

CHAPTER 6

Charges, Indictments and the Trial

This chapter focuses on charges and indictments and outlines the stages in the conduct of a criminal trial. Topics to be addressed in this chapter include:

- (i) the basic requirements for a valid charge or count on an indictment;
- (ii) the procedure on arraignment;
- (iii) the right of the Prosecution not to institute or to discontinue proceedings;
- (iv) selecting a jury;
- (v) opening and closing addresses;
- (vi) the no case to answer submission;
- (vii) the judge's summing up and directions to the jury;
- (viii) problems that may arise requiring discharge of the jury; and
- (ix) taking the verdict.

CHARGES AND COUNTS ON THE INDICTMENT

A charge heard in a criminal court should specify an offence known to the law, include enough particulars to allow the defendant to determine the allegation made against him, and should not be bad for duplicity. The rule against duplicity requires that the particulars of each charge alleged should refer to the commission of only one offence.

Section 10(2) of the Magistrates Ordinance requires that for every allegation of a criminal offence there must be a separate complaint or information. However, allegations arising out of the same criminal transaction may be dealt with by the court in the same proceedings. Where a charge requires amendment, it may be amended pursuant to section 27 of the Magistrates Ordinance.

In the District Court, a charge sheet is drafted on behalf of the Secretary for Justice, in accordance with the form which appears in the First Schedule to the District Court Ordinance.¹ Where proceedings have

¹ Section 77(2), District Court Ordinance.

been transferred from the Magistrates' court to the District Court, under Part IV of the Magistrates Ordinance, the Secretary for Justice is required within 14 days to deliver the charge sheet to the Registrar. When drafting the charge sheet, adaptations to the form appearing in the First Schedule may be necessary. The Registrar is responsible for filing the charge sheet with the Court and causing it to be served on the defendant.² Where necessary, the Court may order further and better particulars of charges to be provided to the defence.³ A charge included on a District Court charge sheet may be amended pursuant to section 23 of the Criminal Procedure Ordinance.

The term 'indictment' is used to describe the formal charge sheet used in the Court of First Instance. The Indictment Rules, Cap 221C, which are subsidiary legislation to the Criminal Procedure Ordinance, set out the requirements for the drafting of an indictment. These rules require that each offence alleged must appear as a separate allegation on the indictment.⁴ Each separate charge on an indictment is called a count. Each count must state the offence alleged with sufficient particularity to allow the accused to know what he is charged with and answer the charge. A trial judge may order the Prosecution to provide further particulars of an offence alleged, to allow the accused to answer the charge. An indictment may include more than one count where the offences are alleged by the Prosecution to be founded on the same facts, or form, or are part of, a series of offences of the same or a similar character.⁵ The Court has the power to sever an indictment in order to secure a fair trial for the accused. A defective or prejudicial indictment may be amended or severed in accordance with section 23 of the Criminal Procedure Ordinance. Offenders who commit crimes together should be tried on the same indictment, although not all counts need be common to all accused. The trial court retains the discretion, however, to order separate trials for co-accused where the interests of justice require it.⁶

The Secretary for Justice may decline to file an indictment despite an accused person's committal to the Court of First Instance for trial.⁷

Pursuant to section 15 of the Criminal Procedure Ordinance, the Secretary for Justice is not bound to prosecute an accused person where he is of the opinion that the interests of public justice would not be served. The Statement of Prosecution Policy provides the test used to determine whether a prosecution is in the public interest:

Once a prosecution has been instituted, the prosecutor is under a duty to ensure its continuation remains in the public interest. If circumstances

2 *Ibid.* section 77(4).

