

**10. Power to refer back to be dealt with summarily**

If after receipt of the documents referred to in section 86(1) of the Magistrates Ordinance (Cap 227) the Secretary for Justice is of opinion that the accused person should not have been committed for trial but that the case should have been dealt with summarily, the Secretary for Justice may, at any time after such receipt, but before an indictment is preferred, refer back the case to the magistrate with directions to deal with the case accordingly, and with such other directions as he may think proper.

(Amended 1 of 1912 Schedule; 6 of 1954 s. 4;  
59 of 1992 s. 2; L.N. 362 of 1997)

**[10.01] Enactment history**

This section was amended pursuant to the Schedule of the Law Revision Ordinance 1912 (1 of 1912), s 4 of the Criminal Procedure (Amendment) Ordinance 1954 (6 of 1954), commencing 4 March 1954 and s 2 of the Administration of Justice (Miscellaneous Amendments) Ordinance 1992 (59 of 1992), commencing 1 September 1992 and LN 362 of 1997.

**[10.02] Secretary for Justice**

This is defined as meaning the Secretary for Justice of the Hong Kong Special Administrative Region, in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

**[10.03] Committed for trial**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning, in relation to a person, (a) committed to prison with a view to his being tried before the Court of First Instance, or (b) admitted to bail to appear and stand his trial before the Court of First Instance.

**[10.04] Summarily**

Triable summarily is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning triable by a magistrate in accordance with the provisions of the Magistrates Ordinance (Cap 227).

**[10.05] Magistrate**

This is defined as meaning any person appointed to be a permanent or special magistrate under the Magistrates Ordinance (Cap 227) in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

**[10.06] Definition**

For the meaning of "indictment", see s 2 above.

**10A. Service of documents in transferred proceedings**

- (1) Where pursuant to an order for transfer made under section 77A of the District Court Ordinance (Cap 336) (in this section referred to as an "order of transfer") any proceedings stand transferred to the court for trial under subsection (6) of that section and where the Secretary for Justice has instituted proceedings pursuant to section 14(1)(aa), he shall, not more than 21 days after an indictment is preferred against the accused person, but subject to subsection (2), deliver to the Registrar and, unless they have already been served, serve on the accused person— (Amended L.N. 362 of 1997)
- (a) a copy of the indictment;
  - (b) copies of the statements of those witnesses whom the prosecution intends to call at the trial;
  - (c) copies of all documentary exhibits; and
  - (d) a list of the exhibits.
- (2) Where the Secretary for Justice considers that it will not be practicable to comply with the requirements in subsection (1) within the period specified in that subsection, he may apply— (Amended L.N. 362 of 1997)
- (a) upon the making of the order of transfer, to the District Court judge who makes the order; or
  - (b) at least 21 days before the date fixed for trial, to a judge, for an extension of that period, and the District Court judge or the judge, as the case may be, may, if he is satisfied that the accused person is not prejudiced thereby, grant such extension as he considers reasonable.
- (3) A statement of a witness referred to in subsection (1)(b) shall—
- (a) be signed by the person making it;
  - (b) contain a declaration by the witness to the effect that it is true to the best of his knowledge and belief and that he made the statement knowing that wilfully making a statement which he knows to be false or does not believe to be true may render him liable for a criminal prosecution;
  - (c) if in a language other than English, be accompanied by an English translation and, if in a language other than Chinese, by a Chinese translation;
  - (d) if made by a person under 21, give his age; and
  - (e) purport to have been read over to the person who made the statement in the language used by that person in making the statement or to have been read by that person.
- (4) A documentary exhibit referred to in subsection (1)(c) shall, if written in a language other than English, be accompanied by an English translation certified under section 27 of the Evidence Ordinance (Cap 8) and, if written in a language other than Chinese, be accompanied by a Chinese translation, unless on an

application made in the District Court the District Judge or, on an application made in the court, the judge, directs otherwise on cause shown.

