CHAPTER 90
TRIAL

§ 90.10. Judge to Control Trial.

It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved.

COURT DECISIONS: DISTRICT COURT, APP. DIV. 1978. The discussion of prior testimony with a future government expert (medical) witness by prosecutor did not violate an order excluding all witnesses from the court before they were called. In any event, the witnesses objected to by Defendant had been excluded from the effect of the Exclusion Order. *People v. Camacho,* D.C. Guam, App. Div., Cr. App. #76-010A, Decided 01/24/78; Aff'd, CA9.

NOTE: Section 90.10 is identical to former § 1044. See also Cal. Pen. Code § 1044 (same). See generally B. Witkin, California Criminal Procedure ″Trial §§ 432-442(1963, Supp. 1973).

§ 90.13. Order of Trial.

Unless otherwise directed by the court, the trial shall proceed in the following order:

(a) If the trial be before the court with a jury, the jury shall be impanelled and sworn.

(b) The court or clerk shall read the indictment, information, or complaint and the defendant's plea to the jury, but shall omit any reference to a prior conviction charged therein.

(c) The prosecuting attorney may make an opening statement. The defendant or his counsel may then make an opening statement or may, at his option, reserve the right to make an opening statement until immediately prior to offering evidence in support of his case.

(d) The prosecuting attorney shall offer the evidence in support of the charge.

(e) The defendant or his counsel may then open the defense. He may make an opening statement, if he has not already done so pursuant to Subsection (c), and may offer his evidence in support of his defense.

(f) The parties may then respectively offer rebutting evidence unless the court, for good reason, in furtherance of justice, permits either party to offer evidence upon his original case.

(g) When the evidence is concluded, unless the case is submitted on either side, or on both sides, without argument, the prosecuting attorney, and the counsel for the defendant, may argue the case to the court and jury; the prosecuting attorney opening the argument and having the right to close.

(h) If the trial be before the court with a jury, the court shall then instruct the jury.

NOTE: Section 90.13 is based on former § 1093 and § 1093 of the California Penal Code. See generally B. Witkin, California Criminal Procedure Trial §§ 393, 427-499(1963, Supp. 1973). The introductory clause to § 90.13 makes clear that the court may depart from the order prescribed where necessary or desirable. For example, he may at the beginning of the trial or during the course of the trial, give the jury instructions on the applicable law. See Cal. Pen. Code § 1093 (6). See 8 Moore, Federal Practice ¶30.02(1974). The authority so provided makes redundant the same substantive statement made in former § 1094. Subsection (b) has been revised to make clear that the reading of the accusatory pleading must not include a reference to any previous convictions under any circumstances. Contrast former § 1993(1) and § 1093(1) of the California Penal Code. Subsections (c) and (e) have been revised to make reference to the opening statements which may be made by the respective sides. See generally B. Witkin, *supra* §§ 428-430. Subsection (g) provides for the order of argument. See also § 90.16 (number of counsel permitted to argue); Fed. R. Crim. P. 29.1 (proposed; same as § 90.13 (g)). See generally B. Witkin, *supra* §§ 443-467. Subsection (h) has been added to refer to the court's charges to the jury. See also §§ 90.19; 105.14 (written instructions may be taken into jury room). Compare Cal. Pen. Code §§ 1093(6), 1127. See generally B. Witkin, *supra* §§ 468-499; 8 Moore, Federal Practice ¶30.09(1974).

§ 90.16. One (1) Counsel to Argue; Exception Allowed.

One counsel shall be permitted to argue the cause for each party but the court, in its discretion, may permit additional counsel to argue any cause.

NOTE: Section 90.16 supersedes former § 1095. It makes clear that one counsel is permitted to argue the cause for each party (rather than each "side") and permits additional counsel to argue in the court's discretion.

§ 90.19. Jury Instructions; Time, Presentation.

(a) If the trial be before the court with a jury, all requests for instructions on points of law must be made to the court and all proposed instructions must be delivered to the court before commencement of argument.

(b) Copies of such requests shall be furnished to adverse parties at the same time they are delivered to the court. Before the commencement of the argument, the court, on request of counsel, shall: (1) decide whether to give, refuse, or modify the proposed instruction; (2) decide which instructions shall be given in addition to those proposed, if any; and (3) advise counsel of all instructions to be given.

(c) Opportunity shall be given to object to any proposed instruction before it is given, out of the hearing of the jury and, on request of any party, out of the presence of the jury. However, no party may assign as error any portion of an instruction or omission therefrom unless he objects thereto stating distinctly the matter to which he objects and the grounds of his objection.

