THE POWER OF AMENDMENT IN THE DISTRICT COURTS UNDER SECTION 32 OF THE DISTRICT COURTS ACT (CHP.40) IN PAPUA NEW GUINEA

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INTRODUCTION

The various arms and intrumentalities of any government today derive their powers and functions from their respective legislative enactments. In Papua New Guinea (referred to herein after as "PNG") the Courts constitute the judicial arm of the government and they exercise the judicial power of the people by virtue of s.158 of the *Constitution*. Their powers and functions are as vested in them by their respective Acts of Parliament,[1] in addition to ss.160-172 of the *Constitution*.

This paper is concerned with only one of the many powers the District Courts Act c.40 (referred to hereinafter as "the Act") and the regulations made thereunder vest in the District Courts and their Magistrates (referred to hereinafter as "the Courts"). Section 32 of the Act gives Magistrates the power to amend any information, summons or warrant to apprehend a defendant, issued upon an information, for an alleged defect either in substance or in form in the information. The power to amend is also available to them where there is a variance between the information itself and the evidence in support of it. Furthermore, no objection is to be taken or allowed when the power is to be or is asked to be exercised, as appears from a plain reading of the section in question.

The discussion which follows will focus only upon the amendment of informations laid pursuant to Part IV Divisions 1 and 2 of the Act. Division 1 consists of only one section, section 28, which provides that proceedings before the District Courts can be commenced by an information or complaint which may be laid by a complainant or his legal representative or other authorised persons for that purpose. Division 2, sections 20-36 deals with proceedings which are commenced by informations and s.32 comes under this division. It is better for our purpose to briefly see what each of these other sections in the division provide for, for a proper understanding before proceeding to our area of concern.

Section 29 states that an information must be for one matter only with the exception of those matters which could be laid in the alternative. As regards the description of persons or things in an information, section 30 provides that it is sufficient if a description therein resembled that of an indictment or if it uses the words of the law creating the offence or something similar to such words. If an information lacks particulars, section 31 gives the courts the power to order such particulars as are necessary to be delivered to the defendant and adjourn the hearing for that purpose. Section 33 provides for the adjournment of the hearing either in the exercise of the court's discretion or upon the request of the defendant if the defendant has been misled by a variance referred to in section 32. This should be done after a subsequent amendment to the information where the defendant needs time to prepare his defence(s) although there is no express statement to this effect. In other jurisdictions, as for example in Victoria,[2] the equivalent of sections 32 and 33 are contained in one section only, thereby making it part and parcel of the

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1. The relevant statutes are the Supreme Court Act (chp.37), the National Courts Act (chp.38), the District Courts Act (Chp.40), the Local Courts Act (chp.41) and the Village Courts Act (chp.44).

2. The Victorian Justice Act, 1958 section 200.

power of amendment. It is therefore submitted that section 33 should not be taken in isolation but in connexion with section 32.

Where there is an amendment s.34 provides that a minute of the amendment should be entered in the proceedings and may if required give it to the party against whom the amendment is made.

In the case of a warrant or a summons upon an information s.35 provides that the information should be in writing if a warrant is to be issued in the first instance and if a summons is to be issued in the first instance, it need not be in writing whether or not the law requires it; a verbal summons is sufficient.

Finally s.36 provides as to the limits of laying an information. It provides that unless it is otherwise provided by a particular law an information should be laid within six (6) months after the commission of the alleged offence.

Section 32[3] specifically provides for the amendment of informations. One of the two means by which proceedings in the District Courts can be commenced (s.28 supra). In section 1 of the Act the term "information" is defined to include *'a complaint for an offence but not any other complaint'*. The term complaint is defined to mean *'a complaint other than a complaint for an offence'*. Informations therefore commence proceedings relating to offences only and nothing else. Curzon's A Dictionary of Law[4] defines the term offence as generally that which is equivalent to a crime, that is, an act or omission punishable under criminal law. It is therefore submitted that, what is contained in Part IV Division 2 relates to criminal matters which come *under the jurisdiction of the District Courts, more particu*larly summary offences anned to mean *'a complaint other than a complaint for an offence'*. Informations therefore commence proceedings relating to offences only and nothing else. Curzon's *A Dictionary of Law* defines the term offence as generally that which is equivalent to a crime, that is, an act or *omission punishable under criminal law.* It is therefore submitted that, what is contained in Part IV Division 2 relates to criminal matters which come under the jurisdiction of the District Courts, more particularly summary offences and those indictable offences tried summarily, and so we are concerned with criminal matters.

There are two parts to this power of amendment. The first relates to the power to amend where there is a defect either in substance or in form in the information itself. The second relates to the power to amend where there is a variance between the evidence adduced in support of the information and the information itself, whether it be in substance or in form.

The former goes to the court's power or jurisdiction to deal with a matter brought before it by way of an information. An information laid against a defendant which discloses all the essential elements of the offence alleged therein gives the court its jurisdiction.[5] It follows therefore that where an information fails to disclose an essential element, it is defective and as such it gives the court no jurisdiction unless section 32 is applied. The latter comes into play without any question of jurisdiction but in the course of the proceedings, when evidence is or has been called in, and the court finds that the evidence varies from the information, the court may exercise its power to amend such an

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3. *The District Courts Act (chp. 40).*

4. Properly cited as I.B. Curzon. *A Dictionary of Law,* (Estover; MacDonald and Evans Ltd, 1979).

5. N. O'Neil & R. Desailly, *The Criminal Jurisdiction of Magistrates in Papua New Guinea* (Sydney, 1982) para.[2.6].

information. This, as will be seen gives the court the power to amend the information where necessary in the interest of justice to cater for the variance.

1. LEGISLATIVE HISTORY

A. *General*

Papua New Guinea as it is now known after got its Independence from Australia on the 16th of September 1975. Prior to Independence there were two distinct territories, Papua *and* New Guinea. Until 1914, Papua was under British Colonial Rule whilst New Guinea was under German Rule. Consequently there were separate sets of laws applicable to these territories, derived from their respective colonial powers. This was the case until after the 2nd World War when Australia was given the mandate to administer the two territories which then become known as the Territory of Papua *and* New Guinea.[6] By virtue of Australia's takeover of the territories most of her laws were imported and applied in the territory.

After Independence most of the laws in Papua New Guinea were and are still derived from Australia. An obvious example is the *Criminal Code Act* (chp.262) which is based upon the *Queensland Criminal Code Act 1899*. The same is put forward by Chalmers and Paliwala who say that the law in PNG'... is that imposed one borrowed from Australia and England. It is an accident that the colonial legal culture was Anglo Australian. [Not only that, there was also the importation of the] method of law making and dispute settlement'.[7]

B. History Of Section 32

The present District Courts Act (chp.40) is a consolidation of several pre and postindependence statutes.[8] We need not look at them at any length because they do not help us in our search for the origin of section 32. Hence there remains still the unanswered question of the origin of this provision.

In the absence of a definite statement as to the origin of the section in question, we turn to other places for assistance. We have already seen that the colonisation of Papua New Guinea led to the imposition of western laws derived from Austrlia and England[9] with most of it being Anglo Australian.

There are several Australian state statutes which have provisions similar to our section 32. The one more identical to section 32 is the *Justice Act of Queensland 1886*. The relevant section is section 48, which is in the following words:

> If at the hearing of any complaint [used to include an information] *any objection is taken for an alleged defect* therein in substance or in form or

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6. D. Fitzpatrick,. *Law and State in Papua New Guinea* (London, 1980) 53.

7. D. Chalmers and A. Paliwala, *Introduction to the Law in Papua New Guinea* (2nd ed, Sydney, 1984) 11 & 19.

8. Appendix 1 Part A of the ACT.

9. Chalmers & Paliwala, *op.cit.*19.

> for any such alleged defect in any summons or warrant to apprehend a defendant issued upon such complaint *or if objection is taken for any variance* between the complaint, summons or warrant and the evidence adduced at the hearing in support thereof the *justices shall make such order for the amendment of the complaint* summons or warrant as appears to them to be desirable or to be necessary in the interest of justice.[10]

This section as Kennedy Allen says[11] was a transcript of s.21 (4) of the *Crimes Act 1914-1950 (Commonwealth Acts 1153)* which is almost in the same terms as the above provision except that it includes the words "indictment" and "information" and excludes the term "complaint". The origin of these Acts, especially the relevant provisions, can be traced back to the second proviso to section 1 of the *English Summary Jurisdiction Act 1884* which has been repealed and replaced by the English *Magistrates' Courts Act 1980* section 127.

