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 Code only claims geographical jurisdiction for the courts of Vanuatu over conduct occurring in the country itself or connected with it in certain specific ways. Section 1 of the Penal Code establishes jurisdiction over conduct occurring anywhere within the territory of Vanuatu, including its territorial waters and air space, and on civil vessels and aircraft registered in Vanuatu. Section 2 affirms that Vanuatu law applies where any element of an offence has taken place within its territory. This would encompass the consequences of conduct initiated elsewhere: for example, a fraud effected by mail or telephone from another country. It would apply, for example, to a complex fraud involving multiple misrepresentations, some occurring within Vanuatu and some occurring elsewhere. The participant within the jurisdiction can be held liable, apparently even if the victim was elsewhere. In addition, with the consent of the Public Prosecutor, any citizen may be prosecuted for an offence outside Vanuatu if the conduct would have constituted an offence if committed within Vanuatu and also constitutes a corresponding offence under the law of the other jurisdiction.

2.3 Under the Code s 5, anyone including an alien arrested in Vanuatu can be prosecuted with the consent of the Public Prosecutor for certain international offences wherever they were committed: piracy; hijacking of aircraft; traffic in persons; slave trading; and traffic in narcotics. For these offences, Vanuatu claims 'universal jurisdiction'. 'Universal jurisdiction' means that 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.

Conduct elements and fault elements

2.4 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 Vanuatu with comprehensive codes.

2.5 'Conduct elements' refers to the conduct that is prohibited: for example, causing the death of another person in the offence of intentional homicide; 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 stabbing or strangling a person in the offence of intentional homicide; 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 intentional homicide;
> (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.

2.6 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): Penal Code ss 89A-90. Intentional assault causing damage is committed when a person (state of affairs) applies force (act) to another person (state of affairs) and causes damage (result): s 107(b)-(c).

2.7 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. The Penal Code s 6(2) states:

> No person shall be guilty of a criminal offence unless it is shown that he intended to do the very act which the law prohibits; recklessness in doing that act shall be equivalent to intention.

However, specific offences can be defined with their own fault elements. For example:

- 'Intent' in the offences of intentional homicide, intentional assault, and theft: ss 106; 107; 122;
- 'negligent' in the offence of unintentionally causing harm: s 108;
- 'knowing' in offences of deception and receiving: ss 124; 130B; 130C; 131.
- 'reckless' in offences of deception: ss 130B, 130C;

- ‘wilfully’ in the offences of arson and malicious damage to property: ss 133-134.

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

2.8 The Penal Code was designed as comprehensive statement 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. Nevertheless, the common law may be used in the interpretation of concepts such as intent and wilfulness.

2.9 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 an offence of intentional homicide to form an intention to kill someone and then to accidentally kill them in a vehicle accident.

2.10 Section 12 of the Code creates a defence of reasonable mistake of fact:

> A mistake of fact shall be a defence to a criminal charge if it consists of a genuine and reasonable belief in any fact or circumstance which, had it existed, would have rendered the conduct of the accused innocent.

The provision presents difficult problems of interpretation because the requirement for a mistake of fact to be reasonable appears to contradict the direction in s 6(2) that every criminal offence requires proof of intention or recklessness. The best interpretation may be that, as a stated ‘defence’, s 12 does not apply to offences with express fault elements. Thus, it does not apply to a claim that a homicide or injury was unintentional, even if the claim is based on an underlying mistake of fact: ss 106; 107. In addition, the reference to ‘fact or circumstance’ confines it to offences relating just to conduct and its circumstances: see **2.5**. It does not apply to offences involving the results of conduct. In consequence, most offences under the Code are excluded from the ambit of s 12. Among the few Code offences to which it applies are rape or indecent assault where a claim is made to a belief that there was consent to the interaction: ss 90; 98(2).

2.11 In its present form, s 12 is the result of a 1989 amendment. In its original form, s 12 provided a defence in the event of a ’genuine, even though not reasonable’ mistake. It therefore fitted neatly within the subjectivist principles of the Code, dovetailing with the direction in s 6(2) that every criminal offence requires proof of intention or recklessness: see **2.7**. However, the difficulty with its amended form is

that a mistakes of fact can underlie a claim for lack of intent, knowledge or recklessness. For example, in a case of homicide by shooting, a claim for lack of intent to kill a person may be based on a mistaken belief that the gun was unloaded. If s 12 were to determine the outcome in such cases, much of the rest of the Code would become redundant. Moreover, legislative intention to make a change of this magnitude would presumably be manifest in a rewritten Code. Section 12 should therefore be read narrowly, so that it applies only to offences where there is no express fault element and also where culpability turns on beliefs about facts or circumstances, not results.

2.12 The defence of mistake of fact is available for a mistake relating to an element of any offence. It therefore has the effect of eliminating certain common law doctrines from the Code. At common law, some offences or parts of offences may have no fault element. These are called offences of strict or 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. Under the Code, however, a defence of reasonable mistake of fact will always be available in the absence of any other way of addressing culpability.

General defences

2.13 Even where the elements of an offence are present, criminal liability may be negated by the existence of a general defence. These general defences fall into two groups.

