the Magistrates' Court, and for that reason needs further time to prepare the petition;
- (b) any case in which a question of law of unusually difficulty is involved;
- (c) a case in which the sanction of the DPP or the Commissioner of FICAC is required by law;
- (d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.

STEP 1:

File the Petition of Appeal at the High Court Registry within 28 days of the day the decision appealed against was handed down. See the provision at *Section 248 (1)* of the **Criminal Procedure Decree 2009** as amended by s. 2 of the **Criminal Procedure (Amendment) Decree 2014**.

STEP 2:

Serve a Petition of Appeal upon the Magistrates Court (Criminal Registry). Upon receiving the Petition of Appeal, the Magistrate against whose order, sentence, ruling or decision is being appealed against must ensure that the record of proceedings in the Magistrates Court is forwarded to the Chief Registrar of the High Court within 28 days. (*s. 250 (1), CPD 09*).

STEP 3:

If the High Court does not dismiss the appeal summarily, the Chief Registrar shall enter the appeal for hearing; serve a notice of hearing on the parties; supply the respondent with a copy of the petition and a copy of the judgment or order appealed against; supply the respondent with a copy of the proceedings (except when the appeal is against sentence); and where additional grounds are filed by the appellant, serve a notice of such filing on the respondent and supply the respondent with a copy of the document containing the additional grounds of appeal. (*s. 252, CPD 09*).

STEP 5:

If the Appellant wishes to discontinue the appeal, the Appellant may do so by giving notice in writing to the Chief Registrar to discontinue the appeal. This may be done at any time before the date of hearing. (*s. 255 (1), CPD 09*).

STEP 6:

If the Appellant wishes to file additional grounds of appeal, this may be filed (by leave of the High Court) at any time not later than 3 days before the date fixed for the hearing of the appeal. (*s. 249 (4), CPD 09*).

STEP 7:

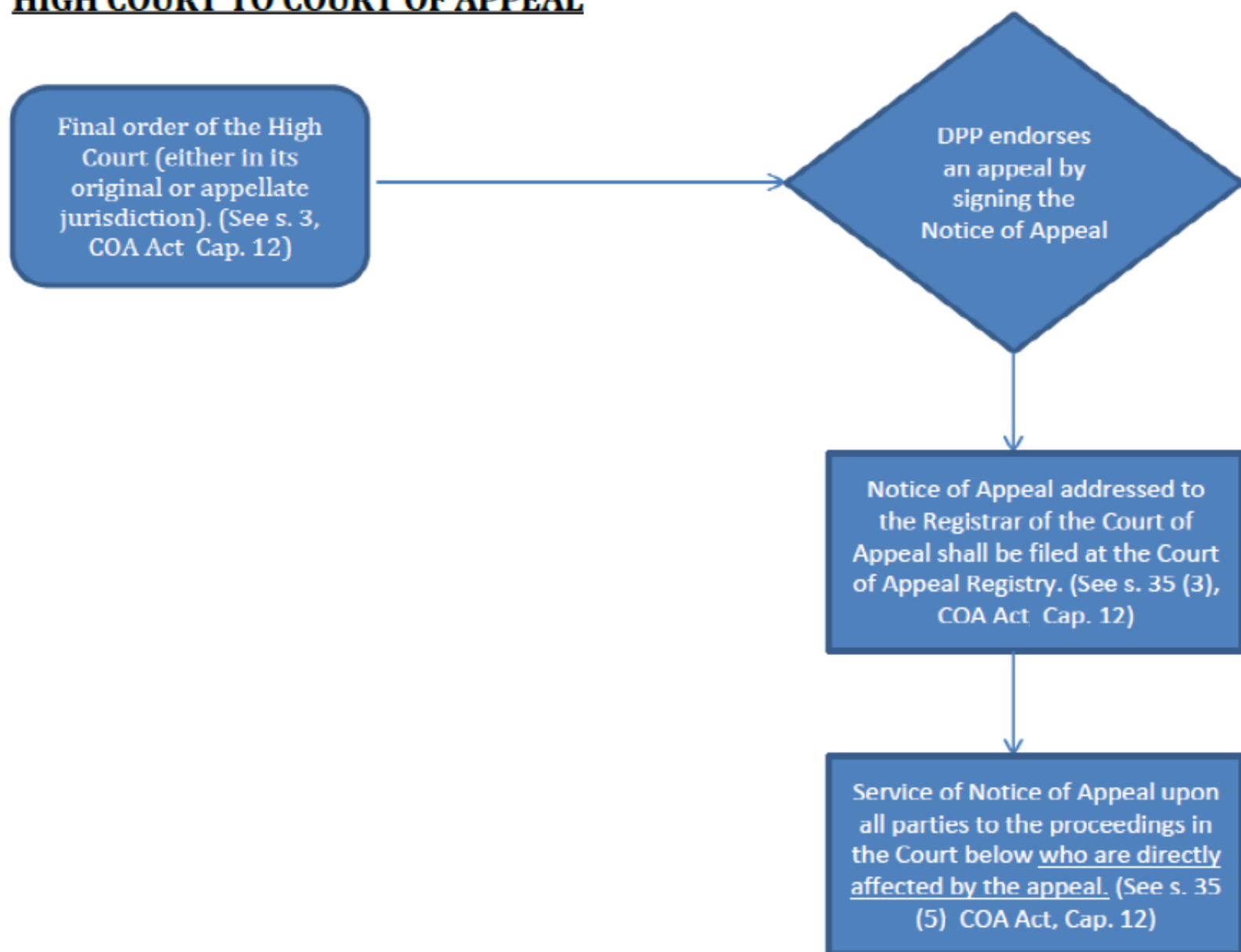
At the hearing of the appeal, the High Court shall hear the appellant or the appellant's lawyer; and the respondent or the respondent's lawyer (if the respondent appears); and the DPP or the DPP's representative (if there is an appearance by or for the DPP). (*s. 256 (1), CPD 09* and *s. 117 (8) (d) of the Constitution 2013*).

"The law is not merely the personal opinions of the judge a case is heard before, but a system of "objective rules and standards" that removes the system of justice from "a chaotic exercise of judicial discretions and indiscretions"."

- Hutul, W and Callahan, J. (2010 – 2011) *The Elusive Doctrine of Stare Decisis*, The Journal of the DuPage County Bar Association, Vol. 23 -

Diagram 4: **APPEALS**

HIGH COURT TO COURT OF APPEAL



APPEALS FROM HIGH COURT IN ITS ORIGINAL JURISDICTION - FIRST APPEALS

Conviction: Grounds of appeal which involves a question of law alone (no leave required) (s. 21 (2) (a), COA Act Cap. 12).

Grounds of appeal which involve a question of fact alone, or a question of mixed fact and law or any other ground which appears to the Court to be a sufficient ground of appeal may be entertained with the leave of the Court or the certificate of the judge who tried the accused that this is a fit case for appeal. (s. 21 (2)(b), COA Act, Cap. 12).

Sentence: With the leave of the Court against the sentence passed on the conviction of any person. If the sentence is fixed by law, ~~then~~ no appeal may lie. (s. 21 (2)(c), COA Act, Cap. 12.)

APPEALS FROM HIGH COURT IN ITS APPELLATE JURISDICTION - SECOND APPEALS

Severely limited

Conviction: On any ground which involves a question of law only. No grounds of fact or mixed fact and law will be entertained. (s. 22 (1), COA Act, Cap. 12)

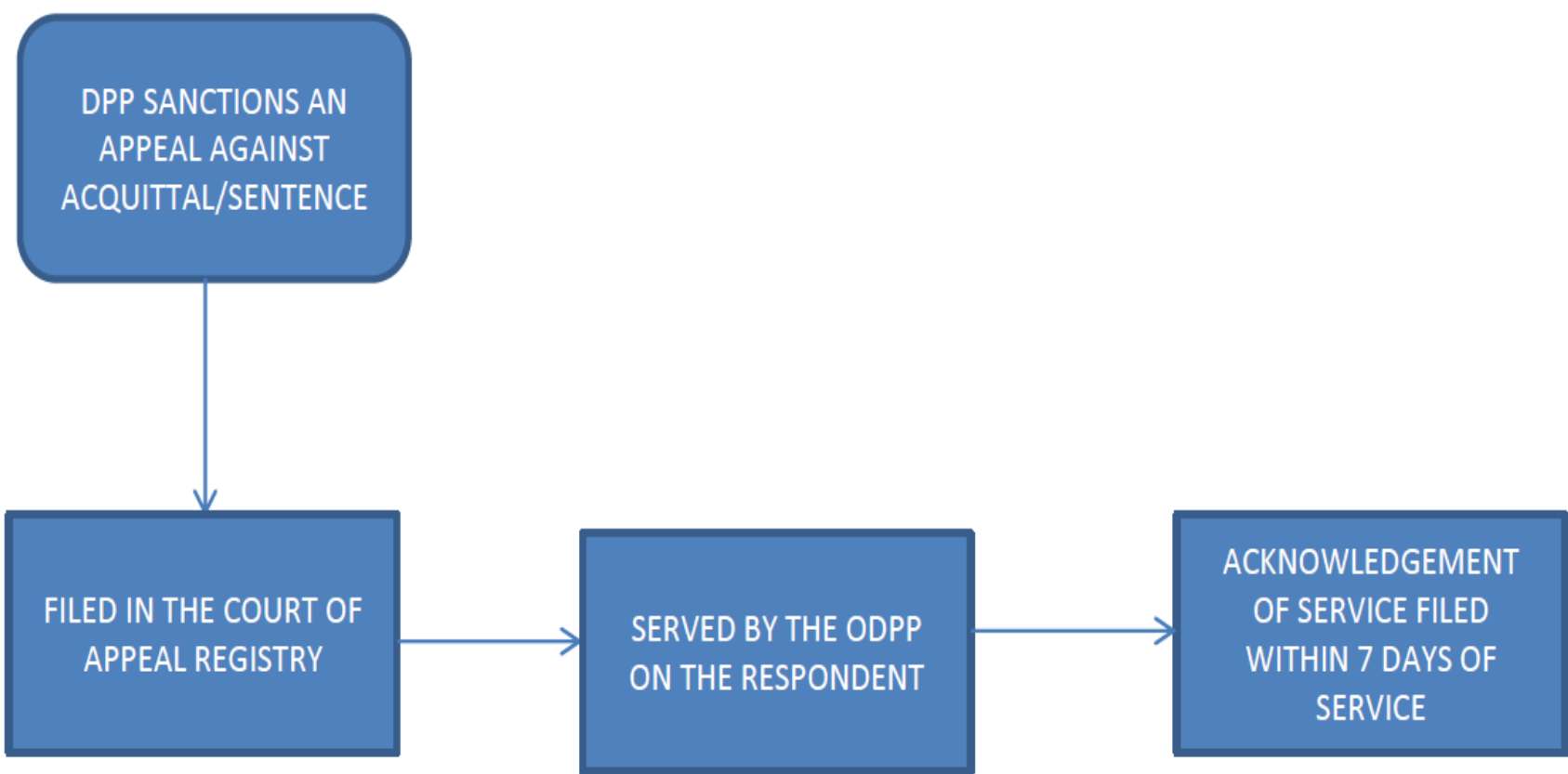
No appeal shall lie against the confirmation by the High Court of a verdict of acquittal by a magistrates' court. (s. 22 (1), COA Act, Cap. 12)