Our section 32 is in the following terms:

> *No objection shall be taken or allowed* to an infortion, or to a summons or warrant to apprehend a defendant issued on an information, *for an alleged defect in the information in substance or in form, or for variance between it and the evidence in support of the information, and any such variance may be amended at the* hearing.[12]

There is obviously some difference in the wording of this section and its Australian (Queensland) counterpart. The one significant difference relates to the question of whether or not an objection is to be taken or allowed, where there is a defect either in substance or in form in the information or where there is a variance between it and the evidence adduced in support of it. Our section 32 very clearly states that 'no objection shall be taken or allowed' whilst its Australian (Queensland) counterpart provides 'if any objection is taken'.

This difference may be as a result of the legislative draftsman's mistake or oversight, or deliberate drafting. However, when one looks into the origin of the above provisions, the 'no objection shall be [taken or] allowed' clause appears in the second proviso to s.1 of the *Summary Jurisdictions Act* 1884 of England. The State of Victoria has adopted this language[13] in the Victorian *Justice Act 1958*. This means the inclusion of the 'no objection shall be taken or allowed' clause, is a deliberate one. The reasons for the inclusion of this language will be examined below.

2. OBJECT AND EFFECT OF SECTION 32

Section 32 relates to technical matters in the criminal trial process. From a careful reading of the section its object appears to be that no technical objection, whether it be in substance or in form, is to be allowed to prevail over the court's power to deal with a matter according to law once an information is presented against a defendant for an

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10. Emphasis mine.

11. A. Kennedy, *The Justice Acts of Queensland (3rd ed,* 1955) 122.

12. Emphasis mine.

13. There may be other states too.

alleged offence.[14] Judicial expression for this can be found for example in the words of Humphreys J. in *Atterton v. Browne,*[15] who was speaking in relation to the second provisio of s.1 of the then English *Summary Jurisdictions Act* and said 'clearly [that section's proviso] indicates that *technical objections to informations are not to prevail, even though they touch the substance of the charge'*.

What then is the effect of this section? The answer to this question can be obtained by looking at the meaning of the section itself. Quite obviously, the section means no objection must be taken or allowed to an information or a summons or a warrant issued upon an information, if the information allegedly has some defect or variance between it and the evidence adduced in support of it whether it be in form or in substance, and any such *variance may be amended* by an order of the court at the hearing. Surprisingly, defects seem not to be covered by amendment because the section specifically states that any such variance may be amended without any mention in the relevant part of the section about defects, although the first part of the section refers to both a defect and variance. In some jurisdictions both are specifically referred to and are covered by amendment.[16] In other jurisdictions such as Queensland the relevant section simply states that where there is a defect or a variance the justices may amend the information. Under the light of the object of the section and similar provisions of other jurisdictions it is submitted that the amendment covers both defects and variances and not only the latter.

In practice the power is often applied to rectify defects as well despite of the section's language. This is something which the cases cited as examples of instances in which the power of amendment has and have not been allowed, will illustrate.

As was pointed out in the introduction, the effect of section 32 is to empower the courts to amend an information where there is a defect in it or where there is a variance between it and the evidence adduced in support of it. The same is quite clearly put forward by John A. Griffin, in his book *'Criminal Procedure in Papua New Guinea'*[17] at page 62 in the following terms:

> The effect of this provision is that if one or more of the rules relating to informations is not complied with, then the information is not to be summarily dismissed merely because it is defective. Instead, the magistrate is to put it in order before proceeding to hear the charge. [As for a variance] an information is not to be dismissed simply because some variance emereges between the allegations contained in it and the evidence actually given before the magistrate.

In short, therefore, this provision was intended to have the effect of vesting in the courts the power to amend an information, where there is a defect or a variance between it and the evidence presented before them to support a charge or an allegation contained in it. This would in turn go to safeguard its object which is to ensure that the course of justice is not defeated or otherwise open to defeat merely on technicalities.

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14. Kennedy, *loc.cit.*

15. [1945] KB 122 at 127.

16. For example s.200 of the *Victorian Justice Act 1958.*

17. (Sydney, 1977).

3. NATURE OF THE POWER

When speaking of any power the question that often arises relates to the nature of the power itself. For the purpose of this paper the question is, what is the nature of the power under s.32. Is it mandatory or discretionary? These question can be answered with particular reference to the wording of the section itself.

When we turn to the wording of s.32 we find in the last line towards the end, that an information which attracts the application of s.32 'may be amended'. The term 'may' signifies in this context, though it is not always the case, that the power contained therein is discretionary and not mandatory.

It is left to the discretion of the courts to decide whether or not to exercise the power of amendment in either one of the two situations specified in the section itself.

Judicial expression of interpretation offered to this section can be found in many cases where the term "may" has been used in a statute. A good illustration directly relating to a provision similar to ours is provided by the case of *Burvett v. Moody.*[18] Madden CJ., who spoke in answer to the question whether or not the lower courts were bound to amend an information under the Victorian equivalent of our s.32 contained in their, then *Justice Act 1890,* answered:

> In my opinion they were not bound to do so. The words in this section are that the Justice may amend the information. Undoubtedly, in the case of all technical amendments they ought to amend, but I think that the word "may" is sometimes to be construed as mandatory in Acts of Parliament, but I do not think that it should be so construed here. And I think this word "may" in this statute gives them a discretion which ordinarily and in most instances they ought to exercise.

Having argued that it is a discretionary power, there is the further question of whether or not that discretion is unfettered. It is an administrative law question as to whether or not the discretionary power of courts under s.32 of the Act limited.

Almost every power, whether judicial, administrative or otherwise, has some form of limitation either expressed or implied. Thus there is no such a thing as unfettered discretion.[19] After all, where a statute grants a discretionary power to any person(s) in authority it is subject to the objects or the policies behind the particular statute concerned when it is to be exercised, and that is what Parliament must have intended when enacting that particular statute.[20]

Our s.32 quite explicitly states that the discretionary power of amendment vested in the courts can only be exercised where there is a defect in the information or where there is a variation between it and the evidence presented in support of it, and not otherwise. Hence there is no room for a proposition which suggests that the s.32 discretion is unfettered.

In addition to the specific limitations the section itself places in the discretionary power of amendment, it is submitted that if and when the power is to be exercised it must be in

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18. (1909) VLR 126 at 131.

19. *Padfield & others* v. *Minister of Agriculture, Fisheries and Food & Others* [1986] AC 997 at 1030.

20. *Ibid.*

the interest of justice, which means to act fairly towards both parties and not just one of them to the exclusion of the other.[21] In other words the interest of justice means an adherence to the principles of natural justice,[22] and that the courts should properly direct themselves in law.[23] This leads us to consider two further questions when and under what circumstances the power should or should not be exercised. These issues will be examined after an examination of the constitutional implications of the section.

4. CONSTITUTIONAL IMPLICATIONS

There is no dispute that our *Constitution* is the supreme law in the country by virtue of s.9 of the *Constitution* itself as well as s.10 which provides that all other laws are subject to the *Constitution*. The *District Courts Act* (chp.40) is one of those laws which is subject to the *Constitution*. In cases of any inconsistency the *Constitution* prevails over the provisions of the Act.[24]

For our purpose the main issue is whether or not s.32 of the Act has any Constitutional implications, more particularly as to whether or not there is anything in s.32 which offends against the *Constitution* in terms of inconsistency. It is one of the requirements of the principles of natural justice that a person who is accused of any misconduct, criminal or otherwise should be afforded a fair hearing first, where he should be given the opportunity to give his side of the story before being penalised. The principles of natural justice are adopted[25] by our *Constitution* by virtue of s.59.

The requirements for a fair hearing are specifically adopted by s.37(3) of the *Constitution* which provides that:

> A person charged with an offence *shall,* unless the charge is withdrawn, *be afforded a fair hearing* within a reasonable time, *by an independent and impartial court.*

As adverted to earlier on, fairness means there should be a fair administration of justice which not only has to be done but also seen to be done as guaranteed by s.37(3) of the *Constitution.*

In the context of our discussion, the question of whether or not the court is acting fairly would come in where the court must decide whether or not to grant an adjournment after an amendment. If the defendant is asking for adjournment pursuant to s.33 of the Act, in order to prepare his or her defence, the issue could not arise, but it would arise if the prosecution asks for an adjournment after obtaining an amendment, especially when the matter has been previously adjourned on more than one occasion. Without going into any deeper discussion as to what should be done in such a case, it will suffice for our

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21. *Associated Provincial Picture Houses Ltd* v. *Wednesbury Corporation* [1948] 1 KB 223 at 228 & 229.

