

Criminal Procedure in Hong Kong

QUESTION ON WHAT IS LIKELY TO HAPPEN

Determining which court

- What type of offence is it? Look at ordinance
 - Any tariff or guideline case?
- Likely option? With tariffs to determine which court.

- 1st appearance of all cases is always in the Magistrate Court ("MC"), where the prosecution may ask for the case to be transferred to the District Court ("DC") or to hear committal proceedings in the MC to determine if it could be transferred to the Court of First Instance ("CFI")
- The first appearance in court of an arrested person will always be the MC. This is so even if the venue decision has not yet been made, or if the prosecution has already decided that the venue will either be the DC or the CFI
- Often on an accused person's first appearance before the magistrate, no plea is taken. This means that for various reasons the prosecution has not yet made a final decision regarding venue.
- The result is that the case is adjourned and the accused person is ordered to appear again in the MC at a later date.

- What is likely to happen on 2nd appearance and in which court?
- Classification of the offence (three categories of criminal offences)
 - **Summary**
 - **Indictable**
 - **Indictable offences that can be tried summarily** (can be tried in all three courts unless specifically has to be in DC because it is a matter mentioned in 2nd Schedule of the Magistrate Ordinance("MO"))
- Jurisdiction of Courts in relation to the classification
- Venue for hearing criminal offences
- Decisions as to venue
- Transfer and committals

SUMMARY OFFENCES

- S15A CPO an offence is summary unless the ordinance which creates the offence declares the offence to be treason or uses the words like indictment
- usually tried in the MC
- S88 MO- Only reason to be tried in DC is that if offence is on same charge sheet as an indictable offence
- If defendant pleads guilty to summary offence then MC may hear the plea in mitigation for the summary offence before transferring the indictable offence to the DC
- May only be transfer to CFI if s79F Criminal Procedure Ordinance ("CPO") it is a summary charge involving sexual abuse or cruelty to children.

- Most prosecutions must be initiated within six months of the offence being committed

INDICTABLE OFFENCES

- S14A CPO: More serious offences, only indictable if the statute provides the crime is
 - Indictable
 - Trial-able on indictment or
 - If person commits the offence he shall be liable on conviction on indictment
- The common law offences are indictable offences but may be tried summarily subject to limitation found in 2nd Schedule of MO
- S91-94A MO - Most indictable offences can be tried in the MO unless stated in Part 1 of the 2nd schedule MO.
- If purely indictable technically to the CFI, check to see if DC can hear.
- No time limit for filing the charge, except specified in the statute

Where it is a matter that can be tried in more than one level, the Prosecution decides based on sentencing power and sentencing guidelines based on the maximum sentence approach

Magistrates' Court

- A summary matter is generally tried here
- A summary matter is transferred to the DC where it appears on the same charge sheet as an indictable offence, which the Prosecution has determined is too serious for summary determination in the summary jurisdiction.
- Can hear indictable offences in Part III MO
- Can hear some indictable offences as set out in the 2nd schedule to the MO
 - Part 1 to 2nd schedule: sets out indictable offences that Magistrates cannot hear
 - Part 2 to 2nd schedule sets out MO can hear but only a permanent magistrate and not a special magistrate
 - Part 3 to 2nd schedule sets offences that can only be determined by CFI
 - ALL INDICTABLE MATTERS WHICH ARE NOT MENTIONED IN THE 2ND SCHEDULE CAN BE TRIED IN THE MO, DC or CFI.
- Permanent magistrates:
 - may hear summary offences and indictable offences not appearing in 2nd schedule of MO except for the ones listed in part 2 of the 2nd schedule
 - POWERS: s92 and 92A MO - 2 years imprisonment and \$100,000 fine for a single offence
 - s52MO if more than one consecutive then up to 3 years
- Special magistrate:
 - Hears summary and indictable offence not listed on 2nd schedule.
 - S91 MO- Single offence-6 months and \$50,000
 - More than one offence-12 months

District Court

- Must be transferred from magistrate on application by the prosecution
- Can determine any indictable matter not listed in part 3 of the 2nd schedule MO

