



**Criminal Procedure
in Hong Kong:
A Guide for Students**

Third Edition

Amanda Whitfort



LexisNexis®

Student

Contents

<i>Foreword to Second Edition</i>	v
<i>Preface to Third Edition</i>	vii
<i>Preface to Second Edition</i>	ix
<i>Table of Cases</i>	xix
<i>Table of Legislation</i>	xxxiii
<i>Table of Practice Directions</i>	xlvii

Chapter 1 Introduction..... 1

1. Stages of the Process of Matters through the Courts.....	1
1.1 Magistrates' Courts.....	1
1.2 District Court.....	1
1.3 Court of First Instance.....	1
2. The Criminal Charge.....	2
3. Bail.....	3
3.1 Police bail.....	3
3.1.1 Bail to bring the arrested person to court.....	3
3.1.2 Operational bail.....	3
3.2 Court bail pending trial.....	3
4. Jurisdiction and Venues for Trial Hearing.....	4
5. Trial or Plea in the Magistrates' Court.....	4
6. Transfer to the District Court.....	5
7. Committal to the Court of First Instance.....	5
8. Voir Dires.....	5
9. Plea in Mitigation.....	5
10. Costs.....	6
11. Appeals.....	6

Chapter 2 Bail..... 7

1. Who May Grant Bail?.....	8
1.1 Police bail.....	8
1.2 Court bail.....	9
1.3 Common conditions for bail granted by a magistrate or judge.....	10
1.3.1 Recognisance.....	10
1.3.2 Cash paid by the accused or another person on his behalf.....	11
1.3.3 Failing to surrender to custody of the court.....	11
1.3.4 When does a magistrate consider bail?.....	13

Table of Contents

1.3.5	When does a District Court judge consider bail?	14
1.3.6	When does a Court of First Instance judge consider bail?	14
2.	Bail Hearings and Admissibility of Evidence at Trial	15
3.	Bail in the Court of Appeal and the Court of Final Appeal	16
4.	Reasons for Refusing Bail	18
Chapter 3	Police Powers	21
1.	Arrest	21
2.	Pre-arrest Powers	22
2.1	The general power to stop, detain and search a person under section 54 of the Police Force Ordinance	22
2.2	Other statutory provisions setting out the powers to stop and search	23
2.3	Pre-arrest questioning	24
2.4	Searching for stolen goods in cars and on persons	26
3.	Searching Premises	26
3.1	Search of premises with a warrant	26
3.2	Search of premises without a warrant	27
3.3	Other relevant provisions relating to searches	28
3.4	General principles of search and seizure	29
4.	Covert Surveillance	30
5.	Arrest	31
5.1	Arrest with a magistrate's warrant	31
5.2	Arrest without a warrant	32
5.3	Means to effect arrest	34
5.4	Arrest by ICAC and other law enforcement officers	34
5.5	Citizens' power of arrest	35
5.6	General principles of arrest	36
5.7	Post-arrest duty to deliver arrested person to police station	37
5.8	Resisting arrest	37
5.9	Remedies for abuse of police powers	37
6.	The 1992 Rules and Directions for the Questioning of Suspects and the Taking of Statements	38
6.1	The Principles	38
6.2	Rule I	39
6.3	Rule II	40
6.4	Rule III(a)	42
6.5	Rule III(b)	42
6.6	Rule III(c)	42
6.7	Rules IV and V	43
6.8	Rule VI	43
6.9	The Directions	43
6.10	Police General Orders	44

Table of Contents

7.	The Right to Legal Representation	44
8.	Effects of the National Security Law on Powers of Law Enforcement Agencies	46
8.1	The creation of a new law enforcement agency in Hong Kong	46
8.2	Powers given to the Hong Kong Police Force in investigations of national security offences	46
8.2.1	Search with or without warrants	47
8.2.2	Covert surveillance	47
Chapter 4	Classification of Offences	49
1.	The Magistrates' Court	49
1.1	Indictable offences	50
1.2	Summary offences	51
1.3	Permanent and special magistrates	52
2.	The District Court	53
3.	The Juvenile Court	53
4.	The Court of First Instance	54
5.	The Court of Appeal	54
5.1	Criminal cases determined by the Court of Appeal in general	54
6.	The Court of Final Appeal	55
7.	Commencing Proceedings by Laying an Information	55
7.1	Time limits on prosecutions	56
7.2	Discontinuing proceedings	57
7.3	Judicial review of the Secretary for Justice's decisions	58
Chapter 5	Transfers and Committals	61
1.	Transfers to the District Court	61
2.	Transfers from the District Court	63
3.	Transfers from the Court of First Instance	67
4.	Committals to the Court of First Instance	68
4.1	Setting down the 'return day'	68
4.2	The return day	70
4.3	The preliminary inquiry	70
4.4	Post committal requirements	73
4.5	The paper committal	75
4.6	Plea of guilty at committal	76
5.	Voluntary Bills	77
6.	Direct Committals in Cases Involving Vulnerable Witnesses	78
7.	Direct Committals in Cases Involving Complex Commercial Crimes	79