22. *Ibid.*

23. *Ibid.*

24. Constitution Section 11.

25. As to what constitutes the Principles of Natural Justice see B. Brunton and D. Colquhoun-Kerr, *The Annotated Constitution of Papua New Guinea* (Waigani, 1984) 213-221.

purpose to broadly state that each case depends heavily upon its own particular circumstances.

For illustrative purposes however, the case of *The State v. Peter Painke* (No.1)[26] is relevant, although the request for adjournment was not after an amendment. It took 14-16 months from the time the defendant was alleged to have committed the offence for which he was committed for trial, 6 months since it first went for trial and 11 months since the committal for the case to come to trial. The court refused the application for adjournment because that would further delay the trial. His honour O'Leary AJ.[27] said: 'in the circumstances, I thought that to postpone the trial any longer would be to deny the accused his right to be afforded a fair hearing within a reasonable time as guaranteed by the constitution'.

The foregoing assumes the section is Constitutional and that the question of constitutionality would only arise in the exercise of the power. It is therefore necessary to see, whether by its mere existence it offends the *Constitution*.

With the exception of the phrase "no objection shall be taken or allowed", there appears to be nothing which offends against the *Constitution*. It is possible from a plain or literal reading of the section to say, that that phrase in s.32 offends the *Constitution* because it effectively takes away a defendant's right to be afforded a fair hearing, especially where an application is made for an amendment to an information.

However, it could be said on the other hand that the phrase only relates to the trial process once commenced and not otherwise and therefore the section appears to be perfectly proper and within the ambit of the *Constitution*.

Both views are persuasive, but it is the submission of this paper that the latter should be preferred because if the section was unconstitutional it would have been challenged, long ago but has never been made. It also touches the ultimate policy or intention of Parliament that a defendant has no right to object to any criminal process against him for an alleged offence, once commenced. In so far as the courts are concerned in the interpretation of statutes there is authority[28] in PNG that the courts are to adopt the "fair and liberal" rule or the "purposive" rule. In the end therefore the latter view is to be preferred.

The foregoing discussion can be easily summed up as follows. Section 32 as it stands cannot be said to offend the *Constitution*. However in its application it may have the effect of offending it, as for example if after an amendment the defendant is not given the opportunity to prepare his defence. But this is something which is already catered for by s.33 of the Act, and thus the constitutionality issue s.32 may not arise at all.

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26. [1976] PNGLR 210.

27. *Id.* 212.

28. PLAR No.1 of 1980 [1980] PNGLR 326 at 333 - 335.

5. THE MECHANICS OF AMENDMENT

A. The Criminal Procedure

In all criminal cases in the District Courts there are two ways by which an accused person may be brought before the court to be dealt with according to law. These are by way of a summons or by way of an arrest either with or without a warrant.

A criminal case normally begins when an information or an arrest is made and a person (called the defendant) is charged with an offence. This may result from police investigations or when another person (called the informant) reports it to the police or goes to a Magistrate. If it is reported to the latter he has to listen to all of what is reported and if he is of the view that there has been a commission of the offence alleged as reported, or it was about to be committed, he may then formally lay an information by drawing up an information. That information should contain a brief account of the offence alleged, the name of the defendant and his particulars. A summons will then have to be issued upon it by the Magistrate commanding the defendant to appear before the court on a specified day, date and time.

If the offence is reported to the police, they have to be satisfied that it has been so committed or is about to be committed and they may then arrest the person reported. They may also arrest a person on their own initiative pursuant to the *Arrest Act* (chp. 339).[29] Ordinary citizens (non-members of the police force) may also arrest a person who commits an offence.[30] Upon arrest, the person effecting the arrest should bring the arrested person to the nearest police station as soon as possible.[31]

Once a person is arrested and is brought to a police station, the police have a duty under s.37(3) of the *Constitution* and s.18(1)(e) of the *Arrest Act* (supra) to bring that person after being formally charged with an offence to a court of law (for our purpose a District Court) without any undue delay, unless the charge is withdrawn.

Where a person is brought before a court by any one of these two means and he appears for the first time for the charge against him, he is required to plead, either guilty or not guilty, to the charge laid against him. If he pleads guilty the prosecution will present the statement of facts to substantiate the charge. After that the prosecution will present the defendant's antecedent report and any previous conviction record, if any. The defendant will then have any opportunity to say anything if he wishes to by way of mitigation before sentence is given. The court will, after hearing all that has to be said by the parties, decide whether to convict or to acquit the defendant.

If however, a plea of not guilty is entered, the prosecution will need to prove their case beyond reasonable doubt by calling in evidence. The defendant is not required to say anything in his defence except, when the plea is taken. Where a prima facie case is established the defendant may call evidence in his defence if he chooses or allow the court to decide on the prosecution case alone. Whatever course is taken the court will at the end decide whether or not to convict the defendant upon the evidence presented before it.

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29. For more on arrest see the *Arrest Act* (chp.339) itself.

30. *Id.* ss.5 & 6.

31. *Id.* ss.16 & 17.

B. Suggestions As To When The Power Of Amendment Should Be Exercised.

The suggestions which follow under this area relate mainly

to defects only since issues on variations arise after evidence is or has been called. Suggestions as to when amendments should be allowed on grounds of variance will therefore be discussed at the appropriate stage later.

It is suggested that should there be a need for any amendment to an information it should be done at an earlier stage in the trial process, preferably at the time when an information goes before a Magistrate to be signed. The reasons for this are that, the jurisdiction of the court as to whether or not to deal with a particular matter is dependant upon the information presented before it. If there is a defect which is serious in degree it gives the court no jurisdiction. There is also the question of doing and seeing justice to be done and additionally the need to avoid the taking of unnecessary long time and the costs factor.

The latter question is a question which can not be taken or viewed in isolation from the question of fair and reasonableness. The question to be asked is "will it be fair and reasonable for a court to allow an amendment at any one of the latter stages in the trial process?" Assume for instance that there is a defective information which goes through all the process leading up to the stage of considering whether or not there is a prima facie case against the defendant without it being rectified. The defendant may have been misled thus far by reason of the defect, more particularly if it goes to touch one of the essential elements of the offence alleged in the information. If the defect is rectified at this stage, he will most certainly need some more time to prepare his defence to the charge as amended. In such a situation the defendant may ask for an adjournment and the courts are bound to grant his request.[32] The taking of some more time means more expenses which may include transportation costs to and from the court, material use (if any) and legal fees where applicable. All these lead to the conclusion that it is quite unfair for the court to place the defendant in such a position. Therefore, it is much better for the court to effect any amendment where necessary in the interest of justice at an earlier stage in the trial process.

The courts are of course subject to their not being able in some cases to identify any defects until at a later stage in the trial. It is therefore submitted that, should there be a need for any amendment after the initial stage, it should be done well before the charge is put to the defendant and a plea of guilty or not guilty is taken.

What is put forward above is quite contrary to some authoritative statements, for example the obiter dicta of Amet J at P.12 in *Utula Samana v. Demas Waki,*[33] that an amendment can be made at any stage in the trial. The submission was made because (in addition to the reasons already given) the police ought to know the nature of the offences they come to deal with. They should therefore ensure that proper informations are laid and that appropriate language is used which would disclose the offence under the appropriate law. If amendment was allowed at any stage in the trial process the defendant may be in some cases unfairly treated by reason of the amendment, say, if it is allowed at a stage nearer to the close of both the prosecution and defence case or nearer to a verdict.[34]

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32. *District Courts Act*, s.33.

33. [1984] PNGLR 8.

34. *The State* v. *Gelam Koivak* (Unreported Judgement) N.565.

To allow amendments at any of the other stages, is not in the best interest of the defendant. If however, amendments are not allowed anytime after the initial stages except where the defect occurred even with the greatest care the courts will be seen to be fulfilling their role as police instructors[35] in so far as it relates to their laying of proper informations. These reasons also apply to those other nonpolicemen or women who are responsible for the laying of informations. A tightening of the rule would in turn go to improve the task of laying proper informations.

No doubt, there is room for one to argue that by just refusing an amendment, proper course of justice would be defeated. In other words, a refusal to allow an amendment after the initial stages would in effect set an offender free from the very door steps of justice. This argument is persuasive only if the question of justice is taken to mean every offender must be punished. This can not be done because, after all, doing justice means being fair and reasonable to all parties concerned as well as the observing public.

