

(b) Exceptions to general territorial jurisdiction**(i) *Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap.632)***

2.005 Under the *Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap.632)*, the area defined as the Mainland Port Area of the West Kowloon Railway Station, Hong Kong, is regarded as an area lying outside Hong Kong by lying within the Mainland for the purposes of the application of laws of Mainland, except for reserved matters and subject to exceptions.

Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance (Cap.632)**Part 2****6. Laws and jurisdiction in Mainland Port Area^(13/12/2018)¹⁰**

- (1) Except for reserved matters, the Mainland Port Area is to be regarded as an area lying outside Hong Kong but lying within the Mainland for the purposes of—
- the application of the laws of the Mainland, and of the laws of Hong Kong, in the Mainland Port Area; and
 - the delineation of jurisdiction (including jurisdiction of the courts) over the Mainland Port Area.
- (2) Subsection (1) does not affect the boundary of the administrative division of the Hong Kong Special Administrative Region promulgated by the Order of the State Council of the People's Republic of China No 221 dated 1 July 1997 and published as SS No 5 to Gazette No 6/1997 of the Gazette.

Part 1**2. Interpretation^(13/12/2018)**

In this Ordinance—

***commencement date** (生效日期) means the day on which this Ordinance comes into operation;

Co-operation Arrangement (《合作安排》) means the Co-operation Arrangement between the Mainland and the Hong Kong Special Administrative Region on the Establishment of the Port at the West Kowloon Station of the *Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement* (a translation of “《內地與香港特別行政區關於在廣深港高鐵路西九龍站設立口岸實施“一地兩檢”的合作安排》”) signed on 18 November 2017, as approved by the Standing Committee of the National People's Congress on 27 December 2017;

Court (法院) means—

- the Court of Final Appeal;

¹⁰ Interpretation and General Clauses Ordinance s.18(3): a marginal note or section heading to any provision of any ordinance shall not have any legislative effect and shall not in any way vary, limit or extend the interpretation of any ordinance.

- the Court of Appeal;
- the Court of First Instance;
- the Competition Tribunal;
- the District Court;
- a Magistrates' Court;
- the Lands Tribunal;
- the Labour Tribunal;
- the Small Claims Tribunal;
- the Obscene Articles Tribunal; or
- the Coroner's Court;

designated area (指定範圍) means the area declared as the West Kowloon Station Mainland Port Area under section 4;

geographical scope (地理涵蓋範圍), in relation to a right or obligation, means the geographical area of Hong Kong, or of any part of Hong Kong, within which, or in respect of which, the right or obligation may be exercised or discharged;

Hong Kong Section of the Express Rail Link (高鐵香港段) means the railway constructed under the scheme for the Hong Kong Section of the *Guangzhou-Shenzhen-Hong Kong Express Rail Link*, which was referred to in G.N. 8022 of 2008 published in the Gazette on 28 November 2008 and 5 December 2008—

- as amended and corrected by the amendments and corrections referred to in G.N. 2598 of 2009 published in the Gazette on 30 April 2009 and 8 May 2009;
- as modified by the modifications referred to in G.N. 6682 of 2009 published in the Gazette on 30 October 2009 and 6 November 2009; and
- as amended by the amendments referred to in G.N. 5488 of 2014 published in the Gazette on 26 September 2014 and 3 October 2014;

Mainland (內地) means the part of China other than Hong Kong, Macau and Taiwan;

Mainland Port Area (內地口岸區)—

- means the designated area; and
- includes a train compartment to be regarded as part of the West Kowloon Station Mainland Port Area under section 5;

non-reserved matter (非保留事項)—see section 3;

reserved matter (保留事項)—see section 3;

right (權利) includes a power and a privilege;

Shek Kong Stabling Sidings (石崗列車停放處) means the area delineated and coloured orange on the plan in Schedule 3 (as read with the Notes on the plan);

West Kowloon Station (西九龍站) means the railway station within which the designated area is situated.

Editorial Note:

* Commencement date: 4 September 2018.

[Note: other definitions are omitted]

3. Interpretation: reserved matter and non-reserved matter^(13/12/2018)

- (1) For the purposes of this Ordinance—
- (a) a reserved matter is a matter to which the laws of Hong Kong apply, and over which Hong Kong exercises jurisdiction, under Article 3 or 7 of the Co-operation Arrangement; and
- (b) a non-reserved matter is a matter to which the laws of the Mainland apply, and over which the Mainland exercises jurisdiction, under Article 4 of the Co-operation Arrangement.
- (2) The Chinese text of Articles 3, 4 and 7 of the Co-operation Arrangement is reproduced in the Chinese text of Schedule 1. An English translation of those Articles is set out in the English text of that Schedule.

4. Declaration of West Kowloon Station Mainland Port Area^(13/12/2018)

The area delineated and coloured orange on Plain No 1 and Annex 1 to Plan No 1 in Schedule 2 (as read with Annex 2 to Plan No 1 and Plan Nos 2, 3, 4 in that Schedule, and with the Notes on the Plans and Annexes) is declared as the West Kowloon Station Mainland Port Area.

5. Train compartments^(13/12/2018)

- (1) For the purposes of this Ordinance, a train compartment of a passenger train in operation on the Hong Kong Section of the Express Rail Link (including a passenger train which is in motion, stationary and during embarkation or disembarkation) is to be regarded as part of the West Kowloon Station Mainland Port Area.
- (2) For the purposes of subsection (1), a passenger train is not in operation—
- (a) within Shek Kong Stabling Sidings; or
- (b) while making a journey from Shek Kong Stabling Sidings to West Kowloon Station or a journey from West Kowloon Station to Shek Kong Stabling Sidings.

2.006 In other words, except for reserved matters as defined under the Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance and subject to exceptions under ss.7 and 8, the Hong Kong courts, including, *inter alia*, the Court of Final Appeal (CFA), Court of Appeal (CA), Court of First Instance (CFI), District Court and Magistrates' Courts do not have jurisdiction over, *inter alia*, criminal conduct which takes place in the West Kowloon Station Mainland Port Area, which includes any train compartment of any passenger train in operation on the Hong Kong Section of the Express Rail Link (including any passenger train which is in motion, stationary and during embarkation or disembarkation).¹¹

¹¹ See also *Leung Chung Hang Sixtus v President of Legislative Council* [2019] 1 HKLRD 292.

(ii) Elements of offences committed outside Hong Kong

Unless otherwise stated in the legislation, a person may not be tried for acts committed outside of Hong Kong. Exceptions to the general rule include offences such as treason¹² and the following circumstances, *inter alia*: **2.007**

- (A) Certain offences under the Theft Ordinance (Cap.210) and Crimes Ordinance (Cap.200) and conspiracy, attempt or incitement of such offences;
- (B) Bribery of a *public* servant, Prevention of Bribery Ordinance (Cap.201);
- (C) Perjury, Crimes Ordinance (Cap.200);
- (D) Murder, Offences against the Person Ordinance (Cap.212);
- (E) Specific sexual offences, Crimes Ordinance;
- (F) Unauthorized entrants, Immigration Ordinance (Cap.115);
- (G) Offences connected with Hong Kong aircraft;
- (H) Offences committed within Hong Kong waters or on board Hong Kong ships;
- (I) Unsolicited Electronic Messages Ordinance (Cap.593);¹³ and
- (J) Offences under the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region.