Sentence: No appeal shall lie in respect of a sentence imposed by the High Court in its appellate jurisdiction unless the appeal is on the ground that the sentence was an unlawful one or was passed in consequence of an error of law; or that the High Court imposed an immediate custodial sentence in substitution of a non-custodial sentence.

DIAGRAM 5:

APPEALS

HIGH COURT TO COURT OF APPEAL



Notice of Appeal

An appeal must be filed within 30 days of the date of the judgment, order or sentence of the High Court.

Leave to Appeal Out of Time:

File a Notice of Application for an Extension of Time within Which to Appeal with a Supporting Affidavit. The main issues to address are:

- (i) The reason for the failure to file within time.
- (ii) The length of the delay.
- (iii) Whether there is a ground of merit justifying the appellate court's consideration.
- (iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?
- (v) If time is enlarged, will the Respondent be unfairly prejudiced?

Final Judgments only

Can only appeal against final judgments.

Stay constitutes a final judgment.

Appeals from the High Court to the Court of Appeal – Original (Trial) Jurisdiction

Ground of law only – Appeal as of right to the Full Bench.
Ground of mixed fact and law – With the leave of the Court (Single Judge).
Appeal against sentence – Leave of the Court (Single Judge) unless the sentence is one fixed by law.

Appeals from the High Court – Appellate Jurisdiction

No appeals on grounds of mixed fact and law will be entertained. May only appeal on a question of law alone.

STEP 1:

File a Notice of Appeal at the Court of Appeal Registry within 30 days of the day the final judgment of the High Court was handed down. (s. 26, **COA Act Cap. 12**) Counsel should include the judgment or decision of the court below; the information and any other related document connected with the proceedings; and any documents, exhibits or parts of exhibits that were in evidence in the court below and are relevant to any question at issue on appeal. (r. 44 (3) and (4) of the **COA Rules Cap. 12**)

STEP 2:

Serve a Notice of Appeal upon all parties to the proceedings in the Court below who are directly affected by the appeal. (r. 35& r.21) Within 7 days after the service of the Notice of Appeal or Application for Leave to Appeal, the ODPP must file a copy of the Notice or Application endorsed with a certificate of the date the notice was served. (r. 43 (2)).

Service should be effected within 14 days after the filing of the appeal documents, and a copy of the served documents along with a certificate endorsing the date the documents were served should be filed with the requisite registry within 7 days of the date of service. If, for reasons outside the control of the ODPP, service has not been possible after a period of 3 months, then Counsel may need to notify the Registrar of the Court of Appeal, and seek further time from the Court of Appeal within which to effect service.

STEP 3:

When the Registrar has received a notice of appeal, or a notice of application for leave to appeal, or a notice of application for extension of time within which to appeal, the Registrar shall forthwith apply to the Chief Registrar of the High Court for a record of the proceedings before the High Court. (r. 42)

STEP 4:

No appeal shall be listed for hearing unless the notice and grounds of appeal or application for leave to appeal; a copy of the judgment or decision appealed from; and a certified copy of the record of the proceedings appeal from, have been filed. (r. 43A)

STEP 5:

Primary responsibility for the preparation of the record on appeal rests with the Registrar in the case of an appellant in person. In any other case, it will depend on the directions of the Registrar. However, in all cases, the Registrar is responsible for the transcript of the judge's notes. (r. 44 (1) and (2))

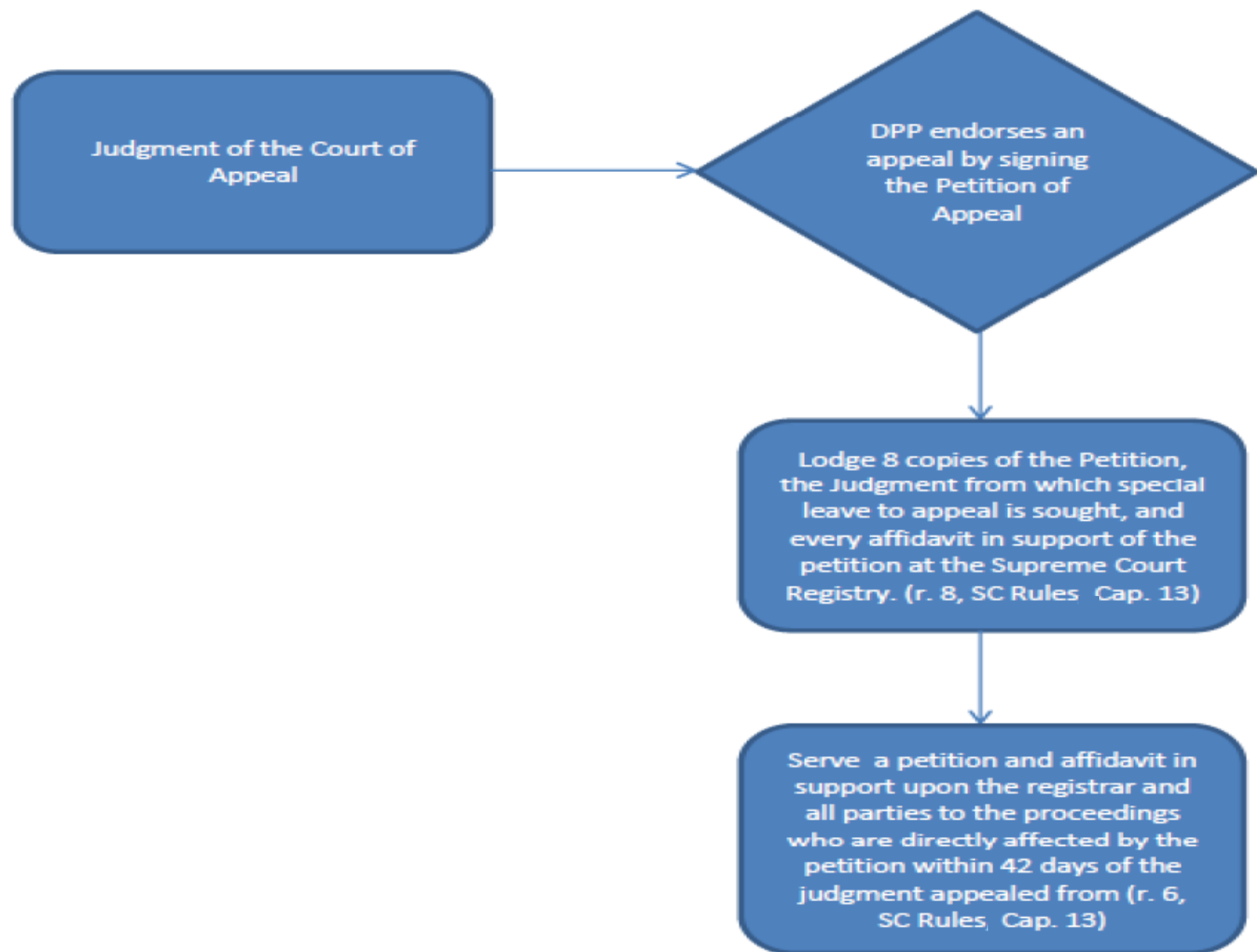
STEP 6:

Within 28 days of certification of the record, the Appellant must serve a notice on all parties named in the notice of appeal or application for leave to appeal that the case record is ready for collection from the appellant. The Appellant is responsible for lodging 4 copies of the record with the Registrar. (r. 44 (9))

DIAGRAM 6:

APPEALS

APPEALS FROM THE COURT OF APPEAL TO THE SUPREME COURT



THE PETITION FOR SPECIAL LEAVE

The Supreme Court will not grant special leave to appeal unless: (a) a question of general legal importance is involved; (b) a substantial question of principle affecting the administration of criminal justice is involved; or (c) substantial and grave injustice may otherwise occur. (s.7 (2), SC Act Cap. 13)

The petition must (a) state succinctly and clearly all facts necessary to state relating to the petition; deal with the merits of the case only so far as is necessary to explain the grounds upon which special leave to appeal is sought; and (c) be signed by the petitioner’s legal practitioner or by the petitioner. (r. 5(2), SC Rules, Cap. 13)

A petition must be supported by an affidavit verifying the allegations made in the petition. Form 6 and 7 set out in Atkin’s Encyclopaedia of Court Forms (Second Edition) Volume 5 (1984 issue) at p. 189 should be used for the petition and affidavit in support. (r. 5 (3) and (4))

TIME FOR LODGING PETITION AND SERVICE

Pursuant to r. 6, “A petition and affidavit in support must – (a) be lodged at the Court registry within 42 days of the date of the decision from which special leave to appeal is sought; and (b) served upon the registrar and all parties to the proceedings who are directly affected by the petition.”