What all this boils down to is that the question of whether or not to amend is a question which must be answered with reference to a proper and careful balancing of the interests of all the parties involved. It is in the interest of the prosecutor who represents the interest of the public or society to see that the defendant is found guilty of what is alleged against him, though it may also be argued that their interest is only to assist the court to do justice. This is because naturally, a prosecutor would be more inclined to having this interest if he has the duty to prosecute and more particularly if his efforts are to be rewarded in one way or another. Also, one effect of permitting amendments freely is to increase the courts workload, since they will be flooded with applications praying for leave to amend. On the other hand, the defendant's interest is to see that the prosecution proves all the essential elements of the offence he is alleged to have committed.

It follows therefore, that, should there be a failure on the part of the prosecution to establish all the essential elements of the offence allegedly committed by the defendant, he should be acquitted.

If there is a defect which relates to one or more of the essential elements of an offence alleged in an information, and prompt steps are not taken by the prosecution to rectify if by way of amendment, the same consequences should follow. It is in the interest of the prosecution to ensure that all defects, whether they be serious or less serious, are rectified before the matter is put to trial, for it will not be in the interest of the defendant to have it corrected in the course of the actual trial particularly at a later stage. After all, the prosecution have the duty to double check all informations and the allegations contained therein before they are presented to the court. It is at this stage that they are supposed to do thorough job. If they as a matter of practice do this they would easily discover any defect and immediately rectify it or cause it to be rectified. The main justification for this is an argument in favour of public interest: that offenders should be dealt with according to law and that they should not be allowed to escape from the full operation of the law on mere technicalities and should not be allowed to cover up failures on the part of the prosecution to ensure proper informations (those in compliance with all the necessary rules and requirements) get to the court. It should not be forgotten that every defendant is guaranteed the full protection of the law by the *Constitution* by virtue of s.37(1). Full protection of the law of course means that a defendant is to be dealt with properly with all fairness in the interest of justice according to the dictates of the law.

35. *The State* v. *Silih Sawi* (Unreported Judgement) N.429(L).

Some senior Magistrates[36] of the District Courts were asked as to when would they be more willing to exercise their power of amendment under s.32. All of them were of the view that they would be more willing to exercise it at an earlier stage in the trial process before the actual hearing in cases of defects, as variances come in (if any) after evidence has been called. In fact some of them have already exercised the power mainly before the hearing or even well before that, before the informations and the charges therein were put formally to the defendants. For reasons already advanced, this should be encouraged.

C. Defects

It should be stated at the outset that we are only concerned with informations which are defective other than by reason of their disclosure of more than one offence. In short we are not concerned with those informations which are defective on grounds of duplicity. This is because it is clearly established that a court does not have the power to proceed to deal with an information which discloses more than one offence,[37] unless it is rectified when the prosecutor elects as to which one of them should be proceeded with and which of them should be dropped. Failure to do so results in the information being struck out or dismissed, or if a conviction has been entered upon such an information, the conviction is bad and cannot stand on appeal: *Edwards v. Jones*.[38]

As mentioned earlier, there are two parts to s.32 under which the courts may exercise the power of amendment. One of the two relates to defective informations. Defects can be either serious or less serious. It is difficult to identify and define what constitutes a defect within the meaning of section 32 which may or may not be amended. Assistance could be gained from looking at some of the decided cases from within and other outside jurisdictions. It is however important to note that foreign judgements are not binding authorities, they are only of persuasive value; they are helpful guides for the development of our own legal principles.[39] With this we turn to some decided cases on this issue: the meaning of a defect within the meaning of s.32.

(I). CASES WHERE AMENDMENT(S) ALLOWED

(a) Exclusion Of Some Factors Or Elements

In *Hunter v. Coombs*[40] the appellant was convicted of a road traffic offence and was disqualified from holding a driving licence until he passed a driving test. He obtained provisional licence which required as a condition that he should display a "L" plate when driving. When driving on a certain road he failed to display the "L" plate contrary to s.109(3) of the *English Road Traffic Act of 1960*. He was charged forthwith but the information failed to mention anything about his failure to display the "L" plate nor the section under which he was charged.

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36. Those interviewed are: Oliver Wijetillake, Salatiel Lenalia, Stephen Oli and others informally interviewed.

37. Hulsburys Laws of England 3rd ed; p.187 para.339.

38. [1947] KB 659 at 662.

39. Constitution Schedule 2.3(1).

40. [1962] 1 All ER 904.

Counsel at the outset of the hearing in the magistrate's court submitted that the information did not disclose a criminal offence, and was incomprehensible? for lack of particulars. With the consent of the defendant, evidence was heard without amending the information and he was convicted for the offence.

On appeal Atkinson J.[41] with whom the other two judges agreed, was of the view that the information was defective and also inaccurate which obviously misled the defendant (now appellant). He was of the view that the information should have been amended before convicting the defendant, upon the application of the prosecution. The conviction was therefore held to be bad and was quashed accordingly.

In at least two pre-independence decisions similar views were taken by the pre-independence Supreme Court. The first is *Andrias Nanganta v. Lewis Nandi.*[42] His honour Frost SPJ., as he then was, was[43]. of the view that a complaint under s.31(b) of the then *Police Offences Ordinance 1912 - 1966,* was defective because 'it alleged merely that the appellant "was found in possession of an offensive weapon, namely a Katapel," without any reference to the other elements of the offence' alleged therein. The other elements were that (1) it was so carried 'without lawful excuse and (2) that it was 'in a public place.' Thus the conviction upon this was bad.

The second case is *Kurua Kerua v. Constable Koloma Vanu.*[44] In this case the appellant was charged and convicted under s.23 of the then *Fire Services Ordinance 1962,* for setting fire to some inflammable grass without first obtaining the requisite consent under that section. Section 24 of the ordinance provided that for the purpose of s.23 certain areas shall be declared to come under the provisions of s.23

The information did not allege that the area (Wau) in which the appellant set fire was an area declared to come under the provisions of s.23, pursuant to s.24. The information was therefore held to be defective and as such, the conviction thereupon was bad.

These two cases should be contrasted with the case of *Prai and Ondawame v. An Officer of The Government of PNG* (supra). As was seen, the appellants in this case were charged and convicted of being illegal immigrants to PNG under s.24(1) of the then *Migrations Act* 1978 (now revised chp.16). On appeal it was argued in their favour that the information was defective because it did not allege that the appellants "unlawfully entered Papua New Guinea", an essential element of the offence. His honour Saldhana J. said:

> There appears to be no statutory provision in our jurisdiction to the effect that an information must contain every element of an offence. There is nothing to that effect in the District Courts Act 1963 [now revised chp.401]. Even in England the rules which provide for the statement of an offence says that the statement need not necessarily state all the elements of the offence. [But] the effect of omitting an element of an offence may not give the defendant reasonable information of the nature of the charge

41. [1962] 1 All ER 904 at 907.

42. (Unreported Judgement, 1972) N.675.

43. *Id.* 1.

44. (Unreport Judgement 1972) N.714.

> [and] sometimes the omission of certain elements of an offence results in a failure to disclose what offence has been committed.[45].

On the whole he was of the opinion that the information against the appellants was defective but there was no need to amend for he said the appellants were under illusion that they were being prosecuted for the offence that, being non-nationals they entered Papua New Guinea without being no in possession of valid entry permits.

The Supreme Court in upholding Saldhana J's view, was of the view that the missing element was implicit in the following; 'You were a West Irian becoming a prohibited immigrant'.

Apart from the facts, the only main difference between this case and the first two cases is that this case does not say anything about amendment as did the other two, but rather implied the missing elements of the offence alleged against the appellants. From this, there appear to be two ways of solving any problems relating to defects as regards the non-disclosure of certain elements or other factors. With the greatest respect for the ruling in *Prai Ondawame,* it is submitted that no matter how good and valid the decision may be (which was decided after independence and is authoritative) all defects must be amended if need be in the interest of justice and also for formality's sake as well as for the sake of having a consistent form of laying informations, unless the circumstances otherwise warrant.

As regards the application of the principle in that case the submission at page 12-13 should be carefully noted. In the circumstances of the case itself no injustice may have been done because the appellants knew exactly why they were charged and convicted, but this may not be so in every other case.

(b) Charge Not Known To Law

An information which charges a person for an offence which is not known to the law has been held to be defective. In so far as this area is concerned the *Constitution* is clear. It says by s.37(2) that nobody is to be convicted of an offence that is not defined by a written law which also prescribes its penalty. The case of *Rogerson v. Stephens*[46] is a good example. The respondent was charged with using a motor vehicle and trailer on a road, without having in force an insurance policy in respect of third party risks, thereby contravening s.35(1) of the English *Road Traffic Act 1930.*

During the course of the trial in the lower court the respondent's counsel submitted that the information was bad in that the offence charged was not known to law. The justice rejected his submission ruled it was good, and proceeded to deal with the matter.

