CRIMINAL LAW IN HONG KONG

Michael Jackson

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The Criminal Law of Hong Kong

INTRODUCTION

The general structure and much of the content of Hong Kong's present body of criminal law was imported into Hong Kong from England in 1843 in the Special Administrative Region's (SAR) early days as an English colony.[1] It has been added to and modified in the course of time, but still closely resembles English criminal law which continues to influence its development. Broadly speaking, the criminal law entails two distinct parts — the general principles of criminal liability, which are used to determine whether a person is liable for any particular offence, and the offences themselves.

The offences include such well-known crimes as murder, rape, theft, and arson, but also many other forms of behaviour. Classified according to the interests they seek to protect, there are, for example, offences against the person (ranging from the most serious crimes of violence such as murder, to relatively minor offences such as common assault), offences against property (covering a range including theft and obtaining by deception, forgery, counterfeiting, and criminal damage), offences against public morals and public order (such as obscenity, public nuisance, and piracy and hijacking), offences relating to the administration of justice (such as perjury, perversion

[1] Specifically, in 1843 when English law was received generally into Hong Kong; see Application of English Laws Ordinance (No. 2 of 1966).

of the course of justice, and contempt of court), and offences against the security of the state (mainly treason and official secrets). Like most modern legal systems, Hong Kong's criminal law also includes a large number of regulatory offences dealing with almost every field of human activity and endeavour, from road traffic to liquor licensing to pollution control.

SOURCES OF HONG KONG'S CRIMINAL LAW

Since 1 July 1997, the root source of all law in Hong Kong, including the criminal law, is the Basic Law of the Hong Kong SAR enacted by the National People's Congress (i.e. legislature) of the People's Republic of China (PRC) (see generally Yash Ghai, *Hong Kong's New Constitutional Order*, Chapter 8, Hong Kong: Hong Kong University Press, second edition, 2001). Article 18 states that the laws of Hong Kong include 'the laws previously in force as provided for in Article 8'. Article 8 provides:

> The laws previously [i.e. as at 30 June 1997] in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this [Basic] Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.

In accordance with Articles 18 and 8, Hong Kong's criminal law continues to have two principal sources, the 'common law' and legislation (i.e. ordinances and subordinate legislation). It differs in this respect from those legal jurisdictions, such as that of the PRC itself, which have attempted to enact a comprehensive criminal code (i.e. a single piece of legislation), and are usually described as having a 'civil law' legal system.

Common Law[2]

'Common law' here refers to law made by judges, i.e. the body of legal principles laid down by judges in cases decided by them, as recorded in reports of their decisions. In this context, 'common law' refers to decisions

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[2] For an introduction to the development of the common law, see Roebuck Derek, *The Background of the Common Law*. Hong Kong: Oxford University Press, second edition, 1991.

of judges in both the 'common law' courts and also the courts of 'equity' (compare Article 8 of the Basic Law, which refers to 'the common law' and 'rules of equity' separately as part of the law remaining in force in Hong Kong after 1 July 1997).

Prior to 1 July 1997, this body of law comprised the 'common law of England'[3] as formally received in Hong Kong in 1844 (subject to subsequent modification in England), as applied to Hong Kong or modified by decisions of the courts of Hong Kong or by legislation (see section 3 of the Application of English Law Ordinance; this ordinance lapsed on 1 July 1997, having been declared to be in contravention of the Basic Law of the HKSAR). As mentioned above, Article 8 of the Basic Law maintained this body of law as the 'common law' of the SAR (except to the extent that it might contravene the Basic Law, and subject always to any subsequent amendment by the SAR's legislature; for the effect of this provision, particularly the meaning of 'maintained', see *HKSAR* v *David Ma Wai-kwan* [1997] 2 HKC 315).

Until the nineteenth century, English criminal law (which provides the basis of Hong Kong's criminal law) was largely a product of the common law, meaning judge-made law, and this remains true of a large part of the general principles of criminal liability discussed in the following chapters.

Some offences also remain a matter of common law. In other words, some activities in Hong Kong are offences because judges at some time in the past decided that the activities were crimes (and neither later judges nor the legislature have adopted a contrary view). Examples of this in Hong Kong's criminal law include murder, manslaughter and common assault. In these cases, it is possible to determine what exactly is prohibited only by reading previous judicial decisions. This power to recognize or declare new offences may still exist as part of Hong Kong's common law, but it is not often exercised, in recognition of the convention that the task of creating new offences should nowadays be left to the legislature and other bodies to whom legislative power has been delegated.[4] Even so, on occasion, this power has been exceptionally exercised in relatively recent times, especially in relation to various forms of 'immoral' conduct. This is illustrated by *Shaw* v *DPP* ([1962] AC 220), in which the House of Lords was invited to rule that the publication of a booklet containing the names and contact numbers of female prostitutes and, in some instances, photographs and

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3 See section 3 of the Interpretation and General Clauses Ordinance prior to its amendment on 1 July 1997; section 3 now refers to 'the common law in force in Hong Kong'.

4 There are occasional exceptions; see, for example, *Shaw* v *DPP* [1962] AC 220, *Knuller* v *DPP* [1973] AC 435.

particulars of sexual perversions they were willing to undertake, breached public morals and should be declared a criminal conspiracy. The Lords accepted this invitation, with Lord Simonds stating (at 267):

> In the sphere of criminal law I entertain no doubt that there remains in the courts a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for.

This may be contrasted with *Knuller (Publishing) Ltd.* v *DPP* ([1973] AC 435), another decision of the House of Lords, this time involving an alleged conspiracy to breach public morals (in this case, an agreement to publish advertisements facilitating the commission of homosexual acts between adult males in private, conduct that had previously been expressly decriminalized). In this case, Lord Simon attempted to deny the existence of any such residual power to extend the criminal law of conspiracy merely to enforce morality. All that the courts can do, he stated (at 490), 'is to recognise the applicability of established offences to new circumstances to which they are relevant.'

One of the central objections to the exercise of this power is that it purports retrospectively (i.e. after the fact) to criminalize conduct not otherwise thought to be criminal at the time of its commission. Apart from this general objection, the purported exercise of such a power in the SAR may also be amenable to challenge under Article 12(1) of Hong Kong's Bill of Rights, which *inter alia* states: '(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under Hong Kong or international law, at the time when it was committed. …'

Some matters of excuse and justification recognized by Hong Kong's criminal law — i.e. criminal defences — continue to be common law in origin (although they may have been expressly or impliedly modified by statute). Examples include the defences of duress, insanity and self-defence (although the principles of self-defence have been treated as impliedly modified by statutory amendments to the related defence of crime prevention). Courts continue to expand and develop defences in response to new circumstances; on occasion, they have even recognized new defences (see, for example, 'duress of circumstances'; below, Chapter 7) at common law. There is less reason for objection to judicial 'lawmaking' of this type, since it usually operates in favour of defendants. Exceptionally, the courts have also abolished existing defences or immunities. An example of this is

R v *R* ([1992] 1 AC 599), in which the House of Lords held that a husband could be convicted of raping his wife, contrary to existing authority holding that a husband was immune from prosecution for raping his wife (see Chapter 12, pp. 605–6). In *C* v *DPP* ([1996] AC 1), on the other hand, the House of Lords refused to abolish the traditional common law presumption that a child aged 10 to 14 (presently 7 to 14 in Hong Kong; see Chapter 6, p. 214) is incapable of committing an offence.[5] In giving judgment, Lord Lowry set out (at 28) five guiding principles that should be followed by courts when invited to undertake 'judicial lawmaking':

> (1) if the solution is doubtful, the judges should beware of imposing their own remedy; (2) caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated while leaving the difficulty untouched; (3) disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems; (4) fundamental legal doctrines should not be lightly set aside; (5) judges should not make a change unless they can achieve finality and certainty.

One of the central features of all 'common law' legal systems (such as Hong Kong's, but also including other countries that originally derived their legal systems from English law, including Australia, Canada, New Zealand and the USA) is the doctrine of judicial precedent.[6] A 'precedent' is a prior judicial decision that contains a 'binding' statement of legal principle. Insofar as that statement of principle is taken to express the legal basis of the decision, it is called the 'ratio' of the decision, and a later judge in a court at the same or lower level in the judicial hierarchy must follow it in a similar case. This feature of common law legal systems — that precedents are 'binding' on later courts — enables the body of judicial decisions to be described as 'law'.