(d) Notwithstanding Subsection (b), if, during the argument issues are raised which have not been covered by instructions given or refused, the court may, on request of counsel, give additional instructions on the subject matter thereof.

NOTE: Section 90.19 continues the substance of former Rule 30; however, Subsection (b) incorporates portions of § 1093.5 of the California Penal Code which make clear that counsel should be advised of all instructions to be given. Moore suggests that under the federal rule (which is identical to former Rule 30), some judges had adopted practices which did not permit counsel to know in advance what the charge would be. See 8 Moore, Federal Practice ¶30.03[2] (1974). Subsection (c) makes clear that an opportunity must be given to make objections before an instruction is given. Moore suggests that this is also not always permitted under federal practice. Id. As to instructions generally, see 8 Moore, Federal Practice ¶¶30.01-30.04, 30.06- 30.08 (1974), B. Witkin, California Criminal Procedure Trial §§ 468-495 (1963), Supp. 1973).

§ 90.21. Proof of Each Element of Offense Required: Exceptions for Negation of Defense; Affirmative Defense.

(a) No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

(b) Subsection (a) does not require negating a defense (1) by allegation in the indictment, information or complaint, or (2) by proof at trial, unless the issue is in the case as a result of evidence at the trial sufficient to raise a reasonable doubt on the issue.

(c) Subsection (a) does not apply to any defense which a statute explicitly designates as an "affirmative defense." Defenses so designated must be proved by the defendant by a preponderance of evidence.

NOTE: Subsection (a) of § 90.21 restates the fundamental principle that the prosecution must prove guilt beyond a reasonable doubt as to every element of an offense. Compare former § 1096. Rules as to pleading and proof of "defenses" are set forth in Subsection (b), which requires the prosecution to negative such a defense by proof only when the evidence at the trial is sufficient to raise a reasonable doubt on the issue.

A category of "affirmative defenses" is recognized by Subsection (c). When the Criminal and Correctional Code (or other statute) provides for such an affirmative defense, the burden of proving it by a preponderance of the evidence is put on the defendant. Such affirmative defenses are not numerous but are provided in appropriate cases. See, e.g., 9 GCA §§ 7.22 (insanity); 7.55(c) (ignorance or mistake); 7.58(d) (non-self-induced intoxication); 7.61 (duress; compulsion); 7.70 (entrapment); 7.73 (renunciation).

§ 90.23. Reasonable Doubt: Defined; May be Read to Jury Verbatim.

(a) Reasonable doubt is defined as follows: "It is not a mere possible doubt because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the mind of the trier of fact in that condition that he cannot say he feels an abiding conviction to a moral certainty, of the truth of the charge."

(b) In charging a jury, the court may read Subsection (a) to the jury and no further instruction defining reasonable doubt need be given.

COURT DECISIONS: D.C. GUAM APP. DIV. 1980. It is not error for the "reasonable doubt" instruction to be given using the terms "important affairs" rather than "a moral certainty" as stated in Subsection (a) of § 90.23 of this Title. *People v. Francisco San Agustin Ignacio,* D.C. App. Guam 1980, Cr. App. #79-00036A.

D.C. Guam App. Div. *People v. Yang,* DCA 84-0005A (1985). Since the Ninth Circuit Court has upheld the giving of a different instruction than the one found in 8 GCA § 90.23, the Appellate Court cannot change such approval without first being directed to do so by the Ninth Circuit.

C.A.9, 1988. 1. Deferential standard of review is not to be applied to the construction of local law by the Appellate Division of the District Court. Strict standard of review de novo review is applicable.

2. Courts of Guam may not rely upon unpublished decisions of the Ninth Circuit. *People v. Yang*, C.A.9 (Guam) 1988, upon rehearing en banc, 850 F.2d 507. Prior decision, same case, overruled, 800 F.2d 945.

NOTE: Subsection (a) of § 90.23 is substantively the same as the second portion of former § 1096. See also Cal. Pen. Code § 1096. (The first portion of former § 1096 is restated in § 90.21.) Subsection (b) incorporates a portion of § 1096(a) of the California Penal Code. See generally B. Witkin, California Criminal Procedure Trial § 484(a) (1963, Supp. 1973); 8 Moore, Federal Practice ¶30.06 (1974).

§ 90.25. Degree of Offense; How Determined.

When it appears that the defendant has committed an offense, and there is reasonable ground of doubt in which of two (2) or more degrees he is guilty, he can be convicted of the lowest of such degrees only.