- (5) An exhibit which is mentioned in a list of exhibits referred to in subsection (1)(d) shall be clearly identified in a statement of a witness referred to in subsection (1)(b) and the accused person or his counsel or solicitor shall be given reasonable opportunity to examine such exhibit.
- (6) Failure to comply with any requirement in subsection (3), (4) or (5) shall not render the service of any documents under subsection (1) or (2) ineffective unless the judge is satisfied that the accused person is prejudiced by such failure.

(Added 59 of 1992 s. 3)

#### [10A.01] Enactment history

This section was added pursuant to s 3 of the Administration of Justice (Miscellaneous Amendments) Ordinance (59 of 1992), commencing 1 September 1992 and amended by LN 362 of 1997.

#### [10A.02] Order for transfer

i.e. in any proceedings before the court, where a charge sheet has been delivered under s 75(3)(a) of the District Court Ordinance (Cap 336) against an accused person, before an opening speech is made by the prosecution, or where no speech is given, before the first prosecution witness is called to give evidence, the Secretary for Justice may apply to the court for an order that the proceedings be transferred to the Court of First Instance: s 77A(1) of the District Court Ordinance (Cap 336).

#### [10A.03] Secretary for Justice

This is defined as meaning the Secretary for Justice of the Hong Kong Special Administrative Region, in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

#### [10A.04] District Court Judge

This is defined as meaning a judge of the District Court in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

#### [10A.05] Judge

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) to mean the Chief Justice, a judge of the Court of Final Appeal, the Chief Judge, a Justice of Appeal, a judge of the Court of First Instance, a recorder of the Court of First Instance and a deputy judge of the Court of First Instance.

#### [10A.06] Counsel

This is defined as meaning a person admitted before the Court of First Instance to practise as counsel in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

#### [10A.07] Solicitor

This is defined as meaning a person admitted before the Court of First Instance to practise as a solicitor in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

#### [10A.08] Documents

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning any publication and any matter written, expressed or described upon any substance by means of letters, characters, figures or marks, or by more than one of these means.

#### [10A.09] Definitions

For the meaning of "court", "Registrar" and "indictment" see s 2 above.

### 10B. Discharge of the accused

- (1) Where the Secretary for Justice fails to comply with the requirements of section 10A(1) within the period specified in that section or where an extension has been granted under section 10A(2), within such extended period — (Amended L.N. 362 of 1997)
- (a) on the date appointed for the commencement of the trial or where that date is adjourned, on such later date, the court shall, on its own motion; or
- (b) where, before the day appointed for the commencement of the trial or if that date is adjourned, before such later date, the accused person applies to a judge for his discharge on the ground of such failure, the judge shall,
- direct that the accused person be discharged in respect of the charges to which the transferred proceedings relate.
- (2) A discharge under subsection (1) shall be deemed to be an acquittal.

(Added 59 of 1992 s. 3)

#### [10B.01] Enactment history

This section was added pursuant to s 3 of the Administration of Justice (Miscellaneous Amendments) Ordinance 1992 (59 of 1992), commencing 1 September 1992 and was amended by LN 362 of 1997.

Chief Judge, a Justice of Appeal, a judge of the Court of First Instance, a recorder of the Court of First Instance and a deputy judge of the Court of First Instance.

#### [82.11] Certificate

A certificate should not be granted lightly; the granting of a certificate merely to obviate the possibility of injustice is improper as the prisoner's rights are amply safeguarded by his right to apply to the Court of Appeal for leave to appeal (*R v Langley* (1923) 17 Cr App R 199, *R v Parkin* (1928) 20 Cr App R 173, *R v Boseley* [1937] 4 All ER 100, (1936–8) 26 Cr App R 99 (CCA)).

#### [82.12] Further provisions

Further provisions relating to appeals against conviction on indictment are contained in ss 83–83D, below. See also in particular ss 83E and 83F concerning retrial; ss 83Q–83T below concerning procedure from notice of appeal to hearing, ss 83U and 83V below concerning the hearing and s 83W below concerning the effect of appeal on sentence and s 83X below concerning restitution of property.

#### [82.13] Other rights of appeal

See ss 83G–83H below, (appeal against sentence) ss 83J–83L below (appeal in cases of insanity or unfitness to plead) and ss 83M–83N (unfitness to stand trial). For appeals to the Court of Final Appeal, see ss 23–25 of the Hong Kong Court of Final Appeal Ordinance (Cap 484).

