
9:

**PRE-TRIAL MATTERS AND FIRST
APPEARANCE**

1 The Criminal Process

The following diagram shows the general process of a criminal case, to preliminary inquiry (for indictable offences) and trial (for summary offences). This chapter and its diagrams explain this process in more detail.

2 How a Case Comes to the Magistrate's Court

Criminal proceedings may be instituted by either:

- making a complaint to the Magistrate; or
- bringing before the Magistrate a person believed to have committed an offence, who is under arrest without warrant: *s76(1) CPC*.

Any person who believes from a reasonable and probable cause that an offence has been committed by any person may make a complaint or bring the person before the Magistrate: *s76(2) CPC*.

A complaint may be made orally or in writing. If made orally, you should put it in writing. All complaints should be signed by the complainant and yourself: *s76(3) CPC*. If not already done so, you should draw up or ask the Clerk to draw up, a formal charge containing a statement of the offence with which the accused is charged, and sign it: *s76(4) CPC*.

In most cases, the Police will make the complaint, and they will present a signed formal charge, which is deemed to be a complaint: *s76(3) CPC*.

Initial steps

How the accused is dealt with by the Police will determine the steps that are taken by the Court. The accused may be:

- issued with a Police Notice, under *s78 CPC*;
- charged and released on Police bail;
- at large; or
- in Police custody.

Police Notice to attend Court – *s78 CPC*

A Police officer may personally serve a notice upon any person who is reasonably suspected of having committed an offence specified in *s78*, requiring him or her to:

- attend court at a specified time and place (at least 10 days after service); or
- appear by advocate; or
- enter a written plea of guilty;

and, if he or she does not intend to appear in person, to enter a written consent to the trial taking place in his or her absence.

The Police files a Notice of Prosecution in the Magistrate's Court and serves the Notice on the accused not later than 14 days from the date of the alleged offence.

Pre-Trial Matters and First Appearance

The Notice should generally state:

- the place, time and date (not less than 10 days from the date of service) in which the accused is required to appear and answer the charge;
- the full name of the informant and the capacity in which they are acting (e.g. Police Constable);
- the accused's name, address, occupation and age;
- the date and nature of the alleged offence;
- a summary of facts, sufficient to inform the accused fully and fairly of the allegations made against him or her.

The printed Notice also contains a notice of the accused's right to enter a plea of guilty in writing. The Court Clerk will insert a date in the Notice (at least 10 days away) by which time the accused must exercise his or her rights.

If the accused does nothing, denies the charge or wishes to appear before the Court, the Clerk will prepare a summons to the accused. The case then proceeds as any other case.

If the accused pleads guilty in writing, **and** consents to the matter being dealt with in his or her absence, it may be dealt with in the absence of the accused.

The offences to which this process applies are:

- any offence under the *Traffic Act* which is punishable only by a fine or by imprisonment not exceeding four months, or both;
- any offence under the *Bicycles Act*;
- any offence under the *Trespass and Branding Act*.

Accused charged and released on bail and/or recognisance

Where:

- an accused is in custody without a warrant; and
- the alleged offence is not murder or treason; and
- the offence is not of a serious nature; and
- the person is prepared to give bail;

the accused may be released on his or her entering a recognisance, with or without sureties, for a reasonable amount to appear before a Magistrate's Court at a time and place named in the recognisance: ss23, 106 and 107 CPC.

A signed copy of the notice will be forwarded to the Court before the date on which the offence is to be heard.

When the Clerk receives the charge, he or she will forward it to the Magistrate for his or her direction.

Note that all charges for plea to be taken on Monday morning should be received no later than noon on the preceding Friday.

Accused at large

Where a charge is laid without the accused being arrested, the Police will include a prepared summons with the charge.

When the Clerk receives the charge, he or she will forward it to the Magistrate for his or her direction. The Magistrate will draw up or cause to be drawn up and shall sign a formal charge containing the statement of the offence with which the accused is charged.

Accused is in Police custody

Any person who is arrested or detained, without an order or warrant, and not released, must be brought before the Court without undue delay: *s5 Constitution; s20 CPC*.

The Police should have prepared a charge sheet: *s76(5) CPC*. Often this will be accompanied by an application for remand in custody. Wherever possible, these should be presented in advance to the Clerk, and the Clerk will open a file and register the case in the Court record before putting it before the Magistrate. The Magistrate should hear the matter at the earliest opportunity.

Occasionally, the charge will be put directly to the Magistrate.