Statutory Sources

The second source of Hong Kong's criminal law is statutory sources, including ordinances, regulations and other forms of subordinate legislation.

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5 This presumption was subsequently abolished in England by statute; see section 34 of the Crime and Disorder Act 1998.

6 See further, Peter Wesley-Smith, *An Introduction to the Hong Kong Legal System* (third edition, 1998), Chapter 9.

Most offences under Hong Kong's criminal law are statutory in origin; that is, the source of the prohibition on the activity is a statutory provision, whether it be in an ordinance,[7] in regulations or in some other form of subordinate legislation. An illustration is provided by section 60(1) of the Crimes Ordinance (cap. 200), which expressly enacts an offence of criminal damage to property (punishable by up to ten years' imprisonment; section 63(2)). It states:

> Any person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether any such property would be destroyed or damaged *shall be guilty of an offence* [emphasis added].

Interpreting statutory provisions such as this often involves the common law. For example, section 60(1) above does not define 'damage', 'destruction', 'property', 'intending' or 'reckless'. The meaning of these terms must instead be sought in the common law.

Some of the general principles of criminal liability as well as some of the defences recognized under Hong Kong's criminal law are also statutory in origin (e.g. diminished responsibility; section 3 of the Homicide Ordinance (cap. 339)), or have been wholly or partially statutorily codified (e.g. the defences of crime prevention (see section 101A of the Criminal Procedure Ordinance) and provocation (see section 4 of the Homicide Ordinance)).

Interpreting criminal law statutes and regulations

Where an offence, defence or general principle is statutory in origin (whether wholly or partially), this does not necessarily exclude the need for the consideration and application of common law principles. Statutory provisions by their nature must be expressed in general terms, and this means that they will have to be interpreted and applied by judges in particular cases in order to decide the case. Sometimes, the statute itself may provide relevant definitions; in other instances, a general definition may be available elsewhere (e.g. in the Interpretation and General Clauses Ordinance (cap. 1)). However, often neither applies.

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[7] Major criminal ordinances include Crimes Ordinance (cap. 200, Laws of Hong Kong), Offences Against the Person Ordinance (cap. 212, Laws of Hong Kong), Theft Ordinance (cap. 210, Laws of Hong Kong), Summary Offences Ordinance (cap. 228, Laws of Hong Kong), Prevention of Bribery Ordinance (cap. 201, Laws of Hong Kong), and the Gambling Ordinance (cap. 148, Laws of Hong Kong).

When interpretation becomes necessary, the general approach that judges should adopt in Hong Kong is set out in section 19 of the Interpretation and General Clauses Ordinance (cap. 1):

> An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit.

The meaning and effect of this provision in relation to criminal legislation has never been clearly decided (see generally Peter Wesley-Smith, *The Sources of Hong Kong Law,* p. 239, Hong Kong: Hong Kong University Press, second edition, 1994). One view is that it requires judges to adopt what is commonly called a 'purposive' approach for both non-criminal and criminal legislation (see *A-G* v *John Lok* [1986] HKLR 325; see also *A-G's Reference (No. 1 of 1988)* [1989] AC 971, in which the House of Lords adopted a 'purposive' approach with regard to criminal statutes). Another view offered by Wesley-Smith is that it requires criminal or penal statutes to be interpreted 'as though [they] were remedial, thus abrogating any common law notion that penal legislation should receive a strict construction'. Wesley-Smith has suggested (at 247) that 'the most sensible view is that … section 19 "does no more than remind a court that it should construe a statute so as to give effect to the intention of the legislature".'

In addition to section 19, there are a number of other matters that a judge should, or at least may, take into account in interpreting criminal statutory provisions, particularly those actually creating offences. These include:

Ordinary meaning

Where possible, the court should give the words used in a statutory provision their 'ordinary meaning' (see, for example, *R* v *Feely* [1973] QB 530; *Brutus* v *Cozens* [1973] AC 854). Unless a word has a special legal meaning and is a legal term of art, it is permissible to look up a word's meaning in a dictionary.

Use of legislative background

If there is ambiguity, then the court may have regard to the legislative background of the statutory provision in question, including pre-legislative materials such as the reports of law reform committees and commissions

that reviewed the existing law. Materials such as these may be used to ascertain the general purpose of the statute or a relevant part of it, but there are limits on the use of such materials in determining the intended meaning of a particular provision (see *Pepper* v *Hart* [1993] AC 593).

Presumption of strict construction

If, after considering the ordinary meaning of the word or words used in a statutory provision, and the legislative background, a judge remains unclear about the statutory provision's interpretation, then he or she should adopt the interpretation 'favouring' the defendant. This is the so-called presumption or rule of 'strict construction' referred to by Wesley-Smith in the passage mentioned above. Courts no longer adopt a strained interpretation of the words used in a statutory provision (contrary to the plain meaning of the words) solely because it will benefit a criminal defendant, but it seems still to be the case that where there is a reasonable interpretation which will avoid the imposition of a penalty, preference should be given to this interpretation. The weight of this presumption should increase where the potential penalties are heavy.

In contrast, courts have occasionally veered towards the contrary position, adopting a somewhat strained view of the words of a statutory provision in order to secure the conviction of the 'obviously guilty'. One example of this is in relation to theft, where the courts have adopted an interpretation of 'appropriation' — the central conduct element of theft — that is morally 'neutral' in character, leaving the question of criminal liability to depend essentially on a determination of whether or not an alleged thief acted 'dishonestly', which in turn depends largely on whether or not ordinary honest people would so characterize his or her conduct (see Chapter 13). Ashworth has noted this 'conviction-minded' approach to interpretation, and has commented as follows (A. Ashworth, 'Interpreting Criminal Statutes: A Crisis of Legality?' (1991) 107 LQR 419, at 443–4):

> If one of the aims of the criminal law is to convict those who culpably cause harm, this constitutes a policy goal which should form part of the doctrine of criminal law and which may properly enter into decisions on interpretation. The claim here is not that criminal laws should be extended retrospectively to citizens' conduct, but rather that people who knowingly 'sail close to the wind' should not be surprised if the law is interpreted so as to include their conduct.

Presumption of mens rea

One particular rule relevant to criminal statutes is that whenever a section creating an offence is silent as to the need to prove criminal intent (mens rea), then such a need for mens rea should be presumed. This is discussed further below (see Chapter 4).

Bill of Rights

Judges should also keep the provisions of Hong Kong's Bill of Rights in mind (see Hong Kong Bill of Rights Ordinance (cap. 383) (BORO)). As already mentioned, a number of the articles in the Bill of Rights directly or indirectly relate to the criminal law. These include:

- Article 2, which deals with the right to life and imposes restrictions on the imposition of capital punishment;
- Article 3, which prohibits torture and cruel, inhuman or degrading treatment or punishment;
- Article 5, which provides that no one shall be subjected to arbitrary arrest or detention (5(1)), that a person who has been arrested shall be informed, at the time of arrest, of the reasons for his or her arrest and shall be promptly informed of any charges against him or her (5(2)), and that a person arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release (5(3));
- Article 6, which deals with the rights of persons deprived of their liberty, i.e. imprisoned; and
- Article 12, previously mentioned, which prohibits retrospective criminal offences or penalties.

Article 11 deals in some detail with the rights of persons charged with or convicted of a criminal offence and is worth setting out in full:

> (1) Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
> (2) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality –
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) to have adequate time and facilities for the preparation of his

defence and to communicate with counsel of his own choosing;
(c) to be tried without undue delay;
(d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court;
(g) not to be compelled to testify against himself or to confess guilt.

(3) In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

(4) Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

(5) When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

(6) No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of Hong Kong.

Article 11(1) has had a significant impact on the recent development of the criminal law in Hong Kong, in particular in relation to burdens of proof, and is discussed more fully below (p. 42).

THE FOUNDATIONS OF HONG KONG'S CRIMINAL JUSTICE SYSTEM

Criminal law is only one part of Hong Kong's criminal justice system (see

Chapter 1).[8] It is therefore important to keep several fundamental notions in mind, for these provide the historical foundations of much of Hong Kong's criminal justice system and as such underpin the body of criminal law doctrine that has evolved as the basis of Hong Kong's criminal justice system.