Chapter 6	Charges, Indictments and the Trial	83
1.	Charges and Counts on the Indictment	83
2.	The Plea	87
3.	Discontinuing Proceedings	88
4.	Stay of Proceedings	89
5.	Empanelling the Jury	91
6.	The Prosecution's Opening of the Case	94
6.1	Prosecution witnesses	94
6.2	No case to answer	95
7.	The Opening of the Defence Case	96
8.	Closing Submissions	96
9.	The Summing up or Judge's Direction to the Jury	97
10.	Jury Questions	97
11.	Discharging the Jury	98
12.	The Verdict of the Jury	98
13.	The Magistrates' Reasons for Verdict	99
14.	The District Court Judge's Reasons for Verdict	100
15.	Alternative Verdicts	101
16.	Accepting the Verdict	101
Chapter 7	Aspects of the Trial Process	103
1.	Guilty Plea Before and During Trial	103
2.	Section 65B: Evidence by Written Statement	104
3.	Section 65C Admissions: Proof by Formal Admission	107
4.	Alibi Evidence	109
5.	Pre-Trial Procedures: The District Court and Court of First Instance Practice Directions	111
5.1	Pre-trial procedure in the Court of First Instance	111
5.2	Pre-trial procedure in the District Court	114
6.	The Prosecution's Duty of Disclosure	115
7.	Disclosure Before Committal to the Court of First Instance	119
8.	Disclosure in Complex Commercial Criminal Crimes Cases	119
9.	Disclosure on Transfer to the District Court	120
10.	Disclosure in Summary Trials	122
11.	Vulnerable Witnesses	122
Chapter 8	Voir Dires, No Case Submissions, Calling Witnesses and Identification Evidence	129
1.	The Voir Dire	129
1.1	Questioning witnesses on the <i>voir dire</i>	135
1.2	Procedure on the <i>voir dire</i>	136

2.	No Case to Answer	138
3.	Section 54 of CPO and Calling the Accused or Defence Witnesses	139
4.	Getting Witnesses to Court	139
5.	Methods of Identification	140
5.1	Identification parades	140
5.2	Group identification	143
5.3	Confrontation identification	143
5.4	Dock identification	144
5.5	Fingerprints, photographs and body samples	144
Chapter 9	Sentencing	147
1.	Theories of Punishment	147
1.1	Retribution	148
1.2	Deterrence	148
1.3	Prevention/Incapacitation	149
1.4	Rehabilitation	150
2.	Sentencing Principles in Hong Kong	151
2.1	Maximum sentence	152
2.2	Examples of tariff	155
2.3	Increases and decreases in a tariff	157
2.4	The prosecutor's role at sentencing	158
3.	Enhanced Sentences	159
4.	Discounted Sentences	161
4.1	General principles for the court to consider	164
5.	Specific Penalties	167
5.1	Bind-over orders	167
5.2	Community service orders	168
5.3	Compensation orders	169
5.4	Confiscation orders	169
5.5	Criminal bankruptcy orders	170
5.6	Detention centre orders	170
5.7	Discharge orders	171
5.8	Disqualification orders	172
5.9	Drug addiction treatment centre orders	172
5.10	Fines	173
5.11	Forfeiture orders	174
5.12	Hospital orders	176
5.13	Juvenile offenders	176
5.14	Probation orders	177
5.15	Reformatory school orders	178
5.16	Rehabilitation centre orders	178
5.17	Restitution orders	179
5.18	Suspended sentences	179
5.19	Training centre orders	180
6.	Appeals on Sentences	182

Table of Contents

7. Pleas in Mitigation.....	183
8. Sentencing Procedure.....	184
9. Making a Plea in Mitigation: Role of the Defence Advocate.....	186
9.1 Factors relevant to the offence.....	186
9.2 Factors relevant to the offender.....	187
9.3 Proposing a realistic sentence.....	188
9.4 Summary of the plea in mitigation.....	189
Chapter 10 Costs in Criminal Cases.....	191
1. General Principles.....	191
2. Defence Costs.....	196
2.1 Summary proceedings.....	196
2.2 District Court.....	197
2.3 Court of First Instance.....	197
2.4 Court of Appeal.....	197
2.5 Other matters.....	197
3. Prosecution Costs.....	198
3.1 Summary proceedings.....	198
3.2 District Court and Court of First Instance.....	198
3.3 On appeal.....	198
4. Legal Aid.....	199
5. Duty Lawyer Scheme.....	199
6. Appeals Against Award of Costs.....	199
7. Costs Unnecessarily/Improperly Incurred/ Wasted Costs.....	200
Chapter 11 Appeals.....	203
1. General Principles.....	203
2. Appeals from the Decision of a Magistrate.....	203
2.1 Self review under section 104 of MO.....	204
2.2 Appeal by notice, in accordance with section 113 of MO.....	205
2.3 Appeal by way of case stated, in accordance with MO.....	206
3. Further Appeals: From the Court of First Instance to the Court of Final Appeal.....	208
4. Appeal by Way of Case Stated from a Decision of a District Court Judge.....	209
5. Appeals to the Court of Appeal from the District Court or the Court of First Instance.....	210
5.1 Appeals against conviction.....	210
5.2 Fresh evidence on appeal.....	213
5.3 Right of appeal.....	214

Table of Contents

6. Abandoning an Appeal and Consequences.....	214
7. Uncontested Appeals.....	215
7.1 Grounds for allowing the appeal.....	217
7.2 Orders on appeal.....	219
7.3 Appeals against sentence.....	220
7.4 Effect of an appeal on sentence.....	220
7.5 Applications for review and appeals by the Secretary for Justice and the Chief Executive.....	221
7.6 Other orders of the Court of Appeal.....	222
8. Appeals to the Court of Final Appeal.....	223
Appendix 1 – Diagrammatic Overview of the Criminal Process in Hong Kong.....	227
Appendix 2 – Prosecution Code 2013.....	231
Appendix 3 – Rules and Directions for the Questioning of Suspects and the Taking of Statements.....	265
Appendix 4 – Practice Directions.....	275
Index.....	329

CHAPTER 1

INTRODUCTION

[1-1] This chapter sets out, and provides a brief summary of, the topics to be covered in the ensuing chapters of this book.

