

# **Chapter 10**

## **First Appearance**



# 1 General Matters at First Appearance

An accused, on first appearance, will be present:

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

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

- your ability to deal with the case;
- the validity of the charge (if not already considered);
- non appearance, therefore summons and warrants;
- legal representation;
- plea, including fitness to plead;
- remands in custody;
- bail; and
- adjournments.

## 1.1 Complainant (Prosecution) Does Not Appear

If the complainant does not appear in person or by an advocate (including a public prosecutor):

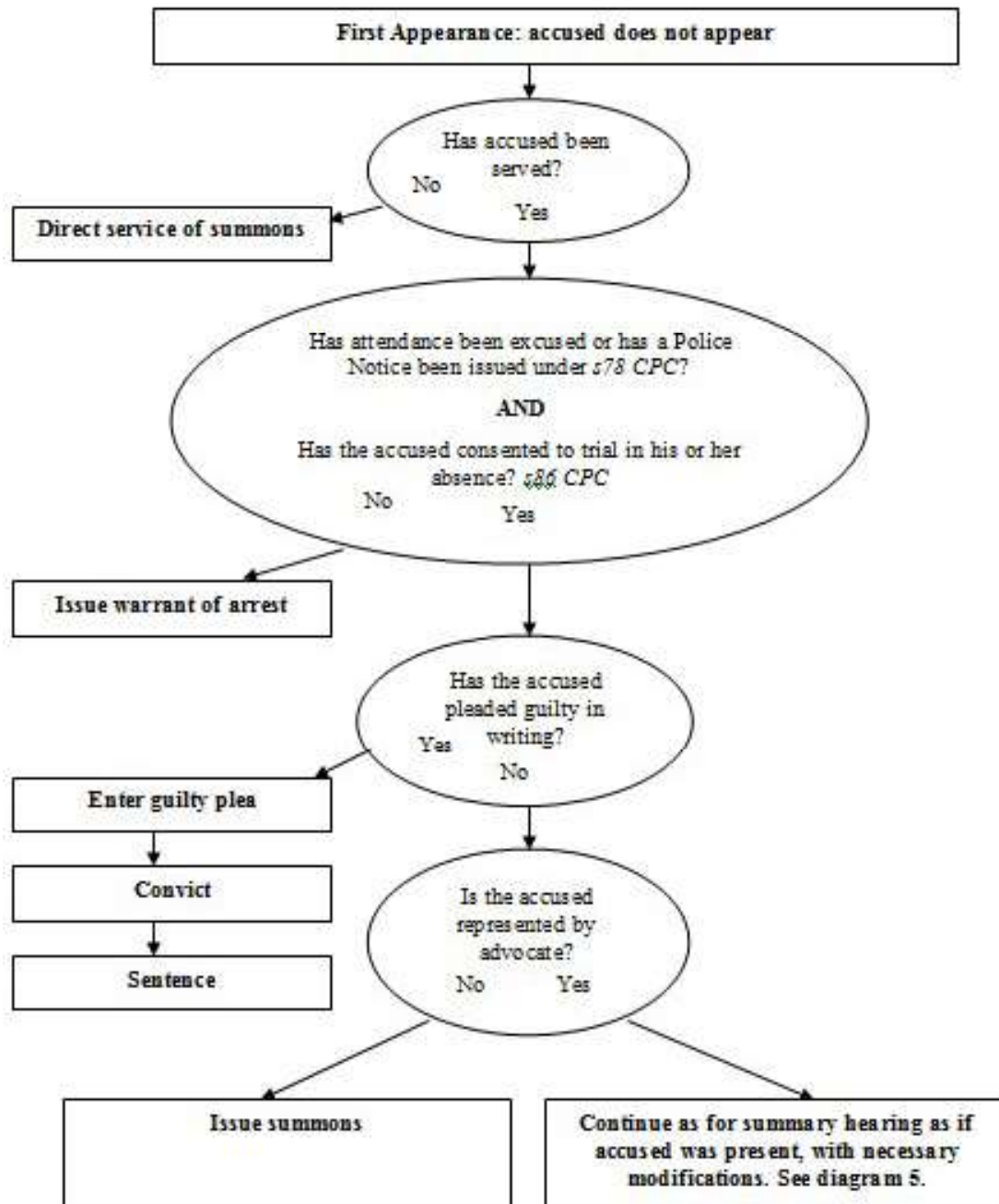
- check that the complainant has had notice of the time and place of the hearing; and
- if so, dismiss the charge unless you think it proper to adjourn the case upon such terms as you think fit: *s185(1) Criminal Procedure Code*.

