

(4) Discontinuance of proceedings in magistrates' courts

1-236 As to the exercise of the power of the Secretary for Justice to take over a private prosecution for the purpose of discontinuing the proceedings, see §1-228, above.
As to the susceptibility to judicial review of a decision to discontinue, see §1-234, above.

(5) Restriction of vexatious prosecutions

1-237 See section 27 of the High Court Ordinance (Cap 4).

(6) Consents to prosecutions, etc

Criminal Procedure Ordinance (Cap 221), s 14B

1-238 14B.—Where any Ordinance provides that no prosecution for an offence shall be commenced without the consent of some person other than the Secretary for Justice, such a provision shall not derogate from the powers of the Secretary for Justice in respect of the prosecution of that offence.

(7) Proof of Consents

1-239 Filing of the consent with the clerk or registrar of the court suffices: *R v Dexter and Others* (1899) 19 Cox CC 360 and *R v Au Keung* (1954) 38 HKLR 142.
See §§1-224 *et seq*, above, as to the form of a consent to the institution of criminal proceedings, and see §4-171, below, as to the presumption that any necessary consents have been given.

THE CRIMINAL JURISDICTION OF THE COURTS

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I. MAGISTRATES' COURTS AND THE JUVENILE COURT

A. MAGISTRATES' COURTS.

The Magistrates' Courts hear charges in respect of a wide range of both summary and indictable offences and also conduct initial hearings in respect of serious criminal offences that are prosecuted either in the District Court before a Judge sitting alone, or in the Court of First Instance of the High Court before a Judge sitting with a jury. Trial is before a Permanent Magistrate who is a qualified barrister or solicitor and who sits alone. Generally speaking, the maximum sentence a Permanent Magistrate may impose is two years' imprisonment and a fine of HK\$100,000. However, some ordinances give Permanent Magistrates the power to impose sentences of up to three years' imprisonment and a fine of HK\$5,000,000.

The Juvenile Courts located in the Magistrates' Courts hear and determines charges against children and young persons under the age of 16, except where the charge is one of homicide. It may also make care or protection orders in respect of children or young people.

Minor offences such as hawking, road traffic law contraventions and littering are heard in the Magistrates' Courts by Special Magistrates, who need not be qualified lawyers. Special Magistrates cannot impose a prison sentence and the maximum fine they may impose is HK\$50,000.

(1) Constitution

(a) Magistrates

Magistrates Ordinance (Cap 227), ss 5, 5A

Chief Executive may by warrant appoint permanent and special magistrates

2-2

5.—(1) The Chief Executive may by warrant from time to time appoint such number of permanent and special magistrates as are in his opinion required for the efficient administration of justice in Hong Kong and may in the case of special magistrates by such warrant limit the jurisdiction and powers to be exercised by the person so appointed. Such appointments together with the warrant of appointment where such warrant limits jurisdiction or powers to be exercised by the person appointed shall be notified in the Gazette.

(2) A permanent magistrate shall exercise all the jurisdiction and powers conferred on a magistrate by any enactment in force in Hong Kong and also such jurisdiction and powers as may from time to time be conferred on a permanent magistrate.

(3) A special magistrate shall, subject to the provisions of his warrant of appointment, exercise all the jurisdiction conferred on a magistrate by any enactment in force in Hong Kong, but his powers of imposing imprisonment and fine shall, in the case of any enactment in force on 20 May 1949, be subject to the limitations as to the maximum term or terms of imprisonment and the maximum fine which such magistrate may lawfully impose under this Ordinance as amended from time to time and in the case of any enactment coming into force after 20 May 1949, be so subject unless such enactment expressly provides to the contrary.

(4) ... (Repealed).

(5) So long as any warrant of appointment of a magistrate issued under this section is in force and unrevoked, it shall continue to have effect notwithstanding his subsequent appointment to some other office.

(6) Any appointment made under the provisions of subsection (1) may be given effect from a date anterior to that of the warrant by which it is made:

Provided that nothing herein contained shall be deemed to authorize the discharge of any magisterial functions by any person so appointed before the date of the warrant or before the requirements of section 17 of the Oaths and Declarations Ordinance (Cap 11) have been fulfilled.

[The section was added by section 3 of the Magistrates Amendment Ordinance 1949 (24 of 1949). Sub-section (1) was amended by the Magistrates Amendment and Validation Ordinance 1949 (48 of 1949), section 3; the Magistrates (Amendment) Ordinance 1974 (3 of 1974), section 2; the Magistrates (Amendment) Ordinance 1994 (59 of 1994), section 6; and the Adaptation of Laws (Courts and Tribunals) Ordinance (25 of 1998), section 2. Sub-sections (2) and (3) were also amended by the Magistrates (Amendment) Ordinance 1994 (59 of 1994), section 6. Sub-section (4) was repealed by the Justices of Peace Ordinance (47 of 1997) (now Cap 510), section 10. Sub-section (6) was added by section 2 of the Magistrates (Amendment) Ordinance 1958 (30 of 1958) and was amended by the Oaths and Declarations Ordinance (20 of 1972) (now Cap 11), section 24.]

2-3

The power of appointment under Magistrates Ordinance, section 5 may be delegated under the Interpretation and General Clauses Ordinance (Cap 1), section 63; see *Att-Gen v Chiu Tat Cheong David and Another* [1992] 2 HKLR 84, CA (decided also in respect of the prerogative power of appointment of the Governor of public officers under the Letters Patent). Cf however, Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, Article 88.

Appointment of deputy magistrates

2-4

5A.—(1) The Chief Justice may by warrant appoint any person who is eligible under section 5A to be appointed as a permanent magistrate or under section 5AB to be appointed as a special magistrate to be a deputy magistrate for such period and on such terms as he thinks fit. Such appointment shall be notified in the Gazette.

(2) Subject to the terms of appointment, a deputy magistrate shall, during the period for which he is appointed, have all the jurisdiction, powers and privileges, and perform all the duties of a permanent magistrate and any reference in any law to a magistrate shall be construed accordingly.

(3) Every appointment made in accordance with this section may be terminated by the Chief Justice at any time.

(4) Where the hearing of any proceedings before a deputy magistrate is adjourned or where judgment is reserved therein or where the determination of any matter is subject to review, the deputy magistrate shall have power to resume the hearing and determine the proceedings or to deliver as the judgment of the magistrate's court the judgment which he has reserved or to review the determination which he has made, notwithstanding that before the hearing is resumed or judgment is delivered or the review is disposed of, his appointment has expired or has been terminated.

(5) For the purposes of subsection (4), the power of a deputy magistrate to determine the proceedings in a resumed hearing includes the power of awarding costs and the making of any order ancillary to or consequential upon the award of costs.

[The section was added by section 21 of the Administration of Justice (Miscellaneous Provisions) Ordinance 1999 (21 of 1999) and was amended under section 143 of the Statute Law (Miscellaneous Provisions) Ordinance 2005 (10 of 2005).]

The legislative intent of this provision was considered in *Securities and Futures Commission v Tsoi Bun* [2011] 3 HKLRD 717, CFI.

This provision was applied also to appoint deputy special magistrates, who are usually restricted in their jurisdiction and powers in that they may not have power to impose any sentence of imprisonment; that they may not impose a fine exceeding the amount set out for level six in Schedule 8 to the Criminal Procedure Ordinance (Cap 221) in respect of any one offence; and that they may not exercise any of the powers under the Mental Health Ordinance (Cap 136). As to level fines, see section 113B and Schedule 8 of the Criminal Procedure Ordinance (Cap 221). A level six fine stands current at HK\$100,000. See also §5-327, below.

(b) Mode of address

Magistrates are addressed as "Sir" or "Madam" or "Your Worship" in English and as "法官閣下" in Chinese. See Bar Circular No 44/97. 2-5

(2) Court business

(a) Sittings

Magistrates Ordinance (Cap 227), s 11

Place and manner of hearing

11.—The room or place in which a magistrate sits to hear and try any complaint or information shall be deemed an open and public court, to which the public generally may have access, so far as the same can conveniently contain them, unless the magistrate otherwise directs where the evidence is of an indecent character, or where a prosecution is for an offence against the Societies Ordinance (Cap 151) and is an offence relating to or otherwise connected with a Triad Society, in which case he shall make a note on the depositions of the direction which he has given: 2-6

Provided that in any case the delivery by the magistrate of his determination and any proceedings subsequent thereto, other than a review under section 104 which requires the hearing of evidence, shall take place in open and public court.

[The section was amended by the Magistrates Amendment Ordinance 1949 (24 of 1949), section 7; and the Magistrates (Amendment) Ordinance 1960 (16 of 1960), section 2. Cf the Administration of Justice (No 2) Act 1848 [Eng], section 12.]

"Magistrate" includes a permanent magistrate and a special magistrate: Magistrates Ordinance, section 2.

As to offences against the Societies Ordinance (Cap 151), see §§37-2 *et seq.*

- 2-7 Evidence of an indecent character includes testimony or oral evidence of indecency: *R v Fan Siu Man* [1986] HKLY 225, HC. As to other powers of a magistrate to exclude the public from a hearing before him, see §2-216, below.

(b) *Case register and minute of proceedings*

Magistrates Ordinance (Cap 227), ss 34-35A

Minute of proceedings

- 2-8 34.—(1) In all proceedings under this Part the magistrate at the hearing shall take or cause to be taken a full minute in writing, or a record whether by means of shorthand notes or mechanical means or otherwise, so far as circumstances permit, of the following matters— (See Form 19)
- the nature of the complaint, if an oral complaint has been made; (Amended 49 of 1965, s 7)
 - the names of the complainant, informant or prosecutor, and of the defendant, and of the respective witnesses on either side;
 - the evidence or depositions of the witnesses;
 - objections to the admissibility of evidence and whether the same have been allowed or disallowed; and
 - the fines, if any, paid into court.
- (2) The minute shall, immediately after the close of the case, be handed to the magistrates' clerk for safe custody.
- (3) The minute or record may be kept in either or both of the official languages.

[Sub-section (1) was amended by the Magistrates (Amendment) Ordinance 1965 (49 of 1965), section 7; and the Official Languages (Amendment) Ordinance 1995 (51 of 1995), section 15. Sub-section (2) was also added by the Official Languages (Amendment) Ordinance 1995 (51 of 1995), section 15.]

"Magistrate's clerk" includes (where there is more than one) either or any of such clerks or such other person a magistrate directs to do anything required by the Magistrates Ordinance to be done by the magistrate's clerk: Magistrates Ordinance (Cap 227), section 2.

Register of cases and proof thereof

- 2-9 35.—(1) The magistrate's clerk shall keep a register in the prescribed form of the minutes or memoranda of all the convictions and orders of the magistrate and of such other proceedings as are directed by the rules made under section 133 to be registered.
- (2) The register, and also any extract from the register certified by the clerk keeping the same to be a true extract, shall be *prima facie* evidence of the matters entered therein for the purpose of informing a magistrate, but nothing in this section shall dispense with the legal proof of a previous conviction for an offence when required to be proved against a person charged with another offence.
- (3) The entries relating to each minute, memorandum or proceeding shall contain the name of the magistrate before whom the conviction, order or proceeding referred to therein was made or had.
- (4) Every sum paid to the magistrate's clerk in accordance with this Ordinance, and the appropriation of such sum, shall be entered and authenticated in the manner directed by the rules made under section 133.
- (5) ... (Repealed).

[Sub-section (1) was amended by the Magistrates (Amendment) Ordinance 1955 (2 of 1955), section 4. Sub-section (5) was repealed by the Magistrates (Amendment) Ordinance 1979 (14 of 1979), section 2. Cf the Summary Jurisdiction Act 1879 [Eng], section 22.]

Inspection etc of minute and register

- 2-10 35A.—(1) Every minute taken under section 34(1) and every register kept under section 35(1) shall be open for inspection without fee or reward by—
- a judge;
 - the Registrar;
 - the Secretary for Justice;
 - a judge or deputy judge of the District Court;
 - the registrar of the District Court;

- a magistrate;
 - any party to the proceedings to which the minute relates or to any proceedings which may be recorded in the register, or his legal representative;
 - any person, or his legal representative, who satisfies the Registrar or the magistrates' clerk that such inspection is reasonably required in connection with actual or potential civil or criminal proceedings by or against that person;
 - any person who satisfies the Registrar or the magistrates' clerk that there is good and sufficient reason for that inspection.
- (2) Any person aggrieved by the decision of a magistrates' clerk to refuse permission to inspect may appeal to a magistrate whose decision shall be final.
- (3) A decision by the Registrar to refuse permission to inspect shall be final.
- (4) The right to inspect under subsection (1) shall include the right to a copy of the minute or register subject, in the case of applicants under subsection (1)(g), (h) and (i), to the payment of the prescribed fee.
- (5) Disclosure of the contents of a minute or register under subsection (1) shall not amount to a breach of the Rehabilitation of Offenders Ordinance (Cap 297).

[The section was replaced with the present provisions by the Administration of Justice (Miscellaneous Provisions) Ordinance 1995 (13 of 1995), section 42. Sub-section (1)(c) was amended by the Declaration of Change of Titles (General Adaptation) Notice 1997 (LN 362 of 1997), made under section 55 of the Interpretation and General Clauses Ordinance (Cap 1).]

This section provides in effect in criminal matters the power of inspection provided by the Rules of the High Court (Cap 4, sub leg A), Order 63 in civil matters: *Re Stonham* [1977-1979] HKC 287.

(3) Rights of audience, representation and court dress

Magistrates Ordinance (Cap 227), ss 16, 18

Right of parties to conduct case personally or by counsel

- 2-11 16.—(1) The party against whom the complaint is made or information laid shall be admitted to make his full answer and defence thereto and to have the witnesses examined and cross-examined by him or by counsel on his behalf.
- (2) Without prejudice to the rights of the Secretary for Justice every complainant or informant shall be at liberty to conduct the complaint or information respectively and to have the witnesses examined and cross-examined by him or by counsel on his behalf.

[The section was added by the Magistrates Amendment Ordinance 1949 (24 of 1949), section 8 and was amended by the Declaration of Change of Titles (General Adaptation) Notice 1997 (LN 362 of 1997), made under section 55 of the Interpretation and General Clauses Ordinance (Cap 1).]

"Counsel" means any barrister, advocate or solicitor having the right of audience before any court of Hong Kong: Magistrates Ordinance (Cap 227), section 2.

Legal officers enjoy the right of audience before magistrates by virtue of their entitlement to act in a matter entrusted by an enactment to the discretion or control of the Secretary for Justice, namely the prosecution of offences (*vide* Magistrates Ordinance, section 12): Legal Officers Ordinance (Cap 87), section 3(2).

Appearance by counsel

- 2-12 18.—At the hearing of a complaint or information, a party may be represented by counsel; and an absent party so represented shall be deemed not to be absent.
- Provided that appearance of a party by counsel shall not satisfy any provision in any enactment or any condition of a recognizance expressly requiring the appearance of the party.

[The section was replaced with the present provision by the Magistrates (Amendment) Ordinance 1976 (36 of 1976), section 5.]

"Party" includes the HKSAR: Magistrates Ordinance, section 2. In addition, the Secretary for Justice is empowered by section 13 of the same Ordinance to appoint public officers to act as official prosecutor or prosecutors and to conduct generally on his behalf any prosecution before a magistrate or any specified classes of prosecutions

or any particular case. Any official prosecutor so appointed may without any written authority appear and plead before a magistrate any case of which he has charge which is being inquired into, tried or reviewed. Section 13 necessarily requires the courts to interpret the word "counsel" as defined in section 2 to include an official prosecutor appointed under section 13; see *Att-Gen v Chan Chit Yin* [1971] HKLR 404, FC. For a case in which a decision of a magistrate refusing to accept a plea on behalf of a non-attending defendant by counsel and requiring the defendant to turn up in person was quashed, see *Chain Chi Woo David v Lo Polly (Special Magistrate)* [1996] 4 HKC 466, HC; *Inglis v Loh Lai Kuen Eda (Permanent Magistrate)* [2004] 4 HKC 220, CFI (affirmed on appeal in [2005] 3 HKC 115, CA).

- 2-13 Formal court attire is not worn before a magistrate's court. However, men should wear a dark suit with a predominantly white shirt, while women should wear a predominantly dark dress or suit with a white blouse: Wilkinson, Rajwani and Pierce, *Advocacy and Litigation Process in Hong Kong*, 3rd Edn, p 145.

(4) Jurisdiction of Magistrates

- 2-14 The jurisdiction of a magistrate is statutory and there is no inherent power to award costs: *Att-Gen v To Fuk Ming* [1989] 1 HKLR 106, CA.

There are only two types of offences in Hong Kong criminal law, those which are summary and those which are indictable. Summary offences are those that are not declared to be treason and do not contain the words "upon indictment" or "on indictment" in the provision creating the offence. They are only triable summarily: Criminal Procedure Ordinance (Cap 221), s 14A(1). See *HKSAR v Tang Siu Kwong* (unrep., CACC 106/1999, 38/2000 & 67/2000, [2000] HKEC 294), CA. Indictable offences may be triable summarily or upon indictment if the provision creating the offence declares it to be triable summarily or upon indictment, or to be punishable on summary conviction or on indictment: *ibid*, s 14A(4). See *Chiang Lily v Secretary for Justice* [2009] 6 HKC 234, CA; leave to appeal refused (2010) 13 HKCFAR 208. Section 14A does not affect the powers conferred upon a magistrate by the Magistrates Ordinance or by any other law to try an indictable offence summarily: Criminal Procedure Ordinance, s 14A(5)(a). The manner of trial does not determine whether the offence is a summary one or one which is indictable: *New Chuan Kong Investment Co Ltd v Securities and Futures Commission* [1999] 3 HKLRD 897, CFA.