In Wakaya Ltd v Chambers and Nusbaum, Civil Appeal No. CBV. ABU0040 of 2010), the Supreme Court per Gates. CJ (P) observed in respect of the provision at r.6: “[46] ... *In Fiji both requirements were contained within the one rule, and filing and service could constitute the commencement of the appeal, not the filing and lodgment alone.*” His Lordship held: “[48] *In Woods v Bate (1987) 165 CLR 660 McHugh J said, “...In recent times the courts have shown great reluctance to invalidate an act done pursuant to a statutory provision because of the failure to comply with an antecedent condition...[50] In this case, the petition and affidavits were lodged within time. That is sufficient to cause the petitions to be afoot. There is no need for a grant of enlargement of time [for reason of the failure to serve within the 42 days].*”

STEP 1:

File 8 copies of the Petition, the supporting Affidavit, and the judgment from which the special leave to appeal is sought and serve them on the Respondent within 42 days of the date the judgment appealed against was handed down. (*r. 6 and r. 8*)

STEP 2:

File a Certificate of Service at the Supreme Court Registry within 7 days of service upon the parties to the proceedings before the lower court.

STEP 3:

After the Petition has been lodged, the registrar must transmit, to the Court registry the record, comprising a certified copy of the record of the Court of Appeal; a certified copy of the proceedings of the Court of Appeal; a certified copy of the judgment appealed from; a certified copy of the drawn up order of the judgment appealed from; a certified copy of the order or certificate of the Court of Appeal granting leave to appeal (if any); a signed list of all the exhibits forming part of the record of the Court of Appeal together with the originals of all such exhibits; and all other documents necessary for the prosecution of the appeal or petition.

STEP 4:

Upon receipt of the record, the registrar must issue a summons requesting the parties and their legal practitioners to appear before the registrar at the time and place stated in the summons to settle the documents to be included in the record of appeal or of revision; and thereafter, whether any of the parties attend or not, settle and sign, and in due course file, a list of such documents.

"By a slow but well sustained progress, the effect of each step is watched; the good or ill success of the first gives light to us in the second; and so, from light to light, we are conducted with safety through the whole series. We see that the parts of the system do not clash. The evils latent in the most promising contrivances are provided for as they arise...We compensate, we reconcile, we balance. We are enabled to unite into a consistent whole the various anomalies and contending principles that are found in the minds and affairs of men."

-Edmund Burke, An Appeal from the New to the Old Whigs 113 (London, J. Dodsley 1791).-

NB: Although a comment on the purpose of policy development, the quote is equally appropriate for the purpose of appeals.

LEAVE TO ADDUCE ADDITIONAL EVIDENCE ON APPEAL

MAGISTRATES COURT TO HIGH COURT

Section 249 (6) of the **Criminal Procedure Decree 2009**:

“Except by leave of the High Court, it shall not be lawful for the appellant on the hearing of the appeal to allege or give evidence on any ground of appeal not included in the petition, or in the additional grounds filed under subsection (4).”

Section 257 of the **Criminal Procedure Decree 2009**:

“(1) In dealing with an appeal from a Magistrates Court the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a Magistrates Court. (2) When the additional evidence is taken by a Magistrates Court, such court shall certify the evidence to the High Court, which shall then proceed to determine the appeal. (3) Evidence taken under this section shall be taken as if it were evidence taken at a trial before a Magistrates Court.”

In **Cumutanavanua v the State** [2002] FJHC 9; HAA0086.2001s (28 March 2002), the High Court expressly approved the following principles in respect of an application for leave to adduce additional evidence on appeal:

“The principles which emerge ... are firstly whether the evidence is relevant to the appeal, secondly whether the evidence is credible and admissible, and thirdly whether there was a good reason for the failure to adduce the evidence in the lower court...”

In **Rajendra Chaudhary v the State** [2002] FJCA 8; AAU0006.1999 (31 May 2002), the Court of Appeal per Sheppard, Tompkins and Smellie JJA held:

“The High Court acting in its appellate capacity is entitled to hear evidence in the hearing of an appeal if it thinks evidence is necessary... So that if in this case the ...Magistrate had made a finding unsupported by the material placed before him, or if for some other reason evidence was necessary to enable the appeal to be determined, the judge could have required it to be given.”

In **Veigaravi v Prices and Incomes Board** [2003] FJHC 116; HAA0017].2003S (26 June 2003), the High Court per Shameem J. accepted that the considerations set out at Section 23 (2) of the **Criminal Appeal Act, 1968** of England was helpful in considering whether additional evidence should be allowed on appeal.

*“...as a statement of general principle Section 23 (2) of the **Criminal Appeal Act 1968 (England)** is helpful. That provision reads:*

“The Court of Appeal shall, in considering whether to receive any evidence, have regard in particular to –

(a) whether the evidence appears to the Court to be capable of belief;

- (b) *whether it appears to the Court that the evidence may afford any ground for allowing the appeal;*
- (c) *whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal; and*
- (d) *whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.”*

In **Gautam v State**, Criminal Appeal No. HAA33 of 2007S (18 May 2007), Shameem J. held that the provision enabling additional evidence at appeal did not exist to allow witnesses to change their position on relevant issues. The provision exists to redress the wrong done when parties were not aware of relevant evidence or were not able to adduce such evidence at trial, and are now able to reveal that evidence at appeal.

THE COURT OF APPEAL

See section 28 of the **Court of Appeal Act Cap. 12**.

In **Mudaliar v State** [2008] FJSC 25; CAV0001.2007 (17 October 2008), the Supreme Court heard a petition for special leave to appeal against the decision of the Court of Appeal disallowing the call of additional evidence at the appeal. Considering the question, the Supreme Court observed:

“31 The application to adduce further evidence before the Court of Appeal was based upon s 28 of the [Court of Appeal Act](#). That section relevantly provides that the Court of Appeal may, if it thinks it "necessary or expedient in the interest of justice" receive such evidence.

*32 The Court of Appeal referred to several authorities in dealing with this application. It cited **Ladd v Marshall** [1954] 3 All ER 745 where Lord Denning stated that there were three preconditions to the reception of such evidence on appeal. These were:*

- the evidence could not have been obtained prior to the trial by reasonable diligence;*
- it must be such as could have had a substantial influence on the result and*
- it must be apparently credible.*

...

61 Plainly, a decision deliberately taken by an accused not to adduce evidence of a particular kind at trial will weigh heavily against its reception on appeal. However, no invariable rule concerning the failure to call such evidence can or should be laid down. The discretion conferred upon the Court must be exercised judicially, but having due regard to the interests of justice, above all else.”

“At his best, man is the noblest of all animals; separated from law and justice, he is the worst.”

-Aristotle-

THE SUPREME COURT

In **Chand v State** [2012] FJSC 6; CAV0014.2010 (9 May 2012), the Supreme Court per Marsoof, Hettige and Sundaram JJ. held:

*"[19] This Court no doubt has the power to permit a party, in an appropriate case, to adduce fresh evidence. Section 28 of the [Court of Appeal Act](#), expressly provides that the Court of Appeal may, if it thinks it "necessary or expedient in the interest of justice" receive fresh evidence, and in terms of Section 14 of the [Supreme Court Act](#) No. 14 of 1988, this Court is possessed of all powers vested in the Court of Appeal, and as the apex court of Fiji Islands, it has the inherent power to make any order that is conducive to the achievement of the ends of justice. As was observed by the High Court of Australia in *Craig v R* [\[1933\] HCA 41](#); [\(1933\) 49 CLR 429](#) at 439-*

"A court of Criminal Appeal has thrown upon it some responsibility of examining the probative value of the fresh evidence. It cannot be said that a miscarriage has occurred unless the fresh evidence had cogency and plausibility as well as relevancy. The fresh evidence must, we think, be of such character that, if considered in combination with the evidence already given upon the trial the result ought in the minds of reasonable man to be affected. Such evidence should be calculated at least to remove the certainty of the prisoners' guilt which the former evidence produced. But in judging of the weight of the fresh testimony the probative force and the nature of the evidence already adduced at the trial must be a matter of great importance."

*[20] Admission of fresh evidence at the stage of an appeal may either be conclusive of the appeal or may cause the court to order a retrial of the matter. The bases for allowing the reception of fresh evidence were set out in *Ladd v Marshall* [1954] 3 All ER 745. In that case Lord Denning, at page 748 A-B, outlined them in the following passage:*

"In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive: third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible."

*[21] Similar, though not identical criteria, to those laid down in *Ladd v Marshall* were stated in *R v Parks* [1961] 3 All ER 633. An important consideration that influenced the approach of the courts in these cases was the interest of the state that litigation should come to an end. In *Hertfordshire Investments Ltd. v Bubb* [\[2000\] 1 WLR 2318](#), the English Court of Appeal emphasised that strong grounds were required to allow fresh evidence in the face of a final decision. These consideration were foremost in the minds of the learned judges in decisions of the High Court of Australia in *Ratten v R* [1974] 131 CLR and *Lawless v R* (1979) 142 CLR.*

[22] The Australian decisions referred to above have also establish that at common law, a distinction is drawn between "fresh" evidence, that is to say evidence which was not known to the accused at the time of his trial, and which could not have been discovered by him with reasonable diligence, and evidence which is merely "new" that is, evidence that was either

known to the accused, or which he could have with reasonable diligence, discovered. See, *Gallagher v The Queen* [\[1986\] HCA 26; \(1986\) 160 CLR 392](#) at 402 and 410; and *Mickelberg v The Queen* [\[1989\] HCA 35; \(1989\) 167 CLR 259](#) at 301. Evidence which was either available, or could with reasonable diligence have been discovered before trial, is not "fresh" evidence.