3 Process up to First Appearance

The diagram on the following page shows the process up to the first appearance of the accused in Court.

3.1 Personal Interest

At this stage, ask yourself whether there is any reason for you not to hear the matter. You should excuse yourself if you have or appear to have:

- bias or prejudice in the matter;
- a personal or business relationship with the accused or victim/complainant; or
- a personal or financial interest in the matter.

See Chapter 3 “Judicial Conduct”, paragraph 1.5.

Where you are unable, from personal interest or any other sufficient reason, to adjudicate, the Chief Justice will direct another Magistrate to hear the case: *s9 MCA*. In practice, it may be possible for you to arrange for another Magistrate in the same district to hear the case.

You must satisfy yourself that it is a good cause or reason. The mere fact that an objection has been raised does not mean that a Magistrate should recuse himself or herself automatically. You must find out what the objection is about and, if you are satisfied that it has good basis and that it would not be in the interests of justice to continue to preside over the matter, then you may excuse yourself.

3.2 Validity of the Charge

General requirements

A formal charge is an accusation of the commission of an offence.

A charge should be filed:

- at the Court within the district in which the offence is alleged to have been committed (wholly or partly); or
- at the Court within the district in which the accused was apprehended; or
- at the Court within the district in which the accused is in custody or has appeared in answer to a summons: *ss58 - 62 CPC*.

Every charge must contain:

- a statement of the specific offence or offences with which the accused is charged;
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: *s117 CPC*.

Pre-Trial Matters and First Appearance

Section 120 CPC sets out how a charge is to be framed. However, unless the Court considers that there has been a miscarriage of justice, you may not quash, hold invalid or set aside any information or complaint only because of any defect, omission, irregularity or want of form or its contents.

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms wherever possible. It should include:

- a statement of offence. It is not necessary that all the essential elements of the offence be included;
- a reference to the section of the enactment creating the offence;
- particulars of the offence, unless specifically not required by enactment.

Where there is more than one count, they should be numbered consecutively, and may be put in the alternative: *s118 CPC*. Check that the charge does not improperly charge more than one offence for the same action (duplicity), unless put in the alternative. For example, separate counts for common assault and assault causing actual bodily harm arising from the same set of facts would have to be put in the alternative. If not, the charge will be defective for duplicity and will have to be amended at the first appearance.

The charge need not go into any exceptions or exemptions to the offence.

Generally, people and property should be reasonably identified, although names need not be given where they are not known.

There is a time limit for laying a charge for certain summary offences in the Magistrates Court. Offences carry a maximum penalty of 6 months imprisonment, or a fine of \$100, or both, cannot be tried by a Magistrate unless the charge is laid within:

- 6 months from the date the alleged offence was committed; or
- a longer time if specially allowed by law: *s206 CPC*.

Validity

Check that the charge sheet:

- is sworn;
- is within time;
- sets out the offence, section and particulars of the offence sufficiently.

Refer to *ss58 – 62, 117, 120 and 206 CPC*.

Ensure that the charge sheet is accurately completed before you sign it.

If the charge is defective:

- return it to the prosecution without directing a case file be opened; or
- raise it with the prosecution at the first appearance, for amendment or withdrawal.

If the only issue is that it is out of time according to *s206 CPC*:

- direct that it be included in one case file opened for all such charges (if there are more than one); and
- at first appearance, declare that it is out of time and not triable, according to *s206*; and
- discharge the accused.

3.3 Joined Charges

More than one offence may be charged together in the same charge as long as:

- they are founded on the same facts; or
- they form or are a part of a series of offences of the same or similar character: *s118(1) CPC*.

They must each be set out in a separate paragraph in the charge, called a count: *s118(2) CPC*.

At any time, before or during trial, you may direct that a count or counts be tried separately. This is particularly desirable if you are of the opinion that the accused will be embarrassed in his or her defence by the counts being tried together: *s118(3) CPC*.

3.4 Joined Accused

The following persons may be joined in one charge and may be tried together:

- Persons accused of the same offence committed in the course of the same transaction;
- Persons accused of an offence and persons accused of or attempting to commit such offence;
- Persons accused of different offences committed in the course of the same transaction;
- Persons accused of different offences provided that all offences are founded on the same facts, or form or are part of a series of the offences of the same or similar character: *s119 CPC*.

3.5 Summons for Attendance

Accused

A summons for attendance may be required to compel the attendance of the accused: *s77 CPC*.

A summons will **not** be necessary where:

- the accused has been served a Police Notice under *s78 CPC*; or
- the accused has been released on Police bail or recognisance.

