CHAPTER 18

TRIAL PROCEEDINGS

Types of courts

18.1 Like most common law jurisdictions, Solomon Islands, Kiribati and Tuvalu have two levels of courts in which criminal cases can be tried: (1) Magistrates' Courts; (2) a superior court called the 'High Court' in Solomon Islands, Kiribati and Tuvalu. Magistrates' Courts provide a simplified procedure, and a less-qualified judge, for less serious cases. Superior courts provide more elaborate procedure, and a more highly-qualified judge, for more serious cases. Superior court judges generally need to be experienced lawyers: Constitutions SI s 78(3); Ki s 81(3); Tu s 124. In contrast, magistrates are often not qualified as lawyers. Magistrates without professional qualifications as lawyers are called '*lay*' magistrates.

18.2 Financial considerations provide a rationale for having two levels of court. Superior courts provide a 'premium' service in the administration of justice. The administration of justice can be costly and there are many other demands on government purses. Hence, Magistrates' Courts have developed as a low-cost option. However, with simplified procedure and less-qualified judges, there is greater risk of mistakes leading to miscarriages of justice. This may be tolerable for less serious cases, where miscarriages do not cause great harm: for example, a fine rather than a prison sentence in a criminal case. However, greater care to avoid miscarriages needs to be taken for more serious cases where the stakes are higher.

Judges, juries and assessors

18.3 The role of judges in the Pacific differs in some respects from that in many parts of the common law world. In most of the Pacific, including Solomon Islands, Kiribati and Tuvalu, superior court trials are conducted by judges who determine all matters of both law and fact. In this respect, there is no difference between trial in the High Court and in a Magistrates' Court. There is no provision for trials with juries. In contrast, superior court trials are generally conducted by *judges and juries* in much of the common law world: for example, in England, Australia and New Zealand. In a trial by judge and jury:

- The judge referees the proceedings, decides what the relevant law is, and decides on the sentence for a person who is convicted.

- However, the jury, a group (a 'panel') of ordinary persons, decides on the facts, applies the relevant law to those facts, and convicts or acquits the defendant.

In Solomon Islands, Kiribati and Tuvalu, a judge performs both roles.

18.4 There is an option for a trial in the High Court to be conducted by a judge sitting with lay 'assessors'.

- One or more assessors may be appointed by the court in Solomon Islands: CPC) SI s 260;
- Two or three assessors may be appointed by the court in Kiribati and Tuvalu: Ki/Tu ss 177-178.

Assessors are advisors to the judge, giving their opinions on factual matters. They substitute for the common law system of trial by judge and jury. Unlike juries, assessors do not decide questions of guilt or innocence. Provision for optional trial by judge and assessors is a widespread feature of superior courts systems in the Pacific region. However, in practice assessors are now rarely if ever used in most jurisdictions, including in Solomon Islands. Kiribati and Tuvalu.

Structure and jurisdiction of courts

18.5 A judge of a High Court must have been qualified to practise as a barrister or solicitor for not less than five years or have already been a judge in some jurisdiction: Constitutions SI s 78(3); Ki s 81(3); Tu s 124. In contrast, no qualifications are prescribed for appointment as a Magistrate: Magistrates' Courts Acts (MCA) SI/Ki/Tu s 7.

18.6 The High Court has 'unlimited jurisdiction' in criminal matters, meaning that it can try any cases: Constitution SI s 77(1); Criminal Procedure Codes (CPC) SI /Ki/Tu s 4(a). In contrast, magistrates have severely restricted jurisdiction: CPC SI/Ki/Tu s 3.

18.7 In Solomon Islands and Tuvalu, there are grades of magistrate. The classification can determine what kind of cases can be tried and what level of punishment can be imposed.

- Solomon Islands has Principal Magistrates, Magistrates First Class and Magistrates Second Class: MCA SI s 3 (as am. by Magistrates' Courts (Amendment) Act 2007).
- Tuvalu has Senior Magistrates and Magistrates.

Kiribati distinguishes between sole magistrates and other magistrates: MCA Ki s 7. However, this distinction concerns the composition of a court rather than its jurisdiction and powers.

18.8 The jurisdiction of Magistrates' Courts in most jurisdictions is defined by reference to the maximum penalties which can be imposed on convicted offenders. However, sometimes these maximum penalties can only be imposed by superior courts if they were to try the offences. Magistrates trying the same cases may have restrictions imposed on their sentencing powers.

