

- (b) the person against or in relation to whom the act is committed or took place dies in Hong Kong as a result of the act; and
- (c) the act would, if taking place in Hong Kong, constitute murder or manslaughter or being accessory to murder or manslaughter,

whatever the citizenship or nationality of the person committing it or responsible for it, the act shall constitute the crime of, as may be appropriate, murder or manslaughter or so being accessory.

- (2) In this section *act* (作為) means an act of commission or an act of omission and includes a series of acts.

(Added 89 of 1990 s.3)  
[cf 1849 c.96 s.3 UK]

### 9. Trial of homicide where cause of death only happens in Hong Kong<sup>(15/02/2017)</sup>

Where any person being unlawfully stricken, poisoned, or otherwise hurt at any place in Hong Kong dies of such stroke, poisoning, or hurt upon the sea or at any place out of Hong Kong, every offence committed in respect of any such case, whether the same amounts to the offence of murder, or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in Hong Kong in which such stroke, poisoning, or hurt happens, in the same manner in all respects as if such offence had been wholly committed in Hong Kong.

(Amended 50 of 1991 s.4; 13 of 1999 s.3)  
[cf 1861 c.100 s.10 UK]

### E. Specific sexual offences

- 2.019 Procuring a person for sexual purposes contrary to Crimes Ordinance ss.119(1), 120 or 131–133 in Hong Kong or elsewhere is triable in Hong Kong.
- 2.020 Certain sexual offences committed against children outside Hong Kong are triable in Hong Kong. See Crimes Ordinance ss.153P, 153Q, 153R and Sch 2.
- 2.021 See *HKSAR v Lee Kwok Wah Francis*<sup>17</sup> for an illustration.

### F. Unauthorized entrants

- 2.022 Where a person is in Hong Kong, he may be charged and convicted for offences under the Immigration Ordinance Pt.VIIA on Unauthorized Entrants, irrespective of the general territorial jurisdiction of Hong Kong courts.

## Immigration Ordinance (Cap.115)

### Part VIIA

#### 37J. Prosecution of acts outside Hong Kong<sup>(26/04/2018)</sup>

Without prejudice to any law or enactment to the like or a similar effect as that of this section, where any person is in Hong Kong, he may be charged and convicted in respect of anything which was done or which occurred wholly or

partly outside Hong Kong that would have been an offence under this Part if it had been done or had occurred within Hong Kong.

### G. Offences connected with Hong Kong aircraft

Where an offence occurs on board a Hong Kong-controlled aircraft, the Hong Kong courts have jurisdiction over such offences. 2.023

## Aviation Security Ordinance (Cap.494)

### Part II

#### 2. Interpretation<sup>(10/11/2005)</sup>

(Adaptation amendments retroactively made - see 2 of 2012 s.3)

- (1) In this Ordinance, unless the context otherwise requires-

*Hong Kong-controlled aircraft* (香港控制的飛機) means an aircraft-

- (a) which is for the time being registered in Hong Kong; or
- (b) which, being for the time being registered outside Hong Kong, is for the time being chartered by demise to a person who, or to persons each of whom-
  - (i) is a person qualified to be the owner of a legal or beneficial interest in an aircraft registered in Hong Kong; and
  - (ii) resides or has his principal place of business in Hong Kong; or
- (c) which is not for the time being registered in any place but in the case of which either the operator of the aircraft or each person entitled as owner to any legal or beneficial interest in it-
  - (i) is a person qualified to be the owner of a legal or beneficial interest in an aircraft registered in Hong Kong; and
  - (ii) resides or has his principal place of business in Hong Kong;

[Note: other definitions are omitted]

#### 3. Application of criminal law to aircraft<sup>(10/11/2005)</sup>

- (1) Any act or omission taking place on board a Hong Kong-controlled aircraft while in flight elsewhere than in or over Hong Kong which, if taking place in Hong Kong, would constitute an offence under the law of Hong Kong shall constitute that offence.
- (2) Subsection (1) shall not apply to any act or omission which is expressly or impliedly authorized by or under the law of Hong Kong when taking place outside Hong Kong.
- (3) No proceedings for any offence under the law of Hong Kong committed on board an aircraft while in flight elsewhere than in or over Hong Kong shall be instituted except by or with 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 any person in respect of any offence, or the remanding in custody or on bail of any person charged with any offence. (Amended LN 362 of 1997)

[cf 1967 c.52 s.1 UK]

<sup>17</sup> [2013] 2 HKLRD 1009 (CA).



## Aviation Security Ordinance (Cap.494)

## Part III

12A. Acts of violence, threats, destruction of property, etc., in general<sup>(10/11/2005)</sup>

- (1) Without prejudice to section 3, 9(1)(b) or 12 but subject to section 12C, where a person does on board any aircraft (wherever registered) and while outside Hong Kong any act which if done in Hong Kong would constitute an offence under section 17(a), 19, 39 or 40 of the Offences against the Person Ordinance (Cap.212) or section 24, 60, 118, 118A, 122, 146 or 148 of the Crimes Ordinance (Cap.200), the act shall constitute that offence.
- (2) For the avoidance of doubt, the references to “public place” and “the public” in section 148(1) of the Crimes Ordinance (Cap.200) shall, for the purposes of subsection (1), be deemed to include an aircraft and the passengers and crew of an aircraft, respectively.

(Added 14 of 2005 s.4)

12C. Request and undertaking<sup>(10/11/2005)</sup>

- (1) Sections 12A and 12B do not apply to an act committed by any person on board a non-Hong Kong-controlled aircraft while in flight elsewhere than in or over Hong Kong unless—
  - (a) the next place of landing of the aircraft is in Hong Kong; and
  - (b) the commander of the aircraft, in the form set out in Schedule 3—
    - (i) makes a request to the Hong Kong Police Force to commence proceedings against the person; and
    - (ii) gives an undertaking that he, and the operator of the aircraft, has not made and will not make a similar request to the authorities of any place outside Hong Kong.
- (2) A request and undertaking by a commander of an aircraft in the form set out in Schedule 3 shall—
  - (a) be admissible in evidence in any proceedings before a court in Hong Kong; and
  - (b) in the absence of evidence to the contrary, be sufficient evidence of the matters stated in the form.
- (3) For the avoidance of doubt, a person in respect of whom a request is made in the form set out in Schedule 3 may be charged with or convicted of any offence under the law of Hong Kong for which he may be liable, notwithstanding that the offence is not stated in that form to have been suspected to have been committed.

(Added 14 of 2005 s.4)

2.024 See also Aviation Security Ordinance ss.5, 9, 10, 11, 12, 12B and 15.

H. Offences committed within Hong Kong waters or on board Hong Kong ships

2.025 Courts in Hong Kong have jurisdiction over offences committed within Hong Kong waters.

2.026 For definition of Hong Kong waters, see Interpretation and General Clauses Ordinance (Cap.1) s.3 and Sch.2.

See Crimes Ordinance Pt.III on Piracy and Other Offences at Sea ss.23B and 23C. 2.027

See also *R v Hui Lan Chak*.<sup>18</sup> 2.028

Certain criminal offences committed on board a Hong Kong ship are triable in Hong Kong courts. An example is found under the Dangerous Drugs Ordinance (Cap.134). 2.029

## Dangerous Drugs Ordinance (Cap.134)

## Part VB

38L. Offences on Hong Kong Ships<sup>(06/07/2018)</sup>

Anything which would constitute an offence under this Ordinance if done on land in any part of Hong Kong shall constitute that offence if done on a Hong Kong ship.

(Added 63 of 1994 s.2)

38P. Interpretation of Part VB<sup>(06/07/2018)</sup>

(1) In this Part—

*Hong Kong ship* (香港船舶) means a ship registered or licensed in Hong Kong;*ship* (船舶) includes any vessel used in navigation and includes a hovercraft;

[Note: other definitions are omitted]

## I. Unsolicited electronic messages

Unsolicited Electronic Messages Ordinance (Cap.593) ss.15–19 and 22–26 prohibit commission of certain acts relating to electronic messages with a “Hong Kong link”. 2.030

## Unsolicited Electronic Messages Ordinance (Cap.593)

## Part I

3. Meaning of *Hong Kong link*<sup>(05/12/2014)</sup>

- (1) For the purposes of this Ordinance, a commercial electronic message has a Hong Kong link if, and only if—
  - (a) the message originates in Hong Kong;
  - (b) the individual or organization who sent the message or authorized the sending of the message is—
    - (i) an individual who is physically present in Hong Kong when the message is sent;
    - (ii) an organization (other than a Hong Kong company) that is carrying on business or activities in Hong Kong when the message is sent; or
    - (iii) a Hong Kong company;
  - (c) the telecommunications device that is used to access the message is located in Hong Kong;

<sup>18</sup> [1993] 2 HKCLR 230 (CA).



- (d) the registered user of the electronic address to which the message is sent is—
    - (i) an individual who is physically present in Hong Kong when the message is accessed; or
    - (ii) an organization that is carrying on business or activities in Hong Kong when the message is accessed; or
  - (e) the message is sent to an electronic address that is allocated or assigned by the Authority.
- (2) For the purposes of subsection (1)(b), (c), (d) and (e), it is immaterial whether the commercial electronic message originates in Hong Kong or elsewhere.
- (3) For the purposes of subsection (1)(b)(iii), it is immaterial whether the commercial electronic message is sent, or is authorized to be sent, from Hong Kong or elsewhere.

2.031 See also Unsolicited Electronic Messages Ordinance s.2.

2.032 For example, Unsolicited Electronic Messages Ordinance s.18 prohibits the sending of commercial electronic message that has a Hong Kong link to electronic address obtained using automated means.

## 2. CRIMINAL COURTS IN HONG KONG

### (a) Overview

#### (i) Introduction

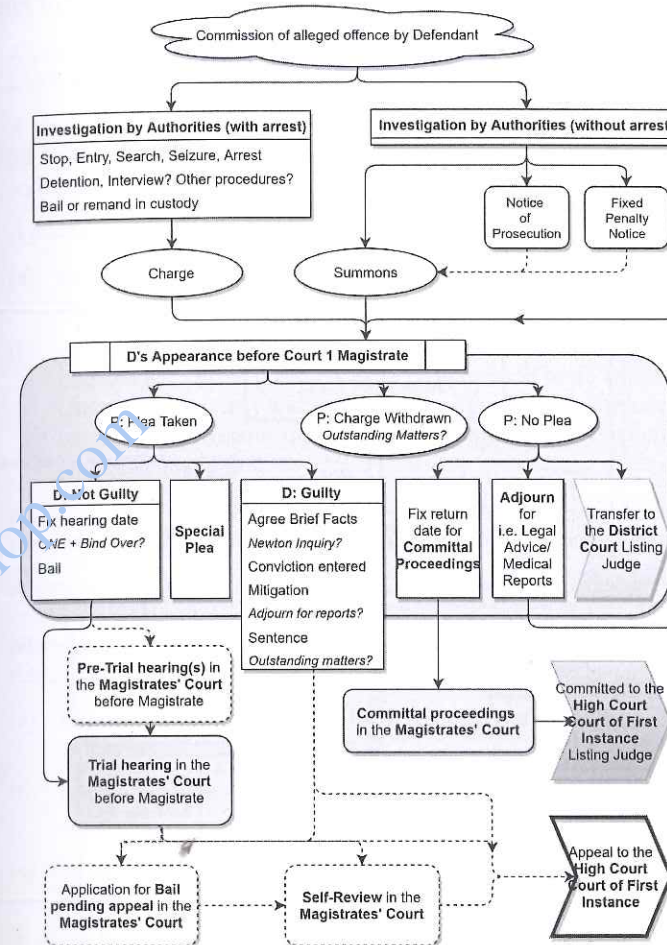
- 2.033 All criminal cases commence in the Magistrates' Courts.
- 2.034 The four courts in Hong Kong that have jurisdiction to try and sentence criminal cases are the Magistrates' Courts, Juvenile Court, District Court and CFI.
- 2.035 All criminal trials, except for jury trials before the CFI, are heard before a single presiding officer, ie, Magistrate (in the Magistrates' Courts) or before a single District Judge (in the District Court).
- 2.036 Criminal trials in the CFI are heard before a single Judge of the CFI and a jury.
- 2.037 To summarise, the modes of trial in the criminal courts are as follows:

Court	Mode of trial	Presiding court	Procedural legislation
Magistrates' Courts	Summarily	Single Magistrate	Magistrates Ordinance and Criminal Procedure Ordinance
District Court	On indictment	Single District Judge	District Court Ordinance ss.74-88 and Criminal Procedure Ordinance via DCO s.79
Court of First Instance	On indictment	CFI judge and jury	Criminal Procedure Ordinance

2.038 Criminal cases commenced in the Magistrates' Courts may be transferred to the District Court or committed or transferred to the CFI for trial and/or sentence under Magistrates Ordinance (Cap.227) (MO) Pts.III and IV ss.80-90.