[23] In *Sachinda Nand Mudaliyar v The State* CAV0001/2007, the aforesaid distinction was adopted and applied by this Court, in the context of an application to lead fresh evidence in the course of an appellate hearing, which might have, if permitted, cast a reasonable doubt as regards the guilt of an accused who had been tried and convicted by the High Court. In this case, the proposed fresh evidence consisted of an affidavit from Dr. John Wittaker, a highly qualified gynaecologist, who had testified for the prosecution at the trial, seeking to qualify his previous testimony in the light of fresh evidence placed before him, and another affidavit from Dr. Andrew Mackintosh, who was also a highly qualified gynaecologist, who had not testified at the trial. In refusing to permit the proposed fresh evidence, this Court observed at paragraph 61 of its judgment that "a decision deliberately taken by an accused not to adduce evidence of a particular kind at trial will weigh heavily against its reception on appeal."

[24] However, as this Court proceeded to point out in *Sachinda Nand Mudaliyar*, in regard to the question whether fresh evidence ought to be allowed, "no invariable rule concerning the failure to call such evidence can or should be laid down. The discretion conferred upon the Court must be exercised judicially, but having due regard to the interests of justice, above all else."

[25] A crucial consideration in deciding whether fresh evidence should be permitted in this case, is that there is a strong likelihood that the Petitioner was aware or should reasonably have been aware of the existence of the medical card now sought to be produced, as the card was maintained in relation to him, and the defence has produced at the trial the x-ray that was taken at Lautoka Hospital on 14th July 2005.

[26] However, even if the defence was not possessed of the said medical card, it is clear that the defence could have procured the same with reasonable diligence. As Tipping J observed in the New Zealand decision of *R v Bain* [\[2004\] 1 NZLR 638](#) –

"Ordinarily if the evidence could, with reasonable diligence, have been called at the trial, it will not qualify as sufficiently fresh. This is not an immutable rule because the overriding criterion is always what course will best serve the interests of justice. The public interest in preserving the finality of jury verdicts means that those accused of crimes must put up their best case at trial and must do so after diligent preparation."

In both *Mudaliar* supra and *Singh* supra, the Supreme Court held that these were not fit cases for leave to permit the calling of evidence on appeal."

"Knowledge without justice ought to be called cunning rather than wisdom."

-Plato-

LEAVE TO APPEAL OUT OF TIME

In **Kumar v State; Sinu v State** [2012] FJSC 17; CAV0001.2009 (21 August 2012), the Supreme Court per Gates. C.J (P) and Hettige and Ekanayake JJ. held

“[4] Appellate courts examine five factors by way of a principled approach to such applications (the application for leave to appeal out of time). Those factors are:

(i) The reason for the failure to file within time.

(ii) The length of the delay.

(iii) Whether there is a ground of merit justifying the appellate court's consideration.

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?”

In **State v Patel** [2002] FJCA 13; AAU0002U.2002S (15 November 2002), the Court of Appeal per Reddy P., Tomkins and Ellis JJA. expressly adopted the following criteria to be applied when considering an application for an extension of time within which to appeal:

“... the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for the delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.”

The Court held:

“We have given careful consideration to each of these factors. We have reached the conclusion that despite the excessive and unexplained delay, the strength of the grounds of appeal and the absence of prejudice are such that it is in the interests of justice that leave be granted to the applicant. Accordingly we extend the time for the giving of the notice of appeal to 17 January 2002, being the day on which the notice of appeal was filed.”

“All the great things are simple and can be expressed in a single word: freedom, justice, honour, duty, mercy, hope.”

-Winston Churchill-

APPENDICES

APPENDIX 1: CHIEF JUSTICE'S PRACTICE DIRECTION NO. 2 of 1982

IN THE SUPREME COURT OF FIJI

PRACTICE DIRECTION No.2 OF 1982

SUPPLEMENTATION OF RECORD OF PROCEEDINGS IN
THE MAGISTRATE'S COURT FOR PURPOSES OF
APPEAL TO THE SUPREME COURT

TUIVAGA, C.J.: Where on appeal from a Magistrate's Court to the Supreme Court in a criminal matter it is desired to supplement or enlarge the record of proceedings in the Magistrate's Court, leave of the Supreme Court to supplement such record must be obtained.

 An application for leave to supplement the record of the Magistrate's Court (which will be considered on its merits) must be made on motion supported by an affidavit. The motion must set out the evidence or other matters alleged to have been omitted from the record and must identify the part of the record by stating the page and line in which the alleged omitted evidence or other matters in proceedings had occurred and should appear in the record. The affidavit in support of the motion must be sworn by someone who was present during the proceedings in the Magistrate's Court and who could speak from his own knowledge and recollection of the matters contained in the motion.

 Upon filing the motion and affidavit as aforesaid in the Supreme Court the appellant must serve copies thereof on the respondent and also on the Officer-in-

Charge of the Magistrate's Court concerned. The Officer-in-Charge will then seek the comments in writing of the Magistrate whose record of proceedings it is sought to supplement. The comments received from the Magistrate will be despatched to the Chief Registrar who will place same before the Judge hearing the appeal.

It is necessary to point out that where a Magistrate is unable to accept the correctness of the alleged omitted evidence or other matters in proceedings or any part thereof, the matter will normally rest there and will not be allowed to be pursued further.

At Suva

March, 1982

APPENDIX 2: CHIEF JUSTICE'S PRACTICE DIRECTION 1 of 1983

IN THE SUPREME COURT OF FIJI
NO. 1 OF 1983

PRACTICE DIRECTION

TRIALS WITHIN TRIALS IN MAGISTRATES COURTS

TUIVAGA, C.J. : Trials within trials should no longer
be held in Magistrates Courts.

Where it is alleged that an accused has voluntarily made a statement under caution leave to adduce it should be given even if it appears that its admissibility may be disputed.

When considering the evidence against an accused for the purpose of preparing their judgment, magistrates should first determine whether they are satisfied that the prosecution have established that the statement is admissible in law i.e. that it has been proved that the accused made the statement and that he made it voluntarily. If not so satisfied magistrates should then exclude the contents of the statement from the case against the accused.

Chief Justice's Practice Direction of 29th June, 1972 and Chief Registrar's circular memoranda 1/74 and 2/75 are hereby revoked.

T. U. Tuivaga
Chief Justice

At Suva
14th April, 1983.

NB: Expressly disapproved in Rokonabete v the State [2006] FJCA 40; AAU0048.2005S (14 July 2006)

APPENDIX 3: CHIEF REGISTRAR'S PRACTICE DIRECTION NO. 3 of 1993

Office of the Chief Registrar,
Supreme Court,
Government Buildings,
SUVA

16 August, 1993

CHIEF REGISTRAR'S PRACTICE DIRECTION NO. 3 OF 1993

TO: President, Fiji Law Society
Secretary, Fiji Law Society
All Legal Practitioners.
Solicitor-General

SPECIAL DAMAGES IN PERSONAL INJURY ACTIONS

1. I am directed to draw the attention of all legal practitioners to the fact that time is too often wasted at the trial of personal injury actions because the parties do not try to agree to the items of special damages, or to find out to what extent they disagree and why, until the hearing is imminent or has actually started. To, avoid this happening, the practice set out in paragraph 2 is to be followed in future.
2. In any personal injury actions in which the damages claimed consist of or include a claim for :
 - a) Loss of earnings;
 - b) Loss of future earning capacity;
 - c) Medical or other expenses relating to or including the cost of care, attention, accommodation or appliances;
 - d) Loss of pension rights;

particulars, where appropriate in the form of a schedule, shall be prepared by the party making such claim and, not later than 38 days after the case has been set down for hearing by the Registrar, shall be served upon all other parties against whom such claim is made. Not later than 14 days thereafter every party upon whom particulars have been served shall indicate in writing whether and to what extent each item is agreed and if not agreed, the reason why not and any counter proposals.

3. The failure by a party to comply with these requirements maybe taken into account in deciding any question of costs.

M.C. Rai
ACTING CHIEF REGISTRAR

APPENDIX 4: CHIEF REGISTRAR'S PRACTICE DIRECTION NO. 2 of 1994

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HIGH COURT LAUTOKA

PAGE 01/05

Office of the Chief Registrar
High Court of Fiji
Government Buildings
S U V A



CHIEF REGISTRAR'S PRACTICE DIRECTION NO. 2 OF 1994

To: Fiji Law Society
All Legal Practitioners
Public Trustee
Trustee Corporation Ltd

Your attention is drawn to the problems experienced by the Principal Probate Registry and the Court on issue of grant on estate administration applications. These problems could be avoided if there is adherence to the Tristram & Cootes precedents and strict compliance with the provisions of the Succession, Probate and Administration Act Chapter 60 and the Non-Contentious Probate Rules 1987 [England] which are in force in Fiji as from 31st March 1988 by virtue of Order 1 Rule 11 of the High Court Rules 1988.

You are requested to comply with the following directions:-

1.0 PRINCIPAL PROBATE REGISTRY

All probate business, contentious and non-contentious is dealt with in the Registry at Suva pursuant to an order made by the Chief Justice.

1.1 Documents are not to be filed in any other High Court Registry.

1.2 Transfer of probate cases to the High Court Lautoka/Labasa would be subject to proper application by counsel for Order of transfer. A proper Order of transfer obtained enables the Registry concerned to create a Duplicate file with photocopies of documents, as their copy record.