#### [82.14] Definitions

For “indictment” and “court of trial”, see s 2 above.

### 83. Grounds for allowing appeal under s. 82

- (1) Except as provided by this Ordinance, the Court of Appeal shall allow an appeal against conviction if it thinks—
  - (a) that the conviction should be set aside on the ground that under all the circumstances of the case it is unsafe or unsatisfactory; or (*Amended 50 of 1981 s. 3*)
  - (b) that the judgment of the court of trial should be set aside on the ground of a wrong decision on any question of law; or
  - (c) that there was a material irregularity in the course of the trial, and in any other case shall dismiss the appeal:

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.
- (2) In the case of an appeal against conviction the Court of Appeal shall, if it allows the appeal, quash the conviction.

- (3) An order of the Court of Appeal quashing a conviction shall, except when under section 83E the appellant is ordered to be retried, operate as a direction to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal.

(Replaced 34 of 1972 s. 18)

[cf. 1968 c. 19 s. 2 U.K.]

#### [83.01] Enactment history

This section was replaced pursuant to s 18 of the Criminal Procedure (Amendment) (No 2) Ordinance 1972 (34 of 1972), commencing 1 September 1972 and was amended pursuant to s 3 of the Criminal Procedure (Amendment) Ordinance 1981 (50 of 1981), commencing 10 July 1981.

#### [83.02] England

Subsection (1)(a) of the Ordinance was of similar effect similar to s 2(1) of the Criminal Appeal Act 1968 c 19 [Eng], until the Act was amended by the Criminal Appeal Act 1995 and now there is no equivalent of subs (1)(b) and (c) or the proviso in the English Act. Subsections (2) and (3) are to the same effect to subs (2) and (3) of the Act.

#### [83.03] Court of Appeal

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning the Court of Appeal of the High Court.

#### [83.04] Appeal against conviction

See s 82 above and note also s 83P(1) below.

An appeal is an appeal against ‘conviction’ within subs (1) above even though sentence has not been passed on the appellant, since a conviction encompasses a finding of guilt by the jury and does not merely refer to the disposal of proceedings by the passing of sentence: see *R v Drew* [1985] 2 All ER 1061, [1985] 1 WLR 914 (CA).

Where a defendant is convicted on his own plea of guilty, the court may allow an appeal against conviction under subs (1)(a) even though the defendant was fit to plead, knew what he was doing, intended to plead as he did, and pleaded without equivocation after receiving expert advice. See *R v Lee* [1984] 1 All ER 1080, [1984] 1 WLR 578 (CA) and also *R v Boal* [1992] 3 All ER 177, (1992) 156 JPR 617 (CA). See further *R v Drew*, above, (applying dicta in *S (an infant) v Manchester City Recorder* [1971] AC 481, [1969] 3 All ER 1230 (HL)) where it was held that a trial judge in the Crown Court has jurisdiction to allow an accused to change his plea at any time before sentence is passed even though the jury has returned a guilty verdict.

**[83.05] Conviction**

The use of the word 'conviction' in subs (1)(a) above, which was the consequence of the decision of the House of Lords in *DPP v Shannon* [1975] AC 717, sub nom *R v Shannon* [1974] 2 All ER 1009 (HL)) ensured that a person who is convicted on indictment after pleading guilty is not precluded from appealing against conviction where he subsequently has grounds for contending that the conviction is unsafe or unsatisfactory, e.g. where it is contended that the conviction of a conspirator who has pleaded guilty is inconsistent with the acquittal of the other conspirator or conspirators.

However the court's discretion to allow an appeal must be exercised only in exceptional cases, eg *R v Lidiard* (1978) SJ 743 (CA), *R v Phillips* [1982] 1 All ER 245 (CA). See also *R v Home Office, ex p Graham* [1983] 1 WLR 1281, when it was held that the use of the word 'conviction' did not widen the jurisdiction of the Court of Appeal to enable it to take into account circumstances arising between arraignment and conviction at retrial.

