CHAPTER 2

OFFENCES AND THEIR PROOF

2.1 This chapter examines geographical jurisdiction over criminal offences, the general conditions of criminal liability, and the law respecting the burden of proof.

Geographical Jurisdiction

2.2 The Penal Codes of Solomon Islands, Kiribati and Tuvalu only claim geographical jurisdiction for their courts over conduct occurring in the countries themselves or connected with them in certain specific ways. Section 5 of the Penal Codes establishes jurisdiction over conduct occurring anywhere within the territorial boundaries of the countries, which would include their territorial seas and air space. Presumably it would also encompass the consequences of conduct initiated elsewhere: for example, a fraud effected by mail or telephone from another country. In addition, s 6 provides that, where an act would be an offence if wholly committed within the jurisdiction, every person doing a part of the act within the jurisdiction may be tried and punished as if the act had been done wholly within the jurisdiction. This would apply, for example, to a complex fraud involving multiple misrepresentations, some occurring within the jurisdiction and some occurring elsewhere. The participant within the jurisdiction can be held liable, apparently even if the victim was elsewhere. However, the participant from outside apparently escapes liability.

2.3 There are as yet no instances of 'universal jurisdiction' in Solomon Islands, Kiribati and Tuvalu. 'Universal jurisdiction' occurs where a person can commit an offence under the law of a jurisdiction even if the conduct occurred wholly elsewhere and there were no results in the jurisdiction. See, for example, the Fiji Crimes Act Part 12, which is titled 'Offences against the International Order': genocide and crimes against humanity (s 99); offences relating to slavery, sexual servitude and deceptive recruiting for sexual services (s 105); offences relating to trafficking in people and debt bondage (s 120). Universal jurisdiction enables Fiji to prosecute its citizens and residents for their conduct when elsewhere. It also enables Fiji to prosecute persons who have come to Fiji for their conduct elsewhere. However, the geographical jurisdiction of the courts of Solomon Islands, Kiribati and Tuvalu, has not been extended in this way.

Felonies and misdemeanours

2.4 In the history of the common law, a distinction was drawn between more serious offences called 'felonies' and less serious defences called 'misdemeanours', with various consequences attaching to the classification. This distinction has become less important over time and has been abolished in many jurisdictions. It is retained in the Penal Codes but is significant in only a few instances.

2.5 Under the definitions in SI/Ki/Tu s 4:

> "felony" means an offence which is declared by law to be a felony or, if not declared to be a misdemeanour, is punishable, without proof of previous conviction, with imprisonment for three years or more;
>
> "misdemeanour" means any offence which is not a felony;

Felonies include murder, manslaughter, unlawfully causing grievous harm, rape, robbery, offences relating to breaking and entering, most but not all forms of theft, and arson. Misdemeanours include common assault, assault occasioning bodily harm, unlawful wounding, and malicious damage to property other than by arson. Most offences of sexual coercion and exploitation have traditionally been designated felonies. The distinction between the two classes of offences was not incorporated when offences of sexual coercion and exploitation in Solomon Islands were reformed through the Penal Code (Amendment) (Sexual Offences) Act 2016. However, these offences are all felonies because of their penalty provisions.

2.6 Instances in which the distinction between felonies and misdemeanours are still relevant include:

- the offence of 'neglect of felony': SI s 382; Ki/Tu s 375. Under these provisions, it is an offence to know that a felony is being planned or committed and to fail to try to prevent it: see **3.2**;
- offences under SI ss 297-302; Ki/Tu s 290-295 relating to the commission or intended commission of offences in buildings: see **8.38**. These offences are restricted to the commission of offences classified as 'felonies';
- penal liability for inchoate offences such as attempts and conspiracy. Separate provision is made for the punishment of felonies and misdemeanours: see **13.1**;
- the law of police powers. Some powers can only be exercised with respect to felonies: see, for example, PPDA Ki ss 108-109; Tu ss 122-123 on the power to

detain and question a person arrested for a felony for a period of time before taking them before a court.