4. Certain criminal offences under the Theft Ordinance and Crimes Ordinance and conspiracy, attempt or incitement of such offences

The Criminal Jurisdiction Ordinance (Cap.461) provides that if specific conditions under this ordinance are met, certain offences¹⁴ under the Theft Ordinance and Crimes Ordinance and the offence of conspiracy to defraud may be tried in Hong Kong, irrespective that the offence would otherwise exceed the general territorial jurisdiction of the Hong Kong courts. **2.008**

Under Criminal Jurisdiction Ordinance s.2, the offences include: **2.009**

Chapter	Section	Description
	9	Theft
	16A	Fraud
	17	Obtaining property by deception
Theft Ordinance	18	Obtaining pecuniary advantage by deception
	18A	Obtaining services by deception
	18B	Evasion of liability by deception
	18D	Procuring false entry in certain records by deception

¹² *Joyce v Director of Public Prosecutions* [1946] AC 347 (HL), where the House of Lords answered the question of "whether an alien who has been resident within the realm can be held guilty and convicted in this country of high treason in respect of acts committed by him outside the realm" to be yes.

¹³ *Archbold Hong Kong 2021*, paras.2-111-2-155F.

¹⁴ Whether substantive offence, conspiracy, incitement or attempt to commit such offences.

2.018 Under Offences against the Person Ordinance ss.8B and 9, the general territorial jurisdiction of murder is extended to include offences where only specific element(s) of the homicide occurred in Hong Kong.

8B. Certain homicide to constitute offences^(22/04/2021)

(1) Where-

- (a) an act takes place on the high seas or in any other place outside Hong Kong;
- (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 U.K.]

9. Trial of homicide where cause of death only happens in Hong Kong^(22/04/2021)

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 U.K.]

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*¹⁹ 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.

¹⁹ [2013] 2 HKLRD 1009 (CA).

Immigration Ordinance (Cap.115)

Part VIIA

37J. Prosecution of acts outside Hong Kong^(29/11/2020)

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 I

2. Interpretation^(12/12/2019)

(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]

Part II

3. Application of criminal law to aircraft^(12/12/2019)

- (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.

- (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;
 - (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.

2.030 See also Interpretation, Unsolicited Electronic Messages Ordinance s.2.

2.031 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.

J. Offences under the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

2.032 On 30 June 2020, the Standing Committee of the National People's Congress added the Law of the PRC on Safeguarding National Security in the Hong Kong Special Administrative Region (NSL) to Annex III of the Basic Law. It was promulgated in Hong Kong on the same day.

2.033 Unless otherwise provided by the NSL, the courts in Hong Kong shall have jurisdiction over cases concerning offences under NSL and shall handle proceedings in accordance with Hong Kong laws under NSL arts.40 and 45.

National Security Law

Chapter IV

Jurisdiction, Applicable Law and Procedure

Article 40

The Hong Kong Special Administrative Region shall have jurisdiction over cases concerning offences under this Law, except under the circumstances specified in Article 55 of this Law.

Article 45

Unless otherwise provided by this Law, magistrates' courts, the District Court, the High Court and the Court of Final Appeal shall handle proceedings in relation to the prosecution for offences endangering national security in accordance with the laws of the Hong Kong Special Administrative Region.

Where an issue arises as to whether an act involves national security or whether the relevant evidence involves State secrets, ie whether NSL applies, the courts in Hong Kong must first obtain a certificate from the Chief Executive on this issue in accordance with NSL art.47 and this certificate is binding on the Hong Kong courts. **2.034**

National Security Law

Article 47

The courts of the Hong Kong Special Administrative Region shall obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves State secrets when such questions arise in the adjudication of a case. The certificate shall be binding on the courts.

In relation to its scope of application, NSL arts.36 to 39 state that if specific conditions under NSL are met, offences under the NSL may be tried in accordance with NSL in Hong Kong (or by the Supreme People's Court under art.55) irrespective of whether the offence would otherwise exceed the general territorial jurisdiction of the Hong Kong courts. NSL applies, *inter alia*, (1) where an act constituting the offence or the consequence of the offence occurs in Hong Kong; (2) to permanent residents of Hong Kong or bodies set up in Hong Kong where the offence is committed outside of Hong Kong; (3) to persons who are not permanent residents of Hong Kong for offences under NSL committed against Hong Kong. The NSL shall apply to acts committed after 23:00 on 30 June 2020. **2.035**

National Security Law

Chapter III

Offences and Penalties

Part 6

Scope of Application

Article 36

This Law shall apply to offences under this Law which are committed in the Hong Kong Special Administrative Region by any person. An offence shall be deemed to have been committed in the Region if an act constituting the offence or the consequence of the offence occurs in the Region.

This Law shall also apply to offences under this Law committed on board a vessel or aircraft registered in the Region.

Article 37

This Law shall apply to a person who is a permanent resident of the Hong Kong Special Administrative Region or an incorporated or unincorporated body such as a company or an organisation which is set up in the Region if the person or the body commits an offence under this Law outside the Region.

- (3) A person who has been released on bail on his depositing a sum of money for the purposes of subsection (2) shall-
- appear before a magistrate at such time and place as any member of the Service of or above the rank of Immigration Officer specifies; or
 - attend at such other place at such time as any member of the Service of or above the rank of Immigration Officer specifies, and thereafter at such time and place, if any, as any such member may specify.
- (4) A person who has been released on bail on his entering into a recognizance for the purposes of subsection (2) shall-
- appear before a magistrate at such time and place as may be specified in the recognizance; or
 - attend at such other place at such time as may be specified in the recognizance, and thereafter at such time and place, if any, as any member of the Service of or above the rank of Immigration Officer may specify.
- (5) If any person fails to appear before a magistrate or to attend at any other place in accordance with subsection (3) or (4), a magistrate may, on application by the Director, order any sum of money deposited, and any recognizance entered into, for the purposes of subsection (2) to be forfeited in the same manner as a recognizance is forfeited under the Magistrates Ordinance (Cap. 227).
- (6) Where a magistrate makes an order under subsection (5), the payment of any sum due as security taken from a surety under subsection (2)(b)(ii) or (iii) may be enforced as if it were a security to which section 64 of the Magistrates Ordinance (Cap. 227) applies.
- (7) A person who is detained under subsection (2)(a) shall be charged and brought before a magistrate-
- subject to paragraph (b), within the period of 48 hours immediately following his arrest; or
 - where he has immediately before his arrest been detained under section 12(1)(b) or (d) or both, within the period of 48 hours immediately following the time when he began to be detained under section 12(1)(b) or (d) or both, as the case may be,
- unless he is sooner released, whether under subsection (2)(b) or otherwise, or is otherwise detained, removed or deported under the Immigration Ordinance (Cap. 115).

(Added 53 of 1996 s.4)

[Note: sub-ss. (8) and (9) are omitted]

- 3.115** For other powers of members of the Immigration Service, see Immigration Service Ordinance Pt.III.
- 3.116** For further powers of detention by the Immigration Department, see Immigration Ordinance Pt.VII and also Immigration Service (Treatment of Detained Persons) Order (Cap.331C, Sub.Leg.).