**[83.06] Under all the circumstances ... unsafe or unsatisfactory; material irregularity in the course of the trial**

Not every irregularity is a ground for quashing the conviction, but only one which goes to the root of the case. Consequently, where prosecuting counsel was inadvertently briefed for the defence and the defence brief was returned, it was held not to amount to a 'material irregularity': see *R v Glukstad* (1972) 56 Cr App R 628 (CA). A trial is not rendered a nullity solely because of the absence of a shorthand note, as the statutory provisions are only directory: see *R v Le Caer* (1972) 56 Cr App R 152 (CA). On an appeal against conviction on the ground that under all the circumstances it is unsafe or unsatisfactory, the court must ask itself whether there is a lasting doubt in its mind whether justice has been done, a reaction which may not be based strictly on evidence as such, but which can be produced by the general feel of the case: see *R v Cooper* [1969] 1 QB 267, [1969] 1 All ER 32 (CA). In considering whether an irregularity had occurred it was held that the decision of a trial judge to discharge a deadlocked jury is not open to review by the Court of Appeal: see *R v Gorman* [1987] 2 All ER 435, [1987] 1 WLR 545 (CA).

Non-disclosure of evidence which ought to be disclosed may amount to a material irregularity within the meaning of subs (1)(c) (*R v Ward (Judith)* [1993] 2 All ER 577, [1993] Crim LR 312 (CA)), and the duty of the prosecution to disclose material documents or information extends to forensic scientists retained by the prosecution (*R v Maguire* [1992] 1 QB 936, [1992] 2 All ER 433 (CA)).

In exceptional circumstances it is open to the court to overturn a jury's verdict rendered unsafe or unsatisfactory by counsel's conduct at the trial. The court will not attempt to assess the qualitative value of incompetent advocacy but rather seek to establish its effect on the trial and verdict: see *R v Clinton* [1993] 2 All ER 998 (CA).

A 'lurking doubt' is a different and vivid way of expressing the same idea as the question posed in subs (1)(a) – namely whether the conviction was unsafe and unsatisfactory: *Kwong Kin Hung v R* [1996] 3 HKC 698.

Inconsistent verdicts were no more than one factor to be considered in determining whether the convictions based on them were unsafe and unsatisfactory: see *HKSAR v Sham Ying Kit* [2000] 4 HKC 380.

**[83.07] Unsafe**

Whether a conviction was 'unsafe' was a matter for the Court of Appeal and the jurisdiction entrusted to it should not be constrained by words not found in the statute, it was held in *HKSAR v Ling Kam Wah* [2002] 3 HKC 297. The court was not to consider whether the accused was guilty. The word 'unsafe' was an 'ordinary word of the English language' connoting a risk of error or mistake or irregularity which exceeded a certain margin so as to justify the description 'unsafe'. In the present case, the number of conflicts and the important nature of many of them, coupled with the improbabilities in the prosecution evidence, were such that it was not possible to say that the conviction was safe.

**[83.08] Wrong decision of any question of law**

See the note 'Question of law' to s 81D, above. In order for a wrong decision on a question of law to be sufficient to found an appeal, the decision on a question of law must be one which is of substance and materially affected the outcome of the trial (*R v Hunting and Ward* (1908) 73 JP 12, 1 Cr App Rep 177, *R v Elliott* [1908] 2 KB 452, *R v Stoddart* (1909) 73 JP 348, *R v Kleiss* (1910) 4 Cr App Rep 101, *R v Clark* [1962] 1 All ER 428). In this context, a question of law may arise either before or after arraignment as long as it can be said that it relates to the trial (*R v Vickers* [1975] 2 All ER 945, [1975] 1 WLR 811 (CA)).

The ambit of subs (1)(b) is not limited to the confines of formal trial and extends to a ruling on a point of law given before arraignment, see *R v Vickers* (above), where a plea of guilty was entered in consequence of the judge's ruling given after the defendant was called on to answer to his name but before arraignment. See also *R v Whitehouse* [1977] QB 868, [1977] 3 All ER 737 (CA), where it was held that it is a wrong decision of law for a judge to accept a plea of guilty to an offence not known to the law.