1. STAGES OF THE PROCESS OF MATTERS THROUGH THE COURTS

[1-2] Please consider Diagrams 1 to 4, in Appendix 1. They provide an overview of the process of a criminal matter through the three types of court with original jurisdiction over criminal matters in Hong Kong.

1.1 Magistrates' Courts

[1-3] Criminal procedure in the Magistrates' Court is determined primarily by the Magistrates Ordinance (Cap 227) (MO), but the Criminal Procedure Ordinance (Cap 221) (CPO) may also apply in this jurisdiction.¹

1.2 District Court

[1-4] The main source of the District Court's power over criminal matters is found in Part V of the District Court Ordinance (Cap 336) (DCO), and Part IV of MO. CPO also regulates criminal proceedings before this court.²

1.3 Court of First Instance

[1-5] The High Court Ordinance (Cap 4) sets out the jurisdictional powers of the Court of First Instance (along with the Court of Appeal). CPO determines criminal procedure in the Court of First Instance.³ Part III of MO is also relevant

-
- 1 For example, s 58 of CPO sets out that for the purpose of ss 54 to 57A of the same Ordinance, 'court' also "includes the District Court and a magistrate".
 - 2 Section 79 of the DCO makes selected provisions under the CPO applicable to the District Court. Another example can be found under s 113A of the CPO which sets out that 'court' includes District Court for the purpose of that section.
 - 3 Section 2 of the CPO defines 'court' as "the Court of First Instance acting in the exercise of its criminal jurisdiction".

to criminal matters to be determined in the Court of First Instance as it provides the procedure for committals from the Magistrates' Court to the Court of First Instance.

2. THE CRIMINAL CHARGE

[1-6] There are various methods to commence criminal proceedings. A common method is to have a charge laid against an arrested person. A decision to charge is usually first made by the police. After charging, the police are required to bring the person in police custody before a magistrate at the earliest opportunity. According to section 52(1) of the Police Force Ordinance (Cap 232), arrested persons should be brought before a magistrate as soon as practicable. Generally speaking, if the arrested person being charged is in custody, he should be brought before a magistrate within 48 hours and without unreasonable delay.

[1-7] When the first appearance before the magistrate takes place, in a hearing commonly known as a mention hearing, the matter moves into the magistrate's care and all further issues are decided by the court. The magistrate will, *inter alia*, make a decision to remand the defendant in custody or admit him to bail if the case has to be adjourned.

[1-8] At a later stage, the matter is considered by a prosecutor who may decide to proceed with the same charge(s) laid by the police or may amend, withdraw or add to the charges. It is necessary to consider the *Prosecution Code* in relation to decisions taken by the Department of Justice.⁴ The *Prosecution Code* identifies the factors which the Department must take into account when bringing a prosecution. Chief amongst these are sufficiency of evidence and the public interest.

[1-9] Prior to the matter being taken over by the prosecutors' office, a defence lawyer should deal with the police officer in charge of the case, as he has initial power over the charges proceeded with against the defendant.

[1-10] A charge should specify an offence known to the law, should include enough particulars to allow the defendant to determine the allegation made against him, and should not be contrary to the rule against 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 MO also 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 together. A charge may be amended in the Magistrates' Court pursuant to section 27 of MO.

[1-11] In the District Court, a charge sheet is drafted in accordance with the form which appears in the First Schedule to DCO. Adaptations to the form may be necessary. The District Court may order further and better particulars of charges to be provided to the accused.⁵ A District Court charge sheet may be amended pursuant to section 23 of CPO.

⁴ See the *Prosecution Code* in Appendix 2.

⁵ DCO s 77.

[1-12] The Indictment Rules (Cap 221C), which are subsidiary legislation to the Criminal Procedure Ordinance, set out the rules for drafting an indictment. An indictment is a formal charge sheet used in the Court of First Instance. These rules require that each offence alleged must appear as a separate allegation on the indictment. Each separate charge on an indictment is called a count. A defective indictment may be amended in accordance with section 23 of CPO.

[1-13] 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, he may enter a special plea of *autrefois acquit* or *autrefois convict*. These special pleas recognise that a person may not be tried twice for the same offence.

[1-14] Section 75 of CPO 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.

3. BAIL

[1-15] The two common types of bail are police bail and court bail pending trial.

3.1 Police bail

[1-16] It should be noted that Part IA of CPO does not apply to police bail.

3.1.1 Bail to bring the arrested person to court

[1-17] After an arrested person is charged, he may be granted bail by the officer in charge of the police station. He will usually be granted bail unless the police believe the charge is very serious and he should be detained. If police release the arrested person, it will be on deposit of a sum of money or on a recognizance (with or without sureties) to appear in court, or surrender on warrant for arrest and detention, or for discharge at a specified time and place, pursuant to sections 52(1) or 52(3A) of the Police Force Ordinance.

3.1.2 Operational bail

[1-18] Where the inquiry cannot be completed (and no charge can yet be laid) the arrested person may be discharged on a deposit of a sum of money or recognizance (with or without sureties) to return to the police station when required. This power is provided in section 52(3) of the Police Force Ordinance.