3 Section 77(3), District Court Ordinance.

4 Rule 3(2), Indictment Rules.

5 Section 18, Criminal Procedure Ordinance and Rule 7, Indictment Rules.

6 Section 23(3), Criminal Procedure Ordinance.

7 *Ibid.* section 15(2).

change, or if new material comes to light, the prosecutor may have to review the prosecution. If it becomes apparent that it is no longer in the interests of justice to proceed with the case, it should be stopped. Alternatively, the prosecutor may decide that it is appropriate to proceed on amended or alternative charges.⁸

The Secretary for Justice institutes proceedings in the Court of First Instance by delivering a signed indictment, with copies for service, to the Registrar of the High Court. The Secretary for Justice has seven days from the date of a paper committal under section 80C(4) of the Magistrates Ordinance to deliver the indictment to the Registrar.⁹ Where a preliminary inquiry is held, the Secretary for Justice files the indictment after receipt of the papers.¹⁰ The Registrar of the High Court files the indictment with the Court.¹¹ The indictment will be marked by the Registrar with the date for arraignment.¹² The Registrar is responsible for the delivery of the indictment to the bailiff, for service on the accused and the Commissioner for Correctional Services.¹³

Before an arraignment in the Court of First Instance, the Secretary for Justice may apply to transfer the proceedings to the District Court. Where the transfer order is made, the Secretary for Justice must file a charge sheet with the Registrar of the District Court within 21 days.¹⁴ The Registrar of the District Court will file the charge sheet with the Court and serve it in the accused.¹⁵

THE PLEA

At his arraignment, in either the District Court or the Court of First Instance, the accused must enter his plea to each of the counts on the indictment. Should he fail to appear for arraignment, the Court may issue a warrant for his arrest.¹⁶ Any application by counsel for the defence to quash a defective indictment should usually be made prior to the arraignment. An order quashing the indictment is subject to appeal by the Secretary for Justice to the Court of Appeal.¹⁷ Any submission that the proceedings constitute an abuse of process will usually be made after the arraignment. Whilst there are many grounds upon which an abuse of

8 See Appendix 1, paragraph 13.1.

9 Section 14(1)(a), Criminal Procedure Ordinance.

10 *Ibid.* section 14(1)(b).

11 Section 26, Criminal Procedure Ordinance.

12 See *ibid.* Form 4, Schedule 1.

13 Section 28, Criminal Procedure Ordinance.

14 Section 75(3), District Court Ordinance.

15 *Ibid.* section 77(4).

16 Section 46, Criminal Procedure Ordinance.

17 *Ibid.* section 81F(1).

process may be alleged, the Court stays the proceedings where it is satisfied that the accused could not receive a fair trial.¹⁸

In the unusual circumstance that an accused person has previously been tried and acquitted or convicted of a charge and is later re-charged with the same offence again, he may enter a special plea of *autrefois acquit* or *autrefois convict*.¹⁹ These special pleas recognise that a person may not be tried for the same offence twice.

Section 75 of the Criminal Procedure Ordinance also requires that a person required to answer a charge is fit to be tried. If the Court finds the defendant is suffering from a disability which renders him unfit to plead to the charge, the court may order his detention in a mental hospital.

DISCONTINUING PROCEEDINGS

At any stage before judgment, a public prosecutor may seek leave to withdraw an indictable charge tried summarily before a magistrate, or which is the subject of committal proceedings. He may also enter a *nolle prosequi* on behalf of the Secretary for Justice.²⁰ The accused person will then be discharged from the offence.

A *nolle prosequi* may be filed by the Secretary for Justice, before the verdict of the jury is entered, in a trial before the Court of First Instance. The effect of the procedure is that the counts presented on the indictment are cancelled. A *nolle prosequi* may be entered on all counts on the indictment or on selected counts only.

It should be noted that the entry of a *nolle prosequi* does not bar the future prosecution of the accused on the same facts.

Between the arraignment of the accused in the Court of First Instance and the point at which the jury has been empanelled, a prosecutor may offer no evidence in support of counts alleged on the indictment against the accused. The judge may then enter a verdict of not guilty against the accused and the accused will be deemed to have been tried and acquitted.²¹ If the prosecutor offers no evidence against the accused, after the jury has been empanelled, the judge should direct the jury to acquit the accused.