- In Solomon Islands and Tuvalu, Principal (SI) or Senior (Tu) Magistrates have jurisdiction over offences with maximum penalties of up to 14 years: CPC SI/Tu s 4(b). However, their actual sentencing power is restricted to 5 years: CPC Ki/Tu s 7(1); MCA SI s 27; Tu s 25. Other magistrates have jurisdiction over offences with max penalties of 1 year and can also sentence up to that limit: CPC SI/Tu s 4(c), 7(2); MCA SI s 27; Tu s 25.
- In Kiribati, magistrates have jurisdiction over offences with maximum penalties of up to 5 years: CPC Ki s 4(b). Sentences up to this limit can be imposed: CPC Ki s 7; MCA s 24.

18.9 Most criminal proceedings commence in a Magistrates' Court. Where the jurisdiction of the High Court and Magistrates' Courts overlaps, the magistrate will need to decide whether to try the case or conduct a preliminary inquiry to determine whether there should be a committal for trial in the High Court: CPC SI s 207; Ki/Tu s 205. A case can also move to a preliminary inquiry on application by the prosecutor. However, most cases will be handled by summary trials unless they are within the exclusive jurisdiction of the High Court.

Classification of offences

18.10 Some jurisdictions classify offences as 'indictable offences' or 'summary offences'. An 'indictable offence' simply means an offence triable in a superior court. The expression 'indictable' relates to the historical use of the term 'indictment' to describe a charge before a superior court. Summary offences are triable by magistrates. This terminology is not used in the legislation of Solomon Islands, Kiribati and Tuvalu. These jurisdictions do classify offences triable in the High Court as 'felonies' (more serious) or 'misdemeanours' (less serious): see **2.4**-**2.6**. However, the trial process is the same for both categories of offence.

Proceedings before trial

18.11 Any accused person will initially appear before a magistrate for a determination of

how the case is to be tried and whether release on bail should be granted to an accused who is in custody.

18.12 In common law jurisdictions, the historical practice has been for a magistrate to conduct a 'preliminary inquiry' (or 'committal proceeding') into the sufficiency of the prosecution's evidence before a case is transferred to a superior court. Many jurisdictions have moved to dispense with this step. Nevertheless, it is still generally a requirement in Solomon Islands, Kiribati and Tuvalu: CPC SI s 210; Ki/Tu s 207. The process protects the accused and saves the criminal justice system the expense of a trial which is foredoomed to failure.

18.13 Evidence sufficient to put the accused to trial is some evidence on, or providing a basis for an inference about, each of the elements of the offence for which the accused will be committed. There need not be evidence which proves the case, but there must be evidence which discharges the prosecution's evidentiary burden. This test is similar to that made during a trial that there is no case to answer: see **18.25**. The credibility of the prosecution's witnesses is not, however, a matter to be considered in deciding whether or not to commit for trial. Credibility is ultimately a matter to be assessed at the trial itself.

18.14 There are two forms of preliminary inquiry: short form and long form: CPC SI s 211-212; Ki/Tu s 208-209.

- A short form inquiry is essentially a paper inquiry, conducted mainly through scrutiny of witness statements and any exhibits the prosecution intends to produce at trial: CPC SI s 211; Ki/Tu s 208. This form of inquiry will be conducted if it appears appropriate to the magistrate to do so and the accused has not made application to the contrary.
- A long form inquiry is a mini-trial, in which witnesses make depositions in person and the accused can ask questions: CPC SI s 212; Ki/Tu s 209. An accused can also present their own witnesses: SI s 216; Ki/Tu s 214.

18.15 The prosecution is ordinarily expected to present its full case at the inquiry and not to hold anything back: *R v Basha* (1989) 39 A Crim R 337. There may, however, be special circumstances in which it is proper to refrain from calling a witness who will be used at trial. For example, in *Basha*, one witness was an undercover police officer who was still undercover at the time of the committal proceedings. In addition, new evidence may become available to the prosecution during the period between the committal or preliminary hearing and the trial. In such cases, the prosecution must give the accused reasonable notice of the intention to call the witness: SI s 264; Ki/Tu s 251. Alternatively, the DPP (SI) or AG (Ki/Tu) can require the original Magistrates' Court to receive an

additional deposition: CPC SI/Ki/Tu s 230.

18.16 At the end of the inquiry, a magistrate has these options:

- Discharge the accused if the evidence is insufficient for a trial. A discharge is not an acquittal, so it is not a bar to a subsequent charge and further proceedings: CPC SI s 212; Ki/Tu s 209.
- Commit the accused for trial in the High Court for the offence charged: SI s 219; Ki/Tu s 218.
- Discharge the accused as to the offence charged but commit for trial on any other offence disclosed on the evidence: CPC SI s 212; Ki/Tu s 209.

