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CRIMINAL: FIRST APPEARANCE

1 General Matters at First Appearance

An accused, on first appearance, will be present:

- after arrest and in custody; or
- after arrest and on 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 of the accused, therefore summons and warrants;
- Legal representation;
- Plea, including fitness to plead;
- Remands in custody;
- Bail;
- Adjournments.

1.1 Complainant (Prosecution) Does Not Appear

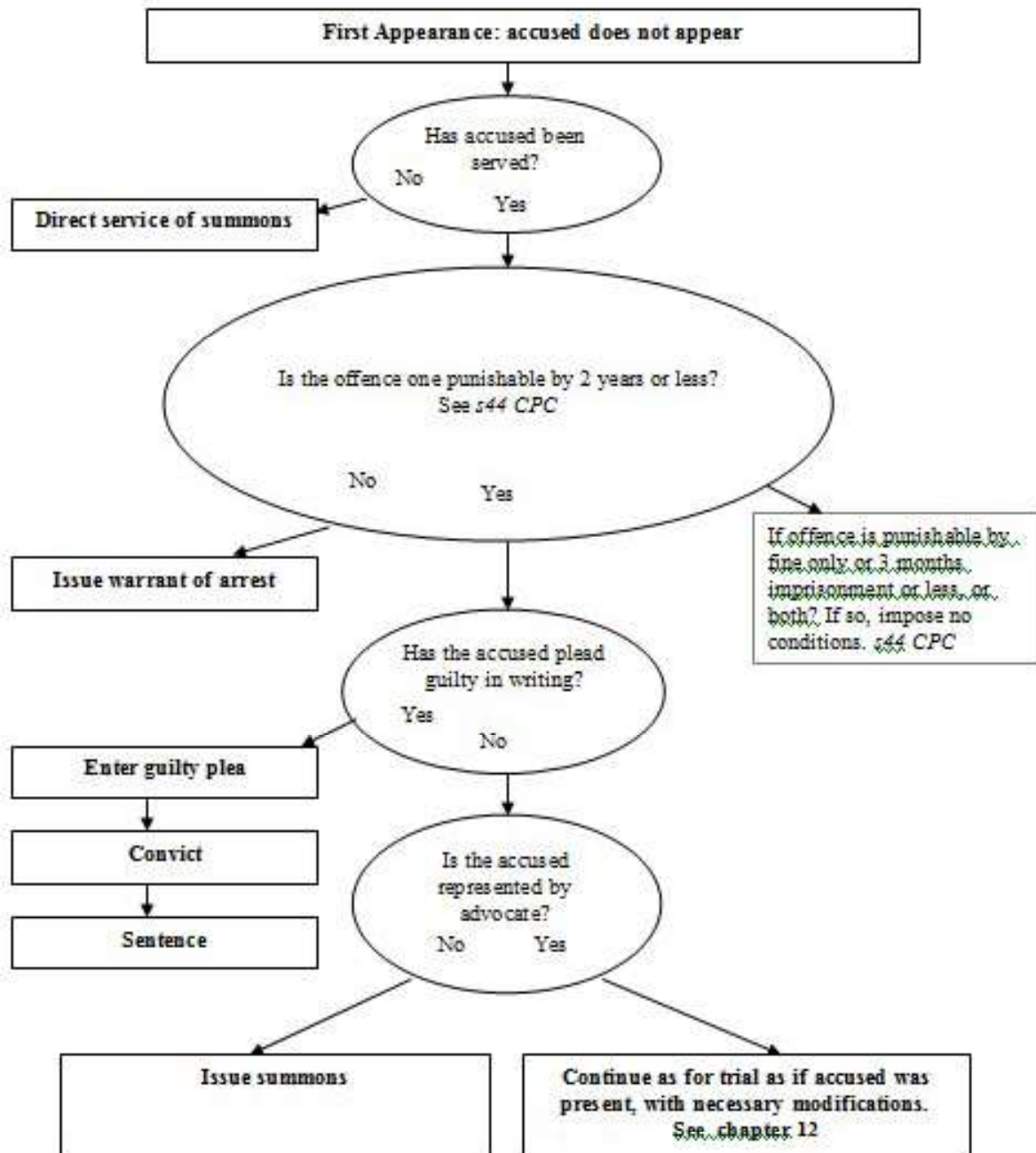
If the complainant does not appear in person or by an advocate (including a public prosecutor):

- 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: *s127 Criminal Procedure Code*.