Diagram 1 Brief Overview of Criminal Proceedings

2.039



2.040 The maximum jurisdiction of the relevant courts to sentence defendants to imprisonment upon conviction (upon guilty plea or conviction) of indictable offences is summarised as follows:

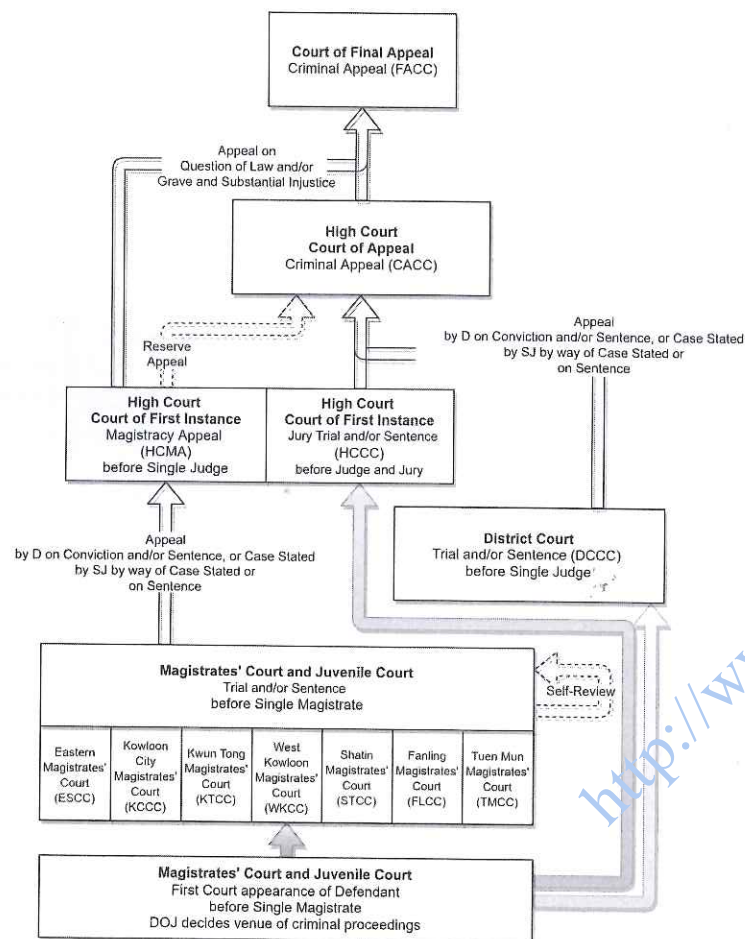
Court	Section	One offence	More than one offence
Magistrates' Court — Special Magistrate	Warrant of appointment	No jurisdiction to impose term of imprisonment	
Magistrates' Court — Permanent Magistrate	Magistrates Ordinance ss.57 and 92	2 years <sup>19</sup>	3 years where run consecutively <sup>20</sup>
District Judge	District Court Ordinance s.82		7 years
Court of First Instance Judge	High Court Ordinance s.3		Unlimited

<sup>19</sup> Provided that nothing in CPO s.92 shall affect any greater or less punishment specifically provided for in any other ordinance.  
<sup>20</sup> Provided that where two or more terms of imprisonment imposed by a magistrate are ordered to run consecutively in whole or in part the aggregate of the said terms of imprisonment shall not, ... in the case of a permanent magistrate exceed three years.



2.041 Criminal appeals and reviews of criminal conviction, order or determination (including sentence) may be heard in the Magistrates' Courts, CFI, CA and Court of Final Appeal (CFA).

2.042 **Diagram 2 Appeal Process of Criminal Proceedings**



2.043 List of current judges in the respective courts is available at <http://www.judiciary.gov.hk/en/organization/judges.htm>.

**(ii) Professional conduct of barristers and solicitors**

2.044 Barristers are bound by the Code of Conduct issued by the Hong Kong Bar Association (Bar Code).<sup>21</sup> Failure to comply with the rules contained in Bar Code may result in, *inter alia*, disciplinary proceedings against the barrister.

2.045 The general duties of a barrister are contained in Bar Code para.10.

<sup>21</sup> Hong Kong Bar Association, Code of Conduct, <http://www.hkba.org/content/code-conduct> (1 June 2018).

**Conduct of Professional Work<sup>22</sup>**  
**General Provisions**

- 10.1 A practising barrister must not, in the course of practice, engage in conduct which constitutes unlawful discrimination or harassment.
- 10.2 A practising barrister is at all times individually and personally responsible for his own conduct and for his professional work both in Court and out of Court and he must exercise his own personal judgment in all his professional activities.
- 10.3 A practising barrister must not:
- compromise his professional standards in order to please his professional or lay client, the Court or a third party; or
  - permit his absolute independence, integrity and freedom from his personal interests or external pressures to be compromised or do anything in such circumstances as may lead to any inference that his absolute independence, integrity and freedom from his personal interests or external pressures may be compromised.
- 10.4 A practising barrister, while engaging in practice, must not give any undertaking that cannot be fulfilled and must fulfil every undertaking that has been given by him.
- 10.5 A practising barrister must in all his professional activities act promptly, conscientiously and diligently and with reasonable competence and must take all reasonable and practicable steps to ensure that professional engagements are fulfilled punctually. He should not undertake any tasks which:-
- he knows or ought to know he is not competent or sufficiently experienced to handle;
  - he does not have adequate time and opportunity to prepare for, perform or complete; or
  - he cannot discharge within the time requested or otherwise within a reasonable time.
- 10.6 A practising barrister must in all his professional activities be courteous and civil, and must act in good faith with all those with whom he has professional dealings. He should not send correspondence to or otherwise communicate with any person in a manner that is abusive, offensive or otherwise inconsistent with the proper tone of a professional correspondence or communication.

**Duty to the Court and Conduct in Court<sup>23</sup>**

- 10.29 A practising barrister has an overriding duty to the Court to act with candour and independence in the interests of justice.
- 10.30 A practising barrister must not knowingly deceive or mislead the Court.
- 10.31 A practising barrister must not devise facts to advance his client's case.
- 10.33 A practising barrister must not, when conducting his case, assert his personal opinion of the facts or the law to the Court unless invited by the Court to do so.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*



- 10.34 A practising barrister must at all times act with due courtesy to the Court before which he is appearing...
- 10.36 A practising barrister must in every case use his best endeavours to avoid unnecessary expense and waste of the Court's time.
- He should, when asked, inform the Court of the probable length of his case.
  - He should also at once inform the Court of any settlement, intention to apply for an adjournment or, provided he can do so without prejudice to his client's interests, other developments or matters which may affect the estimated length of hearing already provided.
- 10.37 Subject to the provisions of this Code, a practising barrister should conduct cases in such manner as in his discretion he thinks will be most to the advantage of his client.
- 10.38 [S]ubject to the provisions of paragraph 10.60, in criminal cases, a practising barrister must ensure that the Court is informed of any relevant decision or legislative provision, of which he is aware, whether it be for or against his contention.
- 10.39 In all cases, a practising barrister must bring any procedural irregularity of which he is or has become aware to the attention of the Court during the hearing and not reserve such matter to be raised on appeal...
- 10.47 (a) A practising barrister must not knowingly make a false or misleading statement to an opponent in relation to the case.
- A practising barrister must take all necessary steps to correct any false or misleading statement in relation to the case that has been made by him to an opponent as soon as possible after the barrister becomes aware that the statement was false or misleading.
  - A practising barrister does not make a false or misleading statement to an opponent simply by failing to correct an error on any matter stated to the barrister by the opponent...
- 10.49 A practising barrister shall not disclose to anyone (including his client, the person instructing him and the Court) any communication that he has had with the barrister for another party in connection with the matter in which they are both involved that was made on the basis that it should remain between them and not be disclosed unless and until otherwise agreed (which basis is often conveyed by the use of the shorthand expression "Counsel to Counsel"), save where disclosure of the communication between Counsel becomes necessary for the proper discharge of the barrister's professional duties.
- 10.59 A practising barrister may appear for more than one defendant in a criminal trial provided he satisfies himself there is no conflict of interest.
- 10.60 Defence Counsel is not under any duty to draw matters of fact or law to the attention of the Court at the conclusion of the summing-up, but he may do so if he believes it would be to the advantage of his client.

**2.046** Generally, a barrister may only represent an accused person in a criminal matter upon receiving instructions from an instructing solicitor, Duty Lawyer Service, Director of

Legal Aid or Bar Free Legal Service Scheme.<sup>24</sup> See Chapter 3: Section 2 on Acceptance of Instructions by Solicitors and Barristers for further discussion.

The right to confidential legal advice enshrined in the Basic Law art.35<sup>25</sup> imposes an obligation of confidentiality on legal advice. Furthermore, legal representatives have a duty not to communicate, to any third person, information which has been entrusted to him in confidence and not to use such information to his client's detriment or to his personal or another client's advantage. This duty continues after the legal representative and client relationship has ceased. A legal representative's duty not to divulge confidential information without the consent of his lay client, express or implied, subsists unless he is compelled or permitted to do so by law.<sup>26</sup> This duty extends to summer students and pupil barristers.<sup>27</sup> **2.047**

Legal representatives shall proceed with caution when making comments to the media. **2.048**

#### Media comment<sup>28</sup>

- 10.74 (a) Practising barristers are under no obligation to express a personal view to the media in relation to anticipated or on-going litigation. Expression of such views is not a legal service, nor is it part of the duties of a barrister to act in the best interests of clients. Accordingly, practising barristers do not have a duty to comply with a request from a client to do so, without the express agreement of the practising barrister.
- When speaking to the media, a practising barrister must be careful not to breach his or her general professional duties (such as to keep the affairs of clients and former clients confidential, and not to bring the administration of justice into disrepute).
  - Practising barristers must ensure that any comment they make to the media does not undermine, and is not reasonably seen as undermining, their independence. Furthermore, any such comment must not bring the profession, nor any other barrister into disrepute.
  - Practising barristers must act responsibly, and exercise professional judgment, and have regard to the full range of professional duties, in deciding whether to make a personal comment or express a personal opinion on the facts or issues arising in current or anticipated proceedings in which they have seen, are, or expected to be involved. The same applies when considering how far any personal comment or opinion can properly go. This is especially important if the proceedings or the comments are likely to attract high levels of media attention.
  - A practising barrister should, before making a comment to the media, consider:
    - the nature and type of the proceedings;
    - the stage those proceedings have reached;

<sup>24</sup> Code of Conduct (n 21 above) para.5.16.

<sup>25</sup> See para.1.007.

<sup>26</sup> Code of Conduct (n 21 above) para.10.18; Chapter 8 — Confidentiality, *Volume 1, Professional Guide*.

<sup>27</sup> Code of Conduct, *Ibid.*, para.11.17(g).

<sup>28</sup> *Ibid.*



- (iii) the nature of proposed comments;
  - (iv) what information is permitted to be conveyed;
  - (v) whether he or she needs the consent of the client; and
  - (vi) the likelihood of prejudice arising from the comments.
- (f) If a practising barrister expresses a personal opinion, it must be honestly held.

2.049 See also Chapter 6: Section 1: Conduct of Defence Counsel in Criminal Proceedings.

2.050 Solicitors are bound by the *Hong Kong Solicitors' Guide to Professional Conduct* issued by the Law Society of Hong Kong (Professional Guide).<sup>29</sup> Failure to comply with rules contained in the Professional Guide may result in, *inter alia*, disciplinary proceedings against the solicitor and/or his firm. See *Hong Kong Solicitors' Guide to Professional Conduct* for details.

#### (iii) Courtroom attire

2.051 All persons are expected to dress appropriately in court. Failure to do so by a legal representative, in particular, may result in the legal representative being requested to change his attire before appearing before the court, causing delay to the court proceedings and/or resulting in possible cost consequences against the legal representative personally.

2.052 General court attire: legal representatives appearing before the courts should dress appropriately, professionally and conservatively. Men should wear a plain dark suit (black or dark blue) with white shirt. Men should also wear a waistcoat, except during summer months. When not robed, men's tie should be dark in colour (black or dark blue) and unobtrusive. Women should wear plain dark suits (black or dark blue) with white long-sleeved blouse, collar which is high to the neck. Shoes should be black in colour and closed-toe. No conspicuous jewellery or ornaments should be worn.<sup>30</sup>

2.053 Robes of legal representatives: when required, legal representatives must be robed. Barristers should wear wig, barrister's gown, wing collar and bands.<sup>31</sup> Solicitors should wear solicitors' gown, wing collar and bands.<sup>32</sup>

#### (iv) Courtroom etiquette

2.054 Court proceedings are formal proceedings. Those attending court proceedings should follow good courtroom etiquette, which include the following:

- (1) Be punctual;
- (2) Show respect to the judge. All persons should stand up and bow towards the judge when the judge enters the courtroom and upon entering or leaving the courtroom;

- (3) When proceedings are in session, all persons, except those addressing the court, are to remain quiet;
- (4) Video and/or audio recording and photography are not allowed inside the courtroom and the Court's building at any time;
- (5) Electronic and computer devices such as mobile telephones and laptop computers may be brought inside the courtroom, but the device must be switched to silent mode with the vibration function disabled; and
- (6) Food and drink (except water) are not allowed in the courtroom.

As counsel appearing on behalf of the lay client, additional etiquette tips should be followed: 2.055

- (1) Be respectful and courteous to all parties;
- (2) Stand up and take turns to address the judge. When finished addressing the judge, sit down;
- (3) To make an objection, stand up to alert the judge and the opposing counsel. Opposing counsel should then sit down;
- (4) Direct all submissions to the judge and not to the opposing counsel;
- (5) Make submissions, do not offer your opinion or comment;
- (6) Remain in attendance at the counsel's bench until excused; and
- (7) Advise lay client, witnesses and associates of the proper courtroom etiquette before the proceedings.

In other words, not only should the legal representative comply with the proper courtroom etiquette and dress appropriately, the duty rests upon an accused's legal representatives to properly advise their lay client of such etiquette and rules prior to attending court. 2.056

Unless there are highly exceptional circumstances, the legal representatives and lay clients must arrive in court prior to the start of court proceedings or time set out as one of the accused's bail conditions and/or as stated on the summons (if so required). The usual practice is to arrive at least 15–30 minutes prior to the start of court proceedings. Traffic congestion is not considered an exceptional circumstance. Legal representatives should also be aware of possible cost consequences against the legal representative personally for his failure to appear in court where there Notice to Act<sup>33</sup> has been filed and/or brief has been delivered. 2.057

#### Duty to the Court and Conduct in Court<sup>34</sup>

10.35 In the interests of the efficient administration of justice and respect for the Court, a practising barrister must use his best endeavours always to be punctual.