The Presumption of Innocence and the Burden of Proof

At the heart of Hong Kong's criminal justice system is the presumption of innocence. This presumption dictates that in every criminal case, it is for the prosecution to prove an accused's guilt, not for the accused to prove his or her innocence. If guilt is not proved to the requisite standard, then the accused is entitled to be acquitted — that is, he or she *must* be acquitted.

Nature of the presumption of innocence

This presumption is a product of the common law. The best-known statement of the common law position is that of Lord Sankey LC, in *Woolmington* v *DPP* ([1935] AC 462) where he stated (at 481–2):

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner [on a charge of murder] killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle [i.e. cut] it down can be entertained.

This presumption is part of the common law of Hong Kong, as recognized by the Privy Council in *Kwan Ping-bong* ([1979] HKLR 1), on appeal from Hong Kong. Lord Diplock observed (at 5):

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[8] See further, Mark Gaylord and Harold Traver, eds., *Introduction to the Hong Kong Criminal Justice System*, Hong Kong: Hong Kong University Press, 1994.

> There is no principle of the criminal law of Hong Kong more fundamental than that the prosecution must prove the existence of all essential elements of the offence with which the accused is charged — and the proof must be 'beyond all reasonable doubt', which calls for a degree of certainty considerably higher than proof on a mere balance of probabilities.

The presumption of innocence now has an additional statutory foundation in Hong Kong in Article 11(1) of Hong Kong's Bill of Rights (cap. 383), which reads: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.'

However, this presumption is not absolute in nature, either at common law or as manifested in Article 11(1). Firstly, at common law, as Lord Sankey LC acknowledged, there may be exceptions to the presumption, whereby the burden of proving matters relevant to guilt or innocence may be placed on the accused. One such exception noted by Lord Sankey relates to the common law defence of insanity. Since the common law presumes all persons to be sane, the legal burden of proving that a particular defendant is not sane (or was not sane at the material time), i.e. was insane, is placed at common law on the defendant, proof being on the balance of probabilities (see Chapter 6, p. 225). A second common law exception, not mentioned by Lord Sankey, relates to what are called 'negative averments' and is discussed more fully below. A third general exception, the second category mentioned by Lord Sankey, concerns statutory exceptions. Hong Kong, like England, has long had a practice of enacting statutory provisions that expressly or impliedly place the legal burden of proving a matter on the accused. This category of exception is discussed more fully below.

Secondly, in relation to Article 11(1), the phrase 'according to law' allows for exceptions, whereby the burden of proving matters relevant to guilt or innocence may potentially be placed on a defendant.

The burden and standard of proof in a criminal trial

In accordance with the presumption of innocence, the general rule is that the prosecution bears the burden of proving the accused's criminal liability or guilt 'beyond reasonable doubt'. This means that the prosecution must prove all the elements of the offence(s) charged, including disproving credible defences, beyond reasonable doubt. This is called the 'legal burden', or sometimes the 'persuasive burden' since it requires the prosecution to persuade the jury or judge (or magistrate) that the alleged facts giving rise

to the prosecution occurred. If the prosecution fails to persuade the trier of fact, then the matter is treated as not proven, and the accused is entitled to be acquitted. This burden remains on the prosecution throughout the whole trial; this means that even if the accused presents a defence that is rejected by the jury or judge, the accused may still only be convicted provided the judge or jury is satisfied that all the elements of the offence have been proved by the prosecution.

The 'standard of proof' is concerned with how much evidence must be adduced by the prosecution (or defendant where the burden of proof is placed upon the defendant) to convict the accused. In relation to the prosecution, the standard of proof in a criminal trial is proof 'beyond reasonable doubt'. This is commonly expressed as requiring the jury or judge to be 'sure' that each particular fact or event or state of mind (to be proved for a particular offence) existed or occurred.

Where the burden of proof is placed upon the defendant, then, in the absence of any express statutory provision to the contrary, the standard is the lower 'civil' standard of proof 'on the balance of probabilities'. This is commonly said to require the jury or judge to be satisfied that the particular fact or event or state of mind in issue is 'more likely than not' to have existed or occurred.

Exceptions: reversing the burden of proof

As already mentioned, there are exceptions to the presumption of innocence, whereby the legal burden is placed on the defendant. Where this is so, the standard of proof is generally the civil standard: that is, proof on the balance of probabilities (i.e. the fact is 'more likely than not' to have existed).

Common law

Two common law exceptions exist. The first is insanity: the legal burden of proving that a particular defendant is not sane (or was not sane at the material time), i.e. was insane, lies at common law on the defendant, proof being on the balance of probabilities (see Chapter 6, p. 225).

The second common law exception relates to what are called 'negative averments'[9] (although it should be emphasized that this category of

[9] See generally, John Rear, 'The Pearl and the Golden Thread: The Proof of Negative Averments I and II' (1972) 2 HKLJ 169, 298.

exception relates to statutory offences, and has also been given general statutory recognition in section 94A of the Criminal Procedure Ordinance (cap. 221) (compare section 101 of the Magistrates' Courts Act 1980). The notion of a negative averment may be illustrated by section 13(1) of the Firearms and Ammunition Ordinance (cap. 238) which reads:

> (1) No person shall have in his possession any arms or ammunition unless –
>
> (a) he holds a licence for possession of such arms or ammunition or a dealer's licence … .

When a charge is laid under section 13, the prosecution essentially makes two assertions (or 'averments'). The first — 'you possessed arms or ammunition' — involves a positive assertion (or 'averment'). The second — 'you didn't have an appropriate licence' — involves a 'negative averment' (or assertion). In essence, section 13 prohibits the possession of arms or ammunition; paragraph (a) specifies the means of avoiding liability, but does not as such set out an essential element of the offence. When a person is charged under section 13, the prosecution (which must prove guilt beyond reasonable doubt) must undoubtedly prove the positive assertion, 'you possessed arms or ammunition', for it contains the elements of the offence, but what about the 'negative averment'? At common law, it was held that since it is generally much easier for a defendant to prove that he or she *has* a licence ('here is my licence') than it is for the prosecution to prove that he or she does not, the burden of proof in relation to the negative averment should be placed on the defendant, on the balance of probabilities. A defendant must, in other words, prove that he or she falls within the stated exception (the negative averment) (and this is called proving the 'affirmative of a negative averment' — i.e. 'I have authority — I fit within the exception', etc.).

This common law exception applies whenever a statutory offence contains language amounting to a negative averment, with a wide range of expressions having been interpreted in this way. It has been codified as a general rule in section 94A of the Criminal Procedure Ordinance (the same rule is also repeated in various forms in many ordinances for the purposes of particular statutory offences). Subsections (2) and (4) state:

> (2) For the avoidance of doubt it is hereby declared that in criminal proceedings –
>
> (a) it is not necessary for the prosecution to negative by evidence any matter to which this subsection applies; and

> (b) the burden of proving the same lies on the person seeking to avail himself thereof.
>
> …
>
> (4) The matters to which subsection (2) applies are any licence, permit, certificate, authorization, permission, lawful or reasonable authority, purpose, cause or excuse, exception, exemption, qualification or other similar matter.

However, neither the common law rule nor section 94A applies to general common law defences, such as self-defence, duress and necessity.

The validity and scope of this common law rule and its statutory equivalents in England were considered and upheld by the English Court of Appeal in *Edwards* ([1975] QB 27), and again by the House of Lords in *R* v *Hunt* ([1987] AC 352). In *Hunt*, the Lords rejected an argument that Lord Sankey's reference to 'statutory exceptions' in *Woolmington* was limited to provisions expressly placing the burden on a defendant, accepting that a statutory provision could impliedly have this effect. In addition, the Lords accepted that the common law rule codified in England in section 101 of the Magistrates' Court Act 1980 applied equally in trials on indictment.