**[83.09] No miscarriage of justice**

The proviso to subs (1) applies to a case of murder as much as to other criminal charges, but only applies where the court can say that if the jury had been properly directed they would have inevitably come to the same conclusion (*Woolmington v DPP* [1935] AC 462, [1935] All ER Rep 1 (HL)); and see also *Anderson v R* [1972] AC 100, [1971] 3 All ER 768 (PC)). 'Inevitably' here merely expressed the necessity for absence of doubt that a reasonable jury properly directed would have returned the same verdict (*R v Haddy* [1944] KB 422, [1944] 1 All ER 319 (CCA); *Stirling v DPP* [1944] AC 315, [1944] 2 All ER 13 (HL)).

The test is whether on the rest of the evidence to which no objection could be taken a reasonable jury would have convicted the appellant (*Stirland v DPP*, above, *Customs and Excise Comrs v Harz* [1967] 1 AC 760, [1967] 1 All ER 177 (HL); *R v Richards* [1967] 1 All ER 829, [1967] 1 WLR 653 (CA)). See also *R v Li Wai Keung* [1994] 1 HKC 243 (CA); *R v Wong Tak Lam* [1983] 1 HKC 168 (CA), *R v Lam Ming Kwong* [1983] 1 HKC 139 and *R v Chiang Chui Shun* [1985] 2 HKC 377 (CA).

The proviso may still be applied in a murder appeal where there has been a failure to leave the issue of provocation to the jury: see *HKSAR v Coady (No 2)* [2000] 3 HKC 570 CA, applying *R v Cox* [1995] 2 Cr App R 513. However, the court said only rarely could a court conclude that the jury would inevitably have convicted the defendant of murder even if provocation had been properly left to them.

The fact that there has been a first trial at which the jury disagreed does not automatically preclude an appellate court from applying the proviso (*Customs and Excise Comrs v Harz* (above), disapproving *R v Johnson* [1961] 3 All ER 969, [1961] 1 WLR 1478 (CCA)).

The proviso will not be applied for the purpose, in effect of substituting a different verdict, and the power so to substitute must be limited to cases where the jury could, on the indictment, find the accused guilty of some other offence (*R v Parker* [1969] 2 QB 248, [1969] 2 All ER 15 (CA)); nor when there has been an improper admission of evidence and improper directions on point of law (*R v Cooper* [1969] 3 All ER 118, [1969] 1 WLR 977, (C-MAC)). Even when the evidence against the accused is overwhelming, the proviso is not applicable when improper pressure is put on him by the trial judge: see *R v Barnes* (1970) 114 SJ 952, 55 Cr App R 100 (CA).

In *R v Pink* [1971] 1 QB 508, [1970] 3 All ER 897 (CA), it was held that there was no rule of law that the proviso was not to apply when the prosecution twice addressed the jury and the unrepresented accused refused to give evidence himself or to call witnesses, and the test to be applied was that contained in the proviso itself. The proviso was applied in a case where the judge had failed to direct the jury, on a charge where the burden of proof lay on the defence, on the standard of proof required (*R v Brown* (1971) 55 Cr App R 478 (CA)), in which several observations on the principles governing the application of the proviso were made.

In considering whether to apply the proviso, the court has no power to substitute a verdict for a different offence on the footing that no miscarriage of justice would have occurred if the jury had convicted of that offence (*R v Deacon* [1973] 2 All ER 1145, [1973] 1 WLR 696 (CA)).

The conviction of one or two alleged conspirators is not invalidated by the acquittal of the other at a subsequent trial: see *R v Shannon* [1974] 2 All ER 1009, [1974] 3 WLR 155 (CA), applied in *R v Whitehouse* [1977] QB 868, [1977] 3 All ER 737 (CA).

There is no hard and fast rule that the proviso ought not to be applied where there has been a misdirection, even where the misdirection amounts to a

failure to direct on corroboration as required by subs (1) above (*R v McInnes* [1989] Crim LR 889, (1990) 90 Cr App R 99 (CA)).

The proviso does not apply to the Court of Final Appeal. Unlike the Court of Appeal, the CFA has no discretion to allow an appeal in the circumstances set out in subs (1)(a), (b) and (c) unless the proviso applied, and therefore it needs no proviso. It is a matter of what is inherent to a court of law as opposed to an academy of law: see *Tang Siu Man v HKSAR* [1998] 1 HKC 371, per Litton PJ at 408C.