<sup>29</sup> Law Society of Hong Kong, *Hong Kong Solicitors' Guide to Professional Conduct*, [http://www.hklawsoc.org.hk/pub\\_e/professionalguide/](http://www.hklawsoc.org.hk/pub_e/professionalguide/) (1 June 2018).

<sup>30</sup> Code of Conduct (n 21 above) Annex 11.

<sup>31</sup> *Ibid.*, Annex 11.

<sup>32</sup> PD 21.1.

<sup>33</sup> See Rules of the High Court (Cap.4A, Sub.Leg.) O.67 in relation to requirements of Notice to Act.

<sup>34</sup> Code of Conduct (n 21 above).



- 2.058 As additional security screenings<sup>35</sup> and house rules<sup>36</sup> have been implemented in the High Court building, please ensure that all relevant parties arrive well in advance of the time of the required attendance.
- 2.059 For typhoon and rainstorm warning arrangements, see [http://www.judiciary.gov.hk/en/crt\\_services/business\\_hours\\_typhoon.htm#typhoon\\_warning](http://www.judiciary.gov.hk/en/crt_services/business_hours_typhoon.htm#typhoon_warning).
- 2.060 For Judiciary's notice as to use of technology in courtrooms, see [http://www.judiciary.gov.hk/en/crt\\_services/notice\\_to\\_court\\_users.pdf](http://www.judiciary.gov.hk/en/crt_services/notice_to_court_users.pdf).

(v) *Language of proceedings*

- 2.061 Official languages in court proceedings in Hong Kong are English and Chinese (Cantonese廣東話/*Punti*本地話).<sup>37</sup>

**Official Languages Ordinance (Cap.5)**

**5. Judicial proceedings**<sup>(15/02/2017)</sup>

- (1) A judge, magistrate or other judicial officer may use either or both of the official languages in any proceedings or a part of any proceedings before him as he thinks fit. (*Amended 21 of 1999 s.24*)
- (2) The decision of a judge, magistrate or other judicial officer under subsection (1) is final.
- (3) Notwithstanding subsection (1), a party to or a witness in any proceedings or a part of any proceedings may-
  - (a) use either or both of the official languages; and
  - (b) address the court or testify in any language.
- (4) Notwithstanding subsection (1), a legal representative in any proceedings or a part of any proceedings may use either or both of the official languages. (*Amended 21 of 1999 s.24*)
- (5) The Chief Justice may make rules and issue practice directions to regulate the use of the official languages in the courts.

(*Replaced 51 of 1995 s.3*)

- 2.062 With a view to disposing of cases fairly and expeditiously, the majority of criminal cases heard in the Magistrates' Courts, Juvenile Courts and District Court are listed before bilingual judges and are conducted in Chinese (*Punti*).
- 2.063 Accused persons may request that a case is to be conducted in English or Chinese, but the decision is a matter of discretion of the listing judge.
- 2.064 In 香港特別行政區訴朱峻瑋 (*Chu Tsun Wai*),<sup>38</sup> counsel for the applicant was criticised for proceeding with his submissions in English during a Chinese appeal

<sup>35</sup> See [http://www.judiciary.hk/en/security/hc\\_security.pdf](http://www.judiciary.hk/en/security/hc_security.pdf).

<sup>36</sup> See [http://www.judiciary.hk/en/security/house\\_rules.pdf](http://www.judiciary.hk/en/security/house_rules.pdf).

<sup>37</sup> Official Languages Ordinance s.3.

<sup>38</sup> [2018] HKCFI 1259.

hearing, without leave of the court. The counsel sought to rely on Official Languages Ordinance s.5(4) as basis for his conduct. In this case, the original trial was heard in Chinese and the appeal in the CFI was listed as a Chinese appeal hearing. The judge reiterated that under Official Languages Ordinance s.5(1) and 5(2), the decision of the courts and/or listing officer as to language of a particular proceedings is final, unless leave is obtained. Section 5(1) applies even where the presiding judge or Magistrate is bilingual.

Basic Law art.11 ensures that an accused has the free assistance of an interpreter if he cannot understand or speak the language used in court. 2.065

Double interpretation is discouraged. For example, where the native language of an accused person is for example Tagalog or Nepali and the interpreter is certified only in English, the court proceedings would be conducted in English. 2.066

Where the accused is deaf, dumb or both, the judge must see that proper means are taken to communicate to him the case made against him and to enable him to answer to it.<sup>39</sup> 2.067

In the course of criminal proceedings, where necessary, documents shall be translated and certified in accordance with the legislation and Practice Direction 10.2: Chinese Translations,<sup>40</sup> which provides additional guidance for Chinese translations to be used in court proceedings. 2.068

**Official Languages (Translation) Rules (Cap.5B, Sub.Leg.)**

**1. Translation of documents in official languages**<sup>(01/07/1997)</sup>

- (1) If a court indicates that it intends to conduct a trial, or a part of a trial, in the Chinese language, any document that is written in the English language that is to be admitted in evidence must be accompanied by a certified translation in the Chinese language.
- (2) If a court indicates that it intends to conduct a trial, or a part of a trial, in the English language, any document that is written in the Chinese language that is to be admitted in evidence must be accompanied by a certified translation in the English language.
- (3) The court may at any time dispense with the need for a translation of a document from one official language to the other official language.
- (4) These Rules apply to both civil and criminal proceedings in all judicial proceedings to which the Ordinance applies.
- (5) In these Rules *court* (法庭) includes a magistrate or other person conducting judicial proceedings.

The translation and certification of documents, if necessary, to be relied on by the Prosecution is prepared by the Prosecution before the trial begins. 2.069

<sup>39</sup> *Archbold Hong Kong 2018*, para.4-16.

<sup>40</sup> Appendix 23.



**2.070** For documents to be relied on by the Defence, translation and certification of documents, if necessary, to be relied on by the Defence is to be prepared by the Defence before the trial begins. Thus, legal representatives should conduct necessary preparation and advise the accused of costs of translating and certifying documents to be relied on by the Defence, as the said costs are to be borne by the accused himself (subject to the subsequent application for costs by the Defence after trial, if any).

**2.071** See Appendix 39: Suggested Translations of Commonly Used Expressions.

(vi) *Record of trial proceedings*

**2.072** The judiciary retains a record of all proceedings that take place in the courtrooms of Hong Kong.

**Criminal Procedure Ordinance (Cap.221)**

**Part III**

**79. Record of proceedings and inspection thereof<sup>(20/04/2018)</sup>**

- (1) A record (whether made by means of shorthand notes, by mechanical means or otherwise) kept in accordance with rules made under section 9, or such other record as the trial judge may direct, shall be taken of the proceedings at the trial of any person on indictment who, if convicted, is entitled or may be authorized to appeal to the Court of Appeal.

(Replaced 13 of 1995 s.43)

[Note: *sub-ss.*(2) to (6) are omitted]

**2.073** Presently, to comply with the requirements under Criminal Procedure Ordinance (Cap.221) (CPO) s.79, audio recordings of court proceedings are kept by way of Digital Audio Recording Transcription Services (DARTS). Inside the courtrooms, the DARTS system is switched on from about 9:00 am to 6:00 pm and is monitored in real time. That being the case, the legal representatives should take care and should not conduct private and/or confidential conversations inside the courtroom to guarantee confidentiality and legal professional privilege.

**2.074** Also, CCTV cameras are placed within the court buildings and courtrooms by the judiciary.

**2.075** Apart from the video and/or audio recording recorded by the judiciary, all other persons including legal representatives are prohibited from making any video and/or audio recording of court proceedings or within the court buildings.

**2.076** In *Secretary for Justice v Ng Wai Bing*,<sup>41</sup> defendants were convicted of contempt for covertly placing an MP3 recorder in a witness room outside the courtroom where a vice trial was taking place to record the conversations of prosecution witnesses, despite the recordings leading to the acquittal of the first defendant in the original vice trial.

<sup>41</sup> [2012] 1 HKLRD 245 (CA).

In *Re Tang Lin Ling*,<sup>42</sup> Andrew Chan J convicted the defendant of contempt of court for taking three photographs of court proceedings from the public gallery, sentenced her to seven days' immediate imprisonment and made an order of cost against her for about HK\$197,000.

Subject to the provisions of CPO s.79(2)–79(6), certain parties may inspect such DARTS record of proceedings retained by the Judiciary.

**Criminal Procedure Ordinance (Cap.221)**

**Part III**

**79. Record of proceedings and inspection thereof<sup>(20/04/2018)</sup>**

- (2) A record taken under subsection (1) shall be open for inspection without fee or reward by-
- a judge;
  - the Registrar;
  - the Secretary for Justice; (*Amended LN 362 of 1997*)
  - a judge or deputy judge of the District Court;
  - the registrar of the District Court;
  - a party interested or his legal representative;
  - any person, or his legal representative, who satisfies the Registrar 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 that there is good and sufficient reason for that inspection.
- (3) A decision by the Registrar to refuse permission to inspect shall be final.
- (4) The right to inspect under subsection (2) shall include the right to a copy of the record subject, in the case of applicants under subsection (2)(g) and (h), to payment of the prescribed fee.
- (5) Disclosure of the contents of a record under subsection (2) shall not amount to a breach of the Rehabilitation of Offenders Ordinance (Cap.297).
- (6) For the purposes of subsection (2) *a party interested* (有利害關係的一方) means the prosecutor or the person convicted or any person named in, or immediately affected by, any order made by the trial judge or any other person authorized to act on behalf of any such person.

(Replaced 13 of 1995 s.43)

[Note: *sub-s.*(1) is omitted]

<sup>42</sup> (HCMP 2917/2017, 4 June 2018).



## (b) Magistrates' Courts 裁判法院

## (i) Generally

- 2.079 Procedure in the Magistrates' Courts is governed mainly by the MO and CPO and Practice Directions such as PD 9.6: Magistracy Appeals in the Court of First Instance<sup>43</sup> and PD 9.10: Use of Screens in Sexual Offence Cases in Magistrates' Courts.<sup>44</sup>
- 2.080 Proceedings in the Magistrates' courts are presided by a single Magistrate and proceedings are tried summarily.
- 2.081 Two types of Magistrates can be appointed by warrant of the Chief Executive, namely, Special Magistrate and Permanent Magistrate.<sup>45</sup>
- 2.082 The Chief Executive may also by warrant appoint any person who is eligible to be appointed as a Permanent Magistrate to be a Deputy Magistrate (or as a Special Magistrate to be a Deputy Special Magistrate) for such period and on such terms as he thinks fit. 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.<sup>46</sup>
- 2.083 The power of the Chief Executive to appoint Magistrates may be delegated to the Chief Justice of the CFA.<sup>47</sup> In practice, the appointment of Magistrates is now exercised by the Chief Justice of the CFA as delegated by the Chief Executive.
- 2.084 Deputy Magistrate, Deputy Special Magistrate or Deputy judge (District Court or CFI) is appointed on a non-permanent basis, who, during the specified period for which he is appointed, has all the jurisdiction, powers and privileges, and perform all the duties, of his permanently appointed counterparts.
- 2.085 Magistrates Ordinance ss.5AA and 5AB sets out the eligibility requirements of appointment as Permanent Magistrate and Special Magistrate, respectively.
- 2.086 As of 2018, Hong Kong has seven Magistrates' Courts, namely, Eastern (ES), Kowloon City (KC), Kwun Tong (KT), West Kowloon (WK), Shatin (ST), Fanling (FL) and Tuen Mun (TM) Magistrates' Courts.
- 2.087 In the Magistrates' Courts, each criminal case is assigned a distinct case number depending on the location of the first court appearance, whether the case is commenced by charge or summons and the year when the proceeding commences. For example, a case initiated by way of charge with the defendant's first appearance in KT Magistrates' Court in 2017 would be assigned a distinct case number with the prefix Kwun Tong Criminal Case (KTCC) with suffix "/2017". A case initiated by way of summons with the defendant's first appearance in ST Magistrates' Court in 2018 would be assigned a distinct case number with the prefix Shatin Summons (STS) with suffix "/2018".

<sup>43</sup> Appendix 21.

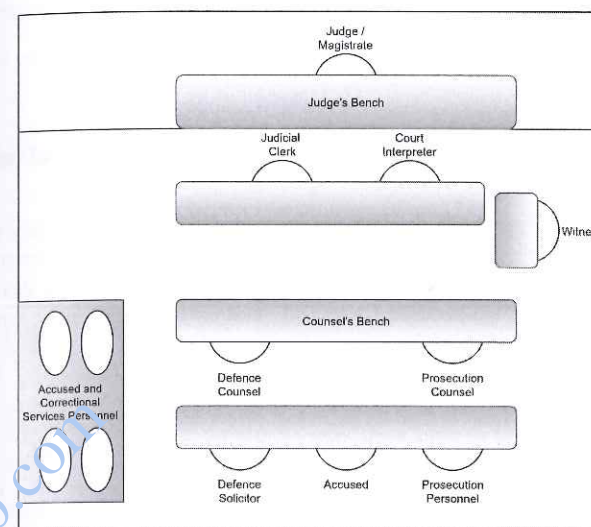
<sup>44</sup> Appendix 22.

<sup>45</sup> MO s.5(1).

<sup>46</sup> *Ibid.*, s.5A.

<sup>47</sup> *Attorney-General v Chiu Tat Cheong David* [1992] 2 HKLR 84 (CA).