In Hong Kong, section 94A and other statutory provisions to like effect have been challenged on a number of occasions for inconsistency with Article 11(1) of BORO. In general, these challenges have been unsuccessful, with section 94A and similar provisions being upheld as a legitimate exception to the presumption of innocence. In the leading Privy Council decision on Article 11(1), *Lee Kwong-kut* ([1993] 2 HKCLR 186), discussed further below, Lord Woolf, discussing exceptions to the presumption of innocence, observed that '[s]ome exceptions will be justifiable, others will not'. As an example, he referred to 'an offence involving the performance of some act without a licence' and commented:

> Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence.

The Privy Council justified its conclusion that such provisions are not in breach of Article 11(1), despite the fact that they place the burden of proof on the defendant, by holding that negative averments are not an 'essential element' of an offence (being instead in the nature of a 'defence' available to the accused). Because of this, there can be little complaint, it is said, if

the burden of proving 'innocence' is placed on the defendant in relation to the negative averment.

Statutory exceptions

Statutory provisions may expressly or impliedly place the burden of proof on the defendant in at least two ways. Firstly, a statutory provision may expressly state that the burden of proving a particular matter lies on the defendant. An example of this can be found in section 3 of the Homicide Ordinance (cap. 339), relating to diminished responsibility, one of the special defences to murder (see Chapter 10, pp. 501–2). Section 3(2) states:

> On a charge of murder, it shall be *for the defence to prove* that the person charged is by virtue of this section not liable to be convicted of murder. [emphasis added]

The standard of proof is on the balance of probabilities.

The second way in which statutory provisions may reverse the burden of proof is through rebuttable presumptions of fact, usually mandatory in nature. Section 13 of the Firearms and Ammunition Ordinance, mentioned above in discussing negative averments, provides a basis for illustrating this type of statutory exception. The section makes it an offence to 'possess' arms or ammunition. Putting aside any question of a licence, the prosecution will prima facie need to prove the following matters beyond reasonable doubt to obtain a conviction under section 13: the existence of 'arms or ammunition', the fact that D 'possessed' them, and D's knowledge that he or she was in possession of arms or ammunition; each of these elements of liability must be proved beyond reasonable doubt. However, section 24 of the ordinance creates several mandatory rebuttable presumptions that the prosecution may rely on to help it 'prove' these matters. Section 24 reads:

> (1) Any person who is *proved* to have had in his physical possession –
> (a) anything containing arms or ammunition, or both;
> (b) the keys of any baggage, briefcase, box, case, cupboard, drawer, safe-deposit box, safe or other similar containers containing arms or ammunition, or both, shall, *until the contrary is proved, be presumed* to have had the arms or ammunition, or both, as the case may be, in his possession.
> (2) Any person who is *proved or presumed* to have had arms or ammunition, or both, in his possession *shall, until the contrary is proved, be presumed* to have known the nature of such arms or ammunition, or both, as the case may be.

> (3) The presumptions provided for in this section shall not be rebutted by proof that the defendant never had physical possession of the arms or ammunition, or both, as the case may be. [emphasis added]

This section does two things. Firstly, it enables the prosecution to obtain a conviction merely by proving beyond reasonable doubt either of the matters specified in subsection (1)(a) or (b). Suppose, for example, the prosecution proves that D *physically* possessed a bag containing a gun (i.e. in fact it was in D's possession). From this single proved fact, everything else necessary to establish the elements of the offence may be 'presumed': firstly, it may be presumed that D 'possessed' the gun (section 24(1)) and then, based on that presumption of possession, it may be further 'presumed' that D knew he or she possessed a gun (section 24(2)).

Secondly, section 24 places the burden of *dis*proving these presumed facts upon the defendant — 'until the contrary is proved'. Thus, to avoid liability, D will need to prove, on the balance of probabilities, that D either did not know he or she had possession of the gun, or did not know it was a gun. Unless D proves either of these exculpatory facts, he or she will be convicted.

The question whether this type of statutory provision may be challenged pursuant to Article 11(1) of the Bill of Rights is discussed below (pp. 42–7).

The evidential burden

Criminal lawyers also speak of the 'evidential burden'. This refers to the need to produce *evidence* to properly raise an issue at trial. This burden can rest on either party, although it usually relates to matters of 'defence' raised by the accused. Suppose, for example, an accused pleads not guilty to a charge of battery on the grounds that he or she was suffering from a seizure at the time and that his or her actions were involuntary. The accused must ensure that some evidence supporting this assertion — in this case, medical evidence of a medical condition that may have caused a seizure — is adduced at trial. If sufficient evidence is adduced, this will put the voluntariness of the defendant's conduct in issue. Once properly raised, then the prosecution, pursuant to its legal burden of proving all the elements of the offence, will have to disprove involuntariness (i.e. prove that the defendant's conduct *was* voluntary). Otherwise, it will have failed to prove an element of the offence — voluntary conduct — beyond reasonable doubt. If such evidence is not adduced, then the prosecution will not need to

disprove involuntariness, and the issue will not have to be considered by the jury or judge. Deciding whether there is evidence supporting an issue, so as to require its consideration by the trier of fact, is a question for the judge. This process is sometimes misleadingly described as 'shifting the burden of proof'; misleadingly because the burden placed on a defendant is not the legal burden of proof resting on the prosecution.

The reason for imposing an evidential burden was stated by Lord Morris in *Bratty* v *A-G for Northern Ireland* ([1963] AC 386, at 416–7):

> As human behaviour may manifest itself in infinite varieties of circumstances it is perilous to generalise, but it is not every facile mouthing of some easy phrase of excuse that can amount to an explanation. It is for a judge to decide whether there is evidence fit to be left to the jury which could be the basis of some suggested verdict.

The evidential burden thus ensures that the prosecution does not have to *disprove* all imaginable defences, only those properly raised and supported by evidence.

The impact of Article 11(1) of BORO

Article 11(1) differs from the common law presumption of innocence in an important respect. As a matter of common law, the presumption of innocence always had to give way to statutory provisions expressly or impliedly reversing the burden of proof, in accordance with the doctrine of legislative superiority. Article 11(1), on the other hand, is itself legislative in nature. In addition, sections 3(1)(2) and 4 of BORO, as originally enacted, expressly empowered the courts of Hong Kong to consider respectively pre-existing and subsequently enacted legislation (including therefore statutory provisions creating offences and reversing the burden of proof) for consistency with the provisions of BORO in the case of pre-existing legislation, and with the International Convention on Civil and Political Rights (on which BORO was modelled) in relation to subsequently enacted legislation. If a statutory provision was found to be inconsistent, the courts were expressly empowered to declare that the statutory provision in question was repealed. From the enactment of BORO until 1 July 1997, many challenges were brought in criminal cases based on Article 11(1); two of the leading cases, *Sin Yau-ming* and *Lee Kwong-kut*, are discussed below.

However, on 1 July 1997, pursuant to a Decision of the Standing Committee of the National People's Congress dated 23 February 1997,

sections 3 and 4 of BORO were repealed for inconsistency with the Basic Law (along with a number of other statutes or statutory provisions). However, it is not clear that this necessarily makes any significant difference as regards the effect of the Bill of Rights, including Article 11(1), for the following reasons. Firstly, as regards pre-existing legislation, at common law, there is a rule of statutory interpretation to the effect that in the event of inconsistency between two pieces of legislation, the later in time prevails. Accordingly, the remaining provisions of the Bill of Rights (including Article 11(1)) theoretically override any inconsistent pre-existing statutory provisions (i.e. existing on 8 June 1991, when BORO came into effect). Secondly, as regards subsequent legislation, a second rule of statutory construction would require legislation passed after BORO to be construed consistently with the International Convention on Civil and Political Rights. Nonetheless, the number and extent of challenges based on Article 11(1) since 1 July 1997 has substantially reduced.

Sin Yau-ming *and* Lee Kwong-kut

The two leading cases on the application and interpretation of Article 11(1), BORO, are *R* v *Sin Yau-ming* ([1992] 1 HKCLR 127), the first decision of the Court of Appeal on Article 11(1), and *A-G* v *Lee Kwong-kut* ([1993] 2 HKCLR 186), the first Privy Council decision on the same issue.