Under certain circumstances under Immigration Ordinance ss.56A and 57, Customs and Excise officers and police officers may exercise powers conferred to the Immigration Department. **3.117**

For other powers conferred to members of the Immigration Service, see, *inter alia*, Competition Ordinance (Cap.619). **3.118**

(d) Powers of immigration officers exercisable by Customs and Excise and/or the Police

Under Immigration Ordinance s.56A, members of the Customs and Excise Service and/or police authorised in writing by the Commissioner of Customs and Excise may exercise powers conferred on an immigration officer by Immigration Ordinance ss.3(2), 4(1), 5(3), (6) or (7), 11(1), (1A) or (2), 18(1)(a), 24(1)(a) or (3), 27, 32(1) or 56(1) or (1A). **3.119**

7. POWERS OF THE POLICE AND CUSTOMS AND EXCISE UNDER DANGEROUS DRUGS ORDINANCE

Wide powers are conferred to the Police and Customs and Excise officers to search and seize items under the Dangerous Drugs Ordinance (Cap.134). **3.120**

Dangerous drugs were once a prevalent problem in Hong Kong, and legislation was enacted to confer powers to the law enforcement agencies to deal with drug-related criminal activities under the Dangerous Drugs Ordinance, Organized and Serious Crimes Ordinance (Cap.455) (OSCO) and Drug Trafficking (Recovery of Proceeds) Ordinance (Cap.405) (DTRPO). Powers include, *inter alia*, requiring the production of documents related to dealings of dangerous drugs under Dangerous Drugs Ordinance s.52(5)(b) and 52(6)(b). Failure to comply with requirements the under s.52 or obstruction of any police officer or member of the Customs and Excise Service in his exercise of powers under s.52 amounts to a criminal offence under s.53. **3.121**

Dangerous Drugs Ordinance (Cap.134)

Part VIII

52. Powers of authorized officers^(26/02/2021)

- For the purposes of this Ordinance, any police officer and any member of the Customs and Excise Service may-
 - stop, board and search any ship, aircraft, vehicle or train which has arrived in Hong Kong (not being a ship of war or a military aircraft), and remain thereon as long as it remains in Hong Kong;
 - search any person arriving in Hong Kong or about to depart from Hong Kong;
 - search any thing imported into or to be exported from Hong Kong;
 - stop, board and search any ship, aircraft, vehicle or train if he has reason to suspect that there is therein an article liable to seizure;

- (e) without a warrant issued under subsection (1E) where it would not be reasonably practicable to obtain such a warrant, enter and search any place or premises if he has reason to suspect that there is therein an article liable to seizure; or (*Amended 62 of 1994 s.8*)
- (f) stop and search any person, and search the property of any person, if-
- (i) he has reason to suspect that such person has in his actual custody an article liable to seizure; or
 - (ii) such person is found in any ship, aircraft, vehicle, train, place or premises in which an article liable to seizure is found.
- (1A) For the purposes of enabling a person to be searched under subsection (1)(f)(i), a police officer of or above the rank of inspector or a member of the Customs and Excise Service of or above the rank of inspector may request a registered medical practitioner or nurse registered or enrolled or deemed to be registered or enrolled under the Nurses Registration Ordinance (Cap.164), to examine the body cavities of that person. (*Added 40 of 1982 s.3*)
- (1B) A medical practitioner or nurse requested to examine the body cavities of a person under subsection (1A) may search the rectum, vagina, ears and any other body cavity of that person. (*Added 40 of 1982 s.3*)
- (1C) A medical practitioner or nurse carrying out an examination of a person at the request, under subsection (1A), of a police officer or member of the Customs and Excise Service who appears to be lawfully engaged in the performance of his duty shall not be bound to inquire whether or not the police officer or member is acting lawfully or within the scope of his duty. (*Added 40 of 1982 s.3*)
- (1D) A police officer or member of the Customs and Excise Service may detain a person in respect of whom a request is to be or has been made to a medical practitioner or nurse under subsection (1A) for such time as may reasonably be necessary to permit a medical practitioner or nurse to complete an examination of the body cavities of that person under this section. (*Added 40 of 1982 s.3*)
- (1E) Where it appears to any magistrate upon the oath of any person that there is reasonable cause to suspect that in any place there is an article liable to seizure under this Ordinance, or with respect to which an offence has been committed or is about to be committed against the provisions of this Ordinance, the magistrate may, by his warrant directed to any police officer or to any member of the Customs and Excise Service, empower such officer or member by day or by night to enter the place named in the warrant and there to search for and seize, remove and detain any such article. (*Added 62 of 1994 s.8*)
- (2) For the purpose of enabling a ship or aircraft to be searched under subsection (1)-
- (a) the Commissioner of Customs and Excise or the Commissioner of Police may by order in writing under his hand detain a ship for not more than 12 hours or an aircraft for not more than 6 hours; and (*Amended 40 of 1985 s.9*)

- (b) the Chief Secretary for Administration may, by order in writing under his hand, detain a ship or aircraft for further periods of not more than 12 hours in the case of a ship or not more than 6 hours in the case of an aircraft. (*Amended L.N. 362 of 1997*)
- Any order made under this subsection shall state the times from which and for which the order is effective.
- (3) Any public officer may seize, remove and detain any thing if he has reason to suspect that such thing is an article liable to seizure.
 - (4) Any public officer authorized in writing by the Director may uproot, seize, remove and destroy any plant of the genus cannabis or the opium poppy.
 - (5) For the purposes of this Ordinance, any public officer authorized in writing by the Director may-
 - (a) enter, inspect and search any place or premises occupied by-
 - (i) a person authorized by virtue of section 22(1)(a), (b) or (c) or (5A) or by virtue of section 24(1); (*Amended 2 of 1992 s.11*)
 - (ii) a person whose authorization as aforesaid has been withdrawn under section 33 and the withdrawal suspended;
 - (iii) a person by whom any such person as aforesaid is employed; or
 - (iv) a person to whom a licence has been issued under this Ordinance;
 - (b) require the production of, and inspect, any register, record, book, prescription or other document kept or made pursuant to the requirements, or for the purposes, of this Ordinance or any other document relating to dealings in a dangerous drug by or on behalf of any such person as aforesaid; and
 - (c) inspect any stocks of a dangerous drug in the possession of any such person as aforesaid.
 - (6) For the purposes of this Ordinance, any public officer authorized in writing by the Director may-
 - (a) enter, inspect and search a hospital or institution specified in the Second Schedule or any place or premises occupied for the purposes of any such hospital or institution;
 - (b) require the production of, and inspect, any register, record, book, prescription or other document kept or made in any such hospital or institution pursuant to the requirements, or for the purposes, of this Ordinance or any other document relating to dealings in a dangerous drug for the purposes of such hospital or institution; and
 - (c) inspect any stocks of a dangerous drug in any such hospital or institution or in any such place or premises.
 - (7) An authorization given by the Director under this section may be given to a police officer, member of the Customs and Excise Service or public officer by name or may be given to any police officer, member of the Customs and Excise Service or other public officer for the time being holding such rank or

