CHAPTER 18

TRIAL PROCEEDINGS

Types of courts and judges

18.1 Vanuatu, like most common law jurisdictions, has two main levels of court in which criminal cases can be tried: (1) the Magistrates Court; (2) a superior court, called the 'Supreme Court' in Vanuatu. The Magistrates Court provides 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. Supreme Court judges must be qualified to practise as a lawyer in Vanuatu and generally need to be experienced legal practitioners: Constitution ss 47, 49. In contrast, magistrates need not be qualified as legal practitioners, though they do need some legal experience. The requirements for appointment as a Magistrate are that the person: (a) holds a degree in law from a recognised tertiary institution; or (b) has suitable legal training or experience: Judicial Services and Courts Act s 18(2). Senior Magistrates must have at least three years' experience as a Magistrate: s 18(5).

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 the government purse. Hence, Magistrate courts 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.

18.3 There is a third level of justice: Island Courts, with localised and severely limited jurisdiction and powers. These are staffed by 'lay' justices who generally lack legal qualifications.

Judges, juries and assessors

18.4 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 Vanuatu, 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 Supreme Court and in the 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 Vanuatu, a judge performs both roles.

18.5 The Judicial Services and Courts Act s 27(b) provides that the Supreme Court must be constituted by a judge sitting alone unless there is statutory provision to the contrary. This replaces an older arrangement whereby criminal matters in the Supreme Court were heard by a judge sitting with lay 'assessors'. Assessors were advisors to the judge, giving their opinions on factual matters but not deciding questions of guilt or innocence. They substituted for the common law system of trial by judge and jury. Provision for trial by judge and assessors is a widespread feature of superior courts systems in the Pacific region. In practice, however, assessors are now rarely if ever used anywhere and have been abolished in some jurisdictions, including Vanuatu. The Criminal Procedure Code still retains provisions on the appointment of assessors: ss 153-59. However, other Code provisions on the procedure for their involvement in trials have been repealed.

18.6 Magistrates also sit alone: Judicial Services and Courts Act s 13(1). However, Island Court judges sit in panels of three: Island Courts Act s 3(4).

Jurisdiction of courts

18.7 The Supreme Court has 'unlimited jurisdiction' in criminal matters (meaning that it can try any cases): Constitution s 48(1); Judicial Services and Courts Act s 28. The jurisdiction of the Magistrates Court depends on the grade of the presiding magistrate. The classification can determine what kind of cases can be tried and what level of punishment can be imposed:

- A 'Magistrate' has jurisdiction over offences with maximum penalties of up to 2 years' imprisonment (as specified in the offence description) and can impose a penalty up to that limit: Judicial Services and Courts Act s 14(2).

- A 'Senior Magistrate' has jurisdiction over offences with maximum penalties of up to 10 years but 'must not impose a sentence greater than imprisonment for 5 years': Judicial Services and Courts act s 14(4). Any greater sentence is available only to the Supreme Court.

These limits may be varied by the act creating the offence or by order of the Supreme Court: s 14(2), (6).

18.8 Most criminal proceedings commence in the Magistrates Court. Where the jurisdiction of the Supreme Court and the Magistrates Court overlap, the presiding Magistrate will need to decide whether to try the case or conduct a preliminary enquiry to determine whether there should be a committal for trial in the Supreme Court. Guideline 7.6 of the *Prosecution Guidelines for the Republic of Vanuatu* states:

> Prosecutors will consider the prosecutions position and advise the court at first mention whether they have formed the view as to whether the matter should be heard by the Supreme Court or the Magistrates Court. It is however, noted that the Public Prosecutors general position is that any offences involving children (as victims or offenders), sexual offences or domestic violence offences involving repeat offending or significant violence are more appropriately dealt with in the Supreme Court.

18.9 An Island Court has notional jurisdiction over 'all criminal charges and matters' within its territorial jurisdiction Islands Court Act s 7) but 'shall not 'impose a fine in excess of VT 24,999 or impose a sentence of imprisonment in excess of 6 months': s 11. In addition, each Island Court has limited territorial jurisdiction and can only try cases occurring within that jurisdiction.

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 Vanuatu legislation, although there are references in the Judicial Services and Courts Act to hearing and determining criminal proceedings 'in a summary way'.

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 enquiry' (or 'committal proceeding') into the sufficiency of the prosecution's evidence before a case is transferred to the Supreme Court. The process protects the accused and saves the criminal justice system the expense of a trial which is foredoomed to failure.

