CRIMINAL LAW IN HONG KONG

THIRD EDITION

VICTOR HO WAI-KIN

Wolters Kluwer

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List of Abbreviations

AG	Attorney General
CAIU	Child Abuse Investigation Unit
CAPO	Complaints against the Police Office
CCTV	Closed-Caption Television
CFI	Court of First Instance
CIU	Complaints Investigation Unit
CPEA	Closer Economic Partnership Arrangement
CSD	Correctional Services Department
DATC	Drug Addiction Treatment Centre
DPP	Director of Public Prosecutions
GDP	Gross Domestic Product
HKC	Hong Kong Court
HKD	Hong Kong Dollar
HKDSE	Hong Kong Diploma of Secondary Education
HKSAR	Hong Kong Special Administrative Region
ICAC	Independent Commission Against Corruption
IPCC	Independent Police Complaints Council
IRD	Inland Revenue Department
IVE	Institute of Vocational Education
MDMA	Methylenedioxymethamphetamine
OCTB	Organized and Serious Crime Bureau
OSCO	Organized and Serious Crimes Ordinance
QKT	Qualified Kindergarten Teachers
RTO	Road Traffic Ordinance
SADPP	Senior Assistant Director of Public Prosecutions
SAR	Special Administrative Region
SARS	Severe Acute Respiratory Syndrome
SFC	Securities and Futures Commission

The judgments delivered at the highest court levels in Commonwealth countr which carry high persuasive value, were followed by the courts in Hong Kon they suited the local conditions.[114]

51. After 1 July 1997, the courts in Hong Kong no longer followed the de sions delivered by the House of Lords or Privy Council in England due to the esta lishment of the Hong Kong Final Court of Appeal. Since then, the courts have bee bound by the decisions of the Court of Final Appeal. The doctrine of preceden remains the same, however (*see* paragraph 50). All inferior courts are bound by th decisions of the Court of Appeal, which considers itself bound by its own decisio Similar to the system before the resumption of sovereignty in 1997, counsel an courts may apply the decisions of courts of other common law jurisdictions (wit out necessarily following them), such as Australia, New Zealand, Ireland, Gre Britain, and Canada, but they would be of persuasive authority only.[115]

The doctrine of precedent in criminal proceedings is also applicable in senten ing. Therefore, the lower-level courts, including the CFI, have to follow the sen tencing guidelines laid down by the Court of Appeal in specific offences.[116] sentencing judge could exercise his/her discretion in not strictly following th guidelines, as his/her decision depends upon the particular facts of each case.

114. *Ibid.*, para. 554.
115. *See also* Art. 84 of the BL, which states that 'the courts of the Hong Kong SAR shall adjudica cases in accordance with the laws applicable in the Region as prescribed in Art. 18 of this law an may refer to precedents of other common law jurisdictions'.
116. In *R v. Lau Tak-ming* [1990] 2 HKLR 370, the Court of Appeal laid down sentencing guidelines fo the offence of trafficking in dangerous drugs; specifically, heroin hydrochloride. In the case of *Kwong-sang and the Queen* [1981] HKLR 610, the Court of Appeal also laid down sentencing guidelines for the offences of robbery with weapons, taxi robbery, burglary, theft of money invol ing breach of trust, and so on.

Part I. Substantive Criminal Law

Chapter 1. General Principles

§1. The Principle of Legality

52. It is a cardinal principle that ignorance of the law is no defence in Hong Kong. All citizens have the right to know which legislation governs their conduct and behaviour. All documents of legislation, including subsidiary legislation, rules, and forms are easily accessible to the public – in some of the public libraries and the libraries of the law schools in universities. Citizens could also look at the legislation via the Internet.[117] Citizens can check the judgments of reported or unreported cases in various levels of the courts through the homepage of the Hong Kong judiciary, which is important in a common law system. Usually, the press widely reports on significant cases containing rulings that have a major impact on society. The prohibited conduct and the penalties of the summary offences are displayed in conspicuous locations to inform people of the consequences of such conduct.

If a person is being charged with an offence and needs to appear in court, free legal services could be provided if certain requirements are met.[118]

According to the Wolfenden Committee in England, the purpose of criminal law is as follows:

> to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation or corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind or inexperienced or in a state of special physical, official or economic dependence.

53. Hong Kong will not enforce the rules of social morality unless they are covered by criminal law. For instance, if a doctor saw a passer-by with serious injuries lying on the road and deliberately did not do anything to save the victim, the doctor will not be liable for any criminal offence. In other words, a person will only break the law if he/she is involved in conduct that contravenes the common law, current statute, and subordinate legislation.

117. Legislation in HKSAR is bilingual, as almost 98% of Hong Kong's population is Chinese.
118. *See* the Legal Aid Services provided to persons who face trial in the District Court and the CFI. A different form of free legal services, the Duty Lawyers Scheme, is provided to persons who face trial in the Magistracy.

54. The second aspect of legality is that the legislation should be drafted in definite and certain terms so in order to avoid doubt as to its application.[119] A certain extent of ambiguity is sometimes unavoidable, but the judge has to explain the meaning of the provisions to the jury based on his/her own interpretation, or existing judicial interpretation.

Courts use different approaches to construe the meaning of legislation. The literal approach seeks the law-making body's intention by interpreting the words in the legislation according to their ordinary literal and grammatical sense.[120] The judge may consult a dictionary in ascertaining the meaning of a word, although this can lead to absurd results in some cases. The so-called golden rule, therefore, allows the judge to vary the literal interpretation if it would result 'in an absurdity, repugnance, or inconsistency with the rest of the legislation'.[121] Sometimes judges adopt a purposive approach; that is, they look at the purpose and context of the legislation rather than the literal meaning.[122] Judges may refer to Hansard – the proceedings or debates among the legislative members – in the course of enacting the law. The court should also interpret statutory provisions by considering technological changes that have taken place subsequent to the passing of the legislation.[123]

Apart from the purposive and literal approaches, courts also adopt the mischief rule: the strict interpretation of ambiguous wording in legislation.[124] It is illustrated in an English authority, *Eastman Photographic Materials Co. Ltd v. Comptroller-General of Patents, Designs and Trade Marks* [1898] AC 571, which states that 'we are to see what was the law before the Act was passed and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed and the reasons of the remedy'.[125] The strict interpretation rule allows judges to opt for the meaning of the legislation that is most favourable to the accused if there is ambiguity.[126] If there are differences or conflicts between the English and Chinese versions of the ordinance, it would be wrong to presume that they bear the same meaning pursuant to section 10B(2) of the Interpretation and General Clauses Ordinance, Cap. 1. Section 10B(3) states that where a comparison of the authentic texts

119. Unfortunately, there is much legal jargon appearing in almost every piece of legislation in Hong Kong, as most of them originated from England.
120. *See* Card, Cross & Jones, *Criminal Law* (London, 2002), 24. *See also* AG's Reference (No. 1 of 1991) [1993] QB 94.
121. *See* Card, Cross & Jones, *Criminal Law* (London, 2002), 24. *See also Grey v. Pearson* (1857) 6 HL Cas. 61.
122. *See* Card, Cross & Jones, *Criminal Law* (London, 2002), 25 and *HKSAR v. Cheung Kwun-yue* (2009)12 HKCFAR 568.
123. *See HKSAR v. Wong Yuk Man*, FACC 10/2011.
124. *Ibid.*, 26.
125. *See Eastman Photographic Materials Co. Ltd v. Comptroller-General of Patents Designs and Trade Marks* [1898] AC 571 at 573.
126. *Ibid.*, 26; *see also Sweet v. Parsley* [1970] AC 132. For a discussion of remedial interpretation (a radical approach) in Hong Kong, *see HKSAR v. Lam Kwong-wai and another* [2006] 9 HKCFAR 574.

of an ordinance discloses a difference of meaning that the rules of statutory interpretation, which are ordinarily applicable, do not resolve, the meaning that best reconciles the texts, having regard to the object and purposes of the ordinance, shall be adopted.[127]

The court may also rely on judicial precedent, which has construed the words or meaning of particular legislation. In some cases, section 3 of the Interpretation and General Clauses Ordinance, Cap. 1, provides plenty of legal definitions that are useful aids to the judge in interpreting the statutes.

§2. The General Necessity of *Mens Rea*

55. A crime cannot be committed if the accused does not have *mens rea*.[128] Broadly speaking, *mens rea* refers to the guilty mind of the accused. Specifically, it means 'the state of mind, intention or recklessness, required by the particular crime and "negligence" to describe the failure to comply with a standard of conduct. Guilt must be understood as legal, not moral guilt'.[129] The prosecution has to prove *mens rea* beyond reasonable doubt in all cases except, for instance, insanity or diminished responsibility, where the burden is on the defence to prove them on a balance of probabilities.[130] A hypothetical case can illustrate this. A passer-by witnesses a robbery on a street. The person he chases is, in fact, an off-duty police officer who is chasing a third person, the real suspect. The passer-by catches up with the police officer and subdues him, mistakenly believing that he is the robber. The passer-by will not be convicted for obstructing the police officer in the due execution of his duty because the passer-by lacks the necessary *mens rea*. Further, the mental condition of the accused, such as drunkenness, duress, insanity, or diminished responsibility will negate the *mens rea* in some cases. Without *mens rea*, it is immaterial whether or not an accused has committed a serious offence.