See also, as to the application of the proviso, *R v Mitchell* [1992] Crim LR 594 (CA).

### [83.10] Definitions

For “court of trial” and “appellant”, see s 2 above.

## 83A Power to substitute conviction of alternative offence

- (1) This section applies on an appeal against conviction, where the appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Appeal that the jury must have been satisfied of facts which proved him guilty of the other offence.
- (2) The Court of Appeal may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of the other offence, and pass such sentence in substitution for the sentence passed at the trial as may be authorized by law for the other offence, not being a sentence of greater severity.

(Added 34 of 1972 s. 18)

[cf. 1968 c. 19 s. 3 U.K.]

### [83A.01] Enactment history

This section was added pursuant to s 18 of the Criminal Procedure (Amendment) (No 2) Ordinance 1972 (34 of 1972), commencing 1 September 1972.

### [83A.02] England

This section is to similar effect as s 3 of the Criminal Appeal Act 1968 c 19 [Eng].

### [83A.03] Appeal against conviction

See s 82 above and note also s 83P(1)(a) below.

- (4) The Commissioner of Correctional Services may at any time cancel or vary the terms of a supervision order under subsection (1).
- (5) A supervision order under subsection (1) shall—
- (a) be suspended in its operation for any period during which the person against whom it was made—
    - (i) is detained pursuant to a recall order under section 109AB; or
    - (ii) is serving a term of imprisonment of less than 3 months, but shall not by reason of any such suspension expire more than 12 months after the date on which it was made;
  - (b) cease to have effect where the person against whom it was made—
    - (i) is ordered to serve a term of imprisonment of 3 months or more;
    - (ii) is ordered to be detained in an addiction treatment centre under the Drug Addiction Treatment Centres Ordinance (Cap 244);
    - (iii) is ordered to be detained in a training centre under the Training Centres Ordinance (Cap 280);
    - (iv) is made the subject of a probation order under section 3 of the Probation of Offenders Ordinance (Cap 298); or
    - (v) attains the age of 26.
- (6) A person who fails to comply with a supervision order under subsection (1) shall be guilty of an offence and liable on conviction to a fine of \$5000 and to imprisonment for 12 months.

(Added 14 of 1980 s. 2)

#### [109AA.01] Enactment history

This section was added pursuant to s 2 of the Criminal Procedure (Amendment) Ordinance 1980 (14 of 1980), commencing 2 May 1980 and was subsequently amended pursuant to s 6 of the Drug Addiction Treatment Centres (Amendment) Ordinance 1986 (24 of 1986), commencing 9 May 1986, s 7 of the Administration of Justice (Miscellaneous Amendments) Ordinance 1990 (6 of 1990), commencing 9 February 1990.

Subsection (1) was replaced pursuant to s 21 of the Prisoners (Release under Supervision) Ordinance 1987 (59 of 1987), commencing 1 July 1988.

Subsection (1A) was added pursuant to s 21 of the Prisoners (Release under Supervision) Ordinance 1987 (59 of 1987), commencing 1 July 1988.

Subsection (2)(aa) was added pursuant to s 7 of the Administration of Justice (Miscellaneous Amendments) Ordinance 1990 (6 of 1990), commencing 9 February 1990.

#### [109AA.02] England

There is no equivalent to this section.

#### [109AA.03] Commissioner of Correctional Services

This is defined in s 2 of the Prisons Ordinance (Cap 234) as meaning the Commissioner of Correctional Services of Hong Kong.