- 2-15 Criminal proceedings in respect of an offence for which a magistrate has power to convict summarily or to make an order for the payment of money or otherwise may be commenced by making a complaint or laying an information (including a charge) before a magistrate or an officer of a magistrate's court who is authorised in writing for that purpose by a magistrate. The magistrate or the officer may then issue a summons requiring the person against whom the complaint has been made, or information laid, to appear at a certain time and place before a magistrate to answer to the complaint or information and to be further dealt with according to law: section 8 of the Magistrates Ordinance (Cap 227). The prosecution begin by the laying of the information or making of the complaint: *Commissioner for Labour v Jetex HVAC Equipments Ltd* [1995] 2 HKLR 24, CA. A magistrate may, after considering the complaint or information and for good cause, refuse to issue a summons: section 8(1B)(b) of the Magistrates Ordinance. If a magistrate does consider the complaint or information, he is entitled, when refusing to issue a summons, to consider and decide whether the information laid discloses any offence known to the law and whether the essential elements of the offence are prima facie present: *Tsui Koon Wah v Principal Magistrate of Kowloon City Magistrates' Courts* (unrep., HCAL 81/2006, [2006] HKEC 1721), CFI. Neither this section nor Article 10 of the Hong Kong Bill of Rights requires a magistrate to hear an applicant upon consideration of the issuance of an information; the magistrate is entitled to determine the application in chambers: *HKSAR v Cheung Kin Chung* [2015] 3 HKLRD 310, CFI. The applicant is under a duty to provide sufficient information to support his application for the issuance of a summons. The magistrate is not under any obligation to give the applicant further opportunities to supply additional information either in person or in

writing, though if he considers it appropriate he may do so: *HKSAR v Cheung Kin Chung* (unrep., HCMA 267/2015, [2015] HKEC 1282), CFI.

For offences which do not exceed a fine of HK\$10,000 and imprisonment for six months (whether or not with or without any additional order, relating to suspension or cancellation of a licence, disqualification from obtaining or holding a licence, or as to compensation or otherwise), the public officer or body corporate authorised to prosecute in respect of that offence may commence the prosecution by filing in a magistrate's court a notice of prosecution and serving a copy of that notice by post on the defendant: Magistrates Ordinance, section 7D(1). The matter may then be dealt with under the Magistrates Ordinance, sections 7E-7J. The filing of a notice of prosecution under section 7D is not mandatory. Should the public officer or body corporate choose to file a notice of prosecution, it is then mandatory upon him to serve a copy of that notice to the defendant. It is not a prerequisite for initiating a prosecution a summons under section 8 to file a notice of prosecution and the choice of not filing one does not render such a prosecution irregular: *HKSAR v Lee Siu Keung Edmond* (unrep., HCMA 572/2014, [2015] HKEC 967), CFI.

A magistrate has jurisdiction to suspend the effect of his determination that a law is unconstitutional pending an appeal against that determination: *Ocean Technology Ltd (t/a Citizen's Radio) v Secretary for Justice* [2009] 2 HKC 157, CFI.

Magistrates Ordinance (Cap 227), s 26

Limit of time for complaint or information

26.—In any case of an offence, other than an indictable offence, where no time is limited by any enactment for making any complaint or laying any information in respect of such offence, such complaint shall be made or such information laid within 6 months from the time when the matter of such complaint or information respectively arose.

[The section was amended by the Adaptation of Laws (Courts and Tribunals) Ordinance 1998 (25 of 1998), section 2. Cf the Administration of Justice (No 2) Act 1848 [Eng], section 11].

As to "indictable offence", see the Magistrates Ordinance, section 2, which defines the words to mean any crime or offence for which a magistrate is authorized or empowered or required to commit the accused person to prison for trial before the court.

Computation of the period of time "within 6 months from the time when the matter of such complaint or information respectively arose" in the Magistrates Ordinance, section 26 does not include the day of the offence: *Secretary for Justice v Maxim's Caterers Ltd* [2009] 4 HKLRD 723, CFI.

Other enactments provide for different time limit(s) for the making of a complaint or laying of an information in respect of an offence to which the Magistrates Ordinance, section 26 would have otherwise applied; see Magistrates Ordinance, section 26A (concerning offences under an order in force under the Civil Aviation Ordinance (Cap 448)). See also *New Chuan Kong Investment Co Ltd v Securities and Futures Commission*, above. *Securities and Futures Commission v Chiu Sin Ming Jason* [2000] 3 HKLRD 18, CFI and *Viva Magnetics Ltd v Secretary for Justice* [2002] 3 HKLRD 571.

Non-compliance with the Magistrates Ordinance, section 26 is a defect going to jurisdiction: *R v Syed Ahmad Noh* (unrep., Mag App 485/1985, [1985] HKLY 255, HC). The time limit in s 26 applies to a summary offence stated to be a statutory alternative to an indictable offence (*Att-Gen v Tong Yiu Pui* [1972] HKLR 71, FC); and a summary offence as an alternative to a different summary offence alleged in the complaint or information (*R v Li Chi Kwong* [1987] 2 HKC 506, HC). However, section 26 does not preclude an amendment to be made more than six months after the matter of such information arose where the information lodged is not a nullity: *Att-Gen v Wong Lau* [1993] 1 HKCLR 257, HC; *R v Yeung Lee Transportation & Engineering Ltd* [1994] 2 HKC 556 (which were overruled in *Secretary for Justice v Yau Yuk Lung* [2007] 3 HKLRD 903, [2007] 3 HKC 545, CFA to the extent of rejecting the proposition of an information that was a "nullity", in the sense of it not capable of being cured by amendment). See also *Poon Chau Cheong v Secretary for Justice* (unrep., HCAL 1/1999, [1999] HKEC 918),

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HC (affirmed in *Poon Chau Cheong v Secretary for Justice* (2000) 3 HKCFAR 121). The effective date of laying an information for the purpose of the Magistrates Ordinance, s 26 is the date the information was lodged in court: *R v Cheung Kwok Cheung* [1982] HKLR 126; *R v Syed Ahmad Noh*, above. An information is lodged as soon as it has been received by an authorised member of the court's staff: whether or not the magistrate had notice of it does not affect the validity of the lodgment as a requirement under s 26: *R v Heilbronn* [1988] 2 HKLR 216, HC.

Criminal proceedings

2-19 Criminal proceedings for an indictable offence defined in the Magistrates Ordinance, s 2 (see §2-15, above) are commenced by the making of a complaint or laying of an information before a magistrate alleging the commission of such an offence. The magistrate may then either issue a warrant for the arrest and bringing up of the accused before a magistrate to answer the complaint or information or issue a summons directed to the accused requiring him to appear before a magistrate at a time and place mentioned in the summons: Magistrates Ordinance, section 72(1). The proceedings are then dealt with as committal proceedings: *R v Gardner* (1936) 28 HKLR 38; and *Att-Gen v O'Donnell, Magistrate* [1985] 2 HKC 283, HC. The provisions of Part III of the Magistrates Ordinance apply and unless the magistrate exercises his powers in accordance with the Magistrates Ordinance, sections 91-94A to deal with the offence summarily, with the consent of the prosecutor, a return day will be appointed and on the return day the accused may elect to have the charge against him heard at a preliminary inquiry. See Magistrates Ordinance, s 93, at §2-25 below. However, certain offences may be transferred directly to the Court of First Instance without committal proceedings: see below, §§2-186 *et seq* and 2-191 *et seq*. A preliminary inquiry involves the taking of evidence from prosecution witnesses and if the accused so desires, the hearing of evidence from the accused or defence witnesses or both. Committal proceedings conclude either on the discharge of the accused or the committal of the accused for trial or for sentence in the Court of First Instance. See Magistrates Ordinance, sections 80A-85. As to the role of the magistrate in a preliminary inquiry, see *Chan Tit Shau v Secretary for Justice* [2004] 1 HKLRD 801, CFI and *Yeung Chun Pong v Secretary for Justice* (2006) 9 HKCFAR 836, CFA. In particular, the magistrate has no duty, whether by implication of the statutory framework or under the common law, to give reasons for committing an accused to trial after a preliminary inquiry. An examining magistrate in committal proceedings should not hear an application for permanent stay of proceedings on the ground of unfairness in the use of evidence. An examining magistrate does not have the discretion to exclude evidence ruled to be admissible during a preliminary inquiry: *HKSAR v Chan Chun Chuen* [2012] 3 HKLRD 265 (applying *Yeung Chun Pong v Secretary for Justice* (above)). On the other hand, a magistrate in committal proceedings has no jurisdiction to consider and decide a question of autrefois convict or acquit as part of his jurisdiction to prevent abuse of process: *Yeung Chun Pong v Secretary for Justice* (2006) 9 HKCFAR 836, CFA (affirming the Court of Appeal's judgment in [2005] 3 HKLRD 789). As to the jurisdiction of the Court of First Instance to try indictable offences, see §2-77, below).

As to other circumstances that lead to the termination of committal proceedings, see *Chiang Lily v Secretary for Justice* (unrep., CACV 55, 151/2009, [2009] HKEC 1562), CA (leave to final appeal refused (2010) 13 HKCFAR 208 (CFA)).

2-20 There are reporting restrictions in respect of committal proceedings: Magistrates Ordinance, s 87A. But an accused or one of the accused may apply for an order of the magistrate that such restrictions shall not apply to reports of the proceedings relating to him: *ibid* s 87A(2).

A magistrate conducting a preliminary inquiry has the discretion to order that no person should have access to the room or building where the preliminary inquiry is taking place without the consent or permission of the magistrate, if it appears to him that the ends of justice will be best answered by so doing. Such a room or building is not deemed to be an open court if the magistrate exercises the discretion to order it to be

closed to the public: *ibid* s 80. See *R v Suttill, Magistrate Ex p Asiaweek Ltd* [1984] HKC 474, HC.

Magistrates Ordinance (Cap 227), ss 91-94A

Indictable offences which may be dealt with by special magistrate summarily

2-21 91.—Whenever any person is accused before a special magistrate of any indictable offence except an offence specified in the Second Schedule, the magistrate, instead of committing the accused for trial before the court, may deal with the case and convict the accused summarily, and on conviction may sentence the accused to imprisonment for 6 months and to a fine of \$50,000: (See Form 93)

Provided that nothing in this section shall affect the provisions of section 94 or any lesser punishment specifically provided in any other Ordinance.

[The section was replaced by the present provision by the Magistrates Amendment Ordinance 1949 (24 of 1949), s 29; and was amended by the Magistrates (Amendment) Ordinance 1958 (30 of 1958), s 7; the Magistrates (Amendment) (No 3) Ordinance 1981 (51 of 1981), s 6; and the Administration of Justice (Miscellaneous Provisions) Ordinance 1995 (13 of 1995), s 59.]

A special magistrate may impose consecutive or partly consecutive sentences but the aggregate of the terms of imprisonment must not exceed 12 months: Magistrates Ordinance, s 57. See §5-54, below.

Indictable offences which may be dealt with by permanent magistrate summarily

2-22 92.—Whenever any person is accused before a permanent magistrate of any indictable offence except an offence specified in Part I of the Second Schedule, the magistrate, instead of committing the accused for trial before the court, may deal with the case and convict the accused summarily, and on conviction may sentence the accused to imprisonment for 2 years and to a fine of \$100,000: (See Form 93).

Provided that nothing in this section shall affect any greater or less punishment specifically provided for in any other Ordinance.

[The section was replaced by the present provision by the Magistrates Amendment Ordinance 1949 (24 of 1949), s 29; and was amended by the Magistrates (Amendment) Ordinance 1958 (30 of 1958), s 7; the Magistrates (Amendment) (No 3) Ordinance 1981 (51 of 1981), s 7; and the Administration of Justice (Miscellaneous Provisions) Ordinance 1995 (13 of 1995), s 60.]

A permanent magistrate may impose consecutive or partly consecutive sentences but the aggregate of the terms of imprisonment must not exceed three years: Magistrates Ordinance, s 57. See §5-54, below.

Where an indictable offence is dealt with summarily by a magistrate with the consent of the prosecution and the accused is acquitted after trial of that offence, but the evidence establishes a case to answer in respect of a summary offence, the jurisdiction of the magistrate to try and deal with the summary offence is subject to the time limit provided under the Magistrates Ordinance, s 26: *Att-Gen v Tong Yiu Pui*, above.

SCHEDULE 2

PART I

1. Any offence which is punishable with death.
2. Any offence (except an offence against section 10 or 12 of the Theft Ordinance (Cap 210), or an offence against Part VIII of the Crimes Ordinance (Cap 200)) which is punishable with imprisonment for life.
3. Any offence against section 21 or 22 of the Crimes Ordinance (Cap 200).
4. Misprision of treason.
5. Any offence against Part I or Part II of the Crimes Ordinance (Cap 200).
6. Blasphemy and offences against religion.
7. Composing, printing or publishing blasphemous, seditious or defamatory libels, except as provided by section 16 of the Defamation Ordinance (Cap 21).
8. Genocide and any conspiracy or incitement to commit genocide.
9. Torture.

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power is to be contrasted with the mandatory one in subsection 83V(2) which requires the evidence to "have been admissible in the proceedings" below. Credible hearsay evidence, in the form of a letter from the Belgian Consulate General, was received under this discretionary power in *HKSAR v Huynh Bat Muoi* [2001] 4 HKC 643, CA.

By virtue of paragraph (b) of subsection 118(1) of the Magistrates Ordinance (Cap 227), the Court of First Instance would also be entitled to receive hearsay as fresh evidence on appeal from the magistracy. The same would appear to be true with respect to fresh evidence on applications and appeals to the Court of Final Appeal, see subsection 17(2) of the Hong Kong Court of Final Appeal Ordinance (Cap 484).

CHAPTER 12

PRIVILEGE, DISCLOSURE AND PUBLIC INTEREST IMMUNITY

Maggie Wong

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I. DISCLOSURE

A. INTRODUCTION

It is not unusual in investigations of serious and/or complex crimes for there to be many statements taken from witnesses or others who might give information of varying degrees of assistance to the investigating authority. Potential exhibits, documentary and real, may be seized, all may be used in evidence while some might not be. Expert opinion evidence might be necessary or useful to the prosecution and sometimes they might obtain expert statements from witnesses who are not helpful to them. Even in quite simple cases it is by no means unusual for there to be more material in existence than is used in the trial. The subject of disclosure is concerned with the duty of the prosecution to disclose to the defence certain materials.

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Such materials can be separated into two types; material directly relevant to evidence which the prosecution intends to adduce at trial as part of its case (ie statements of witnesses and any exhibits) and other material which has been obtained as part of an investigation or which is in existence for some other reason and is known by the prosecution to exist or to which the prosecution have easy or sole access. This latter type of material, often known as "unused material", does not, did not and is not intended to form part of the prosecution case. Sometimes there are materials in the hands of third parties or materials which are only obtained by the prosecution as a trial progresses, or even after it has finished.

Disclosure is by no means always a matter of controversy. Most professionally qualified prosecutors are well aware of their duty to disclose certain materials. The Department of Justice has published guidance to prosecutors on the duty of disclosure (see §12-31). The requirements of fairness and justice which should, and usually do, govern their conduct make it clear and straightforward as to what should be disclosed and what does not have to be. Unfortunately the system sometimes breaks down. Whether through the mistakes of individuals, the conscious decision to not disclose what should be disclosed, the failure on the part of investigating bodies to reveal relevant material to the prosecuting lawyers, or where no blame should be attached, there is always the possibility of miscarriages of justice occurring through non-disclosure. Although there have been cases on disclosure going back to the middle of the nineteenth century, until the 1990s there was a paucity of guidance based on principles to be applied set down by the higher courts. This situation altered dramatically in the early 1990s and the higher

12-2

appellate courts throughout the common law world have been setting down high standards for the prosecution to comply with. There has been such an explosion of decisions within that period, leading to such a degree of evolutionary reform, as to almost amount to a judicial revolution.

In Hong Kong the law governing the principles and procedure for disclosure is almost entirely a matter of the common law and by and large the English authorities are followed. There is an element of statutory obligation imposed on the prosecution, in the very important matter of the disclosure of its case against a defendant and disclosure of expert evidence; and two specific situations where there is an obligation of disclosure imposed upon the defence, where the defendant intends to call evidence of an alibi and where the defendant intends to call an expert witness. Other than these specifics the law of disclosure is governed by principles set out on a case-by-case basis and, often, based on the practical experience of the courts as to the perceived best practice of prosecutors.

B. DISCLOSURE OF THE PROSECUTION CASE AGAINST AN ACCUSED

(i) Fair trial

12-3 The common law, Art 87(2) of the Basic Law, and Art 14 of the ICCPR, guarantee a person the right to a fair trial.

In *R v Ward* (1993) 96 Cr App R 1 Glidewell LJ spoke of the common law right of disclosure as being a component of the rules of natural justice. (p 25) A similar statement was made by Watkins LJ in an earlier case, *R v Knightsbridge Crown Court, Ex parte Goomatilleke* [1986] 1 QB 1, p 15 F-H. Rules of natural justice help to ensure a fair trial.

The prosecution's duty of disclosure is "based on the defendant's common law right to a fair trial and on the principle of openness": see *HKSAR v Lee Ming Tee (No 2)* (2003) 6 HKCFAR 336 [143] per Sir Anthony Mason, NPJ:

"143. The prosecution's duty of disclosure has its foundation in the right of the defendant to a fair trial. The right to a fair trial entails adequate knowledge of the case to be made by the prosecution ... What is fair must be determined in the light of the general principle of open justice ... It would be contrary to that great principle if the prosecution were to withhold from the defence material which might undermine the case against the defendant or which might assist the defence case ... It is therefore the duty of the prosecution to disclose to the defence 'all relevant material which may assist the defence subject to the exception ... of public interest immunity' ... [citations omitted]"

The prosecution's failure to disclose material which it has a duty to disclose breaches Art 14(3)(b) and (3) of the ICCPR:

- (3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality—
 - (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; ...
 - (e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

In relation to Art 14(3)(b), the equivalent article is Art 6(3)(b) of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"). This article was considered by the European Commission on Human Rights in the context of disclosure in *Jespers v Belgium* (1983) 5 EHHR CD 305, [58] where it said:

58. In short, Art 6(3)(b) recognizes the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities. The Commission considers that, if the element in question is a document, access to that document is a necessary 'facility' ('facilite necessaire') if, as in the present case, it concerns acts of which the defendant is accused, the credibility of testimony, etc.