18.13 Some jurisdictions have moved to dispense altogether with preliminary enquiries. This has not happened in Vanuatu but routes for by-passing the procedure have been developed.

- The Criminal Procedure Code would still make preliminary enquiries essential for offences triable only in the Supreme Court. The Code s 143(1) states: 'Every offence triable only in the Supreme Court shall be the subject of a preliminary enquiry by a senior magistrate.
- However, the Public Prosecutor Act s 9(1)-(5) details circumstances when the Public Prosecutor can initiate a prosecution without a committal following a preliminary inquiry:
    - when the accused consents;
    - when a preliminary enquiry has been conducted but there has not been a committal for trial;
    - when there has been a committal for trial but the Prosecutor wishes to proceed on a different charge;
    - and in any other case where the Prosecutor considers it appropriate.

  Section 9(6) provides that these options apply 'despite any provision of Part 7 of the Criminal Procedure Code to the contrary'.

A charge in the Supreme Court without a committal has traditionally been called an '*ex officio indictment*'. This terminology is adopted in Guideline 8 of the Public Prosecutor's *Prosecution Guidelines for the Republic of Vanuatu*.

18.14 The procedure for a preliminary enquiry is flexible. The Criminal Procedure Code s 145 provides:

> (1) The senior magistrate shall not be bound to hold any formal hearing but shall consider the matter without delay in whatever manner and at whatever time or times as he shall consider fit…
> (3) The senior magistrate shall allow, but shall not require, the accused to make any statement or representation.

Some other jurisdictions have developed two separate two forms of preliminary enquiry, long form and short form:

- A long form enquiry is the traditional kind, with a mini-trial in which prosecution witnesses make depositions in person and the defence can ask questions and can also present its own witnesses.
- A short form enquiry is essentially a paper enquiry, conducted mainly through scrutiny of witness statements and any exhibits the prosecution intends to produce at trial.

Either form of enquiry would be permissible under the flexibility offered by s 145(1). However, in practice the short form enquiry is the norm in Vanuatu.

18.15 The test for committing an accused for trial is a 'prima facie' case. The Code s 145(2) provides:

> The senior magistrate shall decide whether the material presented to him discloses, if the same be not discredited, a prima facie case against the intended accused requiring that he be committed to the Supreme Court for trial upon information.

As was discussed in **17.5**, a 'prima facie case' means that there must be sufficient evidence on all elements of an offence to support a conviction. 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. Moreover, the credibility of the prosecution's witnesses is not a matter to be considered in deciding whether or not to commit for trial. Credibility is ultimately a matter to be assessed at trial. There must, however, be evidence that discharges the prosecution's evidential burden on the elements of the offence charged. In *Uyor v Public Prosecutor* [2018] VUCA 41, it was said:

> [12] It is no part of a Senior Magistrate's function to decide whether he or she would be satisfied that a conviction should be entered but only whether on the evidence which is available there is a prima facie case…
> [14] The term "*prima facie case*" is used in most common law countries and it simply means whether at first sight and on the face of the available evidence, without investigation, there is a case to be answered.

This test is similar to that made during a trial about whether there is a case to answer: see below, **18.26**.

18.16 The prosecution is ordinarily expected to present its full case at the enquiry 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 preliminary enquiry and the trial. In such cases, the prosecution must give the accused reasonable notice of the intention to call the witness.

18.17 At the end of the enquiry, 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.
- Commit the accused for trial in the Supreme Court for the offence charged and specify a date for the trial: s 146(2). In practice, this date will be when the trial commences with the taking of the accused's plea rather than when evidence is heard. The Public Prosecutor must then file the information in the Registry of the Supreme Court at least 7 days before the date specified: s 146(3). The Public Prosecutor may amend the information with leave of the Supreme Court: s 146(3)

18.18 Before a trial commences in the Supreme 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. Evidence can generally be taken only in the presence of the accused: Criminal Procedure Code s 120. Proceedings for some minor offences can take place in the absence of an accused who is pleading guilty in the Magistrates Court. The Code s 44(1) authorises a magistrate to dispense with the personal attendance of an accused where the offence is punishable by imprisonment for two years or less and the accused pleads guilty in writing or appears by a lawyer. Moreover, a dispensation is mandated for an offence punishable just by fine or imprisonment not exceeding three months.