#### 109AB. Recall orders

- (1) Where the Commissioner of Correctional Services is satisfied that a person against whom a supervision order under subsection (1) of section 109AA is in force has failed to comply with the order, he may, if such person earned remission under rule 69 of the Prison Rules (Cap 234 sub. leg.) in respect of the period of imprisonment which ended on his release from prison referred to in that subsection, make a recall order against him requiring him to return to prison.
- (2) Subject to subsections (3) and (4), a person against whom a recall order is made under subsection (1) may be detained in prison for a period equivalent to the amount of the remission that was earned by him.
- (3) The Commissioner of Correctional Services may at any time release a person who is detained pursuant to a recall order under subsection (1).
- (4) A recall order under subsection (1) shall cease to have effect where the person against whom it was made—
- (a) is ordered to serve a term of imprisonment;
  - (b) is ordered to be detained in an addiction treatment centre under the Drug Addiction Treatment Centres Ordinance (Cap 244);
  - (c) is ordered to be detained in a training centre under the Training Centres Ordinance (Cap 280);
  - (d) is made the subject of a probation order under section 3 of the Probation of Offenders Ordinance (Cap 298); or
  - (e) attains the age of 26.

(Added 14 of 1980 s. 2)

#### [109AB.01] Enactment history

This section was added pursuant to s 2 of the Criminal Procedure (Amendment) Ordinance 1980 (14 of 1980), commencing 2 May 1980.

#### [109AB.02] England

There is no equivalent to this section.

**[109AB.03] Commissioner of Correctional Services**

This is defined in s 2 of the Prisons Ordinance (Cap 234) as meaning the Commissioner of Correctional Services of Hong Kong.

**[109AB.04] Supervision order**

See s 109AA above.

**109AC. Arrest etc, of persons unlawfully at large**

Remarks: Adaptation amendments retroactively made - see 39 of 1999 s. 3

- (1) If a person against whom a recall order is made under section 109AB(1) is at large at the time it is made, he shall be deemed to be unlawfully at large.
- (2) A police officer may, if he reasonably suspects that a recall order under section 109AB(1) is in force against a person and that that person is unlawfully at large, arrest him and take him to a prison.
- (2A) An officer of the Correctional Services Department specified in a supervision order made under section 109AA in respect of a person against whom a recall order has been made under section 109AB(1) or such other officer of that Department as the Commissioner of Correctional Services may substitute for the officer so specified by a variation of the terms of that supervision order may, if he reasonably suspects that that recall order is in force against that person and that that person is unlawfully at large, arrest him and take him to a prison. (*Added 14 of 1988 s. 2*)
- (3) Any period during which a person against whom a recall order under section 109AB(1) is in force is unlawfully at large shall be disregarded in calculating the period for which he may be detained under the recall order, unless the Chief Executive otherwise directs in a particular case. (*Amended 39 of 1999 s. 3*)

(*Added 14 of 1980 s. 2*)

**[109AC.01] Enactment history**

This section was added pursuant to s 2 of the Criminal Procedure (Amendment) Ordinance (14 of 1980), commencing 2 May 1980. Subsection (3) was amended pursuant to s 3 of the Adoption of Laws (No 17) Ordinance 1999 (39 of 1999), commencing 1 July 1997.

**[109AC.02] England**

There is no equivalent to this section.

**[109AC.03] Recall order**

See s 109AB above.

**[109AC.04] Police officer**

This is defined as including any member of the Police Force in s 3 of the Police Force Ordinance (Cap 232).

**[109AC.05] Prison**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning any place or building or portion of a building set apart for the purpose of a prison under any Ordinance relating to prisons.

**[109AC.06] Commissioner of Correctional Services**

This is defined in s 2 of the Prisons Ordinance (Cap 234) as meaning the Commissioner of Correctional Services of Hong Kong.

**[109AC.07] Chief Executive**

This is defined in s 3 of the Interpretation and General Clauses Ordinance (Cap 1) as meaning (a) the Chief Executive of the Hong Kong Special Administrative Region and (b) a person for the time being assuming the duties of the Chief Executive according to the provisions of Art 53 of the Basic Law.

