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**CRIMINAL:
PRE-TRIAL MATTERS**

1 The Criminal Process

The diagram on the next page shows the general process of a criminal case to be heard in the Magistrate's Court. Each step is explained in detail over the next four chapters.

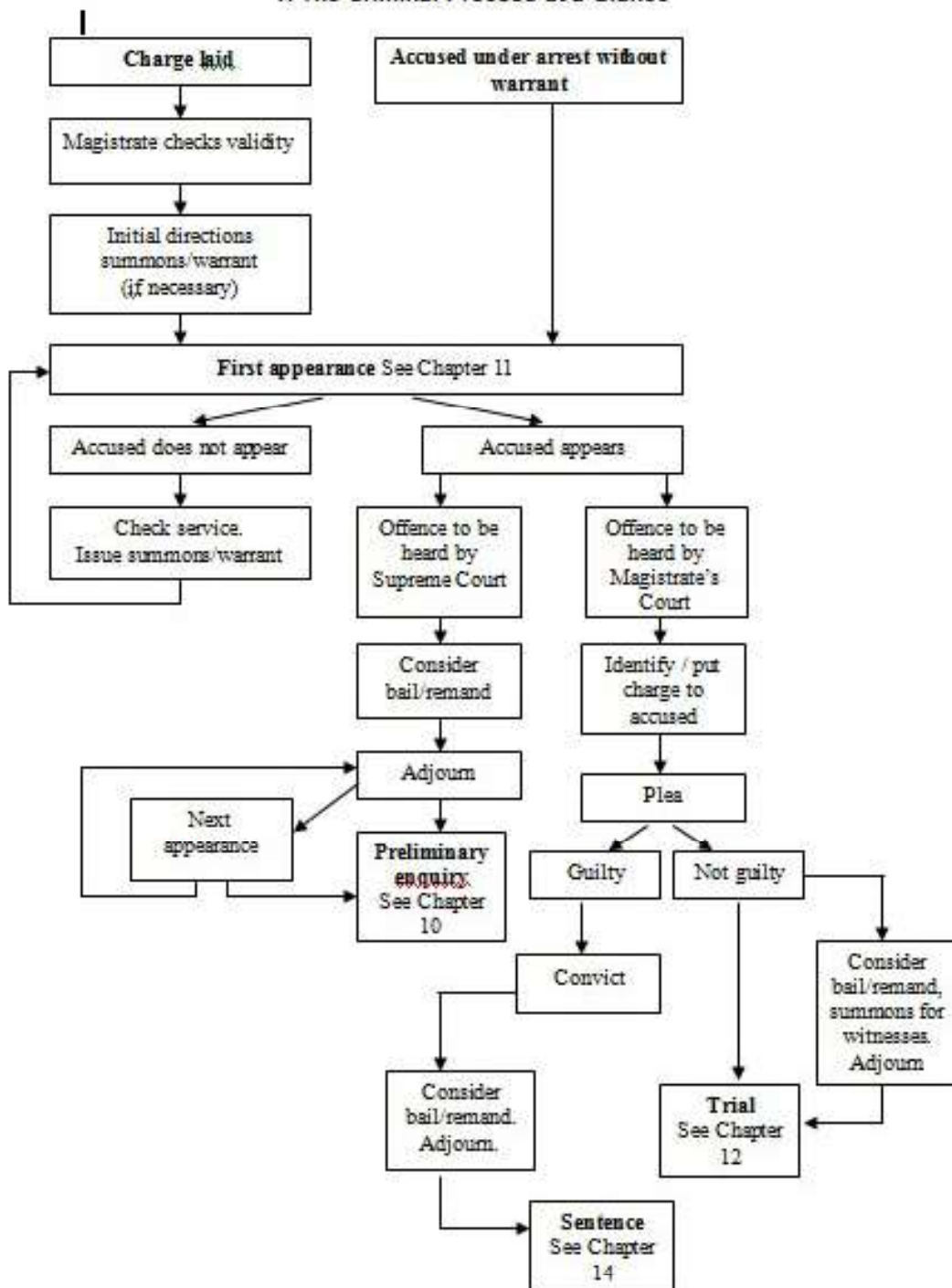
This chapter - Criminal: Pre-Trial Matters explains how a case comes before the Magistrate's Court and the steps to be taken up to the first appearance of the accused.

Chapter 10 - Preliminary Enquiries shows the steps that are taken for matters within the jurisdiction of the Supreme Court.

Chapter 11 - Criminal: First Appearance shows the steps that are taken when the accused appears in front of the Magistrates' Court for the first time.

Chapter 12 - The Criminal Trial shows the steps to be taken when the accused pleads not guilty and a defended hearing takes place in the Magistrates' Court.

1. The Criminal Process at a Glance



2 How a Case Comes to the Magistrate's Court

Criminal proceedings can be instituted by:

- any person who believes from reasonable and probable cause that an offence has been committed and makes a complaint to a judicial officer. The complaint must be made under oath, orally or in writing: *s35 Criminal Procedure Code Amendment) Act 13 of 1984*; or
- by bringing a person arrested without a warrant before the Court: *s12 Criminal Procedure Code*.

If the complaint is made orally it should be:

- reduced to writing by the Magistrate: *s35(2) Criminal Procedure Code*, as amended; and
- signed by the Magistrate: *s35(2) Criminal Procedure Code*, as amended.

Once reduced to writing, the judicial officer must have a formal charge drawn up which contains a statement of the offence with which the accused is charged: *s35(2) Criminal Procedure Code*, as amended.

