

# **Chapter 9**

## **Pre-Trial Matters**



# 1 The Criminal Process

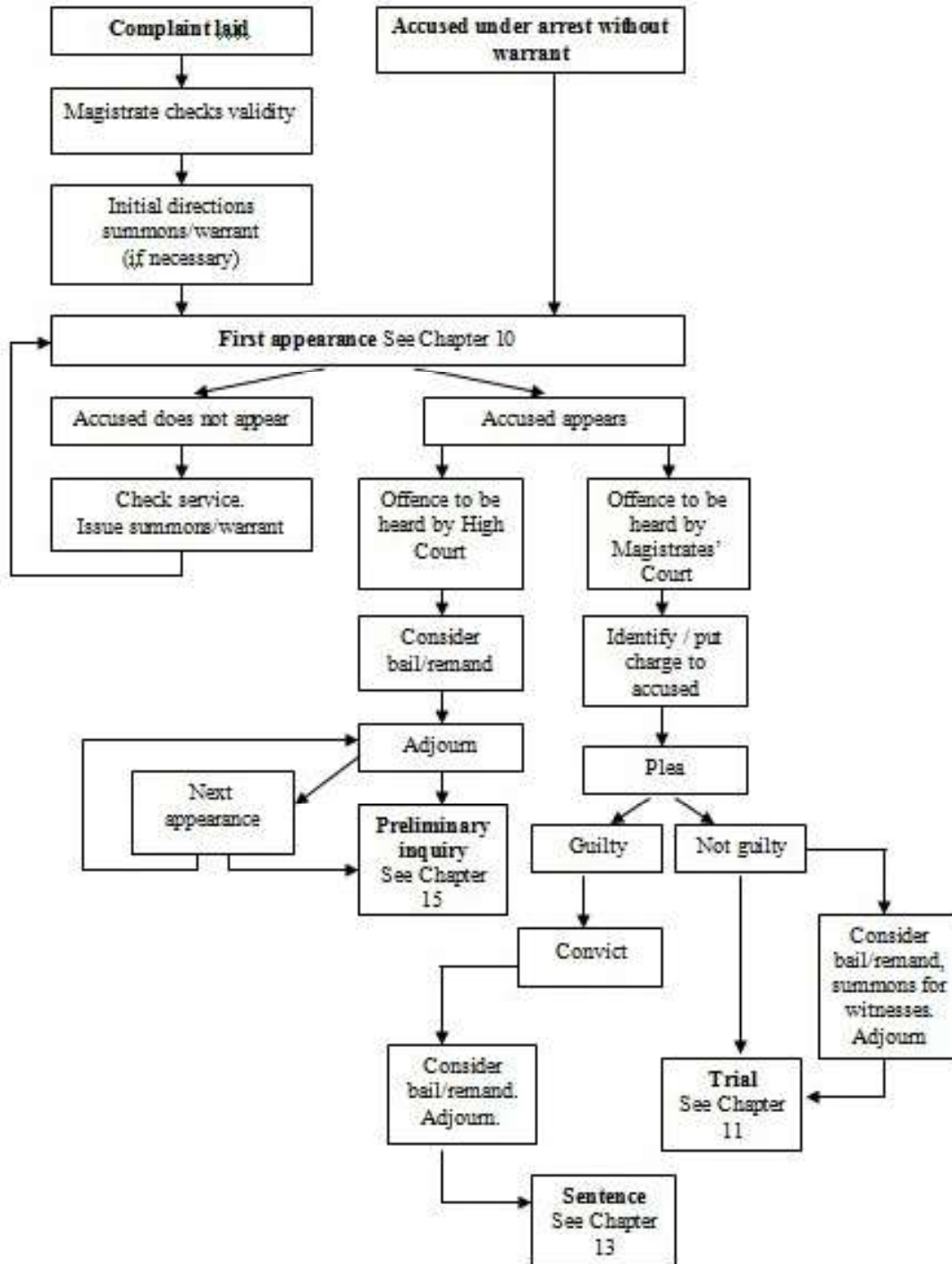
The diagram on the next page shows the general process of a criminal case, to preliminary inquiry (for offences to be heard in the High Court) and trial (for offences to be heard in the Magistrate's Court). Each step is explained in detail over the next three chapters.