In the District Court, the Secretary for Justice may enter a *nolle prosequi* at any time before judgment, pursuant to section 76 of the District Court Ordinance.

¹⁸ See *HKSAR v Lee Ming-tee and Anor* [2001] 1 HKLRD 599.

¹⁹ Section 31, Criminal Procedure Ordinance.

²⁰ Section 15, Magistrates Ordinance.

²¹ Section 51A, Criminal Procedure Ordinance.

EMPANELLING THE JURY

Jurors must be aged between 21 and 65 years of age, be resident in Hong Kong, and must be of sound mind, not afflicted by blindness, deafness or other disabilities affecting service, of good character and have a sufficient knowledge of the English language.²² Persons exempted from jury service, according to section 5 of the Jury Ordinance, include members of the Executive or Legislative Council and justices of the peace.

Exempted public officers are as follows:

- (i) judges, deputy judges, District judges, and deputy District judges;
- (ii) Registrars, Senior Deputy Registrars, Deputy Registrars, and Assistant Registrars;
- (iii) coroners, magistrates, presiding officers, adjudicators or members of any tribunal established by law;
- (iv) officers or members of the staff of any court or tribunal established by law (if their work is mainly concerned with the day to day administration of the court or tribunal);
- (v) legal officers within the meaning of section 2 of the Legal Officers Ordinance (Cap 87);
- (vi) public officers serving in the Department of Justice, the Legal Aid Department, the Official Receiver's Office or the Intellectual Property Department;
- (vii) members of the Hong Kong Police Force, the Immigration Service, the Customs and Excise Service or the Fire Services Department, including persons holding any post specified in the Seventh Schedule to the Fire Services Ordinance (Cap 95);
- (viii) officers of the Correctional Services Department;
- (ix) members of the Government Flying Service;
- (x) the Commissioner, Deputy Commissioner or officers of the Independent Commission Against Corruption;
- (xi) public officers carrying out duties in the Hong Kong Police Force, the Immigration Department, the Customs and Excise Department, the Fire Services Department, the Correctional Services Department, the Government Flying Service or the Independent Commission Against Corruption;
- (xii) public officers serving in a training or apprentice rank;
- (xiii) public officers appointed as principal probation officer, or as a probation officer, under the Probation of Offenders Ordinance (Cap 298); and

²² Section 4, Jury Ordinance, Cap 3.

CHAPTER 9

Sentencing

This chapter focuses on sentencing: the theories of punishment and sentencing dispositions available to the court. Topics to be addressed include:

- (i) the classic theories of punishment;
- (ii) the maximum penalty system;
- (iii) tariff or guideline judgments;
- (iv) the role of the prosecutor at sentencing;
- (v) mitigating and aggravating factors;
- (vi) the 'clang of the prison gates';
- (vii) concurrent and consecutive sentences;
- (viii) parity of sentences;
- (ix) remission;
- (x) reduction for time served;
- (xi) taking other offences into consideration;
- (xii) specific penalties;
- (xiii) appeals against sentence;
- (xiv) pre-sentence reports;
- (xv) sentencing procedure;
- (xvi) preparing the plea in mitigation; and
- (xvii) proposing a realistic sentence.

THEORIES OF PUNISHMENT

The four classic theories of punishment were considered and given a modern interpretation by Lord Justice Lawton in the case of *R v Sargeant*.¹ In that case, Lord Justice Lawton observed that any judge who comes to sentence ought always to have the four classic theories in mind

¹ (1974) 60 Cr App R 74, 77.

and should consider which of them has greatest importance in the case before him, by applying the sentencing theories to the facts of the case. The four classic theories are discussed below.

Retribution

Whilst Lawton LJ observed that the Old Testament concept of 'an eye for an eye and tooth for tooth' is no longer relevant in the criminal justice system of today, he found that a modern form of retribution still has its place.