Conduct elements and fault elements

2.7 An offence consists of conduct elements and fault elements. Some alternative expressions are physical elements and mental elements. In the common law world, the Latin terms *actus reus* and *mens rea* have traditionally been used to describe these two types of elements, although less commonly in those jurisdictions like Solomon Islands, Kiribati and Tuvalu, which have inherited versions of the Griffith Code.

2.8 'Conduct elements' refers to the conduct that is prohibited: for example, causing the death of another person in the offence of murder; taking or converting the property of another person in the offence of theft. Distinctions can be drawn between three kinds of conduct elements:

(a) conduct in the narrow sense of an act or an omission to perform an act such as shooting a gun or strangling a person in the offence of murder; or a state of affairs – such as controlling a substance in the offence of possessing drugs;

(b) a result of conduct – such as causing death in the offence of murder;

(c) a circumstance in which conduct, or a result of conduct, occurs – for example, lack of consent in the offence of rape.

Some general issues respecting conduct elements are discussed in **Chapter 3**.

2.9 An offence can comprise a number of conduct elements of different types. Thus rape is committed when a person (state of affairs) sexually penetrates (act) another person (state of affairs) without the consent of the other person (circumstance): SI ss 136D, 136F; Ki/Tu s 128. Assault causing actual bodily harm is committed when a person (state of affairs) applies force (act) to another person (state of affairs) and causes bodily harm (result): SI s 245; Ki/Tu s 238.

2.10 Conduct elements may be committed accidentally or in a way which makes a person blameworthy. 'Fault elements' refers to the additional, blameworthy ingredients required to make a person criminally liable for serious offences. Different offences can have different fault elements, for example:

- 'malice aforethought' in the offence of murder: SI ss 200, 201; Ki/Tu ss 193, 195;
- 'rash or negligent' endangerment of persons: SI 237; Ki/Tu s 230;
- 'with intent to' permanently deprive the other person in the offence of theft: SI s 258(1); Ki/Tu s 251(1);

- ‘reckless’ as to lack of consent in relation to rape and other sexual offences: SI s 136E;
- ‘knowing’ in the offences of receiving and obtaining by false pretences: SI ss 307-308, 313; Ki/Tu ss 300-301, 306;
- ‘wilfully’ in the offences of arson and malicious damage to property: SI ss 320, 326; Ki/Tu ss 312, 319.

The different kinds of fault elements are discussed further in **Chapter 4**.

2.11 Any fault elements must be express in the Penal Codes. The Codes were designed as comprehensive statements of the law of criminal responsibility, avoiding any need to ‘read in’ fault elements from the common law as would be done with the criminal statutes of some other jurisdictions. In the Western Australia case of *Hayman v Cartwright* [2018] WASCA 116, [66], it was said:

> The common law doctrine of mens rea has no application to the Code. Rather, the elements of an offence (including any mental element) are determined solely by the provisions of the Code.

Nevertheless, the common law may be used in the interpretation of concepts such as intent and wilfulnesss.

2.12 The conduct and fault elements of an offence must generally coincide. This means that the fault elements must be present when the conduct elements occur. An offence is not committed because a person forms an intention to commit an offence at one moment in time and then later accidentally happens to commit its conduct elements. For example, it Is not murder to form an intention to kill someone and then to accidentally kill them in a vehicle accident.

2.13 Some offences or particular conduct elements of offences do not have corresponding fault elements. For example, there is no fault element prescribed for assault in SI s 244; Ki/Tu s 237 or assault causing bodily harm in SI s 245; Ki/Tu s 238. Moreover, some current Australian authority holds that no fault element is to be implied: see *Hayman v Cartwright* [2018] WASCA 116. The flaws in this decision will be examined in **6.18 – 6.21**. However, even if it is correct, this does not mean that the offence can be committed without any fault. Under the Penal Codes s 9(1), there is a general defence of accident which can be available where contact was unforeseeable. Moreover, under s 10(1), there is a general defence of reasonable mistake of fact which can be available where there was a belief that the contact was consensual. It is a distinctive feature of the Penal Codes that general defences do the work of protecting morally innocent persons that under some other criminal statutes is done by fault elements.