2.0 DOCUMENTARY EVIDENCE

At times the Court is faced with the difficulty of making appropriate order (s) sought due to the lack of documentary evidence namely Death Certificates, Birth Certificates, Marriage Certificates and other supporting documents. In the future all applications for estate administration are to comply with the following:-

2.1 Death Certificates

All applications for estate administration must be accompanied by a copy of the original death certificate which is to be annexed as an exhibit to the affidavit to lead grant to probate/administration. No Photocopies or certified copies will be accepted. If deceased person's spouse has predeceased him/her then the beneficiary applying must also annex a copy of the spouse's Death Certificate.

2.2 Marriage Certificates

All applications submitted by the lawful widow or widower of the deceased must be accompanied with a copy of the original marriage certificate. No photocopies or certified copies will be accepted.

2.3 Power of Attorney

Section 28 of Cap.60 empowers the Court to grant probate/administration to the executor's attorney or the executor where the latter is out of the jurisdiction. If Power of Attorney is used for grant of the order sought, the Donee is to register the Power of Attorney with the Registrar of Deeds and it is then lodged with the relevant documents.

2.4 Deed of Renunciation

In cases where beneficiaries have renounced their interests in the estate, proper instruments to that effect are to be drawn up. For proper format of the Deeds of Renunciation please see Appendix I - forms 181, 182, 183, 184 and 185 of Tristram & Coote's 27th edition. The maximum number of names on a Deed of Renunciation shall be 3.

3.0 PLACE OF DOMICILE

Deceased persons place of domicile is to be disclosed in the oath of the intended Executor/Executrix/Administrator/Administratrix.

3.1 Reseal

If deceased person was domiciled abroad, then an application for reseal of grant issued at the local Court in the Jurisdiction of the place of domicile is to be presented here in Fiji and application for reseal of the same is to be made. A registered Power of Attorney must accompany the application.

3.2 Grant of Administration

Attention is drawn to rule 29 which governs applications for grants where the deceased died domiciled outside Fiji. Compliance with this rule may require evidence of the law of the country where the deceased died domiciled.

4.0 JURATS

The Jurat(s) are not to be isolated overleaf from the rest of the contents of such documents as the Affidavit, Justification of Sureties or any other document that requires the signature of a Commissioner for Oaths.

4.1 The Jurat must be completed by the Commissioner for Oaths on the same day it is signed before him, i.e. the place, date and the language which was used to explain the contents of the document to the deponent. These should be written in ink by the Witnessing Officer^{wa} (Commissioner for Oaths, Justices of the Peace, Notaries Public).

4.2 Identification of Witnessing Officer

Proper identification of the Commissioner is necessary: If the signature of the Commissioner on documents is indecipherable he is to identify himself by use of a rubber stamp or otherwise write his name using the same ink below his signature.

4.3 Notaries Public

The Notaries Public must always exercise their duty/obligation with diligence when signing documents and such documents must be impressed with his/her notarial seal.

5.0 CITY AGENTS

All law firms outside Suva are requested to submit the names and addresses of their City Agents in Suva, to enable Probate Registry to send correspondence to appropriate offices. All documents filed at the Registry should bear the name of the City Agents.

6.0 ADVERTISEMENT

Prior to any application for Probate/Letters of Administration being filed, the intended executor/administrator shall advertise the intended application in a daily newspaper calling upon creditors to lodge any claim within 21 days.

Proof of the advertising shall be given in the affidavit of the applicant with a copy of the advertisement annexed thereto.

7.0 DOCUMENT PRESENTATION

Under Order 66 Rule 1 of the High Court Rules - Every document prepared by a party must be on A4 ISO paper of durable quality having a margin not less than one and a half inches wide, to be on the left side of the face of the paper.

6.1 Backing

All documents filed should have proper backing on a separate sheet of paper. The backing should include the name of the document, the solicitors lodging the application and name of the City Agent.

6.2 Paging

All pages of any document must be numbered and typed on only one side of the page.

The above directions apply to all estate administration applications lodged through a firm of Solicitors, the Public Trustee, The Trustee Corporation Ltd. or In Person.

Compliance with these instructions will ensure expeditious processing of applications.

.....
M C Rai

CHIEF REGISTRAR

2 September 1994 - EFFECTIVE DATE

APPENDIX 5: CHIEF REGISTRAR'S CIRCULAR of 31 OCTOBER 1996

Office of the Chief Registrar
High Court
Government Buildings
SUVA

31 October 1996

CIRCULAR MEMORANDUM

TO: All Legal Practitioners, Deputy Registrar Labasa, Deputy Registrar Lautoka and O/C Civil

Commencement of Civil Proceedings Arising in the Northern Division

RHC Order 4 rule 1 (as amended see LN 67/93) provides that proceedings shall ordinarily be commenced in the Division in which the cause of action arises. This includes Judicial Review.

Applications for leave to seek Judicial Review arising in the Northern Division must be lodged at the High Court Registry Labasa and such applications will be considered by the next visiting Judge. Judges will continue to visit Labasa monthly.

In exceptional cases of extreme urgency involving civil applications requiring the immediate attention of a Judge solicitors should attach to the papers a statement setting out the cause of urgency and upon receipt of such a statement the papers will be sent by the Deputy Registrar Labasa by facsimile (at the applicant's expense) to the Chief Registrar who will place them before the current Applications Judge for his consideration and directions.

Solicitors having Northern Division application pending in Suva may wish to consider applying to the Chief Registrar (RHC 032 rule 9 (k)) for their transfer back to Labasa.


M.C. Rai
(Chief Registrar)

Hon. Chief Justice and Hon. Judges - for information

RECEIVED

4 NOV 1996

Ans'd.....

APPENDIX 6: CHIEF JUSTICE'S PRACTICE DIRECTION NO. 1 of 1999

CHIEF JUSTICE'S PRACTICE DIRECTION NO. 1 OF 1999

RIGHTS OF AUDIENCE

The Trust Accounts Act 1996 and the Legal Practitioners' Act 1997 taken together have resulted in important changes to the way in which practising certificates are issued.

Whereas previously practising certificates were issued by the High Court they are now issued by the Fiji Law Society.

Under Section 44(1) of the Legal Practitioners' Act the Fiji Law Society may refuse to renew the practising certificate of a legal practitioner who does not satisfy one or more of the provisions (a) to (j) of the Section, subsection (c) of which is failure to comply with the requirements of the Trust Accounts Act.

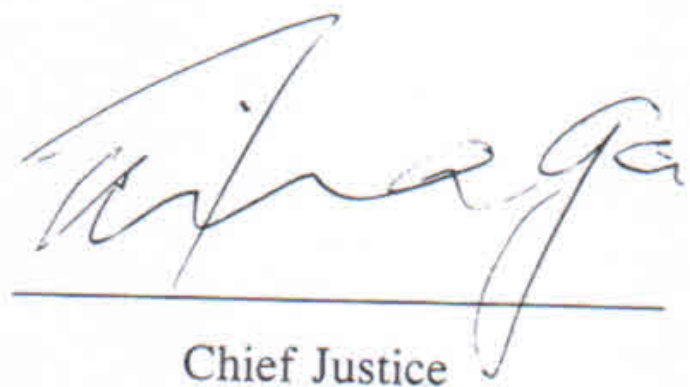
Under Section 52(1)(a) of the Legal Practitioners' Act it is an offence to practise without being the holder of a current practising certificate. Practising certificates expire on the last day of February each year (Section 48(1)).

On 3 March 1999 the Law Society sent the Chief Registrar a list of 39 legal practitioners whose practising certificates had expired and who were not the holders of current certificates. Some legal practitioners whose names appear in the list have since renewed their certificates but most have not.

As Judges or Resident Magistrates we are not directly concerned with the reasons why particular practising certificates have not been renewed. We cannot however allow legal practitioners who are required to hold current practising certificates to appear in our courts without having them.

A list of those practitioners who do not currently have rights of audience is held by the Chief Registrar. Copies of this list are routinely furnished to all courts for information and their action when necessary.

Dated this 24th day of March, 1999.



Chief Justice

APPENDIX 7: HIGH COURT OF LAUTOKA PRACTICE DIRECTION 1 of 2000

HIGH COURT
LAUTOKA

Practice Direction No. 1 of 2000

Order 34 Pre-trial Conferences and Setting Down for Trial

It is apparent that pre-trial conferences are not being carried out in accordance with the High Court Rules. The purpose and efficacy of holding such conferences, an important interlocutory step, is thereby lost.

The parties arrive at Court for the trial with many matters, which should have been agreed, not agreed. Facts, which on a realistic appraisal by counsel are no longer in issue, have therefore still to be proved by witnesses and exhibits unnecessarily. Documents or exhibits not to be challenged should also have been agreed, to avoid time-wasting proof.

Summonses for setting down for trial now go before a Judge [see Chief Registrar's Practice Direction 27 July 1998].

The Judge will review the case position pursuant to powers provided under Ord. 34 r. 2(6).

In particular the Judge will be inquiring of Counsel or litigants:

1. Whether a Pre-trial conference has taken place and if it has been adequate. This means the judge will look into the question of whether the conference has been adequate also.

2. Whether proper discovery has been given and completed.
3. The possibility of further admissions, agreement on some evidence, which is not seriously challenged, and which could shorten the trial.
4. The number of witnesses to be called
5. The names of witnesses
6. Whether there are any difficulties with the availability of witnesses, or difficulties of attendance.
7. The length of trial - a re-examination of the earlier estimate, a more realistic estimation.
8. The legal issues; and the desirability of and need for written submissions.
9. Whether the trial is ready to proceed.

Only when the trial judge is satisfied that the case is ready for trial in all these aspects, will a trial date be allocated.

If counsel is unprepared, or unable to assist with these issues at the hearing of the summons to enter for trial, the judge may decline to hear counsel, decline to enter for trial, or he may enter for trial (if there has been unnecessary delay by either or any litigant to the proceedings) and may consider this failure to comply with Ord. 34 when he comes to consider an order of costs at the end of the trial [Ord. 62 r.10].