Diagram 3 Example of Courtroom Layout in the Magistrates' Courts and District Court 2.088



Normal court hours in the Magistrates' Courts are 9:30 am to 1:00 pm and 2:30 pm to 4:30 pm from Mondays to Fridays and 9:30 am to 1:00 pm on Saturdays, excluding public holidays. Courts may also be opened outside normal hours to deal with cases. 2.089

## (ii) Jurisdiction — Special Magistrate

Special magistrates are appointed by warrant under MO s.5(1) and 5(3). 2.090

## Magistrates Ordinance (Cap.227)

## Part I

5. Chief Executive may by warrant appoint permanent and special magistrates<sup>(11/07/2018)</sup>

- (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. (*Amended 48 of 1949 s.3; 3 of 1974 s.2; 59 of 1994 s.6; 25 of 1998 s.2*)
- (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. (*Amended 59 of 1994 s.6*)

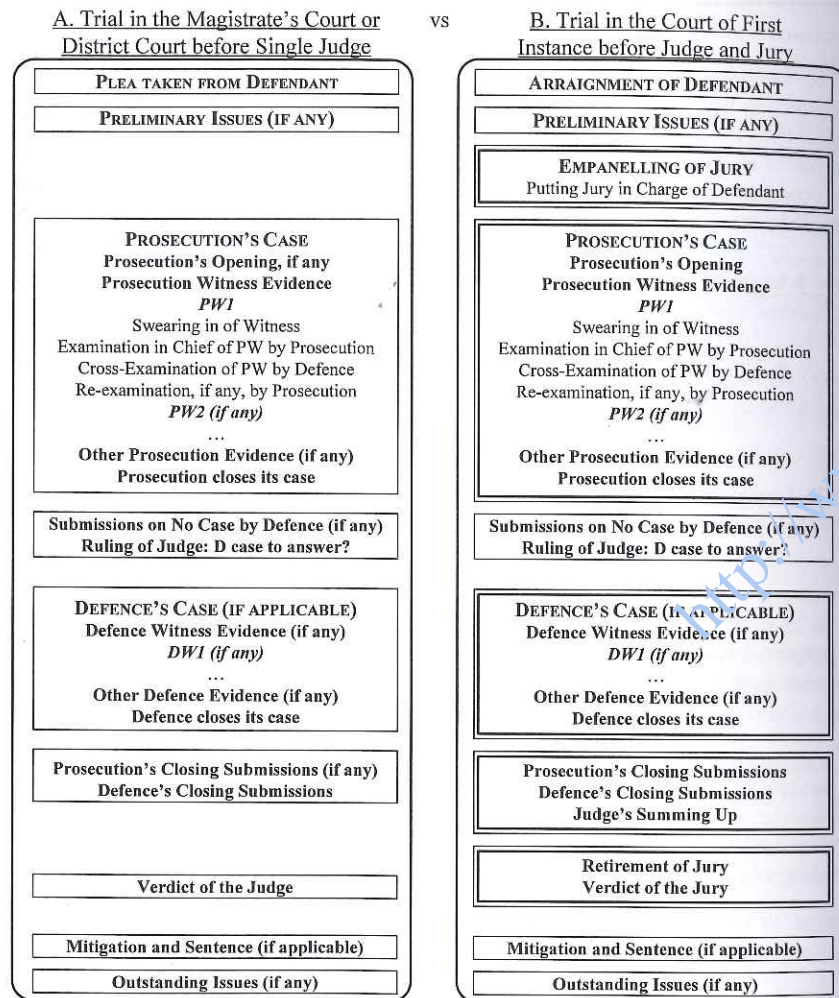
[Note: *sub-ss.*(2), (4) to (6) are omitted]



be followed as nearly as may be in criminal proceedings in the District Court tried upon indictment.

- 6.011** Be that as it may, as criminal proceedings in the Magistrates' Courts and District Court are heard without a jury, before a single presiding officer such as a Magistrate or District Judge, the sequence of events within the trial is therefore, in practice, similar.
- 6.012** It is on this basis that trials in the Magistrates' Courts and District Court are discussed together in this chapter. See Diagram 5 for a brief comparison of the various stages of trial in the Magistrates' Courts or District Court compared to the CFI.

**Diagram 5 Comparison of General Stages in a Criminal Trial**



Before Single Judge



Before Judge and Jury

Once the preliminary court appearances are completed and the case is ready for trial, if the defendant pleads not guilty to the allegations against him, the proceedings should proceed to trial, on the date fixed for the trial to commence. **6.013**

The requirement of a defendant's attendance at criminal proceedings is set out in his bail conditions. In practice, a defendant is usually required to be present at all times at trial, which ensures his right to be tried in his presence and fairness of the trial.<sup>12</sup> **6.014**

If a defendant has been granted bail by the court, he is given a copy of the Bail Form,<sup>13</sup> which sets out the date and time at which the defendant is to surrender to the court and the location of the court. A defendant must attend court in accordance with the bail conditions, otherwise his bail may be immediately revoked, bail money may be forfeited and a warrant for his arrest may be issued.<sup>14</sup> **6.015**

On the day of each criminal court appearance, legal representatives of the defendant shall report promptly to the judicial clerk of the Magistrate or Judge<sup>15</sup> of his representation by completing an Attendance Form for Criminal Proceedings.<sup>16</sup> The said attendance form must be signed by the barrister and/or solicitor instructed to appear on behalf of the accused. **6.016**

In the Magistrates' Courts, there may be more than one trial fixed for a particular court on a given day. The sequence of the hearings of the cases would depend on factors such as whether the case is a part-heard case (ie, trial has already begun and has been adjourned to this day), whether there is a court order for priority to be given to the case (usually where the original trial date has already been rescheduled), whether the defendant is remanded in custody, seniority of the counsel appearing on his behalf, etc. If the original Magistrate is not available to hear a case, another Magistrate in the same court building may offer assistance to deal with the case. This is commonly known as "OA" and the original Magistrate orders that the case be heard before a different Magistrate on the same day. Alternatively, an order may be made for the case to be re-fixed to another date. **6.017**

Unless otherwise stated, for the purposes of this chapter, the Magistrate, Deputy Magistrate, Special Magistrate, Deputy Special Magistrate, District Judge and Deputy District Judge who conduct the trial are collectively referred to as "Trial Judge". **6.018**

For the usual process of proceedings in a criminal trial before a Magistrate, see Diagram 6. **6.019**

<sup>12</sup> See also MO s.18 at paras.2.103–2.104 and MO ss.18E and 19A at paras.5.091–5.092.

<sup>13</sup> Appendix 6.

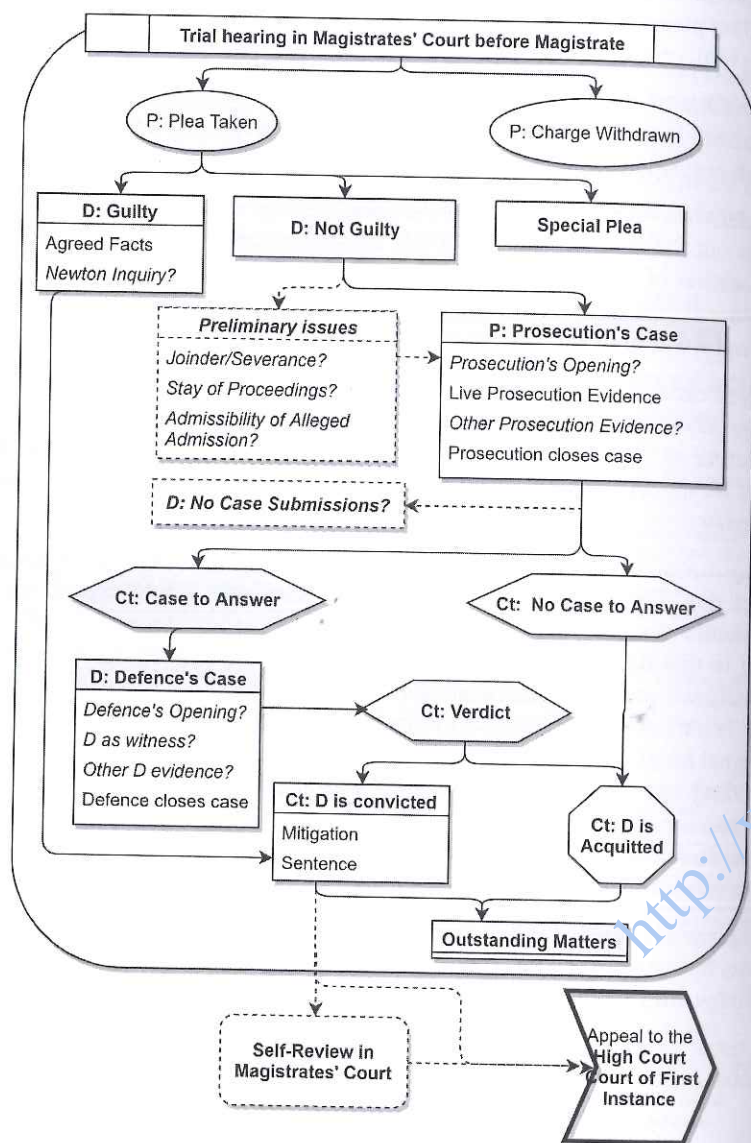
<sup>14</sup> See also paras.5.062, 5.064–5.068.

<sup>15</sup> Usually referred to as court clerk.

<sup>16</sup> Appendix 33.



Diagram 6 Trial in the Magistrates' Courts



6.020 On the day of the trial before the Trial Judge, the first step is for the case to be called by the court clerk, so as to notify parties, including staff at Digital Audio Recording Transcription Services (DARTS), that a particular case is to begin.

#### (b) Swearing in of interpreter (if applicable)

6.021 Hong Kong Bill of Rights art.11(2) ensures that a defendant has free assistance of an interpreter if he cannot understand or speak the language used in court (namely, English and/or *Punti*). This also ensures that the defendant understands the nature and cause of the charge against him.

Where interpretation service is required for the defendant during the trial, the interpreter must first be sworn in before he provides any interpretation service to the defendant. 6.022

The wording of the oath depends on the role of the person, ie, interpreter,<sup>17</sup> witness,<sup>18</sup> juror<sup>19</sup> or usher on retirement of jury<sup>20</sup> and the religion of the person. See Oaths and Declarations Ordinance (Cap.11). 6.023

The importance of the oath taken by an interpreter or a witness is reflected by the fact that one may be charged with perjury if one wilfully makes a statement under oath knowing it to be false or does not believe it to be true.<sup>21</sup> 6.024

To ensure the fairness of the trial, the interpreter provided to the defendant during the trial by the Judiciary cannot be the same interpreter as used by him during the investigation process, if any, as the interpreter may be professionally embarrassed, namely, he may become a witness in the case. 6.025

#### (c) Taking of plea from the defendant

On the day of the trial before the Trial Judge, the information (ie, charge) is again put to the defendant and he is asked whether he pleads guilty or not guilty. 6.026

In the Magistrates' Courts, where a defendant is tried summarily, plea is taken in accordance with MO Pt.II s.19(1).<sup>22</sup> 6.027

Where the case is transferred to the District Court and defendant is tried upon indictment, the charge is put to the defendant and he is asked whether he pleads guilty or not guilty by virtue of CPO s.49 and DCO s.79,<sup>23</sup> namely, the defendant is arraigned. 6.028

#### Criminal Procedure Ordinance (Cap.221)

##### Part III

#### 49. Arraignment of the accused<sup>(20/04/2018)</sup>

- (1) The accused person shall be placed at the bar unfettered and not in prison clothes, unless the court sees cause to direct otherwise.
- (2) The indictment shall then be read over to him by the Registrar, and explained, if necessary, by the Registrar or the interpreter of the court; and he shall be required to plead instantly thereto, unless he objects to the want of due service of the indictment and notice of trial, and the court finds that he has not been duly served therewith.

<sup>17</sup> Affirmation of an interpreter: "I (name in full), solemnly, sincerely and truly declare and affirm that I am well acquainted with the (...) dialect(s) of the Chinese language and the (...) language and that I will well and truly interpret and make explanations to the Court of all such matters and things as shall be required of me to the best of my skill, ability and understanding."

<sup>18</sup> Oath of Christian witness: "I, (name in full), swear by Almighty God that the evidence I shall give shall be the truth, the whole truth, and nothing but the truth."

<sup>19</sup> Oath of a Catholic juror: "I, (name in full), swear by Almighty God that I will give a true verdict in this case according to the evidence."

<sup>20</sup> Affirmation of an usher on retirement of jury: "I, (name in full), solemnly, sincerely and truly declare and affirm that I shall keep all members of this jury together, I will not allow any person to speak to them nor will I speak to them myself about the trial without the leave of the Court."

<sup>21</sup> Crimes Ordinance s.31 at para.2.014.

<sup>22</sup> See para.5.087.

<sup>23</sup> See para.2.146.



- (3) Where the accused person is a corporation, a plea in writing may be entered by its representative, and if either the corporation does not appear by a representative or, though it does so appear, fails to enter as aforesaid any plea, the court shall order a plea of not guilty to be entered and the trial shall proceed as though the corporation had duly entered a plea of not guilty. (*Added 11 of 1962 s.2*)
- (4) In this section and in section 87 of the Magistrates Ordinance (Cap.227), the expression *representative* (代表) in relation to a corporation means a person duly appointed by the corporation to represent it for the purpose of doing any act or thing which the representative of a corporation is by this section or by section 87 of the Magistrates Ordinance (Cap.227) authorized to do, but a person so appointed shall not, by virtue only of being so appointed, be qualified to act on behalf of the corporation before any court for any other purpose. A representative for the purposes of this section and section 87 of the Magistrates Ordinance (Cap.227) need not be appointed under the seal of the corporation, and a statement in writing purporting to be signed by a managing director of the corporation, or by any person (by whatever name called) having, or being one of the persons having, the management of the affairs of the corporation, to the effect that the person named in the statement has been appointed as the representative of the corporation for the purposes of this section or of section 87 of the Magistrates Ordinance (Cap.227) shall be admissible without further proof as prima facie evidence that that person has been so appointed. (*Added 11 of 1962 s.2*)

**6.029** If a charge sheet contains more than one charge, each charge must be put to the defendant separately and the defendant must be asked to plead to each charge as it is read to him.<sup>24</sup> If there are charges for alternative offences, unless the defendant pleads guilty to the main charge, the alternative charge should also be put to the defendant and he should be asked to plead to the alternative as well.