On appeal Lord Goddard CJ.[47] with whom Humprey and Parker JJ agreed, said:

> It is clear that a trailer is not a motor car. There is also no doubt that a motor car and trailer attached are not one vehicle but two, one of which has to be licenced. I can only read the information as alleging that it is an

45. [1979] PNGLR 1 at 7 (National Court on appeal from the Wewak District Court which finally ended up at the Supreme Court.

46. [1950] 2 All ER 144.

47. *Id.* 145, emphasis mine.

offence under the Road Traffic Act, 1930, s.35(1) to use a motor vehicle and trailer on a road without having in force a policy of insurance. It is contrary to s.35(1) to use a motor vehicle, but it is not contrary to that section to use a motor vehicle and trailer. Therefore I think the information discloses an offence which is not known to law. [He than went on to hold that] *the appellant could have been asked by the justices to amend the information by striking out the words "and trailer", but he chose to rely on the information as it was and the justices ruled it was good. I am of the opinion that it was bad and the justices ought to have indicated that they would be prepared to amend it if they were asked* [to do so].

t follows that if an information charges a defendant with an offence known to law, the se of some words (not necessary for the charge) may cause the charge to be unknown to ıe law. This could be cured by an amendment striking out those words. However if an ffence alleged in an information is totally not known to law it should not be amended ut should be thrown out.

c) *Incorrect Reference To Statutes And Sections*

: was held in the case of *John Worofang v. Patrick Wallace,*[48] that where an information ; properly laid against a defendant but fails to make reference to the correct section of ıe statute under which he is charged, this leads to no substantial miscarriage of justice, ɔr it is only a minor defect which can be easily rectified by amendment. The reason is ıat a defendant pleads guilty [or not guilty] to the words of the charge put to him and not ɔ the section number. A defendant can only plead to the facts, and not to law.[49]

d) *Mere Surplusage*

ı many cases informations contain words or phrases which are not necessary for the urpose of the charges or offences contained therein. These words or phrases are referred ɔ as mere surplusages which could be easily amended by striking them out before or at ıe beginning of the hearing to ensure that the defendant is informed precisely of the llegation against him.

. good illustration of this is provided by an Australian case *Turner Jones v. fcDonald.*[50] In that case a complaint was made under the Australian *Fire Brigades Acts 920 - 1931,* alleging that certain freemen with certain plant and equipment attended and xtinguished a fire occurring in a motor vehicle, owned by the defendant, who became able for the expenses and charges of the operation as the motor vehicle was uninsured.

he Full Court of Australia unanimously held that the words 'and extinguished' were othing but mere surplusage because the relevant Act only required that the Fire Brigade ttend to the fire. The inclusion or exclusion of the words 'and extinguished' did not ave any major effect on the information (complaint). Thus the complaint could be asily amended by striking out the words "and extinguished".

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8. [1984] PNGLR 144.

9. *Id.* 145.

0. [1933] St R Qld 99.

(e) Absence Of The Magistrate's Signature

It has already been seen that in schedule 2 of the District Courts Act Form 16 magistrates' signatures are required in all informations laid or presented before them, before they proceed further. Where an information does not bear the magistrate's signature it would be regarded as a defective information. Usually, however, all informations are signed (as they should be) by the magistrates before hearing them or otherwise dealing with them. In most cases it is the carbon copies of the informations which tend to miss out certain letters and words so if ever the magistrate's signature is missing it must be in one of the carbon copies (usually two) or both. Upon proof of the original being perfect in respect of the signature in question, the defect in the copies could be corrected or rectified: *R v. Halkett Ex parte Russ*.[51] In cases where the original information lacks the required signature it has not yet been officially proceeded with The defect can only be rectified by amending the information in terms of the magistrate inserting his signature.[52]

(f) Other Defects

The following have been held to be minor defects which may be rectified by the amendment process. These include informations which failed to record the proper name of the defendant either in spelling or description *(R v. Norkett;*[53] *Whittle v. Frankland),*[54] incorrect description of ownership of property where the offence alleged includes questions of ownership *(Ralp v. Harnell*[55] and wrong dates given or otherwise omitted for the commission of an offence in which the date is not material *(Exeter Corporation v. Herman,*[56] *Hibbered v. Kelleher;*[57] *and O'Mally v. Russell).*[58]

(II) CASES WHERE AMENDMENT NOT ALLOWED

(a) Wrong Party Laying An Information

Where a statute specifically provides who should lay a criminal charge against the offenders that specified person alone has the locus standi to do so and no other person will suffice unless otherwise provided. The question then for our purpose is, if some other person lays an information under such a statute or law, can it be amended to allow the right party or person's name to be entered?

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51. (1929) 45 TLR 507.

52. Kennedy, *op.cit.* 124.

53. (1915) 9 QJP 819.

54. (1962) 2 B & S 49.

55. (1875) 32 LT 816 D.C.

56. (1877) 37 LT 534 D.C.

57. (1901) 27 VLR 474.

58. (1908) VLR 545.

This question can be answered in the light of *Joseph Asia v. Leo Eko*.[59] In that case the appellant was convicted of adultery by the Mendi Local Court. The information which led to his conviction was laid by a policeman. The relevant statute, the *Native Administration Regulation* section 84(3), however, expressly provided that only the native husband of the wife or the wife of the husband with whom the offence was committed, and in their absence their nearest respective relatives, could lay an information.

The policeman was not the husband of the woman with whom the offence was committed, nor was he the nearest relative of the husband. During the course of the hearing the informant's (that is the policeman's) name was deleted and the husband's name - Leo Eko was substituted. No explanation was given for the alteration and the defendant (appellant) was convicted thereon.

Upon appeal, his honour Prentice J.[60] said the following:

> I am of the opinion that the complaint here was not one allowed for by law, and no power in the magistrate of amendment could turn it at the hearing into one laid by "The native husband or in [his] absence his nearest relative".

Thus an information laid by a person who lacks the locus standi cannot be amended to have the name of the person who has it entered. The best thing to do in such a case is to have the information withdrawn or struck out and then have the right party start the whole process again.

(b) Subsequent Dates

Where an information alleges that on a certain date an offence was committed and the date is subsequent to the information, that amounts to a defect which cannot be amended. This is because one cannot be accused of an offence which is at the time of the accusation not an offence, nor can one know what offence another will commit sometime in future. An exception for this would be where one tells another what he intends to do (commit) at a future date as in the case of a criminal conspiracy, or where it is very obvious from his conduct. The law only knows that the prosecution will have to prove that an offence has been committed and not that it will be committed at a later date or time *(Cumming v. Pinnock)*.[61] If however the date in the information is an error made by the person drafting, it could be corrected by amendment if no injustice will be done.

(c) Information Disclosing No Offence

It was mentioned under the discussion on defects which could be amended that an information charging an offence not known (totally) to law cannot be amended. This is also true for an information which clearly does not disclose any offence at all: *De Faro v. Raukin*.[62] This relates more particularly to an information which fails to disclose all the

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59. (Unreported Judgement 1972) N.708.

60. *Id.* 2.

61. (1890) 54 J.P. 564.

62. (1899) 25 VLR 170.

essential elements of the offence it alleges. The effect of this is that no charge can be preferred against the defendant.

(d) Information Charging A Wrong Person

Unless a statute specifically provides otherwise or the right defendant waives the irregularity the courts have no power to amend an information which names a wrong defendant. *City of Oxford Tramway Co. v. Sanky.*[63]

(e) Information Laid Under Repealed Statute(s)

If and when a statute is repealed it loses its legal force or authority as from the date it is so repealed. Thus, if an information under such a statute is laid that information means nothing. The courts therefore have no power to amend such an information if it is laid and is brought before them, by for instance attempting to bring it under a different statute.[64] An Australian case *R. v. The Justice At Palby, Ex parte O'Keife,*[65] illustrates this point. In that case the defendant was charged for unlawfully and wilfully branding a certain heifer belonging to the complainant (informant) for which he was convicted. He was, however, charged under a repealed statute. It was held that the defendant was convicted of an offence not known to law and therefore the conviction was bad in law.

(III) CONCLUSION

The list of situations discussed above are not exhaustive as regards what constitutes a defect within the meaning of s.32 of the Act. The list could, however, assist in determining what constitutes a defect within the scope of s.32. A defect in that connection would include: first, an information which fails to comply with the rules and requirements of laying a proper information; second, an information which fails to disclose all the necessary elements of the offence it purports to allege as well as any other particulars required for that information; and finally, any discrepancy in the information. Some of these defects may be amended and others may not, depending on the nature of the particular defect and most importantly to achieve justice. In other words the question of whether or not a defective information may be amended depends upon the particular circumstances of each case, in the interest of justice which is dependant upon the degree of the defect.