18.17 There are ways for the prosecution to proceed to trial despite a discharge at a preliminary inquiry.

- The DPP (SI) or AG (Ki/Tu) may present a record of the proceedings at the preliminary inquiry to a High Court Judge and apply for an order for committal for trial: CPC SI s 218; Ki/Tu s 217.
- The DPP or AG may also bypass any further preliminary process in the courts and file an information on which a trial can proceed: SI s 233; Ki/Tu s 232.

18.18 Before a trial commences in the High Court, pre-trial hearings before a judge may be conducted to improve case management by clarifying the triable issues, confirming the charges, ascertaining the plea to be made by the accused, determining that length of the trial and exploring how its hearing may be facilitated, and by other measures to enhance efficiency.

Proceedings at trial

18.19 The accused must ordinarily be present throughout a trial in the High Court. Evidence can generally be taken only in the presence of the accused: CPC SI/Ki/Tu s 179. However, proceedings for some minor offences in a Magistrates' Court can take place in the absence of the accused.

- The Codes SI/Ki/Tu s 86 authorise a magistrate to dispense with the personal attendance of an accused where the offence is punishable just by fine or by fine and imprisonment not exceeding three months and the accused pleads guilty in writing or appears by a lawyer.
- Moreover, a magistrate can sometimes proceed to hear and determine a case

even without a guilty plea. For offences punishable by imprisonment for no more than six months and/or a fine, the Codes authorise a magistrate to hear and determine a case in the absence of the accused if a summons has been served a reasonable time beforehand and the accused was given notice that the case might be proceeded with despite his or her absence: CPC SI s 188; Ki/Tu s 186. A conviction may subsequently be set aside if the absence was due to causes beyond the control of the accused and the accused had a probable defence: SI s 193; Ki/Tu s 191.

18.20 The basic order of trial proceedings is similar in a Magistrates' Court and in the High Court.

- Proceedings begin with the accused being called upon to plead guilty or not guilty to the charge: CPC SI ss 195(1), 250(1); Ki/Tu ss 193(1), 240(1). The accused may also plead not guilty of the offence charged but guilty of a lesser offence included in the charge. For example, the accused may plead not guilty of murder but guilty of manslaughter or not guilty of robbery but guilty of theft. The prosecutor can then decide whether to accept the plea or to proceed on the original charge.
- If the accused refuses to plead, a plea of not guilty is entered: SI ss 195(4), 256; Ki/Tu ss 193(4), 246.
- In the event of a guilty plea, the proceedings will switch from trial to sentencing. This switch may also occur during the course of a trial, if the accused later indicates a wish to change the plea to guilty.
- Before any evidence is presented, prosecuting counsel is entitled to address the court to explain the nature of the case against the accused: SI s 200(1), 263, 265; Ki/Tu ss 198(1), 250. The evidence for the prosecution is then presented and witnesses may be cross-examined by the defence: SI ss 196, 263; Ki/Tus s 194, 250, 252. Following cross-examination, the prosecutor may re-examine a witness.
- At the end of the prosecution case, the court considers whether there is sufficient evidence to support the charge. If the court considers that there is sufficient evidence, the accused is asked if evidence will be presented for the defence, or if the accused wishes to make an unsworn statement: SI ss 198(1), 269; Ki/Tu ss 196(1), 257.
- If evidence is to be given for the accused, defence counsel may make an opening statement: SI ss 200(1), 270; Ki/Tu ss 198(1), 257. Following presentation of the evidence, prosecuting counsel has the right to cross-examination and defence counsel the right to re-examination. If the defence evidence introduces new matters which the prosecutor could not have been foreseen, the prosecutor may be permitted to adduce evidence in reply: SI ss 199, 272; Ki/Tu ss 197, 259.

- If there is no evidence for the defence or if the only evidence is that of the accused, the prosecutor sums up first and defence counsel has the last word: SI ss 143, 200(2), 274; Ki/Tu ss 143, 198(2), 261. In Solomon Islands, the position is the same if there is additional evidence for the defence: SI ss 200(2), 273. However, in Kiribati and Tuvalu, the presentation of additional defence evidence gives the prosecutor the right to make the last address: Ki/Tu ss 198(2), 260.
- The magistrate or judge then renders a verdict and, if the accused is convicted, proceeds to sentencing: SI ss 203, 275(2)-(3); Ki/Tu ss 201, 262.
- Arguments from counsel may be heard at the sentencing stage. Moreover, in the High Court, additional evidence may be received: SI s 282; Ki/Tu s 269.