In relation to Art 14(3)(e), the equivalent article is Art 6(3)(d) ECHR. The European Court of Human Rights has held that the guarantees in Art 6(3)(d) are specific

aspects of the right to a fair trial in Art 6(1) – the latter requires the prosecution to disclose to the defence all material in their possession for or against the accused: *Papageorgiou v Greece* (2004) 38 EHRR 30, paras 35–36; *Holland v Her Majesty's Advocate (Devolution)* (2005) SLT 563, paras 72–73; and *Sinclair v Her Majesty's Advocate (Devolution)* (2005) SLT 553, paras 36, 49. Exceptions would be where the material is the subject of PII or legal professional privilege.

In Canada the right to disclosure is a component of the constitutional right to make full answer and defence under s 7 of the Canadian Charter of Rights and Freedoms: *R v Taillefer* (2003) 179 CCC (3d) 353, paras 70–71.

(ii) Duty of disclosure

The duty of disclosure of prosecution unused materials in Hong Kong is governed by the common law. For the rationale, status, nature and scope of the prosecution's duty of disclosure in Hong Kong, see *HKSAR v Lee Ming Tee (No 2)* (2003) 6 HKCFAR 336. There is no legislation which provides for the prosecution's provision of materials to a defendant before trial such as that existed in England since 1996. The common law principles relating to disclosure are general and without jurisdictional distinction. They apply uniformly through the range of courts in Hong Kong where criminal trials are conducted. They apply in magistrates courts as much as they apply in the District Court or the Court of First Instance. Those common law rules of disclosure have evolved over the years.

The common law of Hong Kong have regard to the principles relating to disclosure articulated by the English courts. This common law right of defendants is provided with constitutional underpinning by arts 39 and 87 of the Basic Law and art 11(2) of the Bill of Rights. *Lee Ming Tee (No 2)* at p 387B–G. The prosecution's duty to disclose relevant material is preceded by a duty to "ascertain" what relevant material exists: *Lee Ming Tee (No 2)* p 390I. And that is not limited to relevant material in the possession or control of the investigating agency concerned. It extends to such material "in the possession or control of any other government department or agency if there are particular circumstances suggesting that it may have such material": p 391B–C. As to the scope of the duty, it is explained (at p 391D–E) that:

"The prosecution's duty is to disclose to the defence relevant material (including information) which may undermine its case or advance the defence case. The duty is not limited to the disclosure of admissible evidence. Information not itself admissible may lead by a train of inquiry to evidence which is admissible: *R v Preston* [1994] 2 AC 130 at pp 163–164, per Lord Mustill. And material which is not admissible may be relevant and useful for cross-examination of a prosecution witness on credit."

When a dispute as to disclosable material arises, the courts in Hong Kong and in England have made it clear it is for the court, not prosecuting counsel, to decide such questions and to rule on any asserted legal ground to justify the withholding of disclosure of relevant material. See *HKSAR v Lee Ming Tee (No 2)* (2003) 6 HKCFAR 336 [152]. The courts are expected to exercise active judicial oversight and management of the handling of disclosure issues.

The prosecution's duty of providing material "helpful" to the defence was emphasized in *R v Hennessey (Timothy)* (1978) 68 Cr App R 419 (CA) where Lawton LJ said: "... those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence of help to an accused is either led by them or made available to the defence."

In the later case of *R v Ward (Judith)* [1993] 96 Cr App R 1 (CA) which remains the leading authority on common law principles governing disclosure, Glidewell LJ said:

"We would emphasise that 'all relevant evidence of help to the accused' is not limited to evidence which will obviously advance the accused's case. It is of help to the accused to have the opportunity of considering all the material evidence which the prosecution have gathered."

And later

"The obligation to disclose only arises in relation to evidence which is or may be material in relation to the issues which are expected to arise or which unexpectedly do arise in the course of the trial. If the evidence is or may be material in this sense then its non-disclosure is likely to constitute a material irregularity."

12-9 What was "material" and therefore disclosable was considered by the English Court of Appeal in *R v Keane* [1994] 1 WLR 746, where Lord Taylor approved the following test:

"I would judge to be material in the realm of disclosure that which can be seen on a sensible appraisal by the prosecution: (1) to be relevant or possibly relevant to an issue in the case; (2) to raise or possibly raise a new issue whose existence is not apparent from the evidence the prosecution proposes to use; (3) to hold out a real (as opposed to fanciful) prospect of providing a lead on evidence which goes to (1) or (2)."

12-10 Having referred to the above authorities, the court in *HKSAR v Gao Hejia* (unrep., HCMA 779/2002, [2003] HKEC 83, CFI) stated at paras 20-21:

"20. It should be appreciated that in referring to the disclosure of 'evidence', the above judgments were not restricting themselves to that in the prosecution's possession which was in itself in a form admissible as evidence, but to information, however recorded, which was or may have been material to the issues at trial and therefore 'helpful' to the defence case. Such information, it seems to me, would in the normal course include the statements of the witnesses at trial.

21. One important principle which is clear from the above cases is that the prosecution's duty to disclose is pro-active. It is not a duty which needs to be exercised only upon the request of the defendant. In Ward's case in regard to scientific materials which were not disclosed to the defence the court said:

"An incident of a defendant's right to a fair trial is a right to timely disclosure by the prosecution of all material matters which affect the scientific case relied on by the prosecution, that is, whether such matters strengthen or weaken the prosecution case or assist the defence case. This duty exists whether or not a specific request for disclosure of details of scientific evidence is made by the defence."

12-11 The duty of disclosure in the context of Public Interest Immunity was discussed in *R v H* [2004] 2 AC 134. Lord Bingham commented upon the prosecution's general duty of disclosure at para 14:

"14. Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter experience has shown that miscarriages of justice may occur where such material is withheld from disclosure. The golden rule is that full disclosure of such material should be made."

12-12 The duty is upon the prosecution; arises regardless of whether the defendant has made a request for disclosure of information: *Holland v Her Majesty's Advocate*, para 75; *Sinclair v HM Advocate*, paras 28, 33-34, 46; *R v Crown Court at Harrow, Ex parte Dave* [1994] 1 All ER 315, p 318 c-d.

12-13 In *R v Brown (Winston)* [1998] AC 367 (HL) (which was applied in *Lee Ming Tee*) Lord Hope discussed how disclosure of material which may affect the credibility of a prosecution witness may be an important "issue" in the trial. He said at p 377 E-F:

"Yet fairness requires that material in its possession which may cast doubt on the credibility or reliability of those witnesses whom it chooses to lead must be disclosed. The question whether one or more of the Crown witnesses is credible or reliable is frequently one of the most important 'issues' in the case, although the material which bears upon it may be, as Steyn LJ observed ... collateral."

And at p 378 G-H:

"... there is no doubt that in practice the credibility of a witness is frequently tested by reference to material which is not directly related to the issues of fact which the judge or jury have to decide ... Questions which are directed to the character of the witness provide one example. The fact that a witness has previous convictions, especially for crimes which imply

dishonesty or disrespect for the law, may be of great significance in regard to issues of credibility. But it has nothing to do with the question whether the offence it has nothing to do with the question whether the offence with which the defendant is charged was committed or whether it was the defendant who committed the offence."

This question of the credibility of a key prosecution witness being an "issue" in the trial was addressed in *Ex parte Goonatilleke*, Watkins LJ said at p 11 E-F: **12-14**

Mr. Du Cann submits that a matter going to the credit of a witness in a criminal case cannot be said to be collateral to the vital issue; that is to say, guilt or otherwise, especially where, as here, the witness in question provides the only evidence open that issue. In the circumstances of this case I wholly argue with him. Tanikie's evidence was indispensable to the prosecution and his credit was, therefore, of the highest importance. **12-15**

See also: *Ex parte Dave*, p 319 b-c. **12-16**

In *Sinclair v HM Advocate* [2005] UKPC D2, [33] the Privy Council considered the position of disclosure in Scots law and the relevant Convention authorities. Lord Hope of Craighead set out the following principles:

"First, it is a fundamental aspect of the accused's right to a fair trial that there should be an adversarial procedure in which there is equality of arms between the prosecution and the defence. The phrase 'equality of arms' brings to mind the rules of a mediaeval tournament - the idea that neither side may seek an unfair advantage by concealing weapons behind its back. But in this context the rules operate in one direction only. The prosecution has no Convention right which it can assert against the accused. Nor can it avoid the accused's Convention right by insisting that the duty does not arise unless the accused invokes it first. Secondly, the prosecution is under a duty to disclose to the defence all material evidence in its possession for or against the accused. For this purpose any evidence which would tend to undermine the prosecution's case or to assist the case for the defence is to be taken as material. Thirdly, the defence does not have an absolute right to the disclosure of all relevant evidence. There may be competing interests which it is in the public interest to protect. But decisions as to whether the withholding of relevant information is in the public interest cannot be left exclusively to the Crown. There must be sufficient judicial safeguards in place to ensure that information is not withheld on the grounds of public interest unless this is strictly necessary."

Lord Rodger of Earlsferry added at para 46:

"The Crown's article 6(1) duty to disclose evidence in favour of the defence does not ... depend on any request being made by the defence. That duty subsists unless, unusually, it is waived by the defence."

In that case the Privy Council quashed the convictions, holding that the failure of the prosecution to disclose police statements of witnesses rendered the trial unfair. **12-17**

In the case of *McDonald v HM Advocate* [2008] UKPC 46; 2010 SC (PC)1; 2008 SLT 993, the Privy Council considered the duty of disclosure in Scottish criminal proceedings. In that case, the defence requested statements and details of previous convictions of witnesses from the prosecution, contending that no formal specification of documents was required in light of the prosecution's general duty of disclosure. The prosecution declined to provide the documents requested and considered that for recovery of documents in such wide terms, a petition for the recovery of documents should be lodged with, and considered by, the court. The defence lodged petitions for recovery of documents and challenged before the court, by reference to art 6 of the Convention, the position of the prosecution regarding disclosure.

The Privy Council considered developments in the duty of disclosure in Scotland and the requirements of the Convention. It dismissed the appeals and found the system of disclosure in Scotland, as it operated at the time, to be compatible with art 6. **12-18**

Court of First Instance

In the Court of First Instance disclosure of the prosecution case against the defendant occurs as a result of the requirements for committal in the Magistrates' Courts. Section 80B of the Magistrates Ordinance (Cap 227) reads as follows: **12-19**

"Where there is a committal to the higher court, at least seven days before the committal (section 80B(1), although under the section the defence can consent to a shorter period), the prosecution must serve on the defence a copy of the complaint or information (section 80B(1)(a)) and copies of the statements of witnesses that the prosecution intend to call at trial (section 80B(1)(b) and copies of any documentary exhibits (section 80B(1)(c)) and a list of exhibits (section 80B(1)(d)). There are further provisions for translations to be served (section 80B(2)(c) and section 80B(3)); exhibits should be clearly identified in any relevant witness statement and the defence 'shall be given reasonable opportunity to examine any such exhibit' (section 80B(4)) and certain matters concerning the form and content of the witness statements mentioned above (section 80B(2)(a), (b), (d) & (e))."

12-20 The statutory situation above seems to have existed since at least the middle of the nineteenth century, in a slightly different form in that at that time a witness statement was a deposition, ie a transcribed record of testimony given by a prosecution witness before the examining magistrate. Today almost all committals are "paper committals" based on the witness statements.

District Court

12-21 Section 79(1) of the District Court Ordinance (Cap 336), Mads: clearly when a case is transferred to the District Court from the Magistrates the requirements for disclosure of the prosecution case to the defence should be and are the same as that set out above and below.

Magistrates Court

12-22 In the magistrates' courts there is no statutory obligation imposed upon the prosecution. However, as set out in *HKSAR v Gao Hejia* (unrep., HCMA 779/2002, [2003] HKEC 83), CFI, the guidance to prosecutors does not restrict the duty to the higher courts. It seems that prosecutors in the magistrates' courts are under a duty to provide the same degree of disclosure as in the two senior courts and convictions in the magistrates' courts have been quashed because of material non-disclosure. Some examples are:

1. *HKSAR v Ching Kwok Yin* [2001] 1 HKLRD 268, CFA.
2. *HKSAR v Chong Ho Yin* (unrep., HCMA 411/98, [1999] HKLRD (Yrbk) 179), CFI.
3. *HKSAR v Wong Tin Lung* (unrep., HCMA 21/99: [1999] HKLRD (Yrbk) 178), CFI.
4. *R v Wong Yuk Lam* [1991] 1 HKLR 345.
5. *HKSAR v Gao Hejia* (unrep., HCMA 779/2002, [2003] HKEC 83), CFI.

12-23 *HKSAR v Ching Kwok Yin* [2001] 1 HKLRD 268, CFA, the Court of Final Appeal discussed the prosecution's duty to disclose criminal convictions. In that case the prosecution witness's summary convictions for "breaching condition of stay" and "unlawful use of electricity" were not disclosed. It was a "one-against-one" contest between the prosecution witness (victim) and the appellant. On appeal, the High Court judge found that knowledge of the convictions would not have changed the magistrate's mind about the victim's credibility. The Court of Final Appeal disagreed. Sir Alan Huggins NPJ discussed the prosecution's duty at p 271C-E:

"It is common ground that there is a duty on the prosecution to disclose to the defence details of the criminal convictions of any of its witnesses if it knows of them and that a breach of that duty is a material irregularity...We say only that prosecuting officers would be well-advised to make enquiry about a witness's record where his credibility is likely to be a crucial issue in the case."

12-24 *HKSAR v Chong Ho Yin* (unrep., HCMA 411/98, [1999] HKLRD (Yrbk) 179), CFI, the prosecution failed to produce document relating to conflicting medical evidence in assault case. The appeal was allowed. The court held that a document was a material document if on a sensible appraisal by the prosecution it was (a) relevant or possibly relevant to an issue in the case; (b) raised or possibly raised a new issue whose existence was not apparent from the evidence the prosecution proposed to use; or (c) held out a real (as opposed to fanciful) prospect of providing a lead on evidence which went to (a)

or (b). The opinion of the consultant pathologist was clearly a material document. The non-disclosure could result in a material irregularity which might render the conviction unsafe. In that case the document should have been disclosed to the defence. The prosecution was under the same duties of disclosure with regard to unused material in summary trials as they were in trials on indictment.

In *HKSAR v Wong Tin Lung* (unrep., HCMA 21/99: [1999] HKLRD (Yrbk) 178), CFI, the Court of First Instance allowed an appeal against conviction for possession of offensive weapons after the prosecution failed to disclose the defendant's friend's fingerprints were on one of the knives and on the inside of the bag. The appeal was allowed. It was held that the duty to disclose was a positive duty placed upon the prosecution. There was no duty on the defence to make their own enquiries. The prosecution must make its own enquiries in each case as to whether there was material requiring disclosure. If they failed to do so and made no disclosure even if that failure was innocent and in no way malicious, it might result in a conviction being held unsafe in the event that the undisclosed material became relevant during trial. In prosecuting an individual for possession of items such as offensive weapons, it seemed obvious that the prosecution should disclose, if they knew, whose fingerprints were found on those objects. Here, the presence of the fingerprints was material, at least to the simple issue of whether X had prior dealings with these objects and had given these objects to D.

R v Wong Yuk Lam [1991] 1 HKLR 345, the appellants appealed against their convictions in respect of assault offences on the basis, inter alia, that at the time of the trial the prosecution had failed to reveal and make available to the defence the criminal records of certain prosecution witnesses. The appeal was allowed on the basis that the criminal records of the prosecution witnesses were relevant to the issue of the credibility of such witnesses. There had been a material irregularity in the trial.

The principles and approach applied in the above cases have been the same as those that apply in the higher criminal courts. Indeed in *HKSAR v Chong Ho Yin*, the court specifically ruled that the case of *R v Bromley Magistrates' Court, Ex p Smith* [1995] 1 WLR 944 was to be followed.

Because of the exigencies of summary trials it is sometimes the case that it is only when evidence is called that the defence fully knows the case it has to face. There is usually some disclosure, but often not full disclosure. It would seem to be incongruous if the prosecution were under a duty to comply with the common law requirements for disclosure of unused material in the magistrate's court but not with the requirement to fully disclose the evidence the prosecution will seek to adduce against a defendant. It follows that, in a situation where an accused faces prejudice or the prospect of an unfair trial due to non-disclosure of the evidence to be adduced against him that the principles applicable to the higher courts will also apply in the magistrates.

This seems to have been the view held by Deputy Judge McMahon in *HKSAR v Gao Hejia*. He overturned a conviction on a motoring matter in the magistrates' court when the unrepresented accused had not been given a copy of the brief facts, any witness statements and attached sketches, a copy of a statement of a passenger in the other car who was not called as a prosecution witness and information about a previous conviction of the main prosecution witness, who was also the driver of the other car. The judge made several critical comments about all the above non-disclosed items. He quashed the conviction on the basis that the accused had been "unfairly disadvantaged" in the conduct of his defence. One of the problems was that the guidelines issued with regard to the "Supply of Prosecution Papers in Magistrates Cases" made it clear that even the "brief facts" of the case will be supplied to the defence only "on request" and that witness statements will only be supplied after a written request by the defence solicitors, with a letter justifying the request. Obviously an unrepresented accused is in no position to know that he has to specifically request the brief facts and cannot comply with the requirements of the policy. The policy would seem to fall short of the requirements of *Ward* and *Brown* and of the standards set in the new guidelines set out in §12-32. The judge seems to have accepted this. He held, following *Ward*, that there was a "positive duty" on the prosecution to have disclosed the materials in question. He also expressed the view that where an accused is unrepresented it would be desirable for the trial judge

or magistrate to take some initiative to ensure a proper degree of disclosure by the prosecution.