18.20 The basic order of trial proceedings is similar in the Supreme Court and in the Magistrates Court.

- Proceedings begin with the accused being called upon to plead guilty or not guilty to the charge: Criminal Procedure Code ss 133, 160. 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 to plea or to proceed on the original charge.
- 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, and before prosecuting counsel addresses the court, the presiding judicial officer must read to the accused a statement of the presumption of innocence and the burden of proof on the prosecution: s 81.
- Prosecuting counsel then addresses the court to explain the nature of the case against the accused: s 161.
- The evidence for the prosecution is then presented. Its witnesses may be cross-examined by the defence: ss 134, 162. 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 (a 'prima facie' case) to support the charge: ss 135-136, 164.
    - If the court does not consider that there is sufficient evidence, the court rules that there is 'no case to answer' and the accused is acquitted: ss 135, 164(1).
    - However, If the court considers that there is sufficient evidence, the presiding judicial officer reads to the accused a statement of the right to present evidence or to elect to remain silent without this leading in itself to an inference of guilt: s 88. The accused is then asked if evidence will be presented for the defence, ss 136, 164(2).
- If evidence is to be given for the accused, defence counsel may make an opening statement: ss 138(2), 165.
- Following presentation of evidence for the defence, prosecuting counsel has a right to cross-examination and defence counsel a right to re-examination: ss 136, 166-168. 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: ss 137, 169.
- After all evidence has been taken, there are final addresses from counsel.
    - In the Supreme Court, the prosecutor sums up first and defence counsel has the last word: s 170.
    - In the Magistrates Court the defence address occurs at the end of evidence

for the defence: s 138(2). The Code is silent on whether the prosecutor may make a final address.

- The magistrate or judge then renders a verdict. Reasons must be given: s 95. A convicted person must be informed of the right to appeal and the time within which notice of appeal must be lodged: s 94.
- if the accused is convicted, a sentence hearing is conducted. Additional arguments from counsel may be heard at the sentencing stage: see **21.2**.

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 is examined is the law respecting the exclusion of evidence on the ground that it was wrongfully obtained: see **16.14 – 16.29**.

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 the 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 **2.14-2.26** 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: ss 135, 164(1). For trials in the Supreme Court, s 164(1) states:

> If, when the case for the prosecution has been concluded, the judge rules, as a matter of law that there is no evidence on which the accused person could be convicted, he shall thereupon pronounce a verdict of not guilty.

For example, in *Tabimamas v Public Prosecutor* [2021] VUCA 14, the Court of Appeal upheld a ruling of no case to answer on charges of corruption, on the ground that the conduct that was the subject of the charges was not corrupt.

18.24 If a '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 credible and robust evidence to prove the case beyond reasonable doubt.

18.25 The origins of the 'no case to answer' step lie in the division of functions in a trial with jury between the judge and the jury: the judge being responsible for determining whether there is evidence on which a jury *could* convict and the jury being responsible for determining whether there is evidence strong enough to discharge the persuasive burden of proof beyond reasonable doubt. Nevertheless, the traditional tests for determining whether there is sufficient evidence for a prima facie case have been applied in various jurisdictions to cases where a judge sits alone: see *Public Prosecutor v Suaki* [2018] VUCA 23 at [13]-[16] and the cases cited therein. In *Suaki* at [17], the Vanuatu Court of Appeal concluded:

> There should be no difference between the approach taken in those jurisdictions where there are jury trials or trials with assessors, and Vanuatu.

18.26 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. In the leading case of *Public Prosecutor v Suaki* [2018] VUCA 23 at [11], the Vanuatu Court of Appeal stated :

> It seems to us therefore that a consideration of a "no case to answer" by the judge's own motion or a submission of "no case to answer" ought to be upheld in trials on indictment if the judge is of the view that the evidence adduced will not reasonably satisfy a jury (judge of fact), and this we think will be the case firstly, when the prosecution has not led any evidence to prove an essential element or ingredient in the offence charged and secondly, where the evidence adduced in support of the prosecution's case had been so discredited as a result of cross-examination, or so contradictory, or is so manifestly unreliable that no reasonable tribunal or jury might safely convict upon it.

This is the same test as is used to determine sufficiency of evidence in decisions to charge (see **17.5**) and at preliminary enquiries in determining whether to commit for trial: see **18.15**.

18.27 The judge does not weigh the strength of the evidence at this stage. In *Public Prosecutor v Suaki* at [11], the Vanuatu Court of Appeal stated:

> The determination of "no case to answer" motion does not entail an evaluation of the strength of the evidence presented, especially as regards exhaustive questions of credibility or reliability, such matters are to be weighed in the final deliberations on light of the entirety of the evidence presented,

18.28 With respect to defences, the judge will ultimately have to decide whether any evidential burden carried by the accused has been discharged, so that the prosecution must disprove the defence beyond reasonable doubt: see **2.24 – 2.26**. 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

18.29 Following the end of a trial, a verdict must be given with reasons: Code s 95. This can happen at the time the trial ends or at some subsequent time. The judgment must contain the point or points for determination and the reasons for the decision. Reasons need not be elaborate or lengthy or deal with everything taken into account: *Swanson v Public Prosecutor* [1998] VUCA 9. The Court in *Swanson* approved principles 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.