**Suspended sentences****109B. Suspended sentences of imprisonment**

Remarks: Adaptation amendments retroactively made - see 39 of 1999 s. 3

- (1) A court which passes a sentence of imprisonment for a term of not more than 2 years for an offence, other than an excepted offence, may order that the sentence shall not take effect unless, during a period specified in the order, being not less than 1 year nor more than 3 years from the date of the order, the offender commits in Hong Kong another offence punishable with imprisonment and thereafter a court having power to do so orders under section 109C that the original sentence shall take effect. (*Amended 39 of 1999 s. 3*)
- (2) A court which passes a suspended sentence on any person for an offence shall not make a probation order in his case in respect of another offence of which he is convicted by or before the court or for which he is dealt with by the court.
- (3) On passing a suspended sentence the court—
  - (a) may impose such conditions as it thinks fit;

- (b) shall explain to the offender in ordinary language his liability under section 109C if during the operational period he commits an offence punishable with imprisonment or breaks any condition imposed under paragraph (a).
- (4) If a court has passed a suspended sentence on any person, and that person is subsequently sentenced to detention in a training centre, he shall cease to be liable to be dealt with in respect of the suspended sentence unless the subsequent sentence or any conviction or finding on which it was passed is quashed on appeal.
- (5) Subject to any provision to the contrary contained in this or any other Ordinance—
- (a) a suspended sentence which has not taken effect under section 109C shall be treated as a sentence of imprisonment for the purposes of all Ordinances except any Ordinance which provides for disqualification for or loss of office, or forfeiture of pensions, of persons sentenced to imprisonment; and
- (b) where a suspended sentence has taken effect under section 109C, the offender shall be treated for the purposes of the said excepted Ordinances as having been convicted on the ordinary date on which the period allowed for making an appeal against an order under section 109C expires or, if such an appeal is made, the date on which it is finally disposed of or abandoned or fails for non-prosecution.

(Added 5 of 1971 s. 11)

[cf. 1967 c. 80 s. 39 U.K.]

#### [109B.01] Enactment history

This section was added pursuant to s 11 of the Criminal Procedure (Amendment) Ordinance 1971 (5 of 1971), commencing 26 February 1971 and was subsequently amended pursuant to s 3 of the Adaptation of Laws (No 17) Ordinance 1999 (39 of 1999), commencing 1 July 1997.

#### [109B.02] England

This section is to similar effect as s 39 Criminal Justice Act 1967 c 80 [Eng].

#### [109B.03] Excepted offence

For meaning, see s 109G below.

#### [109B.04] Not take effect

A suspended sentence is a real punishment and is to be considered in some senses as a custodial sentence: see *A-G v Wu Chi Sing* [1989] 2 HKC 76 (CA). As a matter of practice it is wrong in principle to impose a suspended sentence consecutively to a custodial sentence: see *R v Sapiano* (1968) 52 Cr

App Rep 674 (CA), *A-G v Tse On* [1986] HKLR 215, *R v Au Chak Kwan* [1987] 2 HKC 330.

#### [109B.05] Hong Kong

This is defined as meaning the Hong Kong Special Administrative Region in s 3 of the Interpretation and General Clauses Ordinance (Cap 1).

#### [109B.06] Definition

For “court”, see s 109G below.

### 109C. Power of court on conviction of further offence to deal with suspended sentence

Remarks: Amendments retroactively made - see 25 of 1998 s. 2

- (1) If an offender is convicted of an offence punishable with imprisonment committed during the operational period of a suspended sentence or if, during such period, he breaks a condition imposed under section 109B(3)(a) and either he is so convicted by or before a court having power under section 109D to deal with him in respect of the suspended sentence or he subsequently appears or is brought before such a court, then, unless the sentence has already taken effect, that court shall consider his case and deal with him by one of the following methods—

- the court may order that the suspended sentence shall take effect with the original term unaltered;
- it may order that the sentence shall take effect with the substitution of a greater or lesser term for the original term;
- it may by order vary the original order under section 109B(1) by substituting for the period specified therein a period expiring not later than 3 years from the date of the variation; or
- it may make no order with respect to the suspended sentence,

and a court shall make an order under paragraph (a) of this subsection unless the court is of opinion that it would be unjust to do so in view of all the circumstances which have arisen since the suspended sentence was passed, including the facts of the subsequent offence, and where it is of that opinion the court shall state its reasons.

- (2) Where a court orders that a suspended sentence shall take effect, with or without any variation of the original term, the term of such sentence shall commence on the expiration of another term of imprisonment passed on the offender by that or another court, unless the court is of opinion that, by reason of special circumstances, the sentence should take effect immediately.