- (c) inciting another to commit any of those offences;
 - (d) attempting to commit any of those offences;
 - (e) aiding, abetting, counselling or procuring the commission of any of those offences....
- (2) For the purpose of the definition of *organized crime* (有組織罪行) in subsection (1)-
- (a) a conspiracy to commit a Schedule 1 offence involves a matter referred to in paragraph (c)(i) to (iii) of that definition if the pursuit of the agreed course of conduct would at some stage involve that matter;
 - (b) an attempt or incitement to commit a Schedule 1 offence involves a matter referred to in paragraph (c)(i) to (iii) of that definition if what the person attempting or inciting the commission had in view would involve that matter....
- (4) This Ordinance applies to property whether it is situated in Hong Kong or elsewhere.
- (5) References in this Ordinance (except in sections 25 and 25A) to offences or organized crimes include a reference to offences or organized crimes committed before the commencement of this Ordinance; but nothing in this Ordinance imposes any duty or confers any power on any court in or in connection with proceedings against a person for an offence instituted before the commencement of this Ordinance. (*Amended 90 of 1995 s.2*)
- (6) For the purposes of this Ordinance—
- (a) a person's proceeds of an offence are—
 - (i) any payments or other rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of that offence;
 - (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and
 - (iii) any pecuniary advantage obtained in connection with the commission of that offence;
 - (b) the value of the person's proceeds of that offence is the aggregate of the values of—
 - (i) the payments or other rewards;
 - (ii) that property; and
 - (iii) that pecuniary advantage. (*Replaced 87 of 1997 s.36*)
- (7) For the purposes of this Ordinance—
- (a) a person's proceeds of organized crime are—
 - (i) any payments or other rewards received by him at any time (whether before or after 2 December 1994) in connection with the commission of one or more organized crimes;
 - (ii) any property derived or realised, directly or indirectly, by him from any of the payments or other rewards; and

- (iii) any pecuniary advantage obtained in connection with the commission of one or more organized crimes;
- (b) the value of the person's proceeds of organized crime is the aggregate of the values of—
- (i) the payments or other rewards;
 - (ii) that property; and
 - (iii) that pecuniary advantage. (*Replaced 87 of 1997 s.36*)
- (8) For the purposes of this Ordinance, a person who has at any time (whether before or after the commencement of this Ordinance) received any payment or other reward in connection with the commission of an offence or an organized crime has benefited from that offence or organized crime, as the case may be.
- (9) References in this Ordinance to property received in connection with the commission of an offence or organized crime include a reference to property received both in that connection and in some other connection.
- (10) Subsections (11) to (17) shall have effect for the interpretation of this Ordinance.
- (11) Property is held by any person if he holds any interest in it.
- (12) References to property held by a person include a reference to property vested in his trustee in bankruptcy or in a liquidator.
- (13) References to an interest held by a person beneficially in property include, where the property is vested in his trustee in bankruptcy or in a liquidator, a reference to an interest which would be held by him beneficially if the property were not so vested.
- (14) Property is transferred by one person to another if the first person transfers or grants to the other any interest in the property.
- (15) Proceedings for an offence are instituted—
- (a) when a magistrate issues a warrant or summons under section 72 of the Magistrates Ordinance (Cap.227) in respect of the offence;
 - (aa) when a person has been arrested for the offence and released on bail or has refused bail; (*Added 26 of 2002 s.3*)
 - (b) when a person is charged with the offence after being taken into custody without a warrant; or
 - (c) when an indictment is preferred by the direction or with the consent of a judge under section 24A(1)(b) of the Criminal Procedure Ordinance (Cap.221),
- and where the application of this subsection would result in there being more than one time for the institution of proceedings, they shall be taken to have been instituted at the earliest of those times.
- (16) Proceedings for an offence are concluded on the occurrence of one of the following events—
- (a) the discontinuance of the proceedings whether by entry of a *nolle prosequi* or otherwise;

Criminal Procedure Ordinance (Cap.221)

Part III

49. Arraignment of the accused^(20/04/2018)

- (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.
- (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*)

6.032 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.²⁶ 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.

6.033 The pleas open to a defendant are as follows:

- (1) Plea of not guilty;
- (2) Plea of guilty;

²⁶ *R v Boyle* [1954] 2 QB 292 (CA).

- (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*.²⁷

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.²⁸

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.²⁹

If the defendant pleads not guilty to any of the charges, the case proceeds to trial before the Trial Judge in accordance with CPO s.50. **6.036**

50. Effect of plea of not guilty^(20/04/2018)

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.

Chapter 7: Section 2(b): Pleading guilty to a lesser offence, which is also available to trials upon indictment in the District Court. **6.037**

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.³⁰ **6.038**

If the defendant pleads guilty but does not admit to the Brief Facts or Summary of Facts, a *Newton* Inquiry may be necessary before the Court sentences him.³¹ **6.039**

(d) Possible reversal of plea by a defendant

"[A] guilty plea is an answer of admission of guilt by a defendant given in reply to the court's demand to plead. Based on the guilty plea, and very often together with the defendant's agreement with the...brief facts, the court may make a finding of guilt and enter a conviction against the defendant of the offence charged, without requiring proof of the offence by evidence at trial."³² **6.040**

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. In determining an **6.041**

²⁷ See also para.5.094 (see also footnotes).

²⁸ *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 (as he then was), see *HKSAR v Walsh Kent Andrew* [2018] HKCFI 921.

²⁹ See also Bar Code, para.10.56 at para.5.011.

³⁰ See Chapter 8: Mitigation and Sentencing.

³¹ See Chapter 8: Section 2(c): *Newton* inquiry.

³² *HKSAR v Chan Chi Ho Lincoln* (2018) 21 HKCFAR 588, [31].

application for reversal of plea, the court must distinguish whether the plea is equivocal or unequivocal, which is to be determined "at the time it is made."³³

- 6.042** "A plea is equivocal if the defendant adds to his plea of guilty a qualification which, if true, may show that he is not guilty of the offence charged." Unless [the qualification is] clarified, it does not possess the necessary quality in terms of an admission of guilt that would entitle a court to make a finding of guilt and dispense with a trial to prove the offence charged by evidence. For this reason, it cannot be accepted and form the basis of a conviction. And for this reason, an equivocal plea or a conviction resulting from the erroneous acceptance by the court of such a plea is often described as a "nullity". And also for this reason, when the true picture is subsequently revealed, the conviction which is founded on such an insufficient basis must be set aside; no discretion is involved.³⁴ For example, where a defendant intends to plead guilty to 'Theft' under Theft Ordinance (Cap.210) s.10 for stealing a bag of chewing gum, but she adds that she has no intention to steal it, then her plea is equivocal and cannot be accepted by the court.
- 6.043** "[I]f it is not [equivocal], it is an unequivocal plea, based on which the court is entitled to convict the defendant of the offence charged. If, after conviction, the defendant says to the court during mitigation, or to a probation officer when preparing a report for sentencing purposes, something that if it had been said at the time the plea was taken would have amounted to a qualification of the type described above, that does not turn the unequivocal plea into an equivocal one. The plea remains an unequivocal one."³⁵ The court has an unfettered "discretion to allow the reversal of an unequivocal plea after conviction (but before sentence) ..., although...it should be "exercised in clear cases and very sparingly."³⁶ "[T]he overriding consideration, in the exercise of discretion, must be in interests of justice."³⁷
- 6.044** "[W]here the unequivocal plea of guilty was in fact entered into as a result of duress, inducement or misrepresentation, the plea is in substance a nullity, and the court's discretion may only be judicially exercised by allowing a change of plea."³⁸
- 6.045** "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."³⁹
- 6.046** 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.
- 6.047** See also Bar Code, para.10.55 and Annex 12: Confession of Guilt and Professional Guide, para.10.05.⁴⁰

³³ *Ibid.*, [25].

³⁴ *Ibid.*, [32].

³⁵ *Ibid.*, [25].

³⁶ *Ibid.*, [40].

³⁷ *Ibid.*, [44].

³⁸ *Ibid.*, [48] applying *HKSAR v Shum Wan Foon* (2014) 17 HKCFAR 303, 308.

³⁹ *HKSAR v Shum Wan Foon* (2014) 17 HKCFAR 303, 309.