The extremes are clear: on the one extreme an essential element of an offence missing cannot be curred by s.32. On the other extreme a slip of a pen or a silly mistake by the person drafting the information in not including a word or a letter can be curred by s.32. The problem area is, however, in cases falling in between. These could be decided according to the degree of the defect.

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63. (1890) 54 J.P. 564.

64. O'Neil & Desailly, para [2.9]; Griffin, *op.cit.* 63.

65. (1902) St. R. Qld. 191.

D. Variations

What is meant by the term 'variance' as used in s.32? As Kennedy Allen says, 'the extent to which the provision is applicable in practice seems to depend upon the proper meaning and effect to be given to the word "variance"!66 The best definition to start with is that which is offered by the learned author himself in the following words; 'the word points at some difference between the allegation in the information and the evidence adduced in support of it'.67

This definition obviously places a limit on the exercise of the s.32 power. What is clear is that the power of amendment can only be exercised where there is a variance and not where the evidence differs substantially from the offence alleged in an information. For example the information may allege the offence of stealing and the evidence discloses the offence of inflicting bodily harm.68 The learned author further elaborates in his definition (which is acceptable for the purposes of our s.32):

> In a case in which the offence disclosed by the evidence is distinguished in legal nomenclature from the offence stated in the complaint by reason of a variation in the concomitant circumstances attending the committing of it, *but is cognate in its nature and in the criminal quality of it, the relation of the evidence to the complaint may very properly be described as a variance.* But evidence that disclose an offence totally different in its nature and criminal quality and in the concomitant circumstances necessary for the perpetration of it would be substantially a contradiction and disproof of the contents of the complaint so far as they were dependent for proof upon the facts established by the evidence; in such a case the relation of the evidence to the complaint could not be legitimately described as a variance... *The duty to amend the complaint arises where the facts proved do not establish the charge as laid but do establish a cognate offence under the same section.*69

There is support and confirmation of this by Latham CJ. in *Felix v. Smerdon*70 where he said, 'a variance exists where an offence charged is established with some variation or difference in detail. But where the offence is really a different offence... the term "variance" is not applicable.

Thus, the courts could exercise their power of amendment where there is a variance in so far as it is cognate or closely related to the alleged offence in a given information and not otherwise.71

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66. Kennedy, *op.cit.* 127.

67. *Ibid.*

68. *Ibid.*

69. Emphasis added.

70. (1944) 18 *ALJ* 30.

71. *Ex parte Lovell; Re. Buckley* (supra) at 173; O'Neil & Desailly, para [2.8]' *Australian Diggest Supplement* 1944 p.248 par [97].

72. [1907] 1 WLR 142.

As in the case of defects, it is difficult for one to point out what constitutes a variance within the meaning of s.32, for it is conceived that it is something which depends upon the particular circumstances of each case. Despite this difficulty it is submitted that if one looks into the decided cases, both within and outside P.N.G., some basic understanding of what constitutes a variance in addition to what has already been discussed, to determine whether or not the information could be amended to cater for such variance, would be gained.

In *Wright v. Nicholsan,*[72] Lord Parker C.J., was of the view that an amendment should have been allowed for an informationtion which alleged that the defendant had incited a child to commit an act of gross indecency from a specific date to an unspecified date of the same month. His lordship was also of the view that it could have been useless if so amended because of the particular circumstances of the case in that, inter alia, he could easily provide alibis for the whole month.

This shows that there may be cases of variances which could be amended but in the circumstances of the particular case it may not be possible to do so.

(I) CASE EXAMPLES - WHERE AMENDMENT ALLOWED

(a) Same Section/Statute

In *Thomas v. Lee.*[73] the respondent was charged with a street betting offence. The information in part read 'in a certain street to wit a thoroughfare...'The term "street" was defined by the relevant Act to include enclosed land. The evidence established that the offence was committed in an "enclosed land" and not a "throughfare" as alleged. Mann CJ. was of the view that:

> The proper course for the magistrates to have taken was to amend the variance between the information and the facts found by them, by striking out of the information the reference to the throughfare, and adding if they thought necessary, "in enclosed land".[74]

A similar view was taken in *Utula Samana v. Demas Waki.*[75] The appellant in this case was charged and convicted by the Lae District Court that he 'did use insulting words whereby a breach of peace was likely to take place contrary to s7(6) of the Summary Offences Act of 1977'. He was however, originally charged under s.7(a) for allegedly using insulting words with intent to provoke a breach of peace' but the information was later amended after the close of the prosecution case pursuant to s.40 of the then District Courts Act (now s.32).

On appeal the appellant argued that the learned magistrate could not do what he purported to do under s.40 of the *District Courts Act.* However the court ruled that:

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73. [1935] VLR 360.

74. *Id.* 364.

75. [1984] PNGLR 8.

76. *Ibid.*, 12, emphasis mine.

> It is clear from the wording of the section and authorities that a magistrate has considerable scope to deal with charges on information and that a court should not be astute to produce injustice by dismissing a complaint by reason of some unimportant error. The section quite clearly empowers a magistrate to amend an information at the hearing. [For the present case]. *The two offences are similar in nature and character. They relate to the same subject... the facts of the amended charge form part and parcel of the original charge, they are within the same section and subsection, they share the same constituent elements... that they would in effect be stated in the alternative.* And that the amended charge is of less gravity than that originally charged. They *are cognate offences*.[76]

This provides more authority for the statement that the courts may exercise their power of amendment where there is a variance in so far as it is cognate or closely related to the alleged offence in a given information and *not* otherwise.

(II) AMENDMENT NOT ALLOWED

(a) Disclosure Of Different Offence By Evidence

The case of *Felix v. Smerdon* (referred to earlier) provides an example of the course of action to be taken if the evidence discloses a different offence from that which is alleged in an information. In that case, Felix was charged for committing an offence in a place called Clemont in Queensland on the 5th of December, 1942. However, the evidence showed that the offence if committed was committed in a different place called Coment about 90 miles away from Clemont and not at Clemont as alleged. In addition if ever it was committed it was not committed on the 5th but a date before the 16th of December, 1942.

The Magistrate allowed an amendment and convicted the defendant. When the case got to the High Court Latham CJ. said the difference between the evidence and the information was not merely a variance within the meaning of s.65 of the Justice Act [equivalent to our s.32]; it was far more than a variance. It was a different offence from the offence which was alleged in the information'.[77] In addition Starke J. said; 'the provision could not be relied on because the offence proved was not the offence charged. Time and place are not defects in substance in the case for the offence proved was different from the charge and there was no variance for the same reason.[78]

Thus, it is clear that s.32 could not be used to substitute the original charge in an information by another if that other one is establish by the evidence. The proper procedure to follow in such a case is to dismiss the original charge and charge the defendant with the correct charge as established by the evidence and proceed there and then to deal with the new charge or otherwise get the matter adjourned to give the

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77. At p.30.

78. *Ibid.*

79. *Lawrence* v. *Same* [1968] 2 QB at 99; *Peter Kaprendajanda & Others* v. *Isac Ngatia* [1984] PNGLR 58, and also *Ex parte Lovell; Re Buckley* (supra.

defendant time to prepare his defence,[79] whichever is deemed proper in the interest of justice in the circumstances of the particular case.

(b) Variance Resulting From Defence Evidence

So far we have seen variances resulting from prosecution evidence adduced in support of their allegations. What about variances resulting from defence evidence? Are they variances within the meaning of section 32?.

Section 32 clearly provides that the power of amendment is only to be exercised '...where there is a variance between the evidence called in support of the information' and the information itself. It follows therefore that the power is clearly to be exercised (if need be) where there is a variance between the prosecution evidence and the information, and not that which arises or may arise from the defence evidence which is called (if any) primarily to rebut or contradict prosecution cases. Thus it is correct to say that the power of amendment ends upon the close of the prosecution case.

The case of *Wright v. O'Sullivan*[80] supports this view. The appellant in that case was charged for carrying on business as a bookmaker at a certain Royston Park contrary to section 42(1) of the Australian *Lottery and Gaming Act 1926-1947*. After the close of the prosecution case, the appellant gave evidence in his defence admitting the offence alleged against him but swore that he did not do so in Royston Park but at a hotel. The prosecution there on applied for an amendment which was granted and consequently the defendant was convicted, upon the amended information.