3.2 Court bail pending trial

[1-19] Arrested persons charged by police with no police bail granted are normally brought before a magistrate within 48 hours from the time of the arrest. As discussed above, upon bringing the arrested person before the magistrate, the magistrate shall decide whether to grant bail to the defendant before her. The relevant statutory provisions are set out under Part IA of CPO.

[1-20] A defendant generally has the right to bail unless certain conditions exist, such as a likelihood that he will interfere with witnesses, the offence is very serious or he is likely to abscond.

[1-21] Bail may be with or without conditions. Typical conditions include surrendering travel documents, reporting to police at a set time whilst on bail, and providing some form of financial security. However, persons charged with murder or treason must seek bail from a Court of First Instance judge.

4. JURISDICTION AND VENUES FOR TRIAL HEARING

[1-22] Each of the three criminal courts with original jurisdiction has different powers of sentencing. All matters however commence in the Magistrates' Court.

[1-23] Unless otherwise stated in the statutory provisions creating the offences or specifying the penalties of the offences, the maximum sentence of imprisonment in the Magistrates' Court is, in most cases, two years. The maximum sentence of imprisonment in the District Court is seven years. The maximum sentence of imprisonment in the Court of First Instance is not limited (so the sentence can rise to the maximum penalty set in the relevant Ordinance for the offence charged).

[1-24] Sentencing powers of the different courts affect the prosecution's decision as to where the matter should be heard (the venue). If a sentence of over two years is not warranted, the prosecution may decide to leave the matter for determination in the Magistrates' Court. If a longer sentence is warranted, the prosecution may ask for transfer to the District Court or committal to the Court of First Instance. In Hong Kong, the choice of venue for trial hearing is to be decided by the prosecution only. The defence and the judiciary do not have a choice in this matter.⁶

[1-25] The first appearance of the defendant is made before the Magistrates' Court. This is so even if there may be a subsequent decision made to have the matter heard in full in the District Court or Court of First Instance.

5. TRIAL OR PLEA IN THE MAGISTRATES' COURT

[1-26] If a plea of not guilty is taken from the defendant either at first appearance or on a subsequent appearance in the Magistrates' Court this indicates that the prosecution has decided that the matter will be determined as a summary trial. A date for trial will be fixed by the magistrate.

[1-27] It is usual for no plea to be taken on the defendant's first appearance before the magistrate. This is likely because the prosecution has not yet made a decision as to the appropriate venue for the matter to be heard or the prosecution needs further time to provide the defendant with the relevant documents which may facilitate the defendant to seek legal advice as to whether to plead guilty or not guilty. If no plea is taken, the matter is adjourned and the magistrate will order

⁶ *Chiang Lily v Secretary for Justice* (2010) 13 HKCFAR 208; [2010] HKCU 608, [15]-[18].

the defendant to appear again at the Magistrates' Court on a later date and will decide whether to grant bail or to remand the defendant in custody, pending the next hearing.

6. TRANSFER TO THE DISTRICT COURT

[1-28] At the first or subsequent appearance in the Magistrates' Court, the prosecution may ask the magistrate to transfer the matter to the District Court for hearing. This occurs after the prosecution has made a decision that the District Court is the appropriate venue for the matter to be heard. The procedure for transfer is not complicated. The prosecution prepares transfer papers to be signed by the magistrate, who has no power to refuse to transfer the case. The magistrate then orders the defendant to next appear before the District Court.

7. COMMITTAL TO THE COURT OF FIRST INSTANCE

[1-29] Where a full judge and jury trial in the Court of First Instance is determined as appropriate by the prosecution, the defendant will usually be committed for trial through the procedure set out in Part III of MO. In order to commit the defendant for trial in the Court of First Instance, a preliminary inquiry may be held in the Magistrates' Court to determine whether there is sufficient evidence to justify the committal. Witnesses may be called and examined. The test for committal is whether a reasonable jury, properly directed, could convict the accused of the offences charged.

[1-30] The committal can also be made without a preliminary inquiry; by way of 'paper committal'. No witnesses are called and the magistrate simply orders the accused committed for trial in the Court of First Instance.

8. VOIR DIRES

[1-31] Most challenges to the admissibility of evidence relate to an allegation by the defence that a confession statement to be relied on by the prosecution was involuntary.

[1-32] A *voir dire* is a mini-trial on the issue of admissibility of evidence. *Voir dires* are common in the Court of First Instance. Another way to assess the admissibility of evidence is via the 'alternative procedure'. This procedure is similar to a *voir dire* but is the preferred method for challenging the admissibility of evidence in the Magistrates' Court and District Court. The admissibility issue is addressed within the context of the trial rather than through a separate mini-trial. This is possible in the Magistrates' Court and District Court because neither Magistrates' nor District Court trials involve a jury.

9. PLEA IN MITIGATION

[1-33] Where an accused person determines that he will plead guilty to a charge, he is convicted by the court of the offence. A plea in mitigation is then made to

help the court determine the appropriate sentence to pass. The prosecution should not ask for any particular sentence but may outline the sentences available to the court and assist with questions of law. Defence counsel should have a specific sentencing disposition in mind when making the plea and try to convince the court to pass that sentence. If the offence is likely to result in a custodial sentence, counsel should try to minimise the length of that custodial sentence.