- 12-30 It seems clear that the present position is that, in all criminal courts, the prosecution is under a duty to disclose all witnesses and material that they intend to rely on to prove the guilt of the accused, before trial or at least in a timely fashion. Further than this the prosecution should call all witnesses and produce all other evidence they intend to rely on as part of their own case and not seek to ambush the accused during any defence case (see *R v Rice* (1963) 47 Cr App R 79, CA; *R v Kane* (1977) 65 Cr App R 270, CA; *R v Phillipson* (1990) 91 Cr App R 226, CA; and *R v Sansom* (1991) 92 Cr App R 115, CA). See also the Hong Kong cases of *R v Tse Cheuk Suen*; *R v Wong Siu Tat*, *Re Raid* [1991] 1 HKPLR 275; *HKSAR v Prasad*.

Notice of expert evidence

- 12-31 The requirements set out in s 65DA of the Criminal Procedure Ordinance (Cap 221) do not limit the wider obligations of the common law set down in cases such as *Ward* and *Maguire*.

C. DISCLOSURE OF MATERIALS WHICH ARE NOT PART OF THE PROSECUTION CASE

(1) Overview

- 12-32 This is an issue which has concerned the courts since the middle of the nineteenth century. Surprisingly however there were no cases in which generally applicable principles were set down. The first case in which an attempt to set out some generally applicable principles for disclosure, although eventually the appeal was allowed on another, very narrow, ground, was *R v Maguire* [1992] 94 Cr App R 133. In this case, amongst other matters, the Court of Appeal looked at the non-disclosure of certain scientific material, which had not been disclosed at the time of trial, in fact not until many years later, which cast doubt on the prosecution case based on the testimony of expert scientific opinion. The court held, at pp 146-147, that:

1. the forensic scientists involved were under a duty to disclose this evidence to the prosecution (because in the words of Glidewell LJ they were part of "... the total apparatus of the prosecution ..." in *R v Liverpool Crown Court, Ex p Roberts* [1986] QB 1);
2. the prosecution was under a like duty to disclose it to the defence;
3. disclosure was necessary because the material was capable of having "some bearing on the offence charged and the surrounding circumstances of the case";
4. the reasons why there had been no disclosure were irrelevant;
5. the duty of disclosure was a continuing one;
6. material non-disclosure could be a material procedural irregularity for the purposes of an appeal (see s 83 of the Criminal Procedure Ordinance) and could also render a conviction unsafe and unsatisfactory.

- 12-33 The phrase in inverted commas in point 3 is taken from the *Att-Gen's Guidelines* (1982) 74 Cr App R 302. These were guidelines to prosecutors as to the extent of their duty to disclose. By implication in several cases the guidelines had been superseded by the law but in any event in *R v Brown* [1995] 1 Cr App R 191, the Court of Appeal held that the guidelines did not "conform to the requirements of the law of disclosure in a number of critically important respects" (at p 197C). In particular the guidelines were based upon the principle that disclosure was a matter for the discretion of the prosecutor and did not contain any acknowledgement that the courts had "primacy" when deciding questions of procedure for and the extent of disclosure (at pp 197C to 198D). An outline of the latest Hong Kong version is given at §12-32. This is much closer to the common law position set down in this chapter.

- 12-34 *Maguire* was applied by the Privy Council in *R v Berry* (1993) 96 Cr App R 77. The court stated that when ruling on disclosure "the key is fairness to the accused" (at p 82); if the prosecution have conflicting or inconsistent statements made by a witness they are

under a duty to disclose the statements to the defence before trial (at pp 85 and 87); that testimony had been given by witnesses which was "not foreshadowed in the depositions" served on the defence and this failure was a material irregularity (at p 87). *R v Maguire* has been applied in Hong Kong in *HKSAR v Ching Kwok Yin* [2001] 1 HKLRD 268 by the Court of Final Appeal and, either expressly or by implication in other appeal cases and by trial courts, eg *R v Wong Siu Tat* [1993] HKLY 322 and *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336.

In *R v Ward* (1993) 96 Cr App R 1, the Court of Appeal applied the principles in *Maguire* and allowed the appeal on the basis of material non-disclosure. A further ground for allowing the appeal was that new psychiatric evidence had come to light, but it is clear from the judgment that the appeal would have been allowed on the grounds of material non-disclosure only. The court held that there had been a failure to disclose by four "prosecution groups" that is:

- (1) one of the investigating police forces;
- (2) the staff of the DPP and counsel who advised them;
- (3) the psychiatrists who prepared medical reports on Miss Ward at the request of the prosecution;
- (4) the forensic scientists who gave evidence for the prosecution at the trial (all at p 23).

It is clear from the above that for the purposes of disclosure, who comprises "the prosecution" will include all persons, organisations and departments concerned who have an input into the prosecution case. See *R v Blackledge* [1996] 1 Cr App R 326, CA, where an appeal was allowed (after a plea of guilty) because two government departments and the security service (none of whom were directly involved in the prosecution) had failed to disclose certain relevant documents. The materials which had not been disclosed and should have been included:

- (1) Approximately 1,500 statements from people interviewed by the police. Many of these were relevant to the appellant's "proclivities for attention-seeking, fantasy and the making and withdrawal of untrue confessions" (at pp 28/29).
- (2) Even if some of the statements were not relevant to the issues in (1) they should certainly have been disclosed to the DPP by the police and an informed professional decision could have been made as to whether to disclose to the defence (at p 29).
- (3) Some interviews with the appellant; it was irrelevant whether these took the form of a witness statement, or notes of interview, or a police officers report, (at p 25). In particular one interview where she concocted an entirely false identity and personal history in some detail, this showed her "powers of deception and unreliability" (at p 32); and another where she had denied that which she had claimed in other interviews (at p 33). There were other contradictory interviews (at pp 34 to 36) which should have been disclosed to the defence.
- (4) Particular statements of three persons named by the appellant in one of her interviews and in the case of one of them when asked by the defence for details a mistaken denial by the DPP's office that he existed (at the bottom of p 36 to top of p 38).
- (5) Medical reports by two doctors concerning the appellant's emotional and mental state (at pp 39 to 42). In fact the court was very critical of one doctor who it apparently accepted may have "... put the interests of secrecy and security before the interests of the appellant who was his patient" (at p 41).
- (6) Three senior forensic scientists "took the law into their own hands" and "concealed" matters which should have been disclosed (at p 51). These included:
 - (a) Failure to reveal actual test results.
 - (b) Failure to reveal discrepant [test] values.
 - (c) The suppression of certain experimental data.
 - (d) The misrepresentation of certain test results.
 - (e) The concealment of other [unfavourable to the prosecution] test results.
 - (f) Economical witness statements calculated to obstruct enquiry by the defence.
 - (g) Oral evidence at the trial in which they knowingly placed a false and distorted scientific picture before the jury.

12-38 The forensic scientists had become partisan. This was a breach of their duty, which was to assist in a neutral and impartial way in criminal investigations and of the duty to disclose matters which might help the defence or which are not consistent with the prosecution case. Furthermore:

- (1) With regard to scientific evidence the prosecution is under an ongoing duty to disclose anything that arguably might assist the defence. This is a positive duty obliging the prosecution to make full and proper enquiries of forensic scientists to ascertain if there is discoverable material. The duty does not depend on any request from the defence (at p 52).
- (2) The prosecution were under a duty to disclose any evidence and make available to the defence any witness who could give evidence which "tended either to weaken the prosecution case or strengthen the defence case" (at p 1).

R v Ward has been followed in Hong Kong in *HKSAR v Lau Ngai Chu* (unrep., CACC 228/2001, [2002] HKEC 291), CA; *Wong Tin Lung* (unrep., HCMA 21/1999, [1999] HKLRD (Yrbk) 178) (at p 10) and *HKSAR v Gao Hejia* (unrep., HCMA 779/2002, CFI) and in what should be regarded as the leading Hong Kong case, *HKSAR v Lee Ming Tee* [2004] 1 HKLRD 513 (CFA).

(2) Materiality

12-39 Most prosecutors or courts would have little difficulty in deciding what is or is not material. But, some assistance is given in cases such as *R v Keane* (1994) 99 Cr App R 1 and *R v Mills* [1998] AC 382. In the first of these the Lord Chief Justice in the Court of Appeal adopted a test set down in an unreported case *R v Melvin & Dingle* (1993) by Jowitt J, (at p 6). The test for materiality for disclosure is that which, on a "sensible appraisal by the prosecution" is:

1. relevant or possibly relevant to an issue in the case;
2. raises or possibly raises a new issue the existence of which is not apparent from the evidence the prosecution proposes to use;
3. holds out a real (as opposed to a fanciful) prospect of providing a lead on evidence which goes to (1) or (2).

12-40 In *R v Mills*, the House of Lords held that what was material for disclosure was "... all relevant material which may assist the defence" subject to the exception of Public Interest Immunity (at p 402H). In *R v Maguire*, the court there held that what was disclosable by the forensic scientists was material that might have some bearing on the offence charged and the surrounding circumstances of the case. *R v Keane* has been applied in Hong Kong in *HKSAR v Kwan Chak-sing* (unrep., CACC 457/1997); *HKSAR v Wong Tin Lung* (unrep., MA No 21/99) and *HKSAR v Gao Hejia* (unrep., HCMA 779/2002, CFI). In *HKSAR v Lau Ngai Chu* [2002] HKEC 291, CA; the Court of Appeal followed *Ward* and *Keane* and, after affirming that the passage from *Melvin Dingle* represented the common duty of disclosure, held that CCTV tapes should have been disclosed to the defence where the prosecution "should" have concluded that they were "relevant, or possibly relevant, to an issue in the case or held out a real prospect of providing a lead on evidence going to such an issue" and that the quality of the tapes did not affect the duty of disclosure (at [19]-[20]).

12-41 The test to be applied by an appeal court was discussed in *McInnes v HM Advocate*, 2010 UKSC 28. The Supreme Court considered the circumstances where there was a non-disclosure of police statements of a prosecution witness. Lord Hope noted it is now clearly established that art 6 of the ECHR reflects the well-established principle that material must be disclosed of which the prosecution is aware if it either materially weakens the prosecution case or materially strengthens the Crown's case. But not all breaches of that duty will render the verdict unsafe. The test is whether there is "a real risk of prejudice" to the defence case. Lord Hope explained:

"A trial is not to be taken to have been unfair just because of the non-disclosure. The significance and consequences of the non-disclosure must be assessed. The question at the stage of an appeal is whether, given that there was a failure to disclose having regard to what actually happened at the trial, the trial was nevertheless fair.... The test that should be applied is

whether, taking all the circumstances of the trial into account, there is a real possibility that the jury would have arrived at a different verdict." (at § 20)

"The question which the appeal court must ask itself is whether after taking full account of all the circumstances of the trial, including the non-disclosure in breach of the appellant's Convention right, the jury's verdict should be allowed to stand. That question will be answered in the negative if there was a real possibility of a different outcome - if the jury might reasonably have come to a different view on the issue to which it directed its verdict if the withheld material had been disclosed to the defence." (at §24)

"The significance of any infringement of an accused's article 6(1) Convention rights will depend on the circumstances. Of course, an appellant can always argue that, if his advocate had been armed with statements, it is possible that he could have persuaded the jury to come to a different conclusion. But the law deals in real, not in merely fanciful, possibilities. So, in a case like the present, an appellate court will only hold that a trial has been unfair and quash the jury's verdict as a miscarriage of justice if there is a real possibility that, if the statements had been disclosed, the jury might reasonably have come to a different verdict." (at § 30)

That expresses the law in Scotland, but as Lord Brown observed in the same case, the law in England is the same (§36). This test was adopted in *R v William (Venus Rose)* [2013] EWCA Crim 1262 at §36 and *Taylor (Bonnett) v R* [2013] 1 WLR 1144 at §20, 34, and at §37-40:

"37. When Lord Hope of Craighead DPSC said in the *McInnes* case 2010 SC (UKSC) 28, para 20, that "A trial is not to be taken to have been unfair just because of the non-disclosure" one should regard that as an acknowledgment that a constituent right arising under article 6 (ie the right to have access to relevant material) had not been respected but that it was nevertheless possible to conclude that, overall, the trial had not been unfair".....

39 It is possible to read the test in the *McInnes* case as setting a higher standard than that propounded in *R v Graham*. Requiring an appellant to show that there was a real possibility that the jury would reach a different verdict might be supposed to be more onerous than leaving the court in doubt as to whether the appellant was rightly convicted. But the two tests can be reconciled if one regards the recognition of a real possibility as signifying no more than an acceptance that one is left in doubt as to the safety of the conviction. That is how, I believe, the enunciation of the test in the *McInnes* case should be understood.

40 Moreover, in the *McInnes* case the Supreme Court did not suggest that it was required of the appellant that he should demonstrate that there was a real possibility that the jury would reach a different verdict. What Lord Hope said in para 20 was that the verdict should be deemed unsafe if "there [was] a real possibility that the jury would have arrived at a different verdict". He did not suggest that it was incumbent on the appellant to establish that as a proposition....."

The Court of Appeal in Hong Kong adopted the test in *McInnes v HM Advocate in HKSAR v Ng Chun To Raymond* (unrep., CACC 178/2010, [2013] HKEC 1190), at §§119-122 that it is necessary to take a realistic approach to the question as to whether the disclosure of the statement might have led a jury to arrive at a different conclusion on the material issue.

In *Hall v HKSAR* (2009) 12 HKCFAR 562, where there had been non-disclosure to the defence of relevant material, the focus in an appeal against conviction was not on whether the prosecutor was to be criticised, but rather the effect of non-disclosure on the safety of the conviction.

(3) Disclosure of matters relevant to the credibility of a prosecution witness

There are two common situations where there should be disclosure if the prosecution has material which is likely to be relevant to the credibility of a witness called by them. The first is if the prosecution has a statement made by the witness which is materially inconsistent with another statement made by the same witness and/or with the testimony of the witness (see the discussion at §12-19). The second is where the witness has one or more previous convictions or some other discreditable information in the possession of the prosecution (see *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336). A

CHAPTER 25

FIREARMS AND OFFENSIVE WEAPONS

Vicky Chung

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I. FIREARMS

A. INTRODUCTION

Introduction

"The unlawful possession and use of firearms is generally recognised as a grave source of danger to society. The reasons are obvious. Firearms may be used to take life or cause serious injury. They are used to further the commission of other serious crimes. Often the victims will be those charged with the enforcement of the law or the protection of persons or property. In the conflicts which occur between competing criminal gangs, often related to the supply of drugs, the use and possession of firearms provoke an escalating spiral of violence. Where imitation firearms are involved, the risk of life and limb is absent, but such weapons can be and often are used to frighten and intimidate victims in order to reinforce unlawful demands. Such imitation weapons are often very hard to distinguish from the real thing—for practical purposes, impossible in the circumstances in which they are used—and the victim is usually as much frightened and intimidated as if a genuine firearm had been used. Such victims are often isolated and vulnerable. Sometimes the firearm involved, although genuine, has been disabled from firing, or cannot be fired for want of ammunition. In such cases again the risk to life and limb is absent, but the risk of use to frighten or intimidate remains, and the weapon may be used in earnest on another occasion *per Lord Bingham CJ in R v Avis* [1998] 1 Cr App R 420."

25-1

The Firearms and Ammunition Ordinance (1997) repealed and replaced the Arms and Ammunition Ordinance (1981). Together with its subsidiary legislation, they control the possession, use, etc, of arms, ammunition and imitation firearms in Hong Kong.

B. GENERAL DEFINITIONS AND PRESUMPTIONS

Firearms and Ammunition Ordinance, section 2

In the Firearms and Ammunition Ordinance, unless the context otherwise requires, "arms" means:

25-2

- (a) any firearm;
- (b) an air rifle, air gun or air pistol from which any shot, bullet or missile can be discharged with a muzzle energy greater than two joules;

- (c) any portable device which is designed or adapted to stun or disable a person by means of an electric shock applied either with or without direct contact with that person;
- (d) any gun, pistol or other propelling or releasing instrument from or by which a projectile containing any gas or chemical could be discharged;
- (e) any weapon for the discharge of any noxious liquid, gas, powder or other similar thing (including an aerosol containing any noxious liquid, gas, powder or other similar thing which is not in general trade or domestic use in aerosol form);
- (f) any harpoon or spear gun, however powered;
- (g) any other thing declared by the Chief Executive in Council in regulations made under section 52 to be within the definition of "arms" for the purpose of this Ordinance;
- (h) a component part used or intended to be used for the discharge of a missile from any of the arms coming within the foregoing paragraphs, and any accessory to such arms designed or adapted to diminish the noise or flash caused by firing the same, but does not include—
 - (i) any "cartridge-operated fixing tool" as defined in regulations relating thereto made under the Factories and Industrial Undertakings Ordinance (Cap 59);
 - (ii) any slingshot, catapult, bow or other similar weapon, unless the same is included by virtue of regulations referred to in paragraph (g);

The Firearms and Ammunition (Declaration of Arms) Regulations made under section 52 of the Ordinance declares a crossbow with a draw weight of more than six kilograms to be within the definition of "arms" in the Ordinance.

Inclusionary provisions—section 2(4) and section 2(4A)

- 25-3** An article, which would otherwise be within the definition of "arms", is not to be excluded from that definition by reason only of the fact that it is defective or out of repair nor by the fact it has been modified and adapted so that it is (a) capable of firing but not capable of discharging a shot, bullet, missile or other ammunition; or (b) impracticable to restore it to working order: see section 2(4) and section 2(4A) of the Ordinance.

"A component part used or intended to be used ..."