If you adjourn the case, you must admit the accused to bail, remand him or her to prison or take security for appearance, as you think fit: *s185(1) Criminal Procedure Code*.

If you dismiss the charge, you may make an order for compensation from the complainant to the accused and his or her witnesses for the loss of time. Such compensation must not exceed \$5 per person per day for those to whom compensation is payable: *Rule 14(2) Magistrates' Courts Rules*.

## 1.2 Accused Does Not Appear

### 4. First appearance: Accused does not appear



If the accused does not appear, check that the accused has in fact been served:

- if present, the person who served the summons must show on oath that the summons was duly served on the accused in a reasonable time before the trial: *Rule 13 Magistrates' Courts Rules*;
- if the person who served the summons is not present, service may be proved through an affidavit: *s85 Criminal Procedure Code*.

Consider:

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

If service has been proved, you may:

- dispense with the attendance of the accused in certain cases; or
- issue a warrant to arrest the accused: *s88 Criminal Procedure Code*.

### **Dispensing with Attendance of Accused**

Subject to *s10* of the *Constitution*, there are certain instances where you may dispense with the personal attendance of the accused and proceed in his or her absence:

- for all non-felony offences, you **may** dispense with the personal appearance of the accused if you see reason to do so **and** the accused has pleaded guilty in writing or is represented by an advocate: *s86(1) Criminal Procedure Code*;
- for all offences punishable only by fine and/or by imprisonment not exceeding 3 months, you **must** dispense with the personal appearance of the accused if the accused has pleaded guilty in writing or is represented by an advocate: *s86(1) Criminal Procedure Code*.

Despite having dispensed with the attendance of the accused, you may at any later time direct the personal attendance of the accused and, if necessary, enforce the attendance: *s86(2) Criminal Procedure Code*.

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

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

If the attendance of the accused is dispensed with, and previous convictions against the accused are alleged and are not admitted in writing or through an advocate, you may adjourn and direct the personal attendance of the accused: *s86(4) Criminal Procedure Code*.

## **Warrants for Arrest**

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

Some relevant considerations are:

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

Every warrant must:

- briefly state the offence with which the person is charged;
- name or otherwise describe the accused;
- order the person(s) to whom it is directed to apprehend the accused and bring him or her before the Court having jurisdiction to answer the charge;
- be signed by the Judge or Magistrate issuing it: *s89(1)(2) Criminal Procedure Code*.

For offences other than murder or treason, you may direct the officer to whom the warrant is directed, to take security from the accused and release him or her from custody if the accused executes a bond with sufficient sureties for his or her attendance before the Court at a specified time and thereafter until otherwise directed by the Court: *s90 Criminal Procedure Code*.

You do this by endorsing the warrant. The endorsement must state:

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

The officer must forward the bond to the Court.

Every warrant remains in force until it is executed or cancelled by the Court issuing it: *s89(3) Criminal Procedure Code / Rule 9(2) Magistrates' Courts Rules*.

### Execution of Warrant

Warrants are normally directed to all Police officers, but if the immediate execution of the warrant is necessary and no Police officer is available, the warrant may be directed to any person or persons: *s91 Criminal Procedure Code*.