**6.030** The pleas open to a defendant are as follows:

- (1) Plea of not guilty;
- (2) Plea of guilty;
- (3) Plea to the jurisdiction of the court;
- (4) Plea that the defendant has been pardoned;
- (5) Plea of *autrefois acquit*; or
- (6) Plea of *autrefois convict*.<sup>25</sup>

**6.031** Under CPO s.49, the defendant must be present in person during the arraignment in the District Court, even if he resided abroad and the arraignment is only for the purpose of his formal acquittal.<sup>26</sup>

<sup>24</sup> *R v Boyle* [1954] 2 QB 292 (CA).

<sup>25</sup> See also para.5.090 (see also footnotes).

<sup>26</sup> *HKSAR v Walsh Kent Andrew* [2018] 1 HKLRD 558 (CFI) and [2018] 2 HKC 437 (CFI). The defendant's application for certificate to appeal to the CFA was dismissed by Zervos J, see *HKSAR v Walsh Kent Andrew* [2018] HKCFI 921.

It is incumbent upon the legal representatives to advise and explain the merits (legal and factual) of the defendant's case to him before the defendant decides on his plea.<sup>27</sup> **6.032**

If the defendant pleads not guilty to any of the charges, the case proceeds to trial before the Trial Judge. **6.033**

#### 50. Effect of plea of not guilty<sup>(20/04/2018)</sup>

The accused person, on being arraigned, by pleading generally the plea of not guilty, shall, by such plea, without further form, be deemed to have put himself upon the country for trial.

See also Chapter 7: Section 2(b): Pleading guilty to a lesser offence, which is also applicable to trials upon indictment in the District Court. **6.034**

If the defendant pleads guilty, the Brief Facts or Summary of Facts, which form the factual basis of his guilty plea, are read to the defendant. If the defendant admits to the Brief Facts or Summary of Facts, the Trial Judge may convict the defendant and may hear submissions on mitigation made on his behalf.<sup>28</sup> **6.035**

If the defendant pleads guilty but does not admit to the Brief Facts or Summary of Facts, a *Newton* Inquiry may be necessary.<sup>29</sup> **6.036**

#### (d) Possible reversal of plea by a defendant

"A guilty plea made under duress, inducement or misrepresentation is a nullity."<sup>30</sup> **6.037**

In exceptional cases, a defendant who had previously pleaded guilty may wish to apply to change his plea to that of not guilty and to proceed to trial. **6.038**

The Court "has a discretion to allow a defendant to change a plea of guilty to one of not guilty at any time prior to the passing of sentence. This is the case even where the guilty plea is unequivocal. The discretion must be exercised judicially."<sup>31</sup> **6.039**

"Where a defendant applies to change his plea from guilty to not guilty, it is incumbent on [the Court] to make sufficient inquiries to ascertain the basis of the defendant's wish to reverse his plea and to decide if that basis is sound in fact and in law."<sup>32</sup> **6.040**

Before a defendant applies to change his plea in court from guilty to not guilty, legal representatives must consider and advise the defendant on the defendant's change of plea. Such change of instructions may cause embarrassment to the legal representatives and the legal representatives may be under a duty to withdraw representation. **6.041**

See also para.10.55 and Annex 12, Bar Code: Confession of Guilt and para.10.05, Professional Guide.<sup>33</sup> **6.042**

<sup>27</sup> See also Bar Code, para.10.56 at para.5.011.

<sup>28</sup> See Chapter 8: Mitigation and Sentencing.

<sup>29</sup> See Chapter 8: Section 2(c): *Newton* inquiry.

<sup>30</sup> *HKSAR v Shum Wan Foon* (2014) 17 HKCFAR 303, 308.

<sup>31</sup> *Ibid.*, 309.

<sup>32</sup> *Ibid.*

<sup>33</sup> See para.6.005.



## Solicitors' Guide to Professional Conduct

## Chapter 10

Litigation Solicitors<sup>34</sup>

## 10.05 DUTY TO WITHDRAW

If during litigation a client desires or intends to take a course of action which will involve a breach of the duties owed to the court and the opponent, his solicitor must refuse to take or support that course of action. The solicitor must do all he can reasonably to prevent it. If that course cannot be prevented then the solicitor should cease to act or seek leave to do so, subject however to the rules concerning ceasing to act.

- 6.043 For an illustration of the circumstances under which a defendant was permitted to withdraw a plea of guilty, see *HKSAR v Zilinskas*,<sup>35</sup> where Zervos J allowed the defendant (a Lithuanian national) to reverse his previous guilty plea to trafficking in dangerous drugs after accepting that despite he was legally represented with the assistance of an interpreter, he was confused about the elements of the offence and misunderstood the legal procedures on tendering his guilty plea.

## 3. DETERMINATION OF PRELIMINARY ISSUES BEFORE TRIAL JUDGE

## (a) Introduction

- 6.044 In criminal proceedings (assuming there is no issue being taken that the defendant is unfit to plead),<sup>36</sup> there are some preliminary issues which may be heard by the Trial Judge, after plea is taken and before the Prosecution opens its case. Preliminary issues may include, *inter alia*:

- (1) Application for severance of trial;
- (2) Application by Defence for stay of proceedings;
- (3) Admissibility of alleged confessions/admissions of the defendant; and
- (4) Application by Secretary for Justice (SJ) for transfer of proceedings.

## (b) Severance of trial

- 6.045 Under Indictment Rules (Cap.221C, Sub.Leg.) r.7 and subject to CPO s.18,<sup>37</sup> charges for any offences may be joined in the same indictment if those charges are founded on the same facts, or form or are a part of a series of offences of the same or a similar character.

- 6.046 Once charges are properly joined or where two or more persons are properly charged in the same indictment, the court has the discretion to order severance of the charges

<sup>34</sup> Professional Guide (n 9 above).

<sup>35</sup> [2016] 3 HKLRD 505 (CFI).

<sup>36</sup> See Chapter 5: Section 3(e)(ii): Fitness to be tried.

<sup>37</sup> See para.4.146 for Indictment Rules r.7 and CPO s.18.

or to order separate trials for the defendants. This discretion of the court is provided under CPO s.23(3).

## Criminal Procedure Ordinance (Cap.221)

## Part II

23. Orders for amendment of indictment, separate trial and postponement of trial<sup>(20/04/2018)</sup>

- (3) Where, before trial or at any stage of a trial, the court is of opinion that a person accused may be prejudiced or embarrassed in his defence by reason of being charged with more than one offence in the same indictment, or that for any other reason it is desirable to direct that the person should be tried separately for any one or more offences charged in an indictment, the court may order a separate trial of any count or counts of such indictment.
- (4) Where, before trial or at any stage of a trial, the court is of opinion that the postponement of the trial of a person accused is expedient as a consequence of the exercise of any power of the court under this Ordinance to amend an indictment or to order a separate trial of a count, the court shall make such order as to the postponement of the trial as appears necessary.
- (5) Where an order of the court is made under this section for a separate trial or for the postponement of a trial-
  - (a) if such an order is made during a trial the court may order that the jury are to be discharged from giving a verdict on the count or counts the trial of which is postponed or on the indictment, as the case may be; and
  - (b) the procedure on the separate trial of a count shall be the same in all respects as if the count had been found in a separate indictment, and the procedure on the postponed trial shall be the same in all respects (if the jury has been discharged) as if the trial had not commenced; and
  - (c) the court may make such order as to admitting the accused person to bail and as to the enlargement of recognizances and otherwise as the court thinks fit.
- (6) Any power of the court under this section shall be in addition to and not in derogation of any other power of the court for the same or similar purposes.

(17 of 1919 s.6 incorporated)  
[cf 1915 c.90 s.5 UK]

For similar provisions of a Magistrate to order separate trials, see MO s.10(2).<sup>38</sup> 6.047

In particular, the House of Lords in *Ludlow v Metropolitan Police Commissioner*<sup>39</sup> 6.048 directed that:

The judge has no duty to direct separate trials under section [23(3)] unless in his opinion there is some special feature of the case which would make a joint trial of

<sup>38</sup> See para.4.088.

<sup>39</sup> [1971] AC 29, 41F.



the several counts prejudicial or embarrassing to the accused and separate trials are required in the interests of justice. In some cases the offences charged may be too numerous and complicated..., or too difficult to disentangle..., so that a joint trial of all the counts is likely to cause confusion and the defence may be embarrassed or prejudiced. In other cases objection may be taken to the inclusion of a count on the ground that it is of a scandalous nature and likely to arouse in the minds of the jury hostile feelings against the accused.

**6.049** Circumstances for applications of severance of an indictment or charge sheet may include where, *inter alia*:

- (1) Multiple defendants are jointly charged in a single charge;<sup>40</sup>
- (2) Multiple defendants are charged in separate counts, with each involving a different defendant;<sup>41</sup>
- (3) Separate trials for conspiracy counts and substantive counts;<sup>42</sup> and
- (4) Indictment has too many counts.<sup>43</sup>

**6.050** "Severance of an indictment is a matter of discretion for the presiding judge in applying the above principles to the facts and circumstances of the particular case before him."<sup>44</sup>

**6.051** In practice, such an application for severance is usually made by the Defence and may be opposed by the Prosecution.

**6.052** Where the Trial Judge makes an order for severance, the separate trials are then heard in accordance with the order of the Trial Judge, on separate dates as fixed in the order.

**6.053** "[I]t is a matter for the discretion of the judge at the trial whether two people jointly indicted should be tried together or separately. But the judge must exercise his discretion judicially. If he has done so this [Appellate] Court will not interfere, but that is subject to this qualification. If it appeared to this [Appellate] Court that a miscarriage of justice had resulted from the prisoners being tried together it would quash the conviction."<sup>45</sup>

### (c) Stay of proceedings

**6.054** As discussed in Chapter 4: Section 2(b) above, article 63, Basic Law<sup>46</sup> enshrines the Secretary for Justice's independence to control criminal proceedings as he thinks best.

<sup>40</sup> *R v Moghal* (1977) 65 Cr App R 56 (CA).

<sup>41</sup> *R v Assim* [1966] 2 QB 249 (CA).

<sup>42</sup> PD 9.1: Conspiracy; *Hui Shu Tam v R* [1965] HKLR 341 (CA).

<sup>43</sup> *HKSAR v Hui Rafael Junior* (HCCC 98/2013, [2015] HKEC 21), [9] quoting *Ludlow v Metropolitan Police Commissioner* [1971] AC 29, 41F.

<sup>44</sup> *HKSAR v Hui Rafael Junior*; *Ibid.*, [10].

<sup>45</sup> *R v Gibbins* (1918) 13 Cr App R 134, 136 (CA), applied in *R v Lee Shek Ching* [1986] HKLR 304.

<sup>46</sup> See para.2.193.

On the other hand, the court also has the inherent power to stay criminal proceedings brought by the SJ in exceptional cases.

### *HKSAR v Lee Ming Tee*

(2001) 4 HKCFAR 133, 148

The decision whether or not to bring a prosecution falls entirely within the province of the Secretary for Justice: Basic Law art.63. In general, if a prosecution is brought, the court's duty is to try the case. As Lord Morris (quoting with approval the ruling of the Trial Judge in that case) stated in *Connolly v DPP* [1964] AC 1254 at p.1304:

... generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it.

The trial of course proceeds in the vast majority of cases. However, the court also unquestionably has jurisdiction to stay criminal proceedings brought by the Secretary in the exceptional cases where such a course is justified. That jurisdiction rests on the court's inherent power to prevent abuse of its own process: *Connolly v DPP* [1964] AC 1254 at pp.1354, 1361.

The staying of criminal proceedings would only be justified in highly exceptional circumstances.<sup>47</sup> **6.055**

The circumstances upon which such discretion is exercised is summarised in *HKSAR v Ng Chun To Raymond*<sup>48</sup> by Stock VP as follows: **6.056**

"The circumstances in which, in the exercise of a court's discretion, a stay of proceedings will be justified are exceptional. Those circumstances are explained by Ribeiro PJ in *HKSAR v Lee Ming Tee & Anor* But in exercise of its inherent power to prevent an abuse of its own process, the court has jurisdiction to stay criminal proceedings in two circumstances:

- (1) where, notwithstanding the remedial measures which are available to a court to ensure a fair trial, the circumstances are such that 'a fair trial for the accused is found to be impossible and continuing the prosecution would amount to an abuse of process.' (emphasis added) That is because 'the continuation of processes which will culminate in an unfair trial can be seen as a 'misuse of the court process' which will constitute an abuse of process because the public interest in holding a trial does not warrant the holding of an unfair trial.' The burden is on the accused to show on a balance of probabilities that no fair trial can be held. The basis upon which such applications tend to be mounted include delay, unfair methods of investigation, and pre-trial publicity; and
- (2) in rare cases where, even though a fair trial is available, the court is prepared to grant a permanent stay because there has been an abuse of power of a kind that renders the trial of the accused an affront to the court's sense of justice and propriety. An example is the refusal of a court to exercise

<sup>47</sup> *Ibid.*, 150.

<sup>48</sup> [2013] 5 HKC 390, 413, [84] (CA).



jurisdiction over an accused who has been unlawfully abducted from another jurisdiction.”