Under Hong Kong law, a child under 10 years of age is incapable of committing a criminal offence. The rationale is that the child could not form any *mens rea* because of his/her youth.

56. In some circumstances, legislation provides for criminal liability for corporations. In the case of the *Queen v. Lolly Queen Co. Ltd* [1994] 2 HKCLR 51, a company was charged with the offence of applying a false trade description, thereby violating section 7(1)(a)(i) of the Trade Descriptions Ordinance, Cap. 362. Customs officers raided the premises and found the company director. He made a statement on behalf of the company under caution, admitting that he was responsible for financial matters, administration, and import and export business. On appeal, the corporation contended that the magistrate had erred in relying on the director's

127. *See HKSAR v. Lau San-ching and others* [2004] 1 HKLRD 683.
128. Lord Reid said that 'it is firmly established by a host of authorities that *mens rea* is an essential ingredient of every offence unless some reason can be found for holding that this is not necessary'. *See Sweet and Parsley* [1970] AC 132, at 149.
129. *See* Smith & Hogan, *Criminal Law* (London, 2002), 69–70.
130. For a discussion as to the burden of proof on the prosecution, *see Woolmington v. DPP* [1935] AC 462.

admissions on behalf of the company. The appeal was dismissed as there was substantial evidence to show that the appellant was authorized to make admissions on behalf of the company. It is also a trite legal principle there must be a temporal coincidence of the *mens rea* and *actus reus*. This is known as the doctrine of concurrence.[131]

57. There is an exception to the *mens rea* requirement. Hong Kong law contains strict liability offences, for which the establishment by the prosecution of the *actus rea* is sufficient. A mistake of fact, regardless of whether it rests on reasonable grounds, will not afford any defence.[132] These offences are less serious than indictable offences. In some cases, the court may take into account the knowledge of the offender as a defence, even when the offence is one of strict liability.

In *Queen v. Chan Pui-kay* [1992] 1 HKCLR 218, the appellant, a church deacon, had been convicted of allowing an object to fall from a height in violation of section 4B(1) of the Summary Offences Ordinance, Cap. 228. A screen attached to a wall in a church had detached and hit a window. The glass fragments then fell onto the ground, slightly injuring a passer-by. The appellant admitted he was in charge of the church and was, therefore, charged with the offence. The legislation is obviously an offence of strict liability. However, the High Court held that the legislative intent of the section coupled with the wording 'allowed to fall' implied that some knowledge on the part of the offender had to be proved. The appeal was allowed, as the legislation required that the offender should have the power to control the matters that resulted in the falling of the glass. The evidence in that case did not establish that the appellant had such power.

131. *See Fowler v. Padget* (1798) 7 TR 509, 101 ER 1103. Cf. the single transaction rule in murder case which is an exception to the concurrence rule, *see Thabo Meli v. R* [1954] 1 WLR 228 and *WAN Kim-chung v. HKSAR* [2013] HKCFA 96.

132. *See Archbold's Criminal Evidence, Pleadings and Practice* (London, 2003), 1555, para. 17-15; also *R v. Howells* [1977] QB 614.

Chapter 2. Scope of Application of Criminal Statutes

§1. Principles with Respect to Time

I. Non-retroactivity

58. The principle of non-retrospective criminal offences or penalties is a long-established principle.[133] Case law on this aspect is extremely limited. In the Bill of Rights Ordinance, Cap. 383, section 8 of Article 12 stipulates that 'no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed'. Further, it states that 'nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations'.

59. If a specific legislation is repealed on a certain date, the prosecution can still charge the accused if he/she had committed the offence before the date of the repeal. However, an accused could not be convicted of an offence that no longer exists at the time of trial. In *Attorney General of Hong Kong v. Lee Kwong-kut and others* [1993] 2 HKCLR 186 [1993] AC 931, the Privy Council held that section 30 of the Summary Offences Ordinance was repealed from the date of the enactment of the Bill of Rights (8 June 1991), as it was inconsistent with the Bill of Rights Ordinance. In the light of this judgment given by the Privy Council, the appeal was successful, as the appellate court held that the applicant should not have been convicted of a non-existent offence on 5 September 1991.[134]

60. Section 8 of Article 12 of the Bill of Rights Ordinance, Cap. 383, states that:

> nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.[135]

133. *See R v. Lam Wan-kow and another* [1992] 1 HKCLR 272.

134. In a similar case, *The Queen v. Kwok Hing-man* [1994] 2 HKCLR 160, the applicant was convicted of possessing stolen or unlawfully obtained cigarettes, in violation of s. 30 of the SOO, Cap. 228, on 5 Sep. 1991. At that time, the Bill of Rights Ordinance had already been enacted (8 Jun. 1991). The appeal was allowed, as the applicant had been convicted of a non-existent offence.

135. It applies only to the particular provision that was in force when the trial judge imposed the sentence.

A. Principles

61. Hong Kong Courts (HKCs) have jurisdiction over offences committed within their territory regardless of the nationality of the accused.[136] The traditional principle is that an accused person will not be liable for a criminal act if the offence is committed beyond the boundary of the territorial limits of Hong Kong.[137] The territory of Hong Kong is not limited to land, as it includes the airspace and waters of the HKSAR; that is, admiralty jurisdiction.[138] Territorial airspace may have different applications, as it may be subject to international treaties.[139] There are exceptions to this traditional principle in new legislation[140] and recent case law.[141] If an accused contends that he/she did not commit the offence within Hong Kong's territorial limits, it is up to the prosecution to prove that he/she did.

B. Exceptions

62. There are exceptions to the rule of territoriality. The courts of Hong Kong have limited jurisdiction to try persons for criminal conduct outside Hong Kong, be it on the basis of common law or on explicit legislation. For instance, a person who unlawfully takes control of an aircraft in flight by the use of force or threats of any kind commits the offence of hijacking, regardless of which country or territory the

136. *See* the exceptions of all diplomats or consulates in Hong Kong.
137. For a discussion about the rationale behind this principle, *see* Jackson, *Criminal Law in Hong Kong* (Hong Kong, 2003), 56.
138. *See* s. 23B(2) of the CO, Cap. 200, which states that Hong Kong courts (HKC) have jurisdiction to try any offence 'if any act of a person which occurs in the waters of Hong Kong on board a ship which is not a Hong Kong ship and would, were the ship a Hong Kong ship, constitute an indictable offence'.
139. In *R v. Duggam* [1995] 2 HKC 753, D pleaded guilty to four offences of obtaining property by deception and one offence of attempting to obtain property by deception. D was not a Hong Kong resident or citizen. He used another person's credit card to purchase goods on a Quantas flight from Hong Kong to Singapore on four occasions. The general principle is that acts or omissions occurring outside the territory of Hong Kong are not offences under Hong Kong law unless there is an exception. At the material times, s. 1(1) of Sch. 1 to the Tokyo Convention Act 1967 (Overseas Territories) Order 1968 applied to Hong Kong and created such an exception. However, the order only applies to those offences of Hong Kong that take place on board a British-controlled aircraft while in flight elsewhere than in or over the territory of Hong Kong. By adopting a true construction of the Tokyo Convention Act 1967 (Overseas Territories) Order 1968, acts that take place aboard an aircraft that is not British-controlled while in flight elsewhere than in or over Hong Kong did not constitute offences under s. 17(1) of the Theft Ordinance, even if the offence had occurred within Hong Kong or its airspace. D had pleaded guilty to acts that were not offences under Hong Kong law. The conviction was a nullity and was quashed.
140. *See* the CJO, Cap. 461.
141. In *Somchai Liangsiriprasert v. Government of the USA and another* [1990] 2 HKLR 612, a person was charged with conspiracy to traffic in dangerous drugs. The Court held that the HKC had jurisdiction to try the case concerning the conspiracy entered into aboard, with the intention of committing the trafficking of drugs in Hong Kong, even though no overt act pursuant to the conspiracy had occurred in Hong Kong yet. The accused appealed the decision to the Privy Council in England. The appeal was dismissed.

aircraft is registered in and whether the aircraft is flying over Hong Kong or elsewhere.[142] Section 153P of the Crimes Ordinance, Cap. 200 (Extra-territorial effect of sexual offence provisions listed in Schedule 2) provides that a Hong Kong permanent resident or who ordinarily resides in Hong Kong could be guilty of certain sexual offences committed against children outside of Hong Kong. In *HKSAR v. LEE Kwok-wah Francis* [2013] 2 HKLRD 979, the applicant, a Hong Kong resident, set up a children's home in Yunnan, China to take care of orphans. After a trial in Hong Kong, he was convicted to eight years' imprisonment for sexual offences on children committed in China.

