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Hong Kong Criminal Procedure Notes

2022
1st Edition



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1. INTRODUCTION

A. HOW TO USE CONVERSION NOTES

The Hong Kong Criminal Procedure Notes are formatted into a step-by-step guide, which you can use as a checklist in your exams to ensure that every element of the exam question is answered. You may find the Table of Contents to be a quick and useful overview of the law to be applied. You should also answer the exam question using the ILAC method, which will ensure your answer is comprehensive.

Issue State the legal issue relevant to the problem

Law Identify the relevant case law and legislation

Analysis Analyse and apply the law to the legal issue. This is the most important part, so ensure your legal analysis is very thorough.

Conclusion Form a conclusion based on your analysis and application of the law, giving some practical advice to the hypothetical client.



It is very important to spend time perfecting your analysis section, as this is the part that examiners are most interested in. Do not worry if you reach the correct conclusion (there often isn't one clear answer) – examiners will give more weight to your legal analysis, and sometimes may even reward answers that propose an innovative and unconventional answer!

B. ABBREVIATIONS AND LEGISLATION

The Hong Kong Criminal Procedure Notes will refer frequently to the following using abbreviations.

| | |
|----------------------|---|
| CCCO | Complex Commercial Crimes Ordinance (Cap 394) |
| CICCO | Costs In Criminal Cases Ordinance (Cap 492) |
| CPO | Criminal Procedure Ordinance (Cap 221) |
| CSO | Community Service Orders Ordinance (Cap 378) |
| DCO | District Court Ordinance (Cap 336) |
| FPO | Fixed Penalty (Criminal Proceedings) Ordinance (Cap 240) |
| HCO | High Court Ordinance (Cap 4) |
| HKCFAO | Hong Kong Court of Final Appeal Ordinance (Cap 484) |
| ICACO | Independent Commission Against Corruption Ordinance (Cap 204) |
| IR | Indictment Rules (Cap 221C) |
| JO | Jury Ordinance (Cap 3) |
| JOO | Juvenile Offenders Ordinance (Cap 226) |
| MO | Magistrates Ordinance (Cap 227) |
| PFO | Police Force Ordinance (Cap 232) |
| RSO | Reformatory Schools Ordinance (Cap 225) |
| Rules and Directions | Rules and directions for the questioning of suspects |

The Hong Kong Criminal Procedure Notes will also refer frequently the MO Schedule 2 (available at <http://www.hkii.hk/eng/hk/legis/ord/227/sch2.html>) and the CPO (available at <http://www.hkii.hk/eng/hk/legis/ord/221/>).

2. AN INTRODUCTION TO CRIMINAL PROCEDURE IN HONG KONG

A. AN OVERVIEW OF THE CRIMINAL COURTS

- All criminal matters commence in the Magistrates' Court where the defendant makes its first appearance.
- Generally, time does not run against the prosecution for most indictable offences. However, for most summary offences, the prosecution shall prosecute within 6 months from the time when the matter of such complaint or information respectively arose (Section 26 of the MO).
- Depending on the type of offence and the likely sentence, the prosecution may:
 - leave the matter for determination in the Magistrates' Court;
 - ask the magistrate for a transfer to the District Court; or
 - ask the magistrate to commit the accused for trial in the Court of First Instance (judge and jury) with or without a preliminary inquiry.

i. MAGISTRATES' COURT

- Generally, maximum sentencing power of 2 years and a \$100,000 fine for a single offence (Sections 92 and 92A of the MO), and three years' imprisonment for more than one offence where the sentences are to run consecutively (s 57 MO).
- A permanent magistrate may summarily determine:
 - All summary offences;
 - Indictable offences which do not appear in the Second Schedule to the MO; and
 - Indictable offences listed in Part 2 of the Second Schedule to the MO.



ii. JUVENILE COURT

- A juvenile court can hear any charge against a child (under 14) or young person (14 or 15) other than homicide (section 3A(3) of the JOO). It has exclusive jurisdiction over summary offences and concurrent jurisdiction with the District Court and the Court of First Instance over indictable offences committed by juveniles (section 3C of the JOO).
- However if a juvenile is charged jointly with a person of 16 or above, the charge will be heard in the Magistrates' Court instead (Section 3C(2)(a) of the JOO).
- Sentencing powers are limited by those specified in Sections 10-12 of the JOO.

iii. DISTRICT COURT

- A District Court judge may impose a maximum term of imprisonment of 7 years (Section 82(2)(a)DCO).
- A District Court judge may determine:
 - Any indictable matter not listed in Part III of the Second Schedule to the MO;
 - Any summary offence transferred on the same charge sheet as an indictable offence under section 88 of the MO;
 - Any matter transferred to the District Court by the Court of First Instance (section 65F of the CPO).

iv. COURT OF FIRST INSTANCE

- Unlimited sentencing powers subject only to the maximum specified in the ordinance for the offence.
- The Court of First Instance has jurisdiction over all indictable offences
- Trial with judge and jury of 7 or 9 jurors (Section 3 of the JO).
- The Court of First Instance hears appeals (by notice pursuant to section 113 of the MO and by way of cases stated pursuant to sections 105-112 of the MO) from the decisions of a magistrate.

v. COURT OF APPEAL

- The Court of Appeal hears appeals from the District Court and the Court of First Instance (Section 13(3) of the HCO).

vi. COURT OF FINAL APPEAL

- The Court of Final Appeal hears appeals from the High Court.
- Leave is necessary and is only granted if the decision involves a point of great and general importance or if there has been substantial and grave injustice.