In a trial with assessors in the High Court, following the closing addresses by counsel, the judge would sum up the case for the assessors and seek their opinions: SI s 275(1); Ki/Tu s 262(1).

Evidence

18.21 The present text does not cover the complex body of rules governing the admissibility of evidence in criminal trials. The only part of the law of criminal evidence that is examined is the law respecting the exclusion of evidence on the ground that it was wrongfully obtained: see **16.12**-**16.28**.

18.22 Adjudicators must pay attention to the evidence. In *Cesan v R* (2008) 236 CLR 358; [2008] HCA 52, the High Court of Australia quashed convictions in a case where the trial judge had been asleep during significant parts of the trial. The court focused on evidence that the judge's behaviour had repeatedly distracted the jury from paying attention when evidence was presented. In a judge-alone trial, any conviction would be difficult to sustain if the judge had periodically fallen asleep.

No case to answer

18.23 The case for the prosecution must discharge an evidential burden with respect to all elements of the offence unless there is some provision relieving the prosecution of some part of this burden: see **2.23**-**2.24** on evidential burdens. At the end of the evidence for the prosecution, defence counsel might submit that the evidential burden on some matter has not been discharged and that there is, therefore, no case to answer. If this submission is successful the accused will be acquitted without being called upon to

present any evidence in his or her defence: CPC SI ss 197, 269(1); Ki/Tu ss 195, 256(1). This can avoid exposing the accused to cross-examination. It can also give defence counsel the advantage of the last word in summing up: see above, **18.20**.

18.24 If the 'no case' submission fails, the defence may still elect not to call any evidence and argue that the evidence for the prosecution does not satisfy the burden of proof. This is because the prosecution can discharge the evidential burden (that is, the burden to adduce some evidence) and yet fail to provide sufficiently strong evidence to prove the case beyond reasonable doubt.

18.25 In deciding whether the prosecution has discharged its evidential burden, the issue is whether there is evidence capable of supporting a conviction in the sense that, if the evidence is accepted, the offence would be established: This is the same test as that used for the decision to charge (see **17.4**) and the decision to commit an accused for trial in the High Court see **18.13**. The judge does not weigh the strength of the evidence at this stage. In *R v Tome* [2004] SBCA 13 at [6], it was said:

> The test called for by s 269(1) is whether or not there is 'no evidence that the accused committed the offence.' That must mean that if there is some evidence that the accused committed the offence the case must proceed to final determination by the tribunal of fact.

In *Doney v R* (1990) 171 CLR 207; [1990] HCA 51 at [17], it was said:

> [I]f there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.

This test has been endorsed in a series of decisions of the Solomon Islands Court of Appeal: see *R v Tome* [2004] SBCA 13 at [7]; *Bosamete v R* [2013] SBCA at [17]-[20]; *R v Saefafia* [2019] SBCA 6 at [27]. Moreover, established doctrine holds that it is even immaterial that the judge believes that the Court of Appeal, on an appeal against conviction, would hold that a guilty verdict was not reasonably open: *R v Ferguson* [2008] QCA 227; 186 A Crim R 483, [60]-[61]. However, the merits of this tolerant approach were questioned by some of the judges of the High Court of Australia in *Antoun v R* (2006) 224 ALR 51; [2006] HCA 2, Callinan J at [86] note 74, Heydon J at [91].

18.26 With respect to defences, the judge will have to decide whether any evidential burden carried by the accused has been discharged: see **2.23 – 2.24**. However, it has been

said that a judge should be generous to the accused in deciding what is in issue. See, for example, *Buttigieg v R* (1993) 69 A Crim R 21 at 36: 'if there is any possibility that the issue might be left to the jury, it is best that the trial judge should let it go'.

Reasons for verdict

18.27 Following a defended trial, reasons must be given for a judgment and explained in open court: CPC SI s 150(1); Ki/Tu s 149)1). This can happen at the end of the trial or at some subsequent time. The judgment must contain the point or points for determination, the decision and the reasons for decision; it must also be written, and dated and signed by the judge or magistrate in open court at the time of pronouncing it: CPC SI s 151(1); Ki/Tu s 150(1). However, reasons need not be given when the accused has pleaded guilty.