- 25-4** A component within section 2(1)(h) means a part that operates in conjunction with other parts, so as in combination to make an effective entity. A magazine was held to be an integral part of a rifle and was a component part used, and intended to be used, for the discharge of a missile. The phrase is not to be interpreted too restrictively: *Au-Gen v Chan Ming-tim* [1990] 2 HKLR 690.

"Firearm"

- 25-5** "Firearm" means a lethal barrelled weapon of any description from which any shot, bullet or missile can be discharged.

Whether a weapon is a firearm is a question of fact. Accordingly the reported cases do not establish as a matter of law that a particular type of weapon is a firearm: see *Grace v DPP* [1989] Crim L R 365, DC, where the court declined to treat *Moore v Gooderham* (*post*) as authority for the proposition that all air guns are lethal weapons.

In ruling that a can marked "pepper gas" fell within the meaning of "arms", the Court of First Instance (Deputy High Court Judge Longley) in *HKSAR v Robert A. Pascual* (unrep., HCMA 59/2009, [2009] HKEC 1175) said:

"A court can draw inferences from all the evidence. While the noxious quality of the liquid could be proved by evidence of direct analysis the prosecution could also prove it by inference from all the circumstances."

Bewley v R [2012] 2 Cr App R 27, CA, concerns an Italian Kimar model 85 starting pistol originally designed to fire blank cartridges, and was constructed with a solidly blocked dummy barrel, but part of its barrel had been removed by drilling, leaving a small section of the original blockage through which ran an off-centre hole with a

diameter of approximately 2 mm. The top part of the hammer was broken off. A senior forensic scientist was able to fire the starting pistol when he mounted it in a vice or clamp and loaded it with a specially selected lead pellet of 8.4 mm diameter. He used a mallet and punch to hammer that pellet through the muzzle tightly against the mouth of the hole within the barrel. It was ruled that what the senior forensic scientist did amounted to a process of conversion, and once consideration of any conversion was excluded, the starting pistol had no capacity to discharge any shot, bullet or other missile. The opening words of s 57(1) refer to the capacity of a particular item and not its capacity in combination with other pieces of equipment. As such, the Court ruled that the starting pistol does not fall under the meaning of "firearm" as defined in s 57(1) of the Firearms Act of 1968 (of which the opening words of the provision is the same as the definition of "firearm" in s 2 of the Firearms and Ammunition Ordinance).

"Lethal"

A lethal weapon is one which, when misused, is capable of causing injury from which death may result: *R v Thorpe* 85 Cr App R 107, CA, approving the test laid down in *Moore v Gooderham* [1960] 1 WLR 1308, DC. If it is capable of causing more than trifling and trivial injury, it is capable of causing death if discharged point-blank into a vulnerable part of the body, such as an eye, and whether or not it was designed to cause injury is irrelevant: *Moore v Gooderham*, above.

25-6

"Barrelled"

See *R v Singh* [1989] Crim L R 724, CA, where there was an evidential dispute as to whether a flare launcher was barrelled.

25-7

"from which any ... missile can be discharged"

This phrase includes weapons which, although incapable of being fired, can be adapted or altered to discharge a missile: *R v Freeman*, 54 Cr App R 251, CA (starting pistol which could fire bullets if its barrel were drilled), following *Cafferata v Wilson* [1936] 3 All ER 149, DC.

25-8

To prove that a weapon is a firearm, it is essential to call evidence that it is one from which any missile can be discharged or which can be adapted to discharge any missile: *Grace v DPP*, above, where the conviction was quashed in the absence of evidence that an air rifle had been fired or was capable of being fired. Such evidence need not necessarily come from an expert—it could also come from somebody who had seen the weapon being fired or who was familiar with the weapon and could indicate that it did work and what its observed effect was when fired, *ibid*, although the absence of any evidence as to its firing effect was not fatal to conviction in *Castle (J) v DPP*, *The Times*, 3 April 1998, DC.

"Ammunition"

"Ammunition" means:

- (a) ammunition for the arms coming within paragraphs (a), (b), (c), (d) and (g) of the definition of "arms";
- (b) ammunition containing, or designed or adapted to contain, any noxious liquid, gas, powder or other similar thing coming within paragraph (e) of the definition of "arms";
- (c) grenades, bombs and other like missiles (whether capable of use with arms or not), and fuses, percussion caps and priming caps therefor;
- (d) a "cartridge" as defined in regulations relating to cartridge-operated fixing tools made under the Factories and Industrial Undertakings Ordinance (Cap 59);
- (e) any thing declared by the Chief Executive in Council in regulations made under section 52 to be ammunition for the purposes of this Ordinance;

25-9

- (ea) a shot, bullet, missile or any other part of an article which constitutes ammunition under paragraph (a), (b), (c), (d) or (e);
- (f) any shell case or cartridge case, but does not include—
- (i) a hand-grenade which can be used only for fire-fighting purposes;
- (ii) a shot, bullet, missile, used or empty shell case or cartridge case, or any other part of an article which constitutes ammunition under paragraphs (a), (b), (c), (d) or (e), which is used only as an article of personal, household, or office adornment, unless the same is included by virtue of regulations referred to in paragraph (e).

**Inclusionary Provisions—section 2(3),
section 2(4) and section 2(4A)**

- 25-10** An article, which would otherwise be within the definition of “ammunition”, is not to be excluded from that definition by reason only of the fact that it has been used or it does not for the time being contain any explosive, gas, or chemical: see s 2(3) of the Ordinance. An article, which would otherwise be within the definition of “ammunition”, is not to be excluded from that definition by reason only of the fact that it is defective or out of repair: see s 2(4) of the Ordinance. Similarly, an article which would otherwise be within the definition of “ammunition”, is not to be excluded from that definition by reason only of the fact that it has been modified and adapted so that it is impractical to restore it to working order: see s 2(4A) of the Ordinance.

“imitation firearm”

- 25-11** “Imitation firearm” is defined in the Ordinance as any thing which has:
- (a) the appearance of being a firearm, but which is not within the definition of “firearm”;
- (b) the appearance of being an air rifle, air gun or air pistol but which is not within paragraph (b) of the definition of “arms”;
- (c) the appearance of being a grenade, but which is not within the definition of “ammunition”.

The jury should be directed that they should consider whether the article had the appearance of being a firearm, an air rifle, etc, when the accused committed the relevant offence. In considering whether or not the article had such an appearance at that time, the jury are entitled to have regard to the evidence of any witnesses who actually saw the article at that time, together with their own observation of the thing itself (if it is available). The jury are not concerned with what the article looks like at any other time: see *R v Morris and King* 79 Cr App R 104, CA. In that case, two metal pipes bound together with tape and carried by a robber under his clothing so as to make them look like the barrel of a shotgun were held to be an imitation firearm.

“air gun”

- 25-12** “Air gun” includes a gun which uses a compressed gas or compressed gases as a propellant.

The word “includes” in the definition extends the meaning of the term beyond weapons where the propulsion is caused by, or derived from, the use of air.

“air pistol”

- 25-13** “Air pistol” includes a pistol which uses a compressed gas or compressed gases as a propellant.

The word “includes” in the definition extends the meaning of the term beyond weapons where the propulsion is caused by, or derived from, the use of air.

“air rifle”

“Air rifle” includes a rifle which uses a compressed gas or compressed gases as a propellant. **25-14**

The word “includes” in the definition extends the meaning of the term beyond weapons where the propulsion is caused by, or derived from, the use of air.

“Commissioner”

“Commissioner” means the Commissioner of Police and, in relation to any particular power, function or duty of the Commissioner under this Ordinance, means a person having authority pursuant to s 50 to exercise or perform it. **25-15**

“licence”

“Licence” means a dealer’s licence or a licence for possession. **25-16**

“licence for possession”

“Licence for possession” means, subject to s 2(4C), a licence granted under s 27(2) or 30(1)(a) or (b). **25-17**

“dealer’s licence”

“Dealer’s licence” means, subject to s 2(4C), a licence granted under s 27(3) or 30(1)(b). **25-18**

“deal in”

“Deal in” means: (a) to manufacture, store, sell, let on hire, part with possession of, supply, import, export, procure, purchase, take on hire, take possession of, transport, repair, test, prove or offer to do any of the foregoing; (b) to expose for sale or hire, or to have possession for storage, sale, hire, supply, transport, repairing, testing or proving. **25-19**

Presumptions, section 24

20.—(1) Subject to subsections (2) and (3), any person who is in possession of an imitation firearm commits an offence and is liable to imprisonment for 2 years. **25-20**

(2) Any person who, within 10 years of being convicted of an offence specified in the Schedule or of an offence under this Ordinance, commits an offence under subsection (1) is liable to imprisonment for 7 years.

(3) A person does not commit an offence under subsection (1) if he satisfies the magistrate that—

- (a) at the relevant time he was under the age of 15; or
- (b) he was in possession of the imitation firearm in his capacity as a person who deals in imitation firearms by way of trade or business, or as a servant of such a person carrying out his bona fide and lawful instructions; or
- (c) he was not in possession of the imitation firearm for a purpose dangerous to the public peace, or of committing an offence, or in circumstances likely to lead to—
- (i) the commission of an offence; or
- (ii) the possession of the imitation firearm for a purpose dangerous to the public peace, by himself or any other person.

HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574. The principal issue in this appeal is whether s 20(3)(c), by placing an onus on a defendant, is consistent with the presumption of innocence (which is protected by art 87(2) of Basic Law and art 11(1) of the Hong Kong Bill of Rights (“BOR”) implementing art 14(2) of the International Covenant on Civil and Political Rights (“ICCPR”), as applied by art 39 of the Basic Law) and with the right to a fair trial (which is protected by art 87(2) of the Basic Law and art 10 of the BOR (art 14.1 of the ICCPR) as applied by art 39 of the Basic Law).

Section 20(1) of the Ordinance provides that a person who is in possession of an imitation firearm commits an offence punishable with imprisonment; yet s 20(3) goes on to provide that he does not commit an offence if he satisfies the court of one or more of the matters stated in the sub-section. Relying on s 20(3), the prosecution had led evidence to prove that the respondents were in possession of the imitation firearm for any of the purposes listed in s 20(3) (c).

The Court of Appeal (Stuart-Moore VP, Stock JA and Burrell J) resolved this issue by holding that there was inconsistency with the presumption of innocence and the right to a fair trial, so that s 20(1) when read with s 20(3) (c) was invalid and quashed their convictions. The prosecution appealed.

The Court of Final Appeal (Sir Anthony Mason NPJ) in allowing the appeals, quashing the convictions and remitting the matters to the Court of Appeal to consider whether the proviso to s 83(1) of the Criminal Procedure Ordinance should be applied declared that: s 20(1), in conjunction with s 20(3) (c), should be read and given effect as imposing on the defendant an “evidential burden” only as apposed to a “legal” or “persuasive” burden of proof. Earlier on in the judgment the Court of Final Appeal had stated:

“A reverse onus, which places an onus on the defendant to prove all or any of the elements of the offence, appears to be inconsistent with the presumption of innocence because it allows the defendant to be convicted on failing to discharge the reverse onus, even though the prosecution fails to prove all the elements of the offence beyond reasonable doubt. In the cases on reverse onus, a distinction has been drawn between the ‘legal’ or ‘persuasive’ burden of proof and what has been called the ‘evidential’ burden. The distinction is important because an evidential burden (which is not, strictly speaking, a burden of proof) is generally regarded as consistent with the presumption of innocence (*Tse Mui Chun v HKSAR* (2003) 6 HKCFAR 601, [2004] HKLRD 351 per Bokhary PJ and Lord Scott of Foscote NPJ; *R v Lambert* [2002] 2 AC 545 at 563G, per Lord Slynn of Hadley; 572D per Lord Steyn and 589B, per Lord Hope of Craighead; but cf. *Downey v The Queen* (1992) 90 DLR (4th) 449”).

24.—(1) Any person who is proved to have had in his physical possession—

- (a) anything containing arms or ammunition, or both;
- (b) the keys of any baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar containers containing arms or ammunition, or both, shall, until the contrary is proved, be presumed to have had the arms or ammunition, or both, as the case may be, in his possession.

(2) Any person who is proved or presumed to have had arms or ammunition, or both, in his possession shall, until the contrary is proved, be presumed to have known the nature of such arms or ammunition, or both, as the case may be.

(3) The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the arms or ammunition, or both, as the case may be. (Replaced 14 of 2000 section 12)

The wording of this section closely follows that of s 47 of the Dangerous Drugs Ordinance (Cap 134). It is submitted that the cases in relation to section 47 of the Dangerous Drugs Ordinance are relevant to the interpretation of this section. *Chou Shih Bin v HKSAR* [2005] 1 HKLRD 838. A Taiwanese Businessman was found to have an anti-riot handgun in a bag he presented for security screening prior to boarding a flight at Chek Lap Kok airport. In convicting the defendant of an offence contrary to s 13 of the Firearm and Ammunition Ordinance, the District Court judge relied on section 24 of the Ordinance. The Court of Final Appeal (per Bokhary PJ) in allowing the appeal on the “substantial and grave injustice ground” made references to s 24. Even though references to s 24 were *obita dicta*, this judgment should also now be read together with the more recent judgment of *HKSAR v Lam Kwong Wai* (unrep., CACC 213/2003, [2007] HKEC 960).

“Section 24 is a reverse-onus provision. Such a provision evokes consideration of the right to a fair trial and the presumption of innocence constitutionally guaranteed by arts 10 and 11 of the Bill of Rights as entrenched by art 39 of the Basic Law. In *Attorney General v Lee*

Kwongkeut [1993] AC 951 at p 972F–G the Privy Council spoke of what would ‘often be all that is required’ when a reverse-onus provision is under constitutional challenge. As to this it was there said that ‘[t]he court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like’. Where a reverse-onus provision goes so far as to presume the very gravamen of the offence, its construction and constitutionality will come under very close scrutiny”.

“In *Tse Mui Chun v HKSAR* (2003) 6 HKCFAR 601 we cited the decision of the House of Lords in *R v Lambert* [2002] 2 AC 545 and that of the Supreme Court of Canada in *Downey v R* (1992) 72 CCC (3d) 1. We said (at pp 618J–619A) that [a] shifting of the evidential burden only may be safe from a constitutional challenge even where a shifting of the legal burden itself would be vulnerable to such a challenge”.

In *HKSAR v Mohammed Khan Shamin* [2013] 3 HKLRD 469, both respondent and appellant agreed that an evidential burden shall be imposed on a defendant, even though clearly, s 24(2) of the Ordinance operates to impose a persuasive burden on a defendant. Accordingly, s 24(2) of the Ordinance derogates from the presumption of innocence, and while the imposition of this burden satisfies the rationality test to protect the public, given the serious nature of the crime in possession of firearms; it does not satisfy the proportionality test. However, the imposition of an evidential onus on a defendant would be sufficient to satisfy societal interests without derogating from the presumption of innocence. The court further stated that “the court has the power and obligation to adopt a ‘remedial interpretation of a legislative provision which will, so far as it is possible make it Basic Law-consistent.’ We are satisfied that can be done by construing s 24(2) of the Ordinance as imposing an evidential burden only on a defendant”.

Evidence of muzzle energy of air weapons, section 26

26.—(1) A document which purports to be signed by a person authorized by the Commissioner and to certify that an air rifle, air gun or air pistol specified therein was—

- (a) at a time or times specified therein tested as to the muzzle energy with which a shot, bullet or other missile could be discharged therefrom; and
- (b) found at the said time or times to be able to discharge the shot, bullet or other missile specified therein from the said air rifle, air gun or air pistol with a muzzle energy measuring the number of joules specified therein,

shall be admissible in evidence in any proceedings for an offence under this Part (note: Part III of the Ordinance) on its production before a court without further proof.

(2) On the production of a document under subsection (1)—

- (a) the court before which the document is produced shall, until the contrary is proved, presume that—
 - (i) the signature to the document is genuine;
 - (ii) the person who signed it was duly authorized to sign at the time he signed it; and
- (b) such document shall be *prima facie* evidence of the matters contained therein.

C. FIREARMS AND AMMUNITION ORDINANCE, SECTIONS 13 AND 14

Possession of arms or ammunition without licence

13.—(1) No person shall have in his possession any arms or ammunition unless (a) he holds a licence for possession of such arms or ammunition or a dealer’s licence therefor.

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction upon indictment to a fine of \$100,000 and to imprisonment for 14 years.

STATEMENT OF OFFENCE

Possession of arms [or: ammunition] [or: arms and ammunition] without a licence, contrary to section 13(1) and (2) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

A B, on the ___ day of ___, 20___, at ___, in Hong Kong, had in his possession arms [or: ammunition] [or: arms and ammunition] namely, ___, without a licence.

The nature of the offence

- 25-23** It has been held at first instance that section 13(1), when read in conjunction with s 94A of the Criminal Procedure Ordinance (Cap 221), does not create a presumption as to an essential element of the offence. The absence of a requisite licence is therefore not an ingredient that the prosecution has to prove. The words "unless he holds a licence for possession of such arms and ammunition or a dealer's licence therefor" in s 13(1)(a) creates an exception to the offence which is a defence that a defendant can avail himself of if he wishes: *R v Lau Ting-man* (1991) 1 HKPLR 249 and *R v So Sai-fong* (1992) 2 HKPLR 695.

Possession

- 25-24** Where possession of an article has the consequence of subjecting the possessor to a penalty under the criminal law, the concept of possession must include the element of knowledge: *R v Tsang Kwok-wing* [1989] 1 HKLR 270. Possession is a matter of intention—intention to exercise control over something: *R v Lee Man Kit* (unrep., HCMA 392/1989, [1989] HKLY 261). It is submitted that "possession" in the Firearms and Ammunition Ordinance should be given its ordinary meaning. A person has possession of an object if he knowingly has it in his physical and actual custody or otherwise within his physical control, and intends to have custody of it or to exercise control over it as and when occasion requires. Physical custody means the object is on or about the individual's person. If a person is carrying an article in his hand or in a pocket of his clothing, he has it in his possession if: (a) he knows it is there; (b) he intends it to be there; (c) he is aware of its nature; and (d) he intends to exercise control over the object as and when required. A person has physical control of an article, if he knowingly has the ability, as and when occasion requires, to use it to the exclusion of other people or to keep it safe or away from other people and intends so to use or keep it. So, the second way in which a person has possession of an article does not require him to be in physical contact with it, nor indeed within view of it. In this second way a person has possession of an article if: (a) he has control of the article in the sense described; (b) he knows he has control of the article; (c) he knows the nature of the article; and (d) he intends to exercise control over the article as and when required: see *HKSAR v Ng Ning-fu* (unrep., CACC 418/1998, [1999] HKEC 981).