⁴⁰ See para.6.005.

Solicitors' Guide to Professional Conduct

Chapter 10

Litigation Solicitors⁴¹

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.

For an illustration of the circumstances under which a defendant was permitted to withdraw a plea of guilty, see *HKSAR v Zilinskas*,⁴² where Zervos J (as he then was) 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. **6.048**

DETERMINATION OF PRELIMINARY ISSUES BEFORE TRIAL JUDGE

(a) Introduction

In criminal proceedings (assuming there is no issue being taken that the defendant is unfit to plead),⁴³ 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*: **6.049**

- (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

Under Indictment Rules (Cap.221C, Sub.Leg.) r.7 and subject to CPO s.18,⁴⁴ 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. **6.050**

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 **6.051**

⁴¹ Professional Guide (n 9 above).

⁴² [2016] 3 HKLRD 505 (CFI).

⁴³ See Chapter 5: Section 3(e)(ii): Fitness to be tried.

⁴⁴ See para.4.153 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^(20/04/2018)

- (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 U.K.]

[Note: sub-ss. (1) and (2) are omitted]

6.052 For similar powers of a Magistrate to order separate trials, see MO s.10(2).⁴⁵

6.053 In particular, the House of Lords in *Ludlow v Metropolitan Police Commissioner*⁴⁶ 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 the several

⁴⁵ See para.4.094.

⁴⁶ [1971] AC 29, 41F.

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.

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;⁴⁷
- (2) Multiple defendants are charged in separate counts, with each involving a different defendant;⁴⁸
- (3) Separate trials for conspiracy counts and substantive counts;⁴⁹ and
- (4) Indictment has too many counts.⁵⁰

"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."⁵¹

In practice, such an application for severance is usually made by the Defence and may be opposed by the Prosecution. **6.056**

Where the Trial Judge makes an order for severance, the separate trials are then heard in accordance with the court order of the Trial Judge, on separate dates as fixed in the order. **6.057**

"[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."⁵² **6.058**

(c) Stay of proceedings

As discussed in Chapter 4: Section 2(b) above, Basic Law art.63⁵³ enshrines the SJ's independence to control criminal proceedings as he thinks best. **6.059**

On the other hand, the court has the inherent power to stay criminal proceedings brought by the SJ in exceptional cases as recognized by the CFA in *HKSAR v Lee Ming Tee*. **6.060**

⁴⁷ *R v Moghal* (1977) 65 Cr App R 56 (CA).

⁴⁸ *R v Assim* [1966] 2 QB 249 (CA).

⁴⁹ PD 9.1: Conspiracy; *Hui Shu Tam v R* [1965] HKLR 341 (CA).

⁵⁰ *HKSAR v Hui Rafael Junior* (HCCC 98/2013, [2015] HKEC 21), [9] quoting *Ludlow v Metropolitan Police Commissioner* [1971] AC 29, 41F.

⁵¹ *HKSAR v Hui Rafael Junior* (HCCC 98/2013, [2015] HKEC 21), [10].

⁵² *R v Gibbins* (1919) 13 Cr App R 134, 136 (CA), applied in *R v Lee Shek Ching* [1986] HKLR 304.

⁵³ See para.4.006.

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.

6.061 The staying of criminal proceedings would only be justified in highly exceptional circumstances.⁵⁴

6.062 The circumstances upon which such discretion is exercised is summarised in *HKSAR v Ng Chun To Raymond*⁵⁵ by Stock VP as follows:

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

⁵⁴ *HKSAR v Lee Ming Tee* (2001) 4 HKCFAR 133, 150.

⁵⁵ [2013] 5 HKC 390, 413, [84] (CA).

"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."⁵⁶ **6.063**

See paras.5.324–5.326 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. **6.064**

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.⁵⁷ **6.065**

No less than seven days before trial, the Prosecution should serve its skeleton argument and authorities to all relevant parties.⁵⁸ **6.066**

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

(i) Generally

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: **6.067**

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.⁵⁹ **6.068**

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 that the admission was not made as a product of threats, violence, inducements, oppression or deception by persons-in-authority during the investigation process. **6.069**

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*: **6.070**

- (1) Employers;
- (2) Prison officers;
- (3) Teachers and principals;⁶⁰ and
- (4) Person who arrested the accused (in addition to investigating officers, say under CPO s.101).

⁵⁶ *HKSAR v Hon Ming Kong* (2014) 17 HKCFAR 727, 733.

⁵⁷ PD 9.7: Applications to Stay Criminal Proceedings, para.3.

⁵⁸ *Ibid.*, para.5.

⁵⁹ *R v Bonython* (1984) 38 SASR 45 (Supreme Court of South Australia).

⁶⁰ *R v M(MR)* [1998] 3 SCR 393 (Supreme Court of Canada).

- 6.079 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.⁶⁸
- 6.080 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",⁶⁹ namely, where the prejudicial effect of the admission outweighs its probative value.
- 6.081 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.⁷⁰
- 6.082 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.⁷¹
- 6.083 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:
- (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

- 6.084 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 oppression⁷² is involuntary and inadmissible at trial.
- 6.085 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 beyond reasonable doubt that the inducement had not influenced the defendant at the time he made the admission.⁷³ Otherwise, the confession is inadmissible.
- 6.086 Inducements generated by the defendant himself may render an admission inadmissible where the person-in-authority's conduct, words or lack, thereof, is capable of being

⁶⁸ *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168; *R v Sang* [1980] AC 402 (HL).

⁶⁹ *R v Sang*, *Ibid.*, 434.

⁷⁰ *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168, 180.

⁷¹ *Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540, 552.

⁷² *Director of Public Prosecution v Ping Lin* [1976] AC 574 (HL).

⁷³ *Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540, 553.

reasonably understood to be either an acceptance of the offer or a promise of an advantage made by the person-in-authority.⁷⁴

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.⁷⁵

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.⁷⁶

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

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.

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.⁷⁷ It is the usual practice 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*.

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-authority⁷⁸ who acted in breach of the Rules and Directions, if any.

There is no formal requirement as to the format for the Grounds of Objection.⁷⁹ The Defence should balance the need to provide sufficient particulars to the Trial Judge so

⁷⁴ *Ibid.*, 555.

⁷⁵ *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168, 177.

⁷⁶ *HKSAR v Leung Chiu Ming* [2001] 1 HKLRD 272, 275 (CA), following *R v Prager* [1972] 1 WLR 260 (CA).

⁷⁷ Appendix 36.

⁷⁸ See paras.6.070–6.072.

⁷⁹ See Appendix 36 for an example of Grounds of Objection Regarding Admissibility of Alleged Confession.

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).

- 6.094** 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*.
- 6.095** 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 Issues only.
- 6.096** To start, the Prosecution opens its case on Special Issue only, ie whether the alleged admission of the defendant was made voluntarily, and calls its PWs to give evidence to prove the voluntariness of the confession or admission it seeks to rely on.⁸⁰ 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.⁸¹ 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.⁸² 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.
- 6.097** 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 a 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.
- 6.098** 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 *PPI*.⁸³ 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.⁸⁴
- 6.099** 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.

⁸⁰ See Chapter 6: Section 4(b): Procedure of calling a witness.

⁸¹ See Chapter 6: Section 6: Determination of whether Defendant Has Case to Answer.

⁸² See Chapter 6: Section 7: Defence's Case.

⁸³ See Chapter 6: Section 5(a)(i): Real or documentary evidence.