18.28 Reasons need not be elaborate or lengthy or deal with everything taken into account: *Swanson v Public Prosecutor* [1998] VUCA 9. General principles were formulated by the New Zealand Court of Appeal in *R v Connell* [1985] NZLR 233 at 237:

> In practice, if the reasons are of some length it has sometimes been found fairest to announce the verdict at the outset. There can be no invariable rule; the Judge will wish to take into account the implications case by case. If necessary the reasons can be delivered later in writing, although preferably they should be given with the verdict.
>
> Only in most exceptional cases, if ever, is it likely to be consistent with the judicial role in trying an indictment to give no reasons for the verdict. If the verdict is not guilty, however, occasionally a very brief statement of reasons is best. In other cases, whether the verdict is guilty or not guilty, it is obviously impossible to work out a formula covering all circumstances. But in general no more can be required than a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

Language

18.29 English is specified as the general language of proceedings in the High Court of Solomon Islands, Kiribati and Tuvalu: CPC SI s 183; Ki s 181(2); Tu s 181. In Solomon Islands and Tuvalu, English is also the language of Magistrates' Courts: CPC SI s 183; Tu s 181. However, in Kiribati, it is such language as the Chief Justice may prescribe, with Gilbertese in default: CPC Ki s 181(1).

18.30 The Constitutions require the nature of a charge to be communicated to an accused in a language that is understood: SI/Ki s 10(2)(b); Tu s 22(3)(b). In addition, the Constitutions guarantee the assistance of an interpreter without payment if the accused cannot understand the language of the trial: SI/Ki s 10(2)(f); Tu s 22(3)(g).

Trial delay

18.31 Delay is bringing a case to trial is common in all jurisdictions and can occur for a variety of reasons, including the complexities of case preparation, the pressures of case-flow, and under-resourcing of prosecution services or court services. The passage of time before trial can create evidential prejudice for either the prosecution or the accused if, for example, a potential witness has died or evidence has been lost or destroyed. Where the accused has suffered disadvantage, the right to a fair trial may be undermined. In addition, trial delay can be oppressive for an accused, causing psychological distress and impacting on domestic relationships and employment.

18.32 The common law does not recognise any general right to be tried within a reasonable time, although a court can order a stay of proceedings when trial delay has caused evidential prejudice: see *Jago v District Court of New South Wales* (1989) 168 CLR 23; [1989] HCA 46; *Walton v Gardiner* (1993) 177 CLR 378; [1993] HCA 77.

18.33 In Solomon Islands, Kiribati and Tuvalu, the common law has been superseded by a constitutional right to be tried within a reasonable time. The Constitutions provide that every person charged with an offence has the right to a fair hearing 'within a reasonable time': SI/Ki s 10(1); Tu s 22(2). In *DPP v Kamisi* [1991] SBCA 6, it was held that the relevant period for the constitutional right to a hearing within a reasonable time starts when the person is charged: see **17.36**. Earlier delay is immaterial. Potential remedies for breach of the constitutional right include a court order for expedition of the trial and, conceivably, a stay of proceedings if there has been evidential prejudice.

18.34 What is reasonable is a matter for the court to determine in light of all the circumstances. In *Robu v R* [2006] SBCA 14 [17], it was said:

> Factors to be taken into account in determining whether a defendant has been afforded a fair hearing within a reasonable time include the length of the delay; the reason for the delay; the defendant's assertion of his right; and any prejudice to the defence.

In *Seru v State* [2003] FJCA 26, it was accepted by the Fiji Court of Appeal that delays approaching a certain threshold might be regard as 'presumptively prejudicial'. Yet the court did not identify any threshold(s). Moreover, the Criminal Procedure Codes do not provide any guidance.

Legal representation

18.35 In order to ensure a fair trial, the accused may need to be represented by counsel. There are two reasons for this:

- the accused may not have sufficient legal knowledge and skills for an effective defence; and
- the accused may not be in a position to make dispassionate decisions about how best to conduct the case for the defence.

18.36 When an accused is legally represented, submissions by counsel are taken to be submissions by the accused herself or himself. In *Unrinmal v Public Prosecutor* [2013] VUCA 23 at 45, the Vanuatu Court of Appeal said:

> It is fundamental to the way in which Court proceedings are conducted that when parties choose to employ a lawyer to represent them, that lawyer speaks for them and for all intents and purposes is them when the lawyer speaks in Court in their presence on their behalf. This is the way in which the business of the Court is conducted, and essential to its proper operation.

In that case, the Court rejected the proposition that counsel's consent to a prosecution without a preliminary enquiry did not mean that the accused had consented.