This chapter Pre-Trial Matters, explains how a case comes before the Magistrate's Court and the steps to be taken up to the first appearance of the accused.

Chapter 10 First Appearance, shows the steps that are taken when the accused appears in front of the Court for the first time.

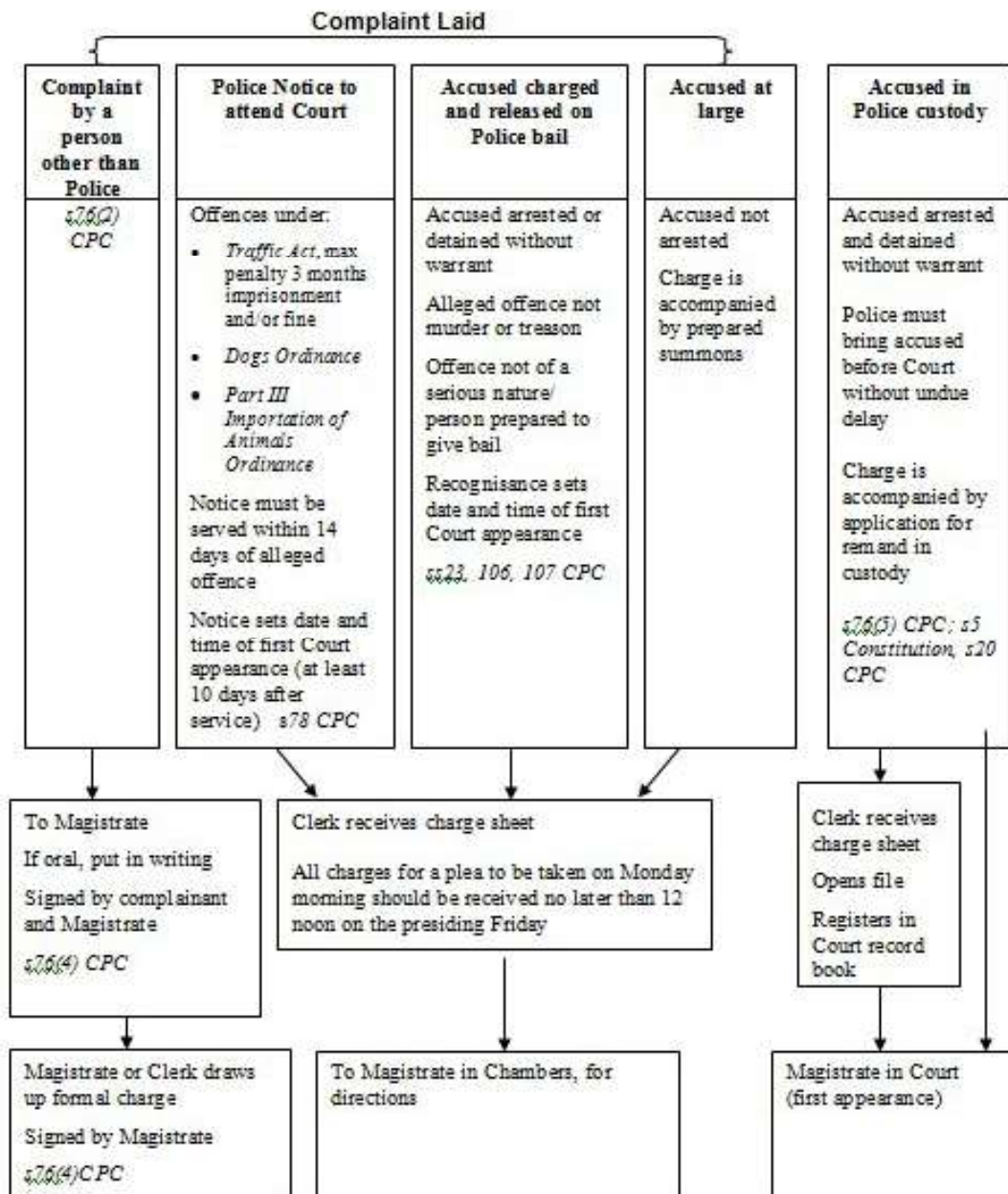
Chapter 11 Defended Hearings: The Trial, shows the steps to be taken when the accused pleads not guilty and a defended hearing takes place.