When executing a warrant, the Police officer or other person must notify the person being arrested of the substance of the warrant: *s92 Criminal Procedure Code*.

Once arrested, and if not released after providing security under *s90 Criminal Procedure Code*, the person must be brought before the issuing Court without unnecessary delay: *s93 Criminal Procedure Code*.

If arrested outside the district of the Court issuing the warrant, the person arrested must be brought before the Magistrates' Court in that jurisdiction, unless the Court that issued the warrant is closer: *s95(1) Criminal Procedure Code*.

#### Accused Persons Arrested Under Warrant

Once the accused is brought before you, you may:

- commit him or her to prison by warrant; or
- commit him or her to the custody of the Police orally; or
- commit him or her to other safe custody: *Rule 11(1) Magistrates' Courts Rules*.

In all cases, you must order the accused to be brought before the Court at a certain time and place: *Rule 11(1) Magistrates' Courts Rules*.

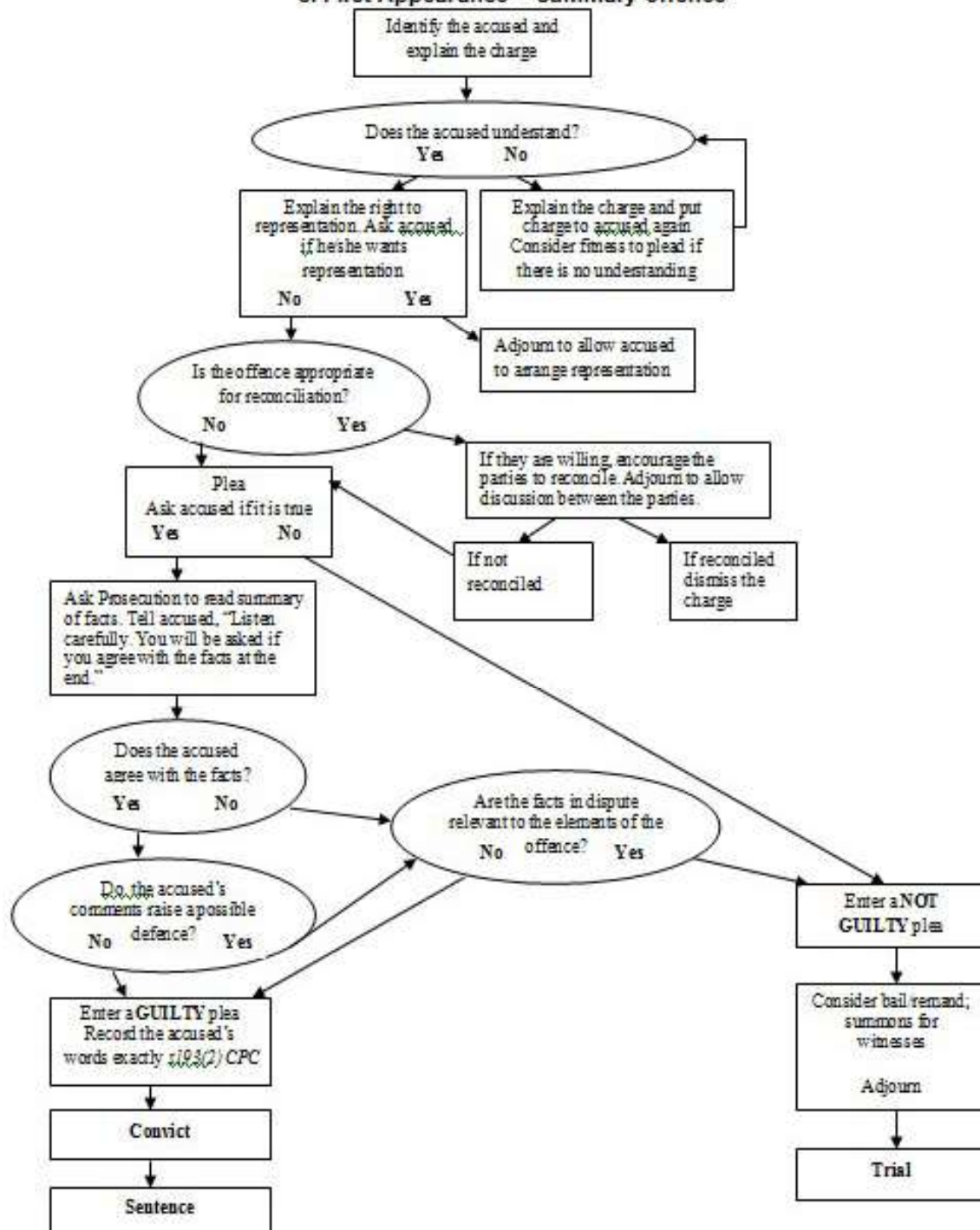
In none of the above situations, may the committal exceed seven days: *Rule 11(1) Magistrates' Courts Rules*.