Section 2(2)(a) of the Ordinance provides that for the purposes of ss 13, 15 and 24, a person is in possession of arms or ammunition or of any of the things or article mentioned in s 24 if they are actually in his possession or under his control or are held by some other person subject to his control or instructions or for him or on his behalf.

An article may be possessed by more than one person at the same time. Mere presence in the company of an article is not of itself possession of it: *R v Lee Man Kit* (unrep., HCMA 392/1989, [1989] HKLY 261).

Presumption

- 25-25** See above.

Construction of licence

- 25-26** The construction of a licence is a matter of law, not fact and thus must be determined by a judge and not a jury: *R v Paul* [1999] Crim L R 79, CA.

For the meaning of "arms" and "ammunition", see above.

Sentencing

- 25-27** This offence is of utmost gravity. Hong Kong's firearms sentencing policy has been designed for many years to act as a strong deterrent to those with no right to have such weapons. The authorities suggest that a 12 year sentence starting point would be

appropriate where a conventional firearm is involved: see *HKSAR v Chan Hoi Ngam* (unrep., CACC 234/1999, [2000] HKEC 78). The Court of Appeal in *R v Ho Chun* [1992] 1 HKCLR 86, in the light of the number of armed robberies which were then taking place, encouraged an upward revision of the previous firearms guideline case which had set "at least six years" as the appropriate sentence for a plea of guilty to the possession of arms and ammunition. The court indicated that it would be unlikely to interfere with a sentence of "at least eight years" in such cases. In *R v Ng Chun Keung* (unrep., CACC 121/93, [1993] HKLY 409), the Court of Appeal said what was said in *R v Ho Chun*, relates to possession of a firearm without ammunition. Possession of a loaded firearm would attract a heavier sentence. Likewise would the possession of both an unloaded firearm and ammunition call for a more severe sentence than possession of an unloaded firearm alone. Having said that, there are cases where a judge may take a starting point lower than 12 years for this offence. The cases which come before the courts vary enormously. At the lower end of the scale, for example, a person may find himself charged with precisely this offence where he has collected an item which is incapable of discharging any ammunition and is in possession merely as a collector of such items.

The appropriate level of sentence for a firearms offence, as for any other offence, will depend on all the facts and circumstances relevant to the offence and the offender. Some of the factors a court may consider relevant are: (1) what sort of weapon is involved? Genuine weapons are more dangerous than imitations. Loaded firearms are more dangerous than unloaded firearms. Unloaded firearms for which ammunition is available are more dangerous than those for which none is available. Possession of a firearm which has no lawful use (such as a sawn-off shot gun) is more serious than possessing a firearm capable of lawful use; (2) what use (if any) was made of the firearm? The more prolonged, premeditated and violent the use, the more serious the offence is likely to be; (3) with what intention (if any) did the defendant possess or use the firearm? Generally speaking, the most serious offences under the Ordinance are those requiring proof of a specific criminal intent. The more serious the act intended, the more serious the offence; (4) what is the defendant's record? The seriousness of any firearms offence is increased if there is an established record of committing such offences or crimes of violence: *R v Avis* [1998] 1 Cr App R 420.

For some local decisions on quantum of sentence, see *KSAR v Yau Siu-kai* (unrep., CACC 148/2000, [2000] 1 HKLRD B2), and the decisions referred to therein. On sentencing decisions involving stun guns, see *R v Lai Chi Fai* (unrep., 480/1995, [1996] HKLY 570) (where a four year starting point was adopted); *R v Cheng Yu Cheung* (unrep., CACC 57/1995, [1995] HKLY 470); *R v Wong Chuen Pong* (unrep., CACC 579 of 1996); *HKSAR v Yung Ting Chun* (unrep., CACC 164/1999) and *HKSAR v Wong Wing Wong* (unrep., CACC 214/2002). On whether a case is of the worst of its type, see *R v Ho Sze Ching* (unrep., Cr App 588 of 1996) and *HKSAR v Li Hung Kwan* [2003] 1 HKLRD 204 in which the Court of Appeal had regard to the purpose for which the stun gun was possessed (no evidence of illegal purpose) and took 20 months' imprisonment as a starting point. Possession of ammunition is usually less serious than possession of arms and there is no sentencing guideline for simple possession of ammunition: see *R v Man Hung Pui* [1993] HKLY 408 in which a four-year starting point was considered appropriate for possessing six rounds of live 7.62 mm calibre ammunition seized from the defendant's residence.

In *HKSAR v Kwai Ping Hung* (unrep., CACC 73 of 2005; CACC 219/2005 and Ng Chun Keung CACC 295 of 2005 [2007] HKEC 173), the three appeals were heard together. The two defendants were re-tried separately. In the first trial the defendant Kwai was convicted of three offences, two of which related to the Firearms and Ammunition Ordinance. The jury was unable to reach a verdict on 2 counts. He was sentenced to a total of 17 years' imprisonment. In the retrial of the two remaining charges the defendant Kwai was acquitted of attempted murder but convicted of the alternative count of using arms with intent to resist arrest contrary to section 17(b) of the Offences against a Person Ordinance (Cap 212). He was sentenced to 18 years' imprisonment of which seven years were ordered to run consecutively to the 17 years imposed after the

first trial. The Court of Appeal varied the sentences to the extent of imposing a total of 17 years' imprisonment essentially on the basis that the trial judge was wrong in making some of the sentences consecutive but did not criticise the judge overall in his approach in relation to the very serious nature of these offences.

The defendant Ng did not appeal against his sentence of 10 years' imprisonment in relation to a sections 13(1) and (2) of the Firearms and Ammunition Ordinance. In *HKSAR v Chau Lap Pui* (unrep., CACC 358/2006, [2007] HKEC 307), the defendant pleaded guilty in the District Court to three charges; the first charge related to his possession of a bottle of pepper spray without a licence contrary to section 13 of the Firearms and Ammunition Ordinance. A scientific examination of the bottle's contents established that the bottle contained CS gas. The doctor who conducted the examination found that "on pressing the operating button of the canister, the nozzle of the bottle can discharge a light yellow liquid containing 'CS' which is a potent eye, throat and skin irritant. 'CS' is an active lachrymatory ingredient in some chemical protection sprays". The other two charges were not related to the first charge. The defendant was sentenced to a total of 3 years' imprisonment. In the first charge the deputy District Court judge took a starting point of 30 months and reduced to 20 months for the guilty plea. After referring to a number of cases, it was argued before the Court of Appeal (Stuart-Moore VP and Lunn J) that there were no guidelines for sentence in such cases. The CA stated "We consider, in the light of everything we have heard, that a starting point of 6 months would be appropriate in the present case, reduced to 4 months for the guilty plea". An overall sentence of 32 months was substituted.

In *HKSAR v Chan Ching Man* (unrep., CACC 48/2007, [2007] HKEC 2246) the defendant pleaded guilty to a number of charges including one of possession of an imitation firearm, an air pistol (contrary to section 17(2) of the Firearms and Ammunition Ordinance) and was sentenced to six years of imprisonment on the firearm charge. The defendant together with another person entered a jewelry shop and stole an expensive Rolex watch. As he attempted to escape a number of employees tried to stop the defendant, at which point he produced the imitation firearm. The defendant aged 18 at the time of the offences had a number of previous convictions. His appeal against sentence was dismissed by the Court of Appeal (Ma CJHC and McMahon J).

In *HKSAR v Wong Chun Yim* (unrep., CACC 185/2007), the Chinese Division of the Court of Appeal (Tang VP, Cheung and Yuen JJA) cited with approval the case of *HKSAR v Chan Chi Fun* [2006] 1 HKLRD 128 (Woo V-P and Yuen JA) in which the Court of Appeal reviewed a number of decided cases. In *HKSAR v Wong Chun Yim* the Court of Appeal (*per* Cheung JA) said "The basis for sentencing in respect of this type of offence is abundantly clear. The level of sentence depends on the court's assessment of the potential risk posed by the arms and ammunition in the defendant's possession, taking into account the circumstances of the case and the defendant's background, and the possibility of the arms and ammunition in question being used. If the defendant had the arms on his body or carried the arms and they were loaded with live ammunition, and the arms had been used, then the starting point upon conviction after trial should be twelve years' imprisonment ...". However, based on the facts of the case the Court of Appeal reduced the original sentence of three years' imprisonment to an immediate release the defendant having served about nine months' imprisonment.

In *Secretary for Justice v Yan Shen* [2012] 3 HKLRD 652, the Defendant pleaded guilty to possession of arms without a license, contrary to section 13 of the Firearms and Ammunition Ordinance. The Defendant had a pistol with an empty magazine with him in his backpack during a routine screening in the departure area of the Chek Lap Kok Airport. The Defendant explained that he had been given the gun in lieu of rent 20 years ago in the USA, brought it with him when he moved to Hong Kong in 2002, subsequently kept the pistol in a safe except when moving residence, and had never used it. On the day concerned, he had carried the pistol home earlier, but had forgotten to transfer the gun to his safe, as he had intended to do. The Defendant was a highly successful senior banker of impeccable character and reputation. Reports from a psychologist and a psychiatrist stated that the Defendant had a dependent personality disorder with adjustment difficulties and anxiety, but posed no danger to the public.

The Defendant was ordered to perform 240 hours of community service, while also continuing to undergo outpatient psychological treatment and a fine of \$50,000. The Secretary of Justice's application to review the sentence was dismissed. It was noted, however, the application would have been allowed, but for post-sentence factors, and the appropriate sentence in this case after plea should have been one in the region of 18 months' imprisonment.

Dealing in arms or ammunition without licence

14.—(1) No person shall by way of trade or business deal in any arms or ammunition unless he holds a dealer's licence authorising him to do so. 25-28

(2) A person who contravenes subsection (1) commits an offence and is liable on conviction upon indictment to a fine of \$100,000 and to imprisonment for 10 years.

For the meaning of "arms", "ammunition" and "deal in", see above.

STATEMENT OF OFFENCE

Dealing in arms [or: ammunition] [or: arms and ammunition] without a licence, contrary to section 14(1) and (2) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

AB, on the day of ____, 20__, at ____, in Hong Kong, by way of trade or business, dealt in arms [or: ammunition] [or: arms and ammunition] without a dealer's licence authorising him to do so, namely manufacturing [or: the appropriate word or phrase in the definition of 'deal in' in section 2(1) of the Firearms and Ammunition Ordinance] _____.

Maximum sentence

When the Firearms and Ammunition Ordinance was amended by Ordinance No 59 of 1984, a number of sections which provided for the punishment for particular offences were amended by increasing the sentences a court can impose. For example, the maximum punishment for possession of firearms and ammunitions without a licence went up from 10 to 14 years; the maximum sentence for possession of arms and ammunition with intent to endanger life went up from 14 years to life imprisonment and the maximum punishment for converting an imitation firearm into a firearm went up from 5 to 14 years. However, the sentence for dealing in arms and ammunition without a dealer's licence remained at the maximum of 10 years and a fine of HK\$100,000. When one has regard to the fact that dealing in arms and ammunition, includes their manufacture, it may be that the legislature does not appreciate the seriousness of that aspect of "dealing in" arms and ammunition: see *R v Lee Wing Fu* [1987] HKEC 187, CA. 25-29

D. EXEMPTIONS TO SECTIONS 13 AND 14

Offences created by sections 13 and 14 do not apply to certain descriptions or classes of persons. These exemptions are set out in sections 3 to 12B in Part II of the Ordinance. They are as follows. 25-30

Possession on behalf of the Government, etc

3.—Sections 13 and 14 do not apply to the possession of, or dealing in, arms or ammunition by any person— 25-31

- (a) on behalf of Her Majesty's Government, including possession by an officer or member of any of Her Majesty's Forces who is in possession of or deals in the arms or ammunition in his capacity as such; or
- (b) on behalf of the Government of Hong Kong, including possession by an officer or member of any of the following in his capacity as such— (Amended 78 of 1999 s 7)
 - (i) (Repealed 20 of 1997 s 25)
 - (ii) the Government Flying Service; (Amended 54 of 1992 s 19)
 - (iii) the Hong Kong Police Force; (Amended LN 362 of 1997)
 - (iv) the Hong Kong Auxiliary Police Force; (Amended LN 362 of 1997)

- (v) the Customs and Excise Service;
- (vi) the Correctional Services Department; (Amended LN 30 of 1982)
- (vii) the Independent Commission Against Corruption; (Amended 14 of 2000 s 3)
- (viii) the Agriculture, Fisheries and Conservation Department. (Added 14 of 2000 s 3 Amended 23 of 2002 s 125)

Section 3(1)(a) of the Ordinance is to be construed in accordance with sections 2A(1) and 2A(2)(c) of the Interpretation and General Clauses Ordinance (Cap 1) as referring to the Central People's Government of the People's Republic of China and the military forces stationed by her in Hong Kong.

Possession by exempted person

25-32

4.—(1) Section 13 does not apply to the possession of arms or ammunition by a person who is in possession thereof under and in accordance with an exemption granted by the Chief Executive under subsection (2) or by the Commissioner under subsection (3). (Amended 13 of 1999 s 3)

(2) The Chief Executive may by notice in the Gazette exempt any person or class or description of persons from the prohibition in section 13 either generally or to such limited extent as he may specify, and may at any time by notice in the Gazette vary or revoke the exemption. (Amended 13 of 1999 s 3)

(3) The Commissioner may in writing—

- (a) exempt any person from the prohibition in section 13 in respect of the possession of specified arms and any specified quantity of ammunition therefor, or in respect of specified ammunition, or in respect of specified arms and ammunition;
- (b) grant such exemption for an indefinite or for a specified period and on such terms and conditions as he thinks fit;
- (c) at any time, by notice in writing, vary or revoke the exemption; and
- (d) waive payment of any fee prescribed in respect of an exemption under this subsection.

Possession for the protection of life or property on vessels

25-33

5.—(1) Section 13 does not apply to the possession of arms or ammunition by the owner or person in charge of a vessel, or by a person who is authorized by the owner or person in charge of a vessel to have such possession, if the arms or ammunition—

- (a) are carried on a vessel, other than a specified vessel; and
- (b) are part of the equipment reasonably required to be carried on such vessel for the protection of life or property; and
- (c) remain at all times on the vessel while it is in Hong Kong.

(2) In subsection (1)—

"vessel" (...) means—

- (a) any ship, junk, boat, dynamically supported craft, seaplane, or other description of vessel used in navigation;
- (b) any other description of vessel in the waters of Hong Kong not used in navigation or not constructed or adapted for use in navigation; and

"specified vessel" (...) means—

- (a) any vessel regularly employed in trading or going within river trade limits (as defined in the Shipping and Port Control Ordinance (Cap 313));
- (b) any vessel employed in sea fishing;
- (c) any vessel used for pleasure purposes;
- (d) any other description of vessel, whether self-propelled or not, used in navigation solely within the waters of Hong Kong;
- (e) any other description of vessel in the waters of Hong Kong not used in navigation or not constructed or adapted for use in navigation;
- (f) any other vessel or description of vessel which the Chief Executive may declare by notice in the Gazette to be a specified vessel,

whether the vessel is provided with a certificate of registry or a certificate of provisional registry granted under the Merchant Shipping (Registration) Ordinance (Cap 415), or with any document granted in a place outside Hong Kong and similar or equivalent in effect to any such certificate. (Replaced 13 of 1999 section 3)

Possession of arms or ammunition carried on aircraft

25-34

6. Sections 13 and 14 do not apply to possession, storage, importation, exportation or transport of arms or ammunition by the owner or person in charge of an aircraft, or by a person who

is authorized by the owner or person in charge of an aircraft to possess, store, import, export or transport arms or ammunition, if the arms or ammunition— (Amended 14 of 2000 s 4)

- (a) are part of the equipment reasonably required to be carried on such aircraft for the protection of life or property or are carried on behalf of a passenger on the aircraft; and
- (b) are committed to the custody of a member of the Customs and Excise Service while the aircraft is in Hong Kong; and
- (c) are only in the possession of the said owner or other person at any time when such possession is necessary—
 - (i) before delivery of the arms or ammunition to, or after their collection from, a member of the Customs and Excise Service; or (Amended 14 of 2000 s 4)
 - (ii) because it is not practicable to comply with paragraph (b) by reason of the short duration of the aircraft's presence in Hong Kong.

Possession on ship or aircraft of foreign state

7.—(1) Section 13 does not apply to the possession of arms or ammunition by any person who is authorized to have such possession by the appropriate authority having jurisdiction on any ship of war or military aircraft of a foreign state if the arms or ammunition remain at all times on the ship or aircraft while it is in Hong Kong.

25-35

(2) A certificate under the hand of the Chief Secretary for Administration shall be conclusive proof that a ship or aircraft is or is not one to which subsection (1) applies. (Amended LN 362 of 1997)

Possession of arms and ammunition in transit

8.—(1) Sections 13 and 14 do not apply to the possession of or dealing in arms or ammunition by a person whose possession or dealing is limited to arms or ammunition— (Amended 14 of 2000 s 5)

25-36

(a) which are brought into Hong Kong only in the course of being transported as cargo to some other place; and

(b) which are—

- (i) recorded as cargo in the manifest of the vessel or aircraft on board which they are brought into Hong Kong and remain on board such vessel or aircraft at all times while it is in Hong Kong;
- (ii) in the case of a vessel, are part of the personal baggage of a passenger and remain on board such vessel in a securely locked cabin or container at all times while it is in Hong Kong.