If a person is hurt anywhere in Hong Kong but dies on the sea or anywhere outside Hong Kong, every offence that was committed in connection with such cases, such as murder or manslaughter, may be tried, determined, or punished as if such offence had been wholly committed in Hong Kong.[143] Other examples include offences by internationally protected persons, the Taking of Hostages Ordinance, Cap. 468, treason, and piracy. Finally, the courts have relaxed the rules of territoriality for the inchoate offences of conspiracy and soliciting another person to commit an offence,[144] attempt, and incitement (*Somchai Liangsiriprasert v. Government of the USA and another* [1990] *supra*).[145]

63. The Criminal Jurisdiction Ordinance, Cap. 461, enacted on 6 March 1996, plugged the loopholes that were hobbling the prosecution of transnational crime.[146] The offences brought under Hong Kong jurisdiction are divided into two groups. Group A includes theft, obtaining property by deception, obtaining a pecuniary advantage by deception, procuring false entry into certain records by deception, procuring a valuable security by deception, false statements by company directors, fraud, blackmail, handling stolen goods, forgery, copying a false instrument, false accounting, using a false instrument and evasion of liability by deception. Group B consists of inchoate offences such as conspiracy, incitement, or an attempt to commit a Group A offence, and common law conspiracy to defraud.[147]

'A Group A offence is deemed to have been committed in Hong Kong if one or more of relevant events in relation to the offence occurred in Hong Kong'.[148] A 'relevant event' is 'any act or omission or other event (including any result of one or more acts or omissions), proof of which is required for conviction of the offence'.[149] A person can also be tried and convicted in Hong Kong for the Group B offence of inciting a Group A offence to be committed in Hong Kong, regardless

142. *See* s. 8 of the Aviation Security Ordinance, Cap. 494.
143. *See* s. 9 of the OAPO, Cap. 212.
144. *See* s. 5 of the OAPO, Cap. 212.
145. *See* Jackson, *Criminal Law in Hong Kong* (Hong Kong, 2003), 56–57.
146. The provisions are similar to the Criminal Justice Act 1993 in England.
147. *See* s. 2 of the CJO, Cap. 461.
148. *See* s. 3(3) of the CJO, Cap. 461. *See HKSAR v. Hon Sui-ho, Mandy* [2009] 3 HKLRD 452: The appellant made telephone calls from mainland China to the victim in Hong Kong and demanded HKD 100,000. The appellant argued that there was no jurisdiction to try the offences of blackmail and criminal intimidation. The appeal was dismissed.
149. *See* s. 3(1) of the CJO, Cap. 461. For an interpretation of 'relevant events' in a case of handling stolen goods, *see HKSAR v. Yeung Ah-lung and another* [2004] 4 HKC 477.

in Hong Kong ('the newspaper') ran a series of articles that scandalized the court and some of the judges. In early 1998, a staff member of the newspaper followed a judge of the Court of Appeal continuously for three days, took photographs, and published them. Apparently, the newspaper was dissatisfied with the judge's decision in a copyright case between the newspaper and a competitor. The newspaper's director, chief editor, and controller were charged with several offences, including scandalizing the court and contempt contrary to common law. In that case, it was the judgment that defined the *actus reus* and *mens rea* for the offence of scandalizing the court and interfering with the administration of justice involving a judge. The court stated that the publication of material, including articles in newspapers, aimed at tarnishing the reputation of the court or judge and erode the public's confidence in the administration of justice, constituted the *actus reus* of scandalizing the court. The pursuit also constituted the *actus reus* of interfering with the course of justice, as the published results could affect the confidence of the readers in the administration of justice.[178] The court subsequently sentenced the chief editor and controller to prison terms of four months each.

For strict liability offences, the prosecution has to prove only the *actus reus*.[179]

I. Omission

74. If an offence requires a positive act, such as killing, driving, wounding, having sexual intercourse, and obstructing, the failure to take action will not give rise to criminal liability. However, there is legislation which explicitly states that the failure to act may be considered a criminal offence in some instances. A case in point, stipulated under section 25 of the Offences against the Person Ordinance, Cap. 212, is neglecting to provide an apprentice or servant with food, clothing, or lodging, whereby the life of apprentice or servant is endangered.[180] In other words, the legislative intent is to make a person liable to a wide range of punishment if he/she is remiss in fulfilling a duty to act.

178. *See* another case of *HKSAR v. Wong Shing-yim and others* [2003] 3 HKLRD 1046, at 1059 A–B. Some hawker control officers of the then Urban Services Department were charged with conspiracy to pervert the course of public justice. On appeal, it was held that the *actus reus* of the offence involved an act or conduct that had a tendency to pervert the course of public justice. However, neither was it necessary to prove that the relevant tribunal was or would actually have been misled.

179. *See HKSAR v. Ng Nga-lee*, HCMA No. 494 of 1998 and *HKSAR v. Kwong Cheuk-him*, HCMA No. 801 of 1997.

180. Other examples are the offence of omitting to do anything one ought to do or an omission under the Quarantine and Prevention of Disease Ordinance, Cap. 141; the offence of a person who is entrusted to take care of a child or young person but wilfully neglects, abandons, or exposes the child or young person in a manner likely to cause unnecessary suffering or injury to the latter's health; and offences such as failing to keep books and accounts, or an officer who knowingly and wilfully permits the omission of an entry in the register of charges under the Companies Ordinance, Cap. 32.

A deliberate omission to state some facts can give rise to criminal liability in Hong Kong. For example, an accused commits an offence if he/she deliberately fails (omission) to disclose all existing debts or loans to the bank when applying (act) for credit facilities.[181]

75. A person also commits an offence if he/she is under a common duty to act by reason of his/her post of employment or if he/she owes a duty of care to others but does not take action. For instance, a laboratory technician is responsible for testing blood before it is supplied to patients in a hospital. The duty to act may arise from a contract between the hospital and the technician. If, by neglecting to perform his/her contractual duties, the technician endangers the lives of others, (e.g., the untested blood to be transfused is contaminated with the AIDS virus), he/she may be liable for manslaughter.[182]

Similarly, a police officer in a public street may be liable for misconduct in public office if he/she makes no attempt to stop a fight, and one of the parties dies.[183] Parents owe a duty to their child, as do step-parents, if they undertake to care for a child. They may be liable for manslaughter if they deliberately fail to provide food and medical care to the child, resulting in the latter's death. If a guard, who is responsible for maintaining the security of a building, allows burglars to enter the building in return for monetary reward, he/she will incur criminal liability.[184]

76. However, if a duty of care does not exist, an omission to act will not give rise to any criminal offence. For example, a person is lying on the street, badly injured, after being shot by a bank robber during a heist. A doctor who walks by and ignores the victim will not be liable for any criminal offence even though he/she did not give the victim medical treatment (e.g., first aid).

77. Lastly, there is a special situation wherein the failure to act may give rise to criminal liability even though legislation does not expressly stipulate that a person is required to act (no duty of care exists). An example would be when a person does something accidentally (e.g., starts a fire in the house without meaning to) and knows that some persons or property has been endangered (e.g., the fire spread quickly in the neighbourhood while many residents were asleep), but fails to take steps within his/her power to prevent or reduce damage to property or injuries to

181. In these cases, a charge of obtaining pecuniary advantage by deception under s. 18(1) of TO, Cap. 210, or fraud under s. 16A of the TO, Cap. 210, could be laid against the accused. Also, an undischarged bankrupt commits an offence under s. 131 (the Bankruptcy Ordinance, Cap. 6) if he/she, say, obtains credit of HKD 100 or more from any person without disclosing his/her status to that person (i.e., being an undischarged bankrupt).

182. *See* the English case of *Pittwood* (1902) 19 TLR 37: If a doctor fails to apply medical treatment to a patient who has no hope of recovery, the English approach would be different, as the doctor's failure to act arises from serving his patient. In Hong Kong, such cases are rarely brought to the criminal courts.

183. *See Dytham* [1979] QB 722.

184. Since the guard knows that the burglar has entered the building as a trespasser and has stolen properties, the guard in effect assists the burglar in committing the crime. Thus, the guard may be found liable for aiding and abetting.

people at risk.[185] In this situation, the person may be found criminally liable for not acting on the accident, provided he/she has relevant *mens rea*.

II. Events

78. In some offences, the occurrence of a specific event is sufficient to incur criminal liability, and a physical act or an omission to act need not be proved. For instance, a person will be guilty of a drug-related offence if he/she is found in possession of illegal drugs. A person carrying a knife in a public street may be found guilty of possessing an offensive weapon in a public place. Under section 29 of the Theft Ordinance, Cap. 210, a person who has any article for use in the course of or in connection with any burglary, theft, or cheating and is not at his/her place of abode may be considered guilty of going equipped for stealing.