18.37 The Constitutions SI/Ki s 10(2)(d); Tu s 22(3)(e) provide that every person charged with an offence has the right:

> to defend himself before the court in person or, at his or her own expense, by a legal representative of his own choice;

An accused person therefore has a constitutional right to use a legal representative: this is affirmed in the Criminal Procedure Codes SI s 178; Ki/Tu s 176. However, a distinction needs to be drawn between a right to use counsel and a right to have counsel provided at public expense. The Solomon Islands Constitution s 92 establishes the office of a Public Solicitor whose functions include 'to provide legal aid, advice and assistance to any person in need who has been charged with a criminal offence'. There are no equivalent provisions in the Constitutions of Kiribati and Tuvalu. However, all three jurisdictions have legislation establishing agencies which provide legal aid on the basis of financial need: in Solomon Islands, the Public Solicitor Act; in Kiribati, the Public Legal Services Act 2018; in Tuvalu, the People's Lawyer Act.

18.38 There is also a supplementary right to legal representation at common law. In *Dietrich v R* (1992) CLR 292; [1992] HCA 57, the High Court of Australia held that an indigent accused has a common law entitlement to have counsel provided for a trial of any serious offence. In the event that representation is unavailable, there may be a stay of proceedings. Several restrictive conditions are built into this principle:

- It applies only to 'serious' offences, particularly those where there is a threat of a sentence of imprisonment.
- The courts will intervene only to protect accused persons who are indigent. Persons who can finance their own legal representation are expected to do so unless the state grants them legal aid.
- The lack of representation must not be due to the fault of the accused person. A person who makes no effort to secure legal aid cannot rely on the *Dietrich* principle. This does not mean, however, that any degree of fault will automatically exclude a stay. The overall reasonableness of the accused's conduct must be considered and unwise decisions at some stages may not be fatal to the accused's claim.

18.39 The question of whether fairness demands any particular level or quality of representation was examined in the Australian case of *Attorney-General (NSW) v Milat* (1995) 37 NSWLR 370. The accused in *Milat* was receiving legal aid but was dissatisfied with its amount in comparison with the resources available to the prosecution. The New South Wales Court of Criminal Appeal appeared to accept that cases might occur in which the representation available to an accused would be manifestly inadequate, in which event the accused would be regarded as effectively unrepresented. Beyond that, however, the court was not willing to contemplate reviewing the level or quality of representation available to an accused. Similarly, in *R v Gudgeon* [1995] QCA 506, the Queensland Court of Appeal rejected an argument that the accused needed senior rather than junior counsel.

18.40 Decisions such as *Milat* and *Gudgeon* also bear upon the issue of when an accused can claim insufficient means to engage a legal practitioner and therefore have one provided by the State. An accused who can afford some level of competent representation, but not the preferred level, is not indigent.

The right to a fair trial

18.41 The Constitutions SI/Ki s 10(1); Tu s 22(2) provide that any person charged with a criminal offence 'shall be afforded a fair hearing'. This reflects the fundament right to a fair trial at common law. Any trial carries a risk of producing the wrong result — either the acquittal of a guilty person or the conviction of an innocent person. A fair trial must minimise these risks. From the standpoint of the accused, a fair trial must minimise the risk of a wrongful conviction. An accused's right to a fair trial incorporates a right to appropriate protections against this risk.

18.42 Principles of fairness underlie many of the traditional features of criminal trials such as the rules on the burden of proof and on the admissibility of different forms of evidence. The High Court of Australia has also emphasised that conceptions of fairness can change, so that the content of the right to a fair trial is subject to further development: see *McKinney v R* (1991) 171 CLR 468 at 478; [1991] HCA 6. In modern times, a number of matters have attracted the attention of the legislators or courts of various jurisdictions. They include several matters already discussed:

- interpreters: see above, **18.30**.
- the potential for trial delay to damage the capacity to make a defence or to cause oppression: see above, **18.31-18.34**.
- legal representation: see above, **18.35-18.40**.

18.43 There are some additional aspects of trial fairness which could be enforced through the general guarantee of a fair hearing in the Constitutions SI/Ki s 10(1); Tu s 22(2). These include:

- prior notice to the accused of the prosecution's case and disclosure of any material which could be relevant to the defence;
- prosecutorial restraint;
- judicial impartiality;
- protections against potentially prejudicial publicity.

These are discussed below.

Disclosure

18.44 A trial cannot be fair unless an accused has a reasonable opportunity to know the prosecution case in advance and prepare a response. The Constitutions of Solomon Islands and Kiribati provide that every person charged with an offence has the right to be informed of the nature of the offence charged: SI/Ki s 10(2)(b). The Tuvalu Constitution requires, more specifically, information on 'the precise nature and particulars of the offence charged': s 22(3)(e).

18.45 Fairness demands that an accused be informed of not only the particulars of the charge but the evidence bearing upon it. There may be occasions when the prosecution is justified in delaying the disclosure of evidence, for example if a witness may be put in danger, but generally all material should be disclosed in good time. The consequence of a breach of the prosecution disclosure requirements may be an adjournment of the trial or a temporary stay of the proceedings.