B. CLASSIFICATION OF OFFENCES

- An offence is indictable if the provision providing for the offence clearly states that the crime is "indictable", "triable on indictment" or the person committing the offence shall be "liable on conviction on indictment". (Section 14A of the CPO and *HKSAR v Lung Po Chak* [2008] 1 HKLRD 644).
- All other offences are summary.

i. SUMMARY OFFENCES

- A summary matter is generally tried in the Magistrates' court which has summary jurisdiction.
- However, a summary matter may be transferred to the District Court if it appears on the same charge sheet as an indictable offence which the prosecution considers too serious for summary determination in the summary jurisdiction (Section 88 of the MO).
- Note however that a summary charge involving sexual abuse or cruelty to children may be transferred to the Court of First Instance (Section 79F of the CPO).

ii. INDICTABLE OFFENCES

- With the prosecution's consent, most indictable offences can be tried summarily (Sections 91-94A, MO) but there are some indictable offences which can only be tried in the District Court or the Court of First Instance.
- The Second Schedule to the MO sets out limitations on the courts in hearing specified indictable offences.
 - The indictable offences listed in Part 1 cannot be determined in the Magistrates' Court jurisdiction (s 91, 92 MO)
 - The indictable offences listed in Part 2 can be determined by a permanent magistrate and not a special magistrate (Sections 91 and 92 of the MO)



- The indictable offences listed in Part 3 can only be determined by the Court of First Instance (Section 88 of the MO)
- All indictable matters not mentioned in the Second Schedule can be tried in the Magistrates' Court, the District Court or the Court of First Instance depending on which court the prosecution decides is most suitable for the case. The prosecution decides this based on the court's power to hand down the likely sentence taking into account any guideline tariff cases for the offence.

iii. EXCEPTED OFFENCES

- When determining the relevant venue and the likely sentence, it is also important to take into account the list of excepted offences in Schedule 3 of the CPO.
- If the accused is a person of or over 16 and under 21 and has been charged with an offence listed in Schedule 3 of the CPO, the Magistrates' Court of District Court (whichever appropriate) shall:
 - Not sentence the accused to imprisonment unless the court is of the opinion that no other method of dealing with such person is appropriate; and
 - for the purpose of determining whether any other method of dealing with any such person is appropriate the court shall obtain and consider information about the circumstances, and shall take into account any information before the court which is relevant to the character of such person and his physical and mental condition (s 109A(1) CPO).

3. POLICE POWERS

A. STOP, DETAIN AND SEARCH

- Section 54(1) of the PFO provides that if a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, who acts in a suspicious manner (i.e. subject opinion of the police officer will suffice), it shall be lawful for the police officer-
 - to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;
 - to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time; and
 - if the police officer considers it necessary to do so (i) to search the person for anything that may present a danger to the police officer; and (ii) to detain the person during such period as is reasonably required for the purpose of such a search.
- S 54(2) of the PFO provides that if a police officer finds any person in any street or other public place, or on board any vessel, or in any conveyance, at any hour of the day or night, whom he reasonably suspects (i.e. objective test) of having committed or of being about to commit or of intending to commit any offence, it shall be lawful for the police officer-
 - to stop the person for the purpose of demanding that he produce proof of his identity for inspection by the police officer;
 - to detain the person for a reasonable period while the police officer enquires whether or not the person is suspected of having committed any offence at any time;
 - to search the person for anything that is likely to be of value (whether by itself or together with anything else) to the investigation of any offence that the person has committed, or is reasonably suspected of having committed or of being about to commit or of intending to commit; and
 - to detain the person during such period as is reasonably required for the purpose of such a search.
- Other stop and search powers are contained in section 55 of the PFO, section 33(6) of the Public Order Ordinance (Cap 245) and section 10C of the Independent Commission Against Corruption Ordinance (Cap 204).
- Note also the power to demand proof of identity under section 17C of the Immigration Ordinance (Cap 115), section 63 of the Road Traffic Ordinance (Cap 374) and section 49 of the Public Order Ordinance (Cap 245).



We hope you have enjoyed this short preview of the Hong Kong Criminal Procedure Notes.
Don't forget to check out the Law Study Tips we have on our website at www.PCLLConversion.com!