III. Causation

79. When a person commits an act that leads to a specific result in a criminal offence, the principle of causation is important, particularly in cases of murder and wounding. The prosecution must prove that the conduct of the accused caused the death of the victim. In general, the chain of evidence related to the offender's conduct and the consequence arising from the conduct should not be broken. If there is any intervening factor that breaks the chain of causation, the accused will not be criminally liable.

80. A person cannot be guilty of an offence unless his/her conduct satisfies both the factual and legal causes for it. The conduct of the accused can only be regarded as the factual cause of death if death would not have occurred when and as it did but for that conduct (commonly known as the 'but for test').[186] If the causal conduct can be proved, the court has to consider whether it was the legal (substantial) cause of the death.[187] In some cases, the factual causation by the accused of a person's death was deemed sufficient; the prosecution did not have to prove that the act of the accused was a substantial cause of death.[188]

In *Queen v. Lee Yiu-kwong and another* [1985] HKLR 184, the driver of a transporting company was instructed by his employer to load long steel rods on a vehicle. The driver was fully aware that the total weight of the rods greatly exceeded the load limit of the vehicle. An accident occurred, and the rods pierced a bus, killing

185. *See* the English authority in *Miller* [1983] 2 AC 161; *see also* the discussion in Card, Cross & Jones, *Criminal Law* (London, 2002), 57. Cf. *R v. G* [2004] 1 AC 1034.
186. *See* Card, Cross & Jones, *Criminal Law* (London, 2002), 210.
187. However, the death would not be attributed to the accused under the '*principle de minimis*'.
188. It is unusual to give the jury any direction on causation in the case of murder. If such direction is required, it is sufficient that the accused's act contributed significantly to the death, and there is no need to prove that the act of the accused is the sole or principal cause of the death (*see* the discussion of 'Medical Treatment: Causation' at 1575 in *Archbold's* (London, 2003); *see also R v. Cheshire* [1991] 93 Cr. App. R. 251).

a passenger. The driver was convicted of dangerous driving causing death. The court said that the prosecution only had to prove that the driver's dangerous manner of driving was the cause of death; they did not have to prove that it was a substantial cause of death. In a murder case, the prosecution has to prove that the act(s) of the accused contributed significantly to the death or that death was caused by the act(s) of two or more accused if they acted in a joint enterprise.[189] It is immaterial if the act of a third party was also a cause of death.

In *HKSAR v. Cheung Ki-wing* [2002] 1 HKLRD 225, the applicant was convicted of a count of murder and robbery in the CFI. He appealed the conviction in relation to murder. A summary of the case: the victim, aged 20, was walking along a street on her way home; she was drunk; the applicant voluntarily assisted her and offered to bring her home; at some stage, the applicant grabbed the victim and took away her gold chain out of greed; he put some adhesive tape tightly around her nose and mouth; when he saw that the victim was still alive, he strangled her; afterwards, he disposed of her body by placing it in a cardboard box inside a refuse room below his flat; the cause of death was suffocation, although fatal injuries were found on her body.

The main issue at the trial was whether the applicant had the intention to cause the death of the victim. The defence contended, *inter alia*, that the jury should have been told to consider the intention of the applicant about the act of wrapping the tape around the head of the victim. It was wrong for the judge to treat the strangulations and suffocation as a 'series of acts' without any break in the chain of causation in those two stages. The Court of Appeal dismissed the application and ruled that the direction given by the trial judge to the jury was correct. The Court of Appeal agreed with the submission by the prosecution that there was no need to give separate directions to the jury about the intentions of the applicant when he committed the two separate acts of wrapping and strangulation. The prosecution cited the case of *R v. John Le Brun* (1992) 94 Cr. App. R. 101 to support its argument:

> It seems to us that where the unlawful application of force and the eventual act causing death are parts of the same sequence of events, the same transaction, the fact that there is an appreciable interval of time between the two does not serve to exonerate the defendant from liability. That is certainly so where the appellant's subsequent actions which caused death, after the initial unlawful blow, are designed to conceal his commission of the original unlawful assault.

In this case, it is clear that the applicant had committed a single series of acts, which caused the death of the victim.

81. The prosecution does not have to prove that the act of the accused is the main cause of death. A person could also be convicted if he/she and a third party significantly contribute to the death of the victim. In general principle (unlike the law of tort), the contributory negligence of the victim is no defence for the accused. If the victim already suffers from a deadly disease, of which the accused has no

189. The situation is similar in England. *See* the case in *Malcherek Steel* [1981] 2 All ER 422 and *Cheshire* [1991] 3 All ER 670.

knowledge, English law considers that the accused has contributed to the death, and such is still applicable in Hong Kong. In other words, the accused must take the victim as he finds him. Does the chain of causation break if the victim refuses to have medical treatment or commits suicide in the course of events? In general, the victim's refusal of medical treatment will not preclude the legal attribution of the cause of death to the accused, providing the refusal is reasonable.[190] Also, if there is an independent intervening act which causes the death of the victim, the death could still be legally attributed to the accused as long as the occurrence of such event is reasonably foreseeable. If X wounds A by shooting him with a gun, it is immaterial that A dies of exposure in cold weather without having received proper medical treatment.[191]

82. What if the immediate cause of death is negligence in the treatment of the victim in hospital? It is rare for the accused to be exempted from criminal responsibility, provided the treatment is given by a competent medical practitioner, unless the negligent treatment was so independent of the acts that it could be regarded as the sole cause of death.[192] The jury should be satisfied that the acts of the accused can fairly be said to have made a significant contribution to the death of the victim.[193]

§3. *Mens Rea*

83. *Mens rea* refers to the state of mind of the accused as an essential ingredient of a criminal offence.[194] Such a state of mind or intention at the time of doing the act could affect the nature of the charge faced by the accused in some cases, and the

190. *See Holland* [1957] Crim LR 702: During a violent assault, the victim sustained blood poisoning in his finger. If he had agreed to have his finger amputated, as advised by the doctor, he would have survived. One of the attackers, a sawyer, was still convicted of murder. *See also Blaue* [1975] 3 All ER 446 and *Dear* [1996] Crim LR 595: The deceased had sexually assaulted the daughter of the accused. The accused stabbed the deceased with a knife, and the latter died two days later as a result of the wounds. The accused contended that the chain of causation was broken because the deceased had committed suicide – he either reopened his wounds or the wounds had reopened by themselves. The appeal was dismissed. The court ruled that the wounds were an operating and substantial cause of death, and the chain of causation had not been broken. It is irrelevant whether or not the act of committing suicide by the accused was unforeseeable.
191. *See* the English case of *Pagett* [1983] 76 Cr. App. R. 279 CA. The accused was holding an innocent girl hostage. A police officer shot at the accused and accidentally killed the captive girl. The act of a third party – the police officer – was held to be reasonably foreseeable. The chain of the accused's conduct and the girl's death had not been broken.
192. *See Cheshire* [1991] 3 All ER 670, which laid down the principle that the chain of causation is rarely broken in cases of the negligent treatment of wounds or injuries if the act of the accused contributed significantly to the death.
193. *See Smith* [1959] 2 QB 35, where the original wound was still regarded as an operating and substantial cause of death, and bad treatment did not break the chain of causation.
194. *See HKSAR v. Cheung Ki-wing* [2002] 1 HKLRD 225: The accused was convicted of murder. The appeal dealt with the intention of the accused at the time of his actions, which resulted in the death of the victim. The *mens rea* of murder is an intention to kill. The defence argued that the accused had no intention to kill because he thought that the victim was already dead. The appeal was dismissed. It was held that the accused had done a single series of acts that led to the death of a

obvious example is murder.[195] In some ordinances, the *mens rea* is stated explicitly, such as 'with intent to', 'knowingly', 'recklessly', and 'fraudulently'.

Normally, the intention is required, but at times, offences can be committed by the offender's recklessness and negligence, subject to a stringent test. However, some criminal law experts do not regard such terms as *state of mind*. Offences of strict liability are an exception.