- S82(2)(a) District Court Ordinance (“DCO”): can impose max 7 years imprisonment

The Court of First Instance

- **S85(2) MO**- Test for committal of criminal case: whether the evidence is sufficient to put D on trial for an indictable offence or if evidence given raises a strong or probable presumption of the D’s guilt
- Has jurisdiction over all indictable offences but no jurisdiction to hear summary offence
- Involves 7-9 jurors as the judge sees fit
- Hears
 - Committal by a magistrate under Part III of MO
 - Voluntary bill has been accepted
 - Proceedings have been transferred pursuant s4 Complex Commercial Crimes Ordinance
 - S79F CPO
 - Proceedings transferred under s77A DCO
 - Order for retrial s83E CPO

Procedure if matter is to be transferred to the DC:

- S88(1) MO a signed application form is handed to the Magistrate to transfer the case to DC
- To effect the transfer the magistrate must sign a transfer form
- S88(2) Application may be made orally or in writing
- Magistrate has no jurisdiction to refuse indictable offence
- They may refuse summary offence only if it can be completely dealt with independently from indictable offence

Procedure if matter is to be tried in CFI

- Trial on indictment (e.g. those offences in Part 3 Schedule 2 MO, which are those offences that must be heard before a jury or with a life sentence)
- **Mag-CFI**
 - Committal proceedings maybe required in the MC first although in HK it is usually just on paper committal
 - S80A MO Prosecution request the MC for a return day, which is not less than 10 days nor more than 42 days ahead
 - The preliminary inquiry may be held to determine if the case should be moved towards the CFI, but does not determine the guilt of the defendant
 - Paper committal is where the case is automatically committed and the defendant is committed on the return day and no preliminary inquiry is necessary
 - Not less than 7 days prior to the return day, the prosecution will serve copies of the, charge sheet, the prosecution witness statements and documentary exhibits
 - On return day an election is made by a paper committal or a preliminary inquiry

- If a preliminary inquiry is held the matter will proceed and the defence will have a chance to cross examine the prosecution witness in the hope of an s82 no case to answer or be committed to trial.
- But must inform prosecution and magistrate 7 days prior to preliminary inquiry date, which witnesses he, wishes to question.
- If he plead guilty s81B MO: the magistrate must explain the offence he is charged with and the elements of the offence at law and record any statement made by the defendant in pleading guilty to the charge and record that the offence and the element of the offence at law were explained to him. If satisfied that the plea is voluntary, he should commit the defendant for sentence in the CFI
- After hearing all evidence for the magistrate must decide whether to commit the defendant for trial in the CFI. The test is: s85(2) MO: whether there are sufficient evidence to put the defendant upon trial for an indictable offence, or if the evidence given raises a strong probable presumption of the defendant's guilt
- S80C (4) MO Paper Committal: again he will be informed of his rights and asked if he pleads guilty. If pleads not guilty, under s16 CPO he has right to apply to CFI for a discharge.
- Paper committal, the accused will be committed to CFI for trial or sentence

Procedure if matter is tried in the MC

- Plea to be taken in the MC

Formal admissions

Guilty plea

- HKSAR v Li Yan: guilty plea=1/3 discount only deny if exceptional reasons (HKSAR v CHUI CHI WAI)
- But if they delay the plea mid trial then the court may deny the discount (HKSAR v LEE Man Kei)
- Once entered into guilty plea cannot change without the leave of the court. Cannot appeal against conviction if he has pleaded guilty unless showing fundamental mistake:
 - The facts he admitted are not the basis of the charged offence(Chai Wai La)
 - The fact he admitted could establish both guilt and innocence (Chan Ching Chi)
 - The charge he pleaded guilty to its defective, invalid or unclear (Chao Tse Yuen)
 - He pleaded guilty under duress (Man Kam Wing)
 - He was labouring under a fundamental mistake (R v Peters)
 - He was not making an informed choice (R v Wong Wai Leung)
 - Prosecution gave inadequate disclosure (R v Early)
- When pleading guilty, the brief facts of the case will be repeated to him in court and he as to agree, before the court will sentence him
- S65C CPO-the brief facts if admitted are binding admissions