To consider bail refer to Chapter 8, paragraph 3.2.

## **2 Offences to be Heard in the Magistrates' Court**

The diagram over the page shows the process for offences to be heard in the Magistrates' Court, at the first appearance of the accused.

### 5. First Appearance – Summary offence





## **2.1 Identifying the Accused and Putting the Charge**

### **Identification of the Accused**

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

- full name;
- address; and
- age.

This is very important. More than one person may share the same name. The accused person might be a juvenile and you would want to treat a juvenile differently to adults. See Chapter 14 Young Offenders.

### **Putting the Charge to the Accused**

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

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

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

### **Explain the Charge to the Accused**

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

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

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

## 2.2 Unrepresented Accused

Most accused persons appear in the Magistrates' Court on their own. Most have little or no idea of Court procedures and rely on the Court system to assist to some extent.

Many accused will simply appear and plead guilty without any real understanding of the elements of the offence they are charged with. It is your duty to ensure they understand the charge and the consequences of pleading guilty.

If an accused appears without representation, explain that he or she has a right to be represented, either by a lawyer or, with leave of the Court, some other person. Ask the accused whether he or she wishes to arrange representation. If so, adjourn to allow this.

## 2.3 Taking a Plea

After you are sure that the accused understands the charge, you then take a plea: *s193 Criminal Procedure Code*.

An accused can plead:

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

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

### **Fitness to Plead**

In certain cases, you will need to consider whether the accused is fit to plead. The issue to be determined is whether the accused is under a disability.

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

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

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

See *s144 Criminal Procedure Code*.

## **Taking the Plea**

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

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

If the accused admits the truth of the facts without further comment, this will suffice as a **plea of guilty**.

However, if the accused admits the truth of the charge, but makes some remarks or comments, you must listen carefully because sometimes those remarks or comments indicate a possible defence. You need to be particularly alert to this if the accused is unrepresented. If the accused disputes any of the facts read out by the prosecution, consider whether the disputed facts are relevant to the elements of the offence.

Note that a plea of guilty is a plea to the **elements** of the charge not necessarily acceptance of the Police summary of facts. If the facts in dispute are not relevant to the elements, enter a **plea of guilty**.

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

For example, on a charge of damaging property, one of the elements is actual damage to property. If the accused pleads guilty but disputes the amount of damage (e.g. the prosecution alleges 10 glasses were damaged and the accused says only three 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 incapable, one of the elements is the behaviour must be in a public place. If the accused admits to being drunk and incapable, but says it was in his friend's backyard, that is relevant and you should enter a plea of not guilty for the accused. It is then up to the prosecution to prove he was in a public place.

“If anything comes up in the statements to the Court by the prosecution or the accused that might suggest a defence, the Magistrate should stop the proceedings and ascertain just what is being asserted. Often a short inquiry will make it plain that the plea is properly entered but in any case where it is not, the Magistrate must enter a plea of not guilty and try it as a contested case.” *Cocker v Police Department* Criminal Appeal Case #Cr.App.1251 of 1998.