For conspiracy, *actus rea* need not be proved.[196] What is required is proof of an agreement between two or more persons to commit an unlawful act with the intention of carrying it out as *mens rea*.[197] Both parties should have the *mens rea*. If someone conspires with an undercover agent to commit an offence, the undercover agent, who has no intention of committing the offence, lacks the *mens rea* to be a co-conspirator.[198] Defences based on the lack of *mens rea*, such as automatism and insanity, are discussed in the coming chapters. A lighter sentence will be imposed if the *mens rea* comes into existence at a later stage of a criminal offence.[199]

I. Intention

84. In Hong Kong, a person accused of a criminal offence will not be convicted of it, even though he/she completes the physical act, unless he/she has the necessary *mens rea* or such 'intention'. Intention has not been defined in any ordinance in Hong Kong, however. The word *intention* occasionally appears in some ordinances,[200] but most of them do not expressly specify the 'intention' that the prosecution has to prove.[201] In *Queen v. Jacqueline Hamilton* [1988] 1 HKLR 138, the accused was charged with making off without payment under section 18 of the Theft Ordinance, Cap. 210. An intention to avoid payment permanently is an essential ingredient of the offence. A charge omitting these particulars is defective.[202] At

20-year-old woman during a robbery. The jury was left to decide whether the verdict should be murder or manslaughter because of his lack of intent at the time of the crime.
195. *See Sweet v. Parsley* [1970] AC 132.
196. In *HKSAR v. Chan Sai-yung* [2003] 1 HKLRD 376, indecent assault was considered an offence requiring basic intent. If the assault had been regarded as undoubtedly indecent, it would not be necessary to prove the sexual intent as the *mens rea* of the offence.
197. *See Queen v. Poon Ping-kwok and another* [1993] 1 HKCLR 56.
198. *See Queen v. Yip Chiu-cheung* [1994] 2 HKCLR 35 and *R v. Anderson (William Ronald)* [1986] AC 27.
199. *See R v. Wong Yin-chung and another* [1993] HKLY 331.
200. Following are some examples and the ordinances that are violated: using false documents with intent to deceive a principal – s. 9(3) of the PBO, Cap. 201; wounding with intent – s. 17 of the OAPO, Cap. 212; access to a computer with a dishonest intent – s. 161 of the CO, Cap. 200; using an instrument with intent to procure a miscarriage – s. 46 of the OAPO, Cap. 212; and throwing corrosive fluid with intent – s. 29 of the OAPO, Cap. 212.
201. *See* the definition of theft (s. 9 of the TO, Cap. 210). The prosecution has to prove the element of 'the intention of permanently depriving the other of it'. Reference could be made to *HKSAR v. Ma Pui-ying* [1998] 1 HKLRD 41 and *Lau Hong-wang and the Queen* [1978] HKLR 192. For the definition of false accounting, the element 'with intent to cause loss' is used in the legislation.
202. However, an intention to delay or defer payment was not sufficient to convict the accused. *See also* Allen [1985] AC 1029.

times, double intention must be proved, such as the offence of using a false instrument under section 73 of the Crimes Ordinance, Cap. 200. Apart from the need to prove an intention to induce somebody to accept the document as genuine, there must also be an intention to induce the person to accept it in order to do or not to do some act to his/her own or someone else's prejudice.[203]

85. There is some confusion among the terms *motive*, *desire*, and *intention*. Motive and intention must be distinguished from each other. For instance, a bank robber enters a bank intending to rob money, and shoots and kills a security guard who puts up resistance. The bank robber had the intention to kill the security guard in order to rob but the motive of the accused was simply greed for money. In an offence like criminal intimidation, the special element of a genuine intention to cause fear and alarm, as opposed to an instinctive outburst, has to be proved.[204]

86. Professor Richard Card further distinguishes 'direct' from 'oblique' intention.[205] Direct intention has been defined as 'a decision to bring about, in so far as it lies within the accused's power, a particular consequence, regardless of whether the accused desired that consequence of his act or not'.[206] Therefore, the accused will be considered as having a direct intention even though he/she genuinely believes that the act is not likely to achieve the outcome. For instance, an accused has a direct intention to kill if he/she shoots someone but genuinely believes that the gun is incapable of causing death.

Oblique intention can be applied to murder. HKCs follow the traditional English case law. In particular, if the accused is charged with murder, it is a trite law that the *mens rea* for murder is an intention to either kill or cause really serious bodily injury. The direction to be given to the jury as to the intention is derived from the case of *Nedrick* [1986] 3 All ER 1 at 4 [1986] 1 WLR 1025, and states:

> where the charge is murder and in the rare case where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case.

However, not every case of murder automatically requires the said *Nedrick* direction.[207]

In *HKSAR v. Sham Ying-kit* [2001] 1 HKLRD 52, two groups of males had clashed at a market. As a result, three persons sustained serious injuries, and one of them died from his injuries a few weeks later. The applicant was charged with one

203. *HKSAR v. Leung Hoi-ham* [1997] HKLY 312.
204. *See HKSAR v. Yau Yu-ming* [1999] 3 HKLRD L5, *HKSAR v. Chan Kai-hing* [1997] HKLY 226 and *Lo Tong-kai v. R* [1977] HKLR 193.
205. *See* Card, Cross & Jones, *Criminal Law* (London, 2002), 62.
206. *See* Mohan [1976] QB 1 [1975] 2 All ER 193 at 200.
207. In particular, the Nedrick direction is not appropriate if it involves a direct attack on the deceased. *See HKSAR v. Lee Kwan-kong and others* [2006] 2 HKC 111.

count of murder and two counts of wounding with intent, but was acquitted of murder. However, the jury had been directed that it was open for them to return verdicts of manslaughter against the applicant on two bases: (1) he had killed the deceased after being provoked and (2) he lacked the intent to cause death or really serious bodily injury. The court subsequently convicted the applicant for manslaughter, as he had lacked the intent to kill. During the trial, the judge in the CFI had given the direction as to the necessary ingredients of a charge of murder and in relation to the necessary intent based on *R v. Nedrick* [1986] 1 WLR 1025. Although the appeal was dismissed on other grounds (*per curiam*), the Court of Appeal stated that a *Nedrick* direction was not necessary in every case of murder, but only where the simple direction on intent is not sufficient. The court further explained that where a man armed himself with a knife with a view to attacking another, and deliberately stabbed or slashed the other with that knife, a *Nedrick* direction on foreseeability was not appropriate. The Court of Appeal criticized the trial judge's failure to take into account the case of *R v. Woollin* [1999] 1 AC 82 (at p. 96) G. H., which had modified the *Nedrick* directions.

R v. Woolin [1999] 1 AC 82 has important bearing on the question of intent in murder cases. The House of Lords held that 'the jury are not entitled to infer the defendant's intent from the foresight of the consequence of his acts unless those consequences are a virtual certainty'. Moreover, *Woolin* is not confined to the case of murder. *Lau Cheong and another v. HKSAR*, FACC No. 6 of 2001 considered whether or not an intention to cause grievous bodily harm was a sufficient *mens rea* in murder ('grievous bodily harm rule'). The challenge to the grievous bodily harm rule failed.

After acknowledging criticism to the grievous bodily harm rule,[208] the Court of Final Appeal nevertheless took the view that it is settled law. The court did not permit any further judicial narrowing of the *mens rea* requirement.

87. The direction given to the trial jury in the CFI is crucial. A misdirection as to the intent in murder cases can result in acquittal or an order for retrial. In *HKSAR v. Lam Chun-wah*, CACC No. 646 of 1997, the accused was convicted of murder in the CFI. The deceased had been assaulted while unconscious, and thereafter, her body had been burnt. The jury had to consider two options in relation to this act of killing. On the one hand, the accused claimed that he had joined two other persons in the attack. He admitted that he had assaulted the victim twice but without the intention to kill or cause grievous bodily harm. He also claimed that when the body was burned, he thought that she was already dead. The prosecution contended that

208. In *Lau Cheong and another v. HKSAR, FACC* No. 6 of 2001 at para. 28, the court recognized that, as pointed out by the defence counsel, 'eminent judges [are] expressing dissatisfaction with the grievous bodily harm rule, largely on the ground that it results in a lack of symmetry between the *mens rea* for murder and the *actus reus* relevant to causing death, particularly when contrasted with the *mens rea* requirements of attempted murder and murder as a secondary participant'; *see* Lord Edmund-Davis in *R v. Cunningham*, Lord Mustill in AG's Reference (No. 3 of 1994) [1998] AC 245 at 250, 258–259 and Lord Steyen in *R v. Powell* [1999] 1 AC 1 at 14–15 and in *R v. Woolin* [1999] 1 AC 82 at 90.

the accused had committed the offence alone and the other assailants did not exist. Even if they had existed, the accused would have committed the offence in a joint enterprise.

88. The Court of Appeal held that if the jury had been given a proper direction as to the *mens rea*, the accused would have been convicted of the lesser offence of manslaughter. Even if the accused had joined the attack that had led to the deceased's unconsciousness and had taken part in the burning of the body, that did not constitute murder if the accused had believed that she was dead at the time of burning the body, unless his 'behaviour in attacking her and burning her body could be considered as a single and uninterrupted series of acts designed to cause her death or grievous bodily harm'. As the trial judge had failed to give such a direction, the appeal was allowed and a retrial was ordered.

89. For some offences, only direct intent is sufficient. Examples are inchoate offences, such as attempt, incitement, and statutory conspiracy. The distinction between 'basic intent' and 'specific intent' is also important. In a generally accepted classification in Hong Kong, offences that can be committed recklessly are classified as requiring basic intent. Specific intent requires direct intention.[209] The distinction is important because defences like voluntary intoxication may succeed if the accused had committed a specific intent offence.