- If he wants to plead guilty but disputes the brief facts or summary of the prosecution's case e.g. plead guilty to assault but dispute the number of times or the way in which he was alleged to have struck the victim: **NEWTON INQUIRY**
- **NEWTON INQUIRY**: this is to challenge the gravity of the criminality as it goes to the potential sentencing
 - R v Tolera: if no agreement can be reached regarding the facts, hold Newton inquiry to determine the disputed fact unless making an implausible assertion or if dispute makes no difference to sentencing
 - Counsel should approach prosecution first
 - The prosecution may call witnesses to give evidence on the fact in dispute
 - Burden of Proof on the prosecution
 - If no evidence or substantial conflict then the defendant will have the benefit of the doubt
 - Test for proving evidence in these enquiries
 - If denial of element goes to the root of the offence then it cannot be said that a guilty plea was entered into.

Admission of evidence by written statement s65B CPO

- The statement has to be admissible, relevant and more probative than prejudicial
- Written statements to be tendered as evidence as if the writer had given that evidence viva voce in the course of the trial
- Statement must be served at least 14 days before trial commences
- If no objection is made within 14 days the parties will be deemed to have agreed that the witness need not appear to give oral evidence at trial.
- The court may still require the witness to attend for examination
- EXPERTS: HRSAR v Wong Ching Yin: deemed agreement on expert status
- **The effect** of this section is that you will lose right to cross examination but can call contradictory evidence
- PD 9.3 Criminal proceedings in CFI: if SJ wants to use witness statements: need to be served 7 days before the trial commences and if object must let SJ know 'as soon as possible'

Admission of proof by formal admission s65C (1) CPO

- Made by s65C CPO, before or during the trial by either party, should be in writing signed by the person making it or by the solicitor on the defendant's behalf, once admitted binds for current proceedings and subsequent proceedings
- Features
 - Enables parties to make formal admission before and during trial
 - Must be relevant and admissible
 - Must be noted for the record and specific
 - Only binds the maker of the admission
 - Once admitted cannot be contradicted without leave from the court
- If made during trial it may be admitted orally but may be in writing if before trial
- Usually a s65C admission is for the accused to admit the chain of evidence
- This in effect means that the accused is admitting the correct procedure had been followed by the Prosecution (Lam Chi Keung v HKSAR), such that since the evidence was admitted, it was not tampered with whilst in police custody

- Courts have hesitated about giving leave to remove admission (R v Hunt)
- PD9.3 Criminal Proceedings in the CFI: SJ may serve a notice to the accused to admit facts relating;
 - Chain of evidence
 - The committing of the offence
 - Admission of documentary exhibits
 - Any other matter which may be specified
- A copy must also be served on the registrar of the high court, 28 days before the date of the trial
- Accused's solicitor will have 14 days to reply to the SJ of the facts admitted and also be served to the Registrar.
- If D admits the chain of evidence it avoids calling all the people who have had contact with the evidence
- RESPONSE: should ask client if they believe the evidence have been tampered with; review prosecution papers to see if there are concerns over the chain of evidence
- If no concerns then advice should be to admit the chain
- There is an underlying duty to shorten the trail and avoid adverse costs.
- As defendant's lawyers you may use this to give facts of self defence

Alibi Evidence s90 (1)(d) MO

- On transfer of case to DC, Magistrates are required to give the defendant an alibi warning that particulars of an alibi must be given to the Prosecution within ten days of his trial commencing on the DC.
- As s75A DCO: cannot call alibi evidence without leave from DC after the criminal matter has been transferred to the DC
- S65D(8) CPO: if transferred to CFI, the same warning must be given and again only have 10 days to give alibi notice before trial commences without needed leave from court
- Alibi notice: contains names and address of alibi witness to be called, or any information in his possession which might be of material assistance to finding this witness.