(2) Sections 13 and 14 do not apply to the possession of or dealing in arms or ammunition by a person whose possession or dealing is limited to arms or ammunition—

(a) which are brought into Hong Kong on board—

(i) a vessel to be transported as cargo to some other place in another vessel or aircraft; or

(ii) an aircraft to be transported as cargo to some other place in a vessel, if—

- (A) the arms or ammunition are recorded as cargo in the manifest of the vessel or aircraft in which they are brought into Hong Kong and the manifest of the vessel or aircraft in which they are transported out of Hong Kong; and
- (B) the arms or ammunition remain on board either the vessel or aircraft in which they are brought into Hong Kong or the vessel or aircraft in which they are to be transported out of Hong Kong, at all times, except during the transfer to that vessel or aircraft, while the arms or ammunition are in Hong Kong; and the Commissioner is given notice before the arms or ammunition are transferred to the vessel or aircraft in which they are to be transported out of Hong Kong, of the particulars of the arms or ammunition and the date, time and place of arrival in Hong Kong of the vessel or aircraft in which they are brought into Hong Kong and the date, time and place of departure from Hong Kong of the vessel or aircraft in which they are to be transported out of Hong Kong; or

(b) which are brought into Hong Kong on board an aircraft ("the first aircraft") to be transported as cargo to some other place in another aircraft ("the second aircraft"), if—

(i) the arms or ammunition are recorded as cargo in the manifest of the first aircraft and the manifest of the second aircraft; and

(ii) the arms or ammunition—

- (A) remain on board either the first aircraft or the second aircraft, at all times, except during the transfer to the second aircraft, while the arms or ammunition are in Hong Kong; or

- (B) are transferred from the first aircraft to a place of storage designated for the purpose by the Commissioner of Customs and Excise in the restricted area, within the meaning of section 2 of the Aviation Security Ordinance (Cap 494), and remain there until they are transferred to the second aircraft to be transported out of Hong Kong. (Added 14 of 2000 section 5)

Possession for purposes of export

25-37

9. Sections 13 and 14 do not apply to the possession, storage or transport of arms or ammunition by a person if that person—

- (a) has received them by delivery from a licensed dealer in the ordinary course of business, or from some other person authorized to have possession of them, and has done so as the carrier, or the agent or employee of the carrier, on whose aircraft, vessel, train or vehicle the arms or ammunition are to be exported from Hong Kong; or
- (b) is in possession of arms or ammunition after they have been delivered as described in paragraph (a) and—
 - (i) ensures that the arms or ammunition are recorded in the manifest of the aircraft, vessel, train or vehicle on which they are to be so exported; and
 - (ii) ensures that prior to their being placed on such aircraft, vessel, train or vehicle, they are kept in a manner and place approved by the Commissioner, on such terms and conditions as the Commissioner thinks fit; and
 - (iii) does not cause any avoidable delay in their being placed on such aircraft, vessel, train or vehicle; and
 - (iv) after they have been so placed, does not remove them from the aircraft, vessel, train or vehicle at any time while it is in Hong Kong or take possession after they have been so removed by some other person.

Possession by carriers, their agents or employees

25-38

9A. Sections 13 and 14 do not apply to the possession or transport of arms or ammunition by a carrier or an agent or employee of a carrier if the possession or transport is in the presence of the licensee of the arms or ammunition concerned or the approved agent of that licensee and the arms or ammunition was received in the ordinary course of business by the carrier or the agent or employee of the carrier from that licensee or approved agent. (Added 14 of 2000 s 6)

Possession of cartridges for fixing tools

25-39

10. Sections 13 and 14 do not apply to the possession of, or dealing in, any cartridge mentioned in paragraph (d) of the definition of "ammunition" in section 2 by any person if that person is in possession thereof—

- (a) as a dealer in such cartridges or as a servant of a dealer carrying out the bona fide and lawful instructions of the dealer; or
- (b) in connexion with the bona fide use of the cartridge for work in conjunction with a "cartridge-operated fixing tool" as defined in regulations made under the Factories and Industrial Undertakings Ordinance (Cap 59).

Possession by corporations, associations of persons, and members thereof

25-40

11.—(1) Section 13 does not apply to the possession of arms or ammunition by a corporation if a responsible officer of the corporation holds a licence for possession which is expressed to be held on behalf of the corporation and if he and the corporation respectively comply with such of the terms and conditions of that licence as are applicable to him and it.

(2) Section 13 does not apply to the possession of arms and ammunition by any person if—

- (a) he is in possession as a member of a shooting club which owns the arms or ammunition; (Amended 14 of 2000 section 7)
- (aa) he—
 - (i) holds a licence for possession of arms or ammunition of the same type, class or description as the arms or ammunition he is in possession of as a member of the shooting club; or
 - (ii) has successfully completed a prescribed course of instruction under the supervision of an authorized arms instructor in the use and handling of arms or ammunition of the same type, class or description he is in possession of as a member of the shooting club; (Added 14 of 2000 section 7)
- (b) (Repealed 14 of 2000 section 7)
- (c) a responsible officer of the shooting club holds a licence for possession which is expressed to be held on behalf of the shooting club; (Amended 14 of 2000 section 7)
- (ca) he reasonably believes that the terms and conditions of the licence referred to in paragraph (c) are complied with; and (Added 14 of 2000 section 7)

(d) the possession is only—

- (i) for the purposes of recreation, sport or competition at a shooting range; or
- (ii) for storage in an armoury, or for repair, testing or proving of the arms or ammunition at a shooting range. (Replaced 14 of 2000 section 7)

(3) In this section—

"prescribed course of instruction" (...) means a course the contents and extent of which have been determined by the Commissioner under section 52(1)(a)(iib). (Added 14 of 2000 s 7)

Possession for purposes of instruction

12.—(1) Section 13 does not apply to the possession by any person of arms or ammunition belonging to a licensee who holds a licence for possession of those arms or ammunition if— (Amended 14 of 2000 s 8)

25-41

- (a) such person has possession for the purpose of being instructed in the use and handling of arms and ammunition; (Amended 14 of 2000 section 8)
- (b) the instruction takes place on premises or at a place approved by the Commissioner;
- (c) such person, while in possession, remains at all times under the supervision of the licensee or his approved agent, who is an authorized arms instructor authorized for that particular type, class or description of arms or ammunition; and (Amended 14 of 2000 section 8)
- (d) such person is aged 15 years or over.

(2) The Commissioner may, upon the application of—

- (a) a licensee; or
- (b) the approved agent of a licensee,

authorize in writing the applicant to instruct other persons in the use and handling of arms and ammunition of a type, class or description specified by the Commissioner in relation to the authorization. (Added 14 of 2000 s 8)

(3) The Commissioner may specify the period for which an authorization is given under subsection (2). (Added 14 of 2000 s 8)

(4) The Commissioner may attach such conditions as he thinks fit to an authorization under subsection (2). (Added 14 of 2000 s 8)

(5) The Commissioner may revoke an authorization or vary or revoke any condition attached to an authorization or add further conditions to an authorization. (Added 14 of 2000 s 8)

(6) In exercising the powers under this section to grant or revoke an authorization, the Commissioner shall, in addition to any other relevant matter that he may reasonably take into consideration, have regard to—

- (a) whether the person concerned is or has ceased to be a fit and proper person to be an authorized arms instructor; and
- (b) whether it is objectionable, for reasons of public safety and security, for that person to be an authorized arms instructor. (Added 14 of 2000 s 8)

(7) For the avoidance of doubt it is stated that—

- (a) section 13 does not apply to the possession, by an approved agent who is an authorized arms instructor, of arms or ammunition for the possession of which he is approved under section 12A(2), for the purposes of instruction;
- (b) subject to paragraph (a), an authorization under this section does not exempt the person authorized from the requirements to be complied with by a person under this Ordinance in relation to the possession of or dealing in arms or ammunition. (Added 14 of 2000 s 8)

Possession by approved agents

12A.—(1) Sections 13 and 14 do not apply to the possession of, or dealing in, arms or ammunition (being the arms and ammunition referred to in subsection (2)) by a person who is—

25-42

- (a) the approved agent of a licensee; and
- (b) carrying out the bona fide and lawful instructions of the licensee where those instructions relate to the duties, obligations and responsibilities of a licensee under this Ordinance.

(2) The Commissioner may, upon the application of a licensee, approve in writing, as an approved agent, a person who is appointed or proposed to be appointed by the licensee to possess or deal in the arms and ammunition in respect of which the licensee's licence is granted.

(3) The Commissioner may attach such conditions as he thinks fit to an approval under subsection (2).

(4) The Commissioner may specify the period for which an approval is given under subsection (2).

(5) The Commissioner may revoke an approval or vary or revoke any condition attached to an approval or add further conditions to an approval.

(6) In exercising the powers under this section to grant to revoke an approval, the Commissioner shall, in addition to any other relevant matter that he may reasonably take into consideration, have regard to—

- (a) whether the person concerned is or has ceased to be a fit and proper person to be an approved agent; and
- (b) whether it is objectionable, for reasons of public safety and security, for that person to be an approved agent.

(7) This section is not to be construed as permitting a person appointed or proposed to be appointed by a licensee as a security guard to possess arms or ammunition without a licence. (Added 14 of 2000 s 9)

Possession of arms or ammunition for being tested on application for licence, or while transporting for testing or inspection

25-43

12B.—(1) Section 13 does not apply to the possession by a person, in the course of taking a test conducted by the Commissioner on the use or handling of arms or ammunition, of the arms or ammunition with which the test is conducted.

(2) Sections 13 and 14 do not apply to the possession by a licensee or his approved agent of arms or ammunition to which the licence relates, in the course of transporting the arms or ammunition, for the purpose of testing or inspection by the Commissioner, to and from the place at which the testing or inspection is to take place. (Added 14 of 2000 s 9)

E. OTHER OFFENCES RELATING TO ARMS, IMITATION FIREARMS OR AMMUNITION

Possession of arms or ammunition with intent to endanger life

25-44

16.—(1) A person commits an offence who has in his possession any arms or ammunition with intent by means thereof to endanger life or to enable another person by means thereof to endanger life.

(2) A person who commits an offence under subsection (1) is liable on conviction upon indictment to imprisonment for life.

For the meaning of “arms” and “ammunition”, see section 2(1) of the Ordinance and above; for “possession”, see above.

Ingredients

25-45

The mischief at which section 16 is aimed is that of a person possessing arms ready for use, if and when occasion arises, in a manner which endangers life. The prosecution are not required to prove an immediate or unconditional intention to endanger life: *R v Bentham* [1973] QB 357; 56 Cr App R 618, CA.

A charge under the first limb of section 16 requires proof of two elements: (a) possession of arms in Hong Kong, and (b) at the time of possession, an intent by means thereof to endanger life. The offence is not limited to an intention to endanger life in Hong Kong: see *R v El-Hakkaoui* 60 Cr App R 281, CA.

It has been decided at first instance in England that the equivalent English provision only applies to the life of another: *R v Norton* [1977] Crim L R 478 (Gibson J). It is a defence to show that the intent to endanger life had a lawful purpose, although cases where such a defence could be raised would be rare: *R v Georgiades* 89 Cr App R 226, CA.

As to intent, see *R v Brown and Ciarla* [1995] Crim L R 328, CA. What is required is an intention to behave in such a way as will, in fact, to the defendant's knowledge, endanger life. An intention to kill is not necessary (dicta in *R v East* [1990] Crim L R 413, CA, disapproved).

The second limb of s 16 (“... to enable another person by means thereof to endanger life ...”) was considered in *R v Jones (IF)* [1997] 1 Cr App R 46, CA. To “enable” means more than “to give the opportunity” because otherwise the offence would almost be one of strict liability. The section requires proof that the possessor intends life to be endangered, although it is unnecessary to prove an immediate or unconditional intent that life be endangered. It is sufficient if the intent is that the arms or ammunition should be used in a manner which endangers life as and when the occasion requires. The trial

judge in that case wrongly gave the jury the impression that the offence was made out if the appellants were in possession of firearms intending to supply them to persons who were in fact criminals.

Use of arms etc to resist arrest

Firearms and Ammunition Ordinance, s 17

25-46

17.—(1) A person who makes any use whatsoever of any arms or ammunition or imitation firearm with intent to resist or prevent the lawful arrest or detention of himself or another person commits an offence and is liable on conviction upon indictment to imprisonment for life (without prejudice to any penalty that may be imposed for any offence to which the arrest or detention relates).

STATEMENT OF OFFENCE

Using firearm with intent to resist [or: prevent] arrest, contrary to section 17(1) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

AB, on the ___ day of ___, 20___, at _____, in Hong Kong, used a firearm, namely _____ with intent to resist his lawful arrest or detention [or: to prevent the lawful arrest or detention of XY].

(2) A person who, at the time of his committing an offence under any of the provisions specified in the Schedule, has in his possession any arms or ammunition or imitation firearm commits an offence, unless he shows that he had it in his possession for a lawful object, and is liable on conviction upon indictment to imprisonment for 14 years (without prejudice to any penalty for the first-mentioned offence).

STATEMENT OF OFFENCE

Possession of arms [or: ammunition] [or: arms and ammunition] [or: imitation firearm] at the time of committing a robbery [or: an offence under a provision specified in the Schedule to the Firearms and Ammunition Ordinance], contrary to section 17(2) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

AB, on the ___ day of ___, 20___, at _____, in Hong Kong, had in his possession arms [or: ammunition] [or: arms and ammunition] [or: imitation firearm], namely _____ at the time of his committing an offence of robbery [or: an offence under a provision specified in the Schedule to the Firearms and Ammunition Ordinance].

(3) If in proceedings for an offence under subsection (1) the defendant is acquitted but it is proved that he is guilty of an offence under subsection (2) he shall be convicted of the offence under subsection (2) and shall be punished accordingly.

SCHEDULE [sections 17(2), 20(2) & 54]

PROVISIONS TO WHICH SECTIONS 17(2) AND 20(2) APPLY

Ordinance	Sections (with general indication of contents shown in brackets)
1. Crimes Ordinance (Cap 200)	60(1) and 60(2) 61 62
	(destroying or damaging property) (Amended LN 126 of 1995)
	(threats to destroy or damage property)
	(possessing anything with intent to destroy or damage property)

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	118	(rape)
	119	(procurement of another person by threats) (Amended 90 of 1991 section 29)
	122	(indecent assault) (Amended 90 of 1991 section 29)
	126	(abduction of unmarried girl under 16)
	127	(abduction of unmarried girl under 18 for sexual intercourse)
	128	(abduction of mentally incapacitated person from parent or guardian for unlawful sexual act) (Amended 90 of 1991 section 29; 81 of 1997 section 59)
	130	(control over another person for purpose of unlawful sexual acts or prostitution) (Amended 90 of 1991 section 29)
	134	(detention of another person for unlawful sexual act or in vice establishment) (Amended 90 of 1991 section 29)
	146	(indecent conduct towards child under 16) (Amended 90 of 1991 section 29)
2. Theft Ordinance (Cap 210)	9	(theft)
	10	(robbery)
	11	(burglary)
	12	(aggravated burglary)
	14	(taking conveyance without authority)
	23	(blackmail)
	27	(going equipped for stealing, etc)
3. Offences against the Person Ordinance (Cap 212)	19	(wounding or inflicting grievous bodily harm)
	20	(attempting to choke, etc, in order to commit indictable offence)
	21	(using chloroform, etc, in order to commit indictable offence)
	30	(placing gunpowder near building, etc, with intent to do bodily injury)
	32(1)	(placing wood, etc, on a railway with intent to endanger passengers)
	32(2)	(casting stone, etc, upon a railway carriage with intent to endanger the safety of any person therein)
	32(3)	(doing or omitting anything endangering passenger or railway)
	36	(assault with intent to commit an arrestable offence, or on a police officer or with intent to resist arrest) (Amended 50 of 1991 section 4(1))
	39	(assault occasioning actual bodily harm)
	40	(common assault)
	43	(stealing or harbouring child under 14 years)
4. Protection of Women and Juveniles Ordinance (Cap 213)	26	(abduction of female infant or any young person or child)
5. Summary Offences Ordinance (Cap 228)	17	(possession of offensive weapon, etc, with intent)
	22	(falsely pretending to be or to be able to influence a public officer)
6. Prisons Ordinance (Cap 234)	17	(escaping or aiding escape from prison or legal custody)
7. Public Order Ordinance (Cap 245)	18	(unlawful assembly)

Ingredients

The issue under s 17(1) is whether the arms, etc, were being used intentionally for the purpose prohibited under the subsection. Whether the police intended an arrest is irrelevant: *R v Mather* [1998] Crim L R 821, CA. In *HKSAR v Suen Wai Leong* (unrep., CACC 188/2007, [2009] HKEC 214) the Court of Appeal (Stock JA, Wright and Saw JJ) in dismissing an appeal against conviction under s 17(1) said that under this section "The prosecution must prove that the applicant did the acts which they say amount to resisting lawful arrest or detention and, in doing those acts, intended to resist what was happening to him".

An offence under s 17(2) is committed when, in possession of the arms, etc, a defendant was committing one of the scheduled offences.

The Court of Appeal emphasised the dangerous nature of pepper sprays in *HKSAR v Chau Lap Pui* (unrep., CACC 358 of 2006, [2007] HKEC 307).

Proof and the framing of charges

Without prejudice to the proof of the other elements of the offence, where a person is charged with an offence under section 17, it shall be sufficient proof in any proceedings under that section in which the prosecution is unable to establish whether the article which the accused used, or had in his possession, was a real or an imitation firearm, if the prosecution establishes that the article was either a real or an imitation firearm without establishing whether the article was one or the other; and a charge may be framed accordingly: section 25(1).