Where a person has been arrested without a warrant (and not on the basis of a complaint) and has been brought before the Court, the Magistrate must draw up and sign a charge which contains a statement of the offence the person has been charged with: *s37(1) Criminal Procedure Code*.

Often this will be accompanied by an application for remand in custody. Whenever possible, these should be presented in advance to the clerk and the clerk should open a file and register the case in the Court record before putting it before the Magistrate. However, often the charge will be put directly to the Magistrate, who should hear the matter at the earliest opportunity.

3 Dealing with the Charge

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: *s21 Judicial Services and Courts Act*.

See Chapter 5, Judicial Conduct, paragraph 2.5.

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.

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.

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.

You will need to 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 to be transferred to another Court and have the accused release on bail: *s60(1) Criminal Procedure Code*.

3.3 Validity of the Charge

General Requirements

A formal charge is an accusation of the commission of an offence. Proceedings are instituted by the making of a charge: *s34 Criminal Procedure Code*.

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: *s24 Criminal Procedure Code*.

Every charge must contain:

- a statement of the specific offence or offences with which the accused is charged; and
- such particulars as may be necessary for giving reasonable information as to the nature of the offence charged: *s71 Criminal Procedure Code*.

Section 35 Criminal Procedure Code authorises a charge to be laid. 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: *s36(2) Criminal Procedure Code*.

Generally, the charge should be set out in ordinary language and should avoid the use of technical terms wherever possible. *Section 74 Criminal Procedure Code* sets out details that need to be included in a charge, including:

- 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; and
- 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. Check that the charge does not improperly charge more than one offence for the same action (duplication), 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 duplication and will have to be amended when the accused first appears before the Court.

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. No prosecution may be commenced against any person for any criminal offence upon the expiry of the following periods after the commission of such offence:

- in the case of offences punishable by imprisonment for more than 10 years, 20 years;
- for more than 3 months and not more than 10 years, five years; and
- for 3 months or less or by fine only; one year: *s15 Penal Code*.

Check Validity

Check that the charge sheet:

- is sworn; *s35 Criminal Procedure Code*, as amended;
- is within time; and
- sets out the offence, section and particulars of the offence sufficiently.

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

If the charge is defective:

- return it to the prosecution for correction; or
- 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 *s15 Penal Code*:

- direct that a case file be opened; and
- at first appearance, declare that it is out of time and not triable, according to *s15*; 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: *s72 Criminal Procedure Code*.

Each offence must each be set out in a separate paragraph in the charge, called a count.

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.

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 complicity or of an attempt to commit the offence;
- persons accused of more offences than one of the same kind committed by them jointly;
- persons accused of different offences committed in the course of the same transaction;
- persons accused of any offence involving dishonesty and of aiding, counselling or procuring the commission of or attempting to commit any such offence;
- Persons accused of any offence relating to counterfeit currency and of complicity or of attempting to commit any such offence: *s73 Criminal Procedure Code*.

See *Public Prosecutor v Simon* [2003] VUSC 58; Criminal Case No 043 of 2002.

4 Ensuring Attendance of the Accused

Once the charge or complaint is dealt with, you may personally issue a warrant, (see *ss45(1)(2), 46 Criminal Procedure Code*) or summons, (see *s38 Criminal Procedure Code*) compelling him or her to attend Court at a specified time and place, or if he or she does not intend to appear in person, to enter a written consent to the trial taking place in his or her absence: *s44(1) Criminal Procedure Code*.

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; and
- state briefly the offence with which the person is charged: *s38(1)(2) Criminal Procedure Code*.

The summons must:

- be in writing, in duplicate;
- be signed by the Magistrate;
- 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: *s38(1)(2) Criminal Procedure Code*.

Service

Sections 39 Criminal Procedure Code requires that the summons is served personally on the person by:

- a Police officer;
- an officer of the Court; or
- another public officer.

Whoever serves the summons must deliver to the accused a duplicate of the summons. The officer serving the summons must:

- ask the accused if he or she can read and understand the summons; and
- if requested or if it appears necessary, explain the substance of the summons in a way that the accused can understand: *s39(1) Criminal Procedure Code*.

The person served must sign the back of the duplicate copy retained by the officer as proof of service: *s39(2) Criminal Procedure Code*.

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 right at the start, rather than issuing a summons if you have reason to believe that the accused is avoiding service or is unlikely to obey the summons or surrender himself or herself into custody: *s45(1) Criminal Procedure Code*.

Every warrant must:

- be signed by a judicial officer;
- briefly state the offence with which the person is charged;
- name or otherwise describe the accused; and
- order the person(s) to whom it is directed to arrest the accused and bring him or her before the Court: *ss47(1),(2) Criminal Procedure Code*.

For an offence, other than one punishable by life imprisonment, 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; and
- the time at which he or she is to attend before the Court.

Every warrant remains in force until it is executed or cancelled by the Court issuing it: *s47(3) Criminal Procedure Code*.

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),(2) 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, 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*.

Accused person 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.

In all cases, you must order the accused to be brought before the Court at a certain time and place. In no circumstances, in any of the above situations, may the committal exceed 14 days: *s143(3) Criminal Procedure Code*.

Upon the request of the person laying the charge and with the consent of the accused, you may also hear and determine the matter immediately: *Rule11(2) Magistrate's Courts Rules*.

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: *s76 Criminal Procedure Code*.

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