In *Sin Yau-ming*, Sin was charged under the Dangerous Drugs Ordinance (cap. 134) with two counts of possession of dangerous drugs for the purpose of unlawful trafficking. In relation to each count, the prosecution sought to rely on several mandatory presumptions of fact then contained in the Dangerous Drugs Ordinance. These provided firstly that a defendant proved to have had the keys to or been in possession of premises in which dangerous drugs were found was to be presumed, 'until the contrary was proved', to have had such drugs in his or her possession (section 47(1)(c)(d)); secondly, that upon possession being proved or presumed, the defendant was to be presumed, 'until the contrary is proved', to have known the nature of the drug (section 47(3)); and thirdly, upon possession of a certain quantity of a particular dangerous drug being proved or presumed, the defendant was to be further presumed, 'until the contrary was proved', to have had such dangerous drugs in his or her possession for the purpose of trafficking (section 46(c)(d)). The Court of Appeal was asked to consider whether these particular statutory provisions were consistent with Article 11(1), and if not, to what extent they had been repealed by virtue of section 3(2) (as it then existed). The Court of Appeal held that the particular provisions

were inconsistent, could not be justified, and therefore were repealed pursuant to section 3(2).

In reaching this conclusion, the Court of Appeal considered how judges in Hong Kong should set about interpreting and applying the Bill of Rights. Acknowledging that BORO was 'sui generis' and therefore not to be simply interpreted using the normal canons of construction, the Court, drawing on Canadian jurisprudence on Canada's Charter of Rights, *inter alia* concluded that mandatory presumptions of facts essential to a particular offence are prima facie inconsistent with Article 11(1), but may be justified by the prosecuting authorities upon proof (1) that there is a rational and realistic connection between the fact(s) proved and the fact(s) presumed, and (2) that the presumption is proportionate. Neither of these criteria was satisfied in respect of the provisions challenged in this case. One important feature of *Sin Yau-ming* is the Court's adoption of the two-step approach employed by Canadian courts in determining whether equivalent provisions in Canada's Charter had been breached: firstly, ask whether the particular provision is prima facie in breach of the presumption of innocence; if so, then secondly ask whether it may nonetheless be justified so as to bring it within the words 'according to law' in Article 11(1). Significantly, negative averments and such like would not necessarily be inconsistent on this approach, since the Court favoured the view that a provision may be prima facie in breach of the presumption of innocence in Article 11(1) only if it has the effect of placing the burden of proving (or disproving) 'essential elements' of an offence on the defendant.

In *Lee Kwong-kut*, a year later, the Hong Kong Court of Appeal expressed a willingness to adopt an even more rigorous approach to the question of whether a statutory provision was prima facie inconsistent with Article 11(1). *Lee Kwong-kut* involved two cases consolidated on appeal. The first, dealing with Lee, involved a charge laid under section 30 of the Summary Offences Ordinance, which read (now repealed):

> Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of $1,000 or to imprisonment for 3 months.

Before the magistrate Lee had argued that section 30 was inconsistent with the presumption of innocence; this had been accepted and the charge dismissed. The Attorney-General of Hong Kong appealed unsuccessfully to

the Court of Appeal. In reaching their conclusion, the Court of Appeal paid heed to several further decisions of the Canadian courts which had rejected an approach focused simply on the 'essential elements' of an offence in determining whether a statutory provision was prima facie in breach of the presumption of innocence, holding instead that 'it is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.' The Court of Appeal went a long way towards accepting this more rigorous approach.

The second case in *Lee Kwong-kut*, involving a defendant named Lo, related to charges of assisting another person to retain the benefit of drug trafficking, contrary to section 25(1) of the Drug Trafficking (Recovery of Proceeds) Ordinance (cap. 405). Section 25(4) provided a defendant with a defence, if the defendant proved certain matters, such as that he or she did not know or suspect that the arrangement in question giving rise to the charge related to any person's proceeds of drug trafficking. Lo challenged the validity of both section 25(4) and also section 25(1), the offence section, which made it an offence to enter into or be concerned in an arrangement facilitating the retention or control of a person's proceeds of drug trafficking, 'knowing or having reasonable grounds to believe' that the person for whom the arrangement is made carries on or has carried on drug trafficking. The trial judge, following the guidelines in *Sin Yau-ming*, held first that these provisions were prima facie in breach of Article 11(1) and then that the prosecuting authority had failed to demonstrate they were permissible according to the criteria laid down in *Sin Yau-ming*.

The Attorney-General of Hong Kong appealed *Lee* to the Privy Council, *Lo* being added with the special leave of the Privy Council. Dismissing the Attorney-General's appeal in *Lee*, but allowing it in respect of *Lo*, the Privy Council effectively rejected the more rigorous approach adopted by the Court of Appeal, taking the view, in the words of Lord Woolf (at 200), that 'it is not necessary, at least in the vast majority of cases, to follow the somewhat complex process now established in Canada'. Instead, suggested Lord Woolf, it should be more simply a matter of 'examining the substance of the statutory provision', perhaps applying a test along the lines suggested by the English Court of Appeal in *Edwards*. Lord Woolf observed (at 197):

> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily

> the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which Article 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of an offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the statutory provision will be important. However what will be decisive will be the substance and reality of the language creating the offence rather than its form.

He added (at 200):

> The court can ask itself whether, under the provision in question, the prosecution is required to prove the important elements of the offence; while the defendant is reasonably given the burden of establishing a proviso or an exemption or the like of the type indicated [in *Edwards*]. If this is the situation, Article 11(1) is not contravened.

Lord Woolf added that even in cases of 'real difficulty', there is still no need to apply the Canadian tests 'rigidly or cumulatively', and, further, that they should in any event only 'be treated as providing useful general guidance'.

The Privy Council concluded that section 30 could not be justified and therefore was correctly held to have been repealed, whereas section 25(4) fell squarely within the type of exception that was permitted under *Edwards*. Lord Woolf stated (at 201):

> It is not important whether section 25(4) is regarded as creating a defence or an exception if it does not constitute part of the substance of the offence. The substance of the offence is contained in section 25(1) as to which the onus is on the prosecution.

Concluding the judgment, Lord Woolf added the following comments (at 202), significantly undermining, in the view of many commentators, the newfound freedom to examine legislation thought to have been given to the Hong Kong judiciary by the Bill of Rights:

> While the Hong Kong judiciary should be zealous in upholding an individual's rights under the Hong Kong Bill, it is also necessary to ensure that disputes as to the effect of the Bill are not allowed to get out of hand. The issues involving the Hong Kong Bill should be approached with realism and good sense, and kept in proportion. If

> this is not done the Bill will become a source of injustice rather than justice and it will be debased in the eyes of the public. In order to maintain the balance between the individual and the society as a whole, rigid and inflexible standards should not be imposed on the legislature's attempts to resolve the difficult and intransigent problems with which society is faced when seeking to deal with serious crime. It must be remembered that questions of policy remain primarily the responsibility of the legislature.

CLASSIFYING OFFENCES

Under the common law, all crimes, whether common law or statutory in origin, were divided for various procedural and substantive purposes into three broad categories, 'treason', 'felony' and 'misdemeanour'. Felonies were purportedly more serious offences than misdemeanours, though in practice this distinction did not always hold true.

Today, for general discussion purposes, all crimes in Hong Kong can be simply known as 'offences'. 'Offence' is non-exhaustively defined for general purposes in section 3 of the Interpretation and General Clauses Ordinance (cap. 1) as including 'any crime, and any contravention or other breach of, or failure to comply with, any provision of any Ordinance, for which a penalty is provided'.

All three of these categories of offence were historically triable on indictment (i.e. before a judge and jury). Subsequently, when the English Parliament began enacting a body of relatively minor statutory offences, it also provided that they should be dealt with by way of a more informal, 'summary' procedure (i.e. by a judge or magistrate alone, without a jury), and this gave rise to a fourth category known as 'summary offences'.

'Treason' still exists under Hong Kong's criminal law as a separate category of offence,[10] along with 'summary offences', but the distinction between 'felony' and 'misdemeanour' was abolished in 1991 (see section 2(1) of the Administration of Justice (Felonies and Misdemeanours) Ordinance (cap. 328)).

On occasion it is still necessary to classify or distinguish.

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[10] See Part I, Crimes Ordinance (cap. 200); section 4(3) provides that 'the procedure on trials for treason or misprision of treason [i.e. failure to disclose knowledge of treasonous acts to the proper authority within a reasonable time] shall be the same as the procedure on trials for murder'. See also section 89(1)(a) of the Interpretation and General Clauses Ordinance (cap. 1).