10. COSTS

[1-34] Generally, an acquitted accused receives his costs unless he was acquitted on a technicality or has misled the prosecution to believe the case was stronger than it was by refraining from assisting them.

11. APPEALS

[1-35] The right to appeal in Hong Kong arises under statute, not the common law. Where no right exists under statute, an appeal cannot be instituted. The jurisdiction of the courts hearing an appeal is also defined by statute. The courts in Hong Kong which may hear appeals are the Court of First Instance, the Court of Appeal and the Court of Final Appeal.

CHAPTER 2

BAIL

[2-1] This chapter focuses on the defendant's right to bail in criminal proceedings. Topics addressed in this chapter include:

- (1) police bail;
- (2) applications to the court for bail;
- (3) likely conditions attached to bail;
- (4) the consequences of failing to surrender to the custody of the court;
- (5) when an application for bail may be made in each of the criminal courts; and
- (6) reasons for the court to refuse bail.

[2-2] 'Bail' is the release of a person by a court (or the police) from detention on that person's undertaking, with or without conditions, to surrender to custody as ordered by the court or directed by the police.

[2-3] When we speak of bail, we usually mean the bail asked for, or given, in court. However, police also have the authority to grant bail and will do so if the offence in question is relatively minor, using the power found in section 52 of the Police Force Ordinance (Cap 232) (PFO).

[2-4] Although bail is discretionary, there is a presumption of an entitlement to bail. The Hong Kong Bill of Rights provides in Article 5(3) that: 'It shall not be the general rule that persons awaiting trial shall be detained in custody but release may be subject to guarantees to appear for trial.' The types of guarantees which may be imposed by the court are found in Part IA of the Criminal Procedure Ordinance (Cap 221) (CPO). The requirement set out in the Bill of Rights also appears in Article 9(3) of the International Covenant on Civil and Political Rights. In addition, Article 28 of the Basic Law provides for the inviolability of the person. In accordance with Article 28, no Hong Kong resident may be subjected to arbitrary or unlawful arrest, detention or imprisonment.

[2-5] The foundation for the presumption of an entitlement to bail pending trial is the presumption of innocence. Section 9D(1) of CPO states that: '... a court shall order an accused person to be admitted to bail, whether he has been committed for trial or not ...'. This presumption may be rebutted. Section 9D of CPO is subject to section 9G of CPO, which states that bail may be refused in certain circumstances. After bail is refused by a court, section 9G(11) of CPO

requires that every time an accused person makes another appearance before that court, the issue of the accused person's bail must be reconsidered.

1. WHO MAY GRANT BAIL?

1.1 Police bail

[2-6] Section 52 of PFO provides that, after inquiries, police should release an arrested person on bail unless an offence is serious or the officer reasonably believes it is necessary to detain the person. Release will be on recognisance to return to the station, surrender on a warrant for arrest and detention or to appear at court. If bail is not granted by police, the arrested person should be brought before a magistrate as soon as practicable, and usually within 48 hours of arrest. The decision whether to release an arrested person on bail rests with the officer in charge of the station, or an officer authorised in that behalf by the Police Commissioner.

[2-7] If the arrested person is released on a recognisance to return to the police station, he is released under section 52(3) of PFO. This is called the 'police operational bail'. The recognisance must be of a reasonable amount and may involve sureties.

[2-8] An arrested person may also be released on a recognisance, of a reasonable amount, with or without sureties, to appear at court on a particular date. This is called the 'police court bail' and is described in section 52(1) and (2) of PFO. The relevant parts of the provisions state that:

- (1) ... Every recognisance so taken shall be of equal obligation on the parties entering into the same and shall be liable to the same proceedings for the estreating thereof as if the same had been taken before a magistrate.
- (2) The respective names, residences and occupations of the person so apprehended and of his surety or sureties, if any, entering into such recognisance, together with the condition thereof and the sums respectively acknowledged, shall be entered in a book to be kept for that purpose which shall be laid before the magistrate before whom the person apprehended is to appear or in the case of a person bound by recognisance to surrender for service of a warrant of arrest and detention or for discharge, before any magistrate, and if such person does not appear or has not appeared when called upon at the time and place mentioned in the recognisance, the magistrate shall forthwith estreat the recognisance:

Provided that if the person apprehended appears and makes application for a postponement of the hearing of the charge against him, the magistrate may enlarge the recognisance to such further time as he may think proper, and when the matter has been heard and determined such recognisance shall be discharged without fee or reward.

[2-9] The officers of the Independent Commission Against Corruption (the ICAC) may also grant bail in accordance with section 10A of the Independent Commission Against Corruption Ordinance (Cap 204) (ICACO). Before releasing the arrested person on bail, a Senior Commission Against Corruption Officer, or an above ranking officer, may require the arrested person to deposit a reasonable sum of money upfront or enter into a recognisance with or without sureties: ICACO

section 10A(2)(b). The officer may require both a deposit and a recognisance in some cases. Bail may be granted requiring the arrested person to return to the ICAC offices at a later time or to appear before a magistrate. If the bailed person fails to appear before the court, or return to the ICAC offices as arranged, his deposit may be forfeited or a magistrate may estreat his recognisance. Police have the power to accept a personal recognisance (also known as 'self-recognisance') from an arrested person. This is a personal promise by the arrested person to pay a sum of money if he fails to comply with the conditions of his bail. A court may no longer take a personal recognisance from a defendant.¹ A court must have a surety to ensure any recognisance entered into by a defendant to secure bail.