The judgment must be written, and dated and signed by the judge or magistrate.

Language

18.30 Although the official languages of Vanuatu are Bislama, English and French, English has become the predominant language of the law. The Supreme Court operates only in English. Both Bislama and English are widely used in Magistrates' Courts. Island Courts generally operate in Bislama.

18.31 Constitutional and statutory provisions are designed to ensure that an accused understands the proceedings.

- The Constitution s 5(2)(c) requires that a charge be communicated to an accused in a language that is understood.
- The Constitution s 5(2)(d) guarantees the assistance of an interpreter if the accused cannot understand the language of the proceedings.
- The Criminal Procedure Code s 121 requires interpretation of any evidence given in a language not understood by the accused or their advocate.

Trial delay

18.32 Delay in 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 as well as negligence. 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.

18.33 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.

18.34 In much of the Pacific including Vanuatu, the common law has been superseded by a constitutional right to be tried within a reasonable time. The Vanuatu Constitution s 5(2)(a) provides that every person charged with an offence has the right to a fair hearing 'within a reasonable time'. Potential remedies for breach of this right include a court order for expedition of the trial and, conceivably, a stay of proceedings if there has been evidential prejudice.

18.35 In *DPP v Kamisi* [1991] SBCA 6, The Solomon Islands Court of Appeal held that the relevant period for a constitutional right to a hearing within a reasonable time starts when the person is charged: see **17.8**. The period for calculating the reasonableness of post-charge delay extends as far as the rendering of the judgment. The judgment must be given within a reasonable time: *Swanson v Public Prosecutor* [1998] VUCA 9.

18.36 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.

See also *R v Morin* (1992) 71 CCC (3d) 1; [1992] 1 SCR 771 (SCC); *Martin v Tauranga District Court* 1995 NZLR 419. 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 particular threshold(s). Moreover, the Vanuatu Criminal Procedure Code does not provide any guidance.

18.37 An accused suffering delay is expected to take any earlier opportunity to assert the right. Otherwise, a remedy may be lost. In *Public Prosecutor v Emelee* [2005] VUCA 11, the Court of Appeal approved this statement from the New Zealand Court of Appeal in *Martin v Tauranga District Court* [1995] NZLR 419 at 432:

> I do not think that a person should be entitled to plead undue delay unless he or she has taken such earlier opportunity as there may have been to protest at the delay up to that point.

18.38 Although delay in laying a charge is immaterial for the purposes of the constitutional right, it can run foul of the limitation periods for prosecutions prescribed in the Penal Code s 15:

> No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence –
>
> (a) in the case of offences punishable by imprisonment for more than 10 years – 20 years;
> (b) in the case of offences punishable by imprisonment for more than 3 months and not more than 10 years – 5 years;
> (c) in the case of offences punishable by imprisonment for 3 months or less or by fine only – 1 year.

Even within these periods, a prosecution could be stayed as an abuse of process if delay in laying the charge caused evidential prejudice to the defence.

Legal representation

18.39 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.

18.40 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 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.

18.41 A distinction needs to be drawn between a right to use counsel and a right to have counsel provided at public expense.

- There is a statutory right to be defended by an advocate in any criminal court and, in Magistrates' Courts by an agent or friend: Criminal Procedure Code s 117. It could also be argued that the right to use counsel on any charge is an element of the right to a fair hearing under the Constitution s 5(2)(a). Fairness demands the right in order to balance the public resources that will be available to the prosecution and minimise the risk of a miscarriage of justice.
- In addition, for a 'serious offence', the Constitution s 5(2)(a) provides that the accused will be 'afforded a lawyer', in other words - will have one provided.

In Vanuatu, the agency for the provision of free legal assistance is the Public Solicitor: Constitution s 56. The Public Solicitor performs this function through the Office of the Public Solicitor, which is staffed by legal officers: Public Solicitor Act s 2.

18.42 There is an inconsistency between the two constitutional provisions relating to the provision of legal assistance:

- Section 5(2)(a) simply states that a person charged with an offence will be afforded a lawyer if it is a serious offence. There is no condition respecting inability to pay for one.
- Section 56 does contain a condition. It states that the function of the Public Solicitor 'shall be to provide legal assistance to needy persons'.