The defendant appealed against the conviction resulting from the amendment and succeeded on the ground that the amendment had the effect of charging the defendant with a different offence. The prosecution appealed to the full court of South Australia: Read J.[81] leading the majority view expounded the following:

> If evidence given on behalf of a defendant shows or tends to show that the offence charged, as defined at the close of the case for the prosecution, had been committed at some place or at sometime other than the place or time appearing from it, it may be open to question whether there is then a "variance" within the meaning of that word as used in s.182 of the Justice Act [the equivalent of our s.32]. If evidence for a defendant in conflict with that of the prosecution is not strictly a "variance" within the meaning of s.182 and that section therefore has no application, the court is not on that account at liberty to record a conviction for any offence which may be proved as a result of the defendants evidence.

However Read J. was also of the view that if the variations were slight and did not touch any of the essential elements of the offence or were otherwise not substantial for the purpose of the charge, they were variances within the meaning of s.182 and therefore the information could be amended.

These latter classes of variances, it is submitted, could, easily be ignored or disregarded for all practical purposes in the interest of justice, as for example, if one is charged with assault for kicking but the defence evidence shows it was only a touching act of assault;

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80. [1948] SASR 307.

81. *Id.* 313 & 314.

that minor discrepancy should be amended. Anything falling short of this cannot be amended on the basis of the ruling of Read J. in Wright v. O'sullivan (Supra).

It was earlier[82] suggested that the power of amendment should be exercised where necessary at an earlier stage in the trial process, preferably before the actual hearing or trial. However, in the case of variances amendments could be allowed during the hearing or trial but before the verdict.[83] After all, variances become apparent when evidence is called in support of an information which is during the hearing well after the initial stages.

In spite of this, the arguments already advanced as regards the duty of the prosecution are equally important here. The underlying argument is that if only the prosecution carefully carries out their duties there could be no need for any amendment because there would be no defect or variance. If care was exercised they would know what evidence will prove what element without leaving any trail of variance either in substance or form; so that when evidence is called in it just comes in to confirm what is alleged in the information and that will be it, they (prosecution) have proved their case.

6. Mover Of Amendments

Upon whose instance should the power of amendment be exercised? In other words, where there is a need for an amendment who should call for it; should it be the court or anyone of the parties interested in the amendment? It is in the interest and wish of the prosecution which is representative of the interests and wishes of the society as a whole for the sake of justice, that offenders are brought to the courts to be dealt with according to law by way of laying an information against them. By reason of this it is in the interest of the prosecution that defects and variances are rectified by amendments, or otherwise they face a dismissal on account of a defect or a variance.

In no circumstances should the courts instigate amendments, as they are there only to do and administer justice. Doing justice as was adverted to already in the course of this paper means also to be seen to be doing justice and not only doing justice. This is to ensure that their role as fair referees as in a game of soccer (though their duties go beyond a literal referee of a game) are not called into question on grounds of acting more towards one of the parties rather than being fair to both parties. His Honour Amet J said in *Utula Samana v. Demas Waki* (supra) at page 12 that '...an amendment could be made at the volition of the court or upon application by the prosecutor. *The latter course is considered preferrable in order that the courts are not seen to be adopting the role of the prosecutor'*.[84] It is submitted that his honor must have foreseen the kind of situation just stated, when adding the underlined qualification to his suggestion that an amendment could be made at the instance of the court or the prosecution.

Being a fair referee does not necessarily mean a judge should only blow the whistle when a rule is breached but he or she should also get the goal posts straight for the parties to

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82. Under the heading "suggestions as to when the power of Amendment should be exercised".

83. *The State* v. *Gelam Koivak* (supra)

84. Emphasis added.

85. Oliver Wijetillake, Principle Magistrate, from my interview with him in Hagen.

score their goals[85] and for that matter spell out the rules if need be. What it means then, is that judges should not take an active role in making amendments where required in the interest of justice though where the defendant is not represented the courts should be more cautious and if justice requires raise any point on behalf of such a defendant. It is submitted that it is perfectly alright for them to indirectly indicate to the prosecution that an information ought to be amended because of a defect or a variance, as otherwise they could not convict on the information as it stands. For example, a magistrate could say to the prosecution, "Mr. Prosecutor I cannot convict on the information as it stands, so what do you wish to do about it". This sort of representation would cause a reasonable prosecutor to realise that the information has something wrong which ought to be corrected before he could get the defendant properly convicted.

It is submitted that so long as the courts in reality maintain their roles as fair referees, their integrity and respect will be maintained with an appreciation of their roles. This will in turn to some extent ensure that the citizens do not resolve to the taking of the law into their own hands. In spite of what is to be further submitted which may amount to an overstatement, it is nonetheless submitted that the people might see in some cases that the courts in instigating amendments may be combining forces with the prosecution to get a defendant convicted.[86] They may therefore tend to see no point in going to the courts when they know that it will not be fair but will be acting against them, though the courts may not necessarily be doing so.

However the question of whether or not the court should intervene is a question which depends upon the degree of a defect or a variance in a given case. If it is not so serious but is only a trivial one the court may cause it to be amended, for it does not go to touch the merits of the case.

7. *Amendments After A Plea*

The importance of effecting all necessary amendments at an earlier stage in the trial process before the charge is formally put to the defendant need not be emphasised again save to say that a proper information will in all fairness ensure that the defendant is properly informed of what is alleged against him, and is therefore required to respond to.

It is not the objective of this paper nor is it necessary to see how a plea is or ought to be taken. It will suffice for our purpose however, to point out that a defendant may change his plea from one of guilty to not guilty or vice versa, anytime before sentence.[87] This is nonetheless subject to the defendant having good reason for the change whose acceptance or rejection is dependent upon the magistrate's discretion.[88]

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86. This happened in a real case in which I was representing the defendant at the Boroko District Court for an assault charge allegedly for "laying hold" but the evidence showed it was by "kicking" and the magistrate got it (the information) amended without any application for the amendment by the prosecutor. The defendant said the court was acting unfairy towards him in that it was assisting the prosecution in so amending the information.

87. R v. *Cole* [1965] 2 QB 338.

88. R v. *Recorder of Manchester* [1971] AC 881; *Naiu Lumage & Others* v. *The State* [1976] 382; and *The State* v. *Joe Ivoro & Gemora* VUNA [1980] PNGLR 1.

89. Unreported and Unnumbered National Court Judgement.Appeal No.59 of 198[illegible], (made available to me by his honour Bredmeyer J).

This part of the paper is concerned with a situation where an information has already been put to the defendant and he has already pleaded either guilty or not guilty and it is later found that the information is defective or has some variance and is amended to rectify the defect or the variance and the allegation contained therein. The earlier discussion on the circumstances in which informations could be amended are equally applicable here and should therefore be noted carefully. Where an information is amended there is no doubt the information and the charge contained therein is in a new version. If the amendment is made after a plea has already been taken, then to do justice the charge in the new version should be put to the defendant in disregard of the original one, if his true position after the amendment is to be ascertained.

A case on point is the case of *Paul Kapi v. Simon Nuni,*[89] in which the appellant was charged and convicted of having in his possession a dangerous drug, namely cannabis, by the Lae District Court. The original information did not disclose an essential element of the offence namely that he "knowingly" had such a drug. This was included by amendment and secured the conviction of the defendant. The defendant was not re-arraigned in terms of the amended version. His honour Kidu CJ. said; 'when the amendment was done a valid charge then was contained in the information. *At this time the Magistrate should have arraigned the defendant (now appellant) with the charge before proceeding further. As the appellant was never arraigned and asked to plead to a valid charge there was no trial and the conviction is bad'.*[90]

It is submitted that where an information is amended on grounds of a defect or a variance or for both, the courts should make sure that the defendant is rearraigned in the terms of the amended information, otherwise their decisions are open to be overruled upon appeal if the defendant is convicted.

8. Costs

Here the question to be addressed is who should bear the costs if any? It has already been seen that it is the prosecution who has the obligation to ensure that only proper and accurate informations get to the courts to be dealt with according to law. If for any reason there is a need for an amendment the prosecution also has the obligation to ensure that an amendment is effected. It would reasonably follow from this that, it is the prosecution (both public and private) who should bear the costs if any which may be incurred as a result of the amendment. This is more relevant where a defendant has been misled by a defective information (also as a result of a variance) and upon an application by the prosecution it is amended which makes it practically impossible for the defendant to defend himself without any preparation. The case inevitably has to be adjourned at the request of the defendant or the court upon its own discretion.[91]

The Magistrates who were interviewed[92] were of the view that the prosecution should bear the costs if any though they showed reluctance in grade-5 Magistrate matters. This

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90. *Id.* 2 & 3, Emphasis mine.

91. *District Courts Act* s.33.