NOTE: Section 90.25 is substantively the same as former § 1097. See also Cal. Pen. Code § 1097. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court § 541(b) (1963). The defendant is entitled to an instruction based on this Section in a proper case. Witkin also notes that although the section literally applies only to offenses divided into degrees, a long line of cases approves a similar instruction for lesser included offenses. See § 90.27.

§ 90.27. Included Offense to be Given Jury.

When there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of an included offense, the court shall charge the jury with respect to the included offense.

COURT DECISIONS: D.C. Guam App. Div. *People v. Grajo,* DCA 86-00002 (1987) In view of this section's requirement that the Court give "lesser included" offenses, it was not error for the Court to give such instructions where there was evidence to support them, even over defendant's objection.

NOTE: Section 90.27 is new but is based on Model Penal Code § 1.07(5) and continues the case law developed under former § 1097. See also § 105.58 (conviction of included offense).

§ 90.29. Evidence Taken Outside of Court Room.

When the court determines that it is appropriate to take evidence outside the courtroom, the court may be convened at another location for the limited purpose of taking such evidence.

NOTE: Section 90.29 replaces and expands former § 1119 to include court trials. Compare Code Civ. Proc. § 393. The section applies to views of the scene where the offense or any other material fact is alleged to have occurred, or a view of any personal property referred to in the evidence which cannot conveniently be brought into the courtroom. It also applies to any situation where it is necessary to take evidence outside the courtroom, such as testimony at a hospital or other location because of the physical disability of an essential witness.

Since a view outside the courtroom is a taking of evidence, the section requires that these proceedings be in a full court session. Under this Section, the judge must be present, and the defendant has a right to be present. In convening the court at a location away from the courtroom, the jury, personnel and parties may be conducted in a body to the location, or permitted to meet there at a certain time.

Whether or not a view is permitted rests within the sound discretion of the trial judge, and his determination should not be disturbed absent a showing of abuse.

§ 90.31. Court to Decide Questions of Law.

The court shall decide all questions of law which arise in the course of trial.

NOTE: Section 90.31 is substantively the same as former § 1124. See also Cal. Pen. Code § 1124.

§ 90.34. Inability of Sitting Judge to Proceed.

If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying that he has familiarized himself with the record of the trial, may proceed with and finish the trial.

NOTE: Section 90.34 is identical to former Rule 25(a). See also Fed. R. Crim. P. 25(a). Compare former § 1053 and Cal. Pen. Code § 1053. See generally 8 Moore, Federal Practice ¶¶25.01-25.03 (1974); B. Witkin, California Criminal Procedure Trial § 266 (1963).

§ 90.37. Inability to Hear Post-Conviction Motions.

If by reason of absence, death, sickness or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt any other judge regularly sitting or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial or for any other reason, he may in his discretion grant a new trial.

NOTE: Section 90.37 is identical to former Rule 25(b). See also § 90.34 and note

there to. See also Fed. R. Crim. P. 25(b), and 8 Moore, Federal Practice ¶25.04 (1974).

§ 90.40. Control of Sworn Jurors.

The jurors sworn to try an action may, in the discretion of the court, be permitted to separate or be kept in charge of a proper officer. Where the jurors are permitted to separate, the court shall properly admonish them. Where the jurors are kept in charge of a proper officer, the officer shall be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to them or communicate with them, nor to do so himself, on any subject connected with the trial, and to return them into court at the next meeting thereof.

NOTE: Section 90.40 is new; it is identical to § 1121 of the California Penal Code. For the admonition required by § 90.40, see § 90.43. For the furnishing of subsistence where the jurors are kept together, see § 90.46 and the note thereto. See generally B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court § 517 (1963, Supp. 1973); 8 Moore, Federal Practice ¶31.06 (1974).

§ 90.43. Duty of Jurors Not to Converse, etc. During Recesses.

The jury shall, at each adjournment of the court before the submission of the cause to the jury, whether permitted to separate or kept in charge of officers, be admonished by the court that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them.

NOTE: Section 90.43 is new; it is identical to § 1122 of the California Penal Code. See § 90.40 and note thereto. See also B. Witkin, California Criminal Procedure Judgment and Attack in Trial Court § 521 (1963, Supp. 1973).

§ 90.46. Jurors to be Provided With Food, Lodging.

While the jury are kept together, either during the progress of the trial or after their retirement for deliberation, the court shall direct the officer to provide the jury with suitable and sufficient food and lodging, or other reasonable necessities.

NOTE: Section 90.46 is new; it is based on the first sentence of § 1136 of the California Penal Code. For the payment of the cost of subsistence where the jurors are kept together, see § 680.11 of the Code of Civil Procedure.