[2-10] An arrested person may also be released by police after providing a cash deposit to secure his release under section 52(3A) of PFO. The sum will be set by the officer in charge of the police station taking into account the seriousness of the offence charged, the means of the arrested person and the day and time of the deposit. A surety may be required to deposit money along with the arrested person or in place of the arrested person.

[2-11] According to section 4 of the Juvenile Offenders Ordinance (Cap 226) (JOO), where a juvenile who appears to be under the age of 16 has been arrested, he should be brought without delay before the Juvenile Court. If an appearance before the court is not possible, a Police Inspector, an equal or above ranking officer, or the Officer-in-Charge of the police station must consider the case and should grant bail to the juvenile in exchange for a recognisance (with or without sureties) securing the juvenile's attendance at court. Bail may be refused if the crime is a grave one (such as homicide), if it is necessary to remove the juvenile from association with undesirables, or if the granting of bail would defeat the ends of justice. Section 5 of JOO requires a juvenile denied bail to be detained in a place of detention (as appointed by the Chief Executive pursuant to section 16 of JOO) until his appearance before the court, unless such detention would be impracticable or the juvenile's health or behaviour would render such a detention place unsafe for the juvenile.

1.2 Court bail

[2-12] Part IA of CPO includes sections 9D and 9G which together provide a defendant with a qualified right to bail unless there are substantial grounds for believing he will:

- (1) fail to surrender to custody as the court may appoint; or
- (2) commit an offence while on bail; or
- (3) interfere with a witness or pervert or obstruct the course of justice.

[2-13] In the Magistrates' Courts, Part IA of CPO should be read in conjunction with the powers found in sections 102 and 79 of the Magistrates Ordinance (Cap 227) (MO). Section 102 of MO allows a magistrate to grant bail to a person accused of an indictable offence and committed to prison pending trial. While committal proceedings are in progress, a magistrate may also grant bail to the

¹ CPO s 9D(3)(a).

defendant under section 79 of MO. It should be noted that, according to section 9G(10) of CPO, a magistrate does not have the power to bail a person charged with murder or treason; this power is reserved for a judge of the Court of First Instance. Where the Secretary for Justice has filed an indictment to prosecute under the voluntary bill procedure (see below), a magistrate has the power, pursuant to section 74(3) of MO, to grant bail to an accused person brought before him on a warrant of arrest.

[2-14] The first decision of a magistrate to grant or refuse bail occurs when the defendant appears for the first time in court. Most cases will not progress very far on the defendant's first appearance before the magistrate. However, there will usually be an application by the defendant, or his legal representative, for bail.

[2-15] If the police have refused the arrested person bail, he should be brought before a magistrate on a charge within 48 hours of his arrest in accordance with section 52 of PFO. If he has been granted bail by the police, he may have been granted bail to appear at court on a particular date. The police court bail lapses on the defendant's first appearance in court and the magistrate must determine whether to remand the defendant in custody until his next appearance or grant him bail. If the defendant is later sentenced to a term of imprisonment, any time spent on remand is usually counted as 'days served' by virtue of section 67A of CPO.

[2-16] Bail may be granted by the magistrate with or without conditions. It is possible for a court to grant a defendant bail on his own undertaking or promise to return to the court (without financial liability) when his matter is next listed but it is more usual for conditions to be attached to the bail.

1.3 Common conditions for bail granted by a magistrate or judge

[2-17] Common law allows the court to impose fair conditions to secure the attendance of the accused in court, to prevent his commission of further offences and to ensure he does not pervert the course of justice.² Part IA of CPO, which applies to bail proceedings in the Court of First Instance, the District Court or the Magistrates' Court,³ provides a list of common conditions designed to ensure this end.

1.3.1 Recognisance

[2-18] An order for a personal recognisance (a promise that the defendant will pay the court money if he fails to appear) is no longer permitted under Part IA of CPO.⁴ For a judge of the Court of First Instance, District Court or a

² *R v Lau Chi-pui* [1980] HKLR 30.

³ CPO s 9C, which sets out 'court' for the purpose of Part IA of CPO includes the District Court and a magistrate. Section 2 of the same Ordinance defines 'court' as 'the Court of First Instance acting in the exercise of its criminal jurisdiction'.

⁴ CPO s 9D(3)(a).

magistrate to accept a recognisance, the person making the promise to pay must not be the defendant; he must be acting as his surety. This arrangement is called a 'recognisance by surety'. The surety promises to pay a sum in the event the defendant breaches his conditions of bail.

[2-19] It is a crime to indemnify a surety under section 9F of CPO. Anyone may act as a surety except a solicitor or his employee (who would require the Law Society's permission).⁵ A magistrate or judge may ask to see bank books or other such proof that any pledged money belongs to the surety and not to the defendant. Section 9D(4) of CPO requires the court to have regard to a potential surety's financial resources and other relevant matters.

[2-20] Sureties have obligations to the court to ensure that the accused complies with all of his bail conditions. If a surety learns the accused is likely to abscond, he may use force to bring him to court and request release from his obligations as a surety, pursuant to section 9E of CPO. On releasing a surety from his obligations, the court must order a warrant for the arrest of the defendant (if he is not already in custody) according to section 9E(2) of CPO. A court may order the forfeiture of the recognisance offered by the surety.⁶ However, the court has discretion in ordering forfeiture and may not make the order where the surety can show he attempted to stop the defendant or advised the police of his fear that the defendant would abscond, or if the loss of the money would cause the surety serious financial hardship.⁷ The payment of the sum may be enforced as a security under section 64 of MO.⁸

1.3.2 Cash paid by the accused or another person on his behalf

[2-21] The court may require a reasonable sum of money to be deposited with the court by the defendant or by another person on behalf of the defendant as a condition of bail pursuant to section 9D(3)(b)(viii) of CPO. The deposit is intended to ensure that the defendant will return to court.