Trial Procedure[11]

The most important distinction relates to trial procedure. An offence may be triable 'on indictment' (or 'indictably') (i.e. before a judge and jury, based on charges specified in a document known as an 'indictment'), or 'summarily' (i.e. before a magistrate sitting without a jury, based on charges specified in a document known as a summons), or both on indictment and summarily.

If an offence is triable on indictment, then the offence is an 'indictable offence', and it may be tried either in the Court of First Instance before a judge and jury, or in the District Court (before a District Court judge sitting *without* a jury). If an offence is triable summarily, then it is a 'summary offence' and must be tried in the magistrates' courts before a magistrate.

Common law offences remain triable on indictment.

Statutory offences will usually be expressly designated as triable on indictment or triable summarily by the statutory provision enacting the offence, but if not, then the matter is regulated by section 14A(1) of the Criminal Procedure Ordinance (cap. 221) which provides that the offence shall be triable only summarily, unless:

- the offence is declared to be treason;
- the words 'upon indictment' or 'on indictment' appear; or
- the offence is transferred to the District Court in accordance with Part IV of the Magistrates Ordinance (section 14A(1) of the Criminal Procedure Ordinance).

In some instances, the statutory provision enacting the offence may specify that an offender may be liable either on indictment or summarily, with different penalties depending on which mode of trial is adopted. It appears that provisions such as these (e.g. section 36 of the Road Traffic Ordinance (cap. 374)) should be interpreted as creating two (or 'dual') offences, one triable summarily by a magistrate and the other triable on indictment.

Although an offence may be declared triable on indictment, this does not generally mean that it *must* be tried on indictment since most such offences may also be tried summarily. This is the effect of section 92 of the Magistrates Ordinance (cap. 227) which provides that a permanent magistrate may (i.e. has jurisdiction to) summarily deal with and try any indictable offence, except those specified in Part I, Second Schedule,

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[11] See generally, G. Heilbronn, *Criminal Procedure in Hong Kong*, (third edition, 1998, Longman).

Magistrates Ordinance.[12] Section 91 of the Magistrates Ordinance likewise confers jurisdiction on a special magistrate to summarily deal with and try a broad range of indictable offences, excluding those set out in Parts I, II and III of the Second Schedule (for example, perjury and bribery (in Part II) and certain immigration offences (in Part III) may be tried by a permanent magistrate but not a special magistrate).

Where a magistrate summarily tries and convicts an offender of an offence triable on indictment, the magistrate's sentencing powers are limited, in the case of a permanent magistrate, to the imposition of two years' imprisonment and a fine of HK$100,000 (even though the offence may provide for greater maximum penalties), and, in relation to a special magistrate, six months' imprisonment and a HK$50,000 fine, unless, in either case, there is express provision in another ordinance permitting or requiring a magistrate to impose a greater or lesser punishment (see sections 91 and 92 of the Magistrates Ordinance).

Where an offence may be tried either summarily or on indictment, the decision whether to proceed before a magistrate, or to have it heard in the District Court or Court of First Instance (i.e. whether to proceed summarily or on indictment), is a matter for the prosecution (section 94A of the Magistrates Ordinance), unlike many other jurisdictions where the accused usually has this choice.

'Arrestable Offence'

In several circumstances, it is necessary to distinguish between 'arrestable' and 'non-arrestable' offences. Pursuant to section 3 of the Interpretation and General Clauses Ordinance (cap. 1), an offence is 'arrestable' if it carries

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[12] Excepted are:
- any offence which is punishable with death;
- any offence (except an offence against section 10 or 12 of the Theft Ordinance (cap. 210), or an offence against Part VIII of the Crimes Ordinance (cap. 200)) which is punishable with imprisonment for life;
- any offence against section 21 or 22 of the Crimes Ordinance;
- misprision of treason;
- any offence against Part I or Part II of the Crimes Ordinance;
- blasphemy and offences against religion;
- composing, printing or publishing blasphemous, seditious or defamatory libels, except as provided by section 16 of the Defamation Ordinance (cap. 21);
- genocide and any conspiracy or incitement to commit genocide; and
- torture.

a maximum term of imprisonment exceeding 12 months. This distinction applies to the following:

Arrest without warrant

The general power of arrest without warrant provided for in section 101(2) of the Criminal Procedure Ordinance (cap. 221) may be exercised only in relation to 'arrestable offences'.

Assisting offenders and concealing offences

Sections 90(1) and 91(1) of the Criminal Procedure Ordinance, respectively enact offences of assisting an offender after the commission of an offence, and concealing material information relating to the commission of an offence in return for payment. Both sections require the offence committed by the offender to be an 'arrestable offence'.

Categories of Offence

Offences may be classified according to the interests they seek to protect. Thus, Hong Kong's criminal law contains offences against the person (ranging from the most serious crimes of violence, such as murder, through sexual offences, such as rape and indecent assault, down to relatively minor offences, such as common assault), offences against property (covering a range of activities from theft and obtaining by deception, through forgery and counterfeiting, to criminal damage), offences against public morals and public order (such as obscenity, public nuisance, and piracy and hijacking), offences relating to the administration of justice (such as perjury, perverting the course of justice, and contempt of court), and offences against the security of the state (predominantly treason and official secrets). In addition, there are a large number of regulatory or public welfare offences scattered throughout Hong Kong's legislation covering a wide range of matters.

HONG KONG'S COURTS OF CRIMINAL JURISDICTION

Hong Kong has three courts with original criminal jurisdiction (i.e. trial courts), the Magistrates Court, the District Court and the Court of First

Instance (formerly the High Court), and three courts with appellate jurisdiction, the Court of First Instance, the Court of Appeal and the Court of Final Appeal. The Court of First Instance and the Court of Appeal together constitute what is now known as the High Court of the Hong Kong SAR (formerly, the Supreme Court of Hong Kong).

The responsibility for commencing prosecutions generally rests with the Secretary of Justice, although the actual commencement of proceedings in the Magistrates' Court by the laying of an information or making of a complaint is ordinarily done by police officers and other persons to whom the Secretary has delegated this authority (section 12 of the Magistrates Ordinance (cap. 227)).

Magistrates

Most criminal cases in Hong Kong commence in one of Hong Kong's ten Magistracies (or Magistrates' Courts) before magistrates exercising statutory criminal jurisdiction pursuant to the provisions of the Magistrates Ordinance (cap. 227). Magistrates have jurisdiction to deal with both summary offences and also indictable offences triable summarily. Offences that must be tried on indictment (e.g. murder) will also first appear in the Magistrates' Courts; in these cases, there will be a hearing known as a *committal hearing*, the purpose of which is to determine whether there is sufficient evidence for the case to be committed for trial on indictment in the Court of First Instance.

Permanent and special magistrates

Section 5(1) of the Magistrates Ordinance provides for the appointment by the Chief Executive of permanent and special magistrates.[13] *Permanent* magistrates must be legally qualified (unlike, for example, in England, where magistrates' courts when trying a case summarily normally consist of two or more lay magistrates who rely on legally qualified court clerks to advise them on the law), and they are empowered to exercise 'all the jurisdiction and powers conferred on a magistrate' by enactment or otherwise (section

[13] In addition, section 5A of the Magistrates Ordinance (added by section 13, Ordinance No. 21 of 1999) provides for the appointment by the Chief Justice of 'deputy magistrates' who hold office for a limited period and, subject to the terms of appointment, have all the jurisdiction, powers and privileges and perform all the duties of a permanent magistrate.