2.14 Under the Penal Codes, a mistake of fact relating to an element of any offence may give rise to a defence under s 10(1), unless by virtue of s 10(2) the defence has been expressly or impliedly excluded. In contrast, at common law, offences or parts of offences which lack a fault element are of two types: strict liability and absolute liability.

- For strict liability, even though there is no fault element, a defence of reasonable mistake of fact may be available.
- For absolute liability, however, a defence of mistake of fact is unavailable.

This distinction is not made in the Penal Codes: see *Bartlett v R* [2011] SBCA 25.

General defences

2.15 Even where the elements of an offence are present, criminal liability may be negated by the existence of a general defence such as lack of will, accident, reasonable mistake of fact, self-defence, duress, or insanity. The Penal Codes provide for a range of such defences, using the formula, 'A person is not criminally responsible for…'. They fall into two groups.

2.16 Some defences deny responsibility for the conduct — for example:

- lack of will: SI/Ki/Tu s 9;
- accident: SI/Ki/Tu s 9;
- mistake of fact: SI/Ki/Tu s 10;
- insanity: SI/Ki/Tu s 12.

2.17 Other defences claim the conduct occurred in special circumstances that justify or excuse it. Examples of contextual defences are:

- compulsion: SI/Ki/Tu s 16;
- defence of person or property: SI/Ki/Tu s 17;
- use of force to effect an arrest; SI/Ki/Tu s 18;
- medical emergency: SI s 234; Ki/Tu s 227.

Such defences are based on the *reason* or *motive* for engaging in the conduct. Codes SI/K/T s 9 third para expressly provides:

> Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act or to form an intention is immaterial so far as regards criminal responsibility.

Nevertheless, under special circumstances, a person's reasons or motive can negate

criminal responsibility by providing a special defence.

2.18 There are some gaps in the coverage of general defences under the Penal Codes, where no provision is made for certain defences recognised at common law or provision is made in terms which appear to assume the survival of the common law defence:

- Defence of persons or property is dealt with by merely stating that criminal responsibility 'shall be determined according to the principles of English common law': SI s 17; Ki/Tu s 17;
- Use of force to effect an arrest is not addressed directly. However, s 18 assumes the existence of such a defence by specifying factors to be taken into account in deciding whether the force used was necessary and reasonable;
- Use of force to correct or punish a child is not expressly established as a defence. However, the offence of cruelty to children includes a qualification that nothing in the section affects the right of certain persons to administer reasonable punishment: SI s 233(4); Ki/Tu s 226(4);
- 'Necessity' to prevent a worse harm occurring is not mentioned as a general defence, although specific provision is made for one of its most obvious applications - that of surgery to benefit a patient: SI s 234; Ki/Tu s 227.

2.19 It is unlikely that any *new* common-law defences of a general character could be recognised. For example, the courts of Solomon Islands, Kiribati and Tuvalu could not follow the United States Supreme Court in developing a substantive defence of entrapment: see *Sorrells v. United States*, 287 U.S 435, 77 L.Ed. 413 (U.S. S.C., 1932); *Sherman v. United States*, 356 U.S. 369, 2 L.Ed.2d 848, 78 S.Ct. 819 (U.S., 1958). On the other hand, it would still be possible for the courts of Solomon Islands, Kiribati and Tuvalu to follow Australia in fashioning procedural instead of substantive remedies for entrapment: see *Ridgeway v R* [1995] HCA 66; 184 CLR 19.

2.20 A distinction is drawn in some other jurisdictions between defences of justification (such as self-defence) and defences of excuse (such as duress or mental impairment). In those jurisdictions which do make this distinction, it is common for defences of justification to be expressed in the formula, 'It is lawful for…', whereas defences of excuse are expressed in the formula, 'A person is not criminally responsible for…'. Under the Penal Codes, however, all defences use the formula, 'A person is not criminally responsible for…'.