- 6.057 “The grant or refusal of a stay is a fact-sensitive question of discretion and the burden is on the applicant for a stay to show, on a balance of probabilities, that the trial is so prejudiced by the matter of which he complains that it is beyond the power of the judge to preside over and hold a fair trial.”<sup>49</sup>
- 6.058 See paras.5.313–5.315 and Practice Direction 9.7: Applications to Stay Criminal Proceedings for requirement of the Defence to give proper notice prior to making such an application.
- 6.059 Where notice has been served, no less than 14 days before trial, Defence should serve its skeleton argument and list of authorities to all relevant parties.<sup>50</sup>
- 6.060 No less than seven days before trial, the Prosecution should serve its skeleton argument and authorities to all relevant parties.<sup>51</sup>

(d) Admissibility of alleged admission and/or confession  
(*voir dire*/alternative procedure)

(i) Generally

- 6.061 Admissions or confessions made by a defendant outside Court against his own interest, if relevant to proving the defendant’s guilt, may be admissible at trial as an exception to the hearsay rule.
- 6.062 However, where the admissibility of any piece of evidence (which the Prosecution seeks to rely on to prove the defendant’s guilt) depends on the existence of certain facts, the Trial Judge must first determine the existence of those facts in order to rule on the admissibility of the evidence.<sup>52</sup>
- 6.063 In the context of admissions or confessions allegedly made by a defendant, where the Prosecution seeks to rely on an alleged admission or confession to prove the defendant’s guilt at trial, the facts that the Prosecution must first prove beyond reasonable doubt are that the confession or admission was made voluntarily by the defendant: that is to say not made as a product of threats, violence, inducements, oppression or deception by persons-in-authority during the investigation process.
- 6.064 Person in authority is to be given its usual meaning and would include law enforcement agencies. Other examples of person in authority include, *inter alia*:
- (1) Employers;
  - (2) Prison officers;

<sup>49</sup> *HK SAR v Hon Ming Kong* (2014) 17 HKCFAR 727, 733.

<sup>50</sup> PD 9.7: Applications to Stay Criminal Proceedings, para.3.

<sup>51</sup> *Ibid.*, para.5.

<sup>52</sup> *R v Bonython* (1984) 38 SASR 45 (Supreme Court of South Australia).

- (3) Teachers and principals;<sup>53</sup> and
- (4) Person who arrested the accused (in addition to investigating officers, say under CPO s.101).

“The question as to who should be considered as a person in authority depended on the extent to which the accused believed the person could influence or control the proceedings against him or her. The question is therefore approached from the viewpoint of the accused ‘...The important factor to note in all of these cases is that there is no catalogue of persons, beyond a peace officer or prison guard, who are automatically considered a person in authority solely by virtue of their status. A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, but their status, or the mere fact that they may wield some personal authority over the accused, is not sufficient to establish them as persons in authority for the purposes of the confessions rule. As the intervener the Attorney General Canada observed, the person in authority requirement has evolved in a manner that avoids a formalistic or legalistic approach to the interactions between ordinary citizens. Instead, it requires a case-by-case consideration of the accused’s belief as to the ability of the receiver of the statement to influence the prosecution or investigation of the crime. That is to say, the trial judge must determine whether the accused reasonably believed the receiver of the statement was acting on behalf of the police or prosecuting authorities. This view of the person in authority requirement remains unchanged.’”<sup>54</sup>

The accused must also perceive the person in question as a person in authority.<sup>55</sup> 6.066

A preliminary hearing referred to as *voir dire*<sup>56</sup> may be held before the Trial Judge (before the Prosecution opens its case on the general issue) where: 6.067

- (1) Voluntariness of an alleged admission or confession is disputed by the maker, ie, the defendant;
- (2) The defendant denies having made the alleged oral admission or confession, but other circumstances may render it involuntary, if it was indeed made; or
- (3) The prosecution evidence raises issue of voluntariness.

*Secretary for Justice v Lam Tat Ming*

(2000) 3 HKCFAR 168

- [1] In the criminal courts of Hong Kong, the prosecution in many cases relies as part of its case on confessions by the accused. Where the accused challenges the confession, the court usually holds a *voir dire* (ie, a trial within a trial) to determine whether the prosecution has established that the confession was voluntary. Where the court is not so satisfied, the confession is inadmissible.

<sup>53</sup> *R v M(MR)* [1998] 3 SCR 393 (Supreme Court of Canada).

<sup>54</sup> *R v Hodgson* [1998] 2 SCR 449 (Supreme Court of Canada) [32], [36], as applied by Zervos J in *Securities and Futures Commission v Chan Shui Sheung Ivy* [2015] 3 HKC 302 (CFI).

<sup>55</sup> *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168, 177.

<sup>56</sup> *Voir dire* (案中案) is a preliminary inquiry and may be used to determine, *inter alia*, the admissibility of evidence such as an alleged admission/confession of the defendant.



Where the court is so satisfied, the confession is admissible but the court retains a discretion to exclude it. This has been called the residual discretion since it relates to evidence which is admissible.

[2] This appeal concerns the proper approach to the exercise of this residual discretion in relation to a voluntary confession. Where a law enforcement agency through an undercover operation obtained from a suspect a confession which is held to be voluntary, how should the court approach the exercise of this residual discretion? The same considerations would apply to confessions and admissions and I shall simply refer to confessions. The Court is solely concerned with the proper approach under the common law in Hong Kong. Both parties to the appeal have not relied on or drawn attention to any provision in the Basic Law or the Hong Kong Bill of Rights Ordinance (Cap.383).

[58] ... in exercising the residual discretion to exclude a voluntary confession, the judge has to consider whether it would be unfair to the accused to use the confession against him at trial and unfairness is to be judged against what is required to secure a fair trial for him. The protection of his right of silence is a principle of a fair trial. In the context of an undercover operation, whether his right of silence has been jeopardised is relevant.

**6.068** In terms of terminology, the issue of admissibility of the alleged confession and/or admission of the defendant is referred to as the "Special Issue". The issue of the defendant's guilt at the trial proper is referred to as the "General Issue".

**6.069** Even where the defendant denies that he made the alleged oral admission, the Trial Judge should conduct a *voir dire* to determine its voluntariness, ie, Special Issue, notwithstanding that the defendant denied that he made it.<sup>57</sup>

**6.070** The Privy Council in *Thakoen Gwitsa Thaporn Thongjai v R*<sup>58</sup> made it clear that when a defendant denied that he not only made an oral admission to the law enforcement agency but also alleged conduct by the law enforcement agencies before or at the time of the alleged admission which might render the admission involuntary and inadmissible if it had been made, the trial judge should conduct a *voir dire* to determine the voluntariness of the alleged admission notwithstanding that the defendant denied that he made it.

**6.071** "The first issue, which is for the judge to decide, is whether, on the assumption that the alleged admission was made, it is inadmissible as being involuntary. The second issue, which is for the jury to decide if the judge rules that the alleged admission is admissible in evidence, is whether the admission was in fact made."<sup>59</sup>

**6.072** "[T]here is no difference between situations where the defendant admits making the admission (oral or in writing) but raises the issue that it was not voluntary, and where he denies making the statement but claims that, if he did make it, he made it involuntarily. In both situations, a *voir dire* should be held. Should the confessions be admitted by the judge, they will go before the jury to decide on the weight, if any, to be accorded

<sup>57</sup> *Thakoen Gwitsa Thaporn Thongjai v R* [1997] HKLRD 678 (PC).

<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*, 684E.

to them. Although, in the case where an accused denied making the statement, the jury must also decide whether he had made the statement."<sup>60</sup>

Where the Trial Judge finds that a confession or admission was voluntarily made but the law enforcement agency acted in breach of rules or internal guidelines, ie, the Rules and Directions, Trial Judge has a residual discretion to exclude the admission to preserve the fairness of the trial.<sup>61</sup> **6.073**

Thus, the Trial Judge "has a discretion to exclude evidence which, though technically admissible, would probably have a prejudicial influence on the minds of the jury, which would be out of proportion to its true evidential value",<sup>62</sup> namely, where the prejudicial effect of the admission outweighs its probative value. **6.074**

Be that as it may, that residual discretion of the Trial Judge to exclude the admissible evidence consisting of a voluntary confession should seldom be, and is seldom, employed by Trial Judges.<sup>63</sup> **6.075**

On the other hand, if the Trial Judge has any doubt whether the admission was made voluntarily, he must exclude the admission and has no discretion to admit it.<sup>64</sup> **6.076**

To summarise, whether an alleged admission or confession (in whole or in part) of the defendant is admissible as evidence to prove the defendant's guilt at trial is dependent on: **6.077**

- (1) Whether the alleged admission is relevant to any issue at trial;
- (2) If so, whether the alleged admission was made voluntarily by the Defendant; and
- (3) If so, whether the Trial Judge exercises residual discretion to exclude the admission.

#### (ii) *Involuntariness of an alleged admission or confession*

An admission or confession obtained as a result of any violence or threat of violence by a person-in-authority, fear of prejudice, hope of advantage or by oppression<sup>65</sup> is involuntary and inadmissible at trial. **6.078**

Inducements may be by way of words or conduct by a person-in-authority, capable of influencing the mind of the defendant so as to generate a fear of prejudice or hope of advantage. If the Trial Judge finds that such inducement was present, he then has to consider whether prosecution has proven that the inducement had not influenced the defendant at the time he made the admission.<sup>66</sup> Otherwise, the confession is inadmissible. **6.079**

<sup>60</sup> *HKSAR v Pang Hiu San* (2014) 17 HKCFAR 545, 557.

<sup>61</sup> *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168; *R v Sang* [1980] AC 402 (HL).

<sup>62</sup> *R v Sang, Ibid.*, 434.

<sup>63</sup> *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168, 180.

<sup>64</sup> *Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540, 552.

<sup>65</sup> *Director of Public Prosecution v Ping Lin* [1976] AC 574 (HL).

<sup>66</sup> *Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540, 553.



- 6.080** Inducements generated by the defendant himself may render an admission inadmissible where the person-in-authority's conduct, words or lack, therefore, is capable of being reasonably understood to be either an acceptance of the offer or a promise of an advantage made by the person-in-authority.<sup>67</sup>
- 6.081** Oppression is conduct by a person-in-authority which tends to sap and does sap the will of the defendant so that he makes the statement.<sup>68</sup>
- 6.082** The manner in which an accused is questioned might amount to oppression provided that the questioning by its nature, duration or attendant circumstances excited hopes or fears or so affected the mind of the defendant that his will crumbled and he spoke when otherwise he would have stayed silent. The issue is essentially a question of fact in each case.<sup>69</sup>
- 6.083** Evidence, if accepted by the Trial Judge, that the effect of the threat, inducement, oppression and/or deception may have been in the operation of the defendant's mind at the time he made the admission/confession would render the admission/confession involuntary.

### (iii) Procedure

- 6.084** Where the defendant's instructions to his legal representatives are such that (1) any alleged admission or confession made by him to the law enforcement agencies was made involuntarily; (2) he did not make any such confession/admission; and/or (3) there is evidence that the law enforcement agencies acted in breach of the Rules and Directions and/or guidelines in their treatment and/or questioning of the defendant, the defendant should be advised to challenge the admissibility of the alleged admission or confession before the Trial Judge.
- 6.085** To challenge admissibility of the alleged admission or confession, before the first day of trial, the Defence should first prepare Grounds of Objection based on the defendant's instructions.<sup>70</sup> It is the usual practice now for these Grounds of Objection to be in writing. Copies of the Grounds of Objection should be provided to the Trial Judge and the Prosecution in the course of the *voir dire*.
- 6.086** Grounds of Objection should include the general particulars of the basis of the Defence's objection to the admissibility of the alleged confession or admission which the Prosecution seeks to adduce. Depending on the circumstances and facts of the case, Grounds of Objection may include the identity of those persons who had threatened, promised, oppressed and/or deceived the defendant into providing an involuntary confession or admission, the particulars of the acts performed by such persons and/or particulars of the acts of the persons-in-authority<sup>71</sup> who acted in breach of the Rules and Directions, if any.

<sup>67</sup> *Ibid.*, 555.

<sup>68</sup> *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168, 177.

<sup>69</sup> *HKSAR v Leung Chiu Ming* [2001] 1 HKLRD 272, 275 (CA), following *R v Prager* [1972] 1 WLR 260 (CA).

<sup>70</sup> Appendix 36.

<sup>71</sup> See paras.6.064–6.066.

There is no formal requirement as to the format for the Grounds of Objection.<sup>72</sup> The Defence should balance the need to provide sufficient particulars to the Trial Judge so as to enable him to determine the issue at hand, and on the other hand not to disclose excessive instructions which may stifle subsequent cross-examination by the Defence of the relevant prosecution witness (PW). **6.087**

On the first day of the trial (assuming there are no other preliminary issues which need to be dealt with), after a defendant is arraigned and he pleads not guilty to the charges against him, the parties may proceed to the *voir dire*. **6.088**

A *voir dire* is also known as a trial within a trial because the manner in which evidence is heard and the procedures are similar to that of an actual trial. Like an actual criminal trial, the stages in a criminal trial also apply to a *voir dire*. Be that as it may, *voir dire* relates to the determination of Special Issue only. **6.089**

To start, the Prosecution opens its case on Special Issue only and calls its PWs to give evidence to prove the voluntariness of the confession or admission it seeks to rely on.<sup>73</sup> After the Prosecution closes its case, the Defence may make submissions of No Case on the issue of the admissibility of the confession or admission.<sup>74</sup> The Trial Judge rules on whether the Defence has a case to answer on the Special Issue, and if so, the Defence proceeds with its case in relation to the Special Issue.<sup>75</sup> The Trial Judge then rules on the admissibility of the alleged confession or admission. It is upon the conclusion of the *voir dire* that the Prosecution then formally opens its case on General Issue, if any, to determine the defendant's guilt. **6.090**

During the *voir dire*, the first PW to be called by the Prosecution should be the witness who seeks to give evidence on alleged confession or admission and/or produce the written admission and/or video record of interview of the defendant. The witness is examined-in-chief by the Prosecution, and the witness testifies to the alleged admission, which may be in the form of a verbal admission uttered by the defendant and heard by the witness and/or contained in real exhibits such as a written statement and/or video record of interview of the defendant. **6.091**

If the alleged confession or admission is contained in a real exhibit, ie, written statement or video tape, the exhibit is marked as a Provisional Prosecution exhibit, say "PP1".<sup>76</sup> The original of the exhibit must be produced. For a written statement, there must be evidence that the defendant adopted or assented to the document by signing the document or by writing it himself. For a video record of interview, the Prosecution would usually prepare a transcript of the entire video which is also produced and marked as a provisional exhibit.<sup>77</sup> **6.092**

Upon oral testimony or production of the alleged admission or confession, the witness is asked to leave the courtroom temporarily. In the absence of the witness, the Defence provides a copy of the Grounds of Objections to the Trial Judge and the Prosecution, **6.093**

<sup>72</sup> Appendix 36.