Anthony Gates
Puisne Judge

26 January 2000

APPENDIX 8: CHIEF REGISTRAR'S PRACTICE DIRECTION 1 of 2000

Chief Registrar's Practice Direction
No. 1 of 2000

To: Deputy Registrars
O/C's Magistrates Courts
O/C's Small Claims Tribunal
Secretary Fiji Law Society (for distribution)

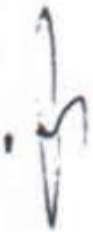
Affidavits

The making of affidavits is governed:

- (i) In the High Court by Order 41 of the 1988 High Court Rules;
- (ii) In the Magistrates Courts (and Small Claims Tribunals) by Order V Part III of the Magistrates Courts Rules (Cap. 14).

When an affidavit is sworn it is essential that the name of the commissioner for oaths be readily identifiable. The signature of the Commissioner should preferably be followed by a rubber-stamped endorsement giving the Commissioner's name and address. Alternatively, the Commissioner's name must be written below the signature in block capitals.

Affidavits the jurats of which do not comply with the above direction are not to be accepted in Court Registries from now on.



M.C. Rai
Chief Registrar

17 March 2000

APPENDIX 9: HIGH COURT OF LAUTOKA PRACTICE DIRECTION 2 of 2000

High Court
LAUTOKA

PRACTICE DIRECTION NO. 2 OF 2000

Requirement for Counsel to be briefed

Solicitors who cannot themselves attend Court or Chambers must brief another Counsel to appear for them. Presently, Clerks arrive at the Chambers Court, and when one of their principal's cases is called, only then attempt to brief Counsel and at that orally.

Unsurprisingly, and quite often, Counsel misunderstands for which litigant he or she appears, knows nothing of the history of the case or what happened on the last mention date, and can provide no adequate explanation why some pendant matter has not been attended to since the last mention. This reflects badly on Counsel in the Chambers Court. Members of the public or waiting litigants may mistakenly consider such Counsel incompetent, when in fact the blame rests with the briefing principal for lateness and inadequacy of briefing. None of this assists the Court in attempting to make necessary interlocutory orders, fix hearing dates, and move on the litigation. Often new dates, observations or queries from the Court, are not communicated back to the principal.

From 3 April 2000 onwards, the Court will expect Counsel to be properly briefed when a case is called on, and that Counsel will not appear in a matter unless properly briefed. "Properly briefed" means that Counsel is the holder of written instructions which as a minimum include :

1. The names of the parties in the entitlement or heading of the case.
2. The case number.
3. The Court, date and time for appearance.
4. The litigant for whom Counsel is briefed to appear, and in what capacity
5. The names of the Solicitors for the other litigants.
6. The nature of the relevant application before the Court, which summons or motion, and its date.
7. What happened on the last Court date and what was ordered.
8. What it is that Counsel is instructed to seek.
9. The available dates of the principal or of Counsel who is to conduct the hearing which is to be fixed.

Counsel briefed should report back to the legal practitioner who briefed him or her by letter with the result, orders, observations, and dates of adjournment. At the moment the uninformed principal telephones the Registry to ask one of the Court Clerks to get out the file and read back what happened. This is a task that should not be burdened routinely on the Registry staff.

If proper minimum briefing and reporting is done, cases which are mentioned time and time again, will not need to be so often mentioned, and the time of the Court (as well as of Counsel and litigants) will not be wasted. Case management is essential in any Court and it is particularly necessary at the Lautoka High Court.

Barristers were not allowed to appear in Court without a brief and it is easy to see why professionally this should have been so, and still is the rule in England. Solicitors are asked to ensure therefore that their clients, the litigants, are represented either by themselves or by Counsel properly and professionally briefed. The Court will decline to hear from Law Clerks or from Counsel who do not hold a proper brief.


ANTHONY GATES
Judge

29 March 2000

APPENDIX 10: HIGH COURT OF LAUTOKA PRACTICE DIRECTION 3 of 2000

HIGH COURT
LAUTOKA

PRACTICE DIRECTION NO. 3 OF 2000

SETTLING OF ORDERS FOR SEALING

Whilst a degree of flexibility is both consonant with common sense and necessary in the settling of orders for sealing at the Court Registry, there are some matters of format which need to be standardised in order that the Court's orders are both credible and worthy of obedience. Many orders presented to the Registry for sealing are deficient or illogical to some extent. Too many are unchecked and bear obvious spelling or information errors. Orders should be checked by Counsel before being allowed to leave a practitioner's office.

Guidance on format can be obtained from both the Fiji High Court Rules [now Appendix 1] and the Supreme Court Practice [Eng.] Part 2 Forms [Prescribed and Practice]. Some of the English forms have undergone considerable modification recently to make them more easily understood by lay litigants. For this reason, I venture to recommend also some flexibility with our own forms.

Orders in Fiji have tended to be settled to include matters not set out in the prescribed forms. If this assists a layman who is served with a court order arising from an ex parte application in understanding what transpired in Chambers and what he has to do to comply with the order, such inclusions are to be encouraged.

Consideration should be given to the following matters of format:

1. Entitlement or Heading

This should be as in the action heading

2. Document Subject Heading: "Order"

Though it appears not to have been a requirement most orders in Fiji carry, centred on the page, the subject heading "Order". This informs and alerts the recipient of and to the nature of the legal document served.

3. Presiding Judicial Officer

"Before the Hon. Mr. Justice Denning in Chambers on 10th January 2000 ex parte".

This further heading also seems not to have been a requirement under the forms. It is generally supplied in Fiji, and imparts helpful information. If an order was made *ex parte* this should be set out within this heading. The Judge's surname only should be given unless two judges bear the same surname or there is some possibility of confusion.

4. The Preamble

There has been much variety in the drafting of that part of the order dealing with the nature of the application, counsel being heard, and the evidence adduced. The White Book and Fiji's forms seem to prefer (i) no mention of the type of summons (ii) and the preamble "upon hearing..... and upon reading the affidavits of..... sworn etc.

Fiji practitioners have often favoured the format :

- (a) Upon reading the summons dated 14th January 2000 to set aside judgment entered in default of defence.
- (b) And Upon reading the affidavits of XYZ sworn on 11th January 2000 and of ABC sworn on 12th January 2000 and both filed herein.
- (c) And Upon hearing Mr. Norman Birkett of Counsel for the plaintiff and Mr. Peter Rawlinson of Counsel for the defendant.
- (d) And Upon reading the written submissions of both counsel filed herein.

It is ordered that : etc.

I make the following observations :

- (i) To refer to the particular summons in response to which the order is made can be most helpful. Often in the course of a court action numerous interlocutory summonses are taken out. It is useful to know from the body of the order itself, in response to which summons the order was made.
- (ii) The forms prefer the chronology that counsel be heard before the affidavits are read. "Heard" probably means no more than "give audience to". The reality however is the reverse. The order of events of the hearing set out should be that counsel is heard after the summons and affidavits are read. Judges are expected to have read both prior to the hearing.
- (iii) Where there are numerous affidavits in the application, it is sufficient to state "And upon reading various affidavits both in support and in opposition filed herein".
- (iv) The inclusion of written submissions is perhaps unnecessary, though such material may be the persuasive matter that leads the court to make the particular order. Inclusion of such in the order therefore is optional.
- (v) Counsel should not be referred to in the order as "A.K. Simmons Esq.", rather as, Mr. A.K. Simmons or Ms O.D. Swan.

- (vi) If in doubt as to the appropriate wording for the Judge's order it is better to send an order in draft to the Deputy Registrar for approval before engrossment.

5. Seal

The forms have the end of the order as follows:

"Dated the day of 2000"

By the Court
Deputy Registrar

Some Fiji practitioners use the word "Sealed" instead of "Dated", others "Entered". "Sealed" is to be preferred as being a more accurate term than "Dated" [which could be confused with the date of the decision] or "Entered". Sealing sets the clock running for time periods for appeal purposes. Sealing is also the term used for the perfecting of the order.

6. Penal Endorsement

Many orders presented for sealing which the litigant may need to enforce do not carry a Penal Notice [Ord. 45 r. 6(4); R 237(4) Matrimonial Causes (High Court) Rules Cap.51]. They should do so. It is advisable that this be presented in a box at the end of the order, in order that the warning notice be drawn fairly to the attention of the litigant who is to obey the order. The Notice should not be in small print.

PENAL NOTICE

If you the above-named Defendant
disobey this order you will be
liable for process of execution
for the purpose of compelling
you to obey the same.

There are special wordings for indorsement,
depending on the circumstances required, which are
set out in the White Book at Ord. 45.

It is to be hoped that Counsel will be able to
follow these principles in order to avoid delays in
the sealing of orders.



ANTHONY GATES

JUDGE

30th June 2000

APPENDIX 11: CHIEF JUSTICE'S PRACTICE DIRECTION NO. 1 of 2010

Practice Direction No. 1 of 2010 **Court Dress for Legal Practitioners**

1. All legal practitioners attending court whether appearing as counsel, spectators, or whilst remaining in the court precincts must be smartly dressed in dignified, decorous and sober attire. Advocacy is more likely to be absorbed accurately when the advocate is free of the clutter and distraction of striking or unusual items of clothing or jewellery.

2. In cases of doubt the presiding judicial officer, whether judge, magistrate, registrar, tribunal, or referee, will be the final arbiter in his or her own court or tribunal of what constitutes proper dress for those proceedings.

3. This Direction is published in order to provide counsel with detailed guidance on what constitutes proper dress for court.

4. Magistrates Court

For Men: Dark suits [black, charcoal grey or navy blue] with shirts of white, pale blue, or grey colour or otherwise of an unemphatic appearance, colour or design. Non-bright ties are to be worn. Black shoes.