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

- reasonable mistake of fact: s 12;
- insanity: s 20.

These provisions use the formula, 'it shall be a defence…'.

2.15 Other defences claim the conduct occurred in special contexts that justify or excuse it. The Penal Code provides for a range of such defences, using the formula, 'A person is not criminally responsible for…'. Examples of contextual defences are:

- superior orders: s 22;
- defence of person or property: s 23(1)-(3);
- preventing an offence or arresting an offender as a justification for the use of reasonable force: s 23(4).

Some such defences are based on the *reason* or *motive* for engaging in the conduct. Motive is often said to be immaterial to criminal responsibility. This is true in the sense

that the fault elements of an offence rarely require proof of a particular reason or motive for engaging in the conduct. Nevertheless, under special circumstances, a person's reasons or motive can negate criminal responsibility by providing a special defence.

2.16 There are some gaps in the coverage of general defences under the Code, where no provision is made for certain defences that are recognised at common law and in the statutes of many jurisdictions:

- Involuntariness or ('lack of will') is not mentioned despite the widespread recognition of voluntariness (meaning the direction of conduct by a conscious mind) as a fundamental requirement of criminal responsibility;
- Duress or compulsion (meaning the commission of an offence under direction and threat of harm) does not negate criminal responsibility but merely 'diminishes' it with consequences for penal liability: s 24 – see **1.11-1.12**;
- Correction or punishment of a child is not recognised as a defence to the use of force;
- Medical emergency is not established as a defence to conducting surgery without consent to benefit a patient;
- The residual defence of 'necessity' to prevent a worse harm occurring is not included.

2.17 In light of the restrictive coverage of general offences, it is possible that additional defences of a general character might be recognised as a matter of common law. The Solomon Islands Court of Appeal has faced a similar problem and determined to leave open the question of whether 'necessity' might be recognised as a common law defence alongside the defences in the Solomon Islands Penal Code: *Luavex v R* [2007] SBCA 13.

2.18 A distinction drawn in some other jurisdictions between defences of justification (such as defence of person or property and law enforcement) and defences of excuse (such as duress). 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 Code, however, the formula 'It is lawful for…' is not used. The formula 'A person is not criminally responsible for…' is preferred for both defensive force and law enforcement.

The Burden of Proof and Evidential Burden

2.19 The Constitution of Vanuatu enshrines the presumption of innocence and the burden on the prosecution to establish guilt according to law: Constitution s 5(2)(b). The Penal Code s 8(1) also states that the prosecution carries the burden of proof. Moreover, it affirms the common law principle that the prosecution must prove its case 'beyond reasonable doubt' and elaborates the meaning of this phrase:

> No person shall be convicted of any criminal offence unless the prosecution shall prove his guilt according to the law beyond reasonable doubt by means of evidence properly admitted; the determination of proof of guilt beyond reasonable doubt shall exclude consideration of any possibility which is merely fanciful or frivolous.

2.20 Constitutional provisions enshrining the presumption of innocence are found in many jurisdictions. However, the criminal statutes of most jurisdictions are silent on the general principles respecting the burden of proof, including the standard of proof that the prosecution must meet. It has generally been left to the common law to establish that the standard of proof in criminal law is generally 'beyond reasonable doubt'. 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.'

2.21 'Beyond reasonable doubt' is a standard of certainty rather than likelihood. However, the Penal Code follows the common law in recognising that this means virtual or practical certainty rather than absolute certainty. This is the point of the dismissal in s 8(1) of possibilities which are 'merely fanciful or frivolous'. 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. In *Public Prosecutor v Nalau* [2010] VUSC 181, Lunabeck CJ said:

> Proof beyond a reasonable doubt has been achieved when I as a judge of fact feel sure of the guilt of the accused. It is that degree of proof which convinces the mind and satisfies the conscience so that I as a conscientious judge of fact feel bound or impelled to act upon it. Conversely, when the evidence I have heard leave me as a responsible judge of fact with some lingering or nagging doubt with respect to the proof of some essential elements of the offence with which the accused is charged so that I am unable to say to myself that the prosecution has proven the guilt of the accused beyond a reasonable doubt as I have defined these words, then, it is my duty to acquit the accused. …I must

> say that it is rarely possible to prove anything with absolute certainty. So the proof or the burden of proof on the prosecution is only to prove guilt beyond a reasonable doubt. When I speak of reasonable doubt I use the words in their ordinary natural meaning, not as a legal term having some special connotation. A reasonable doubt is an honest and fair doubt based on reason and common sense. It is a real doubt, not an imaginary or fanciful doubt which might be conceived by an irresponsible judge of fact to avoid his or her plain duty.

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: Penal Code s 10. The most famous instance of a reverse burden of proof is for the defence of 'insanity'. At common law and also under the Penal Code, insanity must be proved: Penal Code s 20(1).

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, this burden need only be discharged when the defence has been put in issue on the evidence. The burden to put a defence in issue lies with the defendant not the prosecution. As it is expressed in the Penal Code s 9, the defence must be 'sufficiently raised by the defence as an issue'. 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.