Proof of intention may sometimes be relevant to the sentencing process. For the possession of an unlawful object such as a stun gun, the prosecution's failure to prove that the accused had the intention to use the said object may warrant a lighter sentence.[210]

II. Negligence

90. Professor Richard Card states that an accused is negligent 'as to the consequence of an act or omission on his part if the risk of it occurring would have been foreseen by a reasonable person and the accused either fails to foresee the risk and to take steps to avoid it, or having foreseen it, fails to take steps to avoid it or takes steps which fall below the standard of conduct which would be expected of a reasonable person in the light of that risk'.[211]

91. Careless driving and dangerous driving are typical offences that can be committed negligently.[212] A person whose manner of driving falls below the standard of reasonable and prudent driving of a vehicle can be convicted.[213]

209. In *R v. Wong Kin-shu* [1996] HKLY 375, the accused was charged with four counts of harassment of tenants, contrary to s. 119V(2)(b) of the Landlord and Tenant (Consolidation) Ordinance, Cap 7. The appellate court held that it was necessary to prove the specific intent in this offence. Robbery is also considered an offence of specific intent. *See R v. Yeung Ka-wah* [1992] HKLY 299.
210. *See HKSAR v. Li Hung-kwan* [2003] 1 HKLRD 204.
211. *See* Card, Cross & Jones, *Criminal Law* (London, 2002), 90.
212. *Ibid.*, 92. In *HKSAR v. McDonald's Restaurant (Hong Kong) Limited* [1999] 2 HKLRD F13, a McDonald's restaurant (D) pleaded guilty to two offences of employing a person not lawfully

The wording of the legislation of some less serious offences, such as summary offences, expressly addresses negligence. According to section 18 of the Kowloon Canton Railway Corporation Ordinance, Cap. 372, an employee of the corporation commits an offence if, in the course of his/her duty, he/she negligently does or omits to do something in relation to the condition or operation of any part of the railway that has come into public use, which endangers or is likely to endanger the safety of any person on the railway. Negligence has been defined as the failure to exercise such care or skill as a reasonable employee in the situation will exercise.[214]

92. More serious offences, such as manslaughter, require proof of gross negligence regarding the risk of death.[215] The concept of negligence is similar to the concept of Caldwell recklessness (to be discussed shortly). Negligence is different from intention and subjective recklessness in the sense that foresight or awareness of the risk in question is not required.[216] In *HKSAR v. Lai Chun-ho* [2018] 2 HKC 295, the court reaffirmed that the test as decided in *HKSAR v. Lai Shui-yin* [2012] 2 HKLRD 639 for gross negligence was not only an objective reasonable test but the prosecution must prove that the defendant's subjective state of mind was culpable before conviction.

In *R v. Tam Ping-cheong and another* [1996] HKLY 401, a passenger hoist inside a construction site carrying twelve workers plunged into the podium from the twentieth floor, resulting in the death of all passengers. D1, the site structural engineer

employable. The visa restrictions of two Indonesian domestic helpers prohibited them from taking up any employment in Hong Kong. The branch manager of the restaurant had failed to spot the said stipulation when checking the identity documents of the Indonesians. On appeal on sentencing, D contended, *inter alia*, that the sentences were manifestly excessive, as the offences were committed due to the negligence of the branch manager and were unintentional. In *R v. Lai (Dennis)* [1995] HKLY 258, the accused was convicted after trial on two charges of applying for more than one Hong Kong identity card without reasonable excuse, contrary to Reg. 19(2B) (a) of the Registration of Persons Regulations. The court held, *inter alia*, that an understandable or reasonable mistake of fact could afford a defence. However, it would be no defence if there is a criminally negligent or unreasonable mistake; *see also R v. Lamb* [1967] 2 QB 981.
213. For the aspect of sentencing, an immediate custodial sentence is appropriate in cases of gross negligence or deliberate reckless driving; *see R v. Cheuk Yung-kan* [1986] HKLY 351, *Chung Man-Kin v. R* [1978] HKLR 544, and *Cheung Kin-Man v. R* [1981] HKLR 684.
214. Cf. the English case of *Pittwood* (1902) 19 TLR 37. The previously cited legislation on negligence applied, but the accused was charged with the more serious offence of manslaughter. D was a level-crossing keeper, who had failed to close the gate when a train was approaching, resulting in the death of a person who crossed the railroad tracks. D had failed to perform the duties specified in his employment contract as a level-crossing keeper. D was convicted of manslaughter and the court held that he would be criminally liable to other road users if he failed to perform his duties under his employment contract, even though it appeared that D only owed a contracted duty to the railway company.
215. *See The Queen v. Hang Wai-kwan* [1994] 2 HKCLR 28, a case of motor manslaughter. On appeal, the defence contended, *inter alia*, that the jury should have been informed that the risk of death was very high in cases of motor manslaughter. The expression 'reckless' should have been used to indicate the very high level of negligence involved in the manslaughter. The appeal was dismissed. *See also R v. Cheng Ping-mui* [1991] HKLY 264, which discussed the correct direction to the jury involving gross negligence. *See Marcel Noel Andre Fleming and the Queen* [1960] HKLR 125, an appeal involving a legal point that a high degree of negligence should be proved in cases of motor manslaughter.
216. *See* Card, Cross & Jones, *Criminal Law* (London, 2002), 93.

Chapter 3. The Inquiry in Court

§1. The Legal Documentation of an Offence

I. Charges

317. If there is sufficient evidence to charge an accused, the police shall give him/her a charge sheet – a written document that contains the particulars of the offence. A charge must be laid against the accused before he/she is formally brought up to court; the accused has the right to know what offence(s) he/she is being charged with. In the CFI, an indictment is the preferred document.[969]

According to section 2 of the Criminal Procedure Ordinance, Cap. 221, indictment includes any criminal information triable by a jury.[970] A charge sheet is another document used in the District Court. For the Magistracy Court, information, summons, and a complaint are normally used.[971] No matter what form the charge is in, whether indictment, charge sheet or information, it contains the date of the offence, name of the defendant, essential ingredients of the offence, and provision of the ordinance. At times, it includes the name of the victim.[972] Regarding commercial crime, the modus operandi of the accused may constitute the ingredients of the charge.[973]

The prosecution prepares the indictment and the charge sheet. The former is signed by a SADPP and the latter, by government counsel in the prosecution division.[974]

It is preferable to have a precise date of the offence and the name of the person in the particulars of the indictment or charge sheet. However, if there is insufficient evidence to prove the exact time of the offence, the format of the charge or indictment is allowed to be drafted to the effect that the offence occurs 'On a diver dates between … and … ' or 'On or about a date'. If the accused is charged with the offence of theft and has stolen certain property within a very long period, and the prosecution could not pinpoint the dates the offences were committed, it could lay

969. *See* s. 41 of the CPO, Cap. 221: Every person to be tried before the court shall be tried on indictment.
970. For summonses, *see* s. 8, the MO, Cap. 227, and the Magistrates (Forms) Rules.
971. For the timing of filing the indictment, *see* s. 14 of the CPO, Cap. 221. For the form and content of the indictment, *see* ss 17–25 of the CPO, Cap. 221. For procedures in filing the indictment, see ss 26–30, the CPO, Cap. 221.
972. *See HKSAR v. Chen Wei-li* [2005] 2 HKC 174: The Court of Appeal criticized the practice adopted by the Department of Justice in stating the names of the victims of blackmail (extortion of money from prostitutes) in the charge sheet, as the victims would be reluctant to testify out of embarrassment.
973. Cf. ss 3 and 4 of the Indictment Act in England: If the particulars of the charge or indictment are not clear, the defence can make an application to the court so that the prosecution is ordered to provide more particulars of the charge or indictment.
974. *See* s. 17 of the CPO, Cap. 221: Most of the charge sheets in Hong Kong are drafted by a senior law clerk who is approved by the government counsel. *See R v. Newland* [1988] QB 402, 87 Cr. App. R. 188 CA: Counsel is under duty to prepare charges in the proper format before the plea is taken.

a single charge covering the whole period based on the notion of general deficiency.[975] In some cases, the court is not allowed to ask the jury to convict any one of the acts committed by the accused within a long period if the prosecution lays a single charge against him/her.

In *Chim Hon-man v. HKSAR* [1999] 1 HKLRD 764, the accused was convicted of two counts of rape. The evidence showed that the accused had raped the victim several times within a month. The appeal against conviction was allowed. In the original trial, the jury was invited to consider the evidence and convict any of the rapes that occurred within the period specified in the charge. The Court of Final Appeal held that:

> there was a general principle that in the absence of any act or acts being identified as the subject of an offence charged in an indictment, the prosecution could not lead evidence that was equally capable of referring to a number of occasions, any one of which might constitute an offence described in the charge, and invite the jury to convict any one of them … in cases where differentiation was impossible, an indictment might be drawn to include a number of counts, each, apart from the first, alleging 'on an occasion other than alleged [in the previous counts]'. That course could be pursued where the series of offences is alleged to have been committed over a relatively short period of time.