The Police will generally have prepared a summons in advance and attached it to the charge.

Every summons must:

- be in writing, in duplicate;
- be signed by the Magistrate or Officer of the Court;
- be directed to the person summoned and require him or her to appear at a stated time and place; and
- state shortly the offence charged: *s70 CPC*.

Sections 80 – 85 CPC detail how service may be effected.

Witnesses

If it is clear from the charge that material evidence can be given by or is in the possession of any person, you may issue a summons requiring their attendance or requiring them to bring and produce documents as specified: *s127 CPC*; *s60 MCA*.

The Police will generally prepare any necessary summonses in advance and attach these to the charge.

3.6 Transferring the Case

If it appears that the cause of the complaint arose outside the limits of the jurisdiction of your Court, you may direct the case to be transferred to the Court having jurisdiction: *s65 CPC*.

If you think the accused should remain in custody or be placed in custody, direct that the Police take to the Court having jurisdiction:

- the accused; and
- the complaint and recognisances taken, if any.

Issue a warrant for that purpose.

If the accused is not to be held in custody, explain to him or her that you have directed the case be transferred to another Court and have him or her bailed to appear at the other Court.

4 First Appearance

4.1 General

An accused, on first appearance, will be present:

- after arrest and in Police custody;
- after arrest and on Police bail or notice; or
- on summons.

At the first hearing, you will be concerned with some or all of the following:

- The integrity of the charge (if not already considered);
- Non appearance, therefore summons and warrants;
- Legal representation;
- Plea, including fitness to plead;
- Election;
- Remands in custody;
- Bail;
- Adjournments.

Ask unrepresented accused persons if they have seen a lawyer or not, or whether they wish to see a lawyer. If so, then advise them to see the Public Solicitor. This will save time.

4.2 Non-Appearance by the Accused

The diagram on the following page shows the process to follow if the accused does not appear.

If the accused does not appear, either in response to a summons, Police bail or Police Notice, check that the accused has in fact been served. Note that an affidavit of service is proof enough, until the contrary is proved: *s85 CPC*.

If service has been effected, you may:

- dispense with the attendance of the accused in certain cases; or
- issue a warrant to arrest the accused.

Dispensing with attendance of accused

Where a summons has been issued, you may dispense with the personal attendance of the accused if:

- the offence in the charge is not a felony; and
- you see reason to do so or the maximum punishment of the offence is a fine or imprisonment of 3 months or both; and
- the accused has consented to the trial taking place in his or her absence and pleaded guilty in writing or appeared by advocate: *s86 CPC*.

Note that you may direct attendance at any later time.

If the accused appears by advocate, then continue as if the accused is present.

If the accused has pleaded guilty in writing, convict and sentence.

Warrants for arrest

Where the accused does not appear, and his or her personal attendance has not been dispensed with under *s86 CPC*, you may issue a warrant to apprehend him or her and cause him or her to be brought before the Court: *s88 CPC*.

Some relevant considerations are:

- What effort has the Prosecution made to serve the accused?
- Is the failure to serve the accused a result of false information by the accused?
- Does the offence with which the accused is charged carry a term of imprisonment?
- How long after the alleged offence was the summons issued?

Every warrant:

- will in most cases be directed generally to all Police officers and occasionally to other specified persons;
- must be under the hand of the Magistrate;

- must state shortly the offence with which the accused is charged;
- must name or otherwise describe the accused;
- must order the person to whom it is directed to apprehend the accused and bring him or her before the Court to answer the charge and be further dealt with by the law. *See ss89 and 91 CPC.*

You may endorse the warrant to the effect that if the accused executes a bond with sufficient sureties for his or her attendance, the officer to whom the warrant is directed shall take such security and shall release the accused from custody. The endorsement will state:

- the number of sureties;
- the amount in which they and the accused are to be respectively bound; and
- the time at which he or she is to attend before the Court: *s90 CPC.*

This would be useful where the accused is in a remote place, pending the next tour.

4.3 Indictable Offences

The words in the body of the charge and the maximum penalty which the offence carry will indicate if the offence is an offence punishable summarily or an indictable offence. The section creating the offence warrants checking.

Election

You will be faced with three types of offences:

- Summary offences where the accused may be tried summarily in the Magistrate's Court;
- Indictable offences where the Prosecutor may elect to have the charge heard in the Magistrate's Court;
- Indictable offences that can only be heard in the High Court.