<sup>73</sup> See Section 4(b): Procedure of calling a witness.

<sup>74</sup> See Section 6: Determination of whether Defendant Has Case to Answer.

<sup>75</sup> See Section 7: Defence's Case.

<sup>76</sup> See Section 5(a)(i): Real or documentary evidence.

<sup>77</sup> See also Evidence Ordinance ss.27 and 29A for requirements in relation to translation and certification of transcripts.



and the Defence reads the Grounds of Objection aloud for the court's record. The witness then returns to the witness box and continues to give evidence.

- 6.094 After the Prosecution completes its examination-in-chief of the said PW, the Defence is entitled to cross-examine the witness on the voluntariness (or lack thereof) of the alleged confession or admission. The Defence should also put its case to the witness in accordance with *Browne v Dunn*.<sup>78</sup>
- 6.095 In a *voir dire* to determine the admissibility of an alleged confession or admission, the evidence elicited is confined to the voluntariness of the alleged confession or admission of the defendant only, ie, Special Issue only. Questioning should not extend to the defendant's guilt, ie, General Issue. Thus, the witnesses called by the Prosecution should be confined to witnesses who handled the defendant during the investigation process and may give relevant evidence to prove the voluntariness of the alleged confession or admission.
- 6.096 Likewise during the *voir dire*, should the defendant elect to give evidence, the evidence is confined to the Special Issue only. In other words, during the *voir dire*, the Prosecution may only cross-examine the defendant on the circumstances relating to the voluntariness of the alleged confession or admission of the defendant and cannot cross-examine the defendant on the General Issue, namely, the allegations relating to his guilt and/or truth of the alleged admission or confession.<sup>79</sup>
- 6.097 At the conclusion of the *voir dire*, the Trial Judge gives his ruling on the admissibility of the confession or admission the Prosecution seeks to rely on.
- 6.098 The Trial Judge "is not obliged to give reasons for making a ruling on the admissibility of a confession statement. However, there may be occasions where good practice requires a reasoned ruling, such as, where there is a question of law or there is an exercise of a discretion. See *Wallace v R*<sup>80</sup> and also *Thakoen Gwitsa Thaporn Thongjai v R*<sup>81</sup> where it is considered "desirable to give brief reasons when ruling a confession statement inadmissible since such reasons may assist in clarifying the issues should there be an appeal."<sup>82</sup>
- 6.099 If a written statement and/or video record of interview is ruled admissible by the Trial Judge, the Provisional Prosecution exhibit (say PP1) is then formally admitted as evidence in the trial of the General Issue and marked as Prosecution exhibit (say P1) in the court's record.
- 6.100 Where a defendant's statement is vague, ambiguous, contains irrelevant matters and/or material where the prejudicial effect exceeds the probative value, a Trial Judge has the discretion to permit the admission of the statement after it has been edited. For example, a video record of interview of the defendant lasting three hours contains irrelevant evidence from 2:00 hours to 2:20 hours. The Trial Judge has the residual discretion to admit the video after the 2:00 hours to 2:20 hours portion has been edited out and only

<sup>78</sup> See Section 4(b)(iv)D: *Browne v Dunn*.

<sup>79</sup> *Wong Kam Ming v R* [1980] AC 247 (PC).

<sup>80</sup> [1997] 1 Cr App R 396.

<sup>81</sup> [1997] HKLRD 678, [682] (PC).

<sup>82</sup> *Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540, 552.

consider the inculpatory portion from 0:00 hours to 1:59 hours and 2:21 hours to 3:00 hours when considering the General Issue.

If an admission or confession is ruled in, whether in part or in whole, by the Trial Judge, it is advisable that the legal representatives of a defendant advise the defendant as to the merits of the case against him, taking into account the admission or confession, if such advice has not already been considered. There may be circumstances where a defendant elects to change his plea from not guilty to guilty after an admission is ruled in and before the Prosecution formally opens its case, in order to take advantage of the usual sentencing discount for guilty pleas.<sup>83</sup>

It is worthy to note that, where a defendant's statement is ruled inadmissible by the Trial Judge at the conclusion of the *voir dire*, the Prosecution cannot at the trial of the General Issue adduce evidence as to what the defendant said during the *voir dire* or cross-examine the defendant on the basis of his evidence during the *voir dire*. However, where the defendant's confession or admission is ruled admissible, and the defendant elects to give evidence in relation to the General Issue as to the reliability of the confession, cross-examination of the defendant on the basis of his evidence during the *voir dire* is permissible.<sup>84</sup>

#### (iv) *Voir dire vs alternative procedure*

The procedure of *voir dire* may be used in the Magistrates' Courts before a single Magistrate, in the District Court before a single District Judge or in the CFI before a single Judge of the CFI, in the absence of the jury.

In the Magistrates' Courts and in the District Court, in order to deal with cases expeditiously and to prevent the calling of witnesses twice, an alternative procedure may be adopted, which is referred to as "Alternative Procedure".<sup>85</sup>

Where the Alternative Procedure is elected, after the defendant pleads not guilty, the Prosecution opens its case and calls all its evidence in relation to both the Special Issue and General Issue. Before the Prosecution closes its case, the Defence may make a submission of No Case on Special Issue. If there is a case to answer on Special Issue, the Defence elects whether to give evidence on the Special Issue only. A Trial Judge is required to give his ruling as to the admissibility of the confession before the Prosecution closes its case.<sup>86</sup>

In other words, during the Alternative Procedure, the PWs need only to give evidence once. In any event, at the close of the Prosecution's case, the Defence is informed by the Trial Judge whether the admission or confession is ruled admissible, enabling him to make an informed decision as to how to proceed with the Defence's case on General Issue.

<sup>83</sup> See Chapter 8 for further details.

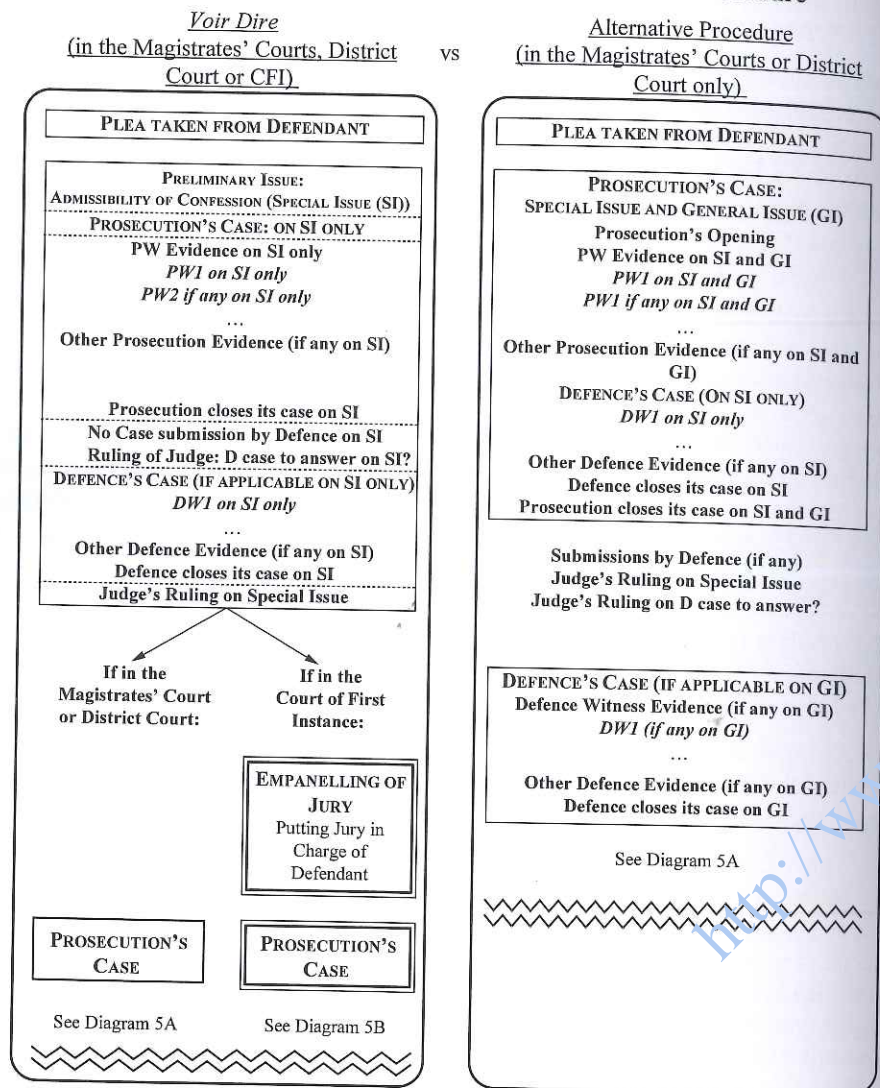
<sup>84</sup> *Wong Kam Ming v R* [1979] HKCLR 35(PC); *HKSAR v Ma Yee Keung* [2000] 4 HKC 713 (CA).

<sup>85</sup> *R v Lam Yin Yung* [1992] 2 HKCLR 53 (CA).

<sup>86</sup> *R v Kwan Wai Hung* [1973-1976] HKC 449 (CA).



6.107

**Diagram 7 Comparison of *Voir Dire* vs Alternative Procedure**

6.108 The Defence may then make submission on No Case on the General Issue. The Trial Judge rules on whether the Defence has a case to answer, and if so, the Defence proceeds with its case on General Issue. The Defence cannot merely adopt the evidence given during the determination of the Special Issue as his evidence in the General Issue.

**(e) Transfer of proceedings from District Court**

6.109 This section only applies to trials in the District Court before a single District Judge.

6.110 Chapter 5: Section 5: Transfer of Proceedings to the District Court, discusses the procedure where proceedings are transferred from the Magistrates' Courts to the District Court under MO s.88. It is noted that after a case is transferred to the District

Court, the SJ may apply to have the case transferred back to the Magistrates' Courts or to the CFI,<sup>87</sup> albeit such applications are not often made. Such applications by the SJ must be made before the Prosecution opens its case under DCO ss.77A and 77B.

Under DCO s.77A(4), the judge may allow or refuse the SJ's application for transfer, and the order is not subject to appeal. 6.111

For the procedure following transfer under DCO s.77A, see DCO Pt.V s.77B. 6.112

See relevant sections under Chapters 5 and 7 for Trial on Indictment in the CFI for procedure following order for transfer. 6.113

**4. PROSECUTION'S CASE****(a) Prosecution's opening**

In a criminal trial, after the defendant is arraigned and pleads not guilty to the charges against him and all the preliminary issues are dealt with, the Prosecution proceeds to open its case. 6.114

In the District Court and CFI, the Prosecution usually opens its case by making opening submissions. The purpose of the opening submissions of the Prosecution is to inform the Trial Judge<sup>88</sup> and the defendant of the leading features of its case against the defendant and to outline the evidence that the Prosecution is going to call.<sup>89</sup> 6.115

To ensure a fair trial, it is vital that the court and the defendant are aware of the allegations made by the Prosecution against the defendant and that the defendant is aware of the case that he is to meet. The Prosecution should be bound by the boundaries set in its opening submissions and should not be permitted, without proper justification, to shift its case during the trial.<sup>90</sup> 6.116

Needless to say, opening submissions are submissions only and do not constitute evidence that the Trial Judge or jury may rely on in reaching a verdict. 6.117

In the Magistrates' Courts, Prosecution usually opens its case by calling the first PW, without making opening submissions. 6.118

**(b) Procedure of calling a witness****(i) Vulnerable witnesses**

As stated in Chapter 5: Section 8(c): Vulnerable witness, special arrangements may be made in relation to vulnerable witnesses who give evidence in criminal proceedings. 6.119

Parties should be aware that such measures, if allowed by the Trial Judge, are in place before the vulnerable witness begins to give evidence so as to protect that particular witness. 6.120

<sup>87</sup> Subject to the restrictions under MO ss.88, 91, 92 and Sch.2.

<sup>88</sup> And jury in a High Court trial.

<sup>89</sup> *Archbold Hong Kong 2018*, para.4-123.

<sup>90</sup> See *Hau Tung Ying v HKSAR* (2011) 14 HKCFAR 453.