If a pocket sulu is to be worn, it should also be of dark appearance with a suitably dark coloured jacket. Black sandals may be worn instead of shoes.

For Women: Suits, sarees, dresses, or sulu jaba [black, charcoal grey or navy blue]. Shirts or blouses of white, pale blue or grey colour buttoned to the neck.

If skirts are to be worn they must extend to knee-length.
Tailored trousers are also appropriate.
Black shoes.

5. High Court

In addition to dress as for the Magistrates Court, in the High Court when the judge is robed, legal practitioners will wear wigs and black court gowns, over a suit (jacket or Bar jacket). They will also wear a white collar with bands, or a jabot. All counsel will be fully and properly robed prior to the judge coming onto the Bench.

For chambers business held in open court counsel will dress as for the Magistrates Court, unless the judge orders otherwise.

6. Court of Appeal and Supreme Court

As for the High Court but without wigs, bands or jabots.

7. **Replacement of Guidelines 2000**

This Practice Direction replaces the General Guidelines on Court Dress 2000.

26th July 2010

A.H.C.T. Gates
Chief Justice

APPENDIX 12: CHIEF JUSTICE'S PRACTICE DIRECTION NO. 1 of 2011



Practice Direction No. 1 of 2011

Withdrawal of Counsel in Criminal Proceedings

1. This Direction applies to counsel appearing in all courts in Fiji including the Court of Appeal and the Supreme Court. It repeats much of the same sentiments as in the Practice Direction published by Nimmo CJ in 1972 [see *CPC annotated by Marie Chan 2008 at p 400*].
2. Occasionally counsel is obliged to withdraw from a case. This may be because instructions have been withdrawn, counsel no longer feels able to represent the client satisfactorily, or considers there to be a conflict of interest, or conflict with his or her duty to the court in continuing to appear for the client, or that counsel is physically incapacitated from appearing. This is not an exhaustive list of instances, for there are likely to be other and proper reasons for seeking withdrawal.
3. Where counsel needs to withdraw, it is counsel's duty as a matter of courtesy and good practice to appear on the next listed mention or hearing date and seek leave to withdraw. But application for leave to withdraw need not await the next court date. Counsel may apply before such date by motion and affidavit. The court will then consider whether to grant leave. This may involve a consideration as to whether or not counsel may be able to continue to serve his or her client's best interests if he or she were ordered to continue and if leave were declined: *Ram Sharan v. Kanyawati* [1969] 15 Fiji LR 220 at p 223; *Lockhart-Smith v United Republic* [1965] E.A. 211 at p 265.
4. However this Direction is no more than a restatement of earlier practice, with which newer members of an increasing Bar may be unfamiliar. It is framed to avoid the situation where counsel, previously briefed and appearing in a matter, fails to appear on the next occasion thus abandoning his or her client. Procedurally, if there is to be a withdrawal by counsel, it is necessary for that counsel to appear before the court and obtain leave for his or her withdrawal from the case.
5. At the interlocutory stages leave may more readily be obtained. At the commencement of a trial or during a trial, leave may not so easily be granted.


6. In summary the court is unlikely to permit withdrawal:

- (a) where counsel would be in breach of his or her duty to the client
- (b) where, though for valid reasons, the application to withdraw is made at the last minute, which would cause postponement of trial, wasted witness costs whether attending from overseas or locally, or where by the withdrawal a waste of court time and public funds is likely to be occasioned
- (c) to enable counsel to undertake an alternative commitment whether of a public or private nature
- (d) where counsel's fee in whole or in part has not been paid.

7. If the court refuses to permit withdrawal and counsel nonetheless withdraws, a report may be lodged with the Chief Registrar for consideration of future action under the Legal Practitioners Decree. With a sense of service and duty to the client and to the Court uppermost, no practitioner, it is to be anticipated, would allow such a situation to arise.

8. In the case of counsel being hospitalized, another counsel may make the application upon his or her behalf. In certain instances a court may insist on the production of a medical certificate as in Form 62 of the CPC.

6th April 2011


A.H.C.T. Gates
Chief Justice
Suva, Fiji

gr

APPENDIX 13: CHIEF JUSTICE'S PRACTICE DIRECTION NO. 2 of 2011

Chief Justice's Practice Direction No. 2 of 2011

"Cessation of practice of including father's names of litigants of Indian ethnicity on all Court Documents"

In colonial days members of the Indian race were obliged to provide their father's name on official forms. Members of other races were not so obliged. The requirement was anomalous and inconsistent, for in some cases a son of a father of non-Indian ethnicity also did not bear the same surname as his father.

On some forms, an ethnicity-neutral question may properly seek to know the name of the applicant's father. This is in order. However questions addressed to Indians or Indians only concerning their father's name are no longer to be requested or answered.

Second, the father's name on all court documents is no longer to be provided. Indeed Registries are instructed no longer to accept documents in that form. Solicitors will be asked to correct the documents before filing, or to re-file incorrectly filed documents. No further filing fees will be charged upon the re-filing.

9 August, 2011



A.H.C.T. Gates
Chief Justice

APPENDIX 14: CHIEF JUSTICE'S PRACTICE DIRECTION NO. 1 of 2012



Chief Justice's Practice Direction No. 1 of 2012

Appellate Procedures and Forms of Address

1. Judges sitting on appeals at all levels have brought to my attention that not all solicitors and counsel have been maintaining proper standards in their dealings with the courts. It is necessary therefore to set out certain standards that are to be observed.

Other litigants to receive copy correspondence

2. For the most part, a litigant has no right to direct unilateral access to the court. In almost all cases, save genuinely urgent ex parte applications, all correspondence with the court must be copied to the other parties to the litigation.

Time to run during Legal Vacation

3. Where any step is to be taken in an appeal to the Court of Appeal or the Supreme Court within a certain time, time will run during the Legal Vacation. This is in contrast to the existing practice in the High Court where time is deemed not to run during the vacation.

Duty of Appellant in Court of Appeal to prepare the record

4. Solicitors' and Counsels' attention is drawn to the Court of Appeal (Amendment) Rules 1999, and in particular to Rule 18(1) which provides that:
 - (a) The primary responsibility for the preparation of the record on appeal rests with the appellant, subject to directions given (by) the Registrar.
 - (b) The Registrar is responsible for the preparation of the transcript of the Judge's notes.

5. In addition, in preparing the record, the appellant must consult all other parties directly affected by the appeal as to its contents [Rule 18(5)].
6. If an appeal record is to be supplemented, the other parties must similarly be consulted on any such application. If the other parties consent to the supplementation of the record that consent must be evidenced by authorized signature of Counsel or Solicitor for the party and forwarded to the Registrar. Any dispute in the matter will be decided by the Registrar or referred to the Court for decision on the supplementation sought.

Registrar ultimately responsible for settling record in Supreme Court

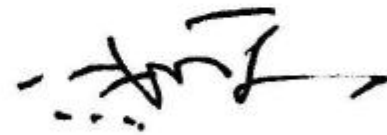
7. In the Supreme Court the Registrar has the duty to settle the record of appeal [Rule 10 Supreme Court Rules]. However it is in the interests of all litigants, that their legal representatives co-operate with the Registrar to arrive at a record, concise yet relevant, to the grounds of appeal to be argued [Rules 10-12]. In default of such co-operation, the Registrar will settle the record alone. Responsible legal practitioners should not allow this situation to arise, and should attend in answer to summonses to settle the record with their opponents or other parties, and contribute to the process.

Duty to provide each member of Court with bundle of cases and legislation

8. At the hearing of the appeal Counsel must have available in court copies of all relevant legislation or subsidiary legislation to which it is intended the attention of the Court is to be invited.
9. Copies of cited cases must be made available for each member of the Court for the hearing. However the bundle of cases to be cited or legislation to be referred to must be filed with the court the day before the hearing or earlier in the case of the Court of Appeal or Supreme Court. Copies of cases downloaded from the internet may be sufficient for Counsel himself or herself to gain understanding and to prepare for the case. But for the conduct of legal argument, the cases filed with the Court must be photocopies of *official* reports only, not copies taken from the internet.
10. It is Counsel's duty to inform the Court as to whether a case cited has been subsequently reversed or confirmed on appeal.

Forms of Address

11. The form of address to be used in Court when addressing a judge of the High Court, Court of Appeal or Supreme Court is “my lord” or “my lady”, “your lordship” or “your ladyship”. “Sir” or “Madam” are incorrect.
12. “Sir” or “Madam” are the correct forms of address for Resident Magistrates in the Magistrates Court. Members of the Bar do not use the address “Your Worship” which is a form of address used for leaders of municipal authorities such as city or town mayors or administrators.



A.H.C.T. Gates
Chief Justice

1st February 2012

APPENDIX 15: CHIEF JUSTICE'S PRACTICE DIRECTION NO. 2 of 2012

Chief Justice's Practice Direction No. 2 of 2012

Wills and Non Contentious Probates Registry Practice

It has been noted that legal practitioners have adopted a variety of procedures with Wills and Non-Contentious Probate applications at the Probate Registry. This Practice Direction intends to clarify and strengthen the integrity of procedures put in place by Chief Registrar's Practice Direction No. 2 of 1994 (02/09/1994).

With effect from today Legal Practitioners and other users of the registry service are requested to comply with the following:

1. Interpretation

In this Practice Direction: -

- (a) 'Registry' refers to the 'High Court Probate Registry, Suva'
- (b) 'Testator' includes 'Testatrix'
- (c) 'Will' includes 'codicil'

2. Registration of 'Wills'

In order to achieve registration, two originals of the deceased's 'Will' are to be filed at the Registry together with the original Birth Certificate of the Testator.

Annexed to this Practice Direction is Form No. W1. This form needs to be duly completed and filed with the Registry to achieve registration of any 'Will'.

