

9:

FIRST APPEARANCE

1 General

A defendant, on first appearance, will be present:

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

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

- the integrity of the charge (if not already considered);
- non appearance, therefore summons and warrant;
- legal representation;
- plea, including fitness to plead;
- election;
- remands in custody;
- bail;
- adjournments.

It is your duty to explain the proceedings to the defendant and explain his or her rights to legal representation, **prior** to putting the charge. Where there is a need to obtain reports, then it is also incumbent upon you to explain the same to the defendant.

It is also incumbent to ask the defendant whether they wish to have legal representation. See *Romanu Naceva & Ors v State* Crim App No. AAU0014 of 1998S.

Usually this appearance is fairly quick and informal. There is a need to make the defendant feel at ease, but not to the extent that he or she displays over-familiarity. A firm and steady directive should be the rule for Magistrates at this initial proceeding.

Urge an unrepresented defendant to see a lawyer. This will save time and ensure that he or she understands the charges, knows the penalties, and is aware of his or her rights. It will also help to identify if there is a need to order any relevant reports to assist you in your deliberations of the case.

If legal aid is sought, adjourn the matter to allow the defendant to liaise with the office of the Legal Aid Commission. However, the prosecution should disclose first phase documents to the defendant at this stage in order to assist the Commission's counsel to assess the defendant's application for assistance.

2 Non-Appearance by the Defendant

If the defendant does not appear, either in response to a summons, Police bail or Police notice, ask the prosecutor to provide you with evidence of service or bail bond. Note that an affidavit of service is proof enough, until the contrary is proved: *s87 CPC*.

If service has been effected, you may:

- dispense with the attendance of the defendant in certain cases;
- issue a bench warrant to arrest the defendant; or
- ask the prosecution whether they are in a position to formally prove their case: *s221 CPC*.

3 Dispensing with Attendance of Defendant

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

- the offence in the charge is not a felony; **and**
- you see reason to do so or the maximum punishment of the offence is a fine or imprisonment of 3 months or both; **and**
- the defendant has consented to the trial taking place in his or her absence and pleaded guilty in writing or appeared by advocate: *s88 CPC*.

You may direct attendance at any later time.

If the defendant appears by advocate, then continue as if the defendant was present.

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

Warrants for arrest

Where the defendant does not appear, and his or her personal attendance has not been dispensed with under *s88 CPC*, you may issue a warrant to apprehend him or her and cause him or her to be brought before the Court: *s90 CPC*.

Some relevant considerations are:

- What effort has the prosecution made to serve the defendant?
- Is the failure to serve the defendant a result of false information by the defendant?
- Does the offence with which the defendant is charged carry a term of imprisonment?

- How long after the alleged offence was the summons issued?

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

- the number of sureties;
- the amount in which they and the defendant are to be respectively bound; and
- the time at which he or she is to attend before the Court: *s92 CPC*.

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

4 Unrepresented Defendant

See the chapter on “Management of Proceedings”.

If at all possible, all defendants charged with offences carrying imprisonment as a penalty, should see the Legal Aid Commission. This may require an adjournment to another date for a plea to be taken.

Where the defendant insists on representing him or herself, be careful that you comply with *s28 Constitution*. This section outlines the rights of defendants charged with criminal offences.

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

5 Putting the Charge to the Defendant

Identifying the defendant

When a defendant is brought before you, you must first ascertain who he or she is. Ask for his or her:

- full name;
- occupation; and
- age.

This is very important. More than one person may share the same name. The defendant might be a juvenile and you would need to treat a juvenile defendant differently to adults.

Explaining the charge to the defendant

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

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

Check for understanding

Check whether the defendant understands the charge. When you are sure he or she understands the full nature of the offence charged, then asks how he or she pleads to the charge. Never take for granted that the defendant might have understood your explanation without his or her confirmation.

6 Reconciliation

See *s30 MCA*.

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

- criminal trespass by day: *s197(1) Penal Code*;
- common assault: *s244 Penal Code*;
- assault causing actual bodily harm: *s245 Penal Code*; and
- wilful and unlawful damage to property: *s324(1) Penal Code*.

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

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

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

7 Pleas

7.1 Pleas Generally

A defendant can either plead “guilty” or “not guilty” to a charge: *s206(1) CPC*.

The defendant may, with leave of the Court, change a not guilty plea to guilty at any time.

The defendant may also, with leave of the Court, change a guilty plea to not guilty at any time, but before sentencing.

For pleas generally, see *State v Isaia Saukova* Crim App HAA of 2000L; *LTA v Eroni Volavola* Crim App 066 of 2002S; *Michael Iro v Reg 12* FLR 104.

7.2 Taking the Plea

After you are sure that the defendant understands the charge, take a plea. See *s206 CPC*.

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

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

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

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

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

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

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

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

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

Where the defendant refuses to plead, a plea of **not guilty** should be entered: *s206(4) CPC*.

Where the defendant is represented, a plea by counsel is acceptable.

7.3 Fitness to Plead

You will need to be conscious in particular cases whether the defendant is fit to plead. A defendant is under a disability if he or she cannot:

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

In these situations, it would be better to ascertain the nature of the problem first than to allow proceedings to continue. Relevant reports may have to be ordered, if necessary, and the matter may have to be adjourned to another date.

A finding of disability can result in:

- the defendant's detention in a hospital or psychiatric facility; or
- the defendant's immediate release.

7.4 Guilty Plea

If the defendant admits the truth of the charge, record the admission, convict the defendant and pass sentence or make an order against him or her: *s206(2) CPC*.

Where there is an unequivocal plea, you should ask the following, "Has any person in authority, Police or otherwise, given you any inducement or made any offer or promise of any benefit to you to persuade you to enter a plea of guilty to these charges?" See *Vilikesa Balecala v State* Crim App No. HAA0062 of 1996.

Entering conviction

The defendant's admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her: *s206(2) CPC*.

You should never sentence a person without convicting him or her first.

You may:

- sentence immediately;
- stand down the matter to consider the appropriate sentence; or
- adjourn the matter to allow for relevant reports to be compiled, and remand the defendant.

If you are adjourning, consider bail/remand.

Sentencing

If there is a dispute as to facts, the prosecution should be offered the opportunity to prove them. If the prosecution elects to forfeit this chance, the defendant's version must be accepted for sentencing.

If the defendant disputes the list of previous convictions, the onus is on the prosecution to prove it. If the list is unchallenged, you should note the list accordingly.

Where a person is charged with any offence and can be lawfully be convicted on such charge of some other offence not included in the charge, he or she may plead not guilty of the offence charged, but guilty of the other offence: *s208 CPC*.

See the chapter on "Sentencing".

7.5 Not Guilty Plea

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

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

8 Election

There are a number of offences in the schedule to the *Penal Code* which are classified “electable”. These offences are triable by the High Court but may be tried in the Magistrate’s Court if the defendant so chooses.

The election should be put to the defendant as early as possible and preferably on the first appearance. However, at times an unrepresented defendant may seek to defer election until he or she has had legal advice. In these situations, it would be better to allow the application and await the presence of counsel before putting the election to the defendant.

On the other hand, if counsel does not appear after the second consecutive adjournment, then perhaps it is upon you to explain the right of election to the defendant and allow the proceedings to move forward. In doing this, it is advisable to take accurate notes of the proceedings.

Where the defendant has elected trial in the High Court, then you must ensure that the transfer procedures under Part 7 of the *CPC (Amendment) Act 2003* are complied with. See *Practice Direction No. 1 of 2003* for these procedures.