⁸⁴ 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.

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*.⁸⁵ **6.100**

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. **6.101**

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.⁸⁶ **6.102**

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. **6.103**

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*⁸⁷ and also *Thakoen Gwitsa Thaporn Thongjai v R*⁸⁸ 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."⁸⁹ **6.104**

If a written statement and/or video record of interview is ruled admissible by the Trial Judge, the Provisional Prosecution exhibit (say *PPI*) is then formally admitted as evidence in the trial of the General Issue and marked as Prosecution exhibit (say *PI*) in the court's record. **6.105**

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 **6.106**

⁸⁵ See Chapter 6: Section 4(b)(iv)D: *Browne v Dunn*.

⁸⁶ *Wong Kam Ming v R* [1980] AC 247 (PC).

⁸⁷ [1997] 1 Cr App R 396.

⁸⁸ [1997] HKLRD 678, [682] (PC).

⁸⁹ *Chau Ching Kay v HKSAR* (2002) 5 HKCFAR 540, 552.

Practice Direction 4.2

Criminal Appeals to the Court of Appeal

6A. Single Judge Applications for Leave

By section 83Y of the Criminal Procedure Ordinance, Cap 221, a single judge of the Court of Appeal or the Court of First Instance is empowered to determine applications for leave to appeal against conviction and/ or sentence. In light of that provision and to make more effective use of judicial resources, it is directed that:

- (1) Unless directed otherwise, all applications for leave to appeal to the Court of Appeal against conviction and/ or sentence will be heard and determined by a single judge as stipulated in section 83Y(4) of the Criminal Procedure Ordinance, Cap 221 and section 5(2) of the High Court Ordinance, Cap 4.....
- (5) A single judge may, upon an application for leave to which this Practice Direction applies:
 - (i) grant leave to appeal on all grounds of appeal;
 - (ii) grant leave to appeal on one or more grounds of appeal and refuse leave to appeal on other grounds ('limited leave');
 - (iii) grant leave on such grounds as appears to him to warrant leave, even though not pleaded in the application for leave; or
 - (iv) refuse leave to appeal.
- (6) If leave or limited leave is granted, the single judge may give such directions for the hearing of the appeal and matters in connection therewith as he sees fit.

Criminal Procedure Ordinance (Cap.221)

Part IV

83Y. Powers of Court of Appeal under Part IV which are exercisable by single judge^(20/04/2018)

- (1) The powers of the Court of Appeal under this Part which are specified in subsection (2) and the power to give directions under section 156(5) of the Crimes Ordinance (Cap.200) may be exercised by a single judge in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions. *(Amended 25 of 1978 s.5)*
- (2) The said powers are the following-
 - (a) to give leave to appeal;
 - (b) to extend the time within which notice of appeal or of application for leave to appeal may be given;
 - (c) to allow an appellant to be present at any proceedings;
 - (d) to order a witness to attend for examination;
 - (e) to admit an appellant to bail;

- (f) to make orders under section 83F(2) and discharge or vary such orders;
 - (g) to give directions under section 83W(1);
 - (h) to give leave to apply for the review of a sentence under section 81A;
 - (i) to make orders under section 83XX for the payment of costs; *(Added 2 of 1978 s.4)*
 - (j) to order a respondent to be detained in custody under section 81A(3). *(Added 20 of 1979 s.8)*
- (3) If the single judge refuses an application on the part of an appellant or applicant to exercise in his favour any of the powers above specified, the appellant or applicant shall be entitled to have the application determined by the Court of Appeal. —
 - (4) The references in this section to a single judge are to a single judge of the Court of Appeal or of the Court of First Instance. *(Added 29 of 1978 s.2. Amended 25 of 1998 s.2)*

(Added 34 of 1972 s.18)
[cf. 1968 c.19 s.31 U.K.]

If leave is refused by a single Justice of Appeal of the CA, the appellant may apply for leave to the Full Court of the CA.⁴⁴ 10.074

"Subject to the rules concerning disqualification of a judge from sitting by reason of bias, whether actual or apparent, a single Justice of Appeal who has refused leave to appeal to the Court of Appeal under section 83Y of the CPO may lawfully sit as a member of the panel if the applicant seeks to have his application determined by the Court of Appeal."⁴⁵ 10.075

Where a defendant appeals against conviction on point of law only, a defendant shall, within 28 days after the day of his conviction and/or sentence,⁴⁶ give notice of appeal to the Registrar of the High Court in accordance with Form VIII in Schedule of the CAR. 10.076

Otherwise, a defendant shall, within 28 days after the day of his conviction and/or sentence,⁴⁷ give notice of appeal to the Registrar of the High Court under CPO s.83Q in accordance with Form XI in Schedule of the CAR. Under Pt.III in Form XI, initial grounds of appeal shall be included.⁴⁸ 10.077

83Q. Initiating procedure^(20/04/2018)

- (1) A person who wishes to appeal under this Part to the Court of Appeal, or to obtain the leave of that Court to appeal, shall give notice of appeal or, as the

⁴⁴ CPO s.83Y(3).

⁴⁵ *HKSAR v Md Emran Hossain* (2016) 19 HKCFAR 679, 704.

⁴⁶ CPO s.83Q(2): "Provided that, where sentence was passed more than 7 days after the date of conviction, verdict or finding, notice of appeal, or of application for leave to appeal, against the conviction, verdict or finding may be given within 28 days from the date which sentence was passed".

⁴⁷ *Ibid.*

⁴⁸ See Appendix 5 for Form XI and Appendix 8 for PD 4.2.

case may be, notice of application for leave to appeal, in such manner as may be provided by rules and orders made under section 9.

- (2) Notice of appeal, or of application for leave to appeal, shall be given within 28 days from the date of the conviction, verdict or finding appealed against, or, in the case of appeal against sentence, from the date on which sentence was passed, or, in the case of an order made or treated as made on conviction, from the date of the making of the order:

Provided that, where sentence was passed more than 7 days after the date of conviction, verdict or finding, notice of appeal, or of application for leave to appeal, against the conviction, verdict or finding may be given within 28 days from the date on which sentence was passed.

- (3) The time for giving notice under this section may be extended, either before or after it expires, by the Court of Appeal.

(Added 34 of 1972 s.18)
[cf. 1968 c.19 s.18 U.K.]

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

- 10.078** According to CAR r.35, time to lodge a notice of appeal or leave to appeal against conviction begins to run from the date of conviction. If the sentence passed was more than 7 days after the date of conviction, under CPO s.83Q(2), the notice against conviction may be lodged within 28 days from the date of the sentence.

Criminal Appeal Rules (Cap.221A, Sub.Leg.)

35. Time for appealing against conviction^(17/09/2020)

The time within which a convicted person shall give notice of appeal, or notice of his application for leave to appeal, against his conviction shall commence to run from the date of conviction.

- 10.079** Notice of appeal, notice of application for leave to appeal or notice of application for extension of time shall be in writing and signed by the defendant/appellant himself.⁴⁹

- 10.080** See also table at para.10.066.

- 10.081** Trial counsel, if instructed, should advise the appellant on “reasonable” grounds of appeal in accordance with PD 4.2 direction 4. Appellate counsel or solicitor who settles grounds of appeal should comply with the duties set out in direction 5.