92. See footnote 36.

93. As to under what circumstances s.260 should be applied the case of *Haranga* v. *Wangiwa* [1984] PNGLR 244 should be of assistance.

94. (1902) 28 VLR 283.

was because of s.261 of the Act where it provides in clear terms to the effect that upon the dismissal of an indictable offence (tried summarily) the courts have no power to adjudicate costs. In respect of all other cases section 260[93] of the Act applies which empowers the courts to adjudicate costs where necessary in their discretion. In practice however the courts usually do not award costs against public prosecutors.

9. DUTIES OF MAGISTRATES, PROSECUTORS AND DEFENCE COUNSEL UNDER SECTION 32 OF THE ACT

In one way or another the duties and responsibilities of (a) magistrates, (b) prosecutors and (c) defence counsel have already been adverted to so this part of the paper will briefly look at some of these duties and responsibilities.

A. Duties Of Magistrates

Where it is alleged that an information is defective because of some defect or variance either in substance or form, it is the duty of the magistrates to determine as to whether or not there is in fact a defect in the information as alleged. If the allegations are true the magistrates have the duty to decide whether or not to amend the information there and then. They should above all remind themselves that they have to do and administer justice in the given circumstances: *Strait v. Colenso*.[94]

If an amendment is allowed to an information the magistrates have the duty to consider whether or not to apply s.33 of the Act which provides that they could grant an adjournment in favour of the defendant in their discretion. However, if the defendant requests for an adjournment they are obliged to grant it (s.33 Act).

The magistrates should at all times remain neutral as much as possible in order to avoid any possible inference of acting unfairly towards one of the parties,[95] though in reality they may not necessarily be so acting.

If an amendment is allowed magistrates have the duty to have the defendant re-arraigned, that is, the defendant should be allowed to plead again, this time on the basis of the amended information.[96]

B. Duties Of Defence Councel

Defence counsel form part of the justice administration system. They of course have the duty to do their utmost best for their client's interest but should also bear in mind that they are at the same time officers of the court. As officers of the court and legal representatives for the accused they should refer any defect or variance to the court's attention upon the sighting of the same, so that the substance of the information could be dealt with quickly and smoothly. After, all applications for amendments which are met with an objection may take more time to deliberate upon.

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95. *Utula Samana* v. *Demas Waki* [1984] PNGLR 8.

96. *Paul Kapi* v. *Simon Nungi* (supra).

97. *The State* v. *Tanedo* [1975] PNGLR 395.

98. (1948) 112 J.P. 27.

Where there is an application for the amendment of a defect or a variance which would not affect the merits of the case,[97] defence counsel should not object to them for it will only involve more expenses or hardships for their client.

A case on point is the case of *Dring v. Mann.*[98] In that case the defendant's name was inaccurately described. Her name was Rosa Jane Mann but was named as Rose Jane Mann. Her solicitor submitted that the information was bad on the ground that she was described as Rose Jane Mann and not Rosa Jane Mann. This was upheld by the lower court. On appeal Lord Goddard C J. with whom the other judges agreed said:

> It is deplorable that an advocate should take such a point. The counsel would ever take such a point I cannot believe, and when a solicitor appearing as an advocate in a case he has the same duty to the court as a counsel, and a point of this sort I say deliberately should not be taken by any responsible advocate.... The only result of this foolish point which was taken by the defendant's advocate is that not only has he now involved his client in the costs of two hearings but she must also pay the cost of this appeal.

This case clearly shows that it is permissible for defence counsel to object to informations which have serious defects or have serious variances but not for minor ones. In this respect the circumstances under which amendments can be allowed and those in which they cannot be so allowed should be carefully noted. Thus it could be argued that defence counsel have no duty to raise objections on minor defects or variances.

Defence counsel are under a duty to exercise proper care, whether or not to raise an objection to an information which is defective or has some variance or to apply for its amendment. This duty is very important in PNG where most magistrates lack sufficient legal knowledge unlike counsel for the parties. The defence counsel must decide whether the defect is trivial to be brought to the notice of the court or of substance in which case his paramount duty is to his client unlike the prosecution: therefore he should not reveal such defects.

On ethical grounds however, defence counsel should not wait for an application to amend an information; they should bring to the courts notice that there is something wrong with the information. For if Counsel waits to capitalise on the defect or variance not yet rectified and a conviction is entered, he may get the conviction quashed but it is not the end of the matter as, the defendant may be charged again with the same offence. This was the case in *Paul Kapi v. Simon* (supra)[99]. and *Dring v. Mann* (supra).

C. Duties Of The Prosecutor[100]

From the very beginning the prosecutor has a duty in the interest of the community according to the dictates of justice to decide whether or not to prosecute a case. If the interest of the community and justice demand that a matter be prosecuted they must

99. From my interview with Mr. Justice Bredmeyer, 19 March, 1987.

100. For more on this see Roberts L.W. Smith 'The Role of the Professional Prosecutor in Papua New Guinea.' (1977) 4 *M.L.J.* 91.

101. Id. 98.

102. PLAR No.1 of 1980 [1980] PNGLR 326

prosecute but if it does not so demand they must not proceed to prosecute even if there is a punishable criminal offence.

If they decide to prosecute they have the duty to ensure that the information is in good order, that all the necessary elements of the offence(s) alleged therein are disclosed and that all forms and requirements concerning informations are in fact complied with. If they find some defect either in substance or form, they have the duty to cause it to be changed or change it by correcting it. At this stage too they have the duty to ensure that the evidence which they propose to call will confirm what is alleged without any trail of variance. If a careful exercise of this duty discloses a likelihood of a variance they should cause the information to be reworded to accommodate it. All these can be summed up in the question which they must ask before proceeding to prosecute: does the information best reflect the substance of the defendants alleged criminal activities?[101] A prosecutor who is serious in his duties would do all these well before putting the information to the defendant which will of course ensure that there is no delay in the trial.

If, however, it is practically impossible to identify any defect or variance prior to the actual commencement of the court proceedings the prosecutors have the duty to apply for amendments soon upon the sighting of them. This means they have to keep a watchful eye throughout the trial until the matter is finally ended, all with the view to aiding the court in the dispensation of justice, and not with a view to persecute the defendant.

10. SUMMARY AND CONCLUSION

We have seen that s.32 of the *District Courts Act* (supra) is a necessary section to have in our criminal trial process in the District Courts. This is because it ensures that mere technicalities do not prevail over the dealing with of offenders according to law by way of having informations laid against them and brought before the court.

However, we have seen too that the power contained therein should be exercised only in cases where justice of the case (s) required it; whether it be for a defect or a variance. The cases cited or referred to should be used as useful guides in cases of defects and variances to decide whether or not to amend.

It was submitted that the power should be exercised if need be at an earlier stage in the trial process, preferably well before he actual hearing of the case, in the nterest of justice not to take the defendant by surprise.

If there is an amendment after a plea has already been taken the accused should always be re-arraigned because the information and the charge therein is in a new version.

It was also submitted that, in order to avoid the court being seen to be acting towards or in favour of the prosecution (though in reality it may not be so acting at all) the prosecution should be the party responsible for moving or applying for amendments. The respective duties of the court, the defence counsel and the prosecutor should be carefully effected.

Furthermore, it was also seen that though the section had a very good intent or object it would easily be clouded over by a literal interpretation despite case law which says the literal interpretation of statutes has no place in PNG.[102] This is particularly the case in regard to the "no objection shall be taken or allowed" phrase, of which one interpretation says that when the power of amendment is asked to be or is to be exercised no objection shall be taken. This interpretation has the effect of denying the right of the defendant to be afforded a fair hearing which is guaranteed by s.37(3) of the *Constitution*.

In these circumstances, the statement of the law in s.32 is quite unsatisfactory. Once again the underlying policy of s.32 is good but the way it is stated causes it to be questioned as regards its constitutionality. For the purpose of preserving its good object the wording of the section ought therefore to be amended. It could be expressed as follows:

> 32. An information, a summons or a warrant issued upon an information may be amended for any alleged defect either in substance or form or for an alleged variance between it and the evidence called in support of it by the court and in principle upon the application of the prosecution.

This draft excludes the controversial phrase "no objection shall be taken" and gives a wide discretion to the court to decide whether or not to uphold (besides other things) any objection as regards the amendment of informations on grounds of defects or variances; and of course it preserves the underlying policy of the section. It would therefore without any doubt fall within the ambit of the *Constitution*.

Finally it is submitted that all the foregoing observations and submissions should be carefully considered before asking for the application of the power of amendment under s.32 and even more carefully when it comes to deciding whether or not to apply that power, in any one given case, whether or not the section in question is amended.