The decision whether an indictable offence can be heard in the High Court or the Magistrate's Court is usually made by the prosecution. However, where a Magistrate forms the opinion that the matter should go to the High Court, a preliminary inquiry is held. Sometimes the Magistrate can commit the matter to the High Court for sentence under *s208 CPC*.

Preliminary inquiries are required only for the purpose of determining if a matter should go to the High Court.

Consider bail/remand in custody, set a date for the preliminary inquiry (if possible at this stage) and adjourn.

Note that the accused must come back before the Court:

- within 15 days if remanded in custody;
- within 30 days if bailed.

4.4 Summary Offences

The diagram on the following page shows the process for summary offences at the first appearance of the accused.

4.5 Reconciliation

See s35 MCA.

In criminal cases, a Magistrate's Court may promote reconciliation and encourage and facilitate the settlement of proceedings in an amicable way for:

- common assault; or
- offences of a personal or private nature not amounting to a felony and not aggravated in degree.

Settlement may be by payment of compensation or other terms approved by the Court.

The complainant/victim must agree – you cannot impose this on parties. You may only encourage and facilitate reconciliation.

It is a good idea to adjourn the proceedings to give the accused time to carry out the terms of the settlement. When you are satisfied that the terms have been satisfied, you may order that the proceedings be terminated.

4.6 Unrepresented Accused

See the general section on Legal Representation in Chapter 8 “Management of Proceedings”.

If at all possible, all accused persons charged with offences carrying imprisonment as a penalty, should see the Public Solicitor. This may require an adjournment to the next plea day.

If an accused insists on representing him or herself, be careful that you comply with s10 of the *Constitution*. This section outlines the rights of accused persons charged with criminal offences.

It is your duty to see that the hearing is fair.

4.7 Arraignment

Identification of the accused

When an accused person is brought before you, you must first ascertain who he or she is. Record his or her:

- full name;
- address; and
- age.

This is very important. More than one person may share the same name. The accused person might be a juvenile and you would need to treat a juvenile accused differently to adults. See Chapter 16 “Juvenile Offenders”.

The charge

You must know the elements of the offence charged. The elements are those particulars the prosecutor must prove beyond reasonable doubt to secure a conviction.

Your understanding of the elements of the offence is very important. Unless you know and understand the elements:

- you will not be able to clearly explain them to the accused;
- you will not be able to decide which evidence is relevant and which is not, affecting admissibility of evidence.

Explain the charge to the accused

You must clearly explain the nature of the offence to the accused person. This involves explaining the elements.

Unless the accused clearly understands the nature of the offence with which he or she is charged, he or she will not be able to work out if he or she has a defence. This will affect his or her ability to enter a plea.

Check understanding

Check whether the accused understands the charge. Only when you are sure the accused understands the full nature of the offence charged, ask the accused how he or she pleads to the charge. Never take for granted that the accused person might have understood your explanation without his or her confirmation.

4.8 Plea

After you are sure that the accused understands the charge, take a plea. See *s195 CPC*.

An accused can plead:

- guilty; or
- not guilty; or
- one of the “special” pleas, e.g. *autrefois acquit* (previous acquittal).

Where the accused is represented, a plea by Counsel is acceptable.

Ask the accused whether the charge is true or not. If the accused says it is true:

- ask the prosecution to read a brief summary of the facts;
- tell the accused to listen very carefully to this. Explain that he or she will be asked at the end whether the facts are true;
- after the prosecution has read the facts, ask the accused whether they are true or not.

If the accused admits the truth of the facts, this will suffice as a plea of guilty. You then:

- record his or her admission as nearly as possible in the words used by him or her;
- convict him or her; and
- pass sentence or make an order against him or her (either immediately or at a later date).

If the accused admits the truth of the charge, but makes some remarks or comments, you must listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this if the accused is unrepresented.

If the accused disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence. Note that a plea of guilty is a plea to the **elements** of the charge not necessarily acceptance of the Police summary of facts. If the facts in dispute are not relevant to the elements, enter a plea of guilty.

If the disputed facts are relevant to any of the elements, or where any remarks or comments made by the accused may amount to a defence, you must enter a plea of not guilty for the accused.

For example, on a charge of malicious damage, one of the elements is actual damage to property. If the accused pleads guilty but disputes the amount of damage (e.g. the prosecution alleges 10 glasses were damaged and the accused says only 3 were damaged). then the element of damage is not disputed, just the amount. That is relevant to sentence, not guilt, and you should enter a plea of guilty.