Practice Direction 4.2

Criminal Appeals to the Court of Appeal

4. Initial Grounds

Where there are “reasonable” grounds of appeal, the solicitor or counsel who was present at the trial, if instructed, should give advice on the prospects of an appeal. He should be in a position to formulate “initial grounds” immediately after the conclusion of the case and without waiting for the transcript of the evidence,

⁴⁹ CAR rr.3 and 4.

of the summing-up or of the reasons for verdict or sentence and to advise the applicant on the filing of the required notice. These grounds are termed “initial grounds” in contrast with “perfected grounds” and should be signed by the drafter and accompany the notice of application for leave to appeal.

If the lay client is not given advice, and is unrepresented during the period limited for the bringing of appeals against either conviction or sentence, officers of Correctional Services will assist him by the provision of the required forms and the forwarding of them to the Registrar, High Court.

5. Where solicitor or counsel settles grounds of appeal, it is his duty to ensure that —
- (a) (i) grounds are only put forward where he has satisfied himself that they are arguable; it is not his duty to put forward grounds merely because the appellant wishes him to do so;
 - (ii) grounds are not put forward unless they are “reasonable”, that is, they afford some real chance of success;
 - (iii) grounds are not put forward unless they are supportable by oral argument and are particularised; and
 - (iv) the grounds put forward are settled with care and accuracy.
- (b) It is not sufficient merely to state that “there was no or no sufficient evidence to ground the conviction”. While greater latitude will be given to applicants in person such grounds risk the application being treated as invalid.
- (c) If leave out of time is sought in respect of either conviction or sentence, a grounding affidavit from the applicant personally should be filed with the application setting out in detail the reasons for it.

In *HKSAR v Chen Keen*,⁵⁰ after dismissing the appeals of the appellants (who were, respectively, represented by three leading counsels from London) after a 10-day hearing, the CA reiterated again that it is the duty of counsel to advance grounds of appeal which are reasonably arguable as prescribed by PD 4.2: Criminal Appeals to the Court of Appeal para.5.

See also paras.10.006–10.010 relating to counsel’s general duties to advance reasonable grounds on appeal.

In the High Court, CA, each appeal lodged is assigned a distinct case number with the prefix Court of Appeal Criminal Case (CACC) and suffix relating to the year the case reaches the High Court Registry, such as CACC 678/2021.

The appeal bundle is served to the appellant by the Judiciary and the appellant is reminded of his right to apply for Legal Aid, if applicable. Where an appellant applies for Legal Aid, the case proceeds after the Legal Aid Department notifies the appellant of the result of his application. After all such procedures are completed, the Registrar fixes a date for the hearing for leave to appeal before a single Justice of Appeal of the CA, in consultation with counsel’s diaries, if applicable.

⁵⁰ [2018] HKCA 121.

- 10.092** Upon leave or limited leave being granted, either by a single Justice of Appeal or Full Court of the CA, the Registrar will fix a date for the substantive appeal hearing, in consultation with counsel's diaries, if applicable.
- 10.093** According to CAR r.38, where the CA grants leave to appeal, the notice of application for leave to appeal shall be deemed to be a notice of appeal.

Criminal Appeal Rules (Cap.221A, Sub.Leg.)

38. Notice of application for leave to appeal^(17/09/2020)

Where the Court of Appeal has given an appellant leave to appeal, it shall not be necessary for the appellant to give any notice of appeal and the notice of application for leave to appeal shall be deemed to be a notice of appeal.

- 10.094** Alternatively, where leave is granted by the Full Court of the CA, it may treat the leave application as the substantive hearing and dispose of the appeal.
- 10.095** Where leave is granted, at the substantive appeal hearing, the CA, under CPO s.83, shall allow an appeal against conviction where:

- (1) the conviction is unsafe or unsatisfactory;
- (2) the trial judge made a wrong decision on any question of law; or
- (3) there was a material irregularity in the course of the trial.

Criminal Procedure Ordinance (Cap.221)

Part IV

83. Grounds for allowing appeal under section 82^(20/04/2018)

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

Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred.

- (2) In the case of an appeal against conviction the Court of Appeal shall, if it allows the appeal, quash the conviction.
- (3) An order of the Court of Appeal quashing a conviction shall, except when under section 83E the appellant is ordered to be retried, operate as a direction

to the court of trial to enter, instead of the record of conviction, a judgment and verdict of acquittal.

(Replaced 34 of 1972 s.18)
[cf. 1968 c.19 s.2 U.K.]

In other words, an appeal against conviction would not be allowed unless the appellant demonstrates that he falls under one or more of the grounds under CPO s.83(1). For further explanation on grounds of appeal under CPO s.83(1), see *Archbold Hong Kong 2021*, paras.7-79-7-102.

Upon allowing the appeal, the CA may:

- (1) quash the conviction on allowing an appeal under CPO s.83(2) (which operates as an acquittal under s.83(3) except where retrial is ordered under s.83E);
- (2) apply the proviso under CPO s.83(1);
- (3) substitute the conviction under CPO s.83A; and
- (4) order retrial under CPO s.83E.⁵⁴

Under CPO s.83(1), the "Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no miscarriage of justice has actually occurred,"⁵⁵ which is commonly referred to as application of the proviso under CPO s.83(1).

The CFA in *Kulemesin v HKSAR*⁵⁶ in approving the test as set out in *Ewan Quayle v Launder v HKSAR*⁵⁷ for applying the proviso under CPO s.83(1) stated that "the test is whether a reasonable jury, properly instructed, would, on the evidence, without doubt convict or would inevitably come to the same conclusion'."

Alternatively, under CPO s.83A, the CA may, instead of allowing or dismissing the appeal, substitute the conviction, where two conditions as clarified by the CFA in *Hau Tung Ying v HKSAR* are satisfied.

83A. Power to substitute conviction of alternative offence^(20/04/2018)

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

(Added 34 of 1972 s.18)
[cf. 1968 c.19 s.3 U.K.]

⁵⁴ See Chapter 10: Section 6(c): Order for retrial.

⁵⁵ CPO s.83(1).

⁵⁶ (2013) 16 HKCFAR 195, 234.

⁵⁷ (2001) 4 HKCFAR 457.

appeal from a magistrate) for an offence of which he was not convicted on indictment. (*Amended 25 of 1998 s.2*)

- (2) The proceedings from which an appeal against sentence lies under this section are those where an offender-
 - (a) is committed by a magistrate under section 81B(3) of the Magistrates Ordinance (Cap.227); or
 - (b) having been made the subject of a probation order or an order for conditional discharge or given a suspended sentence, appears or is brought before the court to be further dealt with for his offence.
- (3) An offender dealt with for an offence in the Court of First Instance in a proceeding to which subsection (2) applies may appeal to the Court of Appeal in any of the following cases- (*Amended 25 of 1998 s.2*)
 - (a) where either for that offence alone or for that offence and other offences for which sentence is passed in the same proceeding, he is sentenced to imprisonment for a term of 6 months or more; or
 - (b) where the sentence is one which the court convicting him had not power to pass; or
 - (c) where the court in dealing with him for the offence makes in respect of him-
 - (i) a recommendation for deportation; or
 - (ii) an order disqualifying him from holding or obtaining a driving licence to drive a motor vehicle under Part 8 of the Road Traffic Ordinance (Cap.374); or (*Amended 75 of 1982 s.114*)
 - (iii) an order under section 109C.
- (4) For the purposes of subsection (3)(a), any 2 or more sentences are to be treated as passed in the same proceeding if-
 - (a) they are passed on the same day; or
 - (b) they are passed on different days but the court in passing any one of them states that it is treating that one together with the other or others as substantially one sentence,

and consecutive terms of imprisonment and terms which are wholly or partly concurrent are to be treated as a single term.