SENTENCING:

Maximum sentence approach

- Legislations in HK sets a maximum for the offence and for any criminal
- The maximum should usually reserve for the worst offence R v Pang Chun Wai
- Pleads guilty pre trial will receive 1/3 discount (HKSAR v Li Yan)
- Used tariff sentencing to promote consistent approaches, not intended to be straight jacket on the sentencing judge
- But prevent Rogue Sentencing- R v Chan Ping Hung, cannot depart for no good reason
- S109A CPO 16-21 years olds should not be imprisoned unless no appropriate sentences available, or they committed 3rd schedule CPO crimes.
- Should always consider mitigating circumstances

Starting point

- Look at the legislation or common law,
- If appropriate HKSAR v Tam Wai Pio: give enhanced penalty if aggravating factors (e.g. organised crime, involved minors or if the crime is prevalent)
 - Theft s9 theft ordinance = 10 years
 - Robbery s10 theft ordinance = life
 - Burglary s11 theft ordinance = 14 years
 - Aggravated burglary s12 theft ordinance = life
 - Murder and manslaughter s2,7 OAPO = life

Discount to sentencing R v Byrne for guilty plea: 1/3

- The guilty plea is taken as the most cogent token of remorse
- The accused has forfeited chance he had of acquittal
- Saved court time and costs
- Accused has accepted his wrong doings
- Judge must give reason for discount
- The discount is not definite, if the defendant is a danger to the public or absconded from the proceedings or the gravity of the offence is so grave that it should not be discounted, the judge will not allow the discount (Wong Kwong Fei)

MITIGATING FACTORS IN pg 134 of txt book.

- Old age, youth offender, supergrass (50% off), pregnancy, mental illness, good character, general humanitarian reasons

AGGRAVATING FACTORS IN pg 135-137 of txt book

- Abuse of public trust, fraud, gravity of matter, multiple offence, persistent re offending
- S27(1) and (11) Organised and Serious Crimes Ordinances permits judge of the DC or CFI if found the crime to be prevalent to award a heavier punishment
 - If it is an organised crime or
 - It is a specified crime
 - The crime is prevalent (crime is widespread at the time, used as a deterrent)

- Yan Wai Ming- court can treat the matter as an aggravating feature and impose a heavier punishment
- S56A Dangerous Drugs Ordinance, if the offence is a conviction of drug involving employment of minors, if prevalent, the court is allowed to impose enhanced punishment.

Tariff sentencing

- Need to look at tariff approach: sentence should be proportional to the gravity of the offences committed
- **ROBBERY CASES WITH DANGEROUS WEAPON – Mo Kwong Sang:**
 - In imposing sentence little account should be given to the previously clear record of anyone who takes part in an armed robbery
 - The appropriate for armed robbery if displayed weapon is 5 years
If invaded private premises then 6 years
 - If used physical violence used then 7 years
 - Aggravating factors-entered the premises at night/ tortured victim: increase sentence
- **DRUG TRAFFICKING CASES - R v Lau Tak Ming and Ors**
 - Up to 10g=2-5 years
 - 10-50g=5-8 years
 - 50-200g=8-12 years
 - 200-400g=12-15 years
 - 400-600g=15-20 years
 - The max is life sentence
 - Judge to take into account profit, number, content, degree of involvement and previous history may be aggravating factors.

Procedure for appeal of SENTENCE to the Court of Appeal s83G CPO

- Appeal from DC and CFI decisions can be made to the Court of Appeal.
- S83I(1) must gain leave from CA to appeal the sentence unless trial judge has given a certificate of fitness for appeal
- The effect of appeal is to have the CA quash the original sentence and substitute a new sentence
- HOWEVER CA may punish unmeritorious appeals (HKSAR v Yau Chun Hung)
- Ground of appeal: pg 178
 - Wrong in Law: beyond court's jurisdiction
 - Wrong in Principle: tariff sentence where an individualised sentence was required or sentence outside normal accepted penalty for the offence
 - Manifestly excessive
 - Wrong factual premise
 - Circumstances have changed significantly since the sentence was imposed

PROCEDURE:

Send to the CA's registrar

- a. Notice of Appeal

- i. Must be sent within 28 days of the date of conviction, verdict, finding unless at least 7 days passed between verdict and sentence.
- b. Notice of application for leave to appeal.
 - i. Where leave is granted the notice application for leave becomes notice of appeal therefore all relevant grounds both for application for leave and for appeal should be in this one notice.
- c. Notice should be prepared by the counsel and must be in writing and signed by the appellant
- d. Grounds of Appeal must indicate the alleged error, refer to the relevant pages on the trial transcript and set out any authorities relied upon
- e. Paper consideration: The papers will go to a single judge who considers whether or not to grant leave for the appeal
- f. Within 14 days of granting leave or refusal, must notify the registrar of intention for appeal
- g. The CA then decides whether to dismiss or allow the appeal and what sentence it will give to substitute.