18.46 In modern times, common law principles have evolved that require the prosecution to disclose to the accused, in advance of the trial, any potential evidence in its possession whether or not it is to be introduced at trial. In particular, evidence that might assist the accused must be disclosed. A leading case is the decision of the Supreme Court of Canada in *R v. Stinchcombe*, [1991] 3 SCR 326 at 338-343, 1991 CanLII 45. Sopinka J said:

> In *R. v. C. (M.H.)* (1988), 1988 CanLII 3283 (BC CA), 46 C.C.C. (3d) 142 (B.C.C.A.), at p. 155, McEachern C.J.B.C. after a review of the authorities stated what I respectfully accept as a correct statement of the law. He said that: "there is a general duty on the part of the Crown to disclose all material it proposes to use at trial and especially all evidence which may assist the accused even if the Crown does not propose to adduce it"…
>
> As indicated earlier, however, 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… A discretion must also be exercised with respect to the relevance of information…
>
> The discretion of Crown counsel is, however, reviewable by the trial judge. Counsel for the defence can initiate a review when an issue arises with respect to the exercise of the Crown's discretion. On a review the Crown must justify its refusal to disclose. Inasmuch as disclosure of all relevant information is

> the general rule, the Crown must bring itself within an exception to that rule.
>
> The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege…
>
> With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.

18.47 To what extent should the prosecution be required to disclose material which has been gathered by investigators but does not appear to be particularly relevant? The answer is not clear-cut. On the one hand, it can be argued that the fruits of an investigation should be available to all parties in order to make their own assessment of relevance. On the other hand, it is sometimes argued that the defence must show a legitimate forensic purpose before a court will be justified in ordering that material is disclosed: *Western Australia v Christie* [2005] WASC 214; (2005) 30 WAR 514.

18.48 An accused is not generally required to disclose to the prosecution any evidence on which he or she will rely. In some other jurisdictions, a defendant is required to make advance disclosure of an alibi and provide details. This is no statutory requirement in Solomon Islands, Kiribati or Tuvalu but a judge or magistrate could adjourn the proceedings to allow the prosecution time to prepare a response.

Prosecutorial restraint

18.49 A trial is an adversarial process. Nevertheless, the role of the prosecutor has traditionally been conceived as being to seek the truth rather than to seek a conviction. Guideline 4.7 of the Solomon Islands *Prosecution Policy* (2009) states:

> A prosecutor must assist the court to find the truth based on the facts, evidence and law. A prosecutor must never seek to persuade a decision maker to a point of view by introducing bias or emotion against the accused.

18.50 A prosecutor is therefore under a duty to act fairly in conducting a prosecution: see,

for example, *Livermore v R* [2006] NSWCCA 334; 67 NSWLR 659; in particular, see the list of improper forms of conduct at [31]. The list includes emotive or intemperate language which might prejudice a jury (or assessors) against the accused or a witness favourable to the accused. The court in *Livermore* took particular objection to the prosecutor repeatedly referring to a witness as 'an idiot'. In *Libke v R*; (2007) 30 CLR 559; [2007] HCA 30, although the conviction was upheld by a majority, all members of the High Court of Australia condemned sarcastic comments made by the prosecutor in cross-examining the accused. Particular objection was taken at [41] and [82] to the prosecutor inappropriately aligning himself with the prosecution's case by expressing a personal opinion of the accused's evidence.

Judicial impartiality

18.51 A judge must display impartiality. An 'impartial court' is included among the rights conferred on a person charged with an offence.by the Constitutions SI/Ki s 10(1); Tu s 22(2).

18.52 For an example of the appearance of judicial partiality, see *Antoun v R* (2006) 224 ALR 51; [2006] HCA 2 In that case, the High Court of Australia quashed a conviction when the trial judge had peremptorily dismissed a submission that there was 'no case to answer' before hearing what counsel had to say on the matter.

18.53 Judicial interventions in counsel's conduct of a case, particularly the examination of witnesses, can generate claims of partiality. In *Natei v R* [2013] SBCA14, it was said:

> [28] It is easy to appreciate the reasons for the complaint. The transcript records frequent interruptions of counsel's examination of the witnesses and a tendency more than once effectively to take over the examination for a short while.
>
> [29] Any judge is entitled to ask questions of a witness. In any trial it will almost inevitably be necessary occasionally to clarify an answer from a witness. It may be necessary to ask a series of questions. Any fair-minded observer will see the reason for such questions and will accept that they are asked to assist the judge in understanding the case properly and conducting a fair trial.
>
> [30] However, should the interventions become too frequent or appear to be taking over counsel's role they may be interpreted by the parties or an observer as demonstrating partiality by the judge. Every judge knows that counsel is acting

under his lay client's instructions and must put the case according to those instructions and frequent interruptions may lead counsel and possibly also his client to feel that the judge does not agree with counsel's conduct of the case or may disturb his train of thought sufficiently to hinder the manner in which he conducts his case.