**(ii) Swearing in of witness**

- 6.121 Other than the defendant, in general, all witnesses who may give evidence in a criminal trial should not enter the courtroom, unless and until he is summoned by the court to enter. This rule applies to all PWs and Defence witnesses (DWs).
- 6.122 The Trial Judge retains the discretion to allow witnesses to remain inside the courtroom and to listen to the testimony of other witnesses; however, this discretion is usually only exercised in favour of expert witnesses.<sup>91</sup>
- 6.123 It is for the party calling the witnesses, such as the Prosecution, to decide the order in which witnesses are called. In practice, the alleged victim of the alleged offence is usually the first to be called, in order to provide the background and context to the trial, especially where no opening speech is made.
- 6.124 If interpretation service is required for the particular witness, the interpreter must first be sworn in before the witness gives evidence, if the interpreter has not already done so.<sup>92</sup>
- 6.125 After a witness is summoned into the courtroom to give evidence and goes into the witness box, the witness stands as he is sworn in and is then seated to give his testimony. Before swearing in, the identity document of the witness should be checked by the court clerk.
- 6.126 In common law, the testimony of a witness in a criminal trial is not admissible unless the testimony is given under affirmation or oath that he is to speak the truth.
- 6.127 A witness may be charged for perjury if one wilfully makes a statement under oath knowing it to be false or does not believe it to be true.<sup>93</sup>
- 6.128 As to the wording of the affirmation or oath to be taken by a witness, see para.6.323.
- 6.129 After a witness is sworn in to give evidence and until he completes his testimony in court, he must not discuss his evidence or the proceedings in any manner with any persons. During breaks and/or adjournments in the criminal proceedings, the Trial Judge would give such warning to the witness who is in the course of giving his testimony. This rule applies to all witnesses, including the defendant and expert witness, in the course of giving evidence.
- 6.130 See also Bar Code, Witnesses para.10.25 and 10.26.<sup>94</sup>

**Witnesses**

- 10.26 Save with the consent of Counsel for the opposing side or of the Court, a practising barrister may not communicate directly or indirectly with a witness, whether or not the witness is his client, once that witness has begun to give evidence until his evidence has been concluded.

<sup>91</sup> See Section 5(c).

<sup>92</sup> See Section 2(b): Swearing in of interpreter (if applicable).

<sup>93</sup> Crimes Ordinance s.31 at para.2.014.

<sup>94</sup> Code of Conduct (n 1 above) and para.5.337.

**(iii) Examination-in-chief of a witness (by the party calling him)****A. Generally**

After a witness is sworn in, he begins to testify and the counsel for the party who calls him, say, the Prosecution, begins to examine the witness. This process is known as examination-in-chief. **6.131**

In criminal proceedings, the general rule is that examination-in-chief is done by the counsel for the party calling that witness orally asking open-ended questions, which are not leading,<sup>95</sup> and allowing the witness to orally relay to the Trial Judge his evidence relating to the issues before the court. In other words, the counsel asks open-ended questions and the witness testifies by giving his answers orally. **6.132**

Under CPO s.79,<sup>96</sup> a record of the proceedings must be kept by the Judiciary. At present, audio recordings of court proceedings are recorded by DARTS. This means that any questions and answers of a witness's testimony must be given orally and any gestures, such as nodding by the witness to signify yes, must be described orally by the counsel and confirmed orally by the witness in order for the answer to be recorded by DARTS. **6.133**

It is generally accepted that leading questions may be used during examination-in-chief under the following exceptions, *inter alia*: **6.134**

- (1) Formal matters such as the name, address and occupation of the witness;
- (2) Matters which are not in dispute;
- (3) To establish a negative, such as asking the alleged victim of an indecent assault whether she consented to the acts of the defendant; and
- (4) Witness who has been declared as a hostile witness.<sup>97</sup>

Subject to CPO s.65B, a PW who has been sworn in in a criminal trial cannot merely adopt his written statement which he gave to the law enforcement agency during the investigation process (and disclosed to the Defence) as his evidence-in-chief. **6.135**

**B. Tendering witness statement in accordance with CPO s.65B**

In Hong Kong, the criminal courts adopt an adversarial system. Furthermore, unless otherwise stated, the burden rests on the Prosecution to prove a defendant's guilt beyond reasonable doubt. As a result, witnesses are called to give live evidence in court so as to test the veracity of a witness and the accuracy and completeness of his evidence. **6.136**

Be that as it may, under CPO s.65B, the Prosecution and Defence may agree to tender a witness's written statement as though the witness is giving his evidence-in-chief in court. **6.137**

<sup>95</sup> Leading questions are questions framed in such a way to suggest the answer to the witness. Leading questions may be allowed where the issues are not contentious and where the opposing party does not object to the leading question.

<sup>96</sup> See para.2.072.

<sup>97</sup> See Section 4(b)(iii)E: Hostile witness.



## Criminal Procedure Ordinance (Cap.221)

## Part III

65B. Proof by written statement<sup>(20/04/2018)</sup>

- (1) In any criminal proceedings, other than committal proceedings, a written statement by any person shall, subject to the conditions contained in subsection (2), be admissible as evidence to the like extent as oral evidence to the like effect by that person.
- (2) A statement may be tendered in evidence under subsection (1) if-
  - (a) the statement purports to be signed by the person who made it;
  - (b) the statement contains a declaration by that person to the effect that it is true to the best of his knowledge and belief;
  - (c) before the hearing at which the statement is tendered in evidence, a copy of the statement is served, by or on behalf of the party proposing to tender it, on each of the other parties to the proceedings; and
  - (d) none of the other parties or their solicitors, within 14 days from the service of the copy of the statement, serves a notice on the party so proposing objecting to the statement being tendered in evidence under this section:

Provided that paragraphs (c) and (d) shall not apply if the parties agree before or during the hearing that the statement shall be so tendered.

- (3) If a statement tendered in evidence under subsection (1)-
  - (a) is made by a person under the age of 21, it shall give his age;
  - (b) is made by a person who cannot read it, it shall be read to him before he signs it and shall be accompanied by a declaration by the person who so read the statement to the effect that it was so read;
  - (c) subject to any directions of the court, is made in a language other than an official language, it shall be accompanied by a translation in an official language and, unless otherwise agreed by or on behalf of the prosecutor and defendant (or, if more than one, all the defendants), the translation shall be certified by the court translator; (*Amended 20 of 1988 s.2; 51 of 1995 s.13*)
  - (d) refers to any other document as an exhibit, the copy served on any other party to the proceedings under subsection (2)(c) shall be accompanied by a copy of that document or by such information as may be necessary in order to enable the party on whom it is served to inspect that document or a copy thereof.
- (7) A document required by this section to be served on any person may be served-
  - (a) by delivering it to him or to his solicitor; or
  - (b) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or by sending it

by registered post addressed to the secretary or clerk of that body at that office.

- (8) In this section, *court* (法庭) includes the District Court and a magistrate. (*Added 34 of 1972 s.11*)

(*Added 5 of 1971 s.6*)  
[*cf 1967 c.80 s.9 UK*]

[Note: *sub-ss.(4) to (6)* are omitted]

In practice, a statement tendered under CPO s.65B is read aloud in court, for the court's record, by the counsel tendering it. **6.138**

## 65B. Proof by written statement

- (5) So much of any statement as is admitted in evidence by virtue of this section shall, unless the court otherwise directs, be read aloud at the hearing and where the court so directs an account shall be given orally of so much of any statement as is not read aloud.

Any document or object referred to in the witness statement tendered under CPO s.65B is produced and marked as exhibit as if it had been produced by the witness in court.<sup>98</sup> **6.139**

65B. Proof by written statement<sup>(20/04/2018)</sup>

- (6) Any document or object referred to as an exhibit and identified in a written statement admitted in evidence under this section shall be treated as if it had been produced as an exhibit and identified in court by the maker of the statement.

Where a statement is tendered under CPO s.65B, it has the same effect as the witness giving the evidence in court and it does not constitute any admission by the other party of the statements contained therein. The Trial Judge or jury is still under a duty to determine whether the evidence tendered under CPO s.65B, in part or in whole, is credible.<sup>99</sup> **6.140**

The Trial Judge, either on his own motion or on application by any party, may require the witness whose statement has been admitted under CPO s.65B to attend court to give further evidence or be cross-examined by the opposing party. **6.141**

65B. Proof by written statement<sup>(20/04/2018)</sup>

- (4) Notwithstanding that a written statement made by any person may be admissible as evidence by virtue of this section-
  - (a) the party by whom or on whose behalf a copy of the statement was served may call the person making the statement to give evidence; and

<sup>98</sup> See also Chapter 5: Section 6(a) — Real or documentary evidence.

<sup>99</sup> *HKSAR v Liu Man Fai* [2004] 2 HKLRD 346 (CF).



- (b) the court may, of its own motion or on the application of any party to the proceedings either before or during the hearing, require the person making the statement to attend before the court and give evidence.

### C. Memory refreshing documents

- 6.142** In criminal proceedings, a witness in the witness box is expected to recall from his own memory the events relevant to the issue at trial. On the other hand, the purpose of a witness giving evidence at trial is not to test his memory, but for the court to assess the reliability of the evidence of the witness and the truth of the matter.
- 6.143** The effect of this general rule is that when a witness is giving evidence in court, he may, with the leave of the Trial Judge, refresh his memory from any witness statements made by him. In order for the Trial Judge to grant leave, sufficient foundation must be laid.
- 6.144** "A sufficient foundation for allowing a witness to refresh his memory in the witness box is laid if the witness is shown the statement and is then asked, and states, that he made the statement to a police officer on a specified date and that, when he made it, the matters contained therein were fresh in his mind."<sup>100</sup>
- 6.145** After the party calling the witness applies for leave for the witness to refresh his memory from a specific contemporaneous document, if the Trial Judge grants leave, the witness remains in the witness box and is shown that document and asked to refresh his memory from it. After he is done refreshing his memory, the document is taken away from him and his testimony continues.
- 6.146** Where a witness is permitted to refresh his memory from a contemporaneous document, the document itself is not evidence.<sup>101</sup>
- 6.147** In practice, applications for leave for the witness to refresh his memory from contemporaneous documents are used sparingly. Among other considerations, it may affect the Trial Judge's assessment of the reliability of that witness's evidence as a whole. Also, the witnesses would have been given their witness statements beforehand to refresh their memory.

### D. Previous consistent statement of witness

- 6.148** Generally, when a witness is testifying in criminal proceedings, he is not permitted to testify as to a previous oral or written statement made by him that is consistent with his evidence in court, as evidence of the facts stated therein. This applies to examination-in-chief, cross-examination and re-examination of a defendant.
- 6.149** In *R v Coll*,<sup>102</sup> Holmes LJ summarised the applicable rule excluding previous consistent statements (whether oral or written) as follows:

Authority is scanty upon this as well as upon many other branches of the law of evidence, and goes little beyond furnishing us with a few principles, the application of which must depend upon the circumstances of the individual case. It is, I think, clear that the evidence of a witness cannot be corroborated by providing statements to the

<sup>100</sup> *R v Lai Chi Ping* [1982] HKC 592, 595A (CA), followed in *HKSAR v Ma Tik Lun Dicky* [2015] 1 HKLRD 380 (CA).

<sup>101</sup> *HKSAR v Hon Ming Kong* [2014] 3 HKC 160, 215 (CA).

<sup>102</sup> (1889) LR 24 Ir 522, 541.

same effect previously made by him; nor will the fact that his testimony is impeached in cross-examination render such evidence admissible. Even if the impeachment takes the form of showing a contradiction or inconsistency between the evidence given at the trial and something said by the witness on a former occasion, it does not follow that the way is open for proof of other statements made by him for the purpose of sustaining his credit. There must be something either in the nature of the inconsistent statement, or in the use made of it by the cross-examiner, to enable such evidence to be given.

The rationale of that rule on inadmissibility of previous consistent statement of a witness could be found in *Jones v South-Eastern and Chatham Railway*<sup>103</sup> where Swinfen Eady LJ said, "If a statement of that kind were admitted it would be easy to manufacture evidence by telling your various friends, and then calling them as witnesses to prove what you had told them."

Four exceptions to this general rule that a previous statement which is consistent with a witness's testimony is inadmissible to confirm such testimony include the following:

- (1) Recent complaints in sexual case;
- (2) Statements of an identifying witness at the identification parade;
- (3) Statements which form part of the *res gestae*; and
- (4) To rebut an allegation of recent invention.<sup>104</sup>

See also *Archbold Hong Kong 2018*, paras.8-108-8-112.

### E. Hostile witness

During the examination-in-chief (and re-examination) of a witness by the party calling him, it may become evident that the witness is adverse or hostile, namely, the witness "has no wish to tell the truth on behalf of the party who has called him".<sup>105</sup> The party calling this witness, say the Prosecution, may apply to the Trial Judge to turn this witness hostile. The burden is on the party making such an application to prove that the witness giving testimony is hostile.

On such an application, the Trial Judge must make an adjudication on whether the witness is hostile.<sup>106</sup> If the Trial Judge finds that the witness is hostile, the witness is then declared as hostile.

If an order is made, the party calling him, say the Prosecution, may cross-examine the hostile witness.

<sup>103</sup> (1918) 87 LJ KB 775, 778.

<sup>104</sup> *HKSAR v Sau Ming* (CACC 145/2003, [2005] HKEC 105) citing well-established principles gleaned from *Nominal Defendant v Clements* (1960) 104 CLR 476, 485, 495; *Jones, Ibid.*, 778-779; *Fox v General Medical Council* [1960] 1 WLR 1017; *R v Weekes* [1988] Crim LR 244; *R v Beattie* (1989) 89 Cr App R 302, 306-307; *R v P(GR)* [1998] Crim LR 663; *White v R* [1999] 1 AC 210, 217G-H; *HKSAR v Fun Tsz Yin Benny* [2002] 2 HKC 406 (CFI).

<sup>105</sup> *HKSAR v Tang Wai Leung* (HCCC 50/2014, [2014] HKEC 1918).

<sup>106</sup> *HKSAR v Chang Kin Man Ivan* [2002] 1 HKC 518 (CA).