Carrying arms or ammunition or imitation firearm with criminal intent

(1) A person commits an offence who has with him any arms or ammunition or imitation firearm with intent to commit an arrestable offence, or to resist arrest or prevent the arrest of another, in either case while he has the arms or ammunition or imitation firearm with him.

(2) In proceedings for an offence under subsection (1) proof that the accused had any arms or ammunition or imitation firearm with him and intended to commit an arrestable offence or to resist or prevent arrest, is evidence that he intended to have the same with him while doing so.

(3) A person who commits an offence under subsection 1 is liable on conviction upon indictment to imprisonment for life.

(4) No prosecution for an offence under subsection (1) shall be instituted without the consent of the Secretary for Justice but this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for any such offence.

STATEMENT OF OFFENCE

Carrying arms [or: ammunition] [or: arms and ammunition] [or: imitation firearm] with criminal intent, contrary to section 18(1) and (3) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

AB, on the ___ day of ___, 20___, at ___, in Hong Kong, had with him arms [or: ammunition] [or: arms and ammunition] [or: imitation firearm], namely, _____ with intent to commit an arrestable offence, namely an offence of _____ while he had the said arms [or: ammunition] [or: arms and ammunition] [or: imitation firearm] with him.

Ingredients

"Have with him"

R v Kell 65 Cr App R 74, CA, establishes two propositions. The first is that, in directing a jury, it may be necessary to distinguish between "having a firearm" and "possession" —mere possession is not enough. As Steyn LJ said in *R v Pawlicki and Swindell* 95 Cr App R 246, CA:

"A man who leaves a shotgun at home while he proceeds to the next town to rob a bank is still in possession of the shotgun but he does not 'have it with him' when he commits the robbery at the bank. Under section 18 the words 'have it' import an element of propinquity which is not required for possession [at p 250]."

The second proposition is that "having with him a firearm" is a wider concept than merely carrying one, notwithstanding the marginal note to the section. In *Kelt*, it was held that, subject to a proper direction, the words "have with him" were capable of covering the situation where the firearm was found in the defendant robber's kitchen, in which he was arrested. In *Pawlicki and Swindell*, convictions were upheld where at the critical time the guns were in a locked car 50 yards away from the intended site of a robbery:

"... the emphasis must be not so much on exact distances between criminals and their guns but rather on the accessibility of those guns, judged in a common sense way in the context of criminals embarking on a joint enterprise to commit an indictable offence [per Steyn LJ at p 251]."

A person cannot have a firearm with him when it is two or three miles away: *R v Bradish and Hall* [2004] 6 *Archbold News* 3, CA.

Having said that, it does not follow that a *Kelt* direction must be given in all cases. No direction on the distinction between "possession" and "has with him" is required where no such distinction arises on the evidence: *R v Lee Ming* [1990] HKLY 278.

Imitation firearm

25-52 The term is defined in s 2(1) of the Ordinance. When an offence under section 18 is alleged, the jury should be directed that they should consider whether the thing had the appearance of being a firearm, air pistol, etc, at the time when the accused had it with him. In considering whether or not the thing looked like a firearm at the time, the jury are entitled to have regard to the evidence of any witnesses who actually saw the thing at that time, together with their own observation of the thing itself (if it is available). The jury are not concerned with whether or not the thing looks like a firearm, grenade, etc, at any other time: *R v Morris and King* 79 Cr App R 104, CA.

Arrestable offence

25-53 An arrestable offence means an offence for which the sentence is fixed by law or for which a person may under or by virtue of any law be sentenced to imprisonment for a term exceeding 12 months, and an attempt to commit any such offence: section 3 of the Interpretation and General Clauses Ordinance (Cap 1).

The ingredients of the offence under section 18(1) are made out if it is proved that: (a) the defendant had with him arms, ammunition or imitation firearm; (b) he intended to have it with him; and (c) at the same time he had the intention to commit an arrestable offence or to resist or prevent arrest: see *R v Stoddart* [1998] 2 Cr App R 25, CA. The court referring to section 18(2) of the Firearms Act 1968 on which section 18(2) was modelled, said the requisite intents (b) and (c) are distinct rather than composite elements of the offence, and held that the prosecution do not have to prove an intention to use or carry the firearm in furtherance of the offence.

Proof and the framing of a charge

25-54 Without prejudice to the proof of the other elements of the offence, where a person is charged with an offence under section 18, it shall be sufficient proof in any proceedings under that section in which the prosecution is unable to establish whether the article which the accused had with him, was a real or an imitation firearm, if the prosecution establishes that the article was either a real or an imitation firearm without establishing whether the article was one or the other; and a charge may be framed accordingly: s 25(1).

Alternative Verdict

Section 18(5) of the Ordinance provides: if in proceedings for an offence under subsection (1) the defendant is acquitted but it is proved that he is guilty of an offence under s 20 (possession of imitation firearm) he shall be convicted of the offence under s 20 and shall be punishable accordingly notwithstanding that there is no consent to prosecute in accordance with subsection (3) of that section.

Trespassing with arms or ammunition or imitation firearm

Firearms and Ammunition Ordinance, s 19

19.—(1) A person commits an offence who, while he has any arms or ammunition or imitation firearm with him, enters or is in any place as a trespasser and without reasonable excuse.

(2) A person who commits an offence under subsection (1) is liable on conviction upon indictment to imprisonment for 14 years.

(3) In subsection (1) "place" means any land (including land covered with water) building, vehicle, vessel, train or aircraft or any part thereof.

(4) No prosecution for an offence under subsection (1) shall be instituted without the consent of the Secretary for Justice but this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for any such offence.

Proof and the framing of a charge

Without prejudice to the proof of the other elements of the offence, where a person is charged with an offence under s 19, it shall be sufficient proof in any proceedings under that section in which the prosecution is unable to establish whether the article which the accused had with him, was a real or an imitation firearm, if the prosecution establishes that the article was either a real or an imitation firearm without establishing whether the article was one or the other; and a charge may be framed accordingly: s 25(1).

Possession of an imitation firearm

Firearms and Ammunition Ordinance, s 20

20.—(1) Subject to subsection (2) and (3), any person who is in possession of an imitation firearm commits an offence and is liable to imprisonment for 2 years.

Enhanced penalty

20.—(2) Any person who, within 10 years of being convicted of an offence specified in the Schedule or of an offence under this Ordinance, commits an offence under subsection (1) is liable to imprisonment for 7 years.

Statutory defence

20.—(3) A person does not commit an offence under subsection (1) if he satisfies the magistrate that—

- (a) at the relevant time he was under the age of 15; or
- (b) he was in possession of the imitation firearm in his capacity as a person who deals in imitation firearms by way of trade or business, or as a servant of such a person carrying out his bona fide and lawful instructions; or
- (c) he was not in possession of the imitation firearm for a purpose dangerous to the public peace, or of committing an offence, or in circumstances likely to lead to—
 - (i) the commission of an offence; or
 - (ii) the possession of the imitation firearm for a purpose dangerous to the public peace, by himself or any other person.

The true nature of the offence created by this section, or the conduct which the legislature intended to criminalise, is possession of an imitation firearm for a non-innocent

or a culpable purpose and the true ingredients of the offence are not mere possession of an imitation firearm. The Court of Appeal in *HKSAR v Lam Kwong Wai* (unrep., CACC 213/2003, [2005] HKEC 26) ruled that s 20(1) as read with s 20(3)(c) is inconsistent with the presumption of innocence prescribed by art 11(1) of the Hong Kong Bill of Rights Ordinance, art 14.2 of the ICCPR, and art 39 of the Basic Law, and with the right to a fair trial protected by art 10 of the Hong Kong Bill of Rights Ordinance, art 14.1 of the ICCPR, art 39 of the Basic Law, and art 87 of the of the Basic Law. The Court in that case emphasised that the scope of its judgment is restricted and does not purport to determine the validity of s 20(1) as read with the ss 20(3)(a) or (b) although it may well be that without s 20(3)(c), what remains is not a viable offence creating provision and certainly is not one that represents the full circumstances in which possession was intended by the legislature to be blameless. (At the time of going to press, this case is pending appeal to the Court of Final Appeal).

Consent to prosecution

- 25-61** 20.—(4) No prosecution for an offence under subsection (1) shall be instituted without the consent of the Secretary for Justice but this subsection shall not prevent the arrest, or the issue of a warrant for the arrest, of a person for any such offence.

STATEMENT OF OFFENCE

Possession of an imitation firearm, contrary to section 20(1) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

AB, on the ___ day of ___, 20___, at ___, in Hong Kong, had in his possession an imitation firearm, namely _____.

Jurisdiction

- 25-62** The fact that the penalty, in circumstances in which the enhanced penalty provided for by s 20(2) are operative, may be seven years does not deprive a magistrate of his jurisdiction to hear and determine the offence or impose a sentence of up to seven years: *R v Tong Yuen* [1989] 2 HKLR 301, CA. Where a person is convicted of this offence as an alternative to the offence of having arms, ammunition or an imitation firearm with intent to commit an arrestable offence or to resist or prevent arrest, the reference in s 20(3) to “magistrate” means the court in which the indictment is tried. The reference to “magistrate” is no more than an error resulting from the insertion of ss (4) and (5) into s 18 in 1984 without ensuring that the necessary consequential amendment was made to s 20(3): *Att-Gen v Chan Hung-hoi* [1987] HKLR 969, CA.

Proof of allegation

- 25-63** Without prejudice to the proof of the other elements of the offence, where a person is charged with an offence under s 20 and, in the proceedings for that offence, the prosecution is unable to establish whether the article which the accused had in his possession was a real or an imitation firearm, if the prosecution establishes that the article was either a real or an imitation firearm the accused may be convicted of that offence: s 25(2).

Converting imitation firearm into a firearm

Firearms and Ammunition Ordinance, s 21

- 25-64** 21.—(1) A person commits an offence who converts into a firearm anything which, though having the appearance of being a firearm, is so constructed as to be incapable of discharging any shot, bullet or missile through its barrel.
(2) A person who commits an offence under subsection (1) is liable on conviction upon indictment to imprisonment for 14 years.

STATEMENT OF OFFENCE

Converting an imitation firearm into a firearm, contrary to section 21(1) and (2) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

AB, on the ___ day of ___, 20___, at ___, in Hong Kong, converted a _____ which, though having the appearance of being a firearm, was so constructed as to be incapable of discharging any shot, bullet or missile through its barrel into a firearm.

[For the meaning of “firearm”, see section 2(2), above]

Dangerous or reckless use of firearm, etc

Firearms and Ammunition Ordinance, s 22

- 25-65** 22.—(1) A person commits an offence who, without lawful authority or reasonable excuse, discharges or otherwise deals with any arms or ammunition in a manner likely to injure, or endanger the safety of, any person or property or with reckless disregard for the safety of others.
(2) A person who commits an offence under subsection (1) is liable on conviction upon indictment to imprisonment for 7 years.

Section 22(1) provides two alternative means by which the offence may be committed. No question of intent arises in relation to the *actus reus* of the offence, which is the discharge or dealing with the arms and ammunition in question. These two means of commission prescribe the *mens rea* of the offence. In relation to the first of these means or component, “in a manner likely to injure, or endanger the safety of, any person or property”, it is for the prosecution to establish only that the firearm was discharged or otherwise dealt with by the defendant. That being proved, all the facts and circumstances surrounding that act would then fall for consideration. The question of recklessness only arises in the relation to the second component: *Att-Gen v Wong Nai Yuen* [1995] 1 HKCLR 313.

STATEMENT OF OFFENCE

Discharging [or: dealing with] arms [or: ammunition] with reckless disregard for the safety of others [or: in a manner likely to injure or endanger the safety of any person or property], contrary to section 22(1) and (2) of the Firearms and Ammunition Ordinance, Cap 238.

PARTICULARS OF OFFENCE

AB, on the ___ day of ___, 20___, at ___, in Hong Kong, without lawful authority or reasonable excuse, discharged [or: dealt with] arms [or: ammunition] [or: arms and ammunition], namely _____ with reckless disregard for the safety of others [or: in a manner likely to injure or endanger the safety of any person or property].

Licensee’s failure to comply with terms and conditions of licence, etc

Firearms and Ammunition Ordinance, s 23

- 25-66** 23.—(1) Any person who holds a licence for possession of arms or ammunitions or a dealer’s licence and who fails to comply with any term or condition of that licence, commits an offence and is liable—
(a) on conviction upon indictment to imprisonment for 10 years; and
(b) on summary conviction to a fine of \$10,000 and to imprisonment for 6 months.

For the meaning of “licence for possession” and “dealer’s licence”, see section 2 of the Ordinance and above.

Construction of licence

25-67 The construction of a licence is a matter of law, not fact and thus must be determined by a judge and not a jury: *R v Paul* [1999] Crim L R 79, CA.

Giving possession of arms and ammunition to unlicensed person**Firearms and Ammunition Ordinance, s 15**

25-68 15.—(1) No person shall part with possession of arms or ammunition to another person or knowingly permit or allow another person to obtain possession thereof (other than an approved agent) unless that other person—

- produces a licence for possession or a dealer's licence granted to him and authorizing him to have possession thereof; or
- shows that, pursuant to Part II, section 13 does not apply to the possession by him of the arms or ammunition in question.

Statutory defence

25-69 15.—(2) If a person takes all reasonably available steps and exercises all due diligence to satisfy himself for the purposes of subsection (1) that—

- a document produced under paragraph (a) thereof is a valid and effectual licence authorizing the other person to have possession of the arms or ammunition in question; or
- section 13 does not apply to the possession by the other person of the arms or ammunition in question,

the first-mentioned person does not commit an offence under subsection (1) by reason only of the fact that the document is not a valid and effectual licence or that section 13 does apply as aforesaid.

(3) A person who contravenes subsection (1) commits an offence and is liable to on conviction upon indictment to imprisonment for 5 years.

Parting with possession

25-70 For the purpose of this section, a person parts with possession of arms or ammunition if he does anything whereby he ceases to be in possession, within the meaning of s 2(2)(a), of the arms or ammunition or of any keys or other thing mentioned in s 24. A person is in possession of arms or ammunition or of any keys or other things mentioned in s 24 if they are actually in his possession or under his control or are held by some other person subject to his control or instructions or for him or on his behalf: see s 2(2)(a).

Other than an approved agent

25-71 An approved agent means a person approved as such under s 12A(2) of the Ordinance. See s 2(1) of the Ordinance.

F. LICENSING**Licences in respect of arms and ammunition**

25-72 27.—(1) An application for—

- a licence for possession; or
- a dealer's licence,

shall be made to the Commissioner in the specified form and the prescribed manner.

(2) Upon application duly made to him under subsection (1)(a) and upon payment of the prescribed fee, the Commissioner may grant to the applicant a licence, conforming with section 28, to possess arms or ammunition or both.

(3) Upon application duly made to him under subsection (1)(b), the Commissioner may grant to the applicant a licence, conforming with section 29, to deal in arms or ammunition or both.

(3A) In exercising the powers under subsection (2) or (3) to grant a licence, the Commissioner shall, in addition to any other relevant matter that he may reasonably take into consideration, have regard to—

- whether the applicant is a fit and proper person to be granted a licence;
 - whether there is good reason for that applicant to hold a licence; and
 - whether it is objectionable, for reasons of public safety and security, to grant the licence to that applicant. (Added 14 of 2000 s 13)
- (4) A licence granted under this section may be subject to such terms and conditions (including conditions imposing a limit or restriction on the number, type, class or description of arms, or the quantity, type, class or description of ammunition, or both) as the Commissioner thinks fit.
- (5) The Commissioner shall, in a form determined by him, keep a register in respect of each type of licence granted by him under subsections (2) and (3). (Amended 14 of 2000 s 13)

Additional conditions in respect of shooting clubs

25-73 27A.—(1) The Commissioner may attach additional terms and conditions (in addition to terms and conditions which may be attached under section 27(4)) to a licence for possession—

- granted to a responsible officer of a shooting club; and
- which is expressed to be held by the responsible officer on behalf of the shooting club.

(2) The additional terms and conditions referred to in subsection (1) may include terms and conditions for the purpose of—

- regulating the conduct of the shooting club in relation to the possession and use of arms and ammunition by its members;
- regulating the operation of any shooting range, armoury or facility owned or under the control or possession of the shooting club, in relation to the use and handling of arms and ammunition by its members;
- without limiting the generality of paragraph (b), ensuring the proper supervision by a range officer of a shooting range or facility used in connection with it, when they are in use; or
- ensuring the safety of persons. (Added 14 of 2000 s 14)

Effect of licence for possession

25-74 28.—(1) A licence for possession shall authorize a named individual, subject to the terms and conditions thereof and to section 33(1), to have in his possession for such period as is provided for in the licence—

- the arms specified therein, and any specified quantity of ammunition thereof; or
- the ammunition specified therein; or
- the arms and ammunition specified therein; or
- any one or more, as mentioned in the licence, of a number of arms specified therein and any specified quantity of ammunition thereof; or
- in the case of a security guard arms of the type, class or description specified therein and any specified quantity of ammunition thereof, (Amended 97 of 1994 s 34)

and shall otherwise be in the specified form. (Amended 14 of 2000 s 15)

Effect of dealer's licence

25-75 29.—(1) Subject to subsection (2), a dealer's licence shall, subject to the terms and conditions thereof and to section 33(1), authorize a named individual or individuals to deal in by way of trade or business and to have possession of arms or ammunition, or both, for that purpose—

- of a type, class or description specified in the licence;
- at the premises (whether one or more) specified in the licence;
- for the period specified in the licence.

(2) A dealer's licence may also authorize the individual or individuals referred to in subsection (1) to deal in or to have possession of as described in that subsection, the arms or ammunition, or both, to which the licence relates, in a place or places approved by the Commissioner in a particular case, and subject to the terms and conditions, if any, imposed by the Commissioner.

(3) Subject to subsections (1) and (2), a dealer's licence must be in the specified form. (Replaced 14 of 2000 s 16)