5(2) of the Magistrates Ordinance). Pursuant to section 92 of the Magistrates Ordinance, the maximum penalty that a permanent magistrate may impose on a convicted offender is two years' imprisonment for a single offence and a fine of HK$100,000, but this is subject to 'any greater … punishment specifically provided for in any other Ordinance' (section 92 of the Magistrates Ordinance; see also section 97(3)(a) of the Magistrates Ordinance, which limits the power to fine 'except where a greater sum is specifically provided for in any other Ordinance'). A number of ordinances give magistrates the power to impose sentences of up to three years' imprisonment and substantially larger fines, in some cases up to HK$5,000,000. Where an offender is convicted of more than one offence and sentenced to a term of imprisonment on each, a permanent magistrate may order the terms to run consecutively, up to three years in total (section 57 of the Magistrates Ordinance). *Special* magistrates are generally Cantonese-speaking persons with some experience of judicial work, though they may not be legally qualified. Their jurisdiction is more limited than that of permanent magistrates, particularly as regards the summary hearing of indictable offences (section 91 of the Magistrates Ordinance). They commonly deal with minor offences such as hawking, traffic summonses and littering. Their sentencing powers are also more limited. Their power to fine is limited to HK$50,000 (section 97(3)(a) of the Magistrates Ordinance, 'except where a greater sum is specifically provided for in any other Ordinance'). Their power to sentence an offender convicted of an indictable offence tried summarily is generally restricted to six months' imprisonment and a fine of HK$50,000 (section 91 of the Magistrates Ordinance; but see also section 94, which permits a maximum sentence of one year's imprisonment in relation to theft or an offence against sections 42 and 43 of the Offences Against the Person Ordinance (cap. 212)). Where an offender is convicted of more than one offence, a special magistrate may impose consecutive terms of imprisonment, not exceeding 12 months in total (section 57 of the Magistrates Ordinance; but cumulative sentences for several assaults committed on the same occasion must not exceed six months — section 44 of the Magistrates Ordinance).

Where an indictable offence is dealt with summarily, then the procedure followed by a magistrate is the same as if the offence were an offence punishable on summary conviction and not on indictment (section 93 of the Magistrates Ordinance).

Review and appeal

An accused who is dissatisfied with the decision of a magistrate may apply to the same magistrate within 14 days after the determination to review the decision (section 104(1) of the Magistrates Ordinance). If still dissatisfied, he or she may appeal in the normal way to the Court of First Instance (section 104(10) of the Magistrates Ordinance).

Alternatively, an accused may, within 14 days of decision, appeal directly to the Court of First Instance against conviction, or sentence, or conviction and sentence (sections 105 to 113 of the Magistrates Ordinance).

Juvenile Court

When a child ('a person under the age of 14 years'; section 2 of the Juvenile Offenders Ordinance) or young person ('between the ages of 14 and 16'; section 2 of the Juvenile Offenders Ordinance) is charged with an offence (other than homicide), he or she will generally[14] appear before a permanent magistrate sitting as a specially constituted court known as a 'Juvenile Court', pursuant to the provisions of the Juvenile Offenders Ordinance (cap. 226) (section 3A(3) of the Juvenile Offenders Ordinance). The Juvenile Court has jurisdiction to make care and protection orders in respect of young persons (section 34 of the Protection of Women and Juveniles Ordinance (cap. 213)), where criminal prosecution is inappropriate.

The District Court

The District Court in its criminal jurisdiction deals with indictable offences transferred from the Magistrates' Court, either for trial or for sentence. Its criminal jurisdiction is based on section 74 of the District Court Ordinance (cap. 336), which provides that it has jurisdiction to hear and determine such charges as may be transferred to it either by a magistrate pursuant to Part IV of the Magistrates Ordinance (section 75(1) of the District Court Ordinance) or from the High Court pursuant to section 65F of the Criminal Procedure Ordinance (cap. 221).

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[14] The Juvenile Court has exclusive jurisdiction over summary offences (section 2(3) of the Juvenile Offenders Ordinance), but the Court of First Instance has concurrent jurisdiction in relation to indictable offences.

In general, the District Court deals with more serious criminal cases, excepting murder, manslaughter and rape. A District Court judge sits alone without a jury in criminal trials. On conviction, he or she may impose a sentence of imprisonment of up to seven years (section 82(2) of the District Court Ordinance (cap. 336)).

There is a right of appeal against conviction or sentence or both to the Court of Appeal within 28 days from the date of decision (sections 83 and 84 of the District Court Ordinance).

The Court of First Instance

The Court of First Instance of the High Court has unlimited jurisdiction in criminal matters (sections 3(2) and 12(3) of the High Court Ordinance (cap. 4)). In practice, it tries the most serious criminal offences, such as murder, manslaughter, rape, armed robbery, complex commercial frauds and drug offences involving large quantities. Trials in the Court of First Instance are heard 'on indictment', that is, before a judge of the Court of First Instance sitting with a jury (section 41(1)(2) of the Criminal Procedure Ordinance (cap. 221)). A jury normally consists of seven (but may exceptionally include nine) jurors selected in accordance with section 3 of the Jurors Ordinance (cap. 3).

In a jury trial, the judge is responsible for deciding matters of law, while the jury decides matters of fact. The judge directs the jury, during his or her summing-up at the end of a trial, on the relevant legal principles the jury must apply, and the jury then 'retires' to the jury room and applies the law to the facts. If a trial judge misdirects a jury on the law, i.e. he or she misstates the law, this may provide an accused with grounds for an appeal against conviction.

Appeals from the Court of First Instance generally go to the Court of Appeal.

The Court of Appeal

The Court of Appeal is the second highest court in Hong Kong's judicial hierarchy, and forms part of the High Court of the Hong Kong SAR (section 3(1) of the High Court Ordinance (cap. 4)). It hears appeals, rather than trials, and these are normally heard by three judges sitting together (section 34(2) of the High Court Ordinance). Its criminal jurisdiction is set out in

section 13(3) of the High Court Ordinance. It may hear appeals from both the Court of First Instance and the District Court (pursuant to section 82 of the Criminal Procedure Ordinance (cap. 221) and section 84 of the District Court Ordinance (cap. 336)). It can also make rulings on questions of law referred to it by the lower courts (pursuant to section 81(1) of the Criminal Procedure Ordinance), hear applications made by the Secretary of Justice for the review of a sentence (pursuant to section 81A(1) of the Criminal Procedure Ordinance), and consider references of law by the Secretary of Justice following an acquittal (pursuant to section 81D of the Criminal Procedure Ordinance).

The Court of Final Appeal

The Court of Final Appeal was established on 1 July 1997, pursuant to the Hong Kong Court of Final Appeal Ordinance (cap. 484), and is the highest appellate court in Hong Kong (replacing the Judicial Committee of the Privy Council). It hears appeals at the discretion of the Court of Final Appeal in criminal matters from any final decision of the Court of Appeal, and any final decision of the Court of First Instance (not being a verdict or finding of a jury) from which no appeal lies to the Court of Appeal.

Leave to appeal must be granted by the Court of Final Appeal (section 32(1) of the Hong Kong Court of Final Appeal Ordinance). Such leave will be granted only if the Court of Appeal or the Court of First Instance (as the case may be) certifies that a point of law of great and general importance is involved in the decision or it is shown that substantial and grave injustice has been done (section 32(2)) (although the Court of Final Appeal has the discretion to certify a matter and grant leave to appeal even where the Court of Appeal or the Court of First Instance declines to do so; section 32(3)). The Court, when sitting, comprises five judges — the Chief Justice, three permanent judges of the Court of Final Appeal, and one non-permanent Hong Kong judge or one judge from another common law jurisdiction (section 16(1) of the Hong Kong Court of Final Appeal Ordinance). The powers of the Court of Final Appeal on appeal are set out in section 17 of the Hong Kong Court of Final Appeal Ordinance. It may confirm, reverse or vary the decision of the court from which the appeal lies, or may remit the matter with its opinion to that court, or may make such other order in the matter as it thinks fit (section 17(1)). It may order a retrial, or may remit a case to the court from which the appeal has been made (section 17(2)). The decision of the Court is final and shall not itself be subject to appeal.

Coroners Court

Questions of criminal liability may also arise in Coroners Courts. A coroner is empowered to investigate deaths occurring in Hong Kong (or outside Hong Kong if the body is found within Hong Kong) where the death has not been certified by a doctor as being solely due to natural causes. The decision on whether or not to hold an inquiry — an inquest — lies with the coroner, as does the decision on whether or not to sit with a five-person jury (if death occurs in official custody, it is mandatory to sit with a jury). The purpose of an inquest is to ascertain the circumstances surrounding the death. On occasion, this may involve issues of criminal liability; for example, where death was caused by a police officer, it may be necessary to determine whether the police officer was lawfully acting in execution of duty or in self-defence.