### 1. The Criminal Process at a Glance



## 2 How a Case Comes to the Magistrates' Court

### 2. How a case comes to the Magistrate's Court



Criminal proceedings can be instituted by:

- complaint; or
- bringing a person arrested without warrant before the Court: *s76(1) Criminal Procedure Code*.

Any person who believes with reasonable and probable cause that an offence has been committed may make a complaint to a Magistrate: *s76(2) Criminal Procedure Code*.

If instituted by the Police or other public officer in the course of their duty, a formal charge signed by the officer is considered a valid complaint: *s76(3) Criminal Procedure Code*.

If not a formal charge from the Police, the complaint may be made on oath, either orally or in writing. It must be reduced to writing and signed by both you and the complainant: *s76(3) Criminal Procedure Code / Rule 3 Magistrates' Courts Rules*.

Once reduced to writing, you must have the complaint drawn up into a formal charge containing a statement of the offence with which the accused is charged: *s76(4) Criminal Procedure Code*.

### **Initial Steps**

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

The accused may be:

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

### **Police Notice to Attend Court – *s78 Criminal Procedure Code***

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

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

and, if he or she does not intend to appear in person, to provide a written consent to the trial taking place in his or her absence: *s78(1) Criminal Procedure Code*.

The Police files a Notice of Prosecution in the Magistrate's Court and serves the Notice on the accused not later than 14 days from the date of the alleged offence: *s78(1) Criminal Procedure Code*.

The Notice should state:

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

The printed Notice should also contain notice of the accused's right to enter a plea of guilty in writing. The Court Clerk will insert a date in the Notice (at least 10 days away) by which time the accused must exercise his or her rights: *s78(1) Criminal Procedure Code*.

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

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

The offences to which this process applies are:

- any offence under the *Traffic Ordinance* which is punishable only by a fine or by imprisonment not exceeding 3 months, or both;
- any offence under the *Dogs Ordinance*;
- any offence under *Part III Importation of Animals Ordinance: s78(3) Criminal Procedure Code*.

### **Accused Charged and Released on Bail and/or Recognisance**

Where:

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

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

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

### **Accused at Large**

A person at large may be served with a summons to attend Court on a specified day to answer to the complaint.