## **Accused Denies the Charge**

If the accused denies the charge, enter a **plea of not guilty**.

### **Accused Refuses to Plead**

Where the accused refuses to plead, a **plea of not guilty** should be entered: *s193(4) Criminal Procedure Code*.

## **3 Guilty Plea – Next Steps**

### **Record Words of Accused**

An admission by the accused of the truth of the charge should be recorded as nearly as possible in the words used by him or her: *s193(2) Criminal Procedure Code*.

### **Enter Conviction**

Convict the accused and enter this on the record.

### **Sentence**

After convicting the accused, you pass sentence. You should never sentence a person without convicting him or her first.

You may sentence immediately. See Chapter 13 Sentencing.

Alternatively, you may adjourn to consider reports or at the request of one of the parties.

### **Adjournment**

If adjourning before sentencing, you may:

- allow the offender to go at large;
- commit the offender to prison; or
- release the offender upon a recognisance with or without sureties, conditional on his or her reappearance at the adjourned time and place: *s189 Criminal Procedure Code*.

If the accused has been committed to prison, the adjournment must be for no longer than 15 days and in all other cases 30 days (the day after the adjournment being counted as the first day): *s189 Criminal Procedure Code*. If you are adjourning, consider bail/remand.

### **Remands / Bail After Conviction**

You may:

- remand the accused to a sentencing date; or

- release the accused on bail on such condition or conditions that he or she attends the Court at the date and time scheduled.

Record all of the above on the Court record.

#### Bail

See the section on bail in Chapter 8 Management of Proceedings.

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

Reasons must be given for refusing bail

#### Warrants of Commitment

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

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

## **4 Not Guilty Plea – Next Steps**

If the accused has pleaded not guilty, a defended hearing must follow. This can happen straight away, or you may adjourn the matter and hear it later.

### **4.1 Immediate Hearing**

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

### **4.2 Hearing at a Later Date**

#### **Adjournment**

If a plea of not guilty is entered and either party is not ready to proceed, you may adjourn the hearing to a certain time and place appointed and stated in the presence and hearing of the parties or their advocates: *s189 Criminal Procedure Code*.

Before fixing the date:

- inform the accused of his or her right to legal counsel (if unrepresented);
- advise the accused to prepare for hearing the case; and

- set a date after considering the time the parties need to prepare their cases and enter into the Court diary.

You may then:

- allow the accused person to go at large;
- commit the accused to prison; or
- release the accused upon a recognisance with or without sureties, conditional on his or her reappearance at the adjourned time and place: *s189 Criminal Procedure Code*.

Record all of the above on the Court record.

If the accused has been committed to prison, the adjournment must be for no longer than 15 days and in all other cases 30 days (the day after the adjournment being counted as the first day): *s189 Criminal Procedure Code*.

### **Remands / Bail After Plea**

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See the section on bail in Chapter 8 Management of Proceedings. If bail is granted, the terms, if any, should be noted carefully on the Court record.

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

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## **4.3 Warrants/Summons for Witnesses to Attend**

### **Summons**

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

*Form 6 – Criminal (Rule 12(1))* in the *Schedule* relating to *FORMS* should be used to summon a witness.

## **Warrant**

Like an accused, a warrant may be issued to compel the attendance of a witness in Court at this stage. You may **only** issue a warrant for a witness at this stage if you are satisfied by evidence on oath that the witness will not attend Court unless compelled to do so: *s129 Criminal Procedure Code*.

### Witnesses Arrested under Warrant

If a witness is arrested under warrant:

- you may order his or her release from custody upon furnishing security by recognisance satisfying you of his or her appearance at the hearing; or
- you may order him or her detained for production at the hearing on failing to furnish security: *s130 Criminal Procedure Code*.