Society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion.²

Retribution is reflected in the sentence as an expression of society's condemnation for the choice exercised by the defendant and attribution of moral blameworthiness.

Deterrence

There are two aspects of deterrence: specific deterrence of the offender and general deterrence of likely offenders. Lord Justice Lawton observed in *R v Sargeant* that experience has shown that deterrence of the offender is not a very useful sentencing approach. Most offenders who are capable of being deterred will be deterred by a prison sentence and for those who are not deterred by the prison experience, there is likely to be a high degree of recidivism anyway. So far as general deterrence of others is concerned, Lawton LJ commented that 'it is the experience of the courts that deterrent sentences are of little value in respect of offences which are committed on the spur of the moment, either in hot blood or in drink or both. Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences'.

Where an offender has not been deterred by previous sentencing, the Court may view this factor as an aggravating feature. The courts may also adopt a more stringent approach to sentencing for a particular crime taking root in the community, in order to deter potential offenders. Heavier sentences may be imposed (as so-called deterrence) where an offence is prevalent: see *HKSAR v Yip Kwok-Fai*.³ Statistics may be called for or submitted to prove prevalence. In Hong Kong, this has been

² *Ibid.*

³ [2002] HKLRD 318.

evidenced by the sentencing attitude towards offenders who commit indecent assaults against fellow passengers travelling on the MTR.⁴

In *Re Applications for Review of Certain Sentences by the Attorney-General*,⁵ the Hong Kong Full Court held that:

1. A court errs in principle if it assesses a penalty on the basis of what is appropriate to the offender without due regard to the requirements of the public interest, if the public interest calls for an exemplary sentence to deter others with the object of affording protection to the public.
2. In determining the appropriate sentence a court must take into consideration all the factors relating to both the crime and the criminal and give such factors the weight which the circumstances may from time to time demand.
3. A court should not make a primary decision as to whether a deterrent sentence is appropriate for an offence before even considering the possible effect on the individual criminal.

In the decision of the Hong Kong Court of Appeal, *The Attorney-General v David Lee Po-man*,⁶ the Court considered the sentence of a youth aged 19 years of age, who pleaded guilty at the earliest available opportunity to one count of kidnapping, contrary to section 42 of the Offences Against the Person Ordinance, and one count of administering chloroform with intent to commit an indictable offence, contrary to section 21 of the same Ordinance. The victim was eight years of age and had been randomly selected; the motive was financial gain. The sentence passed by the trial judge was for detention in a Training Centre. The Attorney-General sought review of the sentence on the basis that it was manifestly inadequate and the Court set aside the Training Centre order and substituted a sentence of five years imprisonment. In giving reasons for its decision, the Court observed that kidnapping can cause great harm to the victim himself and, in addition, enormous distress to the family of the victim. The Court stated that the youth of an offender, while a factor to be borne in mind, is not a predominate factor in sentencing. Deterrence is such a factor.

In the case of *HKSAR v Chan Mo-Kong*,⁷ an appeal from the Magistrates' court to the Court of First Instance, the Court considered a sentence of four months imprisonment imposed on a shopkeeper who assaulted a tourist when she refused to buy certain goods. The offence was the offender's first criminal conviction but the magistrate imposed a sentence intended to deter the public and protect the tourist industry. The Court dismissed the appeal against sentence and held that:

⁴ See *Attorney-General v Ng Sai Man* [1994] 1 HKCLR 151.

⁵ [1972] HKLR 370.

⁶ [1992] 2 HKCLR 70.

⁷ [1998] 1 HKLRD 678.

1. As a general proposition, sentences of general deterrence should not be imposed on first time offenders. However, previous good character was not a prohibition against this and if the facts were sufficiently grave such a sentence might be perfectly proper.
2. In principle, although sentences of a general deterrent nature were of little value to offences which were committed on the spur of the moment, this was no bar to a deterrent sentence even in assault cases when the circumstances demanded it. Thus even if, as the defendant argued, the assault had been committed on the spur of the moment, the magistrate was entitled on the facts to take the deterrence factor into account.
3. Hong Kong's reputation as a tourist destination was well within the province of the magistrate's discretion when considering a sentence of general deterrence.