318. In addition, if A commits an offence jointly with B but B is not prosecuted for some reason, the name of B shall be stated in the particulars of the charge sheet. If the identity of B is unknown, the words 'person unknown' could be stated in the particulars of the charge. Regarding the requirement in particularizing the ownership of property, it is common to state the ownership of the property in the charge sheet and indictment. If the owner of the property is unknown, it is appropriate to refer to the property as belonging to another in the charge of theft. Regarding the location of the offence, it is unnecessary to state the exact location where the offence took place unless it is material to the charge. More often, the place of offence as stated in the charge sheet will be 'in Hong Kong'.

319. As to the joinder of charges of offenders, the legislation clearly specifies that charges for more than one offence may be joined in the same indictment.[976] Further, according to Rule 7 of the Indictment Rules, if those charges are founded on the same facts,[977] or form or are part of a series of offences of the same or similar character,[978] those charges should be joined in the indictment. If an accused commits three burglaries within three weeks in the same district, it is proper for such charges to be joined in the indictment. If the accused is arrested for robbery in a

975. *See R v. Henwood* (1870) 11 Cox CC 526 and *DPP v. McCabe* [1992] Crim LR 885.
976. *See* s. 18(1) of the CPO, Cap. 221.
977. *See* the test in *R v. Bellman* [1989] AC 836 and *see R v. Barrel and Wilson* [1979] 69 Cr. App. R. 250.
978. *See Ludlow v. Metropolitan Police* [1971] AC 29.

street, is later brought back to his/her residence for the purpose of conducting a routine house search, and a certain amount of drugs are found therein, it is possible that the possession of the drugs are part of a series of offences and the accused should face the charges of robbery and possession of dangerous drugs in the same indictment. In general, if several suspects commit various offences almost at the same time, they should be tried together and a joinder of offenders in one charge or indictment is preferable. However, if two accused are charged with two offences of separate natures, they could be jointly charged together in the same trial once the time of the offences and other circumstances such as the sufficiency of nexus have been considered.

However, the defence could make an application for severance of the trial if it believes that the other offences would prejudice the accused, and the court could exercise its discretionary power to make such order of severance.[979] In *HKSAR v. Zheng Wan-tai* [2000] 1 HKLRD 839, Zheng was convicted of handling stolen goods and importing unmanifested cargo after trial. He appealed against his conviction, contending that he had been subjected to prejudice, as the trial judge had refused to impose an order of severance. He contended that he could not succeed in relying on his defence of due diligence on the charge of importing unmanifested cargo because he would have been cross-examined on the matters related to handling stolen goods if he had elected to give evidence on the charge of importing unmanifested cargo. The appeal was dismissed, as the offences were very closely linked with each other.

In *HKSAR v. Leung Chim-fung* [1998] 1 HKLRD 205, the defendant committed robbery using an imitation firearm. He was charged with one count of robbery, one count of possession of an imitation firearm, and one count of unlawfully remaining in Hong Kong. At the beginning of the proceedings, the prosecution severed the offences. The offence of robbery was tried in the CFI, whereas the offence of possession of an imitation firearm was tried in the Magistracy. The Court of Appeal commented that the two offences should not have been severed because they were inextricably linked. Otherwise, there was a risk of an inconsistent verdict when the charges arising from the same facts were tried in different courts.

When a case involves multiple defendants, they can only be tried together if there is evidence that they committed the offence jointly or there is, at least, sufficient nexus.[980]

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979. Cf. s. 5(3) of the Indictment Act 1915. *See also* the approach to order separate trials by the court in *Ludlow v. Metropolitan Police (supra)*. *See also R v. Moghal* [1977] 65 Cr. App. R. 56 CA: The court stated that it was rare to order a separate trial when two or more defendants were jointly charged with a single offence. However, the court may exercise its discretion and order a separate trial when one defendant blamed the other defendants in a joint charge in the same trial.

980. In *R v. Yau Shing-por and another* [1990] HKLY 284, two defendants were tried on the same indictment. The first was charged with four offences and the second, with two, in the same trial. However, they were not jointly charged with any offence. The only connection between the two defendants was that both were arrested on the same day. Different counsel represented each of them but raised no objection that the two defendants were tried on the same indictment. The first defendant subsequently appealed against the conviction and the appeal was allowed. The Court of Appeal ruled that 'it was not wise for defendants who were not jointly charged to stand trial on the same indictment containing charges which had no nexus'.

Sometimes, the prosecution lays an alternative charge against the accused, which is allowed under Rule 5 of the Indictment Rules, Cap. 221C. If alternative counts are involved, the jury will be asked to return a verdict on the basis that the accused is guilty of one or the other offence. There is one exception where an alternative charge is unnecessary. If there is insufficient evidence to convict the accused of the offence stated in the charge sheet, information, or indictment at trial, but he/she is guilty of an offence as stated in the schedule of section 32 of the Theft Ordinance, Cap. 210, the court shall acquit the original charge and convict the accused of such other offence as appropriate. Even if some of the accused are jointly tried in a same indictment, the court has the discretionary power to separate the trial. If multiple defendants are involved in the same case, it is practical that the case be split into separate trials.

A. Duplicity

320. Another common problem in the drafting of indictments and charges is duplicity. It is not appropriate to lay a single charge of an offence in an indictment that covers separate offences arising from the same act. According to Rule 2(2) of the Indictment Rules, Cap. 221C, a single charge shall not cover two or more offences.[981]

There are other problems of the rule of duplicity. For example, a single act may constitute two or more offences, but laying two charges may pose the problem of duplicity. If a robber threatens a victim with a knife and robs him/her of money, he/she could technically be charged with robbery and possession of an offensive weapon, but this is rarely done because a single charge adequately reflects the criminality. If duplicity of charge arises, the proper way to remedy it is to amend the charge or to lay separate charges.

B. Amendment of Charge

321. The prosecution and the courts are empowered by legislation to amend the indictment or charge sheet before the trial begins. Such amendment could be made in relation to the substantial charge of a specific offence or it could be simply a minor amendment of the particulars, such as the spelling of the name as stated in the charges. In cases when the charge is so defective that it amounts to a nullity, it cannot be amended. In *AG v. Wong-Lau trading as Kin Keung Construction and Engineering Co.* [1993] 1 HKCLR 257, then High Court Judge Stock held that:

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981. In *R v. Lee Chi-ching* [1994] HKLY 320, two persons were convicted of fraudulently inducing investment under the Protection of Investors Ordinance. They faced five charges, including false accounting and conspiracy to defraud. One of the grounds of the appeal was that two charges were bad due to duplicity. The appeal was allowed and the conviction was quashed. The Court of Appeal held that the indictment was bad, as the evidence sought to prove four separate offences. Nevertheless, the court may exercise its discretion in amending or quashing the charge if duplicity occurs.

> a defective information was to be distinguished from an information which was a nullity. An information is not rendered a nullity by reason only that an essential ingredient of the offence is omitted. A defective information may be cured by amendment. An amendment must be made even if the defect is material so long as there is no injustice or so long as any injustice which might otherwise arise can be met by an adjournment or an order for costs or by a leave to recall and further examine witnesses or call other witnesses … an information which is a nullity cannot be amended.

A conviction from a defective charge could lead to an appeal. At times, the remedial process is for the prosecution to lay fresh information and withdraw the old charge.[982] The power of amending the indictment derives from the provision of section 23 of the Criminal Procedure Ordinance, Cap. 221. It also applies to the amendment of the charge sheet in the District Court, although the power of the District Court to add or substitute charges is not stated explicitly in the District Court Ordinance (Cap. 336). Therefore, the principle of section 23 could be applied at the District Court level in relation to amendment of charges.[983] The gist of section 23 states that the court shall have the power to amend the indictment if it appears to be defective before or at any stage of a trial, provided that no injustice is caused to the accused.

In *AG v. Chan Hung-hoi* [1987] HKLR 969, it was held that the court could exercise its power in amending the indictment at any time during the course of trial up to the moment when the judgment was delivered in the District Court. Also, the court may replace the original charge with a new one, provided that no prejudice is caused to the accused. Section 27 of the Magistrates Ordinance, Cap. 227, governs the amendment of complaint, information, or summons. If the trial magistrate finds that there is a defect in or variance between the substance or form of any complaint, information, or summons, and the evidence adduced in support of it, the magistrate shall amend them if he/she is satisfied that no injustice will be caused by that amendment, or he/she shall dismiss the complaint, information, or summons. The trial magistrate shall amend the complaint, information, or summons where the defect or variance is not material; or any injustice that might otherwise be caused by an amendment will be cured by an order as to costs, an adjournment, or a leave to recall and further examine witnesses or call other witnesses.

In *Poon Chau-cheong v. Secretary for Justice*, FACC No. 7 of 1999, a magistrate dismissed the information in relation to a bribery offence at the original trial and acquitted the defendant. On review under section 104 of the Magistrates Ordinance, Cap. 227, the magistrate set aside the acquittal and amended the information by

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982. Judge Stock said in the following judgment:

> If, on the other hand, the information is a nullity, no question of amendment arises. What is then required, if the prosecuting authority wishes to proceed, is that a fresh information be laid and if more than six months have passed from the time when the subject matter of the information arose the new information will, for that reason, be bad.