3. Uplifting of 'Wills'

In order to uplift a 'Will' already registered with the High Court pursuant to Section 17 of the Wills (Amendment) Act, Act 10 of 2004; the following documents must be lodged with the Registry.

- (i) In cases where the request is lodged by a Legal Practitioner or a Law firm:
 - a) A letter of Request for the 'Will' which should set out the reasons for the request;

- b) A letter of Authorisation from the Executor/Trustee to the Legal Practitioner or Law Firm to act for the estate or upon the instructions of the executor to obtain the Will;
- c) Production of a valid Photo ID of the Executor/Trustee applicant; and
- d) An Original Death Certificate of the Deceased (Testator).

(ii) In cases where the request is lodged by an individual:

- a) A letter of Request for the 'Will' which should set out the reasons for the request;
- b) A valid Photo ID of the Executor/Trustee applicant;
- c) A Statutory Declaration giving the following undertakings:
 - i) That the 'Will' will be lodged with the High Court Probate Registry, Suva upon any application for a grant;
 - ii) That the 'Will' will be produced to the Chief Registrar within 7 days of any demand so to do, and
 - iii) That the 'Will' will be kept in safe custody until lodged at the High Court Probate Registry, Suva.
- d) An original Death Certificate of the Deceased (Testator).

If the request is made pursuant to a Power of Attorney, then a Certified True Copy of the registered Power of Attorney must be lodged with the Registry to accompany the request above. The original Power of Attorney is to be brought to the Registry for perusal. The original Power of Attorney will be released after perusal, and after a photocopy has been made of it to be kept on file at the Registry.

NB: Wills will not be released to any Third parties unless upon Order of the Court or by virtue of any other law, such as the Succession, Probate and Administration Act [Cap 60].

4. Search for Wills prior to application for grant.

It shall be mandatory for a 'Request for Wills Search' to be conducted by an applicant at the Registry prior to the filing of any application for a grant.

Searches shall be conducted after taking the following steps:

- i) completion of Form No. W2 annexed to this Practice Direction; and
- ii) upon payment of the requisite search fee.

This measure is implemented to eradicate the duplication of applications under the Intestate Succession Rules whilst a 'Will' in the same Estate is already registered with the Registry.

5. Requests for Copies of Oaths, Caveats etc.

Any request for copies of Oaths, Caveats or any other relevant document at the registry shall be by way of a Letter of Request outlining the specific reasons for seeking the said documents. Upon approval for release by the Chief Registrar or his or her nominee, the applicable photocopying fees shall be paid prior to such release.

6. Application of Section 18 Wills (Amendment) Act 2004
[Act No. 10 of 2004]

Section 18 is set out below.

Failure to produce will

18. any person who, having in his possession or under his control any will or codicil of a deceased person or any paper or writing purporting to be such a will or codicil, fails or neglects to produce and deposit the same with the Courts, or, where there is reason to believe that the deceased person's estate is a small estate, with the Chief Registrar of the High Court within 30 days of learning of the death of the deceased person, commits an offence and is liable on conviction to a fine of \$1,000.

[Emphasis Added]

Compliance with the above instructions will assist greatly towards the expeditious and correct processing of applications.



Chief Justice

Date : 14.12.12

REGISTRATION OF WILL

Will Number: _____ REGISTERED BY _____

NAME OF TESTATOR/TESTATRIX : _____
(please state Alias if any) _____

NAME OF EXECUTOR(S) /EXECUTRIX (CES)/TRUSTEES(S):

DATE OF WILL : _____

DATE REGISTERED : _____

(Please provide full details) : _____
[Name]

[Signature]

[Residential Address]

[Postal Address]

[Phone contact]

[Give ID number – FNPF, Driving Licence, EVR, Passport]

- Checklist :**
- ☐ Birth Certificate of Testator/Testatrix
 - ☐ 2 Original Wills

- Official Use only:**
- ☐ ID sighted and confirmed
 - ☐ Entered into Database
 - ☐ Date of Entry: _____

SEARCH FORM

Search No: _____

PART A

Name of Applicant: _____ Contact: _____ (m)

Residential Address: _____ (h)

Postal Address : _____ ID No: _____

RELATIONSHIP TO THE TESTATOR/TESTATRIX (Tick whichever applicable)

Spouse ☐ Partner ☐ Sibling ☐
Parent ☐ Issue ☐ Others ☐ _____
(please specify if others)

PART B

NATURE OF SEARCH (tick whichever applicable)

Wills ☐ Caveat ☐ Probate/Letters of Administration etc ☐ Other: please specify

PART C

DETAILS OF WILLS OR CODICILS TO BE SEARCHED

NAME OF TESTATOR/TESTATRIX : _____

(please state Alias if any) _____

- ☐ Certified true copy of deceased's birth certificate
☐ If testator is deceased, certified true copy of Death Certificate

PART D

FOR PROBATE, LETTERS OF ADMINISTRATION AND CAVEAT

Estate of : _____

(please state Alias if any) _____

PART E

Declaration

I, _____ submit that the information provided in this form is true and accurate to the best of my knowledge and belief.

Signature of Applicant

Date

APPENDIX 16: CHIEF REGISTRAR'S NOTICE DATED 30 OCTOBER 2012



OUR REF.

THE CHIEF REGISTRAR
HIGH COURT OF FIJI
GOVERNMENT BUILDINGS
SUVA, FIJI

PHONE NO: 321 1481

YOUR REF.

FAX NO: (679) 330 0674

DATE:

30th October 2012

Dear Legal Practitioners,

Re: Notice pursuant to the Legal Practitioners (Amendment) Decree No. 53 of 2012

Take note that as per the amendment, all legal practitioners or law firms who have entered into a contingency agreement with their clients with respect to fees upon the award or settlement or value of any property recovered in any proceeding or any claim by or on behalf of the client been transferred to their trust account **must** transfer the said monies from the trust account to their clients within 7 days after deducting not more than ten percent of the award or settlement amount.

Thereafter, within 7 days after the transfer of the amount to the client all law firms or legal practitioners should file an affidavit in the High Court. The affidavit should contain the following particulars:

- a) Certified true copy of the agreement entered with the client
- b) Documentary evidence of the total amount of any award or settlement or the value of any property recovered in any proceeding or claim by or for on behalf of the client received into the trust account of the legal practitioner or law firm
- c) Documentary evidence of the amount of deductions made from the total amount of any award or settlement or the value of any property recovered in any proceeding or claim by or for or on behalf of the client.
- d) Documentary evidence of the total amount transferred or paid to the client.

Any legal practitioner or law firm who fails to comply with the above shall be guilty of an offence and shall be liable upon conviction to a fine not exceeding \$50,000 or to a term of imprisonment not exceeding 5 years, or to both.

A copy of affidavit should be copied to the Chief Registrar's office.

A handwritten signature in black ink.

Mohammed Saneem [Mr.]

Acting Chief Registrar, Judicial Department

APPENDIX 17: NOTICE DATED 7 MARCH 2014



Notice

All legal practitioners are to take note that the investigations carried out by the Legal Practitioners Unit are confidential in nature.

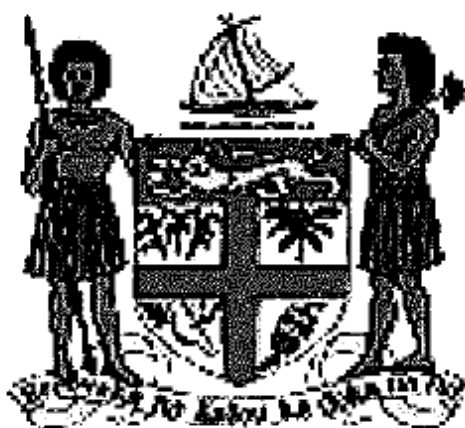
The confidentiality between the complainant, Chief Registrar and the Legal Practitioners Unit shall be maintained and respected at all times.

Practitioners are to take note that the confidential information received in the course of investigations of practitioners and law firms will not be made available to any person before or after investigations nor when disciplinary proceedings are on foot. During prosecutions, the disclosures served will be the only information made available and practitioners and other parties will not be permitted to inspect or access other correspondence which does not form part of disclosures. Such disclosure would be in breach of confidentiality entrusted by the complainants in the Legal Practitioners Unit.

This procedure shall be maintained in order to protect the relationship of confidentiality between the complainants and the Legal Practitioners Unit.

.....
Yohan Liyanage [Mr.]
Chief Registrar

07.03.14



**CHIEF REGISTRAR'S DIRECTIVES TO LEGAL PRACTITIONERS NO. 1 OF
2014**

In accordance with section 50(2) of the Legal Practitioners Decree of 2009, I hereby direct that all legal practitioners with less than two (2) years standing in Fiji may appear on their own in the High Court, Court of Appeal, or Supreme Court **ONLY** for chamber matters, except where the chamber matter has been commenced by way of Originating Summons. However, a legal practitioner with less than two (2) years standing in Fiji is only to appear in a chamber matter in the High Court, Court of Appeal, or Supreme Court if he or she knows, or ought to know, that he or she is competent to appear in the matter, and has the requisite depth of knowledge and skill in order to carry out his or her duty with regard to the matter before the Court.

If a legal practitioner with less than two (2) years standing in Fiji knows or ought to know that he or she is not competent to appear in the matter, and does not have the requisite depth of knowledge and skill in order to carry out his or her duty with regard to the matter before the Court, **then he or she must not appear in a chamber matter** before the High Court, Court of Appeal, or Supreme Court by himself or herself, but can only appear in such circumstances if appearing together with a legal practitioner of at least three (3) years standing.

A handwritten signature in black ink, consisting of a large, stylized 'Y' followed by a series of loops and a final flourish.

Mr. Yohan Liyanage

Chief Registrar, Judicial Department

14 March 2014