[2-22] A cash sum deposited by the accused as a condition of bail may be forfeited where the defendant has failed to surrender to the custody of the court as required.⁹

[2-23] Only a magistrate or judge may forfeit money that has been deposited on police bail.

1.3.3 Failing to surrender to custody of the court

[2-24] If a person admitted to bail fails, without reasonable cause, to surrender as required to custody, he commits a criminal offence pursuant to section 9L(1) of CPO. The offence may be dealt with summarily or on indictment. The District

⁵ *The Hong Kong Solicitors' Guide to Professional Conduct*, Volume 1, 3rd edition, [10.19].

⁶ CPO s 9M(1)(a).

⁷ *R v Keung Cam-yuen (No 2)* [1988] 1 HKLR 427, [1988] HKCU 267.

⁸ CPO s 9M(2).

⁹ CPO s 9M(1)(b).

Court or Court of First Instance may deal with this offence summarily (no jury will be required in the Court of First Instance) without the transfer of the charge, under Part IV of MO, to the District Court, or committal of the case to the Court of First Instance under Part III of MO.¹⁰ On a summary conviction, the defendant is liable to a fine of \$75,000 and imprisonment for six months. On conviction on indictment, he is liable to a fine of any amount and 12 months' imprisonment.¹¹

[2-25] A person admitted to bail may be arrested, without warrant, by police on a reasonable suspicion that he is in breach of a condition of his bail or that he is likely to breach a condition of his bail.¹² Police may also arrest a person admitted to bail without warrant where a police officer has been notified in writing by a surety that the surety believes the person he stands surety for is likely to fail to surrender to custody.¹³ Where a person has been admitted to bail under section 10 of ICACO, or released on bail under section 10A of ICACO, an authorised officer may arrest the bailed person if he has reasonable grounds to believe that that person has breached or is likely to breach the conditions of bail or the officer has been notified by the person's surety of a breach or a likely breach.¹⁴

[2-26] Following such an arrest, the police (or the officers of the ICAC) must bring the bailed person before a magistrate within 24 hours of his arrest or as soon as practicable thereafter, unless the person admitted to bail was due to appear before a court within 24 hours of his arrest, in which case he should be brought before that court immediately.¹⁵ If satisfied that a condition of bail has been breached or is likely to be breached, the court may respite bail or continue bail on the same or altered conditions.¹⁶

[2-27] A Court of First Instance judge may issue a warrant for the arrest of a person who has failed to appear in court on the date of his arraignment to plead to an indictment which has been preferred.¹⁷ A District Court Judge shall have the same power by virtue of section 79 of the District Court Ordinance (Cap 336) (DCO).

[2-28] Where the Secretary for Justice has filed an indictment as a 'voluntary bill' and produced certification that the indictment has been duly filed to a magistrate, the magistrate must issue a warrant for the arrest of the person named on the indictment if he is at large.¹⁸

[2-29] Other conditions of bail under section 9D(3)(b) of CPO include reporting regularly to a police station or the ICAC offices and restrictions on movement, communication with witnesses and residence. These may involve the surrender to the court of the accused's passport or travel documents.

10 CPO s 9L(4).

11 CPO s 9L(3).

12 CPO s 9K(1)(a).

13 CPO s 9K(1)(b).

14 ICACO s 10AA(1).

15 CPO s 9K(2), ICACO s 10AA(2).

16 CPO s 9K(3), ICACO s 10AA(3).

17 CPO s 46.

18 MO s 74(2).

Bail conditions should not be so harsh as to prevent the defendant from earning a living.¹⁹

1.3.4 When does a magistrate consider bail?

(a) Bail pending trial

[2-30] Bail may be sought from a magistrate when the defendant makes his first appearance before the court and when the case of the defendant has to be adjourned.²⁰

[2-31] An application for bail that has been refused by a magistrate may be reviewed on a subsequent appearance by the defendant in the Magistrates' Court. On the first occasion after such a refusal, the court shall hear any arguments of law and facts in support of the defendant's bail application.²¹ The magistrate is, however, not bound to hear any argument as to the law or facts on the second or any subsequent occasions after the bail application has been dismissed.²²

[2-32] When a magistrate transfers a matter to the District Court upon the application by the prosecution, the defendant may seek bail from the magistrate pending the appearance in the District Court.²³

[2-33] Bail may also be sought at each adjournment of committal proceedings under Part III of MO.²⁴ If a defendant is committed to the Court of First Instance for trial through the notice of transfer under section 79F of CPO, the magistrate shall have similar power to remand the defendant or to grant him bail pending trial.²⁵ When a defendant has been brought before a magistrate on a warrant of arrest relating to an indictment filed by the Secretary for Justice under the voluntary bill procedure, he may remand the accused in custody or grant the accused bail in accordance with section 74(3) of MO. A defendant may apply to review a decision of a magistrate to refuse bail or to review the conditions of bail imposed by the magistrate to a judge of the Court of First Instance.²⁶

(b) Bail pending review and appeal

[2-34] Bail may be sought by the defendant if the prosecution or the defendant seeks a review of the magistrate's decision in the Magistrates' Court pursuant to section 104 of MO.²⁷ A magistrate may also consider bail for a convicted person pending an appeal to the Court of First Instance under section 105 or section 113 of MO.²⁸

19 *R v Lau Chi-pui* [1980] HKLR 30.