983. Section 23 of the CPO, Cap. 221, is the same as s. 5(1) of the Indictment Act 1915 in England

replacing a charge of lesser offence, even though the date of amending fresh information had been time-barred. The Court of Final Appeal certified that the following was a point of great general and public importance:

> Whether the provisions of section 27 of the Magistrates Ordinance, Cap. 227 with respect to the amendment of information, may be used on a review under section 104 of the Ordinance of a decision made by a magistrate under section 19(2), and if they can, whether they permit the substitution of one information with another offence, which if laid as a fresh information at the time of amendment, it would be time-barred by virtue of the provisions of section 31A(1) of the Prevention of Bribery Ordinance, Cap. 201.

The Court of Final Appeal held that both questions were to be answered in the affirmative. The appeal was then dismissed. An amendment in relation to laying an additional charge or replacing an original charge with a new one is only appropriate in the course of the trial if no prejudice is caused to the accused as a result of such amendment. In other words, the prosecution could amend a charge sheet by adding a new charge even after plea is taken, as long as no injustice will be caused to the accused.[984] Sometimes, the new charge that is substituted is much more serious than the original charge. It appears that the court adopts the same principle as long as such amendment will not cause any injustice to the accused.[985]

Finally, if the case is tried in the CFI before a jury, the amendment of indictment can be made at any stage in the trial, even up to the time when counsel make their closing submissions, a submission of no case to answer, and summing up.[986] The duty to make amendments to charges rests on the prosecution, although the trial judge could exercise discretion to direct amendment.

For the sake of completeness, the particulars of a charge cannot be amended after the conviction has been recorded in the District Court. If the need for amendment

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984. *See R v. Mak Chi-kin and others* [1973] HKDCLR 117. For the general principles and criteria in making amendments of charges, *see* the judgment in the Court of Appeal in *R v. Johal* [1972] 3 WLR 210. For amendment by adding charges, *see R v. Osieh* [1996] 2 Cr. App. R. 145 and *R v. Swaine* [2001] Crim LR 166 CA. The following two cases are concerned with the amendment of charges that could be made without injustice caused to the accused: *R v. Teong Sun Chuah and Teong Tatt Chuah* [1991] Crim LR 463 CA and *R v. Nelson* [1977] 65 Cr. App. R. 119 CA.

985. In *Queen v. Lee Chi-wai* [1988] 2 HKLR 595, the vehicle of the appellant displayed an expired monthly parking permit in which the month had been altered. When he was brought to the police station for enquiries, he destroyed the exhibit by tearing it up inside the police station. He was charged with one count of criminal damage and one count of altering a forged document. He was acquitted of the latter charge. Having heard four prosecution witnesses, the magistrate exercised his power in s. 27 of the Magistrates Ordinance, Cap. 227, in replacing the charge of criminal damage with one of attempting to pervert the course of justice, which was a more serious offence. The appellant was then convicted of the charge after trial. The appeal was dismissed. The High Court held that the substitution of one charge for another, where there had been a material variance between the offences contained in the information and the evidence adduced in support of it, is allowed if such amendment is made without causing any prejudice to the accused.

986. *See HKSAR v. Ng Siu-chau* [1999] 2 HKC 331, 339: The charges could be amended (1) *after* the submission of no case had been made and (2) *after* the prosecution had made a submission in reply to support the particulars of the re-amended charge. *See also HKSAR v. Tam Chi-choi*, CACC No. 381 of 2008.

is only discovered after a conviction has been recorded, the possible remedial action is to lodge an appeal. The prosecution on fiat also possesses the same power to make an application of amendment to a charge sheet, provided that it is lawfully signed and presented to the court. An application for amendment to the charge sheet must be made in open court in the presence of the accused or his/her legal representative. The defence is entitled to object to the amendment by stating the grounds for the objection. For the process of transfer of proceedings, the charge sheet will be delivered to the registrar of the District Court after a case has been transferred to the District Court from the Magistracy. The charge sheet may contain new charges that were not previously included in the order of transfer.[987] Lastly, a defect in the charge and indictment may provide the defence with grounds for an appeal that could result in the quashing of the conviction or an order for retrial.

Apart from the power of amendment, the Court of Appeal suggested the prosecution consolidate all of the outstanding proceedings or charges against an accused from time to time.[988]

§2. The Trial

I. The Course of Trial

322. An accused has the right to be present in an open hearing. Once the accused indicates to the court a plea of not guilty to the charges laid against him/her, a trial date will be fixed, subject to the availability of the prosecution and defence witnesses, if any.[989] Before the start of the trial, the defence counsel may write to the prosecution by way of plea negotiation, where the prosecution is invited to withdraw the charge or accept that the defendant pleads guilty to a lesser charge. If the prosecution accepts the plea negotiation put forward by the defence, the prosecution could formally apply to withdraw the charge(s) in an open hearing. Once the prosecution accepts the plea negotiation, the accused can enter a plea of not guilty to the charge in open court. Subject to a leave from the court, the prosecution then submits that they will offer no evidence. The court will then formally make such order. However, it is common practice for the prosecution in Hong Kong to make an application to allow the charge to be left on court file instead of offering no evidence in the District Court and the CFI. Such practice derives from the case of *HKSAR v. Tam Wai-pio* [1998] 2 HKLRD 949.

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987. *See* s. 75(2) of the DCO, Cap. 336.

988. *See HKSAR v. Cheung Lai-sing, Dickson*, CACC No. 137 of 2003. *See also* Watkins, L. J. in *R v. Bennet* [1980] 2 Cr. App. R (S). 96, 98: Hong Kong followed the said English authorities. It stated that 'there is an obligation on solicitors, counsel and judges alike to do all within their power to ensure that as far as possible all outstanding charges against a defendant are dealt with in the same court, by the same judge upon a single occasion'. *See also R v. Savage* (No. 4) [1997] 2 HKC 775, 777, which approved the said principle.

989. *See* s. 49 of the CPO, Cap. 221: Arraignment is a process where the indictment should be read over to the accused and he/she is asked to plead to it. The accused chooses between pleading guilty or not guilty; different procedures will then follow accordingly.

When the prosecution closes its case in the course of a trial, the court has to decide whether there is a prima facie case against the accused. If the answer is in the negative, the court has to acquit the accused at this stage. The prosecution could also withdraw all the charges against the accused before trial and the court could make an order of dismissing the charge before any witness is called to testify. If the accused absconds at or near the last stage of the trial, the trial may continue in his/her absence. The prosecution is also allowed to apply for the discontinuance of the proceedings in the course of the trial if, for example, a key witness gives contradictory evidence or becomes a hostile witness. Sometimes, it is necessary to seek adjournment before or in the course of a trial. For instance, it takes the prosecution time to locate a key witness who is out of contact; the defence, to locate an overseas witness to give expert evidence; both the prosecution and defence, to conduct research on legal issues arising from trial; and so on. Only the court has the power to grant the adjournment of the case, which could only be granted if no prejudice or injustice is caused to the accused. The defence may not seek an adjournment as a delaying tactic.

Lastly, if the accused absconds before or during the trial without a valid reason, the court may issue a warrant to arrest him/her. The court can also order the estreatment of bail if it thinks it fit.

323. When the accused pleads guilty to the charges put forward by the prosecution, he/she can plead guilty in an open court by himself/herself, but the mitigation may be done by a legal representative. Regardless of whether the accused is legally represented, he/she must understand the nature of the charges and admit the summary of facts prepared by the prosecution. The summary of facts must support the ingredients of the charges laid against the accused. It includes a summary of the incident and any aggravating features that may assist the court in sentencing. For instance, the injuries sustained by the victim or the value of the stolen items should be stated clearly. In *The Queen v. Wu Man-hon and others*, CACC No. 111 of 1993, the Court of Appeal made criticisms on the summary of facts, as facts that were directly relevant to sentencing had been omitted from it. If an accused maintains a plea of guilty but disputes some elements of the summary of facts, a Newton hearing will be conducted to determine the issue of dispute. The witnesses will be called to testify and the defence is entitled to cross-examine that witness. The issue of identification should be taken into account and the standard of proof is one of beyond reasonable doubt.

There are three situations where Newton hearings are unnecessary: (1) the disputed facts do not affect the final sentence; (2) the defence's version is regarded as 'manifestly false' or 'wholly implausible or incredible'; and (3) the defence's version does not quite contradict the prosecution's evidence but amounts to some mitigation, such as the background of the commission of the offence.[990]

On the other hand, a Newton hearing has to be conducted if the defence's mitigation is not credible. Before rejecting the mitigation, the court should first inform the defence that it will not accept it. In *Queen v. Chung Kam-fai* [1993] 1 HKCLR

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990. For the sentence and discount in sentencing after a Newton hearing, *see HKSAR v. Ho Yuk-wun* [2005] 2 HKC 634.