[31] This issue was considered and guidelines suggested in the *Galea case* [*Galea v Galea* [1990] NSWLR 263] at 281 which include:

> 'The test to be applied in is whether the excessive judicial questioning or pejorative comments have created a real danger that the trial was unfair. If so the judgement must be set aside. ...
>
> Where a complaint is made of excessive questioning or inappropriate comment, the appellate court must consider whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and into the perils of self persuasion. The decision on whether the point of unfairness and been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. It is important to draw distinction between intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion…'

In *Natei,* the judge's interventions were described as 'unfortunate' but it was held that they would not raise a real possibility of bias.

18.54 A judicial officer must not only display impartiality but also offer an assurance of being impartial. Hence, a judicial officer should disqualify ('recuse') themself if they have a personal interest in a case or a connection with one of the parties which might influence their judgment. Solomon Islands, Kiribati and Tuvalu have all adopted codes of judicial conduct. The Kiribati *Code of Conduct for Judicial Officers* (2011) provides:

> 2.3 A Judicial Officer should not sit and hear a case that would give him or his family benefits. This applies whether the benefit is direct or indirect and includes money, lands and any other benefit.
> 2.4 A Judicial Officer should not hear a case which involves a close family member, close friend, or workmate

> 2.5 If he feels [or] think his decision would be affected, or appear to be affected a Judicial Officer should not sit and hear a case. He or she should withdraw and let another Judicial Officer hear the case
> 2.6 A Judicial Officer should not recuse him or her self merely because he or she knows a person involved in the case. In a small community it is inevitable that the Judicial Officers will know the people.

See also the also the Solomon Islands *Code of Conduct for Judicial Officers* (2008) 2.1-2.5 and the Tuvalu *Code of Judicial Conduct* (2011) 2.1-2.11.

18.55 The Vanuatu Court of Appeal in *Mass (trading as Raw For Beauty) v Western Pacific Cattle Co Ltd* [2021] VUCA 32 at [26] summarised the test for apprehended bias in this way:

> The test for apprehended bias has various formulations in overseas jurisdictions. They can be summarised as requiring a determination of whether a fully informed fair minded observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the questions which the Court is required to decide.

Prejudicial publicity

18.56 There is a public interest in the reporting of crime and criminal investigations. Yet publicity about a case, either before or during a trial, can include information or expressions of opinion which would not be admissible in evidence. This could prejudice adjudicators, diverting them from the need to consider only the evidence adduced at the trial itself. The concern has mainly been about the effect on lay actors such as assessors and members of juries. There is conceivably a similar risk with respect to judges and magistrates. Traditionally, however, courts have been prepared to assume that judicial officers can insulate themselves from the effects of immaterial information. Reference has been made to 'the presumption of judicial impartiality': see, for example, *Chaudhary v State* [2010] FJHC 531 at [16].

18.57 In a jury trial, the standard response to the problem of prejudicial publicity is for the judge to warn the jury that any preconceptions about the case must be set aside: *Dupas v The Queen* (2010) 241 CLR 237; [2010] HCA 20. In a judge-alone trial, a self-warning might be appropriate.

18.58 What is required by way of warning will depend on the extent and nature of the

publicity. In *R v Long; Ex parte A-G (Qld)* [2003] QCA 77; 138 A Crim R 103, there had been extensive media publicity about the accused before he was arrested for murder. The reports included details of his criminal history and anti-social conduct, coupled with damning opinions from his former de facto partner. In the Queensland Court of Appeal, the media reporting was described as a 'frenzy of defamation' and it was said that it would be 'difficult … to conceive of publicity more prejudicial'. The trial began 20 months after a publication which was the subject of particular complaint. A permanent stay of proceedings was sought but denied by the trial judge. Instead, the judge sought to counter the publicity by way of three sets of warnings to the jury: at the start of the trial and at the beginning and end of the summing up. The Court of Appeal approved of this course of action.

18.59 The proceedings can also be adjourned to a later date or shifted to a different venue. As a last resort, there could even be a permanent stay of proceedings though this would, require extreme circumstances. See the discussion in *Dupas v R* (2010) 241 CLR 237; [2010] HCA 20.