If you adjourn the case, you must allow the accused bail, or remand him or her to prison, as you think fit: *s127 Criminal Procedure Code*.

If you dismiss the charge, you may make an order as to compensation from the private prosecutor to the accused and his or her witnesses if the Court shall be of opinion that that the charge was frivolous and vexatious. Such compensation must be reasonable for the trouble, expense and any special loss to which such person may have been put by reason of such charge, in addition to his costs: *s103 Criminal Procedure Code*.

| First appearance: Accused does not appear



If the accused does not appear, check that the accused has in fact been served the summons by checking the back of the duplicate retained by the serving officer: *s39(3) Criminal Procedure Code*.

If the person who served the summons is not present, service may be proved by affidavit: *s43 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 cases where the offence is punishable by imprisonment for two years or less: *s44 Criminal Procedure Code*.

Dispensing with Attendance of Accused

Subject to *s44* of the *Criminal Procedure Code* there are certain instances where you may dispense with the personal attendance of the accused and proceed in his or her absence:

For all offences punishable only by fine or by imprisonment not exceeding three months or both, you **must** dispense with the personal appearance of the accused if the accused has pleaded guilty in writing or is represented by an advocate: *s44 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: *s44(2) Criminal Procedure Code*.

If the Court imposed a fine on the accused whose personal attendance has been dispensed with and such fine has not been paid within the time prescribed, the Court must do the following:

- issue a summons calling upon the convicted person to provide a good reason why he or she should not be committed to prison for such term as the Court may then fix within the limits prescribed by law: *s44(3) Criminal Procedure Code*; and
- if the convicted person does not attend Court to provide a reason, the Court may forthwith issue a warrant and commit such person to prison for such term as the Court may then fix: *s44(3) Criminal Procedure Code*.

Warrants for Arrest

Where the accused does not appear, and his or her personal attendance has not been dispensed with under *s44 Criminal Procedure Code*, you may issue a warrant for the arrest of the accused: *ss45, 46 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:

- be under the hand of a judicial officer: *s47(1) Criminal Procedure Code*.
- briefly state the offence with which the person is charged; *s47(2) Criminal Procedure Code*;
- name or otherwise describe the accused; *s47(2) Criminal Procedure Code*;
- order the person(s) to whom it is directed to arrest the accused and bring him or her before the Court having jurisdiction to answer the charge and to be further dealt with according to the law; *s47(2) Criminal Procedure Code*.

Every warrant will remain in force until executed or until it is cancelled by the judicial officer who issued it or, if he is unable to do so, by another judicial officer: *s47(3) 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: *s48 Criminal Procedure Code*.

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

- any conditions of the release of such person: *s48(2) Criminal Procedure Code*; and
- time at which he or she is to attend Court: *s48(2) Criminal Procedure Code*.

The officer must forward the bond to the Court.

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 immediately available, the warrant may be directed to any person or persons: *s49(1) 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: *s51 Criminal Procedure Code*.

The police officer or other person executing a warrant of arrest shall, subject to the provision of s48, without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person *s52 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 the place appointed in and by the summons unless the Court that issued the warrant authorises that the person arrested be dealt with outside the appointed place in the summons: *s46 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; or
- commit him or her to other safe custody.

In all cases, you must order the accused to be brought before the Court at a certain time and place.

As with an accused arrested without a warrant, a person arrested under a warrant may be committed to prison not more than 14 days: *s130(2) Criminal Procedure Code*.