### **Accused is in Police Custody**

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

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

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

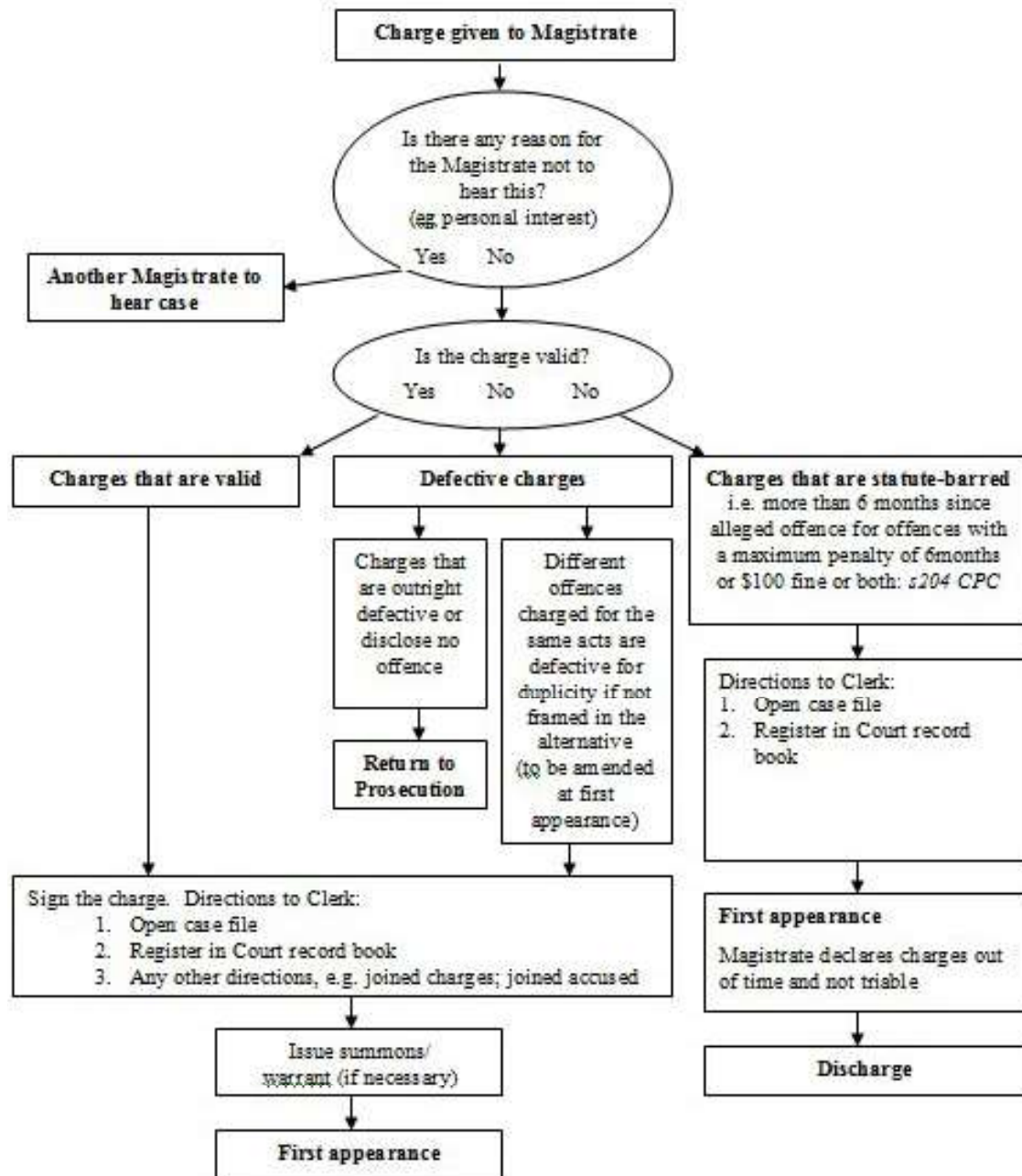
See the section on bail in Chapter 8 Management of Proceedings, for dealing with an accused arrested without warrant.

## **3 Dealing with the Charge**

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



### 3. Process up to First appearance



### **3.1 Personal Interest**

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

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

See Chapter 4 Judicial Conduct, paragraph 1.5.

If you must disqualify yourself, procedures are in place for your replacement so that the case can be heard in accordance with the law and without the possibility of real or perceived bias. See *s11 Magistrates' Courts Ordinance*.

Alternatively, if it appears impossible to hear a case in the jurisdiction because too many Magistrates must disqualify themselves, report the matter to the Chief Justice.

### **3.2 Transferring the Case**

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

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

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

Issue a warrant for that purpose.

If the accused is not to be held in custody, explain to him or her that you have directed the case be transferred to another Court and grant bail on appropriate conditions.

### **3.3 Validity of the Charge**

#### **General Requirements**

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

Generally, a charge should be filed:

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

Every charge must contain:

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

*Section 120 Criminal Procedure Code* sets out how a charge is to be framed. However, unless the Court considers that there has been a miscarriage of justice, you should not quash, hold invalid or set aside any information or complaint only because of any defect, omission, irregularity or want of form: *s77(2) Criminal Procedure Code*.

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

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

Where there is more than one count, they should be numbered consecutively, and may be put in the alternative: *s118 Criminal Procedure Code*.

Check that the charge does not improperly charge more than one offence for the same action (duplicity), unless put in the alternative. For example, separate counts for common assault and assault causing actual bodily harm arising from the same set of facts would have to be put in the alternative. If not, the charge will be defective for duplicity and will have to be amended at the first appearance.

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

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

There is a time limit for laying a charge for certain summary offences in the Magistrates' Court.

Offences carry a maximum penalty of six months imprisonment, or a fine of \$100, or both.