On a charge of drunk and disorderly, one of the elements is the behaviour must be in a public place. If the accused admits to being drunk and disorderly, but it was in his friend's backyard, that is relevant and you should enter a plea of not guilty for the accused. It is then up to the prosecution to prove he was in a public place.

If the accused denies the charge, i.e. pleads not guilty, or if you enter a plea of not guilty for him or her, then:

- proceed with the trial if all parties are ready and the matter can be dealt with quickly; or
- ascertain the number of witness the parties intended to call at the trial so as to know the probable duration of the trial and set a date for the trial;
- deal with bail/remand in custody, and summonses for witnesses if necessary; and
- adjourn the matter.

Where the accused refuses to plead, a plea of not guilty should be entered: *s195(4) CPC*.

A plea should be clearly recorded on the charge sheet. Note whether he or she was represented by Counsel or not.

Fitness to plead

You will need to be conscious in particular cases of whether the accused is fit to plead.

The issue to be determined is whether the accused is under a disability.

An accused is under a disability if he or she cannot:

- plead;
- understand the nature of the proceedings; or
- instruct Counsel.

Remand the accused in the custody of the Police and direct them to arrange a medical assessment and report.

See *s144 CPC*.

4.9 Guilty Plea – Next Steps

Entering conviction

The accused admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her: *s195(2) CPC*.

Convict the accused, enter this on the record and sentence (either immediately or adjourn for reports). You should never sentence a person without convicting him or her first.

If you are adjourning, consider bail/remand.

See Chapter 13 “Sentencing”.

4.10 Not Guilty Plea – Next Steps

Immediate hearing

Sometimes all parties are ready to proceed with a defended hearing (including witnesses). In this case, proceed to hear the matter or adjourn the case to later in the day.

Remands / bail after plea

If a plea of not guilty is entered:

- remand the accused to a hearing date (ascertained from the Prosecutor, the accused's Counsel and your Court diary) and obtain an estimate of hearing time; or
- release the defendant on bail on such condition or conditions that he or she attends trial at the date and time scheduled; and
- record all of the above on the Court record.

Bail

See Chapter 10 "Bail".

If bail is granted, the terms, if any, should be noted carefully on the Court record.

Reasons must be given for refusing bail.

Warrants of commitment

Ensure all warrants of commitment (remands in custody) are completed before you leave the Court for the day.

Any instructions to the Prison should be recorded on the warrant. For example, the accused is to be kept apart from adult prisoners, a need for medication or risk of self-harm.

Warrants/summons for witnesses to attend

On your own motion or on the application of a party, you may issue a summons for any person to appear as a witness, or to appear and produce any material evidence: *s127 CPC; s60 MCA*.

If you are satisfied by evidence on oath that a person will not attend unless compelled to, you may issue a warrant to ensure their attendance: *s129 CPC; s60(2) MCA*.

4.11 Adjournments

Before or during the hearing of any case, you have the discretion to adjourn the hearing to a certain time and place. You must state the time and place in the presence of the parties or their advocates.

In the meantime, the accused may:

- go at large;
- committed to prison; or
- released upon entering into a recognisance, with or without sureties.

No adjournment shall be for more than:

- 30 days, if the accused is at large; or
- 15 days, if the accused is remanded in custody.

See *s191 CPC*.

You must exercise your power to adjourn judicially, by weighing several competing considerations, which include:

- the interests of the accused to a fair trial;
- the interests of the public in ensuring efficient prosecutions;
- the reasons for the adjournment;
- any fault.

Palmer J stated in *Tatau v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 289 of 1992), that “discretionary power must be exercised in such a way as to ensure that the accused has a fair trial according to law”.

Cases offering guidance include:

- *Carryer v Kelly* (1969-1970) 90 WN (Part 1) NSW 566;
- *R v Maher* [1987] 1 QdR 171;
- *Appleton v Tomasetti* (1983) 5 ALR 428;
- *R v Swansea Justices & Davies, Ex parte DPP* (1990) 154 JPR 709: “The power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the Court shall have the best opportunity of giving the fairest available hearing to the parties”.

4.12 Accused is a Corporation

If the accused is a corporation, it may appear by its representative as long as they are appointed to represent it. Ask the person appearing if they are so authorised.

If written authority is produced, place original or photocopy of it on the Court file. In any event, obtain the name and status of the person and endorse it on the charge sheet:

“Accused represented by _____. Is Director/ Managing Director/Secretary etc.
States has been duly appointed by accused to represent it”

or

“See written authority on file”.