Persuasive and evidential burdens

2.21 The Penal Codes are silent on the general principles respecting the burden of proof. However, the Constitutions of Solomon Islands, Kiribati and Tuvalu, enshrine the presumption of innocence and the burden on the prosecution to prove its case: SI s 10(2)(a); Ki s 10(2)(a); Tu s 22(3)(a). They provide that every person charged with an offence has the right to be presumed innocent until proved guilty. See, for example, *Manai v R* [2019] SBCA 8 at [38]. In addition, the Solomon Islands Evidence Act 2009 s 12(1) states:

> In a criminal proceeding the court is not to find the case of the prosecution proved unless it is satisfied that it has been proved beyond reasonable doubt.

The sparse provisions in the Penal Codes respecting the burden of proof involve exceptions to these general principles.

2.22 The burden of proof with respect to some matter may be expressly reversed and placed on the defendant, but then the defendant need only discharge it on a balance of probabilities. The most famous instance of a reverse burden of proof is for the defence of 'insanity'. At common law and also under the Penal Codes, insanity must be proved: SI/Ki/Tu s 12.

2.23 In addition to proving all the elements of an offence, the prosecution is also required to disprove any defence that is in issue on the evidence. However, the burden to put a defence in issue lies with the defendant not the prosecution. In other words, the defendant has an evidential burden to put a defence in issue but, once there is some evidence to support the defence, the prosecution has the burden of disproving it. This does not mean that the defendant always has to introduce evidence of a defence, because it may already be present in the evidence for the prosecution. However, unless supporting evidence is already present, it will need to be introduced by the defendant before the defence can be considered.

2.24 An evidential burden in relation a defence is simply a burden to show that there is some evidence warranting the attention of the court on all elements of the defence. The evidence need not be convincing. An evidential burden is not a burden to prove anything, either beyond reasonable doubt or even on a balance of probabilities. Unfortunately, an evidential burden is sometimes called an 'evidential burden of proof'. References to proof are highly misleading and should be avoided.

Beyond Reasonable Doubt

2.25 The prosecution's burden of proof must be discharged 'beyond reasonable doubt' unless a different standard is specified. The standard of proof required to discharge the prosecution's burden to prove its case is different from the standard of proof that applies in civil cases. In civil proceedings, the burden is on the plaintiff to prove the case on 'a balance of probabilities'. A higher standard in criminal proceedings is justified by the severe sanctions which can follow a conviction. As Blackstone wrote in *Commentaries on the Laws of England, Vol I*, first published 1766: 'It is better that ten guilty persons escape than that one innocent suffer.'

2.26 The expression 'beyond reasonable doubt' is not defined in the Penal Codes. Moreover, there has been some judicial reluctance in the common law world to define it. The fear is that any qualification may dilute the strength of the message about the standard that the prosecution must meet. Phrases which have been held to water down the standard of beyond reasonable doubt include 'a feeling of comfortable satisfaction' (*Thomas* (1960) 102 CLR 584). In one case, objection was even taken to 'feeling sure': *Punj* (2002) 132 A Crim R 595 (QCA). A leading Australian judge has stated that 'it is a mistake to depart from the time-honoured formula. …The attempts to substitute other expressions, ... have never prospered. It is wise as well as proper to avoid such expressions': *Dawson v The Queen* (1961) 106 CLR 1 at 18, Sir Owen Dixon.

2.27 It can at least be said that the standard of 'beyond reasonable doubt' is a standard of certainty rather than likelihood, regardless of degrees of likelihood. However, this means virtual or practical certainty rather than absolute certainty: see *R v Dookhea* (2017) 347 ALR 429; [2017] HCA 36 at [29]-[37]. There can rarely be absolute certainty about anything in life. The certainty which is required in criminal law is certainty in the sense that the term is used in the conduct of everyday affairs. Hence, the Vanuatu Penal Code s 8(1) provides that 'the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous'. The law in all jurisdictions is the same.