Voluntary bill- s24A (1)(b) CPO a.k.a. preferred indictment

- Committal without committal proceedings.
- Usually used when the MC has discharged the defendant or in exceptional circumstances, after the MC has found no case to answer.
- The procedure may be used where the SJ wishes to file a new indictment without undergoing further committal proceedings
- It may also be used if accused or co accused are already committed to CFI and further offenders are charged, it is easier for them to be jointly tried.
- S81B (3) MO: procedure may also be used if the defendant has received a leave from CFI to withdraw his plea.
- Sought by the Secretary for Justice
- S74 (3) MO the court must order the committal of the accused to stand trial without further inquiry or examination.
- A voluntary bill must follow PD9.2 Voluntary Bills of Indictment whereby the SJ need to show to the High Court Judge why there is clearly a good reason to depart from normal procedure and whether the bill is required in the interest of justice.

Suspended Sentence s109B-E CPO

- R v Lam Lai Chun A sentence may be suspended if considered appropriate for the court to order a sentence of imprisonment, but special reasons exists to allow the sentence to be suspended
- A term of imprisonment of up to two years (head sentence) may be ordered to be suspended for one to three years (operational period).
- HOWEVER, Expected offences (offences listed in schedule 3 of CPO) cannot be suspended.
- If breached terms of suspended sentence, will be punished by imprisonment for the original suspended term
- The operational period may be varied if he is not imprisoned on his breach.

- The court is required to activate the suspended sentence unless considers it unjust to do so.

PART B QUESTIONS

Court Transfers:

1) Magistrate to District

- S88 (1) MO- transfer is instigated by an application from the Prosecution on behalf of the SJ.
- Magistrate has no discretion to refuse transfer of an indictable offence but may retain a summary offence, which appears on the same charge sheet, to be determined in the MC
- The MC must sign a transfer form
- He may not transfer a matter to DC on his own volition and may not transfer a matter determinable only in the CFI to the DC by reason of Part 3 2nd Schedule MO
- S88 (3) MO- Summary offence to be dealt with by the MC under s65F CPO may be held by the MC and not transferred.

2) Transfer from District Court

- S77A DCO transfer order to be delivered to the Court after the charge sheet has been delivered but before the prosecution's opening speech.
- The entire proceedings will be stayed before the DC
- Application made by way of motion and supported by affidavit of grounds for application.
- App must be served 21 days before motion hearing.
- Judge will make the transfer order if in the interest of justice and to make order as to cost.
- Judge before transfer to CFI will have to ask the accused if he wants a MC preliminary inquiry.
- If no preliminary inquiry; judge has to tell accused his right to legal aid, give alibi warning (s65D CPO) and inform their right to apply for discharge (s16 CPO)
- If accused is not in court, everything has to be sent to him by post 28 days before trial date (s77B (6) DCO).

i) Transfer from DC to MC

- a. Judge should appoint a date for accused to appear at least 21 days after the transfer order is made 77A(8) DCO
- b. Judge to determine if bail is granted on making transfer order
- c. Transfer ends DC proceeding and is not subject for appeal s77A(12)DCO

ii) Transfer from DC to CFI

- a. A sealed copy of an order for transferred to be delivered by the registrar of DC to registrar of CFI within 21 days of order