Offences cannot be tried by a Magistrate unless the charge is laid within:

- six months from the date the alleged offence was committed; or
- a longer time if specially allowed by law: *s204 Criminal Procedure Code*.

### **Check Validity**

Check that the charge sheet:

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

Refer to *ss58 – 62, 117, 120 and 204 Criminal Procedure Code*.

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

If the charge is defective raise it with the prosecution at the first appearance, for amendment or withdrawal.

If the only issue is that it is out of time according to *s204 Criminal Procedure Code*:

- direct that a case file be opened; and
- at first appearance, declare that it is out of time and not triable, according to *s204*; and
- discharge the accused.

## **3.4 Joined Charges**

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

- they are founded on the same facts; or
- they form or are a part of a series of offences of the same or similar character: *Rule 5 Magistrates' Courts Rules; s118(2) Criminal Procedure Code*..

Each offence must each be set out in a separate paragraph in the charge, called a count: *Rule 5 Magistrates' Courts Rules; s118(2) Criminal Procedure Code*.

If an accused is charged with more than one offence in a charge or information, you may order that the offences be tried separately, if you believe that trying the offences together would harm the accused in his or her defence: *s118(3) Criminal Procedure Code*.

## **3.5 Joined Parties**

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

- persons accused of the same offence committed in the course of the same transaction;
- persons accused of an offence and persons accused of abetment or of an attempt to commit the offence;
- persons accused of different offences committed in the course of the same transaction;
- persons accused of different offences provided that all offences arise from the same facts or form or are part of a series of offences of the same or similar character: *s119 Criminal Procedure Code*.

## 4 Ensuring Attendance of the Accused

Once the charge or complaint is dealt with, you must ensure attendance of the accused at the High Court or a Magistrates' Court through either:

- a summons; or
- a warrant: *s77(1) Criminal Procedure Code / Rule 4 Magistrates' Courts Rules*.

### 4.1 Summons

A summons is a formal means of ensuring the attendance of a person before the Court.

The summons must be directed to the person being summoned and must:

- require him or her to appear before the Court having jurisdiction at a time and place mentioned in the summons;
- state briefly the offence with which the person is charged: *s79(2) Criminal Procedure Code*.

The summons must:

- be in writing, in duplicate;
- be signed by the presiding officer of the Court or by some other officer directed by the Chief Justice;
- be directed to the person summoned and require him or her to appear at a stated time and place; and
- state shortly the offence charged: *s79(1) Criminal Procedure Code*;
- be in *Form 2 – Criminal (Rule 6)* in *Magistrates' Courts Ordinance (Schedule – Forms)*.

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

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

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

#### Service

*Sections 80 – 84 Criminal Procedure Code* detail how service may be effected.

## **4.2 Warrant**

While both summonses and warrants serve the same role of ensuring the accused's attendance in Court, a warrant is a more forceful means of ensuring attendance.

Most often a warrant is issued when an accused does not obey a summons, or does not obey a recognisance of bail. You may, however, issue a warrant at this stage, rather than issuing a summons, **only** if you are satisfied that the person to be apprehended is within your jurisdiction when the charge is laid: *Rule 10 Magistrates' Courts Rules*. This would normally only be appropriate where you are satisfied that the accused will not for some reason attend on a summons.

Even if a summons has been issued, you may issue a warrant before the time appointed in the summons, **only** if a complaint has been made on oath: *s87 Criminal Procedure Code*.

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 an offence 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: *s90(1) Criminal Procedure Code*.

The officer must forward the bond to the Court: *s90(3) Criminal Procedure Code*.

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*.

On the request of the person laying the charge and with the consent of the accused, you may also hear and determine the matter immediately: *Rule 11(2) Magistrates' Courts Rules*.

Upon request by the accused, bail can be granted in such conditions as you order. See also Chapter 8, 3.2.

## 5 Ensuring Attendance of Witnesses

### 5.1 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*, is to be used for summoning a witness.

Where a witness refused to answer to the summons, *Form 7 – Criminal (Rule 12(2))* should be issued to apprehend the witness.

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

### 5.2 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*.