Prevention/Incapacitation

Lord Justice Lawton observed, in *R v Sargeant*, that unfortunately there are some offenders for whom neither deterrence nor rehabilitation are effective. These offenders will commit crimes when the opportunity arises, and may be regarded as a danger to society. For these offenders, the principle of incapacitative and preventative sentencing was established. The sentence may involve a long term of imprisonment to prevent the offender offending again or to protect the public.

In an unreported decision of the Court of Appeal, *R v Wong Pak-lam*,⁸ the Court considered an appeal against sentence by a defendant who had plead guilty to two charges of burglary and four charges of giving false information to pawnbrokers. The sentencing judge had taken into account the defendant's long criminal record and sentenced him to two years and nine months imprisonment on each of the burglary charges and to one month imprisonment for each count of giving false information, all the sentences to be served consecutively. The Court, allowing the defendant's appeal, held that sentence was excessive and stated that the object of any sentence was first to deter the offender and any other members of the public likely to commit that sort of offence and secondly, to prevent the offender from being able to offend again, at least for the period of his detention.

Rehabilitation

Rehabilitation is intended to reintegrate the offender into society by modifying his behavioural attitudes. Rehabilitation assumes the causes of criminality lie in individual maladjustment or social conditions.

The Hong Kong Bill of Rights Ordinance, at Article 6(3), states that the essential aim of the prison system is rehabilitation.

⁸ Unreported, Criminal Appeal No 509 of 1986.

If rehabilitation is intended to modify the behaviour of the offender to conform to the accepted standards of society then treatment is required to achieve this end. Treatment requires community funding to underpin facilities and appropriately trained personnel. The probation and community services provide assistance in this regard through supervision particularly suited to young offenders.

In the case of *Secretary for Justice v Hui Siu-man*,⁹ the Court of Appeal considered an application by the Secretary for Justice to review the sentence of the respondent, formerly the supervisor of the import department of a local bank. The respondent had pleaded guilty to six charges, three of forgery and three of theft, before the District Court. He was sentenced to imprisonment for 21 months on each of the charges with the sentences ordered to be served concurrently. The judge further ordered that the sentence of imprisonment was to be suspended for a period of three years. The Secretary for Justice applied to the Court of Appeal to review the sentence on the ground that it was wrong in principle to suspend sentences for serious commercial fraud involving breach of trust.

The respondent had made a full and frank confession and made full restitution before he was arrested. Due to problems in gaining cooperation from the bank, he was not charged until more than 12 months after he had admitted the offence. However, despite the delay, there was no suggestion that he ever resiled from his original admissions or in any way failed to cooperate with the authorities.

The Court upheld the sentence, observing that:

In cases of commercial fraud it is uncommon to find an immediate acknowledgment of complicity and full restitution. Usually, the offender pleads that no money is left either because of business or, very commonly, gambling losses. The unfortunate victims simply have to bear their loss. We are fully mindful of the duty of the courts to pass sentences which will protect the community by deterring persons who might be like-minded from committing similar offences. Indeed, in the past that has been the overwhelming consideration. However, in modern times, more emphasis has been placed on factors such as rehabilitation of offenders and the interests of the victims of crime. There is no encouragement to make restitution if the offender knows that it will have little effect on sentence. We are satisfied that full restitution, particularly in commercial crimes, must be encouraged and that this can only be done if real weight is given to it as a factor mitigating sentence. We repeat, however, that, of itself, is not a "very exceptional circumstance" which would warrant a suspension of sentence.¹⁰

Judicial discretion is particularly important in sentencing, as the facts of each individual case should be properly reflected in the sentence chosen.

⁹ [1999] 2 HKLRD 236.

¹⁰ *Ibid.* at page 242.