If it appears to a coroner that the death may involve the commission of murder, manslaughter, infanticide or dangerous driving, then the coroner may adjourn an inquest and refer the matter to the Secretary for Justice for decision on whether to prosecute the person or persons responsible for the death.

CRIMINAL JURISDICTION

Territoriality

The traditional rule at common law is that criminal jurisdiction is territorial; a person may prima facie only be tried and convicted by the courts of the Hong Kong SAR for an offence committed within Hong Kong's territorial limits. Therefore, all offences must ordinarily be read as if they included the words 'in the Hong Kong SAR'.

The rationale for this territorial rule is that '[the] criminal law is developed to protect [the local society] and not that of other nations which must be left to make and enforce such laws as they see fit to protect their own societies' (*Somchai Liangsiriprasert* v *Government of the USA* [1990] 2 HKLR 612, at 619, per Lord Griffiths). However, as Lord Griffiths also recognized in *Somchai* (a decision of the Privy Council on appeal from the Hong Kong Court of Appeal, concerning the jurisdiction of Hong Kong's criminal courts over a conspiracy to traffic in dangerous drugs entered into in Thailand), this territorial rule is no longer applied as strictly as it once

was, since 'in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality.'

Accordingly, there are a number of exceptions to the rule of territoriality both at common law and under statute, whereby the courts of Hong Kong may exercise criminal jurisdiction over a person even though his or her alleged criminal conduct, strictly speaking, did not take place in Hong Kong.

Exceptions

Exceptions or extensions of jurisdiction include the following:

(1) Offences of an international character, such as piracy and aircraft hijacking: these may be triable in Hong Kong as a matter of international criminal law, even though the criminal activity constituting the offence takes place outside Hong Kong (*In re Piracy Jure Gentium* [1934] AC 584: Privy Council appeal from Hong Kong) (see also sections 19 to 23 of the Crimes Ordinance (cap. 200), enacting domestic offences that co-exist with their international law counterparts). For a recent example of piracy, the first prosecuted in Hong Kong in 60 years, see *R* v *Liang Bing Zhao* ([1997] 2 HKC 499).

(2) Murder and related offences: several statutory provisions provide Hong Kong's courts with jurisdiction over murder or related offences, despite an element of extra-territoriality. These include: section 9 of the Offences Against the Person Ordinance (cap. 212), which provides that where a person is 'unlawfully stricken, poisoned, or otherwise hurt at any place *in* Hong Kong' but dies as a result '*upon the sea or at any place out of Hong Kong*', then any person alleged to have caused the death, or been party to such, may be tried for murder or manslaughter, or as an accessory to murder or manslaughter, in Hong Kong 'in the same manner in all respects as if such offence had been wholly committed in Hong Kong'; section 5 of the Offences Against the Person Ordinance, which provides that persons who conspire *in* Hong Kong to murder another person, or solicit another person to do so, whatever the nationality or citizenship of the intended victim and wherever he or she may be, thereby commit an offence (see also section 159A(3) of the Crimes Ordinance: for the purposes of conspiracy, 'offence' '… includes murder notwithstanding that the murder in question would not be so triable if committed in accordance with the intentions of the parties to the agreement').

(3) Other offences committed on ships outside Hong Kong (or in

Hong Kong waters): historically, criminal jurisdiction also existed over offences committed on ships outside the territorial limits of the Hong Kong SAR, particularly 'on the high seas'. This reflects the view that ships may be treated as part of a territory (*R* v *Martin* [1956] 2 All ER 86). This jurisdiction is now specifically provided for in sections 23B(1) and (3) of the Crimes Ordinance. Subsection (1) provides that acts taking place on board a Hong Kong ship on the high seas which, apart from section 23B, would not be an offence, but, were they to take place in Hong Kong, would constitute an offence under the law of Hong Kong, shall constitute an offence triable in Hong Kong, regardless of the citizenship or nationality of the person committing the acts. Subsection (3) provides that acts by residents of the Hong Kong SAR (i) on board a Hong Kong ship in any port or harbour outside Hong Kong or (ii) on board a ship which is neither a Hong Kong ship nor a ship to which the person belongs, which, apart from subsection (3), would not constitute an offence under the law of Hong Kong but would do so if the act took place in Hong Kong, shall constitute an offence triable under the law of Hong Kong. In addition, section 23B(2) provides for the reverse: the SAR courts have criminal jurisdiction in certain circumstances over acts committed on board a ship which is not a Hong Kong ship while it is in Hong Kong waters if those acts, were the ship a Hong Kong ship, would constitute an indictable offence under the law of Hong Kong, regardless of the citizenship or nationality of the person committing the acts.

(4) Conspiracy, attempts and incitement: at common law, the courts have expressed a willingness to adopt a more expansive view of jurisdiction in relation to the inchoate offences of conspiracy, attempt and incitement. This was considered by the Privy Council on appeal from the Hong Kong Court of Appeal in *Somchai Liangsiripraesert* v *Government of the USA*, above. Although the case related specifically to conspiracy, Lord Griffiths, delivering the advice of the Privy Council, observed (at 625):

> … the inchoate crimes of conspiracy, attempt and incitement developed with the principal object of frustrating the commission of a contemplated crime by arresting and punishing the offenders before they committed the crime. If the inchoate crime is aimed at England with the consequent injury to English society why should the English courts not accept jurisdiction to try it if the authorities can lay hands on the offenders, either because they come within jurisdiction or through extradition procedures?

and concluded (at 626):

> Unfortunately in this century crime has ceased to be largely local in origin and effect. Crime is now established on an international scale and the common law must face this new reality. Their Lordships can find nothing in precedent, comity or good sense that should inhibit the common law from regarding as justiciable in England inchoate crimes committed abroad which are intended to result in the commission of criminal offences in England. Accordingly a conspiracy entered into in Thailand with the intention of committing the criminal offence of trafficking in drugs in Hong Kong is justiciable in Hong Kong even if no overt act pursuant to the conspiracy has yet occurred in Hong Kong.

(5) Criminal Jurisdiction Ordinance (cap. 461) (CJO): this ordinance extends the criminal jurisdiction of Hong Kong's courts firstly over a range of offences against the Theft Ordinance (cap. 210) (including theft (section 9), fraud (section 16A), six deception offences (sections 17, 18, 18A, 18B, 18D and 22(2)), false accounting (section 19), false statements by company directors (section 21), blackmail (section 23), and handling stolen goods (section 24)) and the Crimes Ordinance (cap. 200) (including forgery (section 71) and five offences relating to false instruments (sections 72 to 76)) (collectively called 'Group A offences'). These offences may all readily have an extra-territorial element. Section 3(3) provides: 'A person may be guilty of a Group A offence *if any of the events which are relevant events* in relation to the offence *occurred in Hong Kong*'. 'Relevant event' in relation to a Group A offence means 'any act or omission or other event (including any result of one or more acts or omissions) proof of which is required for conviction of the offence', i.e. constituting part of the actus reus of the offence (section 3(1) of the CJO). In determining whether or not a particular event is a relevant event in relation to a Group A offence, 'any question as to where it occurred is to be disregarded' (section 3(2)). The operation of the CJO in particular in relation to offences against the Theft Ordinance is discussed more fully elsewhere (see Chapters 13 and 14). Secondly, the CJO applies to inciting, conspiring at and attempting to commit a Group A offence and conspiracy to defraud (collectively called 'Group B offences'). The application of the CJO to incitement, conspiracy and attempt is also discussed elsewhere (see Chapter 9), but in summary, the CJO allows a person to be tried and convicted in Hong Kong (1) of inciting a Group A offence 'whether or not the incitement took place in Hong Kong' (section 4(4)); (2) of conspiring to commit a 'Group A' offence even though the intended offence is to take place outside of Hong Kong provided that a 'relevant event' occurs or will occur in accordance with their intentions in

Hong Kong; and (3) of attempting to commit a Group A offence 'whether or not (a) the attempt was made in Hong Kong; (b) it had an effect in Hong Kong' (section 4(3) of the CJO). In addition, section 4(1) provides generally that a person may be guilty of a Group A offence or a Group B offence (1) whatever his or her citizenship or nationality, or whether or not he or she was a permanent resident of Hong Kong at any material time; and (2) whether or not he or she was in Hong Kong at any such time.

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