2 Offences Requiring a Preliminary Enquiry

The Magistrates' Court **shall** hold a preliminary enquiry in respect of an offence triable only in the Supreme Court: *s143(1) Criminal Procedure Code*.

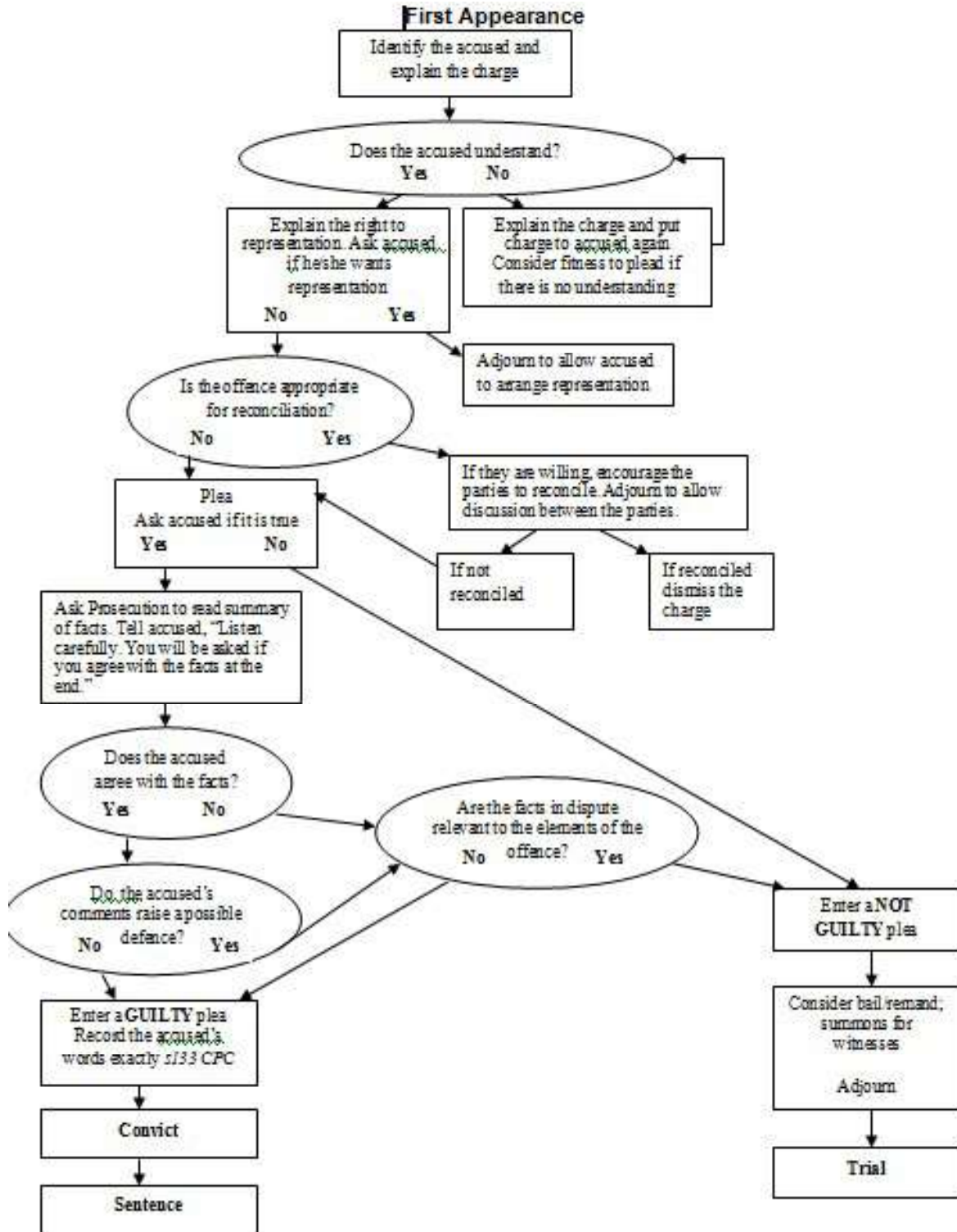
Consider bail/remand in custody, set a date for the preliminary enquiry (if possible at this stage) and adjourn not more than 14 days: *s143(3) Criminal Procedure Code*.