- b. SJ then has 21 days to institute proceedings, if after, the accused can apply for discharge (s16 (1)(a) CPO).
- c. SJ must deliver 1) a copy of the indictment, copies of witness statements of those to be called at trial, copies of all documentary and a list of prosecution exhibits (s10A(1) CPO)
- d. If not delivered CFI may discharge accused under s10B CPO a.k.a an acquittal
- e. S16 CPO discharge, if no prima facie case to answer to or no proceedings have been instituted within 21 days of transfer order
- f. TEST: could a reasonable jury, properly directed, convict on this evidence?
- g. BUT SJ can appeal to discharge

3) Transfer from CFI

- By SJ back to either DC or MC if jurisdiction allows (s65F(1) CPO)
- Unless it is a s77A DC-CFI transfer
- Entire proceedings will be stayed at the CFI when application is made
- App made by way of motion supported by affidavit setting out grounds for application
- Copy of both served on accused at least 21 days prior to the date named for the hearing (s65F(2)CPO)
- If judge finds it is in the interest of justice he will allow the transfer (s65F (4)CPO) and make order regarding cost
- When order made judge will appoint date at least 21 days away, give alibi warning if DC and grant bail/remand in custody.
- Sealed copy of order will be transferred to the registrar of the DC or clerk of MC

COMMITTALS

- Preliminary Inquiry or Paper Committal (almost always paper committal in HK now)
- TEST: s85(2) CPO whether the evidence is sufficient to put the defendant upon trial for an indictable offence, or if the evidence given raises a strong or probable presumption of the defendant's guilty

Direct Committals in Cases involving Vulnerable Witnesses

- S79F CPO- magistrate may order that the accused is committed to the CFI for trial without preliminary inquiry.
- S79F (1) CPO- Used if offence committed against child that involves sexual abuse, an offence of cruelty or assault, injury or threat of injury.
- Prosecutor must consider the test for committal and that denial of a preliminary inquiry is necessary to protect the welfare of the victim
- PROCEDURE: s79F(3) CPO Prosecutor will need to serve notice of transfer certifying his opinion and an affidavit setting out the reason for his opinion on the MC before the defendant had the chance on return day to elect for preliminary inquiry.
- Prior to which the prosecutor will have served to MC and defendant copies of documents described in s80B(1)MO
- MC has no discretion to refuse and has to inform the D of his rights
- A person committed this way is deemed to have been committed for the purposes of s24A and an indictment may therefore be preferred against him (voluntary bill)
- But the accused may still apply s79G for the case to be dismissed.

Direct Committals in cases involving complex commercial crimes

- S3 Complex Commercial Crimes Ordinance- SJ can apply to MC for transfer of an indictable offence directly without allowing accused a chance for preliminary inquiry.
- Prosecution must show a case of
 - Fraud and dishonesty in a commercial context of such seriousness and complexity that it should be committed to the CFI without delay.
 - That there is sufficient evidence to meet the test for committal
 - S3 (2) CCCO- an indictable offence alleged on the same charge sheet which does not involve complex commercial crime may also be transferred.
- Procedure: An order of transfer will stay the proceeding before the MC and transmitted to the CFI
- MC to inform defendant of the CCCO, his right for legal aid, an alibi warning and right to apply for discharge (s22 CCCO, similar to a s16 discharge)
- Within 7 days of making the order the MC must deliver it to the Registrar of the High Court, and the SJ must deliver a summary of evidence to both registrar and the accused s6 CCCO.