(Added 34 of 1972 s.18. Amended E.R. 2 of 2012)
[cf. 1968 c.19 s.10 U.K.]

10.107 See Chapter 10: Section 4(b)(i): Appeal against conviction for procedure prior to substantive appeal hearing, namely, procedure for application for leave to appeal and CPO s.83Q.⁶⁰

10.108 Upon allowing the leave to appeal against sentence, the CA may:

⁶⁰ See para.10.077.

- (1) quash the sentence under CPO s.83I(3)(a) and
- (2) replace such sentence or make such order as it thinks appropriate for the case (whether more or less severe) and as the court below had power to pass or make when dealing with him for the offence under CPO s.83I(3)(b).

83I. Supplementary provisions as to appeal against sentence^(20/04/2018)

- (1) An appeal against sentence, whether under section 83G or 83H, lies only with the leave of the Court of Appeal.
- (2) Where the court, in dealing with an offender on his conviction on indictment, or in a proceeding to which section 83H(2) applies, has passed on him 2 or more sentences in the same proceeding (which expression has the same meaning in this subsection as it has for the purposes of section 83H), being sentences against which an appeal lies under section 83G or 83H, an appeal or application for leave to appeal against any one of those sentences shall be treated as an appeal or application in respect of both or all of them.
- (3) On an appeal against sentence the Court of Appeal, if it considers that the appellant should be sentenced differently for an offence for which he was dealt with by the court below, may-
 - (a) quash any sentence or order which is the subject of the appeal; and
 - (b) in place of it pass such sentence or make such order as it thinks appropriate for the case (whether more or less severe) and as the court below had power to pass or make when dealing with him for the offence.
- (4) The power of the Court of Appeal under subsection (3) to pass a sentence which the court below had power to pass for an offence shall, notwithstanding that the court below made no order under section 109C(1) in respect of a suspended sentence previously passed on the appellant for another offence, include power to deal with him in respect of that suspended sentence where the court below-
 - (a) could have so dealt with him if it had not passed on him a sentence of detention in a training centre quashed by the Court of Appeal under subsection (3)(a); or
 - (b) did so deal with him in accordance with section 109C(1)(d) by making no order in respect of the suspended sentence.

(Added 34 of 1972 s.18)
[cf. 1968 c.19 s.11 U.K.]

In other words, on an appeal against sentence to the CA, the CA may replace the sentence which is more or less severe than the one passed by the court below. **10.109**

Moreover, the CA may impose an order for loss of time pursuant to CPO ss.83I(3)(b) and 83W, namely, that the time during which the appellant is in custody pending appeal (since the filing of the application for leave to appeal to the determination of the appeal, in whole or in part) shall not be counted as part of the sentence served by him, resulting in a net increase in the time served.⁶¹ **10.110**

⁶¹ See Chapter 10: Section 6(d): Order for loss of time.

(c) Appeal/reference by Secretary for Justice on point of law

10.111 Under DCO s.84, following an acquittal in the District Court, the SJ may appeal by way of case stated to the CA on matters of law only.

District Court Ordinance (Cap.336)**Part V****84. Appeal by way of case stated**^(06/12/2019)

An appeal shall lie at the suit of the Secretary for Justice to the Court of Appeal against a verdict or order of acquittal, which shall include any order quashing or dismissing a charge for any alleged defect therein or want of jurisdiction. Such an appeal shall relate to matters of law only and the following procedure shall apply thereto — (*Amended L.N. 362 of 1997*)

- (a) within 7 clear days after the reasons for a verdict have been recorded or after the order of acquittal, or within such further period as a judge of the High Court may, whether before or after the expiration of such period, allow, an application may be made in writing to the judge to state a case setting forth the facts and the grounds on which the verdict or order was arrived at or made and the grounds on which the proceeding is questioned for the opinion of the Court of Appeal; and the provisions of sections 106 to 109 inclusive of the Magistrates Ordinance (Cap.227) shall apply, mutatis mutandis, to the preparation, amendment and setting down of such case stated;
- (b) following such application a judge of the High Court may, on application being made to him in Chambers, issue a warrant addressed to police officers directing that the respondent be arrested and brought before him, and may commit the respondent to prison pending the disposal of the appeal or admit him to bail;

10.112 At the hearing of an appeal under DCO Pt.V s.84(c), the CA shall, whether or not the respondent appears:

- (1) dismiss the appeal; or
- (2) reverse the verdict or order and direct accordingly; and
- (3) give directions as it thinks fit.

84. Appeal by way of case stated^(06/12/2019)

- (c) at the hearing of the appeal, whether or not the respondent appears, the Court of Appeal shall—
 - (i) if it is satisfied that there is no sufficient ground for interfering, dismiss the appeal; or
 - (ii) reverse the verdict or order and direct that the trial be resumed or that the accused be retried as the case may be, or find him guilty, record a conviction and pass such sentence on him as might have been passed on him by a judge; and
 - (iii) give all such necessary and consequential directions as it shall think fit.

(*Added 31 of 1962 s.2. Amended 25 of 1998 s.2*)

For examples of DCO s.84(c)(ii)–84(c)(iii), see 香港特別行政區訴陳志雲⁶² and *HKSAR v Chan Chi Wan Stephen*,⁶³ respectively. **10.113**

Under CPO s.81D, following an acquittal where the defendant was tried in the District Court or CFI, the SJ may refer a question of law to the CA. **10.114**

Criminal Procedure Ordinance (Cap.221)**Part IV****81D. Reference to Court of Appeal of question of law following acquittal**^(20/04/2018)

- (1) Where a person tried on indictment has been acquitted (whether in respect of the whole or part of the indictment) the Secretary for Justice may, if he desires the opinion of the Court of Appeal on a question of law which has arisen in the case, refer that question to the Court of Appeal which shall, in accordance with this section, consider the point and give its opinion on it. (*Amended L.N. 362 of 1997*)
- (2) For the purpose of its consideration of a question referred to them under this section the Court of Appeal shall hear argument—
 - (a) by, or by counsel on behalf of, the Secretary for Justice; (*Amended L.N. 362 of 1997*)
 - (b) if the acquitted person desires to present any argument, by counsel on his behalf or, with the leave of the Court of Appeal, by the acquitted person himself; and
 - (c) if the Court of Appeal so directs, by counsel appointed as amicus curiae by the Registrar.
- (3) Where, on a question being referred to the Court of Appeal under this section, the acquitted person appears by counsel for the purpose of presenting any argument to the Court of Appeal, he shall be entitled to his costs, that is to say to the payment out of the general revenue of such sums as are reasonably sufficient to compensate him for any expenses properly incurred by him for the purpose of being represented on the reference; and any amount recoverable under this subsection shall be ascertained as soon as practicable by the Registrar.
- (4) A reference under this section shall not affect the trial in relation to which the reference is made or any acquittal in that trial.

(*Added 20 of 1979 s.7*)
[*cf. 1972 c.71 s.36 U.K.*]

Reference under CPO s.81D shall not affect the acquittal or trial of the acquitted defendant. **10.115**

(d) Other appeals by Secretary for Justice

Other forms of appeals may be lodged by the SJ under CPO ss.81E and 81F. **10.116**

⁶² (CACC 355/2011, [2012] CHKEC 1006).
⁶³ [2016] 3 HKLRD 186 (CA).