20 MO s 20(3).

21 MO s 9G(11)(a).

22 MO s 9G(11)(b).

23 MO s 90(1).

24 MO s 79(1).

25 MO s 79F(7).

26 MO s 9J.

27 MO s 122(6).

28 MO s 119(1)(a).

[2-35] However, section 119 of MO states that the convicted person must have complied with the recognisance and other requirements found in sections 110 and 114 of MO before bail may be granted.²⁹ The magistrate should grant bail pending appeal where there is no proper ground put forward for refusing bail, such as that the defendant would not appear to prosecute his appeal, or that it is a frivolous matter where there is no merit in the appeal.³⁰

1.3.5 When does a District Court judge consider bail?

(a) Bail pending trial

[2-36] According to section 9D(1)(b) of CPO, the District Court judge may hear an application for bail where the defendant's matter will be determined in the District Court. When an order of transfer (to bring the proceedings to the Magistrates' Court or to the Court of First Instance) is granted under section 77A of DCO upon the application by the Secretary for Justice, the District Court judge may remand the defendant or grant him bail.³¹

[2-37] If the District Court judge refuses the defendant bail, he may seek a review of the decision by the Court of First Instance. He may also seek a review of the conditions of bail by a Court of First Instance judge. This right is granted by section 9J of CPO.

(b) Bail pending review and appeal

[2-38] It should be noted that a District Court judge cannot, in the absence of any statutory authority, grant bail post conviction. This is because, generally, a trial court which has passed sentence does not have an inherent jurisdiction to grant bail pending an appeal.³² A defendant convicted by a District Court judge may make an application for bail pending appeal to the Court of Appeal.³³

1.3.6 When does a Court of First Instance judge consider bail?

(a) Bail pending trial/review of decision of bail by the Magistrate/District Court judge

[2-39] A Court of First Instance judge considers bail when an accused's matter is to be determined by that court pursuant to section 9D(1)(b) of CPO.

[2-40] Pursuant to section 9J of CPO, a Court of First Instance judge may consider an application for review of a decision by a magistrate or District Court judge to refuse bail, or in relation to conditions imposed for bail.³⁴ Those acting for the accused should issue a summons supported by an affidavit. The judge may confirm, vary or revoke the decision to deny bail or conditions imposed by the

²⁹ MO s 119(1)(a).

³⁰ *R v Cheung Yuet Pang* [1991] 1 HKC 569.

³¹ DCO s 77A(10).

³² *Secretary for Justice v Wong Shu Kin & Ors* [2003] 4 HKC 256.

³³ CPO s 83R.

³⁴ CPO s 9J.

lower court and may make other relevant orders (including an order for costs).³⁵ The decision made by a judge on review may not be reviewed again by another judge, pursuant to section 9J of CPO.³⁶

[2-41] The Secretary for Justice may apply for review of a decision made by a magistrate or District Court judge to grant bail pursuant to section 9H of CPO. Such a review requires the Secretary for Justice to issue a summons supported by an affidavit, in accordance with section 9H(2) and (3), unless an order has been made to detain the defendant in custody pending review under section 9I of CPO. If an order for detention is made pending the review of the Magistrate's or District Court judge's decision to grant bail, the review in the Court of First Instance should take place within 48 hours at most.³⁷ The Secretary for Justice may rely on such matters as he or she considers relevant and these matters are not limited to those before the lower court.³⁸ The judge hearing the review may confirm, reverse or vary the original bail decision and may issue a warrant for the defendant's arrest where necessary.³⁹

[2-42] A Court of First Instance judge who transfers a case, on the application of the Secretary for Justice, to the District Court or Magistrates' Court, may grant bail pursuant to section 65F(10) of CPO. Where a defendant has been charged with murder or treason, only a Court of First Instance judge may grant bail.⁴⁰

(b) Bail pending appeal

[2-43] An accused convicted in the Court of First Instance may seek bail pending appeal to the Court of Appeal (if the accused appeals against the conviction and/or the sentence to the Court of Appeal),⁴¹ or to the Court of Final Appeal pursuant to section 34(1) of the Hong Kong Court of Final Appeal Ordinance (Cap 484) (HKCFAO) (if the convicted accused further appeals to the Court of Final Appeal against the conviction and/or the sentence). If the judge of the Court of First Instance is sitting as the single judge of the Court of Appeal, it is possible for him to grant bail pending appeal.⁴²

2. BAIL HEARINGS AND ADMISSIBILITY OF EVIDENCE AT TRIAL

[2-44] In *Kissel v HKSAR*,⁴³ the Court of Final Appeal was asked to consider whether materials from a bail hearing could be utilised at trial proceedings. The court ruled there is no general prohibition against the use at trial of materials from

³⁵ CPO s 9J(2).

³⁶ *HKSAR v Siu Yat-leung* [2002] 2 HKC 175.

³⁷ CPO s 9I(2).

³⁸ CPO s 9H(4).

³⁹ CPO ss 9H(7) and (8).

⁴⁰ CPO s 9G(10).

⁴¹ CPO s 83R.

⁴² CPO s 83Y.

⁴³ [2010] 2 HKC 367, [2010] 2 HKLRD 435.