Note that the accused must come back before the Court:

- within 14 days if remanded in custody;
- within 14 days if bailed.

3 Offences to be Heard in the Magistrate's Court

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



3.1 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 accused differently to adults.

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;
- you will not be able to decide which evidence is relevant and which is not.

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 understanding

Check whether the accused understands the charge. Only when you are sure the accused understands the full nature of the offence charged, 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.

3.2 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, it is vital that you explain to the accused 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.

3.3 Reconciliation

You may promote reconciliation and encourage and facilitate amicable settlement of an offence of a personal or private nature punishable by imprisonment for less than seven years or by a fine only: *s118 Criminal Procedure Code*.

The reconciliation or settlement may be on terms of payment of compensation or other terms you approve: *s118 Criminal Procedure Code*.

The Court may then order that the proceedings be stayed or terminated: *s118 Criminal Procedure Code*.

When attempting to reconcile or settle criminal cases, ensure that all parties are acting freely and that one party is not forcing another party to be part of the reconciliation process against their will.

3.4 Taking a Plea

After you are sure that the accused understands the charge, you then take a plea: *s133 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.

If you determine that the accused is under a disability, you should remand the accused in the custody of the police and direct them to arrange a medical assessment and report: *s91 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. Explain that he or she will be asked at the end whether the facts are true; and
- 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 that the behaviour must be in a public place. If the accused admits to being drunk and incapable, but it was in his friend's backyard, that is relevant, as one of the elements of the offence has not been admitted to or proved, 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 enquiry 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: *s133(4) Criminal Procedure Code*.

4 Adjourments

If the case is not ready to proceed, you will need to adjourn. See chapter 8 Management of Proceedings, for a discussion on adjourments.

5 Guilty Plea – Next Steps

Record Words of Accused

The accused’s admission of the truth of the charge should be recorded as nearly as possible in the words used by him or her: *s133(2) Criminal Procedure Code*.

Enter Conviction

Convict the accused, 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, or adjourn to consider reports or at the request of one of the parties. See chapter 14 Sentencing.

Adjournment

If adjourning before sentencing, you may:

- allow the offender to go at large;
- commit the offender to prison for 14 days: *s130 Criminal Procedure Code*; or
- release the offender upon a recognisance with or without sureties, conditioned on his or her reappearance at the adjourned time and place: *s61 Criminal Procedure Code*.

If the accused has been committed to prison, the adjournment must be for no longer than 14 days: *s130 Criminal Procedure Code*.

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 *ss60 to 70 Criminal Procedure Code*.

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, the accused is to be kept apart from adult prisoners, there is a need for medication or there is a risk of self-harm.

6 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.

6.1 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.

6.2 Hearing at a Later Date

Adjournment

If a plea of not guilty is entered and either party is not ready to proceed, you may do the following:

- adjourn the hearing to a certain time and place then appointed and stated in the presence and hearing of the parties or their advocates, or
- proceed and hear the matter: *s133(3) 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 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 written bond or recognisance with or without sureties, conditional on his or her reappearance at the adjourned time and place: *s61 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 14 days: *s130 Criminal Procedure Code*.

Remands /Bail After Plea

Bail

See *ss60 to 70 Criminal Procedure Code*.

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

If you do not grant bail, you will need to give reasons. You should tell the accused why you will not grant bail and record this in the Court record.

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, the accused is to be kept apart from adult prisoners, a need for medication or risk of self-harm.

6.3 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: *s76(2) Criminal Procedure Code*.

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: *s78 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: *s79 Criminal Procedure Code*; or
- you may order him or her detained for production at the hearing on failing to furnish security: *s79 Criminal Procedure Code*.