Section 56 has been given priority in arrangements for the provision of legal assistance under the Public Solicitor Act. The Act s 5 affirms that the primary function of the Public Solicitor is to provide assistance to persons who cannot afford to pay for it, although it also appears to contemplate assistance being provided for anyone when no alternative is available regardless of their financial means:

> (1) The function of the Public Solicitor is to provide legal assistance –
>
> > (a) to needy persons; or
> > (b) to any person when so directed by the Supreme Court.
>
> (2) For the purposes of this section the term "needy person" is to be interpreted in relation to each particular case and, without limiting the generality of this

expression, account shall be taken of the means of the person to meet the probable cost of obtaining alternative legal assistance, the availability of such assistance and the hardship which might result to the person if compelled to obtain legal assistance other than by the Public Solicitor.

18.43 The Act s 7 recognises that persons receiving assistance may be able to make a contribution to the cost: 'The Public Solicitor may levy a reasonable charge for services provided by his office to any person whom he considers is able to make a contribution towards the cost of such services.'

18.44 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.

18.45 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 must have one provided. An accused who can afford some level of competent representation, but not the preferred level, is not 'needy' within the meaning of the Public Solicitor Act s 5.

The right to a fair hearing

18.46 The Constitution s 5(2)(a) offers a general guarantee that every person charged with a criminal offence 'shall be afforded a fair hearing'. The right to a fair hearing mirrors 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 hearing must minimise these risks. From the standpoint of the accused, a fair hearing must minimise the risk of a wrongful conviction. An accused's right to a fair hearing incorporates a right to appropriate protections against this risk.

18.47 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, **18.31**
- the potential for trial delay to damage the capacity to make a defence or to cause oppression: see above, **18.32-18.38**.
- legal representation: see above, **18.39-18.45**.

18.48 There are some additional aspects of trial fairness which could be enforced through the general guarantee of a fair hearing in the Constitution s 5(2)(a). 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

18.49 A trial cannot be fair unless an accused has a reasonable opportunity to know the case against them in advance and prepare a response. An accused must know 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. This effectively means that, before the trial, the prosecution must provide the defence with briefs of all the evidence to be introduced. The consequence of attempting to introduce undisclosed evidence may be an adjournment of the trial or a temporary stay of the proceedings to allow time for the defence to consider the evidence and prepare a response. A permanent stay may even be considered in a case where the accused is already committed to a particular line of defence.

18.50 In addition, common law principles have evolved in modern times which 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 which 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.

18.51 The Public Prosecutor has issued guidelines that are consistent with the principles enunciated in *Stinchcombe*. Guideline 11 of the *Prosecution Guidelines for the Republic of Vanuatu 2018* states that the prosecution must disclose as soon as is reasonably practicable any material 'known to the prosecution which can reasonably be seen' to be 'possibly relevant to an issue in the case'. The prosecution must also disclose any information that is 'relevant to the credibility or reliability of a prosecution witness'.

18.52 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 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. On the other 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.

18.53 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 Vanuatu but a judge or magistrate could adjourn the proceedings to allow the prosecution time to prepare a response.

Prosecutorial restraint

18.54 A trial is an adversarial process. Nevertheless, the role of the prosecutor has traditionally been conceived as being to seek the truth rather than just to seek a conviction. Guideline 4.7 of the *Prosecution Guidelines for the Republic of Vanuatu 2018* 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.

18.55 A prosecutor is under a common law duty to act fairly: 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 trier of fact 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

18.56 A judge must display impartiality. An 'impartial court' is included among the rights conferred on a person charged with an offence by the Constitution s 5(2)(a).

18.57 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.

18.58 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, the Solomon Islands Court of Appeal 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.

18.59 A judicial officer must not only display impartiality but also offer an assurance of being impartial. Hence, a judicial officer should disqualify ('recuse') themselves if they have a personal interest in a case or a connection with one of the parties which might influence their judgment. The Judicial Services and Courts Act s 38(1) provides:

> If:
>
> (a) a judge has a personal interest in any proceedings; or
> (b) there is actual bias or an apprehension of bias by the judge in the proceedings;
>
> he or she must disqualify himself or herself from hearing the proceedings and direct that the proceedings be heard by another judge.

For magistrates, the same provision is found in the Act s 21(1). The 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

18.60 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 member 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].

18.61 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.

18.62 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.

18.63 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.