Wasted Costs Order

- S17 and s18 Cost in Criminal Cases Ordinance describes two wasted costs
- Underlying objective to conduct litigation effective
- S17) those unnecessarily or improperly incurred by an act or omission by or on behalf of the other party to the proceedings, the court may order the wrong doer to pay the costs so incurred
 - If costs follow the event then it should be up to prosecution to prove costs not properly incurred, should not be included.
 - TONG CUN LIN- conduct of acquitted party may lead to denial of costs, convicted person can be ordered to pay costs in addition to sentence
 - Failure to serve papers on time
 - Failure to notify other side of intention to adjourn
 - Failure to notify guilty plea
 - Failure to obtain witness summons
- s18) where without reasonable cause leading to an otherwise avoidable adjournment court may order a legal or other representative to pay part or all of any wasted costs.
 - BUT s2 wasted cost is narrowly defined (e.g. if they came to court late or failed to attend)
 - And consider HKSAR v Ho Hon Chung limited powers
 - Courts in HK consider that they have less power than UK
 - S18 read with s2 provides almost worthless sanction as it is rare that counsel is ever late and rare that counsel will fail to attend
 - Plus there are good reasons why making such order will be inappropriate.
 - Department of Justice consultation paper interpreted s2 to be;
 - Any costs incurred by a party as a result of any improper or unreasonable act or omission ,of any undue delay or any other misconduct or default on the part of any representative or which in the light of any such act, the court considers it unreasonable to expect that party to pay.
 - Amendments are now made according to consultation paper to be closer to UK
 - As in any case if legal aid comes in, it will be the public that suffers.
 - An order for wasted costs is more restricted than cost order in s17 as before the order is made, the representative has a right to argue against the order
 - A government lawyer does not pay these costs personally; it is made against the general revenue.
 - Such costs cannot be taxed so the court should specify the sum awarded.
 - S25 CCCO: If transferred to CFI without committal to s4 CCCO, a judge if satisfied that a party has incurred costs due to an unnecessary or improper act or omission, then the innocent party may be awarded costs.

Appealing Costs awards:

S19 Cost in Criminal Case Ordinance: any party can appeal costs award. It is possible to appeal on the matter of the costs only.

- MC appeals to CFI
- DC/CFI appeals to CA

S19 (4) CCCO: On appeal the judge may quash the costs order or replace it with another order

- Both the prosecution and the defendant can appeal a cost order and the cost of the appeal itself is at the discretion of the court appealed to.
- S19 (5) prosecution cannot be awarded the costs of its appeal against an award of costs made to a defendant.

APPEAL AGAINST AN ORDER REFUSING COSTS

- HKSAR v Coghlan, court ruled that magistrate's decision to not award costs was an order of the magistrate and therefore is subject to s113(1) MO
- You can appeal against court's decision to not award cost.
- The section states that the magistrate has power to determine in summary that an appeal be heard.
- This was followed in Tong Cun Lin v HKSAR, where an appeal of judge's refusal of costs was heard in the CFA.
- S31 HKCFA ordinance provides for a right to appeal to a court from any final decision of the CA or from any decision of CFI from which no appeal lies to the CA.

DOCK IDENTIFICATION

General rule:

- Where witnesses are invited to identify the defendant for the first time when the defendant is in the dock should be avoided as it is undesirable.
- Where it is observed that the person does not know the accused and there is no subsequent identification parade, a first time identification in Court is not usually permitted.

Absolute no dock identifications:

- Where original observation is by a stranger to the accused without a prior identity parade
- Or there was an identity parade and the accused was not picked out
- Too dangerous for the accused to be identified
- Or evidence is obviously suspect and of little value.

R v Wong Tak Leung: EXCEPTIONS

- Where there is no need for an identification parade because the parties are well known to each other

- Where the original circumstances of the identification are of good quality and there is unlikely to be an issue as to identification
- Where the dispute about identity is confined to two or three people and there is no point in an identity parade
- Where defendant has refused to take part in an identity parade (arrangements should be made for a non consensual identification)
- R v Wong George: Where the original identification is from an album of photographs
- Where not practical to hold identity parade as defendant is too distinct.

Fresh evidence on appeal

S118 (1)(b) MO if the judge thinks additional evidence to be necessary he may receive such evidence just like the powers granted under s83V(1), (6), (10) CPO.

- Fresh evidence may be admitted on appeal if necessary or expedient in the interest of justice to do so
- Unless the court is satisfied that the evidence would not afford any ground for allowing the appeal, it must admit the fresh evidence where it appears likely to be credible and would have been admissible at trial on an issue now subject to appeal and the Court is satisfied that there is a reasonable explanation as to why the evidence was not adduced at trial.
- PROCEDURE: party seeking to adduce new evidence: file notice of motion and supporting affidavit in accordance to PD 3.2 Criminal Appeals to the CA Direction 7(d).
- S83V(5): A sentence may not be increased on appeal